IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 11th February 2025

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 **Respondents**
(2) British Telecommunications PLC

A P P E A R AN C E S

Ronit Kreisberger KC, Roger Mallalieu KC, Derek Spitz, Jack Williams, (On behalf of Justin Le Patourel)

Benjamin Williams KC & Daisy Mackersie
(On behalf of the Respondents)

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(2.06 pm)

MR JUSTICE WAKSMAN: Some of you are joining us livestream on our website or joining us by Teams today remotely so I must start with the customary warning which is that: 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 contempt of court.

What we would like to do today is deal with the question of costs first and then the question of permission to appeal. We're very grateful to all counsel and their legal teams for the various notes and documents which we have been provided with and which we have read.

MS KREISBERGER: In which case, I will hand you over to Mr Mallalieu.

MR JUSTICE WAKSMAN: Yes, Mr Mallalieu.

Submissions by MR MALLALIEU

MR MALLALIEU: Good afternoon, sir, thank you.

It may seem a slightly odd way for me to stand up when it's BT that is applying for the costs order, but as Mr Williams put it to me on the first point, which is the costs order in principle, in essence they are seeking the standard order and we are seeking something different is the way Mr Williams put it and, therefore, subject, sir, to your direction it seemed appropriate that we explained the reasons for our approach.

MR JUSTICE WAKSMAN: Right. Thank you.

MR MALLALIEU: Sir, against that background -- and assuming, if I may, and it's not too bold you have our skeletons, you have the responses.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: The position for the Class Representative, first of all is that in terms of the costs order in principle, that costs order should reflect the relative degrees of success on the various issues which were identified and tried by the Tribunal and, cutting to the chase, the net effect of that is that BT should only recover, we say, 50 per cent, but of course it's a matter for the Tribunal's discretion ultimately, but a percentage -- and we say 50 per cent -- of their costs.

Following that, we then come to points in relation to ancillary issues, such as the question of the payment on account of those costs, and just again, sir, to give you the headline points, we accept the principle that once a cost order is made a payment on account should be made, so the point taken in our initial response, whereby we were seeking a stay of any order for a payment on account is not pursued, but there will be questions as to the quantum of that payment which will turn on an initial consideration of BT's claim for costs and some of the points we have made in our skeleton including the point we press in relation to the position in terms of the after event insurance cover that the Class Representative had.

Sir, after that there are some further ancillary points including the question of the stay of any subsequent detailed assessment of the costs order in BT's favour. I understand that for BT, their position as to whether they agree to that or not is something that they will consider once they have heard the Tribunal's determination on the earlier points.

MR JUSTICE WAKSMAN: Right.

MR MALLALIEU: Sir, subject to that, if I can start with the question of the costs order in principle, in terms of the principles, sir, you have seen that there is very little between us in respect of the principles. If I highlight some general points as to the Tribunal's approach, I will do so by reference to some of the judgments of this Tribunal in previous cases and also of the High Court. I won't, with these initial points, unless it assists, take you to the authorities bundle to take you on a trawl through the authorities.

MR JUSTICE WAKSMAN: I don't think that's necessary. We've read very carefully what the skeleton arguments and the initial correspondence on costs have said. We are very familiar with what Mr Justice Roth has said in the 2024 Merricks decision and in *Trucks* as well. So both sides have referred to those decisions and we have well in mind the main paragraphs in Merricks.

MR MALLALIEU: In that case, I'm very grateful. Thank you, sir.

Without, therefore, indulging in undue repetition, we accept that the starting point is what has been referred to elsewhere as the loser pays principle. Obviously, the Class Representative's claim was unsuccessful and the starting point is therefore that BT recovers its costs. That is, however, only part of what Mr Justice Roth described as the very broad discretion that the Tribunal has to costs and, as he emphasised in the 2017 case as set out in our skeleton argument, the starting point is no more than that. It is subject to displacement or qualification by reference to the various factors in Rule 104.

The overall exercise, sir, as you are very well aware, as was identified -- and BT cite this, in the *Royal Mail v DAF* case -- this is simply to ensure that the overall order is just and a reflection on the circumstances of the case.

