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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th January – Friday 22nd March 2024

Before:
The Honourable Mr Justice Waksman

Eamonn Doran

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

Class Representative

v

(1) BT Group PLC

Respondent

(2) British
Telecommunications
PLC (together, "BT")

A P P E A R A N C E S

Ronit Kreisberger KC, Derek Spitz, Michael Armitage, Jack Williams and Matthew Barry (On behalf of Justin Le Patourel)

Daniel Beard KC, Sarah Love, Daisy Mackersie, Natalie Nguyen and Ali Al-Karim
(On behalf of BT)

Jennifer MacLeod (On behalf of the Competition & Markets Authority)

Thursday, 22 February 2024

1
2 (9.30 am)

3 (In private)

4 (10.47 am)

5 (A short break)

6 (11.10 am)

7 (In public)

8 THE CHAIRMAN: Let me just read out the warning as we are
9 now open again.

10 Some of you are joining us live stream on our
11 website, so I must start with the customary warning: an
12 official recording is being made and an authorised
13 transcript will be produced, but it is strictly
14 prohibited for anyone else to make an unauthorised
15 recording, whether audio or visual, of the proceedings,
16 and breach of that provision is punishable as a contempt
17 of court.

18 Yes, Mr Beard.

19 MR BEARD: Thank you.

20 So actually the first thing I want to go to is
21 {G/57/1}, please. So this is actually a judgment of the
22 Tribunal, but I am using it as a sort of shortcut for
23 a couple of sources. It is the *Ethernet* case, I do not
24 know how familiar you are with it. Were you involved?

25 A. I am broadly familiar, not with the detail necessarily.

1 Q. You are safe, we are not going to be going into the
2 details of the *Ethernet* issues.

3 What I actually just want to pick up is at page
4 {G/57/79}. In the context of this case, there was
5 a discussion about allocations of costs for the purposes
6 of considering what was going on in relation to
7 a particular dispute. We heard about disputes. It was
8 a dispute about what was called a cost orientation
9 provision, which I think you are familiar with?

10 A. Yes.

11 Q. This may trigger -- HH3.1 is the relevant condition.
12 When I say it like that, it does sound like it is
13 a disease of some sort, but no.

14 So here we have a consideration of -- in
15 a regulatory scheme, consideration of cost orientation
16 pricing obligations on BT. The RFS was being referred
17 to. What we saw in that case was the need for further
18 consideration and adjustments to be made to the RFS when
19 considering --

20 THE CHAIRMAN: Sorry, could we have this expanded, please?

21 MR BEARD: Yes, I am so sorry. I am looking at -- I was
22 just down at the bottom of the page.

23 THE CHAIRMAN: Thank you.

24 MR BEARD: So there is a reference back to paragraphs 42-46,
25 which is an exposition about the RFS, but obviously you

1 are familiar with that.

2 Then if we go down to page {G/57/80}, you will see
3 at 199 there is a sort of broad summary of the sorts of
4 principles we were considering yesterday. I am just
5 inviting you to read it. I am just giving you some
6 context in relation to this.

7 So I think, as we discussed yesterday, what the
8 Tribunal is identifying is the fact that within the RFS
9 BT had significant leeway, and I think you accepted that
10 yesterday, correct?

11 A. Yes, this is a discussion about a set of network --
12 wholesale charges -- wholesale access charges relating
13 to the network, and there are particular issues around
14 the network which has very large fixed costs.

15 Q. Yes, sure.

16 Then if we go down to 200. I think this picks up
17 the point that we recognised yesterday, and I am not
18 going to go back to the allocation and attribution
19 points here, but it is the fact that actually changes
20 were made year-on-year so that there were effectively
21 amendments retrospectively to RFS statements. That is
22 correct?

23 A. Yes.

24 Q. At 201, I think, as is not contested by you:

25 "... BT witnesses [in that case] explained in their

1 evidence that the RFS information is not used in the
2 day-to-day financial management of BT."

3 I do not think you had ever suggested it is used in
4 day-to-day management by BT, have you?

5 A. No.

6 Q. Then if we just keep going down there, if you continue
7 to read 201, {G/57/81}. (Pause).

8 What is being identified here is that because it was
9 not used as any sort of day-to-day methodology for
10 actually running the business, actually you could have
11 significant errors in the RFS and they would remain
12 undetected, because no one actively involved in the
13 business was actually looking at it. I do not think you
14 actually dispute that?

15 A. Well, I think that is slightly inconsistent with the
16 document you took me to yesterday, which says that BT
17 regularly reviews the cost allocation basis. So if
18 there is an obvious error, I would imagine that would
19 come up in that review of the operation -- the
20 allocation bases.

21 So I think this is an interesting statement which
22 says the RFS, even though it is provided under
23 regulatory obligations, you know, it has this regular
24 review, there will be errors in it that are not
25 corrected. It is an interesting statement.

1 Q. Right, so errors that are not corrected. But if errors
2 were perceived, then the attribution bases would be
3 changed, is what you are expecting?

4 A. Yes.

5 Q. If the attribution method would be changed, then
6 obviously unit cost would be changed, and so on.

7 A. Well --

8 Q. I just --

9 THE CHAIRMAN: Let him answer the point.

10 MR BEARD: Yes, please. I am so sorry.

11 A. Changing allocation methods, there is a difference
12 between the output, which is unit costs, and how you
13 derive those outputs. You can have an operational
14 change, which requires a change in the sort of
15 allocation bases, but that does not mean -- so you said
16 the kind of reorganisation of call centres is an
17 example. That is not necessarily, you know, a first
18 order lead to a change in the output unit costs. It is
19 a different way of delivering the services, and you need
20 to change the cost accounting system underlying the RFS
21 in order to recognise the fact there has been a change
22 in the way you deliver the service, but that does not
23 necessarily mean that it is going to change the output
24 unit cost.

25 Q. Just to be clear, "not necessarily" I completely accept.

1 But I think, as you accepted yesterday, those sorts of
2 changes can change unit costs. I think you agreed to
3 that on the transcript yesterday. Not necessarily, but
4 they can, yes?

5 A. Yes, upwards and downwards, yes.

6 Q. So that was just one particular issue in relation to
7 allocations or the RFS that I had not picked up
8 yesterday that I wanted to deal with.

9 The next topic, and I am sorry, there is going to be
10 a little bit of bouncing around now because I am just
11 picking up a range of matters, but whilst I am trying to
12 use some cases just to shortcut some propositions, could
13 we go to {G/50/1}, please. This is the *PPC* appeal
14 decision, so again it was a dispute between BT and other
15 CPs, and it related again to concerns about SMP
16 conditions.

17 A. Yes.

18 Q. Again, there was a discussion about cost allocation and
19 cost orientation, because again that was the regulatory
20 provision that was being discussed.

21 If we just pick it up at page {G/50/23}, just so it
22 gives some context. There was a discussion about the
23 economics of cost orientation, paragraphs 65, 66. So we
24 are back dealing with cost orientation provision here.

25 I am not going to ask you a question on this, I am

1 just giving you the reference which I think is pretty
2 much well understood.

3 A. Yes.

4 Q. Then if we go down to page {G/50/27}, paragraph 85, what
5 you see there is in the course of this discussion of
6 cost orientation an issue that has come up in the
7 context of this case, paragraph 85:

8 "There are a number of ways in which common costs
9 can be allocated ..."

10 Referencing combinatorial tests,
11 Fully Allocated Cost test and distributed standalone
12 cost test.

13 Again, not controversial that those are options
14 I think; is that correct?

15 A. When you say these are options in this case, yes, that
16 is ...

17 Q. If we then -- I am going to just actually focus on the
18 last of those from this judgment. If we go to page
19 {G/50/83}, you will see there was consideration of DSAC
20 as an appropriate test for cost orientation purposes.

21 I am just going to take you to a couple of the
22 passages in here. If we go down to page {G/50/84},
23 picking it up -- I am so sorry, could we go to
24 {G/50/85}, and over again, I am so sorry. {G/50/86}.

25 Yes, if we could pick it up at paragraph 282. There

1 is a discussion about cost orientation, so this is
2 obviously in the context of the cost orientation
3 regulatory obligation, and how it affords a degree of
4 flexibility in relation to how it charges. This is an
5 extract approved by the Tribunal from I think the
6 evidence of Mr Geoff Myers. I think you know Mr Myers
7 of old, I imagine?

8 A. Yes.

9 Q. Who is Mr Myers, just in general terms?

10 A. He is an economist who was at Oftel and then was at
11 Ofcom.

12 Q. Then if we go down to 283, you will see Mr Myers'
13 description of DSAC. (Pause). I am just -- I do not
14 think you would have any issue with Mr Myers'
15 description of the DSAC test there, would you?

16 A. So I think it is helpful to give a bit of context
17 where -- so this is the cost orientation requirement
18 which was imposed on BT as an SMP obligation in addition
19 to sort of an overall price cap. So the cost
20 orientation requirement is not -- is looking at how BT
21 structures its prices within an overall price cap.

22 Q. But this is where the price cap does not bite, is it
23 not, Mr Duckworth? That is why the dispute has arisen?

24 A. So it bites in a way that increasing -- so it is
25 a constraint, increasing the price of -- so the cost

1 orientation is applied at product level. If you
2 increase the price of one product and you are at the
3 binding constraint of the cap, then you need to reduce
4 the price of another product in order to -- across the
5 basket of services.

6 Then Ofcom, on the understanding that networks have
7 very large fixed and common costs, and there is
8 heterogenous demand, says, well, we think, taking a
9 Fully Allocated Costs approach, which has, as we have
10 all discussed, no unique way of allocating fixed and
11 common costs, which are very large in this case, that BT
12 should be given some flexibility in how to do that.

13 It is -- you know, because all of these services are
14 SMP services, there is not the sort of market constraint
15 that Mr Parker discusses. It is -- so you need to see
16 the use of DSAC in this context, in the kind of broader
17 context of a network.

18 Q. Just to be clear, there is no reference or consideration
19 here of what you refer to as the overall price cap
20 actually biting. This is all about assessing cost
21 orientation for these particular products, and this is
22 explaining how DSAC can be used in relation to it, is it
23 not?

24 A. Yes, but it is very much contextual.

25 Q. Let us go down to paragraph 286 which is just slightly

1 further down, {G/50/87}, and down to 287.

