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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
(2) British Telecommunications plc
(Together, "BT")

Respondent

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)

Friday, 22 March 2024

(10.30 am)

THE CHAIRMAN: Some of you are joining us live stream, so I start with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

Yes, Mr Beard.

Closing submissions by MR BEARD (continued)

MR BEARD: Sir, thank you.

You will have received my table.

THE CHAIRMAN: Thank you very much indeed, yes.

MR BEARD: What it shows is that there is flexibility in relation to the level of common costs being recovered in relation to SFV --

THE CHAIRMAN: Yes, thank you very much.

MR BEARD: -- in relation to baseline, we just did it in relation to that.

THE CHAIRMAN: That was very helpful, thank you.

MR BEARD: I am conscious of both time and the fact that there are extensive written submissions, so I am going to be brief on limb 2, but that is not to underplay the significance of it.

1 Perhaps what is most striking about the
2 Class Representative's approach to limb 2 is the
3 transparent attempt to avoid having to consider it in
4 essentially any substance, primarily by creating novel
5 legal tests which I will come back to.

6 I am going to focus on the tests, therefore. Then
7 I will emphasise some of the matters -- some of why that
8 matters in the consideration of evidence overall.

9 I will then look at some of the evidence, primarily
10 evidence references, and then pick up one or two issues
11 on comparators that fall within limb 2.

12 Just dealing with the legal propositions, you have
13 our submissions {IR-A/16/165}.

14 Sorry, just pausing for a second. I do not know
15 whether or not we are awaiting a transcriber. (Pause)

16 Thank you. I am so sorry.

17 THE CHAIRMAN: No, thank you for bringing it up.

18 MR BEARD: At 673 we run through some of the legal tests,
19 and then our submissions you will see further at 675 to
20 677.

21 But I need to address the key point made by
22 Ms Kreisberger yesterday -- sorry, two days ago -- that
23 somehow once the Class Representative has supposedly
24 proved that prices are excessive under limb 1, then it
25 is for the defendant, as she put it, to "objectively

1 justify" them under limb 2.

2 If we go to Day 25, page 97 {Day25/97:1}, there she
3 is hypothesising that you have identified what she calls
4 an excessive price under limb 1, and then she says:

5 "... that is why I say I cannot get hung up on where
6 you look at the economic factors because you can see you
7 can do it here [which is in limb 1].

8 "That means that to disprove fairness, to show that
9 an excessive price is not an unfair price, the dominant
10 firm must prove that these are prices -- these high
11 prices would not hold in conditions of workable
12 competition."

13 She repeated the proposition a couple of times and,
14 as I say, referred to this notion that under limb 2 it
15 is for the defendant to disprove excessiveness.

16 Now, that is just wrong as a matter of law. The
17 overall test, as I set out when I was going through
18 *United Brands* yesterday, is unfairness, ascertaining
19 whether the undertaking is able to secure benefits
20 beyond those which might be secured in workable
21 competition, charging a price which bears no reasonable
22 relation to the economic value of the product. We saw
23 how that can be an abuse, but that is the entire test,
24 or that encapsulates the test that the claimant has to
25 prove.

1 If you are applying a cost-plus basis for finding
2 abuse, you have to compare actual cost to actual prices
3 and consider whether those prices are unfair, which is
4 where we get the limb 1/limb 2 description. But the
5 fact you have two limbs in that cost-plus analysis does
6 not change the overall burden of proof, or somehow
7 switch the legal burden in relation to limb 2 on to the
8 defendant.

9 All of that is the test for abuse, that is what the
10 Class Representative has to prove, and there is no
11 sudden presumption kicking in, once you have reached
12 some sort of finding on limb 1, that you can be presumed
13 to have found unfairness. That is not consistent with
14 *United Brands*, and nothing in *Phenytoin* changes that
15 basic position.

16 Lord Justice Green, and I will not take you to it,
17 but in *Phenytoin*, at paragraph 61, he made reference to
18 an excessive price being an example of an unfair price,
19 but in doing so he used the language of "unfair" because
20 there is no reasonable nexus to its economic value.

21 THE CHAIRMAN: Does he not, from memory, but I may have it
22 wrong, is it paragraph 97 in *Phenytoin* where he comes
23 back to this? Because he talks about the factors there,
24 and he does use certain language in paragraph 97, I
25 think, from memory.

1 MR BEARD: The summary of the conclusions.

2 THE CHAIRMAN: Yes.

3 MR BEARD: It would be about {G/73/29}, I think. This was
4 what I took you through two days ago.

5 You see that in (v) where he says:
6 "... if the price exceeds the selected benchmark,
7 the authority should then compare the price charged
8 against any other factors which might otherwise serve to
9 justify the price charged ..."

10 THE CHAIRMAN: That is what I was thinking of, yes.

11 MR BEARD: Yes.

12 THE CHAIRMAN: I am not saying he is saying anything about
13 burden of proof, it was just this justifying --

14 MR BEARD: Yes, that is right. It is just important --
15 well, he is not talking about burden of proof there --

16 THE CHAIRMAN: That is what I am saying --

17 MR BEARD: -- cause, because it is an authority appeal case,
18 but it is noticeable that it says it is for "the
19 authority" there.

20 THE CHAIRMAN: Yes.

21 MR BEARD: But not explicitly about burden of proof,
22 I accept, because it is not an adversarial process that
23 was being dealt with, or, rather, it was by the time it
24 reached Lord Justice Green but it had not been
25 originally.

1 THE CHAIRMAN: It is this bit:

2 "... if the price exceeds the selected benchmark,
3 the authority should then ..."

4 For which you might read here the Tribunal as the
5 ultimate decision-maker:

6 "... compare the price charged against any other
7 factors which might otherwise serve to justify the price
8 charged as fair and not abusive."

9 That is what I was thinking of.

10 MR BEARD: Yes, I am not demurring in relation to that at
11 all. The point I am making is that it is an overall
12 test of fairness, and in the context of an adversarial
13 process what you have to prove for the abuse is the
14 overall unfairness.

15 Obviously you adjudicate on these things, but you
16 cannot interpolate some presumption, as Ms Kreisberger
17 was doing in the legal test. Indeed, we can see this
18 further, how it all works, when we look at the
19 *Hydrocortisone* case. If we just -- we have seen this
20 a number of times, but if we go to paragraph 322(2)(ii)
21 which is {G/96/157}. So this is talking about
22 additional value. It gives the example of product
23 differentiation, some may be through innovation.

24 We have emphasised previously, if we go to the
25 bottom of the page, footnote 399 here, where it

1 specifically talks about those sorts of additional
2 values being potentially "objectively indefensible", is
3 the language used. But it is a subjective test that is
4 to be used there.

5 That subjectivity is important, because it helps us
6 understand how we can practically apply limb 2 and the
7 concept of economic value. Because as
8 Lord Justice Green was saying in *Phenytoin*, what we are
9 asking is what customers might be prepared to pay in
10 conditions of workable competition, and we know that in
11 conditions of workable competition you often get very
12 wide price dispersions, that is customers being prepared
13 to pay a range of prices.

14 What that first of all tells you is that the
15 Parker/Duckworth approach of just assuming that prices
16 must all revert to zero profit, and it is only when you
17 have objective differentiation you can charge more, that
18 is wrong, because that is not representing the position
19 in workable competition where you get price dispersion.

20 Of course, price dispersion is recognising that
21 customers have all sorts of different desires and
22 inclinations to pay for goods and services, depending on
23 their perceptions of product offering, quality, brand,
24 add-ons, benefits, reliability, colour, whatever else.

25 The point is this: where workable competition shows

1 a price spread, you cannot treat those prices as somehow
2 excessive. When you ask yourself in a case where
3 excessive pricing is alleged in a market: what is
4 a price that is reasonably related to economic value,
5 you need to take into account that spread.

6 So unless the Class Representative has shown that
7 there are good reasons not to do that, we say you cannot
8 just assume that you do not have any sort of price
9 dispersion or spread in the market. Of course, here we
10 have illustrations through the evidence of where you get
11 price dispersion actually in the adjacent market,
12 because here we are thinking about a narrow market
13 definition.

14 We saw that in, for instance, {C/383/20}. This was
15 from the pricing trends document, this was in relation
16 to superfast broadband. That was showing that vast
17 spread of prices you got in the superfast broadband
18 market in 2020. We saw it in {C/297/1}, which is that
19 Ofcom table we were looking at the other day, just the
20 various prices in relation to broadband.

21 Of course, we have seen other evidence for instance
22 about spread in relation to calls packages as well, and
23 what this is showing is different brands selling similar
24 products, fundamentally, at significantly different
25 prices in conditions of workable competition. Actually

1 we also see that in some of these situations BT is, in
2 certain of these charts, at the upper end of that
3 spread, but that fits with BT as a premium offering in
4 relation to the particular brand, a premium brand.

5 So the point here is: can the Class Representative
6 show that there should be no or a narrow price spread?
7 The answer plainly is it cannot.

8 We might think, you might think, some of these
9 decisions being made out in that market are objectively
10 irrational, as the Tribunal in *Hydrocortisone* put it,
11 but that is the reality of workable competition, and it
12 does not matter that people see things differently.

13 The approach of the Class Representative really
14 defies real world experience, as we set out in
15 paragraphs 686 to 688 of our submissions.

16 I am going to come back to brand and gives evidence
17 in a moment. The important thing is to situate this.
18 When we are asking: has the Class Representative shown
19 that prices are unfair in being unrelated to economic
20 value, we need to have recognition of that subjectivity
21 in a world where alternatives do exist.

22 So going back to the question that Mr Ridyard posed
23 right at the outset of these proceedings in opening: do
24 you do that? Well, in the case of the use of
25 a cost-plus benchmark, the appropriate way is to use

1 cost allocations and margins that permit that spread of
2 prices to emerge in conditions of workable competition.

3 In other words, the recognition of subjective
4 economic value through limb 2 can be taken into account
5 by ensuring you use benchmarks that allow for the
6 variety of outcomes you see in workable competition.

7 THE CHAIRMAN: As part of the limb 1 exercise.

8 MR BEARD: No, this is effectively treating the test as
9 a whole and using limb 2 to inform how you look at it in
10 the round. So it is not doing away with limb 2, the
11 question of whether a price is above the cost-plus
12 benchmark identified at limb 1 will always be
13 an important question, but the way that you can sensibly
14 bring to bear the economic value subjective
15 considerations in limb 2 is essentially to think about
16 the benchmarks being higher for costs and margin,
17 because in doing that what you are implicitly doing is
18 affording the market that spread of prices.

19 THE CHAIRMAN: Let me just be clear about this from
20 an analytical point of view, just in terms of how one
21 approaches it. This is -- limb 2 arises obviously only
22 if the limb 1 test has been passed.

23 MR BEARD: Yes.

24 THE CHAIRMAN: So you have got to a stage where you have
25 found that the price is excessive on the basis of --

1 significantly and persistently excessive by reference to
2 the benchmark which has been found there. Then you move
3 into limb 2, and I follow -- I follow the point about
4 reasonable relation to value at that stage, and there
5 you say, well, what is the value, and you say, well, the
6 value can be subjective, it does not have to be
7 objectively ... I follow that bit.

8 But where this price dispersion bit fits in, in the
9 context of where, for example, here, Dr Jenkins in her
10 analysis on limb 1 to a certain extent has brought in
11 that factor because she says you have to do a range. So
12 how does it come back?

13 MR BEARD: In a way, the way to look at it is -- if you are
14 looking at it through the perspective of what is it that
15 a claimant has to prove, one way of looking at it is to
16 say, well, if you try and take more austere benchmarks,
17 then in those circumstances you will need particularly
18 clear evidence that there is no reason why there should
19 be a broader spread through limb 2.

20 Another way of looking at the test in the round,
21 taking into account limb 1 and limb 2, is to say, well,
22 we can capture the sense of economic value that we are
23 wanting to look at in limb 2 by essentially ensuring
24 that those benchmarks we use in limb 1 are higher. In
25 other words, we take a more liberal approach to those

1 benchmarks because in doing so what we are doing is
2 capturing more of that overall spread. If you do that,
3 then it may be easier for a class representative or
4 a claimant to come along and say, well, there is no good
5 evidence that there is more on top of that through
6 limb 2. You do not exclude it, but it may be easier for
7 them to say that than if you have taken the approach of
8 adopting the broader benchmarks at limb 1.

9 MR RIDYARD: What does this have to do with value, as such?

10 I can understand your point about the price dispersion,
11 and -- but is that not more about showing the messiness
12 of workable competition and what workable competition
13 means, so would that not push you towards putting
14 this -- I mean, you have taken us to these various
15 benchmarks or comparators showing price dispersion,
16 showing how price dispersion is normal and a normal
17 feature, even if it is hard to explain, but it exists in
18 workably competitive markets, does that not push you
19 towards factoring this into the limb 1 assessment of
20 whether price is significantly above the workably
21 competitive benchmark rather than a notion of value?

22 MR BEARD: Let us take it in stages. The reason why you --
23 one of the reasons why you might think about
24 the generation of price dispersion is because the
25 subjective perspective of consumers vary, and therefore

1 for instance at the top of the price dispersion, even in
2 relation to very similar products, you might expect to
3 have those businesses with brand values where you think,
4 well, actually in those circumstances I am willing to
5 pay more. They tap into something that the consumers
6 like through their marketing or whatever else. So you
7 can see that that price dispersion is to some extent the
8 flipside of the subjective choices that are being made
9 by customers.

10 We say that is the right way of looking at workable
11 competition for the purposes of limb 1, and that has
12 been clear throughout. The point I am making is that if
13 by accepting that broad spread of workable competition
14 and setting the parameters at limb 1, we have to
15 recognise you cannot sort of double-count those factors
16 when it comes to limb 2.

17 Going back to the point that you raised, sir, about
18 significant and persistent, the problem with significant
19 and persistent is what you are doing is you are taking
20 an austere restrictive threshold, which does not
21 actually reflect workable competition, and then what you
22 are trying to do is attach value to these subjective
23 preferences, and what we are saying is that is not
24 a sensible workable way of dealing with these things.

25 This Tribunal does not sit as the council on the

1 subjective value of particular preferences, or, if it
2 does, it goes back to the problem that you identified at
3 the outset: how on earth do you actually do that?

4 So what we are trying to do with limb 2 is actually
5 explain how those factors can be taken into account
6 practically by the Tribunal in the way that it
7 approaches these things. We are not cutting across the
8 analysis that Lord Justice Green puts in place at all,
9 but we are recognising that if you set the parameters
10 for the costs benchmark, and the margin at the upper
11 end, so if you were to take the 90th percentile margin,
12 what you may well be capturing are people who are then
13 effectively attracting people by marketing, or whatever
14 else, who are therefore showing that there is real
15 subjective value there for them.

16 We recognise that you cannot then double-count that
17 back into limb 2, so what I am explaining is how the
18 concepts of workable competition do fit with limb 2. We
19 are not saying it is impossible that there are further
20 additional changes that you can give with limb 2, we do
21 not need to worry about that here, because we say that
22 recognising the existence of economic value means you
23 should confirm the approach that is being adopted by
24 Dr Jenkins in relation to the parameters in limb 1. If
25 you do that, you are capturing a substantial sense of

1 the economic value, and you do not then have to
2 adjudicate on trying to put the specific value on brand,
3 gives or anything like that, when it is a subjective
4 assessment, not an objective one.

5 THE CHAIRMAN: If, on that analysis, nonetheless the
6 Class Representative has shown that the price is
7 excessive, for example because a different view is taken
8 about attribution of common costs or something like
9 that, nothing to do with Dr Jenkins' approach on rate of
10 return and the 90th percentile, which is what you are
11 talking about. But if, contrary to your submissions,
12 nonetheless the limb 1 test is made out, even using the
13 90th percentile or whatever, then by definition there
14 are less things floating around for consideration in
15 limb 2, because it must follow from --

16 MR BEARD: (Inaudible - overspeaking)

17 THE CHAIRMAN: Of course, but that is part of --

18 MR BEARD: That is what I am saying.

19 THE CHAIRMAN: -- your view, which seems to be logical, and
20 I think is what Lord Justice Green is saying, that you
21 cannot double-count, from either party.

22 MR BEARD: Exactly. But the point I am making is if you
23 take the more austere view, you are missing out on --
24 because by taking an austere benchmark what you are
25 missing out on is the spread within workable

1 competition. You are effectively artificially
2 suggesting that all of the prices above that threshold
3 are excessive. We say that is the wrong approach, and
4 part of the reason that is the wrong approach is what
5 you are missing in that is the economic value that
6 generates that price spread, effectively.

7 THE CHAIRMAN: Yes. Thank you, that is helpful.

8 MR RIDYARD: Just to take us to the -- to check this
9 discussion against the information you gave us overnight
10 about the recovery of common --

11 MR BEARD: Yes.

12 MR RIDYARD: Recovery of common costs. In those numbers,
13 broadly speaking, what it is showing is that on
14 Dr Jenkins' view about what is a reasonable price, in
15 one year around 60% of the common costs are recovered
16 over the SFV customers, and they comprise just under 30%
17 of the number of customers. So it is almost like a 2 to
18 1 ratio of those two percentages, and that seems to be
19 more or less constant throughout.

20 So what you are saying is you think that that --
21 obviously you have to be saying you think that skewness
22 in the way in which common costs are recovered is
23 reasonable and it falls within the normal variation
24 and --

25 MR BEARD: This is just -- this is the manifestation of

1 flexibility in relation to recovery of common costs,
2 that is what ... If you did not have flexibility, you
3 would have a perfect -- you would have a perfect ratio
4 if you were doing a FAC customer-driven approach, which
5 would be numbers of customers equate to allocation of
6 costs, that would effectively just be FAC customer, and
7 we are saying that is wrong.

8 You could do it by revenue at that point and look at
9 the revenue, difference of the revenues of the
10 customers, and so on, but all you are doing there is
11 saying, well, there is no flexibility, we use
12 a particular benchmark.

13 That is precisely what is wrong. It is what Ofcom
14 says, and other regulators, and the literature says is
15 wrong about using FAC here, because that is not the way
16 the world works. So, yes, it is higher.

17 MR RIDYARD: I understand what you are saying there,
18 clearly. It is well trodden ground.

19 But then just to get to the kind of -- the bones of
20 this, the question is why should we be thinking that
21 that ratio, that amount of flexibility is reasonable,
22 and at what point would we start to say -- if this was
23 reasonable, at what point would we start to say that was
24 not reasonable?

25 So I guess my question is: is there some benchmark

1 that we can go to, to say, oh, well, that is reasonable
2 because it is just what happens in workable competition.
3 You took us -- again, you took us to those three bits of
4 evidence about price dispersion. None of them was --
5 I do not know that any of them was really central to the
6 evidence that Dr Jenkins gave. If it was, it was --
7 I do not think it was central to the evidence she gave,
8 so --

9 MR BEARD: What Dr Jenkins gave evidence on, and
10 consistently, was the need to have reasonable
11 flexibility. In answer to your question: is there
12 an absolute parameter as to what constitutes reasonable
13 flexibility? The answer is no, that does not exist.
14 The best way that you can attempt to look at that is by
15 looking at cost metrics such as SAC combi that do afford
16 you a degree of reasonable flexibility and are testing
17 how that flexibility works in relation to these issues.

18 If, in those circumstances, you are recovering
19 common costs from SFV by customer proportionately more
20 than by broadband, that is just the sort of thing you
21 will see in all sorts of businesses, in telecoms,
22 non-telecoms, all sorts of other situations, but it is
23 the very reason you have the flexible test.

24 She then carries out other cross-checks, you have
25 DSAC and the FAC customer and so on. But what you are

1 doing is you are asking yourself: in relation to this
2 ex post competition prohibition, has the
3 Class Representative shown that the sorts of outcome
4 that we have is so far unrelated to the economic value
5 that we are talking about that you essentially can
6 condemn this and penalise it in these circumstances?

7 That is where we say you have to effectively be
8 cautious. But it is also why, in so many of these
9 cases, you see regulators saying: we will take a number
10 of cost measures and look at them and then we will think
11 about how far above those cost measures it is, and
12 of course in most of these cases the headroom is
13 absolutely enormous that we are dealing with.

14 MR RIDYARD: In the recent abuse cases, the pharma cases,
15 yes.

16 MR BEARD: Yes.

17 MR RIDYARD: But it is just interesting that when you --
18 what one is looking for is a way of making this
19 judgment, and you took us to these illustrations of
20 price dispersion elsewhere as your benchmark, if you
21 like, that you wanted to put --

22 MR BEARD: I am not going to repeat what Dr Jenkins -- she
23 has obviously come forward with the analytical approach.
24 What I am trying to do is, for the Tribunal, illustrate
25 why it is that it makes sense in simple terms, by

1 reference to workable competition, of thinking in terms
2 of these benchmarks being taken on a non-restrictive
3 basis when you are talking about an ex post competition
4 enforcement in relation to reasonableness. I do go back
5 to the reasonableness of the connection. As soon as you
6 are in the territory of assessing reasonableness,
7 I imagine that no one will ever be able to say that
8 there is some point of flexibility that you must
9 identify. It is going to be a matter of degree.