In terms of points taken by BT in respect of departing from the starting point, they've referred to the judgment of Lord Justice Jackson in a personal injury case called *Fox v Foundation Piling* where he sounded a cautionary note about departing too far and too often from that starting point. I'm sure, sir, you will have already noted in the *Royal Mail v DAF* case the citation of Lady Rose's observation in the Supreme Court in the *Competition Authority v Flynn Pharma* case that the Tribunal, this Tribunal, this specialist Tribunal, has to date been considerably more ready than the High Court to make issue-based costs orders. That was an observation she made without criticism of that practice.

It is accepted by all that it is open to this Tribunal to make an issue based costs order and of course whether to do so will be determined by reference to this Tribunal's view of the issues that were pursued before it and the relevant degrees of success.

In terms of that, again I'm acutely aware that this Tribunal both case managed and then tried this issue over a considerable period of time and has given a very detailed judgment and I don't seek to tell this Tribunal what it has already decided, but just rehearse the key points that we rely on. This Tribunal made it clear that in terms of liability, there were four key stages. A point that was agreed by the parties for the Tribunal to assess when determining whether BT had abused a dominant position. Those were of course: market definition, dominance, excessive pricing, United Brands limb 1 and unfairness, United Brands limb 2.

As this Tribunal noted at paragraph 25 of its judgment, all of the economic experts, as well as the parties' submissions, addressed these four questions separately and in that order.

BT take an overarching point in response to our position on this that because liability required a multi-stage analysis, it was entitled to fully dispute each stage and therefore there is no basis for an issue-based costs order. We say that analysis is simply wrong. Simply because there is a multi-stage analysis to establishing, or not, liability does not mean that the defendant in the case needs to vigorously contest each stage of that analysis.

To take the example from a different sort of case, simply because in a tort case you have to establish duty of care, breach of duty, causation and damage, doesn't mean that in each case the defendant should, at least without adverse costs risk, robustly contest each stage of that process.

Simply because there's a multi-stage analysis does not mean that the defendant can contest each stage of that without the consequences of doing so and incurring

substantial costs in doing so being reflected in the overall costs order.

MR JUSTICE WAKSMAN: Can I just ask a question here? Can it be put in a different way, however, which is that it so happens that in these cases, as we said at the beginning of our judgment, the claimant has to overcome each of these hurdles. If it falls at any of the hurdles, that is the end of the claim. That's the sequential nature of this kind of claim. Why shouldn't the claimant take the risk of the costs, unless it's being said some hopeless or unreasonable point is being taken by the defendant, should at the end of the day it fail at the last hurdle or indeed some prior hurdle?

MR MALLALIEU: The first point is the defendant's position doesn't have to be an unreasonable one for it to be reflected in the just costs orders. That is clear from the authorities. Whether their position is unreasonable may be relevant to the question of the extent to which it's reflected in the costs order, so for example, the authorities talk about where a defendant's position has not been unreasonable but nevertheless they have lost a distinct issue, they're not recovering the costs of that issue, as opposed to if their position had been unreasonable, the order also reflecting the need to compensate the claimant for the costs they have incurred on that issue. Unreasonableness isn't the sole, certainly not the sole, determining factor.

In terms of the fact that the claimant has to establish all parts of that case, well, of course, as with the tort example, at each limb, if they fail, if the claimant fails, for example, to establish duty of care, they're not going to get to breach of duty if they fail to establish duty, they are not going to get causation; and if they fail to establish causation, they are not going to get to quantum.

That is in the nature of litigation where there are a series of hurdles that a claimant has to surmount, then of course in principle they have to surmount all of them. That does not mean that a defendant can contest all of them and contest them vigorously and at substantial cost without it being necessary, in order to do justice, for the costs

order to reflect the costs that were incurred in that contest.

Now, of course, sir, we would accept that if you come to significant issues where within that significant issue there are small parts where the defendant has failed but it has overall succeeded in large part on that issue, then the point may come, depending on the facts of each individual case, where the Tribunal decides that that is too granular to warrant a separate costs order.

The issues we are talking about here, those four identified stages that the Tribunal set out at the start of its judgment, those were very substantial issues which were dealt with in very great detail and where there are marked differences in the measure of success for BT on those issues.

The obvious starting point, not least because it's the first issue is market definition. Now, in terms of market definition, it can't be denied that that was a very substantial and largely, not entirely, I accept, discrete dispute. It occupies, in terms of the judgment, over 250 paragraphs of the Tribunal's judgment.