2 Now, there is no reference to any price -- if we go
3 to 287, there is no reference to this broad concept of
4 a price cap in any of this consideration by the Tribunal
5 so far as we can see, and in relation to carrying out
6 a cost orientation exercise the Tribunal concludes that
7 DSAC as a test was appropriate, and indeed it was the
8 only satisfactory way to deal with matters in this case.

9 So are you saying that because there was a price cap
10 that is not focused on by the Tribunal, DSAC was
11 appropriate in this case but is not relevant in the
12 present case?

13 A. I am saying the cost orientation obligation here is very
14 different from an excessive pricing test that we are
15 being asked to consider. The context -- the market
16 context BT having SMP in these markets, a market with
17 very large fixed and common costs underlying the
18 provision of network services, I think the context is
19 quite different between using DSAC.

20 One of the reasons for using DSAC was it was
21 available, BT had produced it as part of the LRIC model
22 over time, and so the Tribunal is saying: we understand
23 Ofcom has set an obligation which allows -- and given
24 the overall context of the market -- allows some bounded
25 flexibility in the recovery of common costs, what is the

1 appropriate methodology for setting those bounds? The
2 Tribunal came to the decision that, because DSAC was --
3 had been derived and had been published by BT itself,
4 that DSAC, suitably adjusted -- and you talked about
5 adjustments to the RFS -- DSAC, suitably adjusted, was
6 the appropriate way of considering whether BT's prices
7 for individual products had overstepped this kind of
8 bound effect.

9 Q. I understand -- I think I understand the nature of your
10 answer. I do not understand on what basis you say that
11 DSAC is then irrelevant in this case.

12 A. So the market context is very different. Obviously it
13 is in dispute, the degree of fixed and common costs, but
14 these are network services. We have -- you know, DSAC
15 was applied on a product basis under a kind of broad
16 price control, so the issue was not exploitative abuse
17 overall in the terms of BT's profitability for the
18 basket of products was constrained by the overall price
19 cap, but there is a kind of second order concern with
20 the cost orientation condition addressed that BT could
21 use that flexibility within an overall price cap for
22 potentially some anti-competitive prices.

23 Q. So the critical difference is that there was a price cap
24 in the context of PPCs, and there is not a price cap
25 here. Am I capturing that correctly, Mr Duckworth?

1 A. I think that is one of the differences. I think there
2 are obviously differences in the demand side, there are
3 differences in the supply side, the relevant importance
4 of fixed and common costs. So there are a whole host of
5 differences. DSAC has been used in this kind of very
6 narrow context for a cost orientation requirement.
7 I think then saying, well, these two cases, the *Ethernet*
8 case and the *PPC* case, mean that DSAC is not an
9 appropriate methodology to use for an ex post excessive
10 pricing case. It, you know --

11 Q. Let us just go back to paragraph 282, Mr Myers'
12 statement that was approved by the Tribunal or used by
13 the Tribunal {G/50/86}. You will see there:

14 "The overarching economic context is the regulatory
15 balance to be struck between ..."

16 Then (b):

17 "Ensuring that this flexibility [flexibility to
18 recover costs] is sufficiently bounded to prevent the
19 regulated firm from exploiting its market power to set
20 anti-competitive, exploitative or otherwise unreasonable
21 charges."

22 So the cost orientation obligation that we are
23 talking about here is doing precisely what you say the
24 ex post provision is doing. There is not any discussion
25 of this broader price cap issue, and yet here the

1 Tribunal is saying DSAC is an appropriate methodology.

2 You understand that?

3 A. So when you say there is no discussion of the broader
4 price cap --

5 Q. In --

6 A. -- are you saying nowhere in this judgment is there
7 a discussion of the context?

8 Q. In relation to whether or not DSAC is an appropriate
9 test, there is not a discussion of the overall price
10 cap. Here you have a dispute about whether or not the
11 cost orientation provision has been met. The method
12 that is used for assessing cost orientation in this
13 context is DSAC. You are saying that means the context
14 here is completely different.

15 The question I will pose is: whatever the
16 differences in context that exist in this case and in
17 the *Ethernet* case, it does not render DSAC irrelevant to
18 the assessment in the present case, does it,
19 Mr Duckworth?

20 A. I disagree.

21 Q. Super-elasticities, Mr Duckworth. You said I think that
22 where super-elasticities are the same for different
23 services, then using EPMU for the allocation of common
24 costs might be appropriate. Have I captured your
25 evidence correctly on that?

1 A. So this is drawing a sort of Ramsey pricing, where
2 Ramsey pricing is not an efficient, at least in a static
3 sense, way of recovering fixed and common costs to sort
4 of maximise (inaudible).

5 Q. Sorry, I should be -- I was asking something more
6 specific in a way.

7 In order for you to justify using EPMU for common
8 costs, I think what you are saying is that the
9 super-elasticities of the two products you are thinking
10 about had to be similar; is that correct?

11 A. I was explaining why conventionally EPMU is often used
12 as kind of a neutral way of recovering fixed and common
13 costs.

14 Q. But were you saying that? Because when we go to the
15 transcript, which is {Day13/50:1}, you will see there
16 you do refer to EPMU as a convention, but you do so in
17 the context of where the super-elasticities, I think you
18 say, are broadly similar?

19 A. Yes, I say it is proxy Ramsey prices.

20 Q. Yes. It is a necessary condition, is it not, for your
21 position on EPMU, that the super-elasticities of the two
22 services are broadly similar, correct?

23 A. When you say my position on EPMU, I am ...

24 Q. We can go to the JES, which is {E/49/114}. No, if we go
25 back up a page. Sorry, my error, and again.

1 {E/49/112}.

2 So 7.1.5, the proposition is:

3 "Allocating indirect costs in proportion to direct
4 costs, also referred to as an equi-proportional mark-up
5 ... is a reasonable cost allocation method to allocate
6 indirect costs to SFV services."

7 Dr Jenkins, "Agree". Mr Duckworth, "Disagree".

8 So when you talk about it as being a broad
9 convention, you are not talking about it being a broad
10 convention generally, as I understand it, because you
11 disagree with the proposition in 7.1.5.

12 What is critical is in fact the final paragraph on
13 that page of your reasoning. So you disagree with the
14 general use of EPMU, but you say:

15 "For the avoidance of doubt, the use of EPMU to
16 attribute common costs as a mark-up on incremental costs
17 may be appropriate as such an approach could proxy
18 Ramsey pricing under certain conditions."

19 Am I capturing your evidence correctly there?

- 20 A. Yes, so the fundamental disagreement is the use of EPMU,
21 which is a proposition of allocating indirect costs
22 overall in proportion to direct costs, and I say that
23 does not reflect cost causality, and I say, which
24 I think is consistent with the transcript you just drew
25 me to, that EPMU under certain conditions.

- 1 Q. That is all I am testing.
- 2 A. Yes.
- 3 Q. Then I am testing what those conditions are,
4 Mr Duckworth.
- 5 A. Yes.
- 6 Q. As I understand it, the super-elasticities of the two
7 services have to be similar or broadly similar; is that
8 correct? That is what you have said?
- 9 A. Yes.
- 10 Q. But just to be clear, you in your reports have not
11 referred at all to super-elasticities, have you?
- 12 A. No.
- 13 Q. You have not analysed whether or not the
14 super-elasticities here of SFV services and bundled
15 services would be the same or different, have you?
- 16 A. No.
- 17 Q. So you do not actually know whether or not those
18 super-elasticities are broadly similar, do you?
- 19 A. No.
- 20 Q. Just to be clear, super-elasticities, technically
21 speaking they are a revenue-weighted function of own
22 price elasticity for a product and cross-price
23 elasticity across the -- with the product that -- other
24 product that you are thinking about, correct?
- 25 A. It is a complex -- yes.

1 THE CHAIRMAN: Do you want to explain it in your own way,
2 just so that we ...

3 A. I think it is probably -- although I do have a degree in
4 maths, it is quite rusty.

5 THE CHAIRMAN: If you can do it in a digestible way, so that
6 we can understand the point that you are apparently
7 making.

8 A. So effectively it tries to capture the impact of
9 increasing products for -- sorry, increasing prices for
10 a single service in a multi-product firm, taking into
11 account -- so taking account of three factors, one of
12 which is if you increase prices some customers may no
13 longer take that service; if you increase prices some
14 customers may move to another provider; and if you
15 increase prices you may have customers moving to another
16 product provided by the same provider. So you are
17 trying to pull together and encapsulate those sort of
18 three factors.

19 THE CHAIRMAN: Yes.

20 MR BEARD: I am not disagreeing at all. In other words,
21 super-elasticities are measures that you use when, as
22 you put it fairly, you are dealing with a multi-product
23 firm and you are thinking about people switching to
24 other of the products you are considering.

25 A. And competition.

- 1 Q. And competition. Sorry, I was not meaning to --
- 2 A. And also sort of no longer taking up the product --
- 3 Q. Absolutely, because you will be talking about own price
- 4 elasticity in relation to that, and an own price
- 5 elasticity might well be just people stopping, for
- 6 example?
- 7 A. Yes.
- 8 Q. The critical thing is that they are revenue-weighted,
- 9 are they not?
- 10 A. Is that critical?
- 11 Q. Well, in relation --
- 12 A. -- part of the calculation.
- 13 Q. -- to any assessment of super-elasticities they are
- 14 revenue weighted, that is correct, is it not?
- 15 A. As I say, my sort of understanding of the underlying
- 16 calculations are a bit rusty, so I will take your word
- 17 for it.
- 18 Q. The reason it matters here, of course, is if they are
- 19 revenue-weighted, and you are thinking about the
- 20 super-elasticities between on the one hand SFV and on
- 21 the other hand bundles, you recognise that bundles will
- 22 generate far more revenue, do you not? Not profit,
- 23 revenue?
- 24 A. I recognise that bundles generated far more revenue than
- 25 SFV services in this context, yes.

1 Q. So what that will tend to mean is that you would, in
2 those circumstances, not have similar super-elasticities
3 between SFV services and bundles because the revenue
4 weighting would be so significantly different?

5 A. As I say, there is a range of factors that go into that
6 calculation, and you are picking out one factor and
7 saying that is a dominant factor. I mean, it is not
8 something I am able to do in my head, so ...

9 Q. No, sorry, I am not asking you to do super-elasticity
10 maths in your head. You have not done it, and I was
11 putting to you why it is there is a prior as to why they
12 would be different.

13 Let me go to something different entirely.
14 {IR-E/7/59}. This was the table, and I am not going to
15 go back through the discussion, where there were
16 references to margins, and we understand that the
17 fundamental problem with the green bars that you have
18 there is that you have effectively taken out the quantum
19 in relation to these things?

