IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12th December, 2007

Before:
VIVIEN ROSE
(Chairman)

PETER CLAYTON
ARTHUR PRYOR CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED ("**ORANGE**") Applicant

supported by

VODAFONE Intervener

AND

OFFICE OF COMMUNICATIONS ("**Ofcom**") Respondent

supported by

HUTCHISON 3G UK LIMITED ("**H3G**")

T-MOBILE UK LIMITED ("**T-MOBILE**")

BRITISH TELECOMMUNICATIONS PLC ("**BT**") Interveners

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HEARING: PRELIMINARY ISSUES

DAY TWO

APPEARANCES

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared for Orange.

Mr. Graham Read QC, Miss Anneli Howard and Mrs. Sarah Lee (instructed by BT Legal) appeared for BT.

Miss Dinah Rose QC (instructed by Baker & McKenzie) appeared for H3G.

Mr. Ben Lask (Instructed by the Office of Communications) appeared for Ofcom.

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THE CHAIRMAN: Good morning. Thank you, Mr. Read, for handing up the timeline – is this agreed?

MR. READ: No, madam, can I explain that unfortunately, due to the time frame that we were working within, Miss Demetriou only got it this morning. What I suggest is that they have an opportunity to look at it and if there are any issues that arise out of it then the parties can agree after the hearing and send a revise timeline in. I did it in part obviously because the Tribunal asked for it, and also I want to try and shorten how much time I spend this morning, and I think I can do it far more easily by having a single document to refer to the material there.

Can I make two other preliminary points. The first is, madam, I want to try and get through my submissions certainly on the appendix to our skeleton argument as quickly as possible this morning and obviously there is quite a bit of detail already within the skeleton argument, but one of the things is that it is obviously not cross-referenced to the bundle you now have and, indeed, even in the authorities' bundles because of the way the authorities have been printed out the precise references are not always clear. Can I suggest that after the hearing we update the references in the skeleton argument and simply supply you with one that is properly cross-referenced to the current bundle if that would be of assistance.

THE CHAIRMAN: What is it cross-referenced to currently then?

MR. READ: At the moment it is cross-referenced to the notice of appeal and in particular annex 4, and the authorities as they happen are cross-referenced to the law reports, but because most of the authorities have been printing out on Westlaw, in fact the page numbers on the authorities do not easily tie up, which is one of the reasons I was having the difficulty yesterday finding the quotations. Just to make it absolutely clear we thought it might be helpful to the Tribunal if we cross-referenced it to the current bundles, so there is no doubt about what is the document we are actually talking about; that is what I was proposing.

THE CHAIRMAN: Yes, that sounds very sensible, thank you.

MR. READ: Because it will then help me just simply to say "It is the skeleton argument and there is the authority".

The third point – can I just make one thing clear, which is when I was discussing the *H3G* case yesterday and took you to the passage which was dealing with the interconnection regulations, which pre-dated obviously the current material, I took you to those simply because there had been obviously some discussion about them, and indeed, in the *H3G* case they were looking at the standard interconnect agreement which still had the reference to the Director General. But I would not wish there to be any misapprehension about the point

that the H3G Tribunal was considering in terms the Access Directive as indicated by paras. 129 to 131 and if there was any misunderstanding in my submissions on that yesterday I wanted to make the point clear on that.

THE CHAIRMAN: So your point is that insofar as it appears to have been assumed by the parties and by the Tribunal in that Judgment that the dispute resolution procedure could operate in relation to an existing contract that was in the context of looking at the same provisions that we are examining in this case and not the earlier case.

MR. READ: Absolutely, and I am not sure whether that point came across entirely clearly, because I got slightly diverted into the previous regime when I should perhaps have just focused on the existing regime, but it does illustrate the depths the Tribunal went into because they did look not only at the current regime, but also the regime that preceded it as well. So there was a full depth investigation if you like into regulatory ----

THE CHAIRMAN: What has not clearly emerged yet is whether any of the parties to these proceedings are arguing that the dispute resolution procedure under the pre-Framework Directive and specific Directives' regime was different from, or wider than the dispute resolution powers in the regime that we are examining.

MR. READ: That is right, but as far as BT is concerned we say you simply do not need to go there because one comes back to what s.185 meant, and whether or not the Framework and the Access Directives that stand behind it in any way constrain the obvious meaning of "dispute". We say "no" and therefore looking at what may have been the previous regime really does not help a great deal. The previous regime may have some bearing on the way that the Standard Interconnect Agreement was previously drafted, but I think none of the parties are really in a position to investigate that in depth. I think we are now there we obviously have still not got all the contractual documentation in its various forms before you.

So, madam, can I move promptly back on to the issue about whether there was a dispute which was live under the contract. Yesterday I was dealing with time of the essence, and I had really made the point that there is nothing that is explicit in any shape or form that suggests that time is of the essence in this contract. Secondly, that you end up with bizarre consequences if it is, because, for example, you end up with only 14 day period to negotiate.

If I can move on to the next point, which is thirdly, we say clauses in para.13 of the main body of the Agreement itself actually add weight to the fact that time is not envisaged n that paragraph as being of the essence, and perhaps I can just briefly demonstrate a couple of

points on this by reference to the main bundle at tab 15, p.446, and if I can take you to clause 13.3 – of course it is the general principle of contract law that in construing a particular time you have to have regard to the whole of its surrounding circumstances, and 13.3 we say is a useful guide to this.

As you can see it is the procedure for the sending of the OCCN and then in the Notice you specify the proposed new change and the date on which it is proposed the variation is to become effective. So there is an important point that I will come back to about the fact that the effective date has to actually be specified in the OCCN but I will come back to that in the moment. Then it goes on:

> "The Operator shall within 4 Working Days of receipt of such notice acknowledge receipt and within 14 days of receipt of such notice notify BT in writing of acceptance or rejection of the proposed variation."

Now what the next sentence does: "If the Operator has not accepted the Charge Change Proposal within 14 days of receipt of such notice …" what it does not do is then preclude or shut out the operator from further challenging the OCCN. To the contrary, it says in terms that the proposed variation is deemed rejected, i.e. the operator's rights to continue to challenge it are effectively preserved. So in other words the 14 day period in 13.3 does not have quite plainly the effect of shutting out or losing, if you like, the right of the operator to continue to challenge the OCCN. We say that is significant because if 13.3 is envisaging the parties still being able to continue, even if they do not comply with the strict time limit, then that suggests, when you come to 13.7 that it must be intended to have had the same effect. We say you can also see that from 13.5 because 13.5, which deals with the obligation to negotiate in good faith, does not put any time period in.

Now, if there was a strict time period under the contract which, of course, Orange's construction is to negotiate - which of course, Orange's construction of 13.7 necessarily involves -- If that was the case, then you would have expected that to have been made explicit in 13.5 by saying,

> "If the party is receiving a charge change control rejects the charge change proposal, they shall negotiate forthwith in good faith and shall conclude such negotiations within fourteen days, or shall have a fourteen day time period to negotiate in good faith".

Now, the fact that it does not have anything explicit like that, we say, is yet a further indicator that the fourteen day negotiation period in 13.7 cannot, at the end of the day, be a period that is, if you like, of the essence. The problem is that the whole of Orange's

argument has to turn on that fourteen day negotiating period being of the essence because otherwise the one month period does not have anything to bite on. In other words, when you come to 13.7 you have to say that the fourteen day period of negotiation is of the essence as well because if that is not of the essence so that you can continue negotiating further and further, and further, and further on, then of course you have nothing upon which the one month time period can actually necessarily bite. So, we say that is yet a further pointer from the material within the clause itself which strongly suggests that time has never envisaged to have been of the essence.

THE CHAIRMAN: The slightly curious aspect of this is the order in which these things happen - which is that negotiation follows rejection rather than negotiating and then deciding whether to accept or reject, and then deciding whether to refer it to the Director-General.

MR. READ: I confess that having mused over the standard interconnect agreement on numerous occasions it is not always the most fathomable document - not only in this respect, but in a large number of other respects. Of course, it is Orange's case - it has to be Orange's case - that the time period within 13.7 is necessarily of the essence and has the draconian remedy of losing BT any rights it may have if it does not comply with the time period, whereas, in fact, we say that the indicia are all the other way when you analyse Clause 13 and apply the general rules.

THE CHAIRMAN: What is the mechanism? If the OCCN is rejected and then there is a negotiation and they come to an agreement at a level of price which is different from what was set out in the OCCN, does there then have to be another OCCN, or can they amend the previous one?

MR. READ: I think that is dealt with in 13.6.

> "If following rejection of a charge change proposal and negotiation, the parties agree that the charge change notice requires modification, the party who sent the charge change notice may send a further charge change notice".

So, that is the method by which it is done. The reality is that if that happens you then go back to 13.4 because the new notice will then be accepted and then you forthwith enter into agreement to modify. But, the ordering of para. 13 in the main body is not necessarily in the most straightforward of terms. Again, we would reiterate the case that we have cited in para. 5 of the appendix to our skeleton argument - namely, *Bunge -v- Deutsche Conti* which is that if there is any ambiguity it should be resolved in favour of not having the draconian effect that Orange now contends for.

I think that is all I need to say on the construction point.

Can I now try, very quickly, to deal with the estoppel point? If we just go to a couple of authorities to illustrate this? Can I ask you to have the second volume of the authorities bundle - the one which is principally concerned with the contractual material? If one goes to Tab 6 there is the decision of *Amalgamated Investment & Property Co. -v- Texas Commerce International Bank* What happened in that case was that the parties assumed that the contractual documents - the bank guarantee - applied to the plaintiff when actually on a strict construction it did not. But, they all worked on the assumption that it did apply to the plaintiff. When the defendant sought to try and recover sums under that guarantee the plaintiff sought a declaration to say it did not apply to him. If one looks perhaps first on the second page of that report as in the bundle. One can see the second part of the headnote which was dealing with one of the arguments raised by the defendants.

> "-- since the parties had acted upon the agreed assumption that the plaintiffs were liable for the Nassau loan, the plaintiffs were estopped by convention from denying that they were bound to discharge any indebtedness of ANPP to ..."

I will not take you through the complicated bank guarantee, but effectively that was the issue. It adds,

> "When parties in their course of dealing in a transaction have acted upon an agreed assumption that a particular state of facts between them is to be accepted as true, each is to be regarded as estopped against the other from questioning as regards that transaction. The truth of the statement of facts so eschewed".

If I can then ask you to pass on to p.25, looking at the top right-hand of this report. This is one of the points I was making earlier - the way this report is printed out does not actually correspond to the pages in the law report, and you have to try and identify them in the text. On the right-hand side there is the heading 'Conclusion'. This is the judgment of Lord Justice Denning.

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of facts, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by the series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration and so forth".

In typical Lord Denning terminology,

"All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust tp allow him do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands".

Although there may be a detailed debate about whether the first part of what Lord Justice Denning indicated, i.e. whether all the various facets of estoppel had merged into a common doctrine, certainly that latter part reflects a very clear exposition of the law of estoppel by convention.

I could take you through the observations of Lord Justice Brandon, as he then was ----

THE CHAIRMAN: That principle is not contested, is it, Miss Demetriou?

MISS DEMETRIOU: No, madam.

MR. READ: The references are all contained in the appendix, which we will update with the correct page numbers. The only other point which I think needs to be made on this -and I will not even bother taking you to the authority - is that it does not matter whether the parties, before or after the parties have entered into the agreement, if they act on a common assumption after the agreement has been entered that is still sufficient, and that is the decision of the *Vistafjord* cited in para. 12 of the appendix to our skeleton argument.

If I can then turn to the timeline document that we have handed up earlier on this morning, perhaps I can just take you through some of the ----

THE CHAIRMAN: Is this still on the estoppel by convention?

MR. READ: Primarily on estoppel by convention, although it will touch on to the third point that I want to make which is whether or not Orange in fact are in breach of the obligations whether they can now rely upon those breaches in effect to claim that the contract extinguishes BT's rights.