The Tribunal knows what it held. It held that the market definition was essentially as the Class Representative had contended and as BT had disputed. It was an issue, we say -- and of course the Tribunal will have its view -- on which BT was plainly unsuccessful. It was an issue that involved very substantial costs and very substantial time, including a very detailed review of the expert evidence, the differences between Mr Parker and Dr Jenkins on this particular issue.

Again, I don't seek to repeat to the Tribunal what it concluded, but the Tribunal will be well aware that on this issue it repeatedly, in its judgment, found Dr Jenkins's evidence unsatisfactory. Sir, I can give you references to that if it would assist. It is a repeated thread throughout the Tribunal's consideration of BT's case on this issue.

Whilst the Tribunal did not find Mr Parker's evidence ideal on all of the issues in this stage, it did reject expressly the substantial majority of the criticisms made of his

analysis and the overall conclusion was that the Class Representative succeeded in establishing that SFV, single fixed voice, was the separate market. That was a substantial success, we say, for a Class Representative and it came at a substantial cost.

It was an issue that BT could have conceded without -- and this comes back to the point you raised with me a few moments ago, sir -- it could have conceded that issue without, of course, conceding liability because of its ability to fight stages two, three and four. What it did is it contested a point that it didn't have to, to defeat the claim. It lost that point. It took up substantial parts of the Tribunal's time and incurred substantial costs and caused the Class Representative to incur substantial costs on that issue. We say it would be unjust were the costs order not to reflect those circumstances.

BT then, of course, disputed that even if the Class Rep was correct about the market definition, that it was dominant in that market; stage two.

Now of course, if it was right about market definition, then that would have been the end of the claim, but it took its opportunity at every stage -- and the Tribunal may think it reasonably took that opportunity, but that isn't an answer, we say, to this point -- it took the opportunity at every stage of the claim to contest every issue that might allow it to succeed .

Now, on dominance, there was no issue of legal principle between the parties. The Tribunal found that, once the correct market had been identified, i.e. the market as the Class Representative had successfully contended for, then BT's market share gave rise to a presumption of dominance. That was paragraph 455 of the Tribunal's judgment. Yet despite this, BT still disputed dominance and at paragraph 494, the Tribunal concluded that it was plain that BT had a dominant position in that particular market.

Again, this was an issue BT did not need to dispute. It could have, even if it had wanted to dispute stage one, could have said "well, if we're wrong about stage one and about the market, we accept that if what the Class Rep says about the market is correct, then we are dominant. It didn't need to pursue that point in order to give it a position of defence to this claim.

It did, however, do so and it put the parties and the Tribunal to the time and costs of deciding that issue against it. We say that, again, these are two very substantial issues. Sir, I don't know if the Tribunal has seen, but at page 911 of the bundle with our response to the costs application, we produced a table.

MR JUSTICE WAKSMAN: Yes. Paragraph 18 of the letter I think it is.

MR MALLALIEU: Sir, thank you. There's a table there and again it's there to be looked at. I'm grateful for the indication that the Tribunal has already seen it.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: Those two issues, market definition and market dominance, took up -- and I don't understand the figures in the table to be disputed -- took up 25 per cent of the sitting days, 36.6 per cent of the Class Representative's closing, and 33 -- just over 33.5 per cent of BT's closing. These were very substantial issues with very substantial costs attached to them where BT was unsuccessful, and I don't need to say that they were unreasonable in pursuing those points, I simply need to say that they were unsuccessful and these are significant discrete points on which they were unsuccessful.

The third stage, of course, was limb one of United Brands, whether there was excessive pricing, and of course the overall position here was that the Class Representative maintained that there was and BT disputed that.

Perhaps most pertinently for this point, as the Tribunal records at paragraph 940 of its judgment, not only did BT dispute that there was any significant and persistent excess,

but if it was wrong about that as an overarching point, it didn't put forward any alternative case as to what the excess was. The position for the Class Representative -- and whilst I acknowledge and of course accept that the Class Representative did not establish that the excess was as great as had been contended -- the position was that BT denied any excess and didn't advance an alternative position. Therefore, to use the expression that the Tribunal itself used -- again at paragraph 940 -- BT lost on limb one of United Brands. That was the expression the Tribunal used.