20 A. Yes.

21 Q. So we recognise, and you fairly recognise, there is
22 a fundamental issue with it so I am not going to
23 rehearse all of that, but we were interested in testing
24 whether or not there might be a way of doing this
25 differently.

1 Now, you recognise, I think, that Dr Jenkins carried
2 out, as well as her primary SAC combi analysis and DSAC
3 analysis, she actually did some sensitivity modelling in
4 relation to Fully Allocated Cost models for the actual
5 costs. You are aware of that?

6 A. Yes, clearly.

7 Q. They were cross-checks against her SAC combi and DSAC
8 model. That is what sensitivities do, yes?

9 A. I mean, I disagree with the approach she took for the
10 Fully Allocated Cost methodologies, because I do not
11 think they reflect cost causality, but ...

12 Q. Understood. There are sort of different ways that one
13 could do this, but you commented the other day about
14 having revenue based Fully Allocated Costs when you are
15 thinking about this in the context of an excessive
16 pricing case?

17 A. I think the precedence is very clear on that, yes.

18 Q. We have just been discussing your expert evidence in
19 relation to use of EPMU, where you disagree with the use
20 of EPMU?

21 A. To allocate indirect costs.

22 Q. Yes, which is the important thing we are thinking about
23 here. Sorry, I should say I am not talking about direct
24 costs here, just to be clear.

25 A. But also the distinction between indirect costs and

1 fixed and common costs.

2 Q. I understand. So what we did was we had a look at using
3 a customer based driver to see whether or not we could
4 actually strip out SFV profits and costs from this
5 modelling.

6 A. Well, it is not strictly a customer based allocation
7 because it is based online. So, for example, in the
8 annex in the joint expert statement we see -- I have
9 forgotten. I could probably turn it up actually.
10 Sorry, this will take a bit of time. (Pause).

11 So it is {OR-E/49/262}.

12 Q. Yes, that is the proportion of Sport lines sold?

13 A. Yes, exactly. So the proportion of BT Sport lines sold
14 in bundles, including fixed voice, in 2021/22 is 57%,
15 which means that 43% of BT Sport lines are sold without
16 fixed voice. So Dr Jenkins' allocation approach
17 allocates according to fixed voice lines. Here you have
18 got 43% of the BT Sport lines without a fixed voice
19 line.

20 THE CHAIRMAN: Ms Kreisberger, I cannot hear the witness.

21 Can you please not do this during the evidence.

22 I am sorry, Mr Duckworth, do you want to start again
23 on that point.

24 A. So Dr Jenkins has this cost attribution methodology
25 which is based on allocating costs kind of uniformly

1 across voice lines, so every customer who takes a voice
2 line has the same cost attributed to them.

3 Now, I think that kind of fundamentally, even for
4 voice lines, does not reflect cost causality, because
5 customers taking more services over a triple play bundle
6 will lead to more incremental costs than an SFV
7 customer. So basing it just on voice lines, I think it
8 is likely to under-record the costs which should be
9 attributed to triple play compared to costs which should
10 be attributed to SFV, and, conversely, will kind of
11 overestimate the cost which should be attributed to SFV
12 services.

13 MR BEARD: Understood. That problem you presumably say is
14 less significant at the start and more significant at
15 the end?

16 A. No, no, I think that problem is significant all the way
17 through, because there is an additional problem, which
18 is the methodology, because it allocates cost on the
19 basis of voice lines. It allocates absolutely no cost
20 at all to the 43% of BT Sports customers who do not take
21 a voice line, because then we are only allocating costs
22 to voice lines. Here, there are some customers who have
23 no voice line, as I have shown in the table, but
24 Dr Jenkins' methodology attributes absolutely no cost to
25 them because they do not take a voice line.

1 THE CHAIRMAN: Right, just pause there. Just let me make
2 a note of that. (Pause). Thank you.

3 MR BEARD: So let us just start with 2015/2016 where the
4 vast majority of the lines -- the vast majority of the
5 bundles include fixed voice as well. So at that point
6 these problems are, even on your own account, much less
7 acute, is that right?

8 A. Yes, this particular error. There are standalone
9 broadband customers, for example, who do not take
10 a fixed line from BT. So there is an error, yes,
11 a standalone --

12 Q. -- number, is it not, at that point?

13 A. Well, no, I think, as Dr Jenkins shows, there was
14 a movement from standalone broadband to bundles over the
15 period, and so at the beginning of the period there will
16 still be a significant proportion of standalone
17 broadband customers, but that does go down over time as
18 bundling becomes more and more important. There is then
19 this effect where you have standalone Sport -- or not
20 necessarily standalone; as you made clear, some of these
21 may be bundled customers but they do not take voice
22 lines. But there is also potentially -- you know, BT
23 provided mobile services, and some of those mobile
24 customers would not have taken voice lines, may not have
25 taken fixed voice lines as well.

1 So the issue comes and goes depending on the
2 relative proportion of customers who are not taking
3 fixed voice, but the fundamental issue is the
4 methodology does not attribute any costs to customers
5 who do not take a fixed voice line because it is based
6 on sale.

7 Q. Just taking 2015/2016, taking all those points together,
8 nonetheless what you are dealing with there is a small
9 proportion of people who are not taking -- who are not
10 taking fixed voice with their bundles, correct?

11 A. So I think if we just step back and say this is an
12 illustration of part of the error. This is not the
13 complete error, because the error also applies to
14 standalone broadband customers. So for this part of --
15 this evidence shows that in relation to customers taking
16 BT Sport, who presumably require some incremental costs
17 to serve them, it is only a small number of those in
18 2015/16, yes, but there are more standalone broadband
19 customers than potentially standalone voice customers.

20 THE CHAIRMAN: Sorry, where do we get -- you just said 16.

21 Oh, you mean the 2015/16. It is the 93% you are looking
22 at.

23 MR BEARD: Yes.

24 Just to be clear, we are dealing here with
25 customers -- it looks like you have been through the

1 background data, but just to be clear, the customer here
2 includes standalone mobile, standalone broadband,
3 bundles and SFV?

4 A. No, this is just an analysis of BT Sport lines saying --
5 well, "BT Sport lines", BT Sport customers I think is
6 a better description, saying where BT Consumer has
7 a customer who takes BT Sport, what proportion of those
8 also take a fixed voice service? This is only the --

9 Q. I think there may be a dispute about that.

10 Can I just deal with the issue -- we have agreed
11 I think that we are dealing with a small proportion of
12 people in relation to 2015/16, and there will have to be
13 a further interrogation of the data. I put the point to
14 you about the customer base.

15 The point I am making is if you used the Fully
16 Allocated Costs methodology involving customers at this
17 point as a driver, what you could do then is use that as
18 the mechanism to take out both SFV revenues and
19 a measure of costs from the columns that you had in the
20 table that we were just looking at, at {IR-E/7/59}. So
21 rather than using your quantum analysis, you could use
22 a different measure of revenue and cost allocation and
23 take all of the SFV revenue and cost out of that plot.
24 You understand that?

25 A. Well, I think -- sorry, yes, we are turning, sorry, back

1 to the table 3?

2 Q. Yes.

3 A. That requires a view on the -- so you can take
4 the revenues out, we have established SFV revenues. We
5 have established -- and there is little dispute on SFV
6 direct costs, but you still then are back to needing to
7 attribute a proportion of the indirect costs to SFV
8 services, so -- and that is clearly in dispute. So you
9 will need to make some judgment on the indirect costs to
10 remove when you remove SFV revenues and also SFV direct
11 costs.

12 Q. Yes, and that is what is being done here, potentially,
13 taking out the direct and incremental indirect costs,
14 and then using a FAC customer driver model to allocate
15 the common cost. That would be one way of, rather than
16 using your full quantum methodology, trying to control
17 for this problem?

18 A. Yes, it would be an alternative, yes.

19 Q. Leaving those further points aside, an attempt has been
20 made -- now, I anticipate that you are not going to
21 concur with this analysis, but if I may, I have got some
22 hard copies here and I will pass those across.

23 (Handed).

24 What effectively you see here is the black and the
25 green lines are your table. You see that?

1 A. Yes.

2 Q. This is an attempt to deal with the conundrum that was
3 dealt with in the course of evidence about looking at
4 how you might take out SFV revenues and costs in order
5 to be able to effectively control for this change in
6 margin over time more accurately, and what has been done
7 is using the FAC customer's indirect cost allocation.

8 I take the point, and it will be a matter of
9 submission in due course, about your criticisms of the
10 FAC customer sensitivity, which we say are not correct.
11 But if we just focus on the 2015/2016 column, where you
12 are dealing with the smallest number of people that are
13 affected by your problems that you put forward, what you
14 see is using this sensitivity shows that actually the
15 BT Consumer margins, excluding SFV services, those
16 margins are very close to the overall BT Consumer
17 margins. You see that? That is the blue bar.

18 THE CHAIRMAN: Just -- the new thing is the blue bar?

19 MR BEARD: Yes, sorry, the new thing is the blue bar. The
20 old thing is the black and green. We were just looking
21 at the issue that Mr Ridyard -- and we were trying to
22 think of ways in which this could be dealt with.

23 MS KREISBERGER: Sir, I am sorry to interrupt, but we have
24 not seen the underlying analysis to this. There is
25 actually case law from this Tribunal that says you

1 should not take experts by surprise in this way. I do
2 think Mr Duckworth needs to be given an opportunity to
3 consider how this diagram has been put together, the
4 blue line.

5 THE CHAIRMAN: Yes, well, I can see the force of that, but
6 in any event, since we started an hour early we are now
7 coming to the lunch break.

8 Now, there may be some more time that needs to be
9 expended on this. Putting that aside, how are you doing
10 on your cross-examination? Because you thought ...

11 MR BEARD: I only have about 10, 15 minutes at most.

12 THE CHAIRMAN: Right. Let me just think about this for
13 a moment. (Pause). Just give me a moment. (Pause).

14 Right, can we just deal with some housekeeping
15 matters. I am not going to do anything other than tell
16 you when we have availability which may assist on the
17 timing problems which you need to discuss over lunch.

18 We could sit tomorrow from 12 noon onwards to start
19 the limb 2 process hot tub. Then we have next week. We
20 can see that even with some trimming we might need more
21 than one day on the hot tub. We are not sure at the
22 moment, it depends. Using tomorrow, but it is not only
23 a matter for the legal teams, it is very much a matter
24 for the experts who have been in the box a lot this
25 week. So I am just giving you our availability. Then

1 there is next week and we could sit next Friday
2 afternoon only.