I have divided them into two sections. The first is Orange's operator charge change notice, and on the right hand side is BT's, but of course I have kept them in chronological order so you can see how the events unfold. But, as you can see, the first date is obviously 23rd May 2006 when Orange send the OCCN. The date that was in question yesterday, but which I think we now have cleared up, which is namely 9th June 2006 when BT reject, and it is at that point that the 14 day period – if it applies – kicks in, and of course I have made in

footnote 1 the point that we are not accepting it does kick in, or is not of the essence, let us put it like that.

The 14 day period would then expire on 23rd June 2006, and that is when the one month time period would, on Orange's case, commence. But as one can see on 23rd June BT put a negotiating counter proposal to Orange and that is a letter you were referred to yesterday where BT, at some length, set out the reasons why they were disputing Orange's OCCN. Orange do not object at that stage on the basis that the 14 day period for negotiation has expired – they in fact do nothing, but what then happens just over 10 days later is BT then accepts on 3rd July 2006 the OCCN. But what you do have very clearly is a period when Orange itself is not in any shape or form suggesting that there is a strict period for conducting the negotiations, and the negotiations have to be concluded within 14 days, and that thereafter the only remedy is a referral to Ofcom.

There then is a nuance on this because the OCCN, you will recall that when I was referring you earlier to 13.3 there was express reference to the fact that the OCCN had to have a date for commencement in it. The date for commencement in the OCCN was 1st August. In fact, what happens is that on 11th July Orange is seeking in effect unilaterally to change the implementation date to 15th August, and they request BT's confirmation on this. There then is a series of correspondence arguing over this and I have set some of that material out in the left hand column. There is basically an ongoing question about what the implementation date should actually be, which eventually ends up on 23rd August when Orange eventually write agreeing the implementation date of 15th August 2006. I do not think it is necessary to investigate the precise debate that was going on between BT and Orange, save to say this, that it is quite plain that Orange in conducting this line of negotiation were not working on the principle that the requirements of clause 13 were so specific and so procedurally emphatic that one could not, in any shape or form, depart from them. We say that that is yet another instance of Orange, in the course of this immediate discussion regarding all of this, showing that they do not – and never intended – to rely upon the strict time limits within the clause 13.7 if that is what they are indeed.

If I can revert to the right hand column. One sees that that starts on 19th August 2006 with BT ----

THE CHAIRMAN: 19th July.

MR. READ: 19th July, I am sorry, madam, which followed on from T-Mobile and 02's service of an OCCN on BT. On 1st August, and this was again a date that we cleared up yesterday,

Orange rejects that and that is when the 14 day period starts to run, and that 14 day period would have expired on 15th August 2006.

In that 14 day period, there is no attempt by Orange at all to conduct any negotiation. If Orange is right in its construction of clause 13.7 Orange were plainly in breach of the obligation to negotiate in good faith within that 14 day time period. Of course, BT says that that is not actually necessarily a major breach on their part because time is not of the essence. But if Orange are right and time is of the essence then it is, we submit, a major breach on Orange's part.

The first negotiation that actually does take place is over the page on 23rd August 2006, when BT writes a quite extensive letter setting out its stance and asking Orange to clarify what its position is. So that is what happens on 23rd August 2006, which is outside the 14 day period, but nobody at that stage immediately says, or screams at BT: "Well, sorry, you are outside the 14 day period; you are into the period for referral to Ofcom now."

Then on 6th September there is a letter which we have put there "apparently" was sent by Orange to BT claiming that the OCCN is closed. Can I make one point about that letter, because I think it was said yesterday that that letter was sent after the expiry of the one month period, and I think that was based on the false premise that in fact the rejection had been sent on 9th July rather than 1st August. In fact, that letter was not sent on any view after the one month period had ended, so it cannot have the precise effect that I think was being claimed for it yesterday when the dates were slightly misunderstood.

The second point is that of course BT has very grave doubts over that; it did not receive the letter and it is unusual because the letter was in fact not apparently sent by email whereas all other correspondence was. So whether it was actually sent or not is a matter of some debate although what turns on that may not be entirely clear.

As one can see on 5th October 2006 BT write asking for a response to the letter of 23rd August and Orange on 17th October (12 days later) reply referring to the letter of 6th September 2006 and that is where the OCCN process is referred to in terms as closed. However, it is quite plain that Orange did not at the end of the day treat the matter as fully closed because thereafter there were discussions and negotiations with BT specifically over it, and you can see that on 23rd October 2006 there was a telephone conference between Mr. Amos of BT and Orange. There was then further correspondence asking Orange whether Orange's position has changed because BT was on the point of referring the dispute to Ofcom.

THE CHAIRMAN: The teleconference that you note as taking place on 23rd October, is there a document which indicates what was discussed or how long that teleconference was?

MR. READ: Yes, one can see that. I have put the reference down there at tab 17, p.681 in the main bundle. I should add it is an internal email of Orange's setting out, and you can see the call finally happened this morning so it was obviously being anticipated although we do not quite know fully why it was anticipated.

THE CHAIRMAN: This is an internal Orange document.

MR. READ: Yes - as between Mr. Greenfield, who has had the conversation with Mr. Amos to Jane Cooper, also of Orange. You can see on the third paragraph that that BT do not regard their OCCN rejection as settled and apologise for delay, saying that they had either not received, or had mislaid my letter to them sent in September. In fact, we say it seems much clearer now that it was not received. We then set out the fact that BT is on the point of drafting a letter to Ofcom, and then it goes into detail about it. All we know at that stage about Orange's position is that they were going to have a conference call to discuss the matter further at that stage. So, that is how matters stand on 23rd October.

But, what then happens is that following on from that there is a follow-up letter from BT on 28th November and we see that at p.685 in the bundle. There, BT make clear in terms that they are on the point of submitting a dispute to Ofcom. It adds in the final paragraph:

> "If the Orange position has changed from your letters of 6th September and 18th October, then please let me know; otherwise. BT agrees with Orange that there is no benefit to further commercial dialogue on this matter".

What then happens - and one sees this at p.687 - is a reply to that letter. There has obviously been a further telephone discussion between Colin Annette and Jane Cooper. They want to seek 'a mutually convenient time to meet to discuss this issue'. You can see it is relating specifically to the OCCN. There is then a series of correspondence in the form of e-mails and letters sent by e-mail where they discuss a date. It is clear from Mr. Annette's statement that the meeting actually took place on 13th December, 2006. But, we again say that this shows that Orange at that stage had understood, we say, that in fact, that time was not of the essence when one was looking at Clause 13.7 and that they still wanted to continue discussing the matter to see if a solution could be found.

THE CHAIRMAN: Yes. The discussion though does not seem to have been about the actual rates. They were not negotiating over the rates. They were negotiating over the procedure.

MR. READ: I think the furthest I can take this is perhaps to refer you to Mr. Annette's witness statement. He deals with this. That is at Tab 7 in the bundle, p.124. At para. 30 he says,

"Following this letter [which was 28th November, 2006] I spoke to Jane Cooper at Orange [we know that from the correspondence], who suggested that there be further discussions about this point." He has said in the previous paragraph that BT had remained fully prepared to discuss matters and negotiate further before referring any disputes to Ofcom. So, in other words, it was, if you like, a discussion about stopping the matter being referred to Ofcom, which we say is fairly clear meant not simply the question about whether or not the OCCN was closed or not, but actually the rates involved. You can see that Mr. Annette makes a comment on this negotiation. He said,

> "There seemed two possible reasons for Orange to make this approach following BT's letter of 28th November, 2006. Either Orange were serious about trying to continue commercial negotiation over BT's OCCN (in which case it was clear that Orange were accepting that the alleged strict timetable under clause 13.7 was not binding) or this was simply a ploy to make it appear that Orange were, belatedly, trying to go through a negotiating period in case BT did not submit the dispute to Ofcom".

That he says that Orange were not relying on the strict timetable which it is now claimed. He then goes on to deal with it and he exhibits at p.46 of his exhibit bundle, which is p.173 in the new ordering, and he says that basically the discussions took place as recorded by Mr. Annette in his internal e-mail.

I do not think that necessarily takes matters a huge amount further, but what it does show, we would respectfully submit, is that Orange were, even at that stage in December, still willing to consider and talk about pricing. (After a pause): It is being forcefully put to me that in fact I should be specifically pointing to you that they are talking in terms about pricing. You can see that from the letter. "If they could offer me an interim reduction in 3G prices to ... more like 10p evening and weekend". You can see from that e-mail that what is in reality going on here is the bigger picture, if you like, as to what is happening in the rest of the MNO market, which of course, we say, is entirely the reason why a dispute has to be referred to Ofcom on a matter like this, and why we say it is absurd to get down into the minutiae of whether there is an estoppel, or not, based on this document and the earlier documents because of the much more significant and wider regulatory issues that are involved. However, being forced to deal with whether or not there is a live dispute under the contract, I have to make the point that we say that that is conduct that is not consistent with them now being in a position to argue that in fact the dispute has been shut down as a result of the OCCN.

Can I just refer very briefly to a few more points - and I can do this by reference to the appendix perhaps ---- No. Perhaps before we put this bundle away I can just make one or two points from Mr. Annette's statement. If I can ask you to go to Tab 7, p.133, a letter from Ofcom to BT of 26th October, 2005. It was a dispute between BT and twenty-five communications providers about fixed geographic call termination charges. I do not think it is necessary to read the whole of the letter, but in essence what Ofcom is telling BT is, "Look, go back and negotiate further. It is not acceptable for you to be referring these disputes without there being more of an attempt to resolve the disputes between BT and these various communication providers". Now, of course, Orange are not one of those providers, but this is an industry where obviously people know exactly what Ofcom's stance is going to be, and there is a very clear reflection of what Ofcom's stance is.

Again, on p.136 one sees a further letter from Ofcom about another dispute, this time relating to NTS termination charges in which Ofcom make it clear yet again that they are not interested in taking any form of dispute unless there has been significant lengthy negotiations. That is entirely consistent with what is in Ofcom's guidelines, and perhaps if I can ask you to just look first at p.143.

THE CHAIRMAN: Perhaps if you just give us the references to them.

MR. READ: Madam, in that case can I simply say footnote 27 in the appendix to our skeleton argument.

The final point I would make in this respect of para.16 of Mr. Annette's witness statement where he refers to a specific dispute involving Orange, where there was a very long and involved negotiating process that was going on (p.117).

If I can summarise it, we say that there are at least five or six factors that we can rely upon for the purposes of estoppel. What I am not going to do for today's hearing is actually list them and how each individually could actually operate. We say that individually they could operate as an estoppel, but when you bundle the whole thing together we say it is very clear that there was a common assumption that was running through the whole of the industry which included Orange, that Ofcom would never accept a dispute if the parties had only spent 14 days negotiating and that therefore the time limits imposed within 13.7 could not possibly be of the essence and have the effect of shutting the parties out from making a complaint to Ofcom.

If I just summarise those points, the Ofcom guidelines, as I say the relevant parts are summarised in footnote 27, the fact that Orange itself has been in a very long running negotiation, the details of which are in para.16 of Mr. Annette's statement. Further, we

would say that Orange itself, when looking at that timeline, plainly did not believe that the time frame of 14 days for concluding negotiations was of the essence, because as we have seen they do nothing for long periods and at the same time they do not object when negotiations continue outside the 14 day period. At no stage during the course of the process did Orange suggest at any stage that time limits were going to be strict; and finally, we have the period in December when they are still prepared to discuss prices, despite having already at that stage suggested that the matter was out of time. We say when you put all those points together there is a clear common assumption.

The final point we make, and again I w ill not take you necessarily to the authority, which is set out in para.16 of our appendix, but it is quite clear that a party who seeks to get a benefit under a continuing contract cannot do so if he is doing it on account of a breach that he himself has committed. In other words, you cannot use a breach that you have committed in order to put yourself into an advantage and gain a benefit from the contract which otherwise you would not be able to do, and that is the House of Lords' authority of Lord Jauncey. We set out one quote from that, in fact that is the end of a rather long discussion of the authorities which I could take you to but I think for brevity I will not, but it is, we say, quite a clear principle that under no circumstances would a party be allowed to rely upon an alleged breach by the other party to gain the benefit if the party relying on that has itself committed a breach.