Of course, the fact that the Class Rep did not establish that the excess was as great as had been contended, was a material issue for limb two because it made BT's position, in terms of defending limb two, simpler for BT. Nonetheless, in terms of the main area of contest on limb one it was unsuccessful. Again, in that, the Tribunal made a substantial number of criticisms of the evidence of Dr Jenkins on behalf of BT. It found that there had been a problem with her selection of combinations, paragraph 826 of the judgment, it found that the combination approach, the SAC combi approach that she used, didn't provide a reliable or credible basis for a limb one assessment. Paragraph 844. It found that the model she used for the SAC combi had a serious problem. Paragraph 855. And that her approach was seriously deficient. Paragraph 856.

It found that the Class Rep's criticisms of the first cross check that she used, the DSAC model, were well-founded. Paragraph 870. And that there were real problems with her second cross check, the FAC customer analysis. Paragraph 894.

Arguing and determining all of these points and establishing that there was, indeed, excessive pricing all came at a substantial cost without any concession from BT and indeed, as I have already made the point, without any alternative case if there was in principle excessive pricing. So the Class Rep had to take the time and effort to

establish any success on stage three and was successful in doing so.

That was again a very substantial issue. By reference back to the table it took 25 per cent of the sitting days. Each of the Class Rep and BT's closings on this issue took up just short of 28 per cent of their closings.

In the judgment, these issues occupy 434 paragraphs of a total judgment of 1,428. On all three metrics, an issue which took somewhere between 25 and 30 per cent of the time that everybody was applying to this. We say that issue, along with the points about the market and market dominance, are very, very substantial issues with very substantial costs attached to them where it would be wholly unjust for that not to be reflected in the costs order.

We accept, of course, that the Class Representative lost on limb two and as a result the claim was dismissed. We don't accept -- and we say it's not borne out either by the terms of Rule 104 where measure of success is a specific issue identified to be taken into account in all the circumstances, or by the authorities -- but we don't accept that the idea that because the Class Rep brought a claim and was unsuccessful overall, in not establishing a right to damages for the Class Members, that that means that BT's failure on these issues can simply be swept away such that the Class Rep faces all the costs of the entire claim. We say that would be wrong in principle and it would be unfair and unjust on the facts.

There are some ancillary points, sir, which I won't take up too much time on, but when we came to quantum which, because of its primary findings, the Tribunal only addressed relatively briefly in its judgment.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: There were a number of issues, so, for example, the Tribunal found that in relation to overcharge, the Class Representative would have won. It would have been necessary to determine that.

In terms of the class, the Tribunal found that business customers were not excluded, the Class Representative would have won that point and whilst it accepted BT's figure for the percentage of business customers, it rejected BT's arguments about the pass-on margin and it found or would have found for the Class Representative on the point about BT employees with gifted services not being treated differently. So, on both the overcharge point and the class point, we say that the Cass Rep was overall the substantially successful party.

There was a mixed position, as we've acknowledged in our submissions, on the actuarial point, but, again, we say -- and the relevant percentages are set out in the table -- that this should be taken into account if the Tribunal is to do justice in all the circumstances in terms of the applicable costs order.

Ultimately, we acknowledge that BT has been successful, we don't need to establish that BT has behaved unreasonably. We say that fairness and justice cannot be achieved without reflecting the substantial measure of success for the Class Rep or, rather, a substantial measure of failure for BT from very substantial costs bearing issues.

The final exercise, of course, is for the Tribunal to simply step back and take an overview of the situation. There is no magic in any particular figure, the Tribunal will have its own view. We have tried to assist the Tribunal. The Tribunal may think it is POD; arithmetic, I know not, but we've tried to assist the Tribunal with some metrics by which to judge this point. Doing the best we can, we say that overall a 50 per cent costs order would be the reasonable and just outcome.

MR JUSTICE WAKSMAN: Thank you.

MR MALLALIEU: Sir, thank you. Those are my submissions. Do you want me to proceed to the next point?

MR JUSTICE WAKSMAN: Yes, I would like to deal with all of the costs points together.

Thank you.

MR MALLALIEU: Judge, thank you.