3 There is then the question, which we do not need to
4 know about now, but if Mr Punter in fact, even if it is
5 not desperately convenient, can in fact go the following
6 week, then we just extend everything by a day. But if
7 we are being very conservative, very conservative, we
8 would be saying the most we would need on hot tub limb 2
9 would be another half a day, which you could get in
10 various ways, but then it depends how much you are
11 really saying you need on top of one day's
12 cross-examination, whether you are saying it is just
13 half a day, whether you are saying it is more than that.

14 So can we leave that availability with you --

15 MS KREISBERGER: Absolutely, sir. Very grateful.

16 THE CHAIRMAN: -- and then have a think about it. We are
17 not making any decisions, just have a think about it.

18 MS KREISBERGER: Thank you, sir.

19 THE CHAIRMAN: 1 o'clock, then, please.

20 (12.00 pm)

21 (Luncheon Adjournment)

22 (1.09 pm)

23 MR BEARD: It is going to be brief. Just picking up on the
24 table, I know you have been sent data and so on.

25 I think you probably recognise where the data comes from

- 1 and so on?
- 2 A. Yes.
- 3 Q. I think, therefore, the points you were making before
4 the short adjournment I assume you would want to carry
5 over, having seen the data?
- 6 A. Yes.
- 7 Q. But can I just correct one thing that I think you said.
8 Can we go to {IR-E/18/245}, please. If you remember,
9 you went to that Sport table?
- 10 A. Yes.
- 11 Q. I take your point about standalone Sport, but I think it
12 is very important that you -- I think you accept this in
13 fact, that if one goes down to the bottom -- so this is
14 the alternative methods of allocation under FAC, so this
15 is the sensitivity chart. Sorry, do you want to go back
16 up it?
- 17 A. No.
- 18 Q. This is Dr Jenkins' second report annexes, sorry, just
19 to situate it. You probably recognised it faster than
20 the rest of us. You are familiar with it, yes?
- 21 A. Yes.
- 22 Q. This is not a test on the numbers here. I just want to
23 go down to the bottom, because you were talking about
24 the exclusion of standalone mobile and standalone
25 broadband, and so on, and I think it is important that

1 that is not correct. You can see it in the notes --

2 A. Okay.

3 Q. -- and I think you would accept that those numbers --

4 A. Yes. Sorry, I did not --

5 Q. That is fine.

6 THE CHAIRMAN: Sorry, I am sorry --

7 MR BEARD: I am so sorry.

8 THE CHAIRMAN: Sorry, what are the numbers that are in fact
9 incorrect?

10 MR BEARD: What Mr Duckworth said on the transcript was that
11 the FAC allocation exercise that Dr Jenkins was carrying
12 out excluded standalone broadband, standalone mobile
13 customers, in addition to standalone Sport, and I am
14 just taking him to the notes to Dr Jenkins' table that
15 sets out that sensitivity making it clear that it does
16 include standalone mobile, standalone broadband.

17 It does not, just to be clear, you can see this from
18 the note, it does not include standalone Sport, and this
19 will have to be a matter for further submission, but
20 that is actually a very, very small number, but that is
21 not something I am testing you on.

22 A. Yes.

23 THE CHAIRMAN: Wait a minute. So every line represents
24 a different customer.

25 MR BEARD: Yes. I think there is no dispute that that is

1 what is being done. I think Mr Duckworth referred to
2 that before the short adjournment.

3 A. Yes, so I stand corrected on --

4 Q. That is fine, I assumed it was just a mis-remembering.
5 The point is simply in relation to standalone Sport, and
6 that has an impact, you say, on the blue bars. Actually
7 it is a very, very small impact on the blue bars, but
8 that is a matter for another day.

9 A. Yes.

10 THE CHAIRMAN: Right, thank you.

11 MR BEARD: A couple of very quick things, I hope.

12 {Day13/53:1}, I think, if we could -- on the
13 transcript. It is not the right reference, I apologise.
14 It is my fault that I cannot read my own notes of the
15 number.

16 Page {Day13/55:1}. This was an exchange between you
17 and Mr Ridyard where you were talking about effort
18 following value, and you said -- you were agreeing with
19 what Mr Ridyard said, and you say that following the
20 value could cover up an abusive excessive price, and
21 I understand your point here about revenue and value and
22 so on, but you say:

23 "Particularly if you have a captive group of
24 customers ..."

25 I just want to check, I do not think this is

1 contentious, but could we go to {IR-E/21/122}. This is
2 the table from Dr Hunt's report on switching, supplier
3 and service, and I do not think this is in any way
4 contentious. You do not dispute any of these figures,
5 do you, Mr Duckworth?

6 A. No.

7 Q. So when you refer to "captive customers", what you are
8 referring to are groups of customers who were engaged in
9 very significant levels of switching over the relevant
10 claim period, you accept that?

11 A. Yes.

12 Q. {Day14/93:1}, if we may. There had been a couple of
13 exchanges about significance and persistence, some were
14 yesterday, some were two days ago. This is actually
15 from two days ago. Mr Parker talked about issues of
16 significance and persistence, and he kind of summed up
17 his position which I think is your position.

18 If we go over the page, {Day14/94:1}, this is
19 a discussion about how he would deal with issues on
20 excessiveness, and the chairman was asking various
21 questions about significantly above a particular
22 benchmark.

23 Mr Parker's position, and I think yours is, is you
24 set a fairly -- I am loath to use the word
25 "conservative", but bright and relatively low threshold,

1 and then you deal with other considerations in the
2 "'significant' bucket", as Mr Parker puts it at the end
3 of page 94. Do you see that at the bottom?

4 Then if you go over the page {Day14/95:1}, he
5 specifically talks about what he is thinking about:
6 quality, efficiency, innovation, whatever it is.

7 So you and he are in the same place, I think, in
8 saying that when you think about significance and
9 persistence you set a low threshold, but then there are
10 other considerations which are then to be taken into
11 account in assessing significance and persistence,
12 correct?

13 A. So Mr Parker's opinions are clearly his own.

14 So I would characterise what I have done in terms of
15 producing a price benchmark is to produce a price
16 benchmark which reflects the cost of production, and
17 then how is it used is, you know, you would need to ask
18 Mr Parker about significant and excessive.

19 Q. So you do not have a particular view on the significance
20 and persistence issue at all?

21 A. I defer to Mr Parker on those issues.

22 Q. Now, we know of course that the claim period runs from
23 2015 to 2023 and so on. I just want to think about BT
24 setting its prices last year or in 2020. Are you saying
25 that BT should have known that when it was setting its

1 prices in 2020 it should have had regard to the 2009 RFS
2 cost allocation in doing so?

3 A. So just to be clear, my approach is to estimate LRIC+ by
4 taking the LRIC+ proxy in 2009 and projecting it
5 forwards. That is different from saying that prices
6 should have reflected a sort of RFS 2009 conducted in
7 each year since. So if the benchmark is LRIC+, my
8 method for estimating LRIC+ throughout the claim period
9 is to take the 2009 RFS and project that forwards to
10 estimate LRIC+.

11 Now, BT in 2020 could have derived LRIC+ through
12 another methodology and if it provided evidence that its
13 prices were not significantly and persistently above
14 that LRIC+ then that would have been helpful evidence.

15 Q. I see. Just to be clear, you are acting on behalf of
16 the claimant in proving a case saying there is excessive
17 pricing, and you are saying that the LRIC+ methodology
18 that shows excessiveness is one derived from 2009 cost
19 figures, correct?

20 A. Just to be clear, I have set out my calculation which
21 I think is the best, but a conservative estimate of
22 LRIC+ throughout the claim period.

23 Q. But, Mr Duckworth, that is based on cost allocations in
24 2009, is it not?

25 A. It is based on the RFS in 2009, which I have explained

1 I believe represents LRIC+ or a good proxy for LRIC+ in
2 2009, yes.

3 Q. A good proxy for LRIC+ in 2009. But are you saying that
4 BT should have realised that it should have used LRIC+
5 based on 2009 costs when it was considering prices?

6 A. No, I am not saying that.

7 Q. You are not saying that. Are you saying that BT, when
8 it was setting its prices, should actually just have had
9 reference to its actual costs?

10 A. I think that -- that is kind of a matter for BT in many
11 ways, but I think BT could take into account the
12 evidence that it had in front of it, for example, the
13 increase in gross margins, which the documentary
14 evidence shows, and consider whether those significant
15 increases in gross margins for voice products, which is
16 a decent proxy for SFV customers, were explained by
17 changes in the indirect costs of production to deliver
18 services to SFV services.

19 So, yes, that would involve some reference to
20 indirect costs. Now, whether they needed to do a kind
21 of full cost allocation to then understand what the
22 LRIC+ is, is a kind of a second round, but there is
23 evidence, documentary evidence that gross margins were
24 climbing significantly for the voice division.

25 Q. I understand the points that you make about gross

1 margin, but just -- I am just dealing with actual costs.
2 Are you saying that when BT was setting its prices it
3 should actually just have had reference to its actual
4 costs during the claim period?

5 A. Yes.

6 Q. Right. The importance of actual costs being considered
7 in those circumstances is to ensure that an undertaking
8 can assess the lawfulness of its own conduct, correct?

9 A. I think that is a legal question.

10 MR BEARD: I do not have any further questions for you,
11 Mr Duckworth. The Tribunal may have some questions and
12 Ms Kreisberger may.

13 THE CHAIRMAN: Let us go to Ms Kreisberger first.

14 Re-examination by MS KREISBERGER

15 MS KREISBERGER: Mr Duckworth, I would just like to take you
16 back to just a small number of documents that Mr Beard
17 has taken you to.

18 If we begin with -- I just need to angle my EPE so
19 I can see it at the same time. If we begin by going
20 back to the *PPC* judgment that you were taken to.

21 A. Yes.

22 Q. That is at {G/50/1}. You see there the front cover of
23 the judgment. Then if we could go to page {G/50/76} of
24 the judgment.

25 Now, Mr Beard took you to some paragraphs about

1 DSAC. I wonder if you would like to comment on
2 paragraph 254 on this page, and I will be taking you
3 over the page down to paragraph 259, so you may just
4 want to cast your eye over those two pages first.

5 (Pause)?