We say that on Orange's construction of clause 13.7 they plainly have committed a breach because if the 14 day time period for negotiation is of the essence and strict, then plainly they were fully in breach of that having done nothing for significant periods in both the OCCNs during that time, and certainly in the OCCN we are concerned with they do nothing for the period between 1st August and 15th August. So that in essence are the submissions on that section and in closing I would make one point: it has taken me nearly an hour and a quarter to get through this. The thought that Ofcom would have to listen to, get written representations from the parties as to whether a dispute was still live under the terms of the contract or not is in our submission just ludicrous, and if you are going to end up with a ludicrous result like that, which is what you would have to do if Ofcom were saying: "Is there a dispute or is there not a dispute on the contract?" it must strongly point towards the fact that the construction that Orange are now putting upon the words in 185 cannot be right. It could not anticipate a consequence of Ofcom having to explore in the sort of detail that we have explored so far whether a contract is live or not under this agreement.

I think that is all I need to say on Ground 1. Perhaps I can now turn to the tie bar point?

BT has not found this easy – as I suspect like everyone else who has had to look at the point – and our skeleton argument we hope has tried to summarise some of the legal issues that revolve around it. It seems to BT that really there are two competing issues involved here. First is the desire for a clear and practical time period to prevent uncertainty over when time runs and prevent a waste of resources in preparing an appeal that may not come to pass. That would point, obviously to the final determination being the correct date. Balanced against that there is also the point that a party may want the opportunity to challenge Ofcom at an earlier stage when the acceptance of a dispute actually takes place, because obviously if there was an instance where Ofcom accepted a dispute which was patently not proper and fit for it to do so, then why should the party then have to go through the process before it had the right to challenge the initial taking on the dispute and that, of course, would point to the earlier date, the date of the acceptance of the dispute in the first place.

I apprehended yesterday, when Mr. Roth was on his feet, that in fact those two points may not necessarily assumed to be inconsistent with one another, and having heard that BT would certainly seek to endorse that line of argument, and perhaps I can add to it slightly by taking you to the case that we have actually referred to in our skeleton argument.

Before I do that can I make a couple of points about the issue of when time might run in principle, and obviously we set out the general principle accepted – we say – under European jurisprudence as reflected by the *IBM v The Commission* case. We fully accept the point Mr. Roth was saying yesterday that it is not completely on all fours, but we do say that it gives an idea of the leanings of the ECJ and the approach it would adopt to this sort of conundrum, that in fact you would look towards the principle of the matter rather than necessarily looking to the mere provisional decision at the beginning. I do not think I can take that point much further, because we accept the point that Mr. Roth made that it is not absolutely on all fours with what we are looking at here, but we do say that the guiding principle, if you like, can be employed in that manner.

Can I now take you to the case of *R (Burkett) v Hammersmith and Fulham London Borough Council & Anor* or as it used to be called *Ex parte Burkett* but I do not think we are allowed to use the Latin any more, which is at tab 6 in the first authorities' bundle. The case involved planning law and, as one sees from the headnote, the two critical dates were first 15th September 1999 when the local planning authority resolved outline planning permission for a development should be granted, but subject to the completion of a satisfactory agreement under s.106, and I have a recollection that that relates to the roads and the adoption of suitable roads and schemes for drainage. The next date was 12th May

2000 when the s.106 agreement was completed and outline permission was granted unconditionally.

What happened was that the applicant, Mr. Burkett in that case, sought Judicial Review of the decision within the time period if it ran from 12th May 2000, but was out of time under the CPR Part 54 if the date from which time ran was 15th September 1999 i.e. when the outline permission was granted subject to conditions.

THE CHAIRMAN: I think it was Mrs. Burkett, she actually brought Judicial Review proceedings before 12th May grant of the planning permission.

MR. READ: Yes.

THE CHAIRMAN: And that is why there was that point ----

MR. READ: Yes, I have given you the wrong date, it is the February 2000 failure to call in the application I think that was of concern. If one looks at para.29 of the Judgment for example, one sees that Mr. Justice Richardson (as he then was) in the Court of Appeal held that the three month time limit for seeking Judicial grant from the date of the resolution of 15th September 1999 and not from the date of the decision to call in the planning application on 24th February 2000 or the decision to grant planning permission on 12th May 2000. So I think you are right the proceedings had got launched on the basis of the failure to call in by the Secretary of State the planning application and that is what happened.

In any event, the key point was, as was suggested there in that paragraph, what was the precise date? Was it the initial grant of the outline permission with the conditions or whether it was one of the later triggers, and that is what the key was in the decision.

If I can then take you on to para.37, where Lord Slynn sets out there the reasoning behind it, that the Court of Appeal refused it not on lack of promptitude, but the failure to comply with the issuing with in three months of 15th September 1999.

> "Whether that is the correct date depends on the interpretation and the application of the words 'from the date when grounds for the application first arose'."

Now we say that is not absolutely dissimilar from Rule 8, which of course is within two months of the date the appellant was first notified of the disputed decision. He continues:

> "This is the critical issue. In considering this question one must bear in mind that RSC Ord 53, r 5(1) (and for that matter CPR r34.5(1)) were not specifically targeted at town planning applications. These provisions apply across the spectrum of judicial review applications. Making due allowance for the special features of town planning applications, an interpretation is to be preferred which is capable of applying to the generality of the cases."

We do say that actually that does have a bearing here because of course the Tribunal is not only looking at disputes arising out of the Communications Act, but also arising in respect of competition matters as well, and so therefore rule 8 has to be looked at in a wider generality. However, going onto para. 38,

> "Leaving to one side for the moment the application of Order 53, r 4(1) on the running of time against a judicial review applicant, it can be readily accepted that for substantive judicial review purposes the decision challenged does not have to be absolutely final. In a context where there is statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. Town planning provides a class case of this flexibility".

Then he sets out various authorities for that.

> "It is clear therefore that if Mrs. Burkett had acted in time, she could have challenged the resolution. These propositions do not, however, solve the concrete problem before the House which is whether in respect of a challenge to a final planning decision time runs under Order 53, Rule 4(1) from the date of the resolution or from the date of the grant of planning permission. It does not follow from the fact that if Mrs. Burkett had acted in time and challenged the resolution that she could not have waited until planning permission was granted and then challenged the grant".

We believe that that supports the proposition that Mr. Roth was making yesterday - that the two do not have to be mutually exclusive.

Lord Flemming then goes on in para. 45 to set out some very clear reasons why it is preferable that time should run from the later date. One of the reasons he gives is that it gives certainty that people should not lose their rights to appeal, simply because of an ambiguity in time, and also that applications for the preparation of judicial review applications can be costly and burdensome, and they may not be necessary if, at the end of the day, the ultimate, final decision is in favour of the applicant.

Madam, we do think that in general terms there is no necessity to, if you like, stick to the earlier date, which may in itself give an opportunity to review that decision. But, that does not mean that time cannot then run from the final decision.

THE CHAIRMAN: Yes. We are not talking there about bringing in out of time challenge against the first decision. We are talking about bringing an in time challenge to the final decision.

MR. READ: But if the final decision has assumed a jurisdiction which they do not have, then in those circumstances BT says, "Well, there's no reason in principle why a party is then thereby losing his right to prove that challenge to the jurisdiction".

THE CHAIRMAN: What I am not sure about is whether there was anything in Mrs. Burkett's grounds of challenge which specifically related to the initial decision.

MR. READ: No, but I think it is quite clear from the argument in the Court of Appeal -- As ever with these things, what happens of course is that she challenges the failure to take out -- for the Secretary of State to have called the planning application in and challenges no doubt also the final grant, if you like -- the final determination, if I can use that phrase, of outline planning permission. The developer - or possibly the local authority - take the view and say, "No, you cannot raise this now because it is out of time", because, of course, you should have been challenging the decision right from the outset when you originally granted the outline permission subject to the conditions under 106. It is in that context that that issue comes up. But, inherent within that line of argument it is clear that there is a proposition being put by the local authority that in fact there was a right - and she did have the right - to challenge the initial decision and that, accordingly, time ran from that period. What I think the decision appears to make clear is that that may be right, but that, of itself, does not then prevent the bringing of a challenge to the later decision because the issue of jurisdiction can be subsumed in a later decision as well as the earlier one.

Madam, I think that is probably all I have to say on the time bar point, unless there is anything else that you want to hear me on.

THE CHAIRMAN: No. I think that is clear. Thank you.

MISS ROSE: Madam, I have prepared a note, hopefully in the interest of speeding matters up. (Handed) I am not intending to address the second issue, but simply Grounds 1(a) and 1(b) - the time bar point. We have nothing to add to the submissions of Mr. Roth or Mr. Read.

So, if we can come first to Ground 1(a), we have identified the issues as they now appear which, with respect, are perhaps slightly different to the way that they were originally formulated. It is now clear that there are in fact two issues under Ground 1(a).Those are, first of all: was there a dispute relating to the provision of network access between BT and Orange within the meaning of s.185(1) of the 2003 Act? If not, was there a dispute between BT and Orange which related to rights or obligations conferred or imposed under the 2003 Act within the meaning of s.185(2) of the 2003 Act. It is now clear that in fact the issue under Ground 1(a) is not whether or not there was a dispute; the issue is in fact whether this

was a dispute which fell within the scope either of s.185(1) or, if not, within the scope of s.185(2).

We have summarised what we understand to be Orange's case at para. 3. They say, first of all, that this was not a dispute relating to the provision of network access because the parties had already agreed interconnection and there was no threat to terminate the agreement. In other words, Orange's position is that a dispute relating to the provision of network access only concerns a dispute as to the question of whether there will, or will not, be interconnection. The second argument that they make is that they say that the dispute did not relate to rights and obligations under the 2003 Act (this is s.185(2)) because - and there are two arguments here - they say (1) Orange was not under any relevant obligation - and that is common ground; and (2) on the facts BT's end-to-end connectivity obligation was not engaged. That, as we understand it, is the outline of Orange's submissions on the Issue 1(a).

Can I come first to the question of the proper approach to the construction of s.185? On this there appears to be pretty much a broad measure of agreement between the parties. It is common ground that the resolution of these issues is a matter of statutory construction; that Ofcom's statutory jurisdiction under s.185 cannot be either expanded or constrained by the terms of a private law contract between two individual parties. Therefore, in the first instance, the task of this Tribunal is to consider the natural meaning of s.185 in the light of its statutory context and its purpose. Secondly, and of course very importantly, s.185 must be construed compatibly with the Framework Directive and the Access Directive. So, that, essentially, is the approach to be taken to the construction of s.185.

That brings me to s.185(1). If we can just turn it up in the bundle at p.251 at Tab 11. I want to deal first of all with the construction of the statute, and then look at the directives and ask the question as to whether the directives lead to any different result from that which the statute itself indicates we say is clearly the correct approach.

Starting with s.185, "This section applies in the case of a dispute relating to the provision of network access ----" The first point we make is that the words 'relating to' are a broad formulation - they simply mean 'connected with' the provision of network access. A narrower form of wording could, of course, have been used by the legislature if it wanted to adopt a tighter definition of the type of disputes that were covered by s.185(1). Then, secondly, there is in fact a partial definition of the meaning of 'disputes relating to the provision of network access' in s.185(8)(a). We do submit that s.185(8)(a) is of critical

importance because it is not a complete definition of the scope of 185(1), but it is a partial definition of its scope. What s.185(8)(a) says is,

> "The disputes that relate to the provision of network access include [and that is why I say it is not an exhaustive definition; it is partial - that these are included] disputes as to the terms or conditions on which it [meaning network access] is or may be provided in a particular case ----"

Now, the question is: why is s.185(8)(a) included in the statute? The answer is that it is to clarify what is otherwise a potential ambiguity in the term 'provision of network access' because 'provision of network access' can mean one of two things: it can mean, as you have heard Miss Demetriou submit, whether network access is to be provided or not, or it can mean whether network access is to be provided or not, and, if so, the terms on which network access is to be provided. It is made clear by s.185(8)(a) that it is the second, and broader, definition which is intended by this legislation. In other words, the whole purpose of s.185(8)(a) is to clarify the point that Miss Demetriou's argument is wrong. That is why it is in the statute.