10 But we say here, the question is: has the
11 Class Representative shown that that is wrong? The only
12 way they have done it is by reference to the 2009 RFS
13 which, since July last year, has become a sort of
14 biblical text of eternal truth.

15 MR RIDYARD: Thank you.

16 MR BEARD: So I emphasised I think not only how you should
17 look at these issues at limb 1 but actually come up with
18 a workable way of dealing with it here. Mr Parker's
19 approach was obviously to say in a workably competitive
20 market our economic profits will go to zero, and we say,
21 look, this is just not a real world approach, and the
22 points I have been making about spread are illustrative
23 of why that is wrong.

24 He also had his objective uniqueness test. In other
25 words, it is only if some difference is objectively

1 unique that somehow you could attribute economic value
2 to it. You have that in our submissions at
3 paragraphs 681 and 682 {A/16/168}.

4 This is just plainly wrong. The *Hydrocortisone* case
5 makes that clear, it is not about objective difference.
6 He recognised the test was one of his own creation, it
7 is not supported by academic literature, it is not
8 supported by the case law, and what we are really
9 thinking about here is: do buyers have any choices and
10 is the seller offering some element of subjective value?
11 Because if they are doing that, then that has to be
12 taken into account, and this is not falling into what is
13 called a willingness to pay fallacy at all.

14 We accept that it is not simply a matter of pointing
15 to the fact that a price has been paid as saying that it
16 is fair, but what we do say is that in order for the
17 Class Representative to say that the price is unfair,
18 they have to be saying, effectively, that in the
19 conditions of workable competition, consumers would not
20 have the sort of subjective preferences that can create
21 the price dispersion which would be represented by their
22 subjective appraisal of economic value, at the very
23 least in relation to limb 2.

24 MR RIDYARD: Where do mistakes or just consumer

25 irrationality or whatever you want to call it fit into

1 all of this? Suppose that I am an SPC and I -- if
2 I looked at the numbers and paid enough attention to it,
3 I could easily save £20 a month or whatever, some amount
4 per year, by consolidating my two demands into a bundle
5 but I just have not done it yet, and it seems to be
6 quite plausible, there are a number of people in that
7 position.

8 Is that -- is that saying that I value these two
9 individual products ... I just have not thought about
10 it, that is why I made the mistake, so where does that
11 fit into the analysis?

12 MR BEARD: I think you have to be cautious about calling
13 that a mistake, have you not, because there are lots of
14 reasons why people do not switch: they do not want to
15 engage, they want to spend their time thinking about
16 other things, they are perfectly happy with what they
17 have, so part of the subjective value can just be in
18 relation to reliability and not needing to do anything.
19 So I think it is dangerous to think of these things as
20 mistakes.

21 We were having this discussion amongst the team
22 a while ago, and everyone comes up with an example where
23 they think, well, actually I have stayed on price plans
24 or done things where obviously I could have benefited,
25 but I did not actually care, I preferred the stability,

1 or I had many other things I could spend my time doing.

2 I think it is very dangerous to immediately see
3 these things as mistakes. You are actually lapsing into
4 the critique of everyone should be an Econ at that
5 point, or in danger of doing so.

6 MR RIDYARD: I do not think I was doing that! I thought
7 I was trying to be more sort of appreciative of the
8 whole behavioural economics insight, saying for whatever
9 reason people -- the whole point about nudge and the
10 behavioural economics is how can you do public policy
11 things to try and help people help themselves to make
12 better decisions. So I do not really call their current
13 choices a mistake or however you characterise them. The
14 fact is they could do better for themselves and they do
15 not. You are saying -- you are trying to characterise
16 that as that is -- that is a value, because the fact
17 they have not done what they should do shows they value
18 what they are doing now.

19 MR BEARD: No, sorry, I was only being facetious. Obviously
20 I appreciate the point. The point I was just making is
21 it is dangerous to think of these things as mistakes
22 because there can be a whole range of other criteria
23 that means people do not move.

24 MR RIDYARD: What if they are mistakes?

25 MR BEARD: If they are mistakes, it is entirely possible

1 that in those circumstances you say, well, there are
2 public policy tools that we can use. Indeed, there is
3 a whole range of public policy tools we see in financial
4 services, we see in telecoms, water, all sorts of
5 things. We see the government saying, well, we are
6 going to go further, we are going to actively nudge
7 people. But does that mean markets are operating
8 anti-competitively?

9 I think workable competition has to accommodate the
10 fact that we are imperfect consumers. I know
11 John Vickers, a paper cited by Dr Jenkins, actually has
12 a paper on competition for imperfect consumers, because
13 that is what we all are, and in those circumstances you
14 will have people that attach positive brand value, that
15 attach positive value to reliability, that attach
16 positive value to stability. You may also have people
17 that just do not think about these things but may attach
18 value to not thinking about these things. You may also
19 have the ones that just do not think about it at all,
20 and you say, well, actually we would like markets to
21 work more perfectly and therefore we introduce other
22 regulatory tools.

23 MR RIDYARD: So is that not saying that the people who, in
24 my crude terminology, are just making mistakes and
25 should do better but are not, you are saying that is --

1 it is hard to characterise that as them valuing what
2 they do now, but you are having -- my question really is
3 do those fall into -- what category do they fall into
4 when we are trying to look at the limb 2 test?

5 MR BEARD: I am not trying to put them in a category
6 because --

7 MR RIDYARD: Sorry to interrupt. We have to address them,
8 do we not? You cannot keep avoiding it because -- I am
9 not saying this is a killer point either way for one
10 side or the other, but it is something that has to be
11 addressed and grasped.

12 MR BEARD: I do accept that it has to be grasped, the
13 question is does it have to be grasped within these
14 parameters of this test, I think is one of the key
15 things.

16 Because of course what we have actually seen in this
17 case is Ofcom as a regulator deciding that it will
18 effectively carry out some sort of nudge intervention,
19 but you see that in a way in relation to the SPC
20 customers after the provisional findings, they decided
21 they are just testing nudge intervention using different
22 tools entirely.

23 I think what is dangerous is without suggesting that
24 these customers do not exist, because obviously they do,
25 I am not remotely disagreeing, and I obviously recognise

1 that imperfections in the way that people deal come in
2 many forms, as compared to an economically rational
3 outcome. But what we are asking is: what are the
4 conditions of workable competition in the market, and
5 I think there is a danger there of placing too much
6 emphasis on the idea that it is people that are not
7 engaged that are effectively ensuring that there is
8 a sort of spread of prices, values differentiation in
9 the market. There is not a good indication that they
10 are so prevalent that in these circumstances those are
11 the people that are effectively driving this market or
12 would be driving this market here.

13 MR RIDYARD: But if they were, contrary to your belief, if
14 they were the people driving all these sort of
15 inexplicable outcomes to an Econ, that would -- would
16 that not still just fall in what is the normal
17 variation --

18 MR BEARD: I think it --

19 MR RIDYARD: I do not understand why you are being so
20 defensive about it.

21 MR BEARD: Sorry, I was not trying to be defensive about it,
22 because I do say these people just fall within the
23 parameters of normal competition.

24 What I was initially resisting was the idea that
25 because people make what you refer to as mistakes, that

1 we can actually characterise them as mistakes and not
2 actually value through other parameters, that was the
3 only point. In terms of these people, they exist in
4 every market, they are part of workable competition, and
5 all we are saying is that is the way the world works.
6 But in the context of a situation where effectively the
7 whole population works like this, you have to be very
8 cautious about suggesting that they are meaning that
9 workable competition in this market would be
10 systematically different.

11 So to that extent I am not demurring and not seeking
12 to be in any way defensive about the existence of these
13 people, because that is the way the world works, that is
14 the population, and, of course, actually in this case we
15 know that from the number -- the vast amount
16 of switching that occurred, in fact the idea that you do
17 not have people who are alive to these sorts of
18 concerns, and so on, is actually contradicted by the
19 material that we see.

20 Yes, we are not in denial about these people, we are
21 not defensive about the existence of these people. We
22 say they fit into the whole picture of workable
23 competition. When we are thinking about the interaction
24 of limb 1 and limb 2 and the overall fairness test, it
25 is the workable competition issue we are focused on

1 overall, and therefore we do not over-emphasise or are
2 not unduly concerned for these purposes about these
3 people.

4 If you go and ask BT and Ms Blight, the manager that
5 is specifically tasked with dealing with vulnerable
6 customers, BT is concerned about them specifically, we
7 saw that evidence, but that is a different issue.

8 So very briefly on gives. Ms Kreisberger in her
9 oral submissions and in her written submissions at 521
10 says gives are also -- that were provided here were also
11 available in bundles, so you cannot attribute any value
12 to them. It is just the wrong approach, it is just the
13 wrong approach. People can attach subjective value to
14 add-ons, variants in products, and so on, without it
15 necessarily meaning they have to be completely different
16 from add-ons or variants that other people provide as
17 well.

18 The theory that Mr Parker puts forward is that the
19 benefits of those gives will be competed away in the
20 market, but the point we make is that subjective values
21 can differ in relation to these things. So in theory,
22 over time, Mr Parker's approach might, using economic
23 modelling, be correct; in reality, subjective value is
24 attached to these things.

25 Indeed, you had extensive evidence from Ms Blight in

1 relation to these points, about the importance of
2 providing gives, because it provided value for money in
3 relation to the products that were being given, and
4 of course value for money is essentially a company
5 trying to say, well, what subjectively do people value
6 out there, what is it that they would like to have?

7 Just for your reference, we have in Annex 1 to our
8 closings a set of references and narrative that talks
9 about each of the line rental price rises and talks
10 about the different gives and the different strategic
11 considerations taken into account. But it is worth
12 noting that Ms Blight there was thinking about all
13 of these issues, she was concerned about gives, she
14 constantly was thinking about value for money in this
15 context.

16 Yes, Ms Blight actually gave evidence in her witness
17 statement, she was not cross-examined on it, about her
18 using NPS scores in this context. What she says at
19 paragraph 45 in her evidence, which Ms Kreisberger was
20 ready to adopt, but actually what she says is:

21 "We were interested in the relative changes in NPS
22 scores to see whether or not we were doing well."

23 She did not ever say the absolute NPS scores were of
24 concern at all. That was not what she was -- that is
25 not what she says in her evidence, and obviously she was

1 not cross-examined on those points.

2 What she focused on were the particular gives, and
3 we have listed a number of them in our submissions.
4 Obviously we had onshoring of the customer call centres,
5 that is in our submissions at paragraphs 132 to 134, and
6 we heard a good deal of evidence about why those were of
7 appeal. The Right Plan, which is in our submissions at
8 128 to 131. We had the Care Level 2 and Fault Fix
9 Guarantee, that is in our submissions at 138 to 142.
10 That was explained in some detail by Ms Blight how it
11 was that different changes were made to that offering in
12 order to provide the sorts of guarantees that were
13 thought of as valuable to consumers. There is also
14 Call Protect, which is in our submissions at 135 to 137.
15 Those are particular gives that were emphasised.

16 We have dealt with the fallback position of the
17 Class Representative, which is Mr Parker's objective
18 uniqueness test, and we deal with that in our
19 submissions at 706 to 710. But as I say, all of these
20 are examples of evidence which show what BT was trying
21 to do was give value for money, was trying to tap into
22 what economic value customers attached to these
23 products, as any business would.

24 On that basic principle, BT is no different, but the
25 fact it is no different in having that ambition does not

1 mean there is no economic value there for customers.

2 The same is true of the brand value considerations.
3 Effectively, there is no brand value being attached to
4 the assessment by Mr Parker. Indeed, it is striking
5 that Mr Parker in his first report did not even refer to
6 the BT brand at all. It was put in a summary of the
7 evidence from Dr Hunt and Dr Jenkins in his fourth
8 report, but his responsive points do not mention brand
9 there, and it is really only subsequently that there has
10 been an engagement by him at all in relation to the idea
11 of the importance of brand.

12 The fact that there are multiple companies with
13 multiple brands out there does not diminish the value
14 and importance of the BT brand. Obviously what
15 Mr Parker sought to do was say, well, being brand issues
16 they do not really matter that much because of this NPS
17 data. We say that is just not an answer here.

18 He tried to rely on that material and suggest that
19 the NPS scores were more important, but, as I say, there
20 was very limited questioning of Ms Blight about NPS, and
21 not about the relative levels and how they were used, it
22 was only in relation to a particular letter that
23 mentioned NPS. There was no questioning in relation to
24 Mr Bunt who referred to how NPS scores were used,
25 because they were trying to, as he put it, find

1 improvements BT could make. But none of this suggested
2 that there was not any important brand value here.

3 As I say, what we are asking ourselves is in
4 circumstances where the Class Representative has to show
5 prices are unfair in the sense of they are not in
6 a reasonable relation, the Class Representative is
7 simply not in a position to say that there is no
8 material economic value here for the purposes of any
9 limb 2 assessment on a subjective basis.

10 We have actually got direct evidence that the VOCs
11 did particularly value the BT brand. That is in our
12 submissions at paragraphs 724 to 725, and in terms of
13 the bundle reference that is {A/16/729}.

14 There was a good deal of material that indicated
15 just how much they trusted the relevant brand. Indeed,
16 ironically, although it was not referred to, in relation
17 to VOCs, most of the NPS material did not single out
18 VOCs, as we identified. The one piece that did, the
19 VOCs actually attached a high NPS.

20 We do not place weight on that, just as we do not
21 place weight on the other NPS material, but it is
22 important to have a context there.

23 You also, of course, had the broader evidence that
24 Mr Hunt -- Dr Hunt provided on overall levels of
25 satisfaction using quite sophisticated surveys that he

1 put forward in his report, obviously in the context of
2 the discussion of the behavioural evidence, and we
3 summarise that in our submissions at 728 and 729, so
4 that is at {IR-A/16/180}.

5 So in those circumstances, there are a whole range
6 of pieces of evidence that actually have been positively
7 proffered by BT as to why there is subjective economic
8 value here and that the Class Representative cannot just
9 dismiss this, and the only way they can dismiss it is
10 either by making some sort of presumption or by using
11 Mr Parker's test which we say is wrong.

12 There was also of course a running suggestion that
13 BT's strategy was exploitative, and we say the evidence
14 that this Tribunal has seen does not show that BT was
15 engaged in a strategy to specifically exploit SFV
16 customers.

17 The overarching point is the one I made yesterday:
18 citation of documentary material is limited and partial,
19 and the conclusions that the Class Representative seeks
20 to draw from it are not justified.

21 Notably, as I emphasised yesterday, many of
22 the documents referred to which talked about maximising
23 revenue were concerned with voice as a whole, and that
24 is actually evidence that is contrary to the suggestion
25 that there is some kind of specific exploitation of SFV

1 customers. That is what the strategy was.

2 There were occasional parenthetical references.
3 Ms Kreisberger referred to a document where there was
4 a reference to maximising value, "including, eg, from
5 split purchase solus". But as I say, that is part of
6 the overall strategy to maximise value that we saw
7 evidenced in document after document in relation to
8 these matters.

9 BT -- it was suggested, or it is suggested in
10 writing that BT knew that its customers were
11 insufficiently price-sensitive to nullify its price
12 increases. That just is not the evidence that you see
13 from the relevant documentary material. I referred
14 yesterday to specific material referring to BT
15 identifying people as being price sensitive in switching
16 to the Post Office, and those of course are VOC
17 customers, and we know about the large amounts of SPC
18 switching that occurred, and we know in relation to that
19 a good deal more than we did, perhaps, at the start of
20 this trial, about the way in which the
21 Class Representative seeks to avoid dealing with these
22 sensitivities of SPCs, that very important cohort of
23 customers.

24 THE CHAIRMAN: Can I ask one question here, which you might
25 be coming to anyway, but dealing with what sort of

1 factors go into limb 2. One of the points you make in
2 your closing, quite apart from the subjective
3 attribution of value which you have covered very well,
4 is: anyway, they can switch. Now, Ms Kreisberger said
5 that is not something that is a limb 2 type factor,
6 because it is not all about reasonable relation to
7 value, it is a separate thing, and that does not
8 constitute a limb 2 factor, it comes in of course to the
9 analysis of market definition. But by the time you
10 get -- if we get to limb 2, market definition has been
11 defined on a narrow basis and it cannot come in again.
12 Now, what do you say about that?

13 MR BEARD: I do not think we are trying to deploy it as a
14 sort of limb 2 further economic value point in and of
15 itself. What we are saying is the possibility of
16 switching means that when people stay with you, you
17 cannot just assume they are staying with you because
18 they are trapped, you have to think about why it is they
19 are staying with you.

20 THE CHAIRMAN: Right.

21 MR BEARD: That is why it links to economic value. Because
22 if you think that people have economic value but they
23 can leave, because we see lots and lots of them
24 leaving -- sorry, when you are asking yourself whether
25 or not they attach any economic value to the product,

1 and you have evidence on things like gives and brand and
2 so on, and you have people that can leave, because lots
3 and lots of them were leaving, then it is reasonable to
4 say, well, look, actually there is good basis for
5 thinking that there is substantive economic value here,
6 or more particularly --

7 THE CHAIRMAN: For the ones who stay.

8 MR BEARD: Yes, because they could have switched.

9 Now, I entirely take the point Mr Ridyard makes,
10 that there will be some of them who just do not think
11 about these things, we take that point, but it is in
12 that context -- so it is not a separate factor, what it
13 is doing --

14 THE CHAIRMAN: It is not a sort of failure to mitigate
15 point --

16 MR BEARD: No, no, I was not suggesting that.

17 THE CHAIRMAN: No, that was not the suggestion, but it is
18 just so that I have the correct emphasis on the point
19 you are making.

20 You say it is still something that feeds into the
21 value analysis, because if people are able to switch,
22 and they do not, it suggests that there must be a reason
23 for them not switching, or something like that.

24 MR BEARD: Yes, that is it, and we recognise that there are
25 going to be some people who are just, you know, entirely

1 passive; there are going to be in all populations. But
2 when you have other evidence that is looking at why it
3 was that BT was generating these gives, creating value
4 for money, trying to resist churn, and so on, what you
5 then have to think about is: are those people
6 essentially attaching some economic value to the product
7 that they are receiving.

8 THE CHAIRMAN: Thank you.

9 MR RIDYARD: Just on what you were saying about motivation
10 and -- what kind of -- you said that you do not think
11 that the bad documents, as it were, here, are bad enough
12 to put your clients on, you know, the wrong side of the
13 line, so what kind of evidence would -- in another case
14 would persuade you that the intention was bad, and how
15 would that feed into the limb 2 assessment?

16 MR BEARD: I think it is very difficult to hypothesise, but
17 obviously a clear strategy that you were specifically
18 targeting some kind of sub-group that you thought could
19 not escape that was being evidenced over time, and was
20 put to the witnesses in those terms that are proffered,
21 that is going to be the absolute minimum in relation to
22 these things.

23 MR RIDYARD: So if you think of two scenarios. I have 100
24 customers. In the first scenario, 80 of them are
25 constantly on my case asking for a better price and

1 threatening to switch, so at some level I end up giving
2 something away to all of them, but the other 20 just
3 stay silent and I do not do anything, other than just
4 carry on charging them my regular price. So I end up
5 price-discriminating against the 20 and the other 80 get
6 a good deal.

7 In another scenario I look at my customers and say
8 I have these 100 customers, the 20 over there are a bit
9 dozy so I am going to set out to make sure I charge them
10 a high price, and all the others I am going to give
11 a discount to.

12 The observation, the equivalent --

13 MR BEARD: This is why I am not --

14 MR RIDYARD: -- one of them --

15 MR BEARD: -- to try and work out what considerations are to
16 be taken into account, because one has to recognise that
17 broadly speaking, apart from I think in relation to
18 predatory pricing, the legal tests in competition law
19 tend to avoid reliance on any sort of intent or
20 motivation, albeit that the case law recognises that
21 evidence of intent can be instructive in the way in
22 which particularly you understand and interpret the data
23 and dynamics of the market.

24 So actually what you do with intent in most
25 competition cases is not use it as a simple basis for

1 making a choice, but for interpreting the other material
2 you have, so I think that is the way it generally feeds
3 in. Here, the reason I do not seek to exclude that sort
4 of evidence is because I recognise we are in
5 an unfairness scenario, and for me to say, no, you
6 cannot look at motivation or intent in any way, would
7 obviously be wrong when you are considering unfairness
8 in the round, because we have said no particular
9 category of evidence can be completely excluded in these
10 circumstances.