6 THE CHAIRMAN: Could we have it widened, please. Thank you.

7 Sorry, we are at 254?

8 MS KREISBERGER: 254 going down to 257 on the following
9 page, {G/50/77}.

10 THE CHAIRMAN: Just a minute, please. (Pause).

11 Yes, thank you.

12 MS KREISBERGER: So just starting with paragraph 254, which
13 Mr Beard did not take you to, I wondered if you would
14 like to comment on that?

15 A. Could I go back to 254?

16 Q. Yes, I am so sorry. That is page {G/50/76}.

17 A. So yes, this is in the context of PPCs -- a discussion
18 about combinatorial tests to check that no combinations
19 of products over-recover fixed and common costs, yes,
20 and that is -- yes, there is a practical difficulty in
21 doing that, because you need to look at all permutations
22 and combinations.

23 Q. Then if we go forward to the next page, {G/50/77}, could
24 I ask you to look at both 257 and 258. Then if we just
25 go over the page once you have had an opportunity to

1 read that. (Pause). Then 259 on page {G/50/78}.

2 A. Right.

3 Q. Would you like to comment on those paragraphs?

4 A. So there are previous comments which said that as part
5 of this process BT did put forward sort of some
6 combinations I think of products as a sort of defence
7 against an allegation that they had breached the costs
8 orientation obligation, and Ofcom noted that there were
9 fixed and common costs which kind of fell out of
10 those -- fell outside those precise combinations, and so
11 then there was a discussion about what combinations you
12 would need to look at and the complexity of the
13 calculations. So as Mr Budd says, you know, on this
14 page, the theory required a vast number of tests to be
15 done.

16 So there is -- to carry out a SAC combinatorial
17 approach effectively you need to consider a very large
18 number of tests.

19 Q. Thank you, Mr Duckworth.

20 I just want to show you one final page on the same
21 point so you have the Tribunal's finding here. That is
22 on page {G/50/87} and it is paragraph 286(1).

23 A. Yes, which just confirms that it is not practical in
24 this case.

25 Q. Thank you, Mr Duckworth.

1 If we could please go next to {C/1/1}. This is the
2 Provisional Conclusions document from Ofcom in 2017.
3 Now, Mr Beard took you to the annexes to the Provisional
4 Conclusions and he took you to figure A5.14. But could
5 we please turn up page {C/1/99} in the body of the
6 report, and could we focus in on paragraph 8.14, please.
7 I wondered if you would like to comment on that
8 paragraph?

9 A. Right, I think I would kind of refer to this as -- my
10 interpretation of this paragraph is that Ofcom
11 considered for the relevant services with a return on
12 sales of between 5% and 10% sort of reflects cost based
13 measure of profitability, which I take to mean the sort
14 of opportunity cost of investors in a business providing
15 services.

16 Q. Thank you, Mr Duckworth.

17 Then just over the page, 8.17, can I ask you the
18 same question. {C/1/100}.

19 A. So, yes, this is then applying the 10% to the cost and
20 saying this is the level of profit consistent with that
21 10% return on sales which would reduce prices by £8
22 a month excluding VAT, so decreasing prices between £8
23 and £10 per month including VAT.

24 Q. Thank you.

25 Then we can put the Provisional Conclusions away but

1 staying with Ofcom. Mr Beard asked you a number of
2 questions about the 2013 document, that is at {C/340/1}.
3 You have said you wanted to comment on page {C/340/4} of
4 that document which is the executive summary. Mr Beard
5 did not take you back there.

6 Would you still like to make your comment on page
7 {C/340/4}? If we could perhaps zoom in on the
8 introduction.

9 A. So, yes, it is just the point I made that:

10 "This statement sets out decisions designed to
11 promote competition in the supply of telephone calls
12 from fixed lines for the next three years ..."

13 So it is -- despite the title of the statement in
14 this case, the focus of the statement was competition in
15 the supply of telephone calls.

16 Q. Thank you.

17 I would like to then take you to another document
18 Mr Beard took you to. That is {F/843/1}. That is a BT
19 slide deck from 2009.

20 Mr Beard did not take you to slide 17 so could we
21 bring that up on the screen {F/843/17}. Mr Duckworth,
22 would you like to comment on that slide? Do let me know
23 if you need to turn back the pages.

24 A. I think this is just an example that -- the detail
25 escapes me, but an example of -- as the title says:

1 "We are continually striving to simplify our
2 business, improve efficiency and reduce costs - some
3 examples below."

4 So it is an example that, as Mr Cackett said in his
5 testimony, BT Consumer is always looking to reduce the
6 cost of delivering the services it delivers.

7 Q. Could we just move forward to page {F/843/20} of the
8 same slide deck and, again, could I ask you to comment
9 on that, Mr Duckworth.

10 A. So this is showing commitment, as it says on the top of
11 it, to reducing labour costs. Presumably the chart is
12 showing labour resource in terms of full-time
13 equivalent, would be my interpretation, and in 2009/10
14 significantly reducing the number of labour resources
15 for the relevant activity. I am not sure exactly what
16 this applies to.

17 I would also say "Net Transfers from Group" is
18 presumably not an increase in cost for BT Group overall,
19 it is a reallocation from elsewhere within the Group,
20 and so is not necessarily directly comparable to the
21 reductions if the reductions are actually reductions
22 from the perspective of BT Group.

23 Q. Thank you.

24 Then the last question I had for you is I think you
25 spent your lunchtime break productively looking at this

1 chart from Mr Beard. Did you want to comment on that,
2 Mr Duckworth?

3 A. I mean, I think from a very high level, I accept that
4 when you look at the green bars, which is the approach
5 that I have adopted, it is sort of on the assumption
6 that there is an overcharge that considers the returns.
7 I think the blue bars kind of suffer from the opposite
8 problem. If we choose an attribution of SFV services on
9 a Fully Allocated Cost basis which shows that returns
10 for SFV services are not particularly high, then what we
11 are effectively doing here is kind of de-averaging the
12 BT Consumer EBIT margins into the sort of non-SFV
13 services and the SFV services returns, and what this
14 chart effectively shows is that in each of the --
15 I think in each and every year the returns on SFV
16 services based on -- the cost from attribution based on
17 the number of lines and customers, the returns for SFV
18 services are higher than the returns for BT Consumer
19 overall.

20 So when you kind of de-average the returns to look
21 at excluding SFV customers, you get slightly lower
22 returns in the blue bars, but it is very much dependent
23 on the assumption you make about the kind of indirect
24 cost allocation.

25 So I think in 2015/16, according to Dr Jenkins'

1 sensitivity, and I am recalling this from looking at the
2 spreadsheet over lunch, I think you have profitability
3 in 2015/16 of 27%. So when you kind of remove that 27%
4 then it reduces or it shows a lower profitability for
5 BT Consumer excluding SFV services.

6 The choice of the cost attribution methodologies is
7 fairly important there, because if we look at the Ofcom
8 choice of cost attribution methodology for 2015/16 it is
9 showing SFV services having return of sales of 40%. So
10 if you had used that methodology rather than one of
11 Dr Jenkins' sensitivities, then the blue bar would be
12 significantly lower than shown here.

13 So it is very much dependent on your choice of the
14 kind of cost attribution methodologies for SFV. If you
15 choose one which by its nature shows relatively low
16 margins, then it is not going to have such a big impact
17 on the level of the blue bar.

18 MS KREISBERGER: Thank you very much, Mr Duckworth. I do
19 not have any further questions.

20 THE CHAIRMAN: Just one second. I just want to confer with
21 my colleagues. (Pause)

22 Thank you, no, we do not have any questions.
23 Thank you very much indeed, Mr Duckworth, and you can
24 now leave the witness box.

25 (The witness withdrew)

1 MS KREISBERGER: Sir, then I think it is for Mr Beard to
2 call Mr Matthew.

3 MR BEARD: Yes.

4 THE CHAIRMAN: Yes, thank you.

5 MR BEARD: I assume we will just do it on the same basis, we
6 do not need to go through the reports?

7 THE CHAIRMAN: Yes.

8 MR BEARD: But I am assuming he will need to reaffirm?

9 THE CHAIRMAN: Yes, please.

10 Mr David Matthew (reaffirmed)

11 MR BEARD: Mr Matthew, I do not have any questions for you.

12 You have been through the reports. There are some files
13 there, I do not know what they actually have in them.

14 I do not know. They may simply be the files that were
15 available to all of the experts when they were in the
16 hot tub, I am not sure.

17 A. They do have both of my reports.

18 MR BEARD: Right. If at any point you want to look at hard
19 copies, then please do say so to Ms Kreisberger who
20 I think has some questions for you.

21 Cross-examination by MS KREISBERGER

22 MS KREISBERGER: You will be disappointed to hear,
23 Mr Matthew, I only have a handful of questions for you
24 today.

25 Mr Matthew, I would like to turn to the scope of

1 your evidence in the case. So if we begin with your
2 report, so do feel free to turn up the hard copy. It is
3 {IR-E/19/110}.

4 A. Page 110 of the report?

5 Q. It is the Opus number, and you see there paragraph 5.1.
6 Actually is that a bad ... sorry, I am just going to
7 check ...

8 A. So those are the instructions.

9 Q. Yes. Sorry, I am going to turn actually to paragraph 13
10 of the report and that is at page {IR-E/19/8} of this
11 same document. We will go back there in a moment.

12 Do you see there, Mr Matthew, at paragraph 13 you
13 record there the scope of your instructions, and that
14 faithfully records the instructions set out in the
15 letter that you annex. We can go to there afterwards.
16 But you can see there the heading "Instructions", and
17 I would just like to go through the paragraphs here.

18 So if we begin with 13A, so if you have been asked
19 to prepare a written report on the following issues.

20 13A(i):

21 "The role of and policy considerations underpinning
22 ex ante competition regulation, including in particular
23 with respect to Ofcom's ex ante powers under the
24 Communications Act ... this includes providing a general
25 framework of analysis, as well as specific application

1 to the telecoms sector and this case, including:

2 "(i) the nature, purpose, and approach of ex ante
3 regulation, both generally and in the communications
4 sector."

5 Yes?

6 A. Yes.

7 Q. Then (ii):

8 "The nature, purpose, and approach of Ofcom's
9 ex ante regulation in respect of SFV services."

10 A. Yes.

11 Q. Those are high level questions about the function of
12 ex ante regulation, including in relation to SFV
13 services?

14 A. Yes, correct.

15 Q. Then if we go down to B, (i) and (ii):

16 "The role of and policy considerations underpinning
17 [this time] ex post competition law:

18 "(i) both generally and with respect to excessive
19 pricing claims; and

20 "(ii) whether enforced by a regulator with
21 competition powers or through private enforcement."