THE CHAIRMAN: I think Miss Demetriou would say that when you are dealing with a question as to whether access should be allowed, she accepts that that encompasses the question of the terms and conditions because otherwise you could have the operator saying, "Well, of course, I am happy for you to have access to £1 million a minute". So, you cannot divorce the terms and conditions on which it is offered from whether it is in fact being offered.

MISS ROSE: Absolutely, madam. Of course, that applies during the currency of an agreement just as it applies at the outset of an agreement. Once one accepts the logic of that position, you then have to ask, "What is the policy justification for saying, 'Yes, of course, the terms and conditions on which network access is being offered is an essential part, a critical part of the provision of network access when the agreement is entered into, but not thereafter'". We submit that there is no logical policy reason for that distinction at all because the whole basis - and I am going to come to the directives in a moment - for the regulation of this question is from the recognition by the European Community that in some markets (and the UK is one) you do not have a position of equal bargaining power between different network operator - you have one network operator (in this case BT) which controls the infrastructure and other networks which therefore have to interconnect with BT. That is the context in which the Access Directive provides for various safeguards to ensure not only that interconnection is provided, but also that it is provided on terms which safeguard

sustainable competition and guarantee the maximum benefit to end users, which includes price.

Now, once you accept that that is the policy justification that underlies all of this, you then ask, "Well, what is the reason why we would regulate those questions when the parties' first contract, but not thereafter?" The answer is that there is obviously none because BT's position as controlling the infrastructure is true throughout the whole of the currently of the agreement. It remains true for the whole of the period that the other network has to interconnect with BT that controls the infrastructure.

Now, it is right that they will have originally entered into a regulated agreement, but what is to happen if subsequently BT says, "Well, now we think that actually the price of interconnection that you are asking for is much too high, and we are not going to pay you at all - or will only pay you 0.001p per minute to interconnect to terminate on your network". Precisely the same considerations apply at that point as apply at the moment that the contract is entered into because there is no equal bargaining position. There is a need to ensure that sustainable competition is maintained. There is a need to ensure maximum benefit to end users. So, all the policy justifications that apply at the beginning of the contract apply during its currency.

THE CHAIRMAN: I do not see that that is right because it is what the default position is. The default position, once you have entered into the contract is that if BT tried to exercise their power and say "We're only going to pay you 0.001p per minute", Orange, or the other operator, can say, "Well, no, we're parties to a contract. You can't unilaterally vary that contract. So, we don't accept your notice". Thereafter, according to Orange the contract has to continue on. So, one is in a different default position from the position at the beginning.

MISS ROSE: Madam, with respect, there are two problems with that analysis. The first is that in that situation BT can decide to give notice to terminate the agreement. It does not matter whether the notice is two years or a shorter period. In either event, that is going to jeopardise interconnection. The second is that your analysis assumes that it is BT trying to cut the price of interconnection. What may have happened is that the market may have changed very significantly in the interim period so that it may be the individual operator saying, "Well, the price that we originally agreed is now completely uneconomic and does not reflect my costs of interconnection. Therefore I need to negotiate with you a higher price of interconnection" which is what happened in this case. If BT then says, "No, I am not going to do it", the operator is over a barrel and that jeopardises sustainable competition and jeopardises the maximum benefit to end users.

Madam, for those reasons, the issues of competition and benefit to end users remain the same during the currency of the agreement, particularly remembering that these are very long-term agreements, very, very large sums of money, huge investment by the MNOs, in a market where BT controls the infrastructure, and in a market which is changing very rapidly. So, the fact that a particular price has been agreed at the outset of the contract may be of very little relevance to the actual market conditions that obtain at the time of a variation. Madam, you have seen the large lever arch file showing the many, many variations to this agreement that have been agreed over the past decade, or so, which reflects the rapidly moving market. We submit that it is wholly incompatible with the policy of the domestic legislation and with the policy of the Access and Framework Directives to suggest that the national regulation authority only has the power to intervene to ensure interconnection on reasonable terms that are good for competition at the dawn of the agreement. We submit that that is a fundamental defect, and contrary to the policy of the legislation.

More mundanely, we submit that it is the only possible construction of s.185(8)(a) because of the words: "terms or conditions on which it is provided in a particular case" – "which it is or may be provided", that makes it quite clear that what is being talked about here is both current terms and conditions and future terms and conditions - those which have already been agreed and are already in operation and those which may be agreed in the future. We submit there is no other possible construction of those words.

Now, that is further fortified when you come to look at s.190 of the Act - the resolution of referred disputes. S.190 sets out the remedies which Ofcom may grant once it has determined a dispute. It tells us that their only powers are those conferred by this section.

> "Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following:
>
> (a) to make a declaration setting out the rights and obligations of the parties to the dispute;
>
> (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
>
> (c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom;

(d) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.

Again, we submit it is impossible to construe that provision as relating to a body which, on my learned friend's submission, only has the power to intervene at the beginning of a contract.

THE CHAIRMAN: That power in (d) may be a power which is relevant only in s.185(2) disputes, which I think is ----

MISS ROSE: Can I come to that point? In my submission, that is also an impossible construction for a further reason, but can I just deal with it in stages? The first point is to say that if it is accepted that these dispute resolution remedies apply to s.185(1) then my learned friend's case on the scope of s.185(1) cannot be correct. That is so because of the provisions of (b) and (d). If you contrast (b) and (c) you will see that (c) is about the terms of a future transaction and that (b) is about the terms of a current transaction. But, perhaps, more importantly, (d) puts the matter beyond doubt because (d) empowers Ofcom to retrospectively increase or decrease charges that have already been paid. So, clearly relating to a continuing contractual relationship.

Madam, you put to me the only possible answer to this, which is that this is only looking at s.185(2). I, perhaps rather boldly, made the submission that that is not a possible construction. The reason I say that is because looking at the words in parenthesis at s.190(2), "Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) ----" Then, if you go down to (3),

"Their main power in the excepted case is just to make a declaration setting out the rights and obligations of the parties to the dispute".

So, madam, what we can see here is that the legislature has very carefully carved out those disputes to which these resolution powers do not apply, and identified them, and has said, "These dispute resolution powers do not apply to the radio spectrum where you only have a power effectively to declare the rights and obligations". It must therefore follow that these dispute resolution powers do apply to disputes under s.185(1) - otherwise that would also have been an excepted case under s.190. On my learned friend's case, the excepted cases should also have included 185(1).

THE CHAIRMAN: Just wait one moment.

MISS ROSE: Madam, that is the national legislation. My submission in summary is that when you consider ss.185(1), 185(8)(a) and 190 together, the scheme is only explicable as continuing during the currency of the contract as well as at the time of its formation. For the reasons I have submitted that is also consistent with the policy ----

Can I now come to the directives? In my submission, in order for my learned friend to succeed she must be able to demonstrate to the Tribunal that there is something in either of these directives which prohibits the National Regulatory Authority from exercising that power during the currency of the agreement. We submit that not only is there nothing in the directives to prohibit such an approach, but, on the contrary, the directives in fact mandate that approach.

Can we then turn first of all to the Access Directive? First of all, looking at the recitals there are two to which I wish to refer. The first is Recital 5; the second is Recital 6. These are a pair to be read together. Looking at Recital 5,

> "In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treat. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumes, undertakings which receive requests for access or interconnection should n principle conclude such agreements on a commercial basis, and negotiate in good faith".

So, that is the first position. If you like, it is the Utopian position of what should happen in an open and competitive market: free commercial negotiation, open access, interconnection. But, then, going on Recital 6,

> "In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively".

So, that is the sad reality - that the aspiration is an open and competitive market, but the truth of the matter is that we do not have that - we have a situation where some - in particular BT - controls the infrastructure.

> "National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services

in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users."

Then they talk about particular forms of control of access.

So, that is the context in which the National Regulatory Authority is to be given the power to supervise this market -- to supervise interconnection. It must be stressed that this is wholly independent of the powers to regulate where there is significant market power in relation to an undertaking. It recognises the critical importance of interconnection and access to the development of an open and competitive market. It is obviously critical for new undertakings that they are able to connect to the network. Therefore, because of the existing inequalities, it recognises that it is appropriate to give these powers to NRAs to regulate this market.

So, that is the context quite separate from the SMP powers.

Then we come on to the substantive provisions of the directive. First of all, very briefly, Article 2, the definition of access. This is a point which Mr. Read made yesterday.

> "'Access' means the making available of facilities and/or services, to another undertaking, under defined conditions whether on an exclusive or non-exclusive basis, for the purpose of providing electronic communications services."

I must admit that is no more than the commonsense proposition that you put to me earlier that access must include the terms, because otherwise if you offer access on the basis of £1 million it is not access. Therefore that the terms and conditions of access are an integral part of access. If you like access is a package which includes both technical and contractual elements.

We then come to Articles 4 and 5, again to be read together, because Article 4 imposes obligations and bestows rights upon undertakings and Article 5 deals with the powers and responsibilities of the NRA, with regard to interconnection.

So starting with Article 4 we have the "Rights and Obligations for undertakings".

> "Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8."

So first of all a general obligation on everybody to negotiate interconnection, and that of course is enshrined in the UK under general condition 1.1. Then an additional obligation imposed on undertakings to offer access and interconnection on terms and conditions that are consistent with obligations imposed on them by the NRAs. Again, it is quite obvious from that that the terms and conditions of interconnection are an integral part of the obligations being considered under this Directive.

We then come to Article 5, and the starting point is Article 5.1.

> "National Regulatory Authorities shall, acting in pursuit of the objectives set out in Article 8 of the [Framework] Directive encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users."

Madam, we do rely on that provision because we submit that that makes the policy clear, that it is not simply ensuring adequate interconnection, it is ensuring interconnection in a way that promotes sustainable competition, efficiency and gives the maximum benefit to end users, and we submit that that is only consistent with a continuing supervisory duty on the NRA to look at the interconnection arrangements, and to ensure that they are not inefficient, that they are not resulting in distortions of competition, that they are not resulting in inflated prices being passed on to consumers. That therefore must apply during the currency of interconnection agreements and not simply at the outset.

THE CHAIRMAN: Because the solution that fulfils those requirements at the outset of the contract may not fulfil them at some later stage in the contract?

MISS ROSE: Indeed, almost inevitably will not, it is not only foreseeable, but a virtual inevitability that it will not. It is inevitable that the charges will have to change over time, and the inequalities that justify the regulation of this market in the first place are still there. Indeed, of course, if they were not there then the Regulator must step back because we then have utopia, we have the open and competitive market. But for as long as we do not have the open and competitive market, but a market in which one operator controls the infrastructure, controls interconnection the same constraints apply, you do not have an arms' length commercial dealing and therefore you substitute the gap with the continuous supervision of the Regulator, who is able to ensure that consumers are not short changed and that the vulnerable undertaking is not put at a competitive disadvantage; and if that is the purpose at the beginning of the contract it must be the purpose throughout its currency

otherwise the policy fails, and you do not achieve the regulation of the market that the Directive is seeking to achieve. Of course, that is all subject to proportionality, transparency and so on, but that is the basic parameter.

We submit that Miss Demetriou cannot construe that obligation as being expressly limited to intervention only at the outset of the contract and that is how far she has to go because given the submissions I have made about the natural construction of s.185 she has to find something in this Directive that is clearly inconsistent with that and which would prohibit the Member State from empowering Ofcom to supervise these contracts during their currency. Not only can she not do that from Article 5.1 but in fact that approach is inconsistent with the policy enshrined in Article 5.1 and the recitals.