11 But is it significant? We say no. But more
12 particularly, we just say that that evidence does not
13 exist here in relation to this category of SFV
14 customers. Yes, it is clear that BT wanted to maximise
15 its revenue, particularly across the declining voice
16 base and recalibrate it, and we had discussions about
17 calls and access and so on, but there is nothing wrong
18 with that, that is an orthodox strategy, and referring
19 to parenthetical documents does not cut across that.

20 The thrust of the evidence from Mr Bunt was: we
21 thought about setting our access prices across the
22 piece, we thought about setting our calls prices across
23 the piece, the piece being all voice including those in
24 bundles, and in those circumstances the idea that this
25 was being done as a specifically targeted act does not

1 work. Ms Kreisberger resorts to the, well, you are
2 monkeying with the increment, but we have explained why,
3 in the circumstances of this market, that increment
4 would be small, and you would want it to be small in
5 order to compete in broadband.

6 She relies on the fact that there was a sort of
7 working assumption, she says, that there would be at
8 least a £1 a year increase in the access price. We
9 heard evidence as to how that was tested and considered
10 from Mr Bunt and in the evidence that was given by
11 Ms Blight. We also see that in practice that is not
12 what happened.

13 The suggestion that BT knew its price increases had
14 a disproportionate impact on SFV customers, actually
15 Mr Bunt was very clear about how he considered that
16 these prices were being applied both to SFV customers
17 and to all other voice customers, including bundle
18 customers, and explained how these access prices were
19 the ones that you would be paying when you were on the
20 back book, and increases would feed through to you as a
21 bundle customer when you were on the back book, and
22 indeed if you stopped your contract and stopped being
23 a bundle customer at any time, those were the prices you
24 would pay.

25 So we saw both how the prices were designed, but

1 also had evidence in relation to them being implemented.

2 Greater weight was placed on some notes from
3 Mr Bunt's first week at BT, but he gave very clear
4 evidence about how all of these things were considered
5 by him and his team thereafter.

6 I do just want to pick up one point. There is an
7 allegation in the Class Representative's statement that
8 Mr Bunt accepted that BT was definitely acknowledging
9 that SFV price rises hit the digitally excluded hardest.
10 Now, I will not go through it, but if you read the
11 testimony of Mr Bunt in that reference, it is not a fair
12 reflection on Mr Bunt's evidence, and in fact digitally
13 excluded people were -- are not the same as the Class in
14 any event, and the evidence on that is clear.

15 I picked up already the extent to which BT
16 positively engaged, and indeed was praised by Ofcom for
17 its engagement with vulnerable customers. Yes,
18 of course there was the 2017 investigation. Yes,
19 of course there was negotiation in relation to
20 the commitments. That is all understood. But
21 nonetheless, BT did engage with its vulnerable customers
22 and indeed had products that were specifically geared up
23 for vulnerable customers and had teams geared up to deal
24 with them.

25 A final point I think on this is that BT had acted

1 with deliberate non-transparency. That is not fair, it
2 is not a fair accusation in relation to HPS where it was
3 advertised -- promoted to 4 million people across
4 two years, and to allege that BT knew that Ofcom had
5 rung the alarm bell in relation to these price increases
6 in 2014 in relation to SFV is surprising, because
7 of course what was said in 2014 was that Ofcom were
8 monitoring these issues a year after, and when it said
9 "these issues", it did not just talk about SFV services,
10 in fact it did not specifically talk about SFV services
11 at all, it talked about general price increases in
12 relation to fixed lines, and in relation to those
13 issues, of course, there had been the full consideration
14 in 2013 preceding that.

15 Yes, of course, by 2015 there were concerns being
16 expressed by Ofcom and BT was engaging with those, but
17 that does not tell you anything about the overall
18 excessiveness of these prices which this Tribunal is
19 dealing with.

20 Just finally on limb 2 on comparators, I will deal
21 very swiftly: we say there are good reasons why you can
22 consider competitor prices. We have dealt with this in
23 our submissions at 284 to 290 {A/16/74-75}. In essence,
24 what we have explained there, and then further at
25 paragraphs 395 to 410, and paragraphs 761 to 768, is why

1 the allegations of price leadership, which are
2 supposedly the allegations which mean you cannot look at
3 the competitor prices, are mistaken, and that in fact
4 focusing on line rental price increases alone is
5 a flawed way of carrying out this comparison given we
6 are talking of a focal product of calls and lines
7 together, and really the Class Representative does not
8 deal with the calls aspect where there is no good basis
9 for an allegation of any sort of leadership whatsoever.

10 But going beyond that, we obviously have other
11 comparators which indicate that there is no basis for
12 finding excessive prices. In our submissions at
13 paragraphs 769 to 773 we have Home Phone Saver, which is
14 compared against, that is {A/16/188}, and of course
15 business comparators are instructive here. Because,
16 of course, although we recognise that the contract
17 prices for business customers in relation to fixed lines
18 may be higher, they are not, therefore, suggesting that
19 somehow the prices for residential customers are too
20 high; to the contrary, as a relevant comparator which
21 I think the Class Representative accepts is
22 a competitive part of the market, they are actually very
23 instructive. We deal with that at 774 to 777.

24 The Class Representative does not seem to have any
25 good basis for suggesting why it is that a fixed line

1 for a different type of customer should be a completely
2 alien comparator for the prices that are charged in
3 relation to the home -- residential personal use
4 customers.

5 We do recognise that there is a difference here in
6 price, and we do recognise that the call plans will be
7 different, but nonetheless it is an instructive
8 comparator here, and we say the commitments price does
9 not provide any meaningful comparator here, but we do
10 add that Mr Duckworth's benchmark is actually one below
11 the Ofcom commitments price.

12 In relation to Ofcom itself, I have made one or two
13 observations. There is some suggestion our position has
14 shifted in relation to *Qualcomm*, it really has not. You
15 have the section in our submissions, paragraph 782
16 {A/16/189}. We do say that evaluative findings made by
17 Ofcom are not admissible, as I said in response to the
18 Chairman's question in opening, but whether or not they
19 are admissible is essentially a moot point here, because
20 for the reasons given in the *Qualcomm* judgment by the
21 Tribunal, no material weight can be placed on them in
22 any event.

23 What is and can be useful is some of the data that
24 was gathered by Ofcom, for instance some of the ARPU
25 data and so on. The one piece of data that is highly

1 So on to quantum and conclusions. On causation, we
2 have set out our position at paragraphs 927 to 931 of
3 our closing {A/16/223}. I am not going to repeat those
4 points.

5 On quantum itself, I think the Tribunal is probably
6 very well aware of this, but the majority of the claim
7 is actually made in relation to SPCs, 60% of it. Of the
8 total claim, over 40% is actually in relation to calls.
9 There is a 21% claim of the claim as inflation and
10 compound interest, which I will come back to.

11 Let me deal with a couple of issues on Class size.
12 First of all, business consumers -- business customers.
13 The arguments for excluding business customers we have
14 set out in our closing at paragraphs 856 to 872
15 {A/16/204}.

16 The reality is that the Class Representative just
17 does not have an answer on this point. This group
18 should not be in the Class and there cannot be any
19 possible unfairness in relation to them.

20 In closing submissions, Mr Spitz seemed to be
21 distinguishing between the use of the service and the
22 entitlement to it, but that is not a real distinction,
23 you are not entitled to a service where you do not
24 comply with the terms of use, and it does not help him
25 when we are talking about whether the prices charged to

1 these businesses were fair.

2 The same point applies to him saying that there were
3 termination remedies under the contract. That just does
4 not change the position. When we are looking at a
5 breach of statutory duty claim, which is what is being
6 brought, and a breach of the statutory duty claim
7 considering fairness, contract remedies are just not the
8 answer.

9 I think he went as far as to suggest that there was
10 no room under limb 2 to deal with these issues. I do
11 not really understand why that is the case. Going back
12 to the point of the test overall, the test overall, even
13 when you are applying a cost-plus methodology, is a test
14 of fairness. That is how it works.

15 THE CHAIRMAN: But if you adopt the sort of -- this is
16 really the same sort of point we were talking about
17 before the break, which is, yes, but if the notion of
18 fairness or unfairness is captured by, for example, no
19 reasonable relation to value, what has the position of
20 the business customers got to do with that question?

21 I can see that in a broad sense you might say, well,
22 if they had played ball to begin with, they would not
23 have been residential customers, they jolly well should
24 have gone and got a business contract, so what is so
25 unfair if they are deprived of compensation here? But

1 that is a very broad sort of fairness sort of point and
2 I can understand why you are making it, but does it have
3 any place in the limb 2 analysis of fairness?

4 MR BEARD: It certainly has a place in the overall analysis
5 of fairness, and we would say, insofar as limb 2 is
6 permitting you to take into account a range of factors,
7 which it does, then obviously this is an important
8 factor that has to be taken into account. We do not see
9 why there is any delimitation.

10 Of course it is right that what you are doing is
11 asking, in a cost-plus case, whether there is
12 a reasonable relationship between the price and the
13 economic value, but if you are not entitled to have that
14 economic value, then it is almost a sort of predicate
15 point in relation to the overall fairness.

16 In many cases this is not going to arise. This may
17 be an exceptional issue for the consideration in limb 2,
18 and it has certainly not been discussed in limb 2 issues
19 in any other cases, but of course in all those other
20 cases there was not any entitlement question or usage
21 question that arose under the relevant contractual
22 arrangements.

23 So you simply cannot delimit limb 2, as Mr Spitz
24 says. The concept of fairness admits of a range of
25 considerations. It is just correct that, when you are

1 considering the cost-plus approach to the assessment,
2 you specifically think about the issues of economic
3 value in relation to the cost-plus benchmark.

4 THE CHAIRMAN: Thank you.

5 MR BEARD: Again, the point was made that this is a Class
6 claim. Well, that simply does not matter at all. You
7 cannot rely on the sort of scale of the claimants and
8 the anonymity of them to avoid these sorts of issues,
9 and taking account of them plainly does not undermine
10 the Class action regime.

11 The final point was in relation to *Churchill Gowns*
12 where, with respect, we are dealing with a radically
13 different situation. Someone came forward with
14 a misrepresentation claim as a defence to an allegation
15 of exclusionary conduct that was anti-competitive. Here
16 we are dealing with a totally different situation, which
17 is whether you can assert that it is unfair -- in your
18 claim you are asserting that it is unfair in relation to
19 a relationship you were not entitled to. That is where
20 the unfairness lies. If you had had the proper
21 relationship, the business contract, you would have had
22 no claim.

23 So we say no good answer here, and the idea that you
24 must delimit limb 2 concepts of fairness is just outwith
25 the scope of the law as we see it.

1 I do not think I necessarily need to get into any of
2 the mechanics points, to estimate how these things would
3 be dealt with in distribution. In relation to estimates
4 of the share of business customers, we deal with this in
5 our submissions at 873 to 883. It is clear that the
6 survey material that Dr Jenkins relied on was robust
7 evidence, it shows an increase in the percentage of the
8 group being businesses over time.

9 Of course, that makes sense if business contracts
10 would be more expensive in general terms than personal
11 residential contracts, because of course you have people
12 switching away, but if business contracts would be more
13 expensive, then there might be a greater reluctance on
14 the part of business customers to switch. Obviously we
15 cannot test that, but you can see the logic of the
16 position.

17 So it is not as if the change in the percentages of
18 business customers that the Ofcom surveys are
19 identifying through 2016 to 2022 are somehow
20 implausible. We have set out the flaws in Mr Parker's
21 methodology. He effectively, through his mathematical
22 calculations, just ignores that increase, he ignores the
23 2022 data even though he specifically relies on it for
24 the purposes of calculating VAT registrations of
25 business customers. We set out why the BT internal

1 documents are just not reliable, and it is not
2 a sensible approach to say, well, I am taking some low
3 numbers that are unreliable and, in those circumstances,
4 I will average them with robust numbers and come out
5 with a rate. That is not a fair and sensible approach
6 to dealing with these things.

7 We explained how Mr Parker was wrong to say that
8 the surveys would be picking up occasional business
9 calls users; that was to misunderstand how that survey
10 was conducted and how the cohort of people surveyed had
11 been identified as businesses as such.

12 Pass-on, we deal with that at 882 to 883. This is
13 in fact -- this is an important issue, potentially, in
14 relation to business customers if they were to stay in.
15 We do not have any material from the
16 Class Representative which enables us to deal with it,
17 but we have picked it up in our submissions.

18 Just dealing briefly with the deceased customers
19 issues. There is a question on overall methodology, and
20 then there is a question on levels of personal
21 representation.

22 In relation to issue 1, which Mr Spitz did not pick
23 up but, to be fair, has picked up in his written
24 closing, our position is set out in this -- on this
25 issue in paragraphs 887 to 897 {A/16/212}.

1 The simple point is we say there must be a weighting
2 to reflect the duration of a person's presence in the
3 Class. There is a substantial cohort that come in and
4 out, and that substantial cohort is a lot younger than
5 the remainder of the cohort, and therefore treating that
6 younger group as being in the Class over a longer period
7 has a distortive effect on the calculations.

8 It is not a difficult exercise to deal with.
9 Mr Scott has done it, as he explained in the hot tub.

10 In relation to the personal representative issues,
11 our submissions on that start at paragraph 898
12 {A/16/215} in our written submissions. The position of
13 the Class Representative is there is a significant pool
14 of people who die with a will but for whom no grant of
15 representation is applied or awarded and is not needed.

16 To some extent, that proposition is just assuming
17 what he needs to persuade you of. Because although
18 there was not a focus on it in the hot tub, we do know
19 from the Law Commission material that about 50% of all
20 deaths do not go through probate at all, and we also
21 know from Mr Scott's tracing exercise that he identified
22 that around 40% did not, and those are very significant
23 percentages. The idea that in the face of those figures
24 you can make assumptions about the levels of
25 will-writing that take you to very, very high levels of

1 personal representation attribution is flawed.

2 The Class Representative just does not deal properly
3 with that contextual data. Both experts did look at the
4 surveys, but only one of the experts placed any weight
5 on that important contextual data, and that was
6 Mr Scott.

7 On the surveys themselves, I am not going to go over
8 their shortcomings. As we have said, they can only tell
9 you averages for the people who were surveyed in the age
10 brackets they report, so they are actually point
11 findings, each of them, and they are only point findings
12 of people who say they have made a will, and the actual
13 proportion may not be constant because they are
14 averages.

15 Indeed, that is why you see Mr Scott effectively
16 flattening things out as he does, because he is using
17 averages. Mr Scott's plateau at 83% at 75 is perfectly
18 consistent with the figures in the surveys, those
19 average figures, and in particular the 2005 study, which
20 he is said not to have taken into account in response in
21 his reports, actually gives a figure of 84%.

22 What you do not get from any of these surveys, as
23 I say, is Mr Punter's figure of 90%, and that is just
24 the percentage Mr Punter assumes have a personal
25 representative through a will. You then add on those

1 who are intestate, and this is how he gets to a position
2 where almost 95% of the Class would have a personal
3 representative at the age of 90.

4 That is why there is an important question of
5 reduction here. Mr Spitz focused on survey bias and
6 will invalidity, and on the latter we have one survey
7 which specifically identified an 8% figure. Mr Punter
8 relied on some language in that survey in the following
9 paragraph but chose to completely ignore that 8%. He is
10 not entitled to do so. But in any event, we deal with
11 those issues in our written submissions from
12 paragraph 915 onwards.

13 But I go back to the bigger point here. Mr Scott
14 has been very clear that his 20% reduction is not just
15 about one factor or another, it is a top-down overall
16 view taking into account all of the evidence, and that
17 includes the Law Commission and the tracing exercise
18 which I have referred to.

19 The Class Representative says that 20% is
20 unexplained and unevenced. (Pause)

21 I am sorry, 48% for the Law Commission, I apologise.

22 The Class Representative says it is unexplained and
23 unevenced, but that is not correct given the material
24 from the Law Commission and the tracing exercise which
25 gave results for a random sample of around 3,500

1 customers, and that gave a figure of just about 60%, so
2 only slightly higher than the Law Commission's figure.

3 That is why, for Mr Scott, coming out with the
4 figures that he does, the comparisons with the 52% on
5 the Law Commission, the 60% under tracing, the 73% of
6 deaths over 75, which he models to the 83% plateau,
7 adjusting it down by 20%, that is an appropriate way of
8 dealing with these things. As I say, in contrast,
9 Mr Punter drives himself to a position that more than
10 80% in the Class have a personal representative by 75,
11 and 95% by 90.

12 So in those circumstances, what we say is you can
13 see, in particular from the joint experts' statement
14 {E/51/20-21}, the figures 34.1 and 34.2, that the age
15 band within which the tracing exercise resulted in the
16 highest number of records of deaths was 85 to 90, which
17 is exactly when, under Mr Punter's assumptions, you
18 would be reaching this 95% peak. But we say if you are
19 coming out with rates that are so much higher than any
20 of those contextual data points, you do need to
21 undertake an adjustment, which is precisely what
22 Mr Scott has done.

23 Then briefly on the calculation of the overcharge.
24 The main issue here is one which I touched on in
25 brief -- briefly, I think, in relation to limb 2,

1 although I may have skipped over it. But the problem
2 with the whole approach that the Class Representative
3 adopts here is that the counterfactual price that is
4 used in relation to the calculation resorts to their
5 austere cost-plus benchmark.

6 In other words, because of the way they try to say,
7 oh, you should take these alternative issues, limb 2
8 issues, workable competition issues into account in the
9 significant and persistent element, they say once you
10 get to quantum you have said that that price is
11 significantly and persistently above -- you have said
12 the price is significantly and persistently above the
13 cost benchmark, well, wipe out all of that consideration
14 and we will run quantum on the cost benchmark.

15 It is another reason why the approach being adopted
16 to cost benchmarks is plainly wrong, and nothing,
17 I should stress, in *Albion Water* assists here, because
18 in *Albion Water* you had a regulatory assessment of
19 various cost measures -- a multiplicity of cost
20 measures, I should say. It was then further assessed by
21 the Tribunal, and then there was an agreed price between
22 the parties in relation to these issues, and that was
23 what was found to be the relevant counterfactual price.
24 It is not a good basis for what the Tribunal has dealt
25 with -- not a good basis -- how the Tribunal has dealt

1 with things there is not a good basis for the
2 Class Representative's approach here, and you will see
3 more detail on that in paragraphs 848 to 855 of our
4 closings, {A/16/202}.

5 As I say, in contrast the cost benchmarks put
6 forward by Dr Jenkins actually take -- can be seen as
7 taking those sorts of factors into account.

8 That takes me to inflation and interest. The
9 inflation component that has been put forward -- to be
10 fair to Mr Spitz, he talked about only having building
11 blocks for his approach. There is no authority for it.
12 It would mean effectively in almost all damages cases,
13 as far as we can see, there would be no continuous
14 miscalculation of loss, because you should have been
15 baking in some kind of spending power parity principle.

16 We would just emphasise that apart from it having no
17 proper legal basis, and we set out our position from
18 paragraph 932 onward {A/16/224}, it is not actually
19 supported by the *Merricks Remittal* judgment.

20 If we call up paragraph 92 {G/79/25}. At
21 paragraph 92 there was a criticism of the evidence that
22 had been put forward in support of borrowings rates and
23 savings rates for the Class, and you will see five lines
24 from the bottom:

25 "Both the above approaches assume the answer to this

1 question and fail to take into account the need to show
2 as a matter of probability that the money would not have
3 been used simply for a little extra expenditure.

4 Indeed, if either approach was valid it would mean most
5 claims for monetary loss by individuals in the courts
6 would result in an award of compound interest."

7 What is being said there is you have not proved the
8 extent of borrowing or saving. Why? Because the money
9 might just have been spent. But of course there is no
10 suggestion in *Merricks* that you should then go on and
11 look at, in relation to a notional money that has then
12 been spent, some kind of spending parity recalculation
13 which is effectively what the inflation measure in this
14 case would do. Obviously it does not deal with that
15 issue, it was not put forward, but I just note that in
16 relation to these issues.

17 On the interest point itself, we picked up our
18 response to the Tribunal's question, and we say on the
19 facts of this case simple interest on the whole amount
20 of Bank of England plus 2%, as I say, simple interest
21 would be appropriate.

22 There are a couple of points of error in the
23 approach that is described in the closing submissions of
24 the Class Representative where there seems to be
25 a suggestion that is not our case. To be clear, that is

1 our case, simple interest.

2 We of course acknowledge that Dr Jenkins accepted
3 this is generally a compound world, but we also
4 emphasised the requirements of *Sempre Metals*, which we
5 dealt with in particular at paragraphs 941 and 942 of
6 our closing submissions {A/16/226}, and the key point
7 here is that apart from age, there are no good
8 modifications from the position of the general
9 population in relation to the compound interest claim
10 here.