22 So these are questions about the functions of
23 competition regimes and excessive prices?

24 A. Correct.

25 Q. That one is put at a level of abstraction not in

1 relation to SFVs specifically?

2 A. Indeed.

3 Q. Then C is the interplay between the two regimes,
4 generally and in this case.

5 So again, you are being asked questions about the
6 policy underlying the two regimes.

7 A. Sorry, yes.

8 Q. Then D, that is:

9 "The appropriateness of relevant cost allocation
10 methodologies in ex post competition claims in the
11 telecommunications ..."

12 A. Correct.

13 Q. Again, it is not linked to the facts of the case, it is
14 about methodologies generally in telecoms?

15 A. Yes, correct.

16 Q. Sorry, Mr Matthew. It is hard to hear.

17 Then if we go back to paragraph 4, so that is back
18 to page {IR-E/19/6} of this document, you say this:

19 "The purpose of this Expert Report is therefore not
20 to offer personal knowledge of matters of fact, such as
21 Ofcom's thinking during the relevant reviews. Rather,
22 its purpose is to provide information and comment on the
23 relevant regulatory context drawing on my wider
24 experience, and why such further context matters in this
25 case."

1 So that is very clear. You are not giving evidence
2 of fact?

3 A. Correct.

4 Q. Your evidence is directed to the regulatory context?

5 A. Correct.

6 Q. Really just for completeness, you emphasise the same
7 point again in your second report. That is at
8 {IR-E/20/4}, paragraph 5.

9 A. I will -- I am sure you are right. I will just turn it
10 up just because it is just helpful to have it up anyway.

11 Q. Please do, and please do take a moment to read it, but
12 I think the wording is identical.

13 A. Actually, I will just open it. I will take your word
14 for it.

15 Q. Do you have the page there? It is page 4, paragraph 5,
16 so it is {E/20/4}.

17 A. Yes. Which paragraph? Paragraph 5. Yes.

18 Q. Now, the parameters of the evidence you have been asked
19 to give in these proceedings on policy issues, that is
20 reflected in the documents you were sent. Let us just
21 have a look at that. So back to {IR-E/19/109}. This is
22 your letter of instruction. Just so you can see, it
23 begins on page {IR-E/19/106}. Then if we turn forward
24 to page {IR-E/19/109}, it says that -- so this is your
25 letter of instruction from Simmons & Simmons. They say:

1 "You will be provided with the following documents."

2 The first document are the instructions to

3 Dr Jenkins. The date seems to have been left blank.

4 The second category of documents are the Ofcom

5 materials. If you just cast your eye down the list and

6 then over the page, these are familiar documents?

7 A. Yes, so I think 2006, 2009, 2013 are the reviews that
8 have been aired, and there is nothing on the other page.

9 Q. No, we will turn to that in a moment.

10 Then if we do go over the page {IR-E/19/110} there
11 is a third category of documents, and that is
12 inter partes correspondence in the proceedings?

13 A. Yes.

14 Q. Then paragraph 4.2 says:

15 "... you shall also be provided with any other
16 documents or data determined to be useful for preparing
17 your report."

18 Mr Matthew, you do not include any list of documents
19 in either of your reports?

20 A. Right.

21 Q. Do you recall that? You cannot recall?

22 A. I do not recall actually.

23 Q. I think you can take it on trust --

24 A. I will take it on trust. I do not ...

25 Q. Just for completeness, so you have it, there is

1 a supplemental set of instructions on page {E/19/113}.
2 Those are the instructions that added the last point in
3 your first report on cost allocation methodologies in ex
4 post competition claims?

5 A. Yes.

6 Q. You see that at paragraph 3.2?

7 A. Yes.

8 Q. But these instructions do not refer to any additional
9 documents, if you turn the page. You just see there
10 some information in the timetable.

11 THE CHAIRMAN: Sorry, is that right, there are no further
12 documents referred to in the --

13 A. No, I do not believe so. I will take it on trust there
14 are not.

15 MS KREISBERGER: Coming back then to the list of documents
16 you were sent with your original instructions. We saw
17 there Dr Jenkins' instructions, the Ofcom materials, the
18 inter partes correspondence. That would seem to suggest
19 that at the time you were instructed you were not sent
20 the pleadings which had mostly been exchanged by the
21 time of your instruction. I think there was a reply
22 still outstanding.

23 A. I actually cannot remember what we were sent when ...
24 I certainly have seen the pleadings.

25 Q. You have seen them since?

- 1 A. Yes.
- 2 Q. Now, this fairly limited list of documents is in
3 accordance, is it not, with the high level nature of the
4 evidence you are being asked to give in relation to
5 policy?
- 6 A. Yes.
- 7 Q. It is certainly right that you have not conducted
8 a review of BT's disclosure?
- 9 A. No, I have not.
- 10 Q. That is in line with the remit of your evidence?
- 11 A. Yes.
- 12 Q. Now, just against that background, I would like to turn
13 to some of the evidence you gave in the hot tub this
14 week. You gave evidence on the 2009 RFS. I do not
15 think we need to turn it up. You will recall it.
16 I have the reference if it is helpful.
- 17 MR BEARD: I think it is worth turning up.
- 18 MS KREISBERGER: Mr Matthew, would you like it in front of
19 you? I am going to -- let me put the short point to
20 you, because it may simply save time, but I am very
21 happy to give you the reference.
- 22 A. Yes.
- 23 Q. The particular point you gave evidence on was about the
24 treatment of common costs in the RFS. Do you recall
25 that?

1 A. I do recall.

2 Q. Also the use of surveys?

3 A. I do not know if I commented on surveys specifically.

4 Q. Then let us then have a look at {Day14/34:1}. Dealing
5 with the common cost point first. It begins at line 8,
6 yes, we see your name there?

7 A. Yes, so I have scanned that.

8 Q. Thank you. Now, you do not mention the cost allocation
9 performed by BT in its 2009 RFS in either of your two
10 reports, do you, Mr Matthew?

11 A. Again, I will take it on trust that I do not.

12 Q. So I will put it to you then, taking it on trust, that
13 you do not mention it for instance in your reply
14 report --

15 A. No.

16 Q. -- once Mr Duckworth had set out his reliance on it?

17 A. Yes, I do not recall with all these things whether there
18 is some footnote that might mention it. I just would
19 prefer not to rely on my own memory test.

20 Q. I want to be --

21 A. But if you tell me you do a word search and it is not
22 there, fine.

23 Q. Just so it is clear and there are no tricks, you mention
24 the 2009 RFS once in a footnote in relation to margin,
25 but there is no mention of cost allocation in the 2009

1 RFS in your reports?

2 A. So in my report I did refer to the RFS?

3 Q. At footnote 23 you refer to margins, but not to the cost
4 allocation performed by BT in the RFS.

5 A. Got it, yes. So I did refer to it, there we are,
6 footnote 23.

7 Your question is: did I look into the details of the
8 cost allocation that underpin that, is that ...

9 Q. My question is: do you refer to the cost allocation
10 exercise conducted by BT in the RFS in your reports?

11 A. Since I had already missed this one it would be helpful
12 if you confirmed that I did not, but I am happy to --
13 I do not recall commenting on that, and I do agree that
14 this comment was not following on from a substantial
15 piece of analysis in one of my reports that I can
16 recall.

17 Q. It is not one of the documents mentioned as sent to you
18 by the legal team, in fact.

19 A. Yes.

20 Q. Just to be clear, when you gave your views on cost
21 allocation in the 2009 RFS by BT, that was outside the
22 scope of the evidence in your reports?

23 A. So when I gave that comment it was from general telecoms
24 knowledge which is there are common costs. The RFS is
25 a Fully Allocated Cost system, and so as a matter of

1 logic it will be the case that all costs are allocated,
2 including common ones, and it goes no further.

3 Q. If we move on to a different point in relation to the
4 evidence you gave this week. You gave your opinion,
5 Mr Matthew, on price dispersion in bundles in the
6 hot tub. That was {Day14/80:17}. You gave some views
7 on price dispersion.

8 Now, on the next page, page {Day14/81:14}, you might
9 recall Mr Ridyard pressed you on whether you had
10 evidence in relation to these opinions either from
11 telecoms or from the economy in general, and your
12 answer, you see that there at line 18:

13 "On the telecoms market, I am just speaking from
14 just general observation that when you plot telecoms
15 prices you see a lot of variation."

16 Now, Mr Matthew, in your reports you do not address
17 the topic of price dispersion in telecoms services, do
18 you?

19 A. I do not think I provide facts on it. I do discuss the
20 general points about segmentation and that you do get
21 quite a lot of segmentation in the number of markets.

22 Q. On the point about price dispersion within markets, you
23 do not express a view on that in your reports?

24 A. Well, I express a view that you do get quite a lot of
25 segmentation and variation of a variety of sorts, which

- 1 would include price dispersion, but I did not include
2 a plot of price dispersion in retail telecoms.
- 3 Q. You do not, in fact, identify any documents provided to
4 you or reviewed by you on that issue?
- 5 A. No. So the ones I was thinking of in the hot tub was
6 the one that came up in the witness of fact process.
7 Also it is general knowledge. I have just looked at
8 things like this in other reviews quite recently. So
9 I mentioned the *Hull* case, where there was some degree
10 of retail price comparison required and so we plotted it
11 at that time. The dispersion is quite significant.
12 That is all.
- 13 Q. Just then to remind you at page {Day14/83:9} of the
14 transcript, you very candidly said, no, you do not have
15 evidence in terms of the broader economy, it is just
16 your belief?
- 17 A. Correct.
- 18 Q. So you do not have any documents on that point either in
19 your reports?
- 20 A. No, I do not have documents, is my belief. I am pretty
21 confident that it is well founded.
- 22 Q. Then on Day 13 in the hot tub you offered an opinion on
23 late innovation to Voice Only Customers. Do you recall
24 that, Mr Matthew?
- 25 A. This is the point about switch-off of PSTN networks,

1 which leads to retailers to Voice Only Customers
2 incurring some costs in moving them on to the new
3 system.

4 Q. Just so we have it, it is {Day13/92:1}. Mr Matthew, the
5 chairman pointed out to you -- it is actually I think on
6 the previous page, at the bottom of the previous page.
7 The chairman pointed out to you that you were talking
8 about events that post date the voice only customer
9 claim period?

10 A. Correct.

11 Q. Now, Mr Matthew, you do not say anything about supposed
12 innovation for Voice Only Customers in your reports, do
13 you?