It is in that context that we come on to Article 5.4, and you will recall, of course, that this is another sub-paragraph of the same Article, so we are still in the same field, still talking about the powers and duties on the NRA and the main one is Article 5.1 we have just looked at. Then:

> "With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of the [Framework] Directive in accordance with the provisions of this Directive and the procedures referred to in Articles ;6 and 7, 20 and 21 of the Framework Directive."

Now, just to unpick that, that gives a power to the National Regulator to intervene, even though the parties are not in dispute. So in other words, the parties may be quite happy with the interconnection agreement that they have reached, but if the Regulator concludes that that agreement is not conducive to efficiency, to sustainable competition and is not giving the maximum benefit to end users the NRA must have the power to intervene, even though there was no dispute of its own motion.

Also, a further power must be given to intervene where the parties cannot agree between themselves. Again, we submit it is impossible to construe that as applying only at the outset of a relationship, otherwise what is the scope that is given to the power to the NRA to intervene of its own initiative? It is meaningless.

Not only that, Miss Demetriou placed a lot of weight on the words "in accordance with the provisions of this Directive", but we submit that that is no more or less than a reference to

this Directive and the obligations and powers conferred under the Directive, including of course most relevantly the power conferred under Article 5.1.

Then we see that Article 8 of the Framework Directive is invoked in terms of the objectives – I am going to come on to that in a minute – but also that the procedures in Article 20 of the Framework Directive are invoked, and the real significance here of Article 20 of the Framework Directive in the context of access is that the dispute resolution procedures in Article 20 of the Framework Directive give the procedures by which the NRA's intervention is to be conducted, but the actual substantive power that the NRA is exercising in relation to access matters derives its source from Article 5.4.

Of course, we accept there is an overlap and I do not differ from anything said by Mr. Roth on that, that where you are looking at obligations arising out of the Directives you anyway have a free-standing duty, in fact, under Article 20. So that, we say, is the significance of the Access Directive.

THE CHAIRMAN: You take a slightly different approach from Ofcom, in that I understood Ofcom as arguing: well, one looks at Article 5.4, it says with regard to access and interconnect ion and those are very broad terms, and there is nothing to suggest that that they should be constrained, but you say: "One does need to construe Article 5.4 in the context of Article 5 as a whole ----

MISS ROSE: Yes.

THE CHAIRMAN: -- and also Article 4, but if you do that you see that in fact it has to apply during the currency of the agreement.

MISS ROSE: Yes, for the reasons I have given the policy considerations apply throughout and also the power to intervene of its own motion makes it clear that the existence of an agreement does not preclude intervention by the Regulator.

THE CHAIRMAN: Because, you say, is difficult to envisage a situation where it would be appropriate for the Regulator to intervene of its own motion in the absence of an existing relationship.

MISS ROSE: That is one reason, but another reason is that there is clearly no limit or qualification on the circumstances in which the Regulator can intervene of its own motion, that cannot be limited to the moment at which two parties are entering an agreement, that simply would not make any sense.

We then come to the Framework Directive, and first of all Article 8, because as you have seen both Article 5.1 and Article 5.4 of the Access Directive make it clear that when

exercising its powers under the Access Directive, the Regulator must do so in accordance with the objectives defined at Article 8 of the Framework Directive.

Looking at those objectives set out at Article 8.2, Article 8.2(a):

> "ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality."

Now as the Tribunal will be aware the reference to consumers deriving maximum benefit again appears expressly in Article 5.1 but what we can see here from Article 8 of the Framework Directive is that that expressly includes price, and therefore it is quite clear from Article 5 of the Access Directive, read together with Article 8 of the Framework Directive, that the interventions of the Regulator include interventions relating to price where the price may not be giving the maximum benefit to consumers and you have my submissions about how that would not make sense if it only applied at the beginning of the contract, but not to later variations, because if there was a later variation which was going to adversely affect consumers then on my learned friend's construction Ofcom would not be able to intervene either of its own motion, or at the request of either party to sort the problem out.

THE CHAIRMAN: Yes, and one can envisage a situation where actually the parties agree to an inflated price which they can then pass through to their customers.

MISS ROSE: Indeed, madam, that is indeed one of the issues which this Tribunal will be asked to grapple with in January, because as the Tribunal will recall Ofcom, when resolving these disputes, held that it would not insist on the prices being lowered, provided that BT was able to pass the prices on to consumers. One of the grounds of appeal that various parties and interveners are relying on is that it is said that that is the wrong approach in principle because Ofcom has failed to have regard to its obligation to maximise the benefits to consumers in terms of price. So one can actually see that being engaged on the facts of this case and on the basis of Miss Demetriou's submission there would be no power to do that, and we submit again it is plainly inconsistent with the scheme under the Directives.

The next one, as the Tribunal can see, is:

> "(b) ensuring that there is no distortion or restriction of competition I the electronic communications sector"

And that again relates back to the objective of ensuring sustainable competition, is the way that it is put, and you have my submissions on that point.

Then there is the question of dispute resolution and the provisions under Article 20. We do submit that of course there is a power given to the regulatory authority under Article 5 (4) to

intervene, either of its own motion or a request, but dispute resolution is not simply a power bestowed on the Regulator, it is also a right granted to the undertakings under the Framework Directive, because the Framework Directive recognises that where an operator is unable to reach agreement it is a valuable right for it to be able to have recourse to an independent statutory Regulator to resolve the dispute. We see that first of all from Recital 20 to the Framework Directive, where it says:

> "In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection and for the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith, but failed to reach agreement should be able to call on the National Regulatory Authority to resolve the dispute."

That is the way that it is put, that the aggrieved party should be able to call on the NRA to resolve the dispute, it is a right in the aggrieved party. We see that reflected in the provisions of Article 20, which imposes a duty on the NRA to determine the dispute. So Article 20(1):

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

So again it is a right given to the undertaking and a duty on the NRA to resolve it, and we submit that that again is of general relevance when you are construing the scope of the dispute resolution function, because what you are looking at is a Directive that grants rights to undertakings to have their disputes resolved, and we submit it is in principle inappropriate for those provisions to be narrowly, or restrictively construed.

THE CHAIRMAN: And that right, you say, is imported from Article 20 into Article 5(4)?

MISS ROSE: Yes, because Article 5(4) refers expressly to Article 20. We also submit that the construction of these directives which we put forward is strongly supported by the decision of the CAT in the H3G case at tab 7 of the authorities' bundle. Madam, I do not propose to go back to it but I do draw the Tribunal's attention again to paras. 129 to 131. It is right to say that the parties in that case were not directly considering the question of whether the dispute resolution powers only arose at the beginning of the contract period; what was

expressly in issue was whether or not the dispute resolution powers included the regulation of price, and it was being argued at that time by Ofcom that they did not deal with price, they dealt only with the provision of access. The CAT said "No", they do include price and price is an essential element of access, and that brings me back to my initial policy argument which is if price is an essential part of access it makes no sense if price can be regulated only at the outset of the agreement.

Then Orange relied on what they called their "purposive" argument, which is in fact a floodgates' argument, where it was said that Ofcom would be swamped by trivial complaints if this approach were adopted. We submit there is nothing in that point. Even if there were anything in that point it could not lead to a different construction, but in fact you have heard from Ofcom that there is no difficulty with the way that these provisions operate on the basis that they have always been understood as applying during the currency of the contracts. Indeed, it is Orange's construction which leads to results which are contrary to the policy and purpose of the 2003 Act, and you already have my submission on that. I said in the note it would deprive the parties to these crucial agreements of the recourse which they currently enjoy to an independent regulator to ensure that there is a mechanism for the speedy resolution of disputes ensuring interconnection continues without disruption and at a price which ensures the maximum benefit to consumers and sustainable competition.

We submit no good policy reason to confine Ofcom's powers to the beginning of the contract. Those are our submissions on s.185(1).

I can deal rather more shortly with s.185(2), if we just turn it up in the bundle, p. 251.

> "This section also applies in the case of any other dispute if –
>
> > (a) it relates to rights or obligations conferred or imposed by or under this Part or any of the enactments relating to the management of the radio spectrum that are not contained in this Part."

Now again you see the broad wording "relates to", but in fact there does not appear to be any real dispute between the parties as to the construction of s.185(2) because first of all everybody agrees that 185(2) only applies if 185(1) does not. In other words, even if this dispute does – and we say it does – relate to a regulatory obligation, if it falls within the scope of 185(1) because it relates to the provision of network access, 185(2) is not engaged. It is only if you are against us on that that we get to 185(2). Secondly, it now appears to be accepted by Orange that this provision does apply to disputes arising after the original agreement was entered into.

We submit that that position adopted by Orange demonstrates the illogicality of their position, because that would mean that disputes between parties to agreements which did not concern access could be resolved by Ofcom after the commencement of the agreement, but that disputes between parties concerning regulatory obligations which did concern access, falling between 185(1) could not be resolved by Ofcom after the commencement of the agreement.

THE CHAIRMAN: Even if they arise from a regulatory obligation? I understood the point that Orange would accept that a dispute which relates to a regulatory obligation concerning network access that arises without putting access at risk would fall within s.185(2) because I do not think you can construe the term "relating to the provision of network access" broadly in order to cut things out of s.185(2) without also interpreting it broadly as to say what falls within 185(1), but as I understood it their case is that there is a category of disputes relating to network access arising from a regulatory obligation that falls within 185(2), which includes disputes during the currency of the agreement, so that 185(2) is partly implementing Article 20, but also to that extent implementing Article 5(4).

MISS ROSE: Well madam, if that is the way that they put it one becomes wholly baffled by what is said to be the policy underlying it, or how this is said to relate to the Directives, because what one then comes down to is a situation where my learned friend accepts that disputes that relate to network access, where there is a regulatory obligation can be resolved by Ofcom after the commencement of the agreement, even though those disputes plainly fall within the ambit of Article 5(4) of the Access Directive. The question then is how is my learned friend construing Article 5(4) of the Access Directive as intended to exclude the Regulator's power to intervene in these contracts after they have commenced if she is accepting that those disputes come in anyway through the medium of Article 20 of the Framework Directive? On that basis there would be an inexplicable inconsistency between ----

THE CHAIRMAN: No, maybe I was mistaken in that. I think it is accepted generally that there is an overlap between Article 20 and Article 5(4), whereas there is no overlap between s.185(1) and s.185(2).

MISS ROSE: Yes, and that 185(1) relates to 5(4).

THE CHAIRMAN: Yes.

MISS ROSE: But the difficulty, madam, is how my learned friend is seeking to distinguish between these two subsections. What is the rationale for saying that 185(1) applies only a the time of conclusion of the contract, but 185(2) applies during its currency? Where is she

identifying any provision in any Directive or Statute that makes that distinction? 185(1) and 185(2) are in the same section of the Statute with the same ambit; they both derive their authority from Article 20 and additionally in the case of 185(1) from Article 5(4), so where is the policy or provision which limits 185(4) to the commencement of the contract but not 185(2)? It is wholly illogical and unsupported by any legislative provisions.

She has been driven to it, madam, because otherwise 185(2) does not make sense and, of course, 190 does not make any sense at all. She could not make the submission that 185(2) only applies at the commencement of agreements because that would make 192(d) completely inexplicable. So she is driven to make some kind of distinction between these two provisions even though there is no basis for it in the legislation.

But, in any event, given that she does make that concession, the only question that arises under 185(2) is whether this is a dispute which relates to rights or obligations conferred or imposed on the legislation.

The simple answer to that question is that this dispute does relate to BT's end-to-end connectivity obligation, and of course imposed under s.74 of the Act, read together with Article 5 of the Directive. As the Tribunal saw yesterday, BT is obliged to purchase interconnection at a reasonable price. The substance of BT's complaint to Ofcom, or in its original OCCN, was that the rates that it was being charged by Orange were unreasonable because they would result in an increase in BT's cost base, without any associated increment in the value added to BT. We can see that in the OCCN itself, which is at p.221 of the bundle (643). This is the 19th July letter where BT enclosed their OCCN to reduce termination costs down to 2G only termination costs.