11 The approach of Mr Parker fails to take account of
12 specific characteristics of the Class sufficiently so as
13 to show how it is distinct from the general population,
14 and it is based on a series of theoretical assumptions
15 that do not meet the *Sempre Metals* criteria.

16 Mr Spitz sought to rely on the *Trucks* case at one
17 point to make good his point that the Tribunal has no
18 difficulty in favouring a compound interest calculation
19 over a simple one. Mr Ridyard will recall there was
20 a vast amount of detailed evidence in relation to how it
21 was that one would calculate compound interest in that
22 case. Very different from the present case.

23 As to other authorities, *Merrick's Remittal* itself at
24 paragraph 80 shows the importance of the application of
25 the *Sempre Metals* criteria, also at paragraph 84, so

1 that is {G/79/21-22}, and *McLaren*, a further case which
2 we refer to at paragraph 945 of our submissions, is also
3 useful. There, compound interest was certified in
4 respect of a sub-Class of purchasers for whom they could
5 evidence that they had purchased specific vehicles on
6 finance. That was the sort of evidence that was
7 required, not simply issues of marginal propensity to
8 consume that we deal with in our submissions.

9 So with that, unless the Tribunal has questions,
10 I sum up.

11 This claim was essentially brought on a false
12 premise about the level of switching, it has continued
13 to deny the significance of that, the role of SPCs, the
14 interaction between calls and access, and indeed the
15 nature of calls pricing generally.

16 It has not grappled with the fundamental changes in
17 the sector since 2009, and at each stage in the analysis
18 it suffers from fundamental flaws on market definition,
19 on the use of the 2009 RFS which was reached for by the
20 Class Representative last July, and now has become the
21 point of continuing apparent truth in relation to cost
22 allocations.

23 It depends on an unrealistically restrictive
24 approach on margins, and a denial of brand and
25 subjective economic value as having any significance.

1 It also relies on significant legal misconstructions
2 both on the substance of the law and on the treatment of
3 evidence, as well as restrictive use of economic
4 principles and applying austere economic theory which is
5 unreal, and the impact of which would not be limited to
6 just this case, contrary to Ms Kreisberger's
7 submissions. As a precedent, adopting those sorts of
8 principles, or anything like them, would not only be
9 wrong but of much broader damaging consequence.

10 In the circumstances, this claim should be rejected.

11 Thank you.

12 THE CHAIRMAN: Thank you very much indeed. Just one moment,
13 please. (Pause)

14 A very narrow question, which is: there is this
15 alternative case based on line rental only. Is there
16 anything you want to say about that, specifically?

17 MR BEARD: We do not understand how it works, essentially.

18 In circumstances where the focal product for the market
19 definition is both, we do not understand then what is
20 being said. Presumably what is being said is although
21 you have the market definition covering both, you can
22 look at an overcharge only in relation to line rental.
23 We have made our case very clearly in relation to why
24 market definition is wrong, but of course there is
25 an agreement that the relevant pricing proxy here is

1 ARPU, so we do not understand in what circumstances one
2 can then talk about there being an overcharge in
3 relation to only a component of that price, without
4 taking into account all of the calls aspects with which
5 we have been grappling as well.

6 In those circumstances, we do not understand how the
7 Class Representative gets through to some kind of
8 autonomous notionally lesser claim in relation to these
9 issues, and to be fair to Ms Kreisberger, she at no
10 point during her submissions has spelled out that chain
11 of clear reasoning as to how you get there in relation
12 to both market definition, limb 1 and indeed limb 2.

13 Because at each stage you are going to have real
14 problems arising, disentangling the factors that apply
15 in relation to access only, when all of the factors that
16 we have been dealing with in limb 1 and in limb 2 apply
17 in relation to both components of the focal product to
18 which we have been referring.

19 THE CHAIRMAN: Thank you very much. A very succinct answer.

20 Just one second. (Pause).

21 Thank you, Mr Beard.

22 MR BEARD: I am grateful.

23 Reply submissions by MS KREISBERGER

24 THE CHAIRMAN: Yes.

25 MS KREISBERGER: Thank you, sir.

1 Sir, I have a number of points that focus on market
2 definition and limb 1 principally.

3 Beginning with market definition, I am going to just
4 say a few words, if I may, about the SSNIP test.

5 Mr Beard described the SSNIP test as analysing the
6 rate and scale of increases in price. That was
7 {Day26/97:1} of the transcript. He was talking about
8 ARPU and I will come on to that, but I just want to show
9 you that he got the test itself wrong.

10 If we turn up the CMA Guidelines on Market
11 Definition at {G/137/6}, paragraph 2.7:

12 "In essence the test seeks to establish the smallest
13 product group... such that a hypothetical monopolist
14 controlling that product group... could profitably
15 sustain 'supra competitive' prices, ie prices that are
16 at least a small but significant amount above
17 competitive levels."

18 So the test is whether the hypothetical monopolist
19 could charge prices which are set at a small increment
20 above the competitive level. The test is not whether
21 you can observe, or identify observed increases from
22 prevailing prices, although they might be informative,
23 but the test you are applying is an increment above the
24 competitive level.

25 That is why, and I will come back to this briefly,

1 that is why Mr Parker's SPC price differential dataset
2 is so informative, because it compares the prices paid
3 by SPCs against the competitive benchmark of dual play
4 prices for the same products, which, if I might adopt
5 Mr Ridyard's language, are "a nice fixed point" in the
6 case "to latch on to".

7 Of course, when one performs that exercise as
8 Mr Parker did, it shows large price differentials which
9 are sustained over a very long period of time.

10 I will come back to a little of the detail, if
11 I may, but staying with some high level points first.
12 Mr Beard said that Mr Parker's case was that switching
13 is entirely unrelated to price, which he described as a
14 "remarkable suggestion". Mr Ridyard rightly picked him
15 up on that.

16 I just want to show you how Mr Parker put his
17 approach, this was in the hot tub {Day9/129:16}.

18 Mr Parker said:

19 "But it seems to me the point of a switching
20 analysis in a hypothetical monopolist test is to
21 understand whether it leads to a competitive constraint.
22 It is not an end in itself. For me I think the
23 discussion about secular trend, I think we both agreed
24 there is one. It is a question of how big. To me the
25 relevant question is: was it enough to prevent BT from

1 raising its prices ...

2 "that, to me is the most important lens that you
3 need to apply to the level of switching.

4 So I am not disputing that there was a level of
5 switching. I just do not think it was enough to
6 constrain BT's pricing."

7 THE CHAIRMAN: Yes.

8 MS KREISBERGER: Another criticism from Mr Beard was that
9 the Class Representative uses backwards reasoning of the
10 sort deprecated in *Hydrocortisone*. That is at
11 {G/96/70}, paragraph 153 of the judgment, and I think
12 you have seen that.

13 Just so you have it there in front of you, this was
14 the criticism which the Tribunal levelled against
15 backwards reasoning. The type of backwards reasoning
16 described here is not the reasoning of the
17 Class Representative. The Tribunal here was warning
18 against assuming dominance on the basis of a price shown
19 to be abusive. So you show the price to be abusive and
20 then you work backwards and make an assumption of
21 dominance and then, based on that, you then make
22 an assumption of a narrow market.

23 That is not what Mr Parker has done. He does not
24 make any assumptions about market definition or
25 dominance based on a finding of excessive prices. On

1 the contrary, he does something very different in fact.
2 He applies a range of SSNIP tests at the market
3 definition stage based on different price datasets. He
4 identifies SFV prices which exceed competitive levels by
5 more than the SSNIP threshold, 5-10%, and it is on the
6 basis of those tests that he identifies SFV markets.

7 His evidence also then takes account of the
8 assessment under limb 1, because the limb 1 data also
9 establishes that there is a SSNIP above the competitive
10 level. So he does all of it. He does not just reason
11 backwards making assumptions. The limb 1 data provides
12 a comparison of overall SFV revenue per user against
13 cost-plus, which is the competitive benchmark. So it
14 would be very odd for him not to take account of that
15 evidence of SSNIP above the competitive level.

16 Just for your note, that is at Parker 5,
17 paragraph 3.2.6 {E/5.1/17}, and that is where he takes
18 account of the increment in the limb 1 data. He does
19 not reverse engineer, but he does take account of ARPU
20 dataset.

21 BT's argument here is somewhat paradoxical, because
22 on the one hand BT complains about this
23 reverse-engineering from limb 1, but he does not do
24 that. On the other hand, it complains that Mr Parker
25 made a mistake by not relying on ARPU for his SSNIP

1 tests. But that is the limb 1 dataset and he does rely
2 on it. So they are conflicting charges but neither of
3 them are legitimate criticisms.

4 What Mr Parker does not do is he does not adopt the
5 approach to ARPU which BT urges on you, which is to look
6 at the rate and scale of the increase in ARPU, but that
7 would be the wrong approach, because I have shown you
8 the question is: does the price exceed the competitive
9 level by more than 5-10%? He looks at ARPU, he looks at
10 the competitive benchmark, and he sees a much bigger
11 differential --

12 THE CHAIRMAN: That is in limb 1.

13 MS KREISBERGER: Yes, that is using the limb 1 data, but it
14 shows you the gulf is bigger --

15 THE CHAIRMAN: I think the point that was being made was in
16 relation to the price differential that he uses for the
17 purpose of market definition, properly so-called, which
18 just looks at line rental.

19 MS KREISBERGER: I am going to come back to that. Actually,
20 the accusation was: you have not looked at ARPU. Well,
21 he has. But the way they put it is: you have not looked
22 at ARPU because, if you did, you will see that it is
23 pretty flat. My submission is you are not looking at
24 ARPU movements, you are looking at -- the great benefit
25 of limb 1 is you have ARPU and the competitive

1 benchmark, and the question is: is there a differential
2 that is greater than the SSNIP above the competitive
3 level?

4 I am going to address you specifically on the price
5 differential.

6 THE CHAIRMAN: We will of course wait for that. Yes.

7 MS KREISBERGER: So if I could move on to that topic then,
8 and I will be coming back to ARPU as well.

9 Mr Beard criticised in general terms the use of data
10 on absolute price differences, which is his
11 characterisation of the SPC dataset, and he referred to
12 literature from Professor Motta. Although he did not
13 mention Dr Jenkins' own academic commentary on the
14 subject, that was the airport example you might
15 remember. She gives an example there of price
16 differences which are in fact relevant to market
17 definition, you have seen that.

18 Two points I would like to draw out, if I may.

19 The first point is Mr Parker is not drawing
20 conclusions on market definition simply by observing
21 different differences in absolute prices between
22 products. He is not saying: I observe a difference
23 between product A and product B in the market, because
24 the facts here are more informative. The price
25 comparison between SPCs and dual play prices is directly

1 probative of the SSNIP test, and that is for two
2 reasons: the products supplied to the customer groups
3 are identical. So if we come back to Dr Jenkins'
4 example, where you have two routes from different
5 airports in each case, it is not an identical product or
6 service, here you have identical products supplied, it
7 is just under one contract or two. The second reason is
8 that we are all agreed, and it is common ground, that
9 the dual play product is not simply an observed price,
10 we know it is a competitive price, it is common ground.

11 So that is why I say he is not just pointing at two
12 products and observing a price difference, he is using
13 a product which is known to be the competitive price
14 level and comparing the SPC prices with that competitive
15 level, and when he runs that comparison, he sees these
16 very large price differentials which exceed the SSNIP
17 threshold over a long period of time.

18 MR RIDYARD: If the price differential between the bundle
19 and the two standalones was totally explained by
20 synergies of providing a bundle over -- the cost
21 synergies of providing a bundle over providing two
22 separate products, then what you just said would not
23 work, I do not think, would it? Because they would both
24 be competitive prices; the most competitive price for
25 product A is 10, the most competitive price for

1 product B on its own is 10 as well, the most competitive
2 price for offering A and B in a bundle is 15. They are
3 all competitive prices. So in that scenario finding
4 a price difference between A plus B and A and B in
5 a bundle does not identify an excessive price anywhere,
6 does it?

7 MS KREISBERGER: If there were evidence that the
8 differentials that you observed between SPCs and
9 dual play were attributable to these vast cost-savings,
10 then that would be right. I am going to --

11 MR RIDYARD: I know your position, because you explained it
12 very well in the response the other day, is that is not
13 the case and the margins are higher on the standalone.
14 But just looking at the prices alone cannot tell you
15 that, I do not think.

16 MS KREISBERGER: If the differential were actually the
17 product of some huge cost difference, that is right. We
18 know it is not and I was going to show you this when we
19 come on to the table, Figure 7. But just to foreshadow
20 the point, the BT split service -- SPCs are in
21 essentially the same position as BT dual play customers,
22 because any cost-savings -- so the SPC is served down
23 the same line as the dual play customer. So only
24 focusing on the difference between those two tells you
25 it is not attributable to cost differences because the

1 costs are essentially the same.

2 So that completes my point on the probative nature
3 of the SPC dataset for the SSNIP test.

4 My second point, I just want to give you references
5 for your note. Mr Ridyard mentioned the *Slovak Telekom*
6 case during Mr Beard's submissions. That case is
7 actually a good example of the Commission relying on
8 price differentials in relation to market definition.
9 In that case it was in relation to evidence of fixed
10 broadband and mobile broadband being in separate product
11 markets {G/124.1/56} at paragraphs 131 to 145. It is
12 a similar approach.

13 So now I am moving on to Figure 7, Mr Parker's
14 figure 7, and Mr Beard's criticisms. Mr Beard's
15 criticisms were in relation to the data inputs into that
16 graph. It is at {OR-E/3/80}. If we could just keep it
17 up on the screen, perhaps focusing in a little on
18 Figure 7 itself.

19 Mr Beard's first criticism was that Mr Parker had
20 made an error by using the averages of the cheapest list
21 and cheapest promotional prices for dual play packages
22 up to Q1 2017, whereas he uses averages for SPC prices
23 through the period. Of course, Mr Parker used the data
24 that Ofcom had. But Mr Beard's attack was that, well,
25 he was not comparing like-with-like because of the use

1 of the cheapest data.

2 This point goes nowhere, and you can see that from
3 the graph itself. Because from Q2 2017, the dual play
4 figures, those are, I am sure you remember by now, the
5 blue diamonds and the yellow triangles, from Q2 2017
6 they are based on averages of all dual play products,
7 not averages of the cheapest products. So from that
8 date at least the criticism, the like-for-like
9 criticism, does not apply and, if you look at the graph,
10 it is very clear that when you move from average
11 cheapest price to average price in Q2 2017, the large
12 price differentials just remain in place. In other
13 words, the change in the data makes no material
14 difference whatsoever. There is no structural break
15 between the two periods.

16 We do not need to go to them, but you will recall
17 figures 10 and 11 on the post-commitments period. There
18 the dual play average price data is based on average
19 prices of all products again, not averages of cheapest
20 products. So again the criticism has no application to
21 them. But before I leave this point, that Mr Beard made
22 quite a lot of, it is a very good demonstration of the
23 pitfalls of Mr Beard's attempts to take belated potshots
24 at Mr Parker's analysis without any expert evidence of
25 his own to support the point.

1 Had Dr Jenkins made this point about average
2 cheapest prices in her reply report, then Mr Parker
3 could have explained why that criticism is wrong in the
4 joint statement, and you would be hearing from him in
5 the first instance about an expert graph rather than
6 from me. That is how the process is meant to work.

7 THE CHAIRMAN: Yes.

8 MS KREISBERGER: Mr Beard's second line of attack was that,
9 by using averages for dual play prices, Mr Parker is
10 in fact concealing a vast range of different prices. To
11 make this point he relies on what he calls a new version
12 of Figures 7 and 8. We will go to that in a moment.

13 The first point is, if you want to compare dual play
14 and SPC prices, using averages is a sensible way to do
15 that when there are different price points in the
16 market. Mr Parker used averages for both SPCs and
17 dual play customers. He did not, for example, use the
18 lowest dual play figure he could identify. It is
19 a fairly obvious proposition, but the reason to use
20 averages is that it avoids the problem of the outlier.
21 So averages here are likely to be a good proxy for the
22 competitive list prices and promotional prices available
23 to dual play customers, and Ofcom of course took the
24 same approach, taking weighted averages.

25 My second point in my submission is you should take

1 no account of Mr Beard's new graphs. He told us this
2 week that they were prepared by lawyers, not economists.
3 That does not cure the problem. In fact, lawyers
4 generating graphs in relation to expert evidence would
5 be a pretty big red flag. This is a reworking of expert
6 analysis by lawyers who have no duty to give the
7 Tribunal their independent opinion and who are not
8 subject to a prohibition on assuming the role of
9 advocates.

10 Let us just turn it up {OR-A/16/61}. So this is in
11 their closings. You will recall Mr Beard speaking to
12 the smears. There we go. We just have no idea how they
13 have come up with their smears and BT have not disclosed
14 any underlying datasets. Actually, when you start
15 looking closely at these graphs, what you see is highly
16 tendentious analysis, just as you would expect when the
17 analysis is prepared by the legal team, not independent
18 experts.

19 I would just like to illustrate that submission by
20 reference to a couple of examples. First, if I could
21 ask you to look at the light red squares. If we could
22 zoom in on Figure 7.

23 THE CHAIRMAN: Just give me one moment, please. (Pause)

24 MS KREISBERGER: If we could just see the key as well. I do
25 not know if it is possible to zoom out a tiny bit.

1 Thank you. Yes, the light red squares, they are marked
2 BT SLR and BT cheapest standard broadband. So this is
3 the lower priced product that they have now plotted into
4 this graph. That product was factored into what are
5 here the solid red squares. That is the split purchase
6 averages. The solid red squares are an average of three
7 standard standalone broadband products from BT, and
8 Mr Parker explained all this by reference to the
9 underlying data pack during cross-examination. For your
10 note, that was Day 12, page 13, line 10 to page 15, line
11 16 {Day12/13:10}. {Day12/15:16}

12 What BT have done here is they have chosen to plot
13 out the cheapest of the three broadband products, but
14 the lawyers who prepared this graph conveniently omitted
15 to plot out the most expensive of the three. So they
16 have broken out one of the products in the solid red
17 squares, the cheaper one, because they want to lower the
18 differential but they have not broken out the more
19 expensive one, and that would sit above the red squares.

20 THE CHAIRMAN: Sorry, the cheapest ones which they have put
21 in is the non-solid red squares?

22 MS KREISBERGER: Exactly.

23 THE CHAIRMAN: Yes. Just a moment.

24 MS KREISBERGER: Exactly, yes. This really shows the
25 pitfalls of starting to break products out of the

1 average, especially when you only do it for some but not
2 others. It gets worse. Could we turn up {IR-A/15/50},
3 paragraph 133(a). This is my written closings. Could
4 we blow that paragraph up, please. Thank you very much.
5 I will start reading it out with my poor eyesight:

6 "Mr Beard suggested that Mr Parker had failed to
7 include the price for one of BT's standard broadband
8 products ... in the analysis presented in his Figure 7.
9 However, the reason Mr Parker excluded this product was
10 that it was not available throughout the relevant
11 period; in any event, including this faster and more
12 expensive product in the analysis would have resulted in
13 a higher average price being paid by SPCs, thus
14 increasing the differential between the price paid by
15 split service SPCs ..."

16 That is BT SPCs:

17 "... and the price paid for bundles, and
18 strengthening Mr Parker's conclusions."

19 If you did add in this further data point, it would
20 be way above the red squares. But again that is not
21 featured in the lawyered version of the graph.

22 If we could bring the graph back. Thank you very
23 much. That is ideal. Another feature of the graph is
24 the treatment of two Sky data points which Mr Beard
25 addressed you on. I covered this point in closings.

1 Mr Parker did refer to the Sky data in his third report
2 because it was in Ofcom's evidence. He did not include
3 it in Figure 7 because that figure is based on the data
4 provided by third parties in response to Ofcom's
5 section 135 notices.

6 THE CHAIRMAN: Sorry, just bear with me. I just want
7 to capture that. Just a moment. He did not refer to it
8 in Figure 7 because you say the figure was based on data
9 provided by third parties.

10 MS KREISBERGER: To Ofcom in response to section 135
11 notices, which was then disclosed in these proceedings
12 and Sky did not consent. So we did not have the Sky
13 data disclosed. But he did capture the data points
14 because he summarises Ofcom's findings in terms which
15 include the Sky data. I was just going to give you the
16 references for your note.

17 THE CHAIRMAN: Yes.

18 MS KREISBERGER: Parker 3, 4.104 to 5, {IR-E/3/86-87}. He
19 simply records there Ofcom's findings in relation to
20 each of the provider's packages.

21 But we then went on in our written closings to show
22 why the Sky data is consistent with Mr Parker's
23 conclusions. He says that in Parker 3.