We then come to the question of issues to do with quantification on payment on account. Can I start first with the point about what I will describe as the ATE cover point.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: This is the point that is addressed in our skeleton argument from paragraph 49 onwards. The starting point, we say, in relation to this, as the Tribunal will well know, is that collective proceedings of this type involve what to many in general civil litigation is seen as a rather odd procedure and whereby the Class Representative has been certified; the authorisation condition. That is, as we know from both generally but also from recent judgments such as *Gormsen* and *Riefa*, that scrutiny of the authorisation condition is not merely something that the parties can engage on, it's something the Tribunal has to satisfy itself independently that that is made out.

Part of that authorisation condition is that the Class Rep has to establish that he will, that's the term "will", be able to pay the defendant's recoverable costs if ordered to do so. That is Rule 78(2)(d).

In terms of the facts in relation to how the process went here, the Class Representative, as is common practice, provided a witness statement in support of the application for certification. That witness statement, the relevant part, is page 944 in your bundle.

MR JUSTICE WAKSMAN: I have looked at the -- we have all looked at the passage which I think is about 98 to 100; is that right, something like that?

MR MALLALIEU: It is. I'm very grateful for the indication that that's been looked at.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: Sir, again, in the interests of time, I won't invite you to turn it up unless it assists. You've seen the passage. What the Class Rep does there is he sets out the basis on which he considers that he is able to satisfy rule 78(2) and the core of that is that ATE insurance has been purchased already in the sum of 2 million plus 9.9 million; that is paragraph 101.

MR JUSTICE WAKSMAN: Just a moment.

MR MALLALIEU: Would it assist to turn it up?

MR JUSTICE WAKSMAN: Yes, just give me one second, please.

MR MALLALIEU: Of course. The relevant section should be page 968 onwards of the bundle.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: The Tribunal is working in paper, but for those working electronically, it's page 979 of the PDF.

The position as established we can see, starting from paragraph 100 onwards, to provide for the eventuality, referred to in rule 78(2)(b), the funder, HF, had agreed to pay any adverse costs order in relation to the collective proceedings.

Then, at 101, in line with this obligation agreed to purchase ATE insurance and has already secured insurance of the sums of 2 million and 9.9 million, the difference being the two providers of the insurance. Then at 102, an additional 4.6 million of insurance is to be purchased which was, in fact, purchased resulting in a total of 16.5 million. We don't need to worry about the inner or outer limits for present purposes.

Then at 103, we say this is material, the Class Representative in his statement seeking certification says:

"I'm informed by my legal advisers that this level of cover [so that is the 16.5 million] should be sufficient to cover BT's recoverable costs in order to do so."

Then there's a paragraph referring to the rating of the various insurers obviously

intending to provide assurance to the defendants and the Tribunal as to the security of that insurance cover.

MR JUSTICE WAKSMAN: Can I just check, looking at the position slightly more broadly, am I right that Harbour Funding has also given a direct indemnity to BT up to the amount of the ATE?

MR MALLALIEU: It has. Up to the amount of the ATE. You have that document at page 1066; 1076 for those using the PDF.

MR JUSTICE WAKSMAN: We have slightly different numbering here. Is it a discrete document that's in the consequentials hearing bundle?

MR MALLALIEU: It is, sir. My references have gone wrong slightly. It is at page 1076 in the PDF. It should be 1066 in the bundle. It is the deed of undertaking and in terms of tabs, tab 31.

MR JUSTICE WAKSMAN: It wasn't in my -- it hadn't been put in my bundle. One second, please. (Pause) In here, in the deed of undertaking at 1066, it says:

"Pre-certification sub-policy 3 million".

But that 3 million is of the 16.5, is it?

MR MALLALIEU: That is correct, sir. That's why it's described as sub-policy limit. So it's a ring-fenced 3 million maximum for the CPO period and then a total, inclusive of the 3 million, of 16.5 million.

MR JUSTICE WAKSMAN: Then finally, so far as the Class Representative is concerned, he has a completed indemnity as to adverse costs orders in whatever amount is made subject to fraud, et cetera.

MR MALLALIEU: Indeed, sir, under the litigation --

MR JUSTICE WAKSMAN: Clause 2, I think.

MR MALLALIEU: Correct.

MR JUSTICE WAKSMAN: Thank you.

MR MALLALIEU: If I may, just since we're at the deed of undertaking, if you would be good enough to come three pages into that, so page 1068 in the bundle, 1078 in the PDF.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: We can see that the material terms here, which is under paragraph 2, in particular (b) and (c):

"Harbour will provide ... investment agreement is not terminated ..."