> "In light of recent pricing proposals by the mobile operators to BT, BT feels compelled to address the large increase in its cost base that these proposals will cause.
>
> BT is deeply concerned at the apparent bundling of 2G services, which are subject to SMP-based regulation, with 3G services, which currently have no SMP. In parallel, we are concerned that Orange's 3G termination service appears to contain costs for component services that BT's terminating calls do not use and which, therefore, we do not wish to purchase. These are significant commercial issues. The proposed increase in Bt's cost base, with no associated increment in the value added for BT, is of great concern."

Essentially what is being said is that: "The price you are seeking to charge us is unreasonable for these reasons." The effect of that – if that is right – is that BT would not

be under a regulatory obligation under its end to end connectivity obligation to purchase the call termination at that rate, and that is the issue that has been referred to Ofcom, and that is the issue that Ofcom have decided because if you look at Ofcom's determination of the dispute, going to p.779, this is the summary of Ofcom's determination, and we see the summary of its conclusion in relation to Orange in the bullet points at para.1.14 on p.779. The second bullet:

> "that the charges for mobile voice call termination on Orange's network contained in its OCCN of 23 May 2006 are reasonable for the purposes of the end-to-end obligation and BT was and is required to purchase at these charges until such time as alternative charges are agreed between the parties."

We submit that it is quite plain from those facts, and from that determination, that this was a dispute that related to a regulatory obligation.

THE CHAIRMAN: As I understand it, there is some contention - not in this case, but in other cases - as to whether the end-to-end connectivity obligation does relate to the prices which BT pays for the interconnection services it buys, or whether it only relates to the prices that BT charges for allowing access to its infrastructure. But, as far as you are concerned, you accept the point that was made by Ofcom yesterday that in rejecting an OCCN under the standard interconnection agreement, BT should be interpreted as saying, "This is unreasonable. We will not buy at that price. Our end-to-end connectivity agreement would not require us to buy at that price".

MISS ROSE: Yes - because BT would not be able to object to the charge if the charge was reasonable. The fundamental flaw, with respect, in my learned friend's argument is that the parties are not here simply engaged in a free commercial negotiation without regulatory input because BT's hands are tied in relation to this contract because BT is under an obligation to interconnect at a reasonable price. Therefore, if the price that is being offered by Orange is reasonable, BT has to take it. That is the whole point of the interconnection obligation. That is going to be of great significance when we come on to H3G's appeal. They can see why we are here today. This is going to be of great significance when we come on to H3G's appeal because part of our case, as you will have seen, is that we submit that Ofcom has misinterpreted the end-to-end connectivity obligation on BT, and, in particular, misinterpreted what a reasonable price is and given far too much latitude to the MNOs to charge higher prices, which are then regarded by Ofcom as reasonable for that purpose.

But, all we need to say for present purposes is that it is plain - absolutely plain - that this is a dispute which relates to a regulatory obligation, and that it is simply wrong to suggest that this was a pure commercial negotiation without any regulatory input. This was a negotiation in the context of BT's obligations of the end-to-end connectivity obligation.

THE CHAIRMAN: Because you would say that the regulatory obligation is not simply to interconnect, but to interconnect at a reasonable price.

MISS ROSE: Yes. Madam, I do not understand anybody to be disputing that. Mr. Read makes the point to me about Orange's Ground 3 of its appeal. It may be worth us looking at that, madam. Page 15. We see the end-to-end connectivity obligations summarised at para.58. If you look at para. 1.2,

> "The purchase of such services shall occur as soon as reasonably practical, and shall be on reasonable terms and conditions including charges, and on such terms and conditions including charges as Ofcom may from time to time direct".

So, an obligation on BT to purchase call termination at reasonable charges. No obligation - absolutely right - on Orange to offer call termination at a reasonable rate. The point is that Orange is free to offer whatever price it chooses. BT may, for whatever reason, and there may be, of course, other commercial considerations between the parties, accept a high price which is offered by Orange. But, if BT thinks the price is unreasonably high, BT can refuse to agree it. However, if the price is not unreasonably high, BT has to agree it - even if it does not like it. It cannot negotiate the price down below a reasonable level - whatever that means. That is why this is not an arm's length commercial negotiation.

Now, it is right to say, if we look on in the notice of appeal at para. 60,

> "Because the requirements of reasonableness applies only to BT it cannot empower Ofcom to make any direction as to the reasonableness of any charge proposed to be levied by another person such as Orange from whom BT purchases wholesale narrow band call termination services. In the light of the statutory background which the end-to-end connectivity condition was imposed, Orange submits that a direction as to the reasonableness of any charge can be made only in order to protect terminating operators from attempts by BT to impose an unreasonably low price or to relieve BT of its obligation to purchase termination or Ofcom considers it would be unreasonable to oblige BT to purchase termination at the charges proposed by the operator".

Madam, we do not disagree with that analysis, but that makes no difference to the argument that this dispute falls within the ambit of BT's regulatory obligation because BT's complaint was, if you look at para. 60(b), that what Orange were seeking to do was to

oblige BT to purchase call termination at an unreasonably high price. BT were saying, "We're not going to purchase call termination at that price because we think it is unreasonably high". That immediately brings into play the regulatory obligation, and therefore s.185(2).

THE CHAIRMAN: Thank you.

MISS ROSE: Madam, that is all I want to say about Issue 1(a). So far as Issue 1(b) is concerned - the time limits under the contract - there is very, very little that I wish to say on this. Simply, we make the submission that Orange's case on this point has actually evaporated following its acceptance that the actions of the parties cannot determine the meaning of dispute under the 2003 Act. At most we say the relevance of the question - whether BT adhered to the contractual provisions concerning negotiation and time limits for a reference of a dispute to Ofcom - that is only relevant to the exercise of Ofcom's discretion under s.186. In other words, it goes to the question of whether the parties have actually made proper commercial efforts to resolve this, and whether there are other reasonable means available under the contract for resolving the dispute. It has no bearing on the applicability of s.185.

Madam, unless I can be of any further assistance, those are our submissions.

THE CHAIRMAN: There are no other parties to be heard before Miss Demetriou replies? (After a pause): Thank you.

MISS DEMETRIOU: Madam, perhaps I can start by saying that it appears that there is much common ground on the approach to the interpretation of s.185 of the Act, and, in particular, it is agreed between everyone that the only power that the Tribunal is looking at here is the power contained in s.185, and, secondly, that s.185 must be interpreted in accordance with the Framework Directive and the Access Directive. So, those two issues are uncontested. Let me start, perhaps, by saying that Mr. Read criticised us for ignoring the normal meaning of the word 'dispute'. He referred back to the dictionary definition and said that it meant nothing more than a disagreement, and that we were trying to somehow confine that meaning to something narrower. Well, we are not, madam. I hope it is clear from my submissions so far that of course we accept that the normal meaning of dispute is a disagreement, but what we say is that the issue does not stop there. I do not understand Mr. Roth or Miss Rose to disagree with us. What we say is that, yes, there has got to be a dispute, but, secondly, the dispute has to relate to a particular substantive category of particular substantive issues. Ofcom itself accepts that it does not have jurisdiction over

each and every disagreement that may arise between network operators. So, the point Mr. Read makes is really a non-point, in my submission.

What we are debating here is not whether or not the dispute has to relate to particular substantive categories, but what the ambit of those substantive categories is. We say it is something narrower. Those against me say that it is something broader. So, that is the nature of the dispute here before the Tribunal today. Ofcom puts its case in two ways, both of which it says engage s.185(1) of the Act. It says first of all that it had jurisdiction because this dispute did relate to the provision of network access. Secondly, it says that in any event there is a regulatory obligation in play here - namely, the end-to-end connectivity obligation on BT. That is the point on which Miss Rose has just addressed the Tribunal. So, it puts its case in those two alternative ways -- or cumulative ways. It says it has jurisdiction under both those heads. I deal with each of them in turn.

As to the provision of network access, and the meaning of that phrase in s.185(1) of the Act, Mr. Roth submitted that Orange seeks to give too narrow a construction to that phrase. However, significantly, what he did recognise is that Ofcom can only intervene to resolve disputes which engage its regulatory functions. He himself acknowledged that Ofcom has n desire to intervene as a commercial arbitrator between parties, and it is confined to its regulatory functions. Now, if one give the broadest possible meaning to s.185(1) a relating to any issue to do with network access, then one brings into the frame all sorts of dispute which do not engage Ofcom's regulatory functions. So, what we way is that s.185(1) has to be construed against the backdrop of the directives, and that Article 5(4) of the Access Directive states quite plainly in its final sentence that the National Regulatory Authority must under Article 5(4) act in accordance with the provisions of this directive.

Miss Rose just fairly accepted that this phrase has to be given some meaning. It is not a meaningless phrase. So the question is: what does that phrase mean? What are the provisions of the directive that were engaged in this case? That is a question which the Tribunal put to Mr. Roth. He replied that it was the general objective in Article 5(1) to secure interconnection. That, as I understand it, is Miss Rose's position too. So, she points to Article 5(1) and says, "There is a general function here of securing interconnection, and one reads that with Article 8 of the Framework Directive, the objectives in Article 8 and that gives a broad range of powers to Ofcom in respect of interconnection, to make sure it is secured in the interests of end users and the competitive way, and so on, and so forth".

We say that that is the wrong way to read those provisions. What Article 5(1) does not do, in my submission, is give the NRA a free-ranging power to do whatever it likes as long as

broadly what it is doing can be said to relate to securing network interconnection. The reason for that is that its powers are limited -- its functions are limited expressly by the directives. Perhaps I could just ask the Tribunal to turn up the Access Directive again at Tab 10 of the bundle. One sees at Article 5(1) the broad statement that,

> "National regulatory authorities shall ... encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services ... in pursuit of the objections set out in Article 8".

The key phrase in Article 5(1) is again 'in accordance with the provisions of this Directive'. So, it cannot do anything which it thinks might conceivably further the aims set out in Article 8 of the Framework Directive. The reason for that is this: that would allow Ofcom, for example, to impose price controls, if it thought that it were in the interests of adequate access and interconnection to do so. It would allow it to do that under Article 5(1), read with the objectives in Article 8 of the Framework Directive, but it is quite plain from the rest of this directive that it only has the power to impose price controls in very specific circumstances - namely, when it has gone through the process of designating an undertaking as having SMP.

THE CHAIRMAN: Does your argument require us to say that because of those words - 'in accordance with the provisions of this Directive' - this dispute resolution power entitlement is not a separate regulatory function of the National Regulatory Authority' it is only a function which has to be attached to some other task that is conferred by the directive.

MISS DEMETRIOU: That is precisely my submission. What I am saying is that the framework is that the directives set out regulatory tasks, and those are substantive regulatory tasks - for example, those set out in Articles 9 to 11 of the Access Directive. Then, it permits procedural mechanisms by which those tasks can be carried out. One of them is that set out in Article 20 of the Framework Directive, which is where there is a dispute which engages one of those regulatory functions, then Ofcom can step in. One of them is the power of intervention in Article 5(4) of the Access Directive where it can step in of its own accord. But, what it cannot do is use those procedural mechanisms to come in and impose all sorts of regulatory obligations which it cannot do -- It cannot circumvent the requirements set out in the rest of the directives - the substantive provisions. So, if it wants to impose a price control -- I am pointing to the most draconian one, but if one looks at Article 10 of the Access Directive, that is an obligation of non-discrimination. Now, one might think that non-discrimination is not a particularly controversial obligation to be able to impose. But, if Ofcom wants to impose that obligation, what it has to do is go through the complicated

procedure of designating an undertaking as having SMP. If the undertaking does not have SMP then it cannot impose an obligation of non-discrimination. Likewise, an obligation of transparency; likewise, price control.

So, what we say is that you certainly cannot use Article 20 of the Framework Directive, or Article 5(4) of the Access Directive as a back door route to imposing that kind of obligation simply because vaguely the matter falls within the objectives under Article 8 of the Framework Directive. We say that will not do at all. So, madam, you have understood correctly the nature of our submission. We say that follows from Article 8(3) which I took you to in my opening - Article 8(3) of the Access Directive which states in terms that national regulatory authorities cannot impose the obligations in Articles 9 to 13 on operators that have not been designated as having SMP.