24 If we could turn up {IR-A/15.1/1}, this is Annex 1
25 to our written closings. You can see there on the

1 right-hand side we have added in the Sky data points
2 there in green. They are marked confidential; green for
3 confidential. In each case you see the differential
4 there between the price paid by an SPC buying Sky
5 standalone broadband at each of these two data points,
6 it is only two data points, and in each case it exceeds
7 the average dual play prices by more than a SSNIP.

8 As I addressed in my oral closings, Mr Parker's
9 evidence is that the correct price to focus on is the
10 promotional price for the dual play bundle. So those
11 are the prices in the column to the far right.

12 Mr Parker's evidence under cross-examination was you
13 focus on the promotional price because that is where the
14 action is. That was Day 12, page 41, lines 20 to 22.

15 {Day12/41:20-22} I showed you the evidence on that.

16 For your note that was Day 24, page 67, line 5 to
17 page 68, line 12. {Day24/67:5} {Day24/68:12}

18 THE CHAIRMAN: Just a moment.

19 MS KREISBERGER: Just while we do that, if we could bring up
20 the graph again. Thank you. Just a couple of further
21 issues with the new Figure 7. The first is, can you see
22 the yellow triangles? They are intended to represent
23 the one in Mr Parker's Figure 7 and Figure 8. But if
24 you go down to the key at the bottom, they are labelled
25 "Standard dual play (promotional) (average of cheapest

1 available)". But I just showed you that actually in
2 Mr Parker's analysis and Ofcom's from Q2 2017 they are
3 not averages of the cheapest available, they are just
4 averages of all products.

5 Given that this was one of Mr Beard's main lines of
6 attack on the data, that is a misrepresentation on the
7 face of Mr Beard's graph. It is not an average of the
8 cheapest available --

9 THE CHAIRMAN: Sorry, you mean --

10 MS KREISBERGER: Sorry, in the key it is represented. So if
11 you look on the right-hand side of the key, below the
12 graph, the yellow triangle they say:

13 "Standard dual play (promotional) (average of
14 cheapest available)."

15 It is not true for the later period, and that was
16 one of Mr Beard's main points --

17 THE CHAIRMAN: It is not that the lines are wrong, it is
18 just the descriptor there.

19 MS KREISBERGER: Correct.

20 MR BEARD: (Inaudible) -- filling out.

21 THE CHAIRMAN: Thank you. That is helpful.

22 MR RIDYARD: The blue diamonds there are ... they are all
23 fine because they are the ...

24 MS KREISBERGER: It is the same point.

25 MR BEARD: We accept the description of those points is the

1 description of Figure 7 itself. The abbreviation is
2 incomplete, Ms Kreisberger is right on that.

3 MS KREISBERGER: I have one more point on this before I move
4 on, if I may ...

5 THE CHAIRMAN: Yes.

6 MS KREISBERGER: It really does underscore the problem with
7 this. In BT's version here, Mr Beard's graph, look at
8 the blue diamond representing the average of the
9 cheapest list prices for dual play bundle in 2016 Q1.
10 So it is the blue diamond. This diamond is less than
11 the minimum available list price for a dual play bundle,
12 which is what we understand to be represented by the
13 lower line of the solid blue shaded bar, the bottom of
14 the blue smear.

15 THE CHAIRMAN: Sorry, just a minute. You said the diamond
16 is less than the minimum available list price for
17 a dual play bundle.

18 MS KREISBERGER: So the smear is intended to be the minimum
19 available list price for a dual play bundle; the blue
20 smear. If we look at 2016 Q1, so it is the second
21 column along from the left, the blue smear goes into the
22 yellow smear and that is meant to be the sort of
23 lowest -- lower band of the list price. But they have
24 the Sky dual play list price, the average Sky dual play,
25 as below their blue smear. It just cannot be right. It

1 is a mathematical impossibility. The lowest available
2 dual play list price cannot be above the average of the
3 cheapest available dual play list prices. We just do not
4 think this is reliable.

5 THE CHAIRMAN: Let me just make a note of that.

6 MS KREISBERGER: That is what we understand the blue smear
7 to mean.

8 THE CHAIRMAN: Just a minute.

9 MR RIDYARD: So the range of those list prices should be
10 even larger than shown in this chart? Or the blue
11 triangle has not been put in the right place?

12 MS KREISBERGER: Yes. I would not press it further than
13 that.

14 THE CHAIRMAN: Just one second.

15 MS KREISBERGER: Just to reiterate, our experts have not had
16 any opportunity to engage with the legal team's work
17 product here. So we say you cannot place any reliance
18 on this data. It is inadmissible, in my submission.

19 THE CHAIRMAN: Is that a convenient point?

20 MS KREISBERGER: It is. Thank you, sir.

21 (1.03 pm)

22 (The short adjournment)

23 (2.00 pm)

24 THE CHAIRMAN: Yes.

25 MS KREISBERGER: Thank you, sir. I only have one final

1 short point on the price differentials analysis.

2 Mr Beard repeated the point that Mr Bunt had given
3 evidence that SPCs might be getting good deals on
4 broadband and TV from Sky and that might be sort of
5 concealed within the data. In other words, non-voice
6 bundles in the SPC data.

7 I did address that on Monday. It is not a good
8 point. Mr Bunt there is engaging in speculation, but
9 I showed you the evidence that the proportion of bundles
10 that do not contain voice is extremely small. That is
11 Ofcom evidence.

12 Just for your note, I addressed that at Day 24,
13 page 76, line 3, over the page to line 18 {Day24/76:3}.
14 So I showed you the recent Ofcom quantitative evidence
15 on non-voice bundles, TV bundles essentially, and
16 Mr Beard did not answer that point.

17 That completes my points on Figure 7.

18 I was then going to move on to Mr Parker's fifth
19 report, which is the factoring in of calls.

20 Mr Beard mischaracterised the SPC differential
21 analysis as looking at line rental prices in isolation.
22 The whole purpose of the second part of Parker 5 was to
23 factor calls into the price differential dataset,
24 and I just wanted to say a word on how that was done.

25 We have explained it in the note provided on

1 Tuesday, no need to turn it up, but that is
2 {OR-H/264.1/1}. But the key point is that Mr Parker
3 adds in an ARPU figure for calls in Parker 5. So he
4 calculates the calls ARPU by taking the overall SFV
5 services ARPU, he does that for a particular quarter
6 from BT's data, that is undisputed data, and he
7 subtracts the line rental ARPU -- price and ARPU are
8 synonymous when you get to line rental -- and that
9 basically leaves you with the calls ARPU. Then he adds
10 the calls ARPU to both the SPC price and to the
11 dual play price in the differentials analysis.

12 THE CHAIRMAN: One second.

13 So he starts with the calls ARPU and then subtracts
14 line rental?

15 MS KREISBERGER: No, he starts with the overall --

16 THE CHAIRMAN: Overall. That is what I ... Because it is to
17 get to the calls ...

18 MS KREISBERGER: To get to the calls ARPU. Yes, exactly.

19 THE CHAIRMAN: To get to calls ARPU.

20 The overall ARPU for SPCs?

21 MS KREISBERGER: For SFV.

22 THE CHAIRMAN: For the whole of SFV?

23 MS KREISBERGER: Yes. Sorry, for SPCs. That is quite
24 right, yes, for SPCs. So it is overall ARPU for SPCs.

25 THE CHAIRMAN: Subtract the line rental --

1 MS KREISBERGER: Minus line rental, which gives you SPC
2 calls ARPU.

3 THE CHAIRMAN: Then add that to ...

4 MS KREISBERGER: The SPC -- each side of the price
5 differentials dataset. So he has the -- at Figure 7 he
6 adds it in to the line rental prices for both sides,
7 dual play and SPC. That is based on there being no
8 reason to think that calls revenue is different for
9 split purchasers compared to dual play customers, and
10 that is agreed. So you have it, Dr Jenkins confirmed
11 that --

12 THE CHAIRMAN: BT SPCs and BT dual play?

13 MS KREISBERGER: It is agreed there is no reason to think
14 there is a variation between SPCs and dual play
15 customers when it comes to calls charges. There is no
16 material difference between the two customer groups.
17 Dr Jenkins says --

18 MR RIDYARD: Calls charges or calls revenue?

19 MS KREISBERGER: Well, it is revenue, but it is captured by
20 calls ARPU.

21 Dr Jenkins confirmed that that is her approach as
22 well, at Day 9, page 168, lines 2 to 8 {Day9/168:2-8}.

23 So the effect of that is Mr Parker is comparing
24 total ARPU for SFV services plus standalone broadband,
25 so that is the SPC side, the top lines on the graph.

1 Would it be helpful to call it ...

2 MR RIDYARD: Yes.

3 MS KREISBERGER: Thank you. You are ahead of me. That was
4 impressive.

5 No, that is the new figure. We should go ... That
6 is the lawyers' version. Do we have the reference to
7 Parker 3?

8 Would you like me, sir, if it is helpful, just to
9 summarise that again?

10 THE CHAIRMAN: Yes.

11 MS KREISBERGER: So the SPC numbers are total ARPU for SFV
12 services, because you have added calls to line rental.
13 Plus standalone broadband, because they are the split
14 purchasers. So those are -- if we take Figure 7, the
15 red squares at the top which are the split service
16 customers, which we were talking about earlier, and the
17 green dots, they have TalkTalk standard broadband. So
18 that is the ARPU figure taken in Parker 5.

19 THE CHAIRMAN: So this is what we have up on the screen, is
20 it?

21 MS KREISBERGER: Yes, so this is what he has added calls
22 ARPU to.

23 THE CHAIRMAN: That is what he has added calls ARPU to?

24 MS KREISBERGER: Yes.

25 THE CHAIRMAN: But this is his original Figure 7?

1 MS KREISBERGER: Yes, this is the original, and ... Yes,
2 I did give you the figures in my oral closings on
3 Parker 5 on the consequence of doing this, the figures
4 you get.

5 But all I want to draw out for you is the fact that
6 the Parker 5 method is using line rental price plus
7 calls ARPU for SPCs, plus standalone broadband, compared
8 to the line rental price for dual play, plus calls ARPU
9 on the assumption that both -- each customer group is
10 generating the same level of calls ARPU.

11 THE CHAIRMAN: Yes.

12 MR RIDYARD: So it is just adding an identical number to
13 both lines.

14 MS KREISBERGER: Yes. If it is helpful to have the
15 reference, that is -- Parker 5 is at {E/5.1/15}.

16 I am coming back to a point Mr Ridyard made where he
17 described SFV ARPU as the total revenue BT gets from me
18 as a customer, so that is the data which Parker 5 is
19 using. Once you factor in calls into Figure 7, you are
20 looking at total ARPU figures.

21 THE CHAIRMAN: But as Mr Ridyard said, that is just adding
22 the same number to either side.

23 MS KREISBERGER: It is, because there is no reason to think
24 that there is some difference.

25 THE CHAIRMAN: But are you going to deal with, or, if not,

1 can you deal with the separate ARPU point which was it
2 is flat --

3 MS KREISBERGER: Yes.

4 THE CHAIRMAN: That is a different point.

5 MS KREISBERGER: That is a different point. Absolutely. It
6 is just that I wanted to be clear, so that it is not
7 lost, that the Parker 5 sensitivity to Figure 7 is also
8 an ARPU analysis.

9 THE CHAIRMAN: Thank you, that is helpful.

10 MS KREISBERGER: I am in fact coming on to flat ARPU as my
11 next topic.

12 THE CHAIRMAN: Thank you.

13 MS KREISBERGER: You have my point where I began, that you
14 are not looking at changes in prevailing prices, you are
15 looking at price compared to the competitive level, so
16 that is the SSNIP test.

17 THE CHAIRMAN: How does that bear on this question?

18 MS KREISBERGER: Right. So the reason, the short answer,
19 and then I am going to show you some data, but the short
20 answer is the reason ARPU, even though line rental
21 prices are going up, costs are coming down, calls prices
22 of whatever metric are going up, the reason why ARPU
23 stays flat is because of usage, calls usage. So in
24 other words, ARPU does not necessarily increase even
25 though the component prices are increasing because

1 people are buying fewer calls units or paying for fewer
2 calls, so that is the short point.

3 So if they are paying for fewer calls units then
4 revenue per user does not increase with the prices.

5 That is my simple point.

6 THE CHAIRMAN: Yes.

7 MS KREISBERGER: That is why you need to -- if you are
8 looking at ARPU -- so at the risk of repetition, I have
9 shown where Mr Parker looks at ARPU for split
10 purchasers, so he has done that. But if you are looking
11 at SFV revenue overall, because of this usage effect,
12 the SSNIP test has to be run by comparing the revenue
13 against the competitive benchmark. In other words, the
14 cost-plus benchmark.

15 Let me -- so each of the ARPU datasets do that. So
16 the SPC, at the risk of complicating it, but the SPC
17 dataset does that by comparing dual play prices to SPC
18 prices. The limb 1 comparison is between overall SFV
19 ARPU for all SFV customers and the cost-plus benchmark.

20 THE CHAIRMAN: Yes, that is common ground.

21 MS KREISBERGER: That is the SSNIP, that is the SSNIP we are
22 looking at.

23 So looking at movements is not helpful because of
24 the usage issue. The CMA says the SSNIP test involves
25 asking: can the price be raised by more than a small

1 increment above the competitive level? When you are
2 looking at ARPU revenue per user, you answer that
3 question by comparing to a cost-plus benchmark.

4 Can I show you something that Ofcom -- an Ofcom
5 analysis on this point. Mr Beard, when he was making
6 his submissions on ARPU, said that he wanted to show you
7 Figure A5.4, which is an Ofcom chart from 2017 which is
8 also replicated in Parker 2. But Mr Beard then said
9 that it was not exactly the same chart, and he seemed to
10 think better of it. He moved swiftly on and did not
11 take you to it.

12 It is an Ofcom chart, there are two of them,
13 and I want to show you at {E/2/14}. Sir, I think this
14 will help illustrate the point: Ofcom conducted the same
15 analysis but this is for the pre-claim period. So
16 Mr Duckworth's data relates to the claim period.

17 THE CHAIRMAN: Just one moment.

18 Sorry, can we -- before we do that, can I just get
19 something else clear, which is that when you were
20 dealing with the flat ARPU point in your closings, your
21 oral closings, as I recall, you said, well, it is not
22 a problem anyway because it was always too high and it
23 was high in the pre-claim period.

24 Now, BT have pointed to some Ofcom data which
25 in fact came out in Mr Parker's second report, where it

1 was kind of flat anyway throughout that period as well.
2 So BT are saying, well, so what? The flat ARPU problem
3 still remains. Notwithstanding what you were saying,
4 and I think what Mr Duckworth was saying, is, yes, but
5 if you look at the earlier period it is still too high.
6 Where has that point gone?

7 MS KREISBERGER: I am going to show you that now. That is
8 precisely the point ...

9 THE CHAIRMAN: Okay.

10 MS KREISBERGER: Thank you, sir. I am going to show you
11 both of these ... if I show you the first one briefly,
12 and then we can have a more careful look at Figure 2.

13 So Figure 1, perhaps we can focus in on that for
14 a moment. Ofcom's -- so this is Ofcom's estimate of
15 BT's gross margins for line rental and calls, so this is
16 gross margins for both. I showed this to you on Monday,
17 that was Day 24, page 90, lines 4 to 15, for your note
18 {Day24/90:4-5}. You see there that gross margins from
19 07 to 2015/16 are enjoying a very clear upward trend.

20 So if revenue is flat during this period, then
21 direct costs must be reducing, because profitability is
22 going up on a gross margin basis.

23 MR RIDYARD: Is this chart for SFV?

24 MS KREISBERGER: This is SFV.

25 Then that is illuminated by Figure 2, so that is

1 labelled "Ofcom's estimate of BT's SFV net profits".
2 The whole bar, the three colours together, that is
3 Ofcom's estimate of ARPU, they call it total revenue per
4 line and it is all SFV revenue.

5 So you see there, if you just focus on the tops of
6 the bars, there is a bit of movement but not much.

7 THE CHAIRMAN: Yes.

8 MS KREISBERGER: It is essentially flat. But you also see
9 net profits, that is the red section of the bar, rising
10 steeply. So for instance, if you take -- I am not even
11 going back to the beginning of the period -- if you take
12 2012/2013, for instance, to the end of this period, then
13 they rose from £5.77 to £9.39. That is a 62% rise in a
14 three-year period against a backdrop of falling usage.

15 MR RIDYARD: Although they were making greater profits
16 beforehand. You have started from £5.77 that is 2012.

17 MS KREISBERGER: Yes, in fact they were making £3.87 at the
18 beginning of the period.

19 MR RIDYARD: Then it went up to £6.24 and £5.92 and £6.76.

20 MS KREISBERGER: Yes, and then back up to --

21 MR RIDYARD: Right.

22 MS KREISBERGER: Yes. So my submission is what you can take
23 from these tables is that although revenue is not going
24 up over the period, because people are buying fewer
25 calls units, more of that revenue sticks with BT as

1 profit, and the SSNIP here is the difference between the
2 cost-plus benchmark, which we could take as the dark
3 blue and light green together, the costs, and the SFV
4 revenue. That is essentially the limb 1 analysis for
5 the pre-claim period.

6 MR RIDYARD: So this is like my favourite chocolate bar.
7 They are telling me the price is the same as it was last
8 year, but I notice they have reduced the size of it by
9 20%.

10 So what you are saying is even with flat ARPU since
11 2007 right to the present day, more or less, the
12 profitability has increased substantially, and it
13 increased substantially during this 2007 to 2015 period.

14 MS KREISBERGER: Yes.

15 MR RIDYARD: It more than doubled.

16 MS KREISBERGER: Yes.

17 MR RIDYARD: So that is a kind of a SSNIP in fundamental
18 real terms, as it were.

19 MS KREISBERGER: Yes.

20 MR RIDYARD: Once it got there, it stayed there throughout
21 the claim period.

22 MS KREISBERGER: Yes.

23 MR RIDYARD: This is exactly why the other day I asked
24 you -- you have now provided references to where we can
25 get a kind of consolidated series of all of these

1 numbers in one place so we can see this happening.

2 MS KREISBERGER: Yes, it is helpful. Of course the basic
3 premise is in conditions of workable competition you
4 would expect prices to be driven down to cost, whereas
5 here you see the profit margin increasing prior to the
6 claim period.

7 THE CHAIRMAN: Just run past me again the SSNIP test that
8 you say is implied by all of this.

9 MS KREISBERGER: Yes, so it is precisely the same as the
10 limb 1 SSNIP test, because your cost-plus benchmark is
11 somewhere around the combination of the costs that you
12 see here, wholesale costs and retail costs.

13 THE CHAIRMAN: What you now do not get, however, if you take
14 ARPU in, is the point that had at least been made at
15 an earlier stage, which is you just see line rental
16 continuing to increase as against decreasing costs,
17 because if you just take line rental you are not
18 capturing the entire price.

19 MS KREISBERGER: Yes, that is fair. That is why the line
20 rental sort of alligator jaws, that is just one part of
21 the jigsaw. But you are seeing the consequence of that,
22 but taking in calls as well -- this is ARPU, SFV ARPU --
23 and you see the consequence here: costs are coming down,
24 profits are going up.

25 That is not a story you see in conditions of

1 workable competition where prices are driven down to
2 cost.

3 MR RIDYARD: That is saying your alligator jaws are not
4 a piece of the jigsaw at all. This is the story, is it
5 not, here.

6 MS KREISBERGER: This is the main story, that the alligator
7 jaws are consistent. That is just showing you line
8 rental.

9 MR RIDYARD: I know, it is only one part of the price, which
10 is why ... But you are saying this is a more fundamental
11 measure of what is going on.

12 MS KREISBERGER: Yes, so this is really adding to
13 Mr Duckworth's evidence, because Mr Duckworth's evidence
14 gives you the next stage, chronologically, but this
15 shows you what was happening prior to the claim period,
16 profits were going up.

17 THE CHAIRMAN: So what all of this boils down to, it seems
18 to me, is you still have, as it were, intact
19 Mr Duckworth's original, well, Figure 7 as added, with
20 the calls going on the top. You say it is the same
21 amount for each side, so it is ultimately not going to
22 make any difference, and the gap is still going be to
23 there.

24 MS KREISBERGER: It changes the precise percentages, because
25 the absolutes do not change. But the figure given in

1 Parker 5, for instance, is 99% differential, so it makes
2 no difference --

3 THE CHAIRMAN: There you say there is still that kind of
4 SSNIP test.

5 MS KREISBERGER: Yes.

6 THE CHAIRMAN: If I have got it right.

7 MS KREISBERGER: Yes.

8 THE CHAIRMAN: It now cannot be said to be defective,
9 because it is only looking at line rental prices,
10 because you now have the calls in it as well, so you
11 have that kind of SSNIP test. But otherwise, if you are
12 to -- otherwise you are now -- your other limb, not to
13 use the word advisedly, the other way of you doing your
14 SSNIP test is now limb 1, it is a limb 1 differential.