14 A. For voice -- I certainly do not talk about the PSTN
15 switch-off, because I was not looking at innovation in
16 that area. So, yes, that was a comment I made in the
17 hot tub from general knowledge about recent developments
18 in telecoms.

19 Q. You have not cited any evidence in support of that
20 claim?

21 A. No, I have not.

22 Q. Mr Matthew, I would like to move on then to a different
23 topic. If we could turn up your first report, please.
24 That is at {IR-E/19}. If we could turn up paragraph 81
25 {IR-E/19/43}. In the sentence above the blue text you

1 say:

2 "... I note that BT did not and, it appears, could
3 not, discriminate between customers or customer groups
4 who took fixed voice services (whether standalone, VO or
5 SP, or in a bundle) until the introduction of the BT
6 Commitments."

7 Prior to the BT Commitments BT knew which customers
8 it was supplying bundles to, did it not?

9 A. So this comment -- let me just read the sentence.

10 (Pause).

11 So that is a record of the Ofcom position at the
12 time where it is quoted below.

13 Q. It is not a trick question, Mr Matthew. At the time
14 that BT sold bundles to customers before the
15 Commitments, it knew which customers it was selling
16 bundles to?

17 A. Correct.

18 Q. It charged them the price for the bundle?

19 A. Correct.

20 Q. We have seen that BT lowered what it labels the
21 incremental broadband price to enable it to serve -- to
22 provide bundles at competitive prices, yes?

23 A. So, yes, it adopted -- yes, so I do describe that in my
24 report, the balance between the line rental and the
25 incremental broadband.

1 Q. So it is wrong to say that BT could not offer different
2 prices to standalone customers and bundle customers
3 before the Commitments?

4 A. So, yes, before the Commitments BT could set different
5 prices for bundles and for Standalone Fixed Voice, and
6 I am sorry, if this is read to mean something that it
7 could not do that, that would be incorrect.

8 Q. We can correct that.

9 Let us move on to a different topic. If we could
10 bring up the joint statement, {OR-E/49/179}. Do you see
11 there, Mr Matthew, proposition 7.3.4?

12 A. I am sorry, I am not as quick as the ... Which bundle is
13 the joint in?

14 Q. For the EPE, if we could zoom in on the proposition at
15 the top of the page, please.

16 A. I see, on the screen. Do you know where the hard copy
17 is, though?

18 Q. I do not think we will need it for this. It is really
19 just the proposition there at the top of the page.

20 I think that would be a sledgehammer, too many trees.

21 A. Yes.

22 Q. Do you see there the proposition:

23 "Whether or not a product is purchased by the end
24 customer is relevant to the interpretation of
25 'significance'."

1 A. Yes.

2 Q. You say there "Disagree".

3 A. Yes.

4 Q. That is something you and Mr Parker disagree on. He
5 agrees with the proposition, if we could just see the
6 third column on the right?

7 A. I rather thought we had actually agreed on this, but
8 maybe I am wrong.

9 Can I just get the hard copy, because I just find it
10 easier to scan a total page rather than jumping around
11 like this.

12 MS KREISBERGER: Does Mr Matthew have that? Folder 3.

13 A. Yes, okay. So it is in the ...

14 Q. Page 179 of that document.

15 Now, I just want to focus on your disagreement with
16 the proposition, please, not on Mr Parker's evidence.

17 A. Okay, so my comment here is directed at Mr Parker's
18 previous point. I do not think I say anything more,
19 apart from generally I do disagree that --

20 Q. You disagree with that proposition. That is the only
21 point I am putting to you.

22 You do refer to some case law in your reports,
23 Mr Matthew. You refer, for instance, to the *Phenytoin*
24 case. But I would like to show you a different
25 Court of Appeal judgment, and that is the judgment in

1 *London & South Eastern Railway v Gutmann*. Is that
2 a case you are familiar with?

3 A. I am really not familiar with it.

4 Q. Okay. Let us call it up, it is {G/89/1}. I simply want
5 to show you one passage from the judgment. It is
6 another certification of collective proceedings
7 confirmed by the Court of Appeal.

8 A. Could you --

9 Q. It is about people who buy train tickets.

10 A. Could you blow it up a little bit? Thank you.

11 Q. Then I would like to turn to page {G/89/31}, please,
12 paragraph 93. So if we could zoom in on 93, please.

13 I am just going to read the beginning of that
14 passage to you. The Court of Appeal held:

15 "The law relating to abuse is concerned with
16 consumer unfairness because when an undertaking is
17 dominant it is, by definition, freed from the
18 competitive shackles which otherwise incentivise and
19 discipline it to maximise consumer welfare and benefit.
20 This is why most laws worldwide which prohibit abuse of
21 dominance include within the prohibition the imposition
22 of some form of 'unfair' terms and prices. These are
23 often described as 'exploitative' abuses."

24 Mr Matthew, do you see there the Court of Appeal's
25 finding that the underlying purpose of the prohibition

1 on unfair pricing is to protect consumers from being
2 exploited by high prices?

3 A. (Pause). So I am going to defer to others on the
4 interpretation of this, but from my reading this is
5 a reflection of the *United Brands* test. It looks like
6 it. So we have got unfair terms here, and we are in the
7 territory of exploitative abuse, so ...

8 Q. The beginning says, "The law relating to abuse is
9 concerned with consumer unfairness"?

10 A. Yes, so that makes sense given the unfairness limb 2 of
11 *United Brands*. Is there any other legal connection
12 there or am I in the right territory?

13 Q. Very much so.

14 Just to note in passing, you will be familiar with
15 a similar duty on Ofcom to further the interests of
16 consumers under the Communications Act. I do not think
17 we need to turn that one up.

18 Now, when you are considering whether an overcharge
19 is significantly above the competitive level, you would
20 want to take into account that the law against unfair
21 pricing is, to use the Court of Appeal's expression,
22 "concerned with consumer unfairness", yes?

23 A. So that is the law as written, so ...

24 Q. That means when you are looking at whether BT's SFV
25 prices are significantly above the cost-plus benchmark,

1 it would be somewhat artificial to close your mind to
2 the fact that the customers who were paying those prices
3 are end consumers?

4 A. So on the law here I have no idea where it stands. I do
5 approach this from the economics, and from the economics
6 things can be unfair if they are done at wholesale
7 levels that then might have unfair impacts as well. So
8 to give an example from Ofcom, they do take into account
9 sort of distributional impacts between different
10 customer groups when making wholesale judgments from
11 time to time.

12 Q. Perhaps I can help you. Let us stay with the economics
13 of the relationship. If you are dealing with high
14 prices, overcharges to end consumers, they cannot pass
15 those overcharges on, can they?

16 A. No, they cannot.

17 Q. Unlike a business?

18 A. A business might be able to, and in fact often would,
19 and that is why it affects the end consumers.

20 Q. So that is quite right, is it not, it would be the end
21 consumer who is left bearing the full brunt of the
22 overcharge in that case?

23 A. Yes. So in those cases, that is an example I do give in
24 my reports, that a high wholesale price then has
25 negative effects on the end consumers, is the ultimate

1 objective with all of this.

2 Q. Let us think of another practical example. Landline
3 generally have to pay the prices on offer from BT. They
4 do not engage in business to business negotiation?

5 A. For the residential customers that would be true.

6 Q. Yes. Now, let us turn up the overcharges. That is in
7 Mr Parker's fourth report, Annex A. So that is
8 {IR-E/5/192} and it is Table 19. Can we zoom in, and
9 I need to be careful about confidentiality.

10 You see there, if we just take standard line rental,
11 the overcharge is the "Difference" row, and so you can
12 see there the figures for 2016, 106, 127, 134, 119, 120,
13 and then confidential figures.

14 So those are the annual overcharges, the amounts
15 that we say Class Members have overpaid.

16 Before I put the question to you, could we then go
17 to page {IR-E/5/193} over the page, and Table 21. That
18 is the bottom half of the page. You see there -- so
19 I have shown you the annual overcharges, these are the
20 cumulative overcharges. So assuming a Class Member was
21 a customer on 1 October 2015, if I have that date right,
22 and was a Class Member every year of the class period up
23 to March 2022, then you can see, for instance, I cannot
24 read out that figure, but for standard line rental you
25 see the full amount that the customer would have been

1 overcharged by, and you see that also for Line Rental
2 Plus.

3 THE CHAIRMAN: So that is just going up in increments, is
4 it, taking the previous year cumulative? Yes.

5 MS KREISBERGER: So it goes up to the full overcharge which
6 could have been borne by a Class Member throughout the
7 period.

8 Mr Matthew, you would accept that for individual
9 consumers, within the class for particular consumers,
10 these overcharges could represent a significant sum of
11 money?

12 A. So as written, and I do not comment on any of the
13 overcharges at all, these -- I mean, these are the Class
14 Representative's estimates of how much higher prices are
15 compared to what is suggested to be the competitive
16 benchmark, is that right?

17 Q. Yes, that is right.

18 A. I agree that the absolute amounts are not trivial.

19 Q. Significant?

20 A. I mean, in absolute terms these are reasonable amounts
21 of money.

22 MS KREISBERGER: Thank you, Mr Matthew. I do not have any
23 further questions for Mr Matthew.

24 THE CHAIRMAN: Mr Beard, anything?

25 MR BEARD: Two quick ones.

1 Re-examination by MR BEARD

2 MR BEARD: Mr Matthew, how long were you at Ofcom?

3 A. Ten years.

4 Q. From when to when?

5 A. 2012 to 2022.

6 Q. What did you do?

7 A. I was the Economics Director, which meant I was the
8 senior economist on a number of major reviews, and also
9 I had broad oversight of some important areas of Ofcom.
10 It is a big place, they subdivide sectors into
11 different -- to people who specialise in those for
12 periods.

13 Q. Thank you.

14 Just one clarification. If we could go to
15 {E/19/81}. No, sorry, I think it is page {E/19/57},
16 paragraph 81.

17 A. Yes.

18 Q. No, still wrong. It is paragraph 81, so maybe --
19 {E/19/43}. Thank you very much.

20 I think Ms Kreisberger was asking you about this
21 last sentence:

22 "In this context I note that BT did not, and it
23 appears, could not, discriminate between customers or
24 customer groups who took fixed voice services ... until
25 the introduction of BT Commitments."