Madam, one further point is that this is reinforced by the final sentence of Recital 32 to the Framework Directive which is at Tab 9, p.190 of the bundle. You will recall that this is the recital which explains the dispute resolution mechanism in Article 20. What it says in the final sentence (which I do not think you have been taken to yet) is that the intervention of a national regulatory authority in the resolution of a dispute between undertakings should seek to ensure compliance with the obligations arising under this directive or the specific directives. We say that that reinforces our point that these procedural provisions do not give further substantive powers to Ofcom.

Madam, we say that this further explains s.185(8)(a) of the Act, which is a point that has been take against me. What we say about that is that s.185(a) is explaining that Ofcom can intervene in relation to disputes relating to the provision of network access, including disputes as to the terms and conditions on which it is provided. We say that is fine, but only if it is intervening in relation to one of its regulatory tasks. So, for example, if it were the case that the existing terms and conditions under which interconnection was being supplied, for example, breached a regulatory obligation which had been imposed - so, I think the example I gave in opening was that if Ofcom was to impose a price control as it did in relation to 2G services, and it becomes clear that that has been breached by the parties, then that is a term and condition in respect of which network access is being provided, but because there is a breach of the regulatory obligation Ofcom can intervene because then it is acting within the substantive four corners of its powers under the directives. So, that is how we explain s.185(8)(a).

THE CHAIRMAN: Do you say that s.185(1) can then apply during the course of a contract when one is relying on s.185(1) to the extent that it implements Article 20 in relation to network access - regulatory obligations rather than Article 5(4).

MISS DEMETRIOU: Madam, on the facts of this case it does not arise. That is why my position in opening was that there is an agreement here under which network access is guaranteed. That is the default position point which you identified. So, because interconnection is ensured, then we say s.185(1) does not apply because it is not a question of initial access to interconnection. But, one of the points Mr. Roth made yesterday was that that is one circumstance in which interconnection is jeopardised - may be jeopardised - if there is no agreement in place. But, what he said is that there may be factual circumstances in which an agreement is in place, but where something happens to jeopardise interconnection - say, for example, one of the parties just terminates in breach of the agreement, or one of the parties I think gives notice to terminate that will expire quite soon. Now, in those circumstances there is an agreement in play that one can that it relates to the initial provision of network access because what is happening is that network access is being jeopardised. So, it is not necessary to my case to show that s.185(1) only ever applies if there is no agreement in play at all. But, what I do say is that what none of these provisions do is give Ofcom the power to intervene to resolve disputes if none of its specific regulatory functions are engaged.

Another point which has been put against me on that is s.105 of the Act. You will recall that Mr. Roth referred to it yesterday. Perhaps we could just turn that up. It is not in the bundle, but ---- What is said against me here is that s.105 applies to network access questions. It was said against me that subsection 6 defines 'network access question' as meaning a question relating to network access or the terms and conditions on which it is, or may be, provided in a particular case.

Now, what the Tribunal was not taken to directly was s.105(1)(b) because s.105(1) states that, "This section applies where (a) and (b) are cumulatively satisfied". (b) says that Ofcom must consider that for the purposes of determining the network access question, it would be appropriate for them to exercise their powers under this chapter to set, modify or revoke conditions falling within subsection (2). One sees that the conditions under subsection (2) are the specific regulatory obligations that Ofcom is specifically empowered to apply under the Access Directive.

So, none of these provisions, in my submission, give Ofcom any authority to intervene to resolve a dispute where its specific regulatory functions are not triggered. We say that they

are not triggered in this case. We say that for the reasons which - I do not want to repeat myself - I canvassed in opening, which is that the default position under this contract is that BT has a duty to continue to interconnect. The default position on the non-agreement on BT's OCCN was that the parties simply would have reverted to the price previously agreed between them a matter of days earlier. So, that is the default position.

THE CHAIRMAN: That is the default position in this particular case because there happened to have been, shortly before, an agreement. But, your case has to also be that if BT had refused to accept Orange's OCCN, then the fact that, now, some calls are terminated on the 3G network, whereas that was not the case in 1996 presumably, that change in the market could not have necessarily resulted in a change to the pricing to the carrier price list unless BT was prepared to accept it./

MISS DEMETRIOU: Madam, I do accept that. I do accept the point made against me, which is that if BT had not accepted Orange's OCCN, then it would have been stuck with the 2G prices. What Miss Rose says to that is, "Well, then we have got this horrific spectre of a two year agreement where the parties can do whatever they like and agree prices which are completely uncompetitive, and Ofcom cannot step in". But, madam, that is totally unrealistic because Ofcom can step into fulfil its regulatory functions. Those include setting access conditions, setting price controls, and all the rest of it. It has got the full panoply of powers. Those powers are expressly there to correct anti-competitive pricing in the market. But, what it cannot do is step in and say, "Well, we don't quite like this price" without pinning its colours on the mast of a particular regulatory obligation. We say that would entirely circumvent its power to impose price controls, which is a draconian power, and which it can only exercise if certain procedural conditions and substantive conditions, such as the existence of SMP are met. So, it is not at all the case, as Miss Rose sought to suggest, that Ofcom has to stand by and do nothing. No, that is not right. It can step in to correct a lack of competitiveness in the market, and if it thinks that end users are suffering, it can set all sorts of conditions. But its powers to do that have to be exercised in accordance with the provisions of the directive. It cannot use Article 5(1) and Article 8, which sets out general vague objectives, as some kind of fall-back to step in whenever it likes if the statutory conditions for its intervention are not satisfied. That is our case.

THE CHAIRMAN: So, if BT had simply refused to accept all these blended rates, OCCNs - and we put aside for the moment that they did not at first realise that that is what they were being asked to accept -- If they had rejected all the OCCNs from the mobile operators attempting to introduce this blended rate, but nevertheless Ofcom thought that it was right

that the operators ought to be able to charge a different rate for the proportion of calls that are terminated on the 3G network, what is it you say that Ofcom could have done in those circumstances?

MISS DEMETRIOU: Madam, that would depend on why Ofcom thought it was right, because we say that Ofcom can only intervene to ensure that what it thinks right happens if - if - there is a regulatory reason for doing it. So if my client could say to Ofcom, "Well, we think that this is wholly unfair because what we are being asked to do actually offends these particular principles in the Directive, and therefore we think you have power to step in", then there would have been power. But, if my client simply thought that commercially they had a raw deal, but there was no regulatory reason why they should be able to impose a higher price, that is a question of pure commerciality between the parties. So, my clients would have been stuck with the lower price unless it could point to a regulatory reason why that was unfair. I accept that that would not have been palatable for my client. But it is a different question whether it could actually have done anything under the legislation. If this means that in future the parties think that in negotiating this kind of agreement they should not negotiate a two year agreement, and there should be some more involved provisions for variation, so be it. But, that cannot inform the nature of the statutory functions and the ambit of those statutory functions of Ofcom. That is our submission.

That is why we say in this case that it is not simply question of pointing to Article 5(1) of the Access Directive and the objectives in Article 8 of the Framework Directive. We say that you have to identify the specific regulatory function, and none arose here. The reason why none arose here was first of all, on connectivity, that we say that was not jeopardised because of the default position under the contract. The only other point I have to meet on that is the end-to-end connectivity obligation imposed on BT. What we say about that is really quite simple. I think the point is probably best made by reference to Ofcom's determination in these disputes which is at Tab 27. Mr. Roth took you at p.794 to paras. 4.3 and 4.4. I do not think he took you in detail to paras. 4.13 and 4.16. We say that these paragraphs demonstrate the logical flaw in Ofcom's position because what Ofcom is saying at para. 4.13 is that BT's proposal of lower charges for mobile call termination implies that it would refuse to purchase mobile call termination at any higher charge. We say that that is just simply factually incorrect. No such implication can be drawn from it. There is a contract there which requires connectivity to continue at the previously agreed rate. So, we say that this is simply factually incorrect, this conclusion. Once one sees that that is incorrect, then one sees that there is no threat at all to continued connectivity.

THE CHAIRMAN: You say there is no threat to connectivity, first because there is a two-year termination space in the contract, and also that one cannot assume that BT would have felt sufficiently strongly about this actually to go through that whole termination process.

MISS DEMETRIOU: That is absolutely right, madam. You saw the explanation given in Mr. Annette's witness statement for accepting Orange's elevated rate -- blended rate in the first place. There were a variety of commercial reasons that led it to accept it. What I submit is that in the light of that, it is simply implausible to assume that BT would have threatened to end connectivity in breach of this agreement on the ground simply that Orange had not accepted its OCCN. In any event, it may have opted to do that, but if it had opted to do that, then Ofcom may have had power to intervene - this may have been a dispute which related to network access. But, that did not happen in this case. So, what Ofcom has done is simply drawn the conclusion, which we say is impermissible, that Orange's failure to accept the OCCN implied that BT would terminate the agreement. We say that is a wholly implausible conclusion to draw. If that is the peg on which Ofcom is hanging its jurisdiction, we say that is simply insufficient.

We say that also is the flaw in Miss Rose's point at para. 30 of her note where she says that there is an obligation on BT to accept any price offered by Orange. That is simply not the case because the agreement contains this mechanism. Had BT not accepted Orange's OCCN, then, as I have accepted, Orange would have been stuck with its previous rate.

Madam, that is all I have got to say in reply on Ground 1(a).

In relation to Ground 1(b) I do not want to repeat my submission, but I would say that Mr. Read addressed at some length the question of whether time was of the essence in the contract, and whether there has been estoppel. Our answer to that is a short one, and it is either wrong or right: we say that is completely irrelevant because, as I said at the outset, the private law rights or ramifications of compliance or non-compliance with Clause 13. If time were of the essence, the consequence of time being of the essence or not, Orange would be able to treat BT as being in repudiatory breach of contract if time were of the essence. But, that is not the point I am making. The point I am making is that by generating this dispute, BT circumvented the contractually agreed provision for negotiation. There is a provision for negotiation which did not happen because BT, rather than issuing a new OCCN, simply referred this dispute out of time. So, that is the long and short of the point. I am not proposing to deal with any of Mr. Read's points about estoppel or time being of the essence because we say that they are unnecessary. We say we do not have to deal with them

because our point is a matter of construction of the statute. It is wrong or it is right. But, I said in opening that it does not depend on the factual conduct of the parties.

Unless I can assist further, those are my submissions in reply.

MISS ROSE: Madam, can I make one very brief point? My learned friend relied on Article 8(3) of the Access Directive requiring there to be a finding of SMP before particular conditions are imposed. I would just draw your attention to the fact that Article 8(3) says, in terms, that it is without prejudice to the provisions of Article 5(1).

THE CHAIRMAN: Are you saying then that they could, in the context of the determining a dispute under Article 5(4) impose conditions like the SMP conditions without having made a finding of SMP?

MISS ROSE: Madam, they already have done because one of the express powers under Article 5(1) is the power under Article 5(1)(a) "To the extent that it is necessary to ensure end-to-end connectivity to impose obligations on undertakings that control access to end-users". As you know, madam, the end-to-end connectivity obligation imposed on BT requires it to purchase interconnection at a reasonable price, and so to that extent controls BT's ability to negotiate a lower price.

The only other point I would make about that is that it is quite clear that Article 5(1) gives substantive powers. Apart from anything else, it is headed 'Powers and Responsibilities of the national regulatory authorities with regard to access and interconnection'.

THE CHAIRMAN: The first point that you made about it being without prejudice to Article 5 - where is that?

MISS ROSE: That is at the beginning of Article 8(3). My learned friend was relying on the provisions in Article 8(3).

THE CHAIRMAN: Your second point was whether it is a second substantive regulatory function or a procedural ... (overspeaking) ...