15 MS KREISBERGER: Yes, but it was always in there, and
16 Mr Parker refers to it in Parker 5, I think you have the
17 reference. So he has -- it is his evidence that you see
18 the SSNIP because, as I have said, that is the whole
19 nine yards, the comparison of the competitive benchmark
20 with the price.

21 THE CHAIRMAN: Now just to finish off my question. Can
22 we go to the next page {E/2/15}, I just want to check
23 ... It was 2.34 that BT had referred to in its footnote
24 about Mr Parker making a reference to the flat-lining
25 thing, or perhaps it was ...

1 Can we go back one page {E/2/14}. I think it is
2 just underneath the graph actually. That is it. Can
3 we just move it down a bit so I can get the top part of
4 the page. 2.30, indeed:

5 "The results can be seen in Figure 2 ... Average
6 revenue per line was relatively stable over time."

7 That was the point that had been fixed upon.

8 MS KREISBERGER: Yes. In fact I had meant to show you this
9 paragraph, sir. It is purely descriptive of what I have
10 just shown you:

11 "Average revenue per line was relatively stable over
12 time ... wholesale costs have declined over the period,
13 which explains why gross margins have increased
14 significantly in Figure 1 above. Retail costs have
15 increased in more recent years but even accounting for
16 this, there has been a material increase in net margins
17 since 2007/08."

18 THE CHAIRMAN: As you say, this -- what you are now saying
19 is, okay, we accept that ARPU has been, broadly
20 speaking, flat. You are making a different point now
21 which is about increasing profitability, increasing
22 margin.

23 MS KREISBERGER: Yes.

24 THE CHAIRMAN: How does that actually fit into the SSNIP?

25 MS KREISBERGER: It is not so different, if I might venture,

1 because it has always been our evidence that the reason
2 why limb 1 is the most complete answer you could be
3 looking for is that limb 1 shows you the cost-plus
4 benchmark for ARPU compared to -- revenue compared to
5 ARPU. So limb 1 has always been the best evidence of
6 a SSNIP, and this shows Ofcom taking the same approach
7 to the pre-claim period.

8 MR RIDYARD: So another way of thinking about it, it is not
9 a literal -- if you think of price and ARPU as
10 synonymous, it is not a literal SSNIP, because price --
11 ARPU has stayed the same, but it is a -- it is more than
12 a small -- you are saying it is more than a small but
13 significant reduction in the size of my chocolate bar
14 over time and that is what has made it less competitive
15 now than it was before they started reducing the size
16 of the bar.

17 MS KREISBERGER: I would adopt that, and perhaps take it
18 a step further, which is that what you see there are
19 essentially direct and indirect costs, wholesale and
20 retail, and that is a decent proxy for the competitive
21 level which is where prices would be driven down to in
22 workable competition.

23 MR RIDYARD: I can understand -- I think I understand the
24 logic of that. So it is really saying the limb 1 test
25 and the SSNIP test are one and the same thing.

1 MS KREISBERGER: Precisely. The limb 1 test is informative
2 data for the SSNIP test, because essentially it is
3 asking the same question: have prices been raised
4 significantly above the competitive level? The SSNIP
5 test, it is a small increment, and at the excessive
6 pricing stage of the analysis, is it significant, is it
7 material?

8 MR RIDYARD: During the claim period you are saying they
9 have been sustained above the competitive level. They
10 have not been increased because they already were too
11 high.

12 MS KREISBERGER: Precisely.

13 MR RIDYARD: It was in this ten-year period before the claim
14 period that there was actually a kind of a SSNIP. It
15 was not an increase in price, it was a reduction in how
16 much you got for your monthly or constant amount
17 of money.

18 MS KREISBERGER: Yes. However you look at it, there is
19 an increment above the competitive level.

20 THE CHAIRMAN: Thank you.

21 MS KREISBERGER: Thank you.

22 Unless there are any other questions on that, I was
23 going to move on to my next point which I will take very
24 briefly. It is the VOC event study, and I really want
25 to bring out the same point, in fact, which is this is

1 another example of Mr Parker relying on ARPU for market
2 definition purposes.

3 So you will recall this is Dr Jenkins' event study,
4 and Mr Parker calculates the commitments discount as a
5 30% reduction in ARPU for VOCs, and he relies on the
6 fact that the switching rates at the time of the
7 reduction indicate that VOCs had a price elasticity of
8 minus 0.7, which means they are price inelastic, so that
9 is another example of an ARPU analysis.

10 Mr Beard said:

11 "There is a serious problem [I am quoting] with
12 Mr Parker's minus 0.7 figure because of the asymmetry
13 issue."

14 That was Day 26, page 33 {Day26/33:1}. That is
15 a bad point. I did touch on this on Monday, but just to
16 respond to Mr Beard. The minus 0.7 is based on the
17 decline in the rate of switching by VOCs that was
18 observed in the period following the 30% decrease in
19 ARPU. In other words, it is looking at switching levels
20 from Voice Only to bundles. It is literally -- it has
21 literally nothing to do with bundle customers switching
22 back to SFV. So there is no asymmetry issue there.

23 MR RIDYARD: So you are saying if there was this asymmetry
24 thing, you could switch one way but you somehow could
25 not switch back, then what you would observe would be

1 a flat-lining, but you would not get a further
2 reduction.

3 In the original line you would -- you might -- the
4 2018 undertakings might have stopped further switching
5 happening.

6 MS KREISBERGER: Yes. So he is only looking at if the rates
7 of switching are reduced. So you are only looking at
8 one direction, VOCs to bundles. That is why it is not
9 an asymmetrical issue.

10 MR RIDYARD: Yes.

11 MS KREISBERGER: Then I was going to pick up on the HMMT
12 test just very briefly, that is the recapture point, and
13 Mr Parker's fifth report.

14 It is obviously right that Mr Parker has always used
15 BT price data as the basis for his market definition
16 assessments, so the HMMT is not signaling any change in
17 approach. The methodology stands. All that Mr Parker
18 did in Parker 5 was to explain, by reference to the US
19 merger guidelines and the academic literature, why it is
20 appropriate to use BT data notwithstanding the recapture
21 issue, the recapture effect.

22 I just want to respond to one of Mr Beard's
23 criticisms, in fact it was his only substantive
24 objection, was to say that the HMMT approach is useless
25 because it will always give you a finding of narrow

1 markets. That was his submission, and you will remember
2 he gave his red and green coke bottles example.

3 That is not right, it will not always give you
4 a narrow market. In any case, the outcome of the HMMT
5 will depend on the facts in the case and the data in the
6 case.

7 So for instance here, Mr Parker has of course
8 identified very large SSNIPs, but if BT's pricing data
9 showed that price increases to SFV services were not
10 sustainable, could not be profitably sustained, then in
11 that case you would find the broader market. It is just
12 what the data tells you. The answer as to whether the
13 SSNIP test is met, is the SSNIP profitable or not, will
14 always depend on what the data tells you.

15 So the test is not useless or it is not
16 predetermined, it is just on these facts you identify
17 a narrow market because of the high price differentials.

18 But Mr Beard's approach is asking you to ignore the
19 fact that BT and other SFV suppliers face less of
20 a constraint on their pricing than a single-product
21 hypothetical monopolist would do. In other words, that
22 would just ignore actual evidence of market power in the
23 real world.

24 So that completes my reply submissions on market
25 definition.

1 THE CHAIRMAN: Thank you.

2 MS KREISBERGER: If I could then move on -- I am moving on
3 to limb 1, and I am going to address -- I am going to be
4 focusing on points on costs, and I would just like to
5 address a particular point on costs disclosure before
6 I move on to the substance.

7 At Day 26, page 12, lines 14 to 21 {Day26/12:14-21},
8 Mr Beard said this:

9 "At no point since the extensive disclosure was
10 agreed, thousands of documents, vast amounts of data, at
11 no point has the Class Representative indicated in
12 correspondence or otherwise that it expected BT to
13 undertake and disclose to the Class Representative
14 separate cost allocations for SFV services before or
15 during the claim period for the purposes of these
16 proceedings, to actually undertake those exercises."

17 Of course it is right that the Class Representative
18 did not require or try to require BT to undertake any
19 particular cost allocation exercise. That would be
20 an impossibility. The Class Representative has no basis
21 to insist that BT undertakes any particular cost
22 exercise. That is a matter for BT.

23 But the real crux of Mr Beard's comments seems to be
24 to suggest that the Class Representative did not ask for
25 the right disclosure.

1 MR BEARD: No -- (Inaudible)

2 THE CHAIRMAN: Let us just hear what Ms Kreisberger has to
3 say, either it will be relevant or it will not be
4 relevant.

5 MS KREISBERGER: Thank you, sir. I just want to show you
6 that the Class Representative did ask for granular SFV
7 data and it did it on a number of occasions.

8 If I could just turn up one document, {H/6.11.1/1}.
9 So this is a request, it is a standalone document, it is
10 a request from the Class Representative and it contains
11 the response from BT, so it is the request and the
12 response, it is attached to a letter from Simmons to
13 Mishcon.

14 MR RIDYARD: When was the date of this?

15 MS KREISBERGER: 1 March 2022.

16 If we could move forward to page {H/6.11.1/3}, under
17 the heading "Pricing and profitability" at the lower
18 part of the page, you see there the
19 Class Representative's request and BT's response to the
20 request for margin data for SFV VOCs. So that is
21 the margins on VOCs.

22 Then at page {H/6.11.1/4} there is the same request
23 for split purchasers, so that is a request for margin
24 data on SFV services in relation to SPCs.

25 Then if we move forward to page {H/6.11.1/9}, both

1 rows there, those are the Class Representative's
2 requests for granular SFV cost data together with BT's
3 responses.

4 THE CHAIRMAN: Just pause there so we can read it. (Pause).

5 Yes.

6 MS KREISBERGER: I am showing you this to show you that
7 the Class Representative did ask -- Mr Beard said we did
8 not ask for this disclosure. The
9 Class Representative --

10 THE CHAIRMAN: Sorry, but which disclosure? Because
11 I thought the point at issue here was disclosure or the
12 creation of a costs allocation in terms of indirect
13 costs, in relation to the common costs component and the
14 increment component, but that is not what these
15 questions are asking about.

16 MS KREISBERGER: 3 and 4.

17 THE CHAIRMAN: Just a moment. 3 and 4 on this page

18 {H/6.11.1/9}:

19 "Retail costs per line ..."

20 MS KREISBERGER: That is indirect costs.

21 THE CHAIRMAN: That is indirect costs.

22 MS KREISBERGER: If you read across to BT's response.

23 I am reminded by Mr Williams the language here
24 reflects Ofcom's language of retail costs, because that
25 is --

1 THE CHAIRMAN: I see. Retail costs means indirect costs.

2 MS KREISBERGER: It means indirect, and the CR had no
3 visibility on BT's internal language, as it were, how it
4 might label it.

5 THE CHAIRMAN: Just a moment.

6 I see. Right.

7 MS KREISBERGER: So that is what I wanted to show you, sir.

8 For completeness, we have prepared a table of all
9 the correspondence, because there was actually a lot of
10 toing and froing, which I am sure you would not thank me
11 for taking you to at this point, but we have picked out
12 the key items of correspondence on the issue, it is
13 simply a table listing the relevant correspondence.

14 (Handed)

15 So that was responding to Mr Beard.

16 THE CHAIRMAN: Yes.

17 MS KREISBERGER: If I might then move on to the costs
18 themselves under limb 1. I will just begin by saying
19 a few words on use of the RFS, the 2009 RFS, as the
20 starting point.

21 So as you heard, at times Mr Beard seemed to veer
22 into suggesting that the RFS itself is not a safe
23 starting point rather than the uprating issue.

24 We had thought this was common ground. You have my
25 submission that the RFS is an extremely rigorous cost

1 allocation exercise, reflecting costs causality on a
2 "fairly represents" basis. It was audited and it was
3 prepared under regulatory and statutory obligations, and
4 it was done in significantly more detail and granularity
5 than the other exercises you see in other excessive
6 pricing cases, by regulators in particular.
7 Essentially, it is the most sophisticated analysis we
8 have available to us.

9 Again for your note, Dr Jenkins accepted in the
10 Joint Experts' Statement at 7.1.15 that it is a "good
11 proxy for BT's costs on a LRIC+ basis" in 2009. You
12 have seen her oral evidence on this. She said there
13 would not be anything wrong with using the RFS if it
14 were up-to-date, and that her objection was to the fact
15 that it was not up-to-date.

16 Mr Beard also made the point yesterday that the RFS
17 itself is based on judgments. Now, to the extent that
18 there are judgments within the RFS, they are judgments
19 about cost allocation by BT, they are BT judgments, and
20 they were contemporaneous and they were audited
21 judgments. So it is a somewhat odd position for
22 Mr Beard to adopt to cast shade on his client's own
23 judgments as unreliable at the time, we are not talking
24 about uprating here, and of course Mr Beard has not
25 advanced any evidence as to their unreliability at the

1 time.

2 MR RIDYARD: Can I just go back to what Dr Jenkins said.

3 What you just told us there was she said it was a "good
4 proxy for BT's costs on a LRIC+ basis", and Dr Jenkins
5 does not think LRIC+ is a good idea.

6 MS KREISBERGER: Yes. Well, except she then does say in her
7 oral evidence, I will just give you the reference for
8 your note, it is paragraph 372 of our written closings,
9 that is --

10 THE CHAIRMAN: We looked at it with Mr Beard the other day
11 actually.

12 MS KREISBERGER: Yes, you did, and there was some sort of
13 rowing back after Mr Matthew interjected, but the
14 language she used was: there would not be anything wrong
15 with using the RFS if it were up-to-date.

16 MR RIDYARD: Anything wrong for what purpose, though?

17 MS KREISBERGER: I think she was talking about our purposes,
18 for limb 1.

19 MR RIDYARD: That seems -- but the RFS is doing LRIC+, and
20 she does not think LRIC+ is the right way to do it.

21 MS KREISBERGER: I understood her evidence to be: had there
22 been a LRIC+ dataset --

23 MR RIDYARD: She would not have bothered with the combi
24 test.

25 MS KREISBERGER: -- she would not have bothered with SAC

1 combi.

2 MR RIDYARD: That does not make any sense.

3 THE CHAIRMAN: I am not sure why this is causing so much
4 amusement, but just to go back to what she said, I think
5 this was your point, Ms Kreisberger. She says: while
6 I agree with this statement in principle, that the
7 indirect costs reported in the 2009 RFS are a good proxy
8 for BT's costs for LRIC in 2009 ...

9 MS KREISBERGER: Yes.

10 THE CHAIRMAN: But that is not the question. The question
11 is whether those costs can be used to derive the
12 appropriate amount of indirect costs to be allocated
13 over the claim period. So that is her point, it is
14 a timing point.

15 MS KREISBERGER: That is our point. Exactly.

16 Line 16 on Day 14, page 33 {Day14/33:16} is where
17 she said:

18 "I do not think there would be anything wrong with
19 that."

20 In response to your question.

21 THE CHAIRMAN: Yes, we have looked at that.

22 MS KREISBERGER: Yes, and I was just going to make the
23 observation that the judgments in the RFS cannot be
24 compared to the type of judgments made by Dr Jenkins in
25 her SAC combi approach. It is a different order of

1 magnitude.

2 If we could then call up {E/18/131}, this is
3 Figure 5.4 from Dr Jenkins' reply report, and Mr Beard
4 took you to this at various points. It is worth looking
5 at this again, and I am going to ask you to look
6 carefully at what happens from 06/07, 07/08, 08/09.

7 Mr Beard said if you look at the levels, they
8 oscillate, and that it shows that the manner in which
9 you can identify indirect costs is very, very much more
10 flexible, is what he said. He said if it can vary by
11 100 million between 07/08 and 08/09, you cannot just
12 select the 2009 RFS, there is no magical way of doing
13 things, he said. That was pages 85 to 87 of the
14 transcript.

15 So his implication was that "why would you use 2009
16 rather than the earlier RFS available", because this is
17 just a snapshot.

18 I would like to show you what Mr Duckworth's
19 evidence on this is, {IR-E/6/72}, paragraph 5.76. This
20 is Mr Duckworth's magical explanation. He says:

21 "I have reviewed BT's internal documents which
22 highlight savings due to 'Cost Transformation' of
23 £104 million between [year ending] 2008 and [year
24 ending] 2009. BT stated in the 2009 annual report that
25 the 'reduction in SG&A costs was driven by a focus on

1 cost transformation, labour efficiency and supplier
2 savings'. I consider that it is reasonable to conclude
3 that the reduction was due, at least in part, to an
4 increase in BT's efficiency."

5 So he gives there the explanation for indirect costs
6 being lower in the 2009 RFS, it is because of evidenced
7 cost-savings.

8 THE CHAIRMAN: But a separate point made by Mr Beard was the
9 precise way of allocating costs can vary from one RFS to
10 another, and there were some documentary references to
11 that. There is nothing wrong in that for individual
12 years, but it is problematic if you assume that the
13 precise way in which costs are allocated in 2009 is
14 going to be the same for future years.

15 MS KREISBERGER: I wonder if the best way for me to tackle
16 that is I am going to come on and deal with each of the
17 types of costs that arise and show you that there is no
18 issue when you look at -- I am going to take direct
19 costs, indirect costs, and, sir, I hope that will
20 address your question. But what you see in that graph
21 is the downward trend from 07/08.

22 What it is showing is that BT was able to reduce
23 unit costs, despite falling demand, for residential
24 fixed voice services in the period up to 2009. That is
25 what Mr Duckworth says, if we just go back to 5.74

1 {IR-E/6/71}. So you see there:

2 "... BT was able to reduce unit costs despite
3 falling demand for residential fixed voice services."

4 Then unfortunately the table is across two pages,
5 Table 17. It shows costs falling from between 2007 and
6 2009, with potentially a blip in 2008 for access
7 non-network costs.

8 If we could go to {IR-E/7/71}, that is
9 Mr Duckworth's second report, and there he specifically
10 addresses Dr Jenkins' criticisms that actual costs
11 fluctuate markedly from year to year. He explains his
12 choice of the 2009 RFS at 7.22 at the bottom of
13 the page. Picking it up from the second sentence:

14 "BT's cost transformation programme is likely to
15 have contributed to falling SG&A and D&A costs over
16 time. It may explain the observed fall in costs between
17 07/08 and 08/09 and would have likely have contributed
18 to costs falling further in 2009/10 and beyond. I have
19 balanced the evidence from BT's internal documentation
20 of cost efficiencies against the evidence of cost
21 volatility by choosing that lower SG&A and D&A estimate
22 but not applying any adjustments for the costs
23 reductions over the period."

24 THE CHAIRMAN: Yes. Thank you.

25 MS KREISBERGER: Now I am going to move on to the projecting

1 forwards, and, sir, I hope I am going to pick up your
2 question in this section, the short point being that
3 there is no evidence that you will have wildly differing
4 allocations that make any material difference, but
5 I will go through, if I may.

6 I am now looking at projecting forward the indirect
7 costs.

8 THE CHAIRMAN: Yes.

9 MS KREISBERGER: Mr Beard's basic point is that you should
10 not -- you cannot safely rely on the 2009 RFS because
11 indirect costs have changed in some material way.

12 Now, I want to show you that taking 2009 is, if
13 anything, a conservative approach, but before I do,
14 there was quite a lot of confusion in Mr Beard's
15 submissions when we were talking about the different
16 categories of costs, so I hope you will forgive me, I am
17 going to go through the categories at a fairly basic
18 level, so I may be traversing familiar territory, but
19 I just want to walk through the four cost types: direct
20 costs, indirect incremental costs, indirect fixed and
21 common costs, and then fixed costs.

22 My overarching theme as I go through is to pick up
23 the Chairman's observation, which is that Mr Beard has
24 not made any of his points about costs, he has not made
25 them good on the evidence. He has not identified any

1 indirect cost changes which would show -- which would
2 make good his point that the indirect costs allocated to
3 SFV services in the 2009 RFS are too low and so should
4 not be used for the benchmark.

5 (Pause)

6 THE CHAIRMAN: Right.

7 MS KREISBERGER: In fact, he has not pointed you to a single
8 indirect cost, indirect SFV cost, that he can show has
9 increased or has arisen since 2009. That part of the
10 case is built on sand. What he has done is advance
11 a number of purely hypothetical examples.

12 Now, it is his case that projecting forwards is
13 unsafe, so then he has to make that good on the
14 evidence. At some point, Mr Beard complained that the
15 Class Representative had not put these points to BT
16 witnesses, but these points form no part of the
17 Class Representative's case. If he wants to make the
18 attacks, he has to prove them to be --

19 THE CHAIRMAN: I think the counterpoint he was making is
20 this is your methodology that is being used --

21 MS KREISBERGER: Yes.

22 THE CHAIRMAN: -- and if you are going to make judgment
23 calls about, for example, the cost effectively remaining
24 stable apart from an increase for inflation, then that
25 is for you to make good.