1 You very fairly clarified that that was not meaning
2 between bundles and fixed voice services.

3 You cite there footnote 126, second witness
4 statement of Mr Bunt.

5 If we could just go to that, paragraph 18. {D/2/4}.
6 Could we just go down to 18. Do you want to just review
7 that? (Pause)

8 A. Yes, so this is the point you are selling the same line
9 rental.

10 Q. Same line rental?

11 A. Yes.

12 MR BEARD: Thank you. I do not have any other questions for
13 you, Mr Matthew.

14 THE CHAIRMAN: Mr Matthew, thank you very much. That
15 concludes your evidence and you may leave the witness
16 box.

17 (The witness withdrew)

18 MR BEARD: Now, Ms Kreisberger has indicated she does not
19 want to cross-examine Dr Jenkins, so I think that takes
20 us into housekeeping.

21 THE CHAIRMAN: Yes.

22 Housekeeping

23 MR BEARD: Ms Kreisberger and I did have a discussion across
24 the short adjournment about this, thinking about what
25 our options would be. I think both sides have real

1 difficulties with the idea of moving things around so
2 that we could start tomorrow, so I think that is
3 problematic.

4 THE CHAIRMAN: Right.

5 MR BEARD: The thought we had is that if we have broadly two
6 and a half days for limb 2, and we will come back to the
7 exact time and length of those days in a moment, but
8 broadly speaking if we looked at two and a half days for
9 limb 2, which would be a day to a day and a half for the
10 hot tub and then a day for cross-examination thereafter.
11 I realise that there are issues about timing, but in
12 total.

13 We would then move to the behavioural evidence;
14 hot tub on the afternoon of the Wednesday and then
15 cross-examination morning of the Thursday.

16 Then we would move to the actuaries, hot tub and
17 cross-examination. I think everyone anticipates, and
18 obviously we have not had the agenda for the hot tub,
19 but we anticipate that that might be shorter.

20 Ms Kreisberger has indicated that Mr Punter has
21 difficulties beyond Thursday and therefore could not be
22 available on Friday afternoon. However, Mr Scott could
23 be. So if we did not get everything done on Thursday
24 afternoon in relation to hot tub and cross-examination
25 of all of the actuaries, Mr Scott could move into Friday

1 afternoon which I think is when the Tribunal indicated
2 it could sit.

3 Now, all of that would be subject to the idea
4 potentially of sitting early and late, particularly on
5 the Wednesday and the Thursday, because on the Wednesday
6 we would have a morning where there would be
7 cross-examination in relation to limb 2, and then you
8 would have new experts coming in at the lunchtime and
9 then being cross-examined the next day. Therefore, it
10 is not one set of experts on an extra-long day, and the
11 same would be true then in relation to Thursday.

12 THE CHAIRMAN: Just to remind me, the Thursday was going to
13 be the single day --

14 MS KREISBERGER: All day.

15 THE CHAIRMAN: -- all day for the actuarial experts.

16 MS KREISBERGER: That is right.

17 THE CHAIRMAN: Now, if that were to be split half/half,
18 hot tub and cross-examination, and we were therefore
19 starting it not on Thursday morning but Thursday
20 afternoon, having had the previous 24 hours, as it were,
21 on the behavioural experts, and so that would assume
22 that the hot tubbing of the actuarial experts would
23 finish close of play Thursday; is that right, half
24 a day?

25 MS KREISBERGER: Not quite.

1 MR BEARD: No, I think we would have to close slightly
2 earlier than that.

3 MS KREISBERGER: Sorry, the hot tubbing of the actuarial
4 experts, yes. So because Mr Punter, he is unfortunately
5 available Friday morning but not Friday afternoon, he is
6 on a plane.

7 THE CHAIRMAN: Sorry, I thought he was -- I thought under
8 the original programme ...

9 MS KREISBERGER: So we were wondering whether hot tubbing
10 and cross-examination of the actuarial experts could be
11 compressed to half a day.

12 THE CHAIRMAN: Hang on a second, sorry. But originally --
13 I see.

14 MS KREISBERGER: It just gives it the morning then to --

15 THE CHAIRMAN: Sorry, but as matters stood, Mr Punter was
16 going to have to give evidence on the Thursday.

17 MS KREISBERGER: Yes.

18 MR BEARD: Yes, he can.

19 MS KREISBERGER: He is still around on Thursday but not on
20 Friday afternoon.

21 THE CHAIRMAN: I see. So on this basis -- but you say
22 Mr Scott is available on Friday?

23 MR BEARD: Yes.

24 THE CHAIRMAN: How does that work if Mr Punter is not here?

25 MR BEARD: For the cross-examination.

1 THE CHAIRMAN: For the cross-examination.

2 MR BEARD: Yes. So what it would mean is that on a longish
3 afternoon on the Thursday you would do the hot tub and
4 at least Mr Punter's cross-examination.

5 THE CHAIRMAN: I see.

6 MR BEARD: Then you would have leeway to do Mr Scott on the
7 Friday afternoon. So what we are trying to do is
8 effectively trying to keep it within the week, because
9 it becomes more and more complicated with
10 availabilities. So we were just trying to come up with
11 solutions, none of which are perfect, but it effectively
12 steals at least a half day extra for limb 2, and
13 depending on how late/early we sit there might be a bit
14 more time there as well.

15 Then you would have a day for the behavioural
16 experts, hot tub and cross-examination. Then you would
17 have a half day, possibly a longish half day, for the
18 actuarial hot tub plus Mr Punter's cross-examination.
19 Then Mr Scott's cross-examination could be postponed
20 until the Friday afternoon.

21 THE CHAIRMAN: Right.

22 MS KREISBERGER: It occurred to us, but obviously we are
23 entirely in your hands, that the hot tubbing of the
24 actuarial -- I say "us" on my side, I am not speaking
25 for Mr Beard -- that the hot tubbing of the actuarial

1 experts might be fairly limited. You may have some
2 questions?

3 THE CHAIRMAN: I appreciate the fact that -- we are going to
4 be dealing with this probably tomorrow, but I appreciate
5 there is agreement between you as to what questions are
6 asked, it is probably the case we are not going to have
7 much to add to it, but we need to look at that.

8 Can I just check. The other thing is -- so is it
9 the case that Mr Punter, apart from not being available
10 on the Friday, is indeed not available the following
11 Monday?

12 MS KREISBERGER: Yes, he is on a plane I am told on Friday.

13 THE CHAIRMAN: I see.

14 MS KREISBERGER: He did say he could be available the
15 following week by video link but I suspect that is not
16 terribly attractive.

17 MR BEARD: That is effectively the backstop constraint on
18 all of this. There is one further availability wrinkle
19 but I will pick it up in a moment.

20 THE CHAIRMAN: Right.

21 MR BEARD: But, yes, it does depend on how long the Tribunal
22 wants for the hot tub for the actuaries. Obviously
23 a hot tub is useful, because there are some complex
24 issues which are probably more efficiently aired through
25 the hot tub process, and there is an irony that actually

1 if you turned it all into cross-examination it would
2 take longer.

3 THE CHAIRMAN: I appreciate that. That is the idea. Just
4 give me a moment, would you. (Pause).

5 We can see the advantages of all of that. We are
6 basically content to do that.

7 Now, the only thing is we do think that in order to
8 try and ensure we do not run short we should also start
9 early on Monday morning, because it may be that we will
10 then definitely finish the limb. We may then finish
11 limb 2 hot tub completely on the Monday. That might
12 allow a little bit more scope for cross-examination but
13 it may ease the pressure a little bit.

14 MR BEARD: Yes, that is fine. Indeed, if that were to
15 happen -- because the only other wrinkle we have is that
16 Dr Jenkins is not available on the Wednesday, so
17 I raised with Ms Kreisberger that if we were going to do
18 the two and a half day thing what might have to happen
19 is Dr Jenkins got cross-examined before.

20 THE CHAIRMAN: First.

21 MS KREISBERGER: We are not attracted to that, I am afraid.

22 That would be a reversal of the usual approach that the
23 claimant's expert goes first. So I understood that
24 Dr Jenkins is going to see if she can re-arrange --

25 THE CHAIRMAN: Let us review that but part of the wrinkle

1 here is as a consequence of the fact that we are
2 moving -- we have been asked to go --

3 MS KREISBERGER: I appreciate that.

4 THE CHAIRMAN: One of the reasons which was put forward
5 there was that you might need more time for
6 cross-examination so I think we have to cut our cloth
7 accordingly I am afraid.

8 MS KREISBERGER: What I think we should do in that case is
9 Dr Jenkins could go before Mr Matthew and we aim to get
10 it all done on the -- get Dr Jenkins' cross-examined by
11 close on Tuesday if we must and Mr Beard will have
12 Tuesday morning.

13 MR BEARD: I think you mean Wednesday.

14 MS KREISBERGER: No, if the hot tub is one day.

15 THE CHAIRMAN: If we get through the hot tub on the Monday.

16 MS KREISBERGER: Yes, then --

17 THE CHAIRMAN: Because what would have happened if we had
18 not made any changes to this, it would have been hot tub
19 on the Monday and cross-examination of everybody on the
20 Tuesday.

21 MS KREISBERGER: Quite. So if we are back to the one day
22 hot tub on the Monday I think we should assume that any
23 cross-examination of Mr Matthew will go to the Wednesday
24 but not Dr Jenkins.

25 THE CHAIRMAN: That is one possibility. Let us see where we

1 get to but we are just going to have to manage with the
2 wrinkles that we are presented with.

3 One point which I think will be clear from the
4 questions on limb 2 which we raised which, as you can
5 see, have been driven to quite a large extent by the
6 questions that you put, is I think it is important to
7 stress that we have prefaced these questions from an
8 economic point of view. We appreciate that there could
9 be overlaps between questions that are properly
10 addressed to the experts and matters of law.

11 MR BEARD: Yes.

12 THE CHAIRMAN: So all we are saying is we are encouraging,
13 I think, all the experts, if they think this is not
14 a matter of their expert expertise as economists to say
15 so.

16 MS KREISBERGER: That is well understood.

17 MR BEARD: That is extremely helpful, sir. It was an issue
18 that had already been raised backstage about one or two
19 of the questions so it just very helpful having that
20 steer. I am grateful.

21 THE CHAIRMAN: Which, as it happens, might or might not
22 shorten things.

23 MR BEARD: Yes.

24 THE CHAIRMAN: All right. Thank you. On that basis we will
25 stop now and we will reconvene at 10 o'clock on Monday

1 morning.

2 MR BEARD: Most grateful.

3 THE CHAIRMAN: Thank you all very much.

4 (2.33 pm)

5 (The hearing adjourned until Monday, 26 February at

6 10.00 am)

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