MISS ROSE: We make the point that Article 5 is headed 'Powers and responsibilities of the national regulatory authorities ----' Before I leave this point, madam, looking again at para. 131 of the H3G decision - the original CAT decision - it is made clear that under the Access Directive the NRAs have at least two sort of powers - the first are powers to take steps to ensure end-to-end connectivity; the second are powers to intervene where SMP has been found. There are two separate sets of powers. The end-to-end connectivity powers are those in Article 5 - not those in Article 8.

MR. READ: Madam, can I make two short points as well, because they really do concern BT?

THE CHAIRMAN: Yes.

MR. READ: The first is that it has been asserted again in reply that BT has an obligation under the Standard Interconnect Agreement to terminate the calls on Orange. I made clear in my submissions that at no stage has anyone identified the obligations under the Standard Interconnection to do it. We say they just are not there, and in reply again there has been no attempt to identify what provisions within the SIA actually require BT to terminate the calls on Orange's network. We say there are none, because that is misunderstanding of the SIA. The reason we have to is the end-to-end connectivity obligation but I do not want that point getting lost because there has been no attempt – there has been assertion but no attempt – to identify the provisions within the SIA.

The second point, which picks upon the preliminary point I made at the start of this hearing is that we have come away from Orange's notice of appeal where the ground 1 was put entirely on the meaning of the word "dispute". What troubles me about this is we are now at a stage where Orange's submissions go head to head on Ofcom's dispute resolution powers. That is a matter that is contained within the notices of appeal of certainly T-Mobile in the termination rate dispute case. They have opted not to come here today on the basis of the notice of appeal and the letter of 15th November that Orange have served. We are now way beyond what the meaning of a dispute is, and fully and squarely into Ofcom's dispute resolution powers, and we are troubled that one of the parties who certainly has raised this in the notice of appeal and has not appeared because it was accepted at the CMC on 31st October, that in fact this was a self-contained issue that could be dealt with outside the core issues. We are now coming squarely back within one of the core issues in the TRD appeal.

THE CHAIRMAN: Yes, Miss Demetriou?

MISS DEMETRIOU: Madam, just very briefly three points in reply to each of those three points.

On the last, I am very surprised if Mr. Read did not identify in advance that this hearing might involve questions as to the ambit of Ofcom's dispute resolution powers, because that is what the whole case is about. In any event, our case was very clearly put, I hope, in our skeleton argument and I have not sought to deviate from the way it is put in our skeleton argument, so the suggestion that any prejudice might have been caused to the three parties against me is purely a question of legal submission. We just say it is wholly without any substance at all.

As to Mr. Read's other submission about the agreement somehow not covering this service we find that very, very surprising and if I have not dealt with it, it is purely because it is a submission that has got lost, but we say that follows plainly from the fact that this is an operator service which is covered in the appropriate schedule to which a price has been

agreed and one sees from clause 5.1 that this agreement covers operator services for the duration of this agreement.

THE CHAIRMAN: Yes, it covers operator services – is the point being made – should BT choose to take those services, or ask for those services. The question is, is there any requirement that it takes those services.

MISS DEMETRIOU: Well madam, if it is phrased like that, that is exactly the way in which the end-to-end connectivity obligation itself is framed.

THE CHAIRMAN: Yes, that is right, he says the obligation to take these services arises from the end-to-end connectivity obligation, not that there is no contractual obligation under the SIA on BT to take the services. If it does then it has to pay for them in accordance with the contract.

MISS DEMETRIOU: I am making a slightly different point, I think, which is we say the end-to-end connectivity obligation is, as a matter of fact, reproduced in the contract. So there is of course this overlay of the end-to-end connectivity obligation but we say that the way BT has chosen to comply with it in this case is by means of this contract, and one sees that from the Tribunal's decision in the *H3G* case, where the Tribunal made that point itself – I think it is at para.77, now this did relate to the previous end-to-end connectivity obligation on BT (p.100 of the bundle) but what the Tribunal is saying in the final part of that paragraph, it describes the nature of the previous end-to-end connectivity obligation, which is very similar to the current one and then it says BT complies with its obligation by means of standard form documentation, a reference offered to all parties which wish to connect to its network including a standard form interconnect agreement, so that is how it has chosen to comply with it. But that does not remove the contractual force between the parties, that obligation is giving contractual effect.

THE CHAIRMAN: That paragraph is dealing with BT's service to Orange, terminating Orange's calls on BT network. The point that is being put – I do not know whether this is right or wrong, but you have not pointed to anything in the SIA which requires BT to purchase from Orange the MCT service because apart from the end-to-end connectivity obligation there is nothing in the contract which prevents BT from saying: "We are not going to allow our customers to ring Orange network customers, and we are simply not going to buy Orange connection services".

MISS DEMETRIOU: Madam, I will come back to clause 5.1 of the Agreement, and it may be that I have not sufficiently addressed the point because I did not appreciate it was in issue,

but clause 5.1 states that: "The parties shall convey calls and provide the services and facilities pursuant to the schedules." This is one of the services identified ----

THE CHAIRMAN: Sorry, which is this?

MISS DEMETRIOU: This is p.438 of the bundle. It is difficult to see what the agreement could relate to if it were not the continued provision of the services provided by Orange. These are the services referred to in the Schedule, price has been agreed and the contract is for a duration of two years, that is what it envisages.

THE CHAIRMAN: Perhaps if we put it this way: would it be a breach of the contract for BT to say: "Thank you very much, but we do not want to buy any more interconnection services from you." We will provide you with interconnection on to our network, but thank you, we do not want any more interconnection services from you"?

MISS DEMETRIOU: We say it certainly would be because BT and Orange have contracted for Orange to supply those services. Those are the operator services envisaged by clause 13.

THE CHAIRMAN: Yes, so if BT wants them Orange is obliged to provide them, but is BT obliged to acquire them?

MISS DEMETRIOU: Well, madam, we say, first, that it is, and it may be that we will have to come back to you with written submissions on this point if the Tribunal thinks it is important, because I have to say I did not appreciate – and this may be my fault – that this was an issue, because we have said all along, we have referred to the default position under the contract, and the point ----

THE CHAIRMAN: Well I think the point goes to the question of whether BT's end-to-end connectivity obligation is engaged, which it needs to be in order for the dispute to fall within s.195(2) if it does not already fall within 185(1), but I am not sure we can take this any further today.

MISS DEMETRIOU: We day in any event factually it was not engaged, because there was in fact no threat to terminate services, so we have a factual answer as well. But clearly if the question of the contractual provisions become important then we would like the opportunity to address you, if need be, in writing.

THE CHAIRMAN: Well let us leave it like that, that we will notify you if we want you to address this point in writing.

MISS DEMETRIOU: Thank you. Turning to Miss Rose's point about Article 8(3) and what we say about that again is that it is constrained by the wording of 5(1)(a) which is that Ofcom can only intervene to the extent that it is necessary to ensure end-to-end connectivity, and again I come back to my point that it was on the facts of this case necessary.

That is all I wanted to say, thank you.

THE CHAIRMAN: Mr. Lask?

MR. LASK: Madam, just two very short points of clarification. The first relates to the submissions Miss Demetriou was making a few minutes ago on the relationship between dispute resolution powers and Ofcom's other functions under the Directives. Just to clarify Ofcom's position, it is that Article 5(4) of the Access Directive, and Article 20 of the Framework Directive, as reflected in s.185 each give Ofcom a distinct basis for intervention in order to resolve a dispute. So dispute resolution is, in itself, a regulatory function, and to say that one cannot use those provisions to circumvent the other provisions which give Ofcom the power to impose obligations is to conflate the jurisdictional question with the question of how Ofcom approaches disputes on a substantive basis.

So Ofcom would accept that the dispute resolution provisions do not in themselves give Ofcom the power to impose obligations, and that is what is meant by "in accordance with" in Article 5(4). So essentially when Ofcom is resolving a dispute in exercise of its power under Article 5(4) it cannot impose SMP obligations unless it otherwise has that power under Article 8 of the Access Directive.

THE CHAIRMAN: Well why then is Article 8(3) expressed to be without prejudice to Article 5(1)?

MR. LASK: Article 8(3) is without prejudice to Article 5(1) and Article 5(2). What that means is that Ofcom could, if it had the power to impose an obligation under 5(1) do so without otherwise satisfying the provisions of Article 8, but that is quite separate from where it is exercising its power under Article 5(4). Article 5(1) is in itself a distinct basis for the imposition of obligations and the end-to-end connectivity obligation is an example of that. Article 5(4) is a separate distinct basis for intervention, and that is intervention by way of dispute resolution. But Ofcom, or any NRA cannot use Article 5(4) in itself to impose an obligation permitted under Article 5(1) or under Article 8 unless it otherwise has those powers.

THE CHAIRMAN: So Article 5(1) you say confers a power and a duty to take steps to fulfil those objectives, and those could include the kinds of obligations which are SMP obligations, but without the need to make a finding of SMP, and Article 5(4) is a further regulatory function of resolving disputes, but would not empower Ofcom to impose those kinds of obligations.

MR. LASK: That is correct, and while that does begin to trespass on the question of what is Ofcom's substantive approach to a dispute resolution I think the important point we would

ask the Tribunal to bear in mind is that in relying on Article 5(4) and/or Article 20 for its jurisdiction to resolve these disputes Ofcom does not get into the issue of whether it is circumventing the other provision to the Directives. That question really goes to the way in which Ofcom has substantively resolved the disputes, it is a distinct question from jurisdiction.

THE CHAIRMAN: Thank you.

MR. LASK; The second point arises in relation to a submission made by Mr. Read, and it was at the end of his submissions on the question of estoppel. I think if I understood him correctly, he said there was a common assumption in the industry that Ofcom would never accept a dispute unless and until the 14 day negotiation period had expired. That may or may not be a common assumption in the industry but by way of clarification Ofcom does not adopt that position, and does not accept that that position is reflected in its 2004 guidelines.

THE CHAIRMAN: I do not think he was tying you to the 14 day deadline, I think the point was a more general point that Ofcom expects the parties to have undertaken a serious commercial negotiation and will bat the dispute back to them if it thinks that they have not. I do not think he was implying that Ofcom has regard to the terms of the contract to see whether the parties have complied with whatever contractual obligations there are to negotiate in good faith, I thought it was a wider point than that.

MR. LASK: Ofcom would accept the wider point if that is the case, but the point I wanted to make was whether on the basis of the contract or not Ofcom would not seek to impose any artificial limitations on when there has been negotiation.

THE CHAIRMAN: That is the point that because you do not that is an argument that he relies on to say because you do not it cannot be the case that Orange is entitled to enforce this 14 day limit on the negotiations, I think I have got that.

MR. READ: Absolutely, and I am sorry if I have yet again not presented it in the correct manner, certainly to Ofcom.

MR. LASK: Madam, I am very grateful, thank you.

(The Tribunal confer)

THE CHAIRMAN: Miss Demetriou, I think you undertook at the beginning of the hearing yesterday, having regard now to the contractual provisions that have been referred to in the course of this hearing, for those instructing you to write to the Tribunal confirming that those terms are as they appear in the version of the agreement that is attached to annex 2 of the notice of appeal I think.

MISS DEMETRIOU: We did undertake to do that and we will write to the Tribunal. Our understanding at the moment, having done whatever we can overnight, is that there is no material difference but we will certainly pursue that write to the Tribunal.

THE CHAIRMAN: Not that there is any difference, rather than that there is no material difference.

MISS DEMETRIOU: What we have done is checked the clauses that have been in play and there are no changes as far as we are aware to those clauses, but we will double check and write to the Tribunal as requested.

THE CHAIRMAN: Thank you very much.

MISS DEMETRIOU: The second point relates to Mr. Read's timeline, because you did ask me to confirm whether or not we agreed to that. We agree to the key dates, we do not agree to the submissions made in relation to those dates which are included, so we do not agree to all the commentary but we agree with the key dates.

THE CHAIRMAN: Thank you.

(The Tribunal confer)

THE CHAIRMAN: Thank you very much to everybody, that has been very helpful.