1 MS KREISBERGER: So our -- the Class Representative's
2 position is that the uprating by CPI is conservative and
3 we have put in evidence to support that submission.
4 That is very important. So that is not a judgment call.
5 The CR's case is evidence-based, and I have shown you
6 some of Mr Duckworth's evidence. So it is a position
7 that indirect costs would reduce over time.

8 So that is the CR's evidence, and Mr Beard's
9 position is: no, indirect costs would have risen. But
10 he has not pointed you to any evidence to make that
11 submission good, it is just a baseless attack.

12 The other criticism he levelled of Mr Duckworth's
13 evidence, repeatedly, was that Mr Duckworth did not
14 cross-check his RFS analysis against the BT disclosure
15 data. But how could Mr Duckworth do that? The BT
16 disclosure data is not disaggregated, there is no means
17 of cross-checking the RFS. That is why Mr Duckworth
18 goes to the RFS.

19 THE CHAIRMAN: Yes.

20 MS KREISBERGER: Then taking the costs categories in turn,
21 starting with direct costs, just briefly. There are
22 potential economies of scope from selling two or more
23 services down the same line, even in BT's case with two
24 wholesale products. Mr Beard accepted that at pages 66
25 to 67 of yesterday's transcript {Day27/66:1}. These

1 translate into reduced per line costs for bundles
2 compared to standalone costs for the component parts.

3 THE CHAIRMAN: Yes.

4 MS KREISBERGER: So in competitive bundle markets that will
5 lead to lower prices for bundles, and it is part of the
6 explanation for these low incremental broadband prices
7 where broadband is added to an existing voice line, and
8 that is -- that really is the story as to why bundles
9 become attractive to some customers and have become the
10 focus of competition.

11 But what matters for the limb 1 analysis is the
12 direct costs of SFV services, such as WLR which covers
13 the full cost of the line. So any direct cost economies
14 of scope for selling multiple services to bundle
15 customers are irrelevant to the construction of the
16 benchmark, the cost-plus benchmark for SFV. Direct cost
17 changes from 2009 to the claim period are already
18 explicitly factored in, there is no projecting forwards
19 of those costs. Mr Duckworth uses actual direct costs
20 attributed across the voice line base on a per line
21 basis, so the same cost is allocated to a line whether
22 it is SFV or a bundle.

23 So any changes in direct costs are accounted for.
24 For example, any gives are factored into direct costs.
25 For your note, Dr Jenkins and Mr Duckworth agree on that

1 {OR-H/263/1}. So that is direct costs.

2 Then if we turn to indirect incremental costs. So
3 indirect incremental costs for SFV services are the
4 elements of SG&A and D&A that are causally related to
5 SFV. Mr Duckworth and Dr Jenkins agree that it is only
6 indirect incremental costs for SFV services that matter,
7 not other services. That is at JES page 105,
8 'components of the cost-plus benchmark'.

9 Mr Beard claimed yesterday that the incremental
10 costs could change substantially over time. That was
11 page 17, lines 2 to 3 {Day27/17:2-3}. What he must have
12 meant is that incremental costs have increased,
13 otherwise 2009 is conservative.

14 THE CHAIRMAN: Yes.

15 MS KREISBERGER: But Mr Beard has not advanced any evidence
16 or even an explanation as to why he says there were
17 significant increases per line in indirect incremental
18 costs for SFV services since 2009. There is no evidence
19 at all before the Tribunal to support that proposition.

20 What is more, it is counterintuitive, because SFV
21 services are a legacy product, there is limited or no
22 innovation or changes to the inputs over time, and they
23 are delivered to a declining customer base largely made
24 up of long tenure customers. We have addressed that.
25 For your note, it is at paragraph 376(c) of our

1 closings, {A/15/132}.

2 So if there has been a change in indirect
3 incremental SFV costs, that would take the form of
4 a reduction over time because of the cost saving
5 programmes and efficiencies, and the CR relies on actual
6 evidence, actual documentary evidence of that, and the
7 fact that there would be likely to be a reduction in
8 spend on SFV customers for particular costs categories
9 because the locus of competition has shifted to bundles.

10 So if you take, for instance, customer acquisition
11 costs for new SFV customers, they would be likely to
12 have gone down. We do not have any evidence from BT on
13 that. The introduction or the expansion of non-SFV
14 products after 2009 for BT Consumer as a whole will have
15 led to increases in indirect costs for those other
16 services, so broadband and BT Sport, and so on.

17 So, for example, increases in SG&A costs will likely
18 reflect, for example, that the focus on marketing is on
19 bundles and marketing the BT Sport channel, and
20 increases in D&A costs will likely reflect new costs
21 such as systems development costs to serve bundled
22 customers.

23 On Tuesday I showed you the evidence in relation
24 to a new billing IT system, and the documentary
25 evidence, contemporaneous documentary evidence, showed

1 that the billing system was introduced to serve bundle
2 customers. That was {OR-F/843/14}. That is
3 a significant item of evidence, because that was one of
4 Mr Beard's hypothetical examples of a new cost which he
5 said would need to be allocated to SFV, and I showed you
6 on Tuesday he actually put that hypothetical example to
7 Mr Duckworth, and in his enthusiasm for hypothetical
8 examples he had overlooked the actual documentary
9 evidence from his own client which shows that this is
10 a very good example of a cost caused by bundles which
11 should therefore be allocated to bundles.

12 Mr Beard tried another one in his oral closings,
13 and I just want to read to you what he said
14 {OR-A/16/129}. Sorry, written closings, BT's written
15 closings. Paragraph 527.

16 THE CHAIRMAN: Yes.

17 MS KREISBERGER: It says this:

18 "... it was put to Mr Duckworth in cross-examination
19 that a hypothetical post-2009 publicity campaign to
20 promote BT's telephony services -- which campaign would
21 be publicising both bundled and SFV services -- would
22 require 'a completely different approach to
23 apportionment of those costs as compared to a situation
24 before [BT] started offering those services in
25 bundles'."

1 The reference to the transcript is Day 15, page 147,
2 lines 24 to 25. {Day15/147:24-25}.

3 So here he is hypothesising a very particular
4 campaign but he has not advanced any evidence of it, so,
5 again, it is not a good basis on which to challenge
6 Mr Duckworth's evidence on the costs data.

7 THE CHAIRMAN: He agreed with him, though, did he not?

8 It says:

9 "Mr Duckworth agreed ..."

10 MS KREISBERGER: If hypothetically ...

11 THE CHAIRMAN: "... apportionment bases for 'a new set of
12 products' could have been 'potentially radically
13 changing'."

14 MS KREISBERGER: But there is no evidence, it is just
15 another hypothetical example. That is the point I am
16 drawing out.

17 Mr Beard asked me to correct that the document that
18 proves -- the document that proves that the IT billing
19 system was introduced ...

20 Sorry, it is quite distracting, actually.

21 The document was put to Mr Duckworth, that is
22 the document that shows that the IT billing system was
23 introduced in order to service bundles, and Mr Duckworth
24 responded, you will remember, in the transcript, to say:
25 this is a good example of a cost which is attributable

1 to bundles, not SFV services. Because costs
2 causality --

3 THE CHAIRMAN: Were you about to give me a different
4 reference or something?

5 MS KREISBERGER: No. I think Mr Beard pointed out that the
6 way I worded my submission might not have made clear the
7 document was also put to Mr Duckworth. It does not
8 change my submission, which is the example is one which
9 supports my case, not his.

10 THE CHAIRMAN: Is that a convenient moment?

11 MS KREISBERGER: It is. Thank you, sir.

12 (3.11 pm)

13 (A short break)

14 (3.25 pm)

15 THE CHAIRMAN: Yes.

16 MS KREISBERGER: That completes indirect incremental costs.

17 THE CHAIRMAN: Right.

18 MS KREISBERGER: I move on to my third category of indirect
19 fixed and common costs.

20 A fixed and common cost is a cost that must be
21 incurred in order to provide multiple services. If new
22 services are introduced, to which an existing fixed cost
23 is common, then there is an economy of scope, because
24 you are spreading a fixed cost across a greater number
25 of services.

1 Since deregulation in 2009 BT increased the number
2 of services it has been able to offer as it competes
3 vigorously for bundle customers and other customers. So
4 if there were significant fixed costs, and they are
5 relevant to supplying those other products, so they are
6 common to them, then those fixed costs over time will be
7 spread across a larger number of products.

8 I would like to go through my points on common costs
9 in stages.

10 The first stage of the Class Representative's
11 response to common costs, the arguments that have been
12 made around common costs, the first stage is that they
13 are low. As you know, that is our case.

14 Just at the outset, Mr Beard misrepresented
15 Mr Duckworth as saying there are zero or no common
16 costs. For precision, his evidence is that common costs
17 are low or immaterial. He did not say zero. For your
18 note, this point is addressed at paragraph 377(f) to 380
19 of our closings, {IR-A/15/135}.

20 If common costs, costs which are common to SFV as
21 well as other services, are low, then any projection
22 forwards issues are immaterial. In other words, BT has
23 been taking us down a very large rabbit hole.

24 The evidence that common costs are low is summarised
25 at paragraphs 379 to 380, and 405 to 410 of our written

1 closings, but I would like to address two pieces of
2 evidence, if I may.

3 The first is third parties, third party comparators
4 for these purposes. Mr Beard's submission was that
5 other providers are not relevant. Now, it is common
6 ground that SFV services are asset-light, the experts
7 agree on that, and the references are at paragraph 455
8 of our closings.

9 So in circumstances where these services are
10 asset-light, it is just not really credible to assume
11 common costs of hundreds of millions, as Dr Jenkins
12 does. If fixed and common costs were so large, it does
13 not explain why these smaller operators, TalkTalk,
14 Utility Warehouse and Phone Co-op, were able to enter
15 the market for SFV services, fixed voice, and compete in
16 the market.

17 If we could turn up {IR-E/6/87}, this is
18 Mr Duckworth's first report, Figure 8. You see there
19 the revenue for TalkTalk is the purple line, line 3 from
20 the bottom, Utility Warehouse is in yellow, and
21 Phone Co-op is the blue line right at the bottom.

22 You can see there, and you heard submissions from
23 Mr Beard on this, Phone Co-op operated between 2013 and
24 2017. Mr Beard described Phone Co-op as a "minnow", and
25 I would adopt that description of it, it was a minnow,

1 and it swam in the sea of fixed voice for five years.
2 That is not a flash in the pan, that is a sufficiently
3 long period to show that BT's contention of very high
4 fixed costs is not plausible.

5 If there were hundreds of millions of fixed costs
6 here, Phone Co-op could not have entered and operated in
7 this market at all. That would be a huge barrier to
8 entry.

9 THE CHAIRMAN: It depends if you think it is the same kind
10 of operation. I think the point being made is that it
11 is a vastly different kind of organisation than BT, it
12 has a small market, and the way in which it services
13 them or the way in which it chooses to promote itself,
14 et cetera, might involve very much lower fixed costs.

15 MS KREISBERGER: That in itself suggests these costs are
16 scalable. It suggests there is not a fixed cost for
17 operating in the voice -- in the fixed voice market. So
18 it is evidence that points in my favour. It is
19 small-scale entry.

20 So it rather suggests that the costs to provide SFV
21 reduce significantly as scale reduces, and that would
22 suggest they are not fixed costs.

23 MR RIDYARD: Is that right? Could you choose to attack
24 a market by -- by paying as you go and operating on
25 a small scale or doing something more substantial and

1 operating on a large-scale; might you not get different
2 kinds of cost in those two situations?

3 MS KREISBERGER: I am not sure that is something I can
4 answer.

5 MR RIDYARD: It was really something for us to ponder,
6 I think.

7 MS KREISBERGER: I would say though that it is also
8 consistent with Mr Cackett's evidence, that is his oral
9 evidence, I think I did refer to this earlier in the
10 week, Day 8, page 178 to 180 {Day8/178:1}, which is that
11 head office costs are variable over time based on
12 demand, so it is an example of a scalable cost.

13 I should say Mr Beard did not address TalkTalk or
14 Utility Warehouse which you saw on that graph. But in
15 respect of SSE and Post Office, BT is right to point out
16 that they did not enter the market on a standalone
17 basis, they were entering on the back of their own
18 broader business.

19 But nonetheless, if we call up {IR-E/7/39}, Table 1.
20 So that is the comparison of total costs, the provision
21 of telephony by the Post Office, with Dr Jenkins'
22 estimate of costs.

23 So in other words, when BT says, well, they are not
24 standalone businesses, it is asking you to assume that
25 these huge differentials between their figures for total

1 costs and Dr Jenkins' estimate can be explained on the
2 basis of they are other businesses.

3 THE CHAIRMAN: Sorry ... (Pause). Was the point --

4 MS KREISBERGER: So the point is that the differentials that
5 you see there between total cost, Post Office all
6 telephony total costs, and common costs according to
7 Dr Jenkins -- these are not confidential figures, are
8 they? You see the differential between -- if you take
9 Post Office SFV total cost, 78 million, compared to
10 Dr Jenkins' estimate of fixed and common costs for SFV
11 services, so that is the direct comparison, 78 with 390,
12 and BT is asking you to assume that the Post Office bore
13 these costs, these costs were loaded on to its main
14 business. It could not otherwise operate at this scale
15 given the total costs for SFV services. It is a total
16 disconnect.

17 MR RIDYARD: I think the argument there is that Post Office
18 is obviously a big company with a big expensive network,
19 which is Post Office business, and it was doing -- it
20 was doing this telephone business on the back of that.
21 So if for some reason we asked the Post Office to say
22 what are the common costs of operating a postal network
23 or a Post Office network and a telephone business on the
24 side of it, it would say, well, you could not -- we
25 could not just operate a telephone business for what we

1 are -- as a standalone basis on the way we are doing it
2 in practice, because in practice we are leaning on the
3 existence of the counters and all that infrastructure,
4 and that is big number.

5 MS KREISBERGER: Yes. We do not know. I cannot take it any
6 further than that, having no insight into that.

7 Could I pick up the TSO cross-check which Mr Beard
8 addressed you on, as did I earlier in the week. In
9 relation to the slide which shows a 20% adjustment,
10 Mr Beard said:

11 "As I understand it, what is being suggested is that
12 there is a line in there under SG&A, further down, which
13 is TSO direct, indirect and fixed costs, and there is
14 an allocation of TSO direct and indirect costs that has
15 fallen across time, and somehow that is to be taken as
16 a downweighting for SFV services. That is not
17 consistent with this cross-check."

18 We will just pull up the slide. {OR-F/505/8},
19 page 8 of this document. Mr Beard has misunderstood the
20 document. So Mr Duckworth is not pointing to the
21 downward trend as justification, which is what Mr Beard
22 said. He was pointing to what is said in the notes to
23 the table, and the notes to the table say:

24 "Significant downweight - Proportion of number of
25 products [around] 3-4%."

1 You see that against the TSO entry there.

2 What is shown in the underlying spreadsheet which
3 Mr Duckworth addresses is that when BT was producing
4 these numbers on a fully allocated costs basis, it
5 applied a downward adjustment before allocating the
6 costs. In other words, the reference to 3-4% of
7 products on the slide is the justification for the 20%
8 assumption that is used in the spreadsheet which
9 underlies the calculations.

10 Mr Duckworth addressed that in his evidence, and
11 I will give you the reference {Day13/153:16}. So that
12 is the 20% downweight.

13 Just picking up a couple of other points that
14 Mr Beard made on this. He described the information
15 used by Dr Jenkins in her cost allocation exercise as a
16 "rich repository". He said she took the cohort of data
17 and actually carried out a qualitative analysis in order
18 to come up with the data she did.

19 Actually, she just looked at labels on cost lines
20 which are not very illuminating at all.

21 THE CHAIRMAN: Why not? Why are they not a good start?

22 MS KREISBERGER: They just do not take you very far in
23 themselves. They are not very illuminating as to the
24 cost allocations.

25 THE CHAIRMAN: But if it -- if there is a descriptor and it

1 gives you -- and it is a description of a costs
2 activity, and you are trying to work out what is
3 a common cost and what is an incremental cost, what is
4 wrong with that as a starting point?

5 MS KREISBERGER: -- as a starting point perhaps, but it does
6 not give you any information as to the cost allocations
7 based on a label, a descriptor.

8 THE CHAIRMAN: Thank you.

9 MS KREISBERGER: But Mr Beard criticised Mr Duckworth for
10 not using what he described as the "millions of pounds
11 worth of disclosure" which was available to allocate
12 costs in the claim period. So I just note that
13 Dr Jenkins does not use what Mr Beard refers to as
14 "millions of pounds worth of disclosure" for her cost
15 allocations, she relies on these labels in BT's systems
16 and one Ofcom document that is contradicted by the
17 evidence I have just shown you.

18 Staying with fixed costs, a point that I fear may be
19 obvious is that fixed costs that are not common to SFV
20 services are irrelevant to the SFV benchmark, and
21 I think Mr Ridyard made this observation: the only costs
22 which are relevant are costs which are common to SFV
23 services. So costs which are, say, common to standalone
24 television and bundles are not common to SFV and should
25 not be allocated to SFV. So changes in those kinds of

1 common costs are not relevant to projecting forwards the
2 RFS, and the experts agree on that {E/49/105}.

3 So any new common costs that are not common to SFV
4 but are common to other products do not arise for
5 allocation to the benchmark.

6 Now, BT argues that there are increased indirect
7 costs for BT Consumer as a whole and that this, at least
8 in part, reflects an increase in fixed and common costs.

9 Mr Beard accepted yesterday, page 30, lines 1 to 11
10 of the transcript {Day27/30:1-11} that he was looking at
11 BT Consumer costs for all services, but Mr Beard has not
12 identified a single category of cost which has become
13 common to SFV since 2009.

14 So it is not that he has not met the evidential
15 burden, he has not even engaged with it. He cannot show
16 you there is some new cost since 2009 which has become
17 common to SFV and is therefore a basis for questioning
18 the RFS from 2009.

19 My third point is economies of scope, and Mr Ridyard
20 told me earlier in the week he would have liked to have
21 heard more about them, which is music to any lawyer's
22 ears. Any fixed and common costs at the time of the
23 RFS, which are common to the services that BT has
24 introduced after 2009, in other words bundles, can now
25 be recovered across more services. In other words, if

1 there are fixed and common costs, and they have become
2 common to these services that have been added since
3 2009, any allocation to SFV services would likely be
4 reduced.

5 MR RIDYARD: If you are engaging in a LRIC+ exercise.

6 MS KREISBERGER: Yes.

7 So that is the economies of scope point.

8 Mr Duckworth does not make any adjustment to the BT
9 RFS to reflect those kinds of economies of scope, which
10 means his approach is conservative. So he will have
11 overstated the extent to which costs -- these kinds of
12 costs should now be allocated to SFV services, because
13 if they do exist then they should be spread across
14 a greater number of services.

15 MR RIDYARD: So if we say the BT brand name in itself is one
16 of those things, just for the sake of argument, and say
17 it is an expensive thing, over time BT introduces more
18 and more products under the BT brand name, so that means
19 that the cost -- the LRIC+ approach would allocate less
20 and less -- a smaller and smaller number to SFV.

21 So in that situation, you could start off saying
22 that in year one the profits of SFV were reasonable, but
23 by year five, when BT had introduced a load more BT
24 branded products, costs would have come down. So in
25 year five, although the SFV had not done anything at

1 all, just sat there doing the same thing year after
2 year, suddenly its costs would have come down, its
3 prices would then be excessive.

4 MS KREISBERGER: Well, I do not know about excessive -- it
5 would depend -- on if they were

6 MR RIDYARD: Quite a few ifs in that statement.

7 MS KREISBERGER: But if they were material to that level,
8 but again we are hypothesising.

9 MR RIDYARD: Yes.

10 MS KREISBERGER: But in theory, yes.

11 MR RIDYARD: People who criticise LRIC+ would give that as a
12 good illustration of why LRIC+ is not the whole answer.

13 MS KREISBERGER: Except the point being put by Mr Beard is
14 that the cost benchmark is too low, but this would show
15 that the cost benchmark --

16 MR RIDYARD: I understand the point within the terms of
17 LRIC+, yes.

18 MS KREISBERGER: Coming back to what BT says, at
19 paragraph 506 of their written closings they hypothesise
20 that there may have been incremental costs of SFV
21 services in the RFS, so incremental at the time of the
22 RFS, that have become fixed and common across
23 BT Consumer as a whole, including SFV services, in the
24 claim period.

25 We are not able to understand that submission. We

1 do not know how a cost that was once incremental
2 transforms into a fixed cost, we certainly cannot think
3 of any, and BT, and it is BT's argument so it is not
4 really our job, BT has not identified a single type of
5 cost that would fall into this category. It is just
6 something they posit. It is not explained and it is not
7 plausible that there are material -- these are not
8 theoretical concerns, it has to be a material issue.

9 To the extent that what Mr Beard is driving at in
10 his written closings is that there are new or increased
11 incremental costs, well, I have addressed you on
12 incremental costs. So it might be that there is some
13 muddling here between incremental and fixed and common,
14 but I do not think I can take it any further than that.

15 As put in the written closings, it is an implausible
16 hypothesis, and in the absence of evidence that this is
17 any sort of realistic possibility, in my respectful
18 submission, it should be discounted.

19 My last point is fixed costs for voice in 2009.
20 This is the dis-economies of scale, number of lines
21 point. So BT hypothesise that there are dis-economies
22 of scale. This refers to fixed voice costs in 2009
23 which are spread over fewer lines in 2015 onwards. So
24 in other words, this particular hypothesis depends on
25 there being large fixed costs that are required to

1 provide Voice services only. So these costs are not
2 common, so they do not get spread across all these other
3 services that BT now provides.

4 Again, I am afraid I return to my refrain: BT has
5 not identified what these costs are, it has not given
6 the example of a single type of cost that would fall
7 into that category, and it has not provided any
8 indication of the scale of these supposed costs. It is
9 all entirely based on hypothesis, some of which is
10 really lacking in plausibility.

11 If BT were right and these large fixed voice costs
12 existed, then it is right that they would be divided
13 amongst a smaller number of lines in the claim period
14 than in 2009, and that would -- or could result in
15 dis-economies of scale, which is what happens when you
16 spread fixed costs across decreasing output.

17 But I have addressed you on the fact that these are
18 creatures that have not been identified, not been
19 explained, but this is also contrary to evidence which
20 is before the Tribunal. The evidence we have shows that
21 the fall in the number of lines does not necessarily
22 translate into higher indirect costs, I took you to
23 a passage from the BT RFS, that was {E/13/818}, and it
24 was that first sentence:

25 "Retail operating costs have also decreased ..."

1 That is a reference to indirect costs.

2 "... as a result of the fall in numbers of
3 connections and rentals."

4 You have seen Figure 5.4 that Mr Beard took you to
5 many times in Dr Jenkins' reply report which shows
6 indirect costs becoming lower as lines go down -- as
7 lines go up.

8 I think you have the point that Dr Jenkins treats
9 all common costs as common across all services operated
10 by BT Consumer, so she has not identified large -- she
11 has not identified -- she is operating on the assumption
12 that there are not any large fixed costs which arise out
13 of Voice Only. When I put this point earlier in the
14 week, Mr Ridyard said, well, yes, that is her
15 assumption. But in my submission, that is an important
16 point, because the Tribunal should not treat seriously
17 hypothetical arguments advanced by BT which are
18 contradicted by the assumptions of their own expert.

19 Then there is the point that you have that there are
20 Telco businesses operating at much lower scales than BT,
21 so coming back to the Phone Co-op example. That
22 suggests that there are not material economies or
23 dis-economies of scale above some very small level of
24 operation.

25 So the last point I wanted to make on this category

1 is BT's hypothetical example at paragraphs 510 to 512 of
2 its closings {OR-A/16/125}. So here BT -- it is
3 a curious one, BT assumes that all incremental costs in
4 2009 are not incremental anymore but they become fixed,
5 and there are no costs common to voice and other
6 services, so again that is contrary to Dr Jenkins. But
7 Mr Beard also seemed to misunderstand his own example.
8 He said it was about economies of scale and scope.
9 Actually, this example is positing economies of scale
10 with respect to voice services.

11 It also refers to fixed and common costs across
12 multiple services, but the example is actually just
13 about fixed costs for voice services, not costs which
14 are common with other non-voice services. Again, this
15 stylised example, where all indirect costs are fixed and
16 there are no incremental costs, is really in the realms
17 of fantasy, it is not borne out by the evidence, it does
18 not get off the ground, and of course the numbers
19 posited here are just made up.

20 So overall, none of these hypothetical examples give
21 rise to any reason to doubt Mr Duckworth's benchmark as
22 the best available estimate of SFV costs, but also
23 a likely conservative benchmark for the claim period.

24 THE CHAIRMAN: Yes.

25 MS KREISBERGER: Sir, the last topic I was going to address

1 is margins.

2 THE CHAIRMAN: Yes.

3 MS KREISBERGER: Which I can deal with crisply. I would
4 like to go back to {IR-C/2/31}. This is the table we
5 spent some time on yesterday, Table A5.14. Mr Ridyard
6 asked yesterday whether the implications of this table
7 is that the Tribunal is being asked to essentially
8 impose a regulated price on BT and assume it is
9 a natural monopoly. I would like to address you on --
10 develop my submission as to how this table should be
11 understood.

12 The short point is that it is encapsulating really
13 quite starkly the cost asymmetries between BT and other
14 providers. The reason why other providers cannot
15 compete for SFV customers on a 10% margin is because of
16 the way BT has dominated this market because it is
17 an ex-monopolist.

18 So what you are seeing there is that other providers
19 do not enjoy BT's incumbency advantages, and so they
20 have to pay a lot more to acquire customers, they have
21 to pay a lot more than BT, because they do not benefit
22 from a large legacy customer base.

23 So Ofcom here is explicitly -- I am going to take
24 you to other parts just briefly -- but Ofcom is
25 explicitly recognising these cost asymmetries here, it

1 is essentially recognising that BT has strength, market
2 power, which drives up the costs for rivals.

3 Ofcom is not saying that a 10% margin is below what
4 one would expect to observe in conditions of workable
5 competition, in a workably competitive market. On the
6 contrary, I showed you, and I think we should go back to
7 it {C/1/100}, the Provisional Conclusions,
8 paragraph 8.17.

9 Ofcom says in terms:

10 "Our analysis suggests that a ROS of no more than
11 10% is consistent with a cost-based estimate of
12 profitability for a provider of retail voice services
13 ..."

14 So they are saying the 10% margin is the competitive
15 level.

16 I have shown you that paragraph before, but I do not
17 think I read paragraph 8.18, the following paragraph,
18 where Ofcom says:

19 "However, as discussed below, an adjustment of this
20 size would be highly likely to make it uneconomic for
21 other CPs to compete in offering SFV services and
22 acquiring customers. Other CPs incur substantial
23 acquisition costs when acquiring customers which BT does
24 not incur when serving its existing SFV subscriber base.
25 These costs make other CPs less profitable when compared

1 to BT."

2 So Ofcom is recognising there that a 10% margin is
3 an appropriate return for a provider of retail voice
4 services, in other words, that is the margin you should
5 find in conditions of workable competition, and it is
6 recognising that other providers cannot compete with BT
7 on that margin because of these significant cost
8 asymmetries.

9 MR RIDYARD: That was why I went to my natural monopoly. So
10 nothing you are saying here is making me think it is not
11 a natural monopoly.

12 MS KREISBERGER: Sorry, I did not mean to suggest I was
13 disputing that, but rather I am addressing Mr Beard's
14 submission, which is, well, they are not saying 10% is
15 the right margin for conditions of workable competition.
16 But of course, when you are setting the benchmark, the
17 cost-plus benchmark, you are setting a margin that
18 reflects conditions of workable competition, not
19 a margin which is the product of BT's domination of the
20 market.

21 MR RIDYARD: Yes. So the consequence of going down to 10%
22 for BT is that no one else can live with it, but that is
23 fair enough.

24 MS KREISBERGER: Yes, because of its market strength, yes.
25 So, yes, sir, I am agreeing with you, but just

1 simply developing the point.

2 Now, BT is saying you should take 20-25%, and if you
3 do that, you are essentially building in BT's SMP
4 advantage into the benchmark, you are baking it in, and
5 that is not the right approach, that is not the exercise
6 involved, of course, in building the competitive level.

7 Ofcom had the aim of promoting competition as well
8 as reducing detriment to consumers. So if we could go
9 to {IR-C/1/97}, paragraph 8.2 of the Provisional
10 Conclusions. If I could just ask you to cast your eye
11 over paragraphs 8.2 and 8.3. (Pause).

12 When Ofcom is regulating the market, it is looking
13 to protect consumers from supracompetitive prices, but
14 it is also looking to encourage entry and expansion, and
15 that is the context for Figure A5.14.

16 But the law on this is absolutely explicit: prices
17 that incentivise entry are not an appropriate benchmark
18 for limb 1.

19 If we could have a look at the Tribunal's judgment
20 in the *Liothyronine* case, that is at {G/95/113}. I will
21 just show you two paragraphs, but I would invite the
22 Tribunal to read paragraphs 317 to 321.

23 If I could just show you 317:

24 "In our view, the CMA was justified in rejecting
25 Entry-Incentivising Prices as a valid competitive

1 benchmark. As noted above, it was common ground between
2 the experts that Entry-Incentivising Prices do not
3 reflect the outcome of an effectively competitive
4 process, they represent the beginnings of the
5 competitive process. The question for the Tribunal is
6 whether Entry-Incentivising Prices are nevertheless
7 a valid comparator. In the Tribunal's view, they are
8 not for the following reasons ..."

9 They give a number of reasons.

10 If we can go over the page {G/95/114},
11 paragraph 321:

12 "As to the Appellants' contention that applying
13 a benchmark below the Entry-Incentivising Price would
14 deprive consumers of the potential benefits of
15 competition, we agree with the CMA's position that, as
16 noted above, it is not part of the *United Brands* test
17 that the price benchmark must be set at a level to
18 facilitate competition. The test does not presuppose
19 that the potential benefits of competition are such as
20 to justify and render non-abusive whatever price is
21 needed to incentivise other entrants to compete. Nor
22 does the test require a comparison to be made between,
23 on the one hand, the benefits of competition with, on
24 the other hand, the harm resulting from excessive
25 prices."

1 So on that basis, Mr Beard cannot draw any support
2 from Figure A5.14 for the use of a 20% margin.

3 THE CHAIRMAN: Yes.

4 MS KREISBERGER: Those, sir, are my reply submissions,
5 unless I can be of further assistance.

6 MR RIDYARD: I have a question about -- I think it is
7 a limb 2 question but I am not sure these days.

8 This question about how -- if one were to decide
9 that the SPC customers could switch to a bundle, and
10 most of them would be made better off by doing so, but
11 they have not done so just because they, for whatever
12 reason, some behavioural impediment or whatever it is,
13 they have not chosen to take advantage of a bundle
14 offer. If we find that that is due to mistaken conduct
15 or, I do not know how you describe it exactly in
16 behavioural terms, how do we then -- how should we then
17 treat the high prices that they are paying? Are they --
18 are these something which are inherently unfair, or are
19 they -- how do they feature into the limb 2 assessment?

20 That is really the question I was asking Mr Beard
21 several times this morning.

22 MS KREISBERGER: Yes. It engages with the -- well,
23 certainly the way Mr Beard put his argument, engages
24 with the willingness to pay fallacy. Because the fact
25 that these SPCs are paying these high prices in

1 seemingly irrational conditions, or at least for some it
2 may be -- we do not know how -- what -- makes up the
3 cohort. Some may be behaving rationally, they may have
4 their reasons, others may be behaving irrationally and
5 could save money by switching. The fact they continue
6 to pay the high prices tells you nothing at all because
7 that would simply be the willingness to pay fallacy. It
8 is always the case that --

9 MR RIDYARD: I am familiar with the willingness to pay
10 fallacy, yes.

11 MS KREISBERGER: So that does not help you.

12 As to -- your question, as I understand it, the fact
13 that they could switch to a bundle does not really
14 illuminate the question at all, because it does not
15 illuminate the question of economic value, and, as
16 I addressed you earlier in the week, economic value is
17 asking what should customers reasonably pay, and
18 a proxy, to use Lord Justice Green's language, a proxy
19 for what they should reasonably pay is the price in
20 conditions of workable competition.

21 So the fact that they could switch and make savings
22 underlines the unfairness of the price they are paying,
23 that takes you back to the price differential analysis,
24 but it certainly does not -- it is not a justification
25 for the higher price that they are paying, because in

1 all of this one is really -- the analysis is to identify
2 the excess of course under limb 1, and identify that it
3 is significant, material. Then once you have identified
4 that the price they are paying is significantly above
5 the competitive level, the analysis moves on to, well,
6 is there some justification for this price that exceeds
7 the competitive level, for instance, some distinctive
8 feature that cannot be found in any other product?

9 We are so far removed from that scenario. BT has
10 not advanced any convincing evidence to show that their
11 SFV service, to use Mr Bunt's expression, is so
12 overpriced because it is adding some value compared to
13 rivals.

14 So they have not shown you any evidence which should
15 compel the Tribunal to say, well, the cost-plus
16 benchmark is not really capturing what could be charged
17 in a competitive market.

18 MR RIDYARD: I suppose in my scenario I am not even allowing
19 that because I am saying these people are not choosing
20 BT because they think BT is great or better than Sky --

21 MS KREISBERGER: They have just got stuck.

22 MR RIDYARD: They are just there and doing it for reasons
23 that may be quite hard to understand. So even if there
24 was evidence of that for some consumers, I am ruling
25 that out for these ones. So these ones are just

1 straightforward -- it is just straightforward limb 2
2 abuse, is it? Wherever that happens.

3 MS KREISBERGER: It is consistent, yes, with the price being
4 unfair. Because it is hard to explain. It is not
5 explained -- in your scenario it is not explained by any
6 additional value which you should take account of in
7 limb 2.

8 MR RIDYARD: Yes.

9 MS KREISBERGER: It is actually explaining that these high
10 prices are really a function of market power and this
11 is-- the unswitchy --

12 MR RIDYARD: In a way, are they that? They are a function
13 of people making bad decisions, are they not?

14 MS KREISBERGER: They continue to pay the high prices. Yes,
15 quite. Again, coming back to the evidence that we pray
16 in aid on unfairness. You have seen that we rely on
17 evidence to show that BT knew this to be the case; that
18 there are these irrational -- and they refer to them
19 in places as irrational customers, and that this was
20 really part of BT's strategy to derive maximum value
21 from this customer base. So it is all part of the
22 picture of an unfair set of prices, yes. Ultimately it
23 shows that there is nothing here in the economic value
24 story. These are excessive prices which are examples of
25 unfair prices.

1 MR RIDYARD: Thank you.

2 MS KREISBERGER: Thank you.

3 MR DORAN: Could you just rehearse why we might take the
4 Ofcom idea of the 10% margin as the product of
5 a workably competitive market? You quoted them as
6 saying that:

7 "... as discussed below, an adjustment of this size
8 would be highly likely ..."

9 I think you might have meant "highly unlikely":

10 "... to make it uneconomic for other CPs to compete
11 in offering SFV services ..."

12 But actually it did, so far as we can see.

13 MS KREISBERGER: Yes. So their point there is the
14 asymmetries of cost. So they are acknowledging that the
15 difficulty in this market is very far removed from
16 a market with conditions of workable competition. So
17 they are saying, because of the extent of BT's market
18 power, its dominance, its large legacy customer base,
19 other providers have to spend more money to try and
20 attract customers. It is a barrier to entry and
21 expansion. But they say the cost-based margin -- it
22 might be helpful just to pull up the paragraph
23 {IR-C/1/100} at 8.17. If we could perhaps just blow up
24 the top. Thank you. So in 8.17 Ofcom are talking about
25 an £8 to £10 reduction. This was before

1 the commitments, of course. It is the Provisional
2 Conclusions, and the settlement was less than that.

3 But:

4 "Our analysis suggests that a ROS of no more than
5 10% is consistent with a cost based estimate of
6 profitability for a provider of retail voice services."

7 But then they go on at 8.18 to acknowledge in terms:

8 "Other CPs incur substantial acquisition costs when
9 acquiring customers ..."

10 BT does not incur those costs, and that is why it
11 makes other CPs less profitable:

12 "We would therefore only use an £8-10 reduction in
13 prices if we were not also imposing engagement
14 remedies."

15 So they are acknowledging there that, if your
16 objective is to stimulate competition, then a 10% margin
17 creates difficulties for competitors because they have
18 to spend more money to compete with the dominant
19 operator. You will remember we are talking about market
20 shares of 70% to 80% before the commitments. So Ofcom
21 is not here looking at what would be the margin in
22 conditions of workable competition, it is looking here
23 at -- it is acknowledging the problem of setting prices
24 to attract entry in these difficulty circumstances.

25 MR DORAN: So because of the secular trend there is no

1 workably effective market price here. It only pertains
2 to BT. So one fixes the BT price at this level, and
3 there is no price at which anybody can actually compete
4 for people, which is consistent with BT only earning
5 an appropriate return.

6 MS KREISBERGER: Yes, if appropriate is the workable
7 competition benchmark, at that level life is difficult
8 for rivals.

9 MR DORAN: So workable competition means basically
10 a regulated monopoly supplier?

11 MS KREISBERGER: I would say it is not workable
12 competition --

13 MR DORAN: So there is not a workably effective competitive
14 price?

15 MS KREISBERGER: When Ofcom is reflecting on where to set
16 the price, it is saying: we are acknowledging that this
17 is not a workably competitive market, because it has
18 a very dominant, perhaps superdominant operator, and,
19 therefore, if we are going to cut BT's price because we
20 want to reduce consumer detriment in this very
21 uncompetitive marketplace, this dominated marketplace,
22 then if we also want to stimulate entry and, as
23 the regulator, they are looking at these different,
24 somewhat conflicting, objectives, then they are looking
25 at what level they could bring the price down to, to

1 meet all these objectives. But that is not the question
2 under limb 1. The question under limb 1 is purely to
3 set a competitive benchmark, a competitive price level.

4 MR DORAN: It is the just contrast between the competitive
5 benchmark level which is not suitable for competition
6 because nobody can --

7 MS KREISBERGER: But it is still competition --

8 MR DORAN: Indeed. This is the slightly circular part of
9 this argument.

10 MS KREISBERGER: This is the *Liothyronine* example.

11 MR DORAN: I absolutely understand. It is nothing to do
12 with entry-incentivising, it is to do with
13 exit-incentivising, because nobody can compete at that
14 level.

15 MS KREISBERGER: Table A5.14 is looking at margins other
16 than the 10%. They are saying people can compete if
17 BT -- if BT is permitted a higher margin, then --

18 MR DORAN: I absolutely understand the point. It is
19 contemplating that as a price emerging from workably
20 effective competition that is the interesting thing.

21 MS KREISBERGER: Yes, but this could not be -- yes, this
22 could not be further -- and, as I am reminded by my
23 team, if so-called competition harms consumers, then it
24 is not a good thing.

25 MR DORAN: Indeed.

1 THE CHAIRMAN: Can I just pick up one point, which is on
2 your alternative line rental claim. Because Mr Beard
3 made some points today just about how that actually
4 works at all, as it were, when you have everything
5 coming through on ARPU involving line rental and calls.

6 MS KREISBERGER: Then it does not arise. It was always
7 there as a secondary case. Could I just take
8 instructions for a moment?

9 THE CHAIRMAN: Yes. I just want to know the circumstances
10 in which it does arise.

11 MS KREISBERGER: Yes. (Pause). In principle, it is not
12 addressed purely by market definition because if the
13 harm only arose in line rental you could -- the
14 secondary case would have significance. But our
15 principal case is that harm is on overall ARPU and
16 essentially, if that is right, then one does not need to
17 fall back on a line rental only excessive --

18 THE CHAIRMAN: If you win on your principal claim, you do
19 not need to get there. I am just trying to work out the
20 situation in which it could arise. In other words,
21 where you do not succeed on your primary claim. That is
22 what I am trying to work out.

23 MS KREISBERGER: Yes. It is only if there is -- if the harm
24 is only on line rental rather than total ARPU, you could
25 have excessive pricing on line rental only.

1 THE CHAIRMAN: You have excessive pricing or excessive and
2 unfair pricing on line rental.

3 MS KREISBERGER: Yes, on line rental only.

4 THE CHAIRMAN: But you would not have excessive and unfair
5 pricing if you looked at the whole thing.

6 MS KREISBERGER: That is the only circumstances in which it
7 would arise; the harm was on line rental only.

8 THE CHAIRMAN: Just before we rise, can I just check -- we
9 are very grateful to both sides for all documents they
10 have put in. I think we have everything now.

11 MS KREISBERGER: I hope so.

12 THE CHAIRMAN: Mr Beard, is there anything more?

13 MR BEARD: Not as far as I know. I look behind me with some
14 trepidation, but no.

15 THE CHAIRMAN: We are extremely grateful for all of those
16 documents. Thank you both and your legal teams very
17 much for all your assistance. We will rise now.

18 (4.22 pm)

19 (The Hearing Concluded)

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