Sorry:

"... will, provided that the investment agreement is not terminated, pay to the proposed defendants any legal costs incurred subject to an adverse costs order up to a maximum amount of 16.5 million subject to a maximum of 3 million for costs incurred pre-certification."

Then (c) covers off the same position if the investment agreement is terminated prior to conclusion, which again is a direct indemnity to pay straight to the defendant to BT any costs subject to an adverse costs order up to the maximum amount of 16.5 million.

Sir, those terms -- and I'm not going to take you through the correspondence, not least because, of course, we haven't heard from BT in response to this and I will respond, if I may, to any points they make by reference to the correspondence.

Our summary of the correspondence, which you have in the bundle at tab 18, is that what happens, when the witness statement comes in from the Class Representative, is that BT interrogates the cost cover, the ATE cover in particular to see if it provides, as they describe it, sufficient adverse costs protection. That's the term they used in their 9 February 2021 letter at page 930.

They express concerns that it doesn't provide adequate cover. That is their letter of 3 March, page 932, but those concerns are expressed not because of quantum but because of the terms of the policies and whether the conditions for those policies to

be effective have been met.

The consequence of the expressions of concerns by BT to Harbour is the putting in place of the indemnity that we have seen. The purpose of the indemnity essentially being to ensure that there are no difficulties in BT getting the benefit of the £16.5 million of after-the-event insurance cover.

MR JUSTICE WAKSMAN: I see.

MR MALLALIEU: Sir, you will no doubt, from other cases, be familiar with the sort of process that goes on at certification, so this is a common issue whether the defendant can be satisfied and whether the Tribunal can be satisfied that the Cass Rep will be able to pay the defendant's recoverable costs in order to do so, which is commonly met by some form of provision, such as after-the-event insurance, but defendants commonly object to the standard ATE policy, it's the same sort of point that's seen in security for costs applications.

The ATE policy on its face isn't good enough because it has qualifications, it has exclusions, there's no third party right of enforcement and therefore some form of greater security is provided. One way it's sometimes done is by anti-avoidance endorsements from the ATE insurer, another way is the funder providing the direct indemnity we have here.

The point is it is to back the ATE cover that has been obtained and it is that ATE Cover and that level which is relied on by the Class Representative in seeking certification.

Where we come to with that point is that throughout all of the correspondence throughout the disputes that we've seen leading up to certification, the one thing that BT doesn't do is say "it's not enough". The Class Rep proceeds to certification and the Tribunal grants certification on the basis that, as expressly stated by the Class Representative in his witness statement, paragraph 103, the level of cover, 16.5 million, will be sufficient to cover BT's recoverable costs.

Had BT at that certification hearing raised an issue that the quantum was insufficient, then of course there may have been argument. This or similar arguments have occurred in the past where defendants have taken issue as to the adequacy in terms of quantum of the Class Rep's adverse costs protection and, for example, the Tribunal has inquired as to whether or not BT -- the defendant's costs really would be recoverable at a particular level, et cetera, et cetera.

Of course, then the Class Rep can take steps in response to that to decide whether or not, if any, indication to the Tribunal has been given, whether to take out additional insurance, which of course comes at an additional cost, or steps of that kind.

BT does none of that. Nor, during the proceedings, if it were the case that at the certification hearing BT considered that level of cover sufficient, but matters changed, at no stage during the proceedings does BT pop up and say "we think now your level of costs cover is inadequate" or "Tribunal we think that the basis on which the Class Rep was certified is now vulnerable because the likely level of recoverable costs is substantially greater".

We have made the point in our skeleton that the Class Rep, in fact, did keep the Tribunal updated as to changes in the Cass Rep's own budget, but BT simply did not.

The consequence, we say -- there are two points, we say, really in terms of consequence. The first is that ultimately the question for the court is what is just and reasonable for the Class Rep to pay, and we say in these circumstances it would not be just and reasonable for the Class Representative, whether through the indemnity or otherwise, to face a liability for costs, for BT's total recoverable costs, in excess of the level of cover that was said to be put place was not disputed and was said to be adequate to cover BT's recoverable costs if awarded to them.

On that basis, we invite the Tribunal, whatever other order it makes, to order that the total of BT's recoverable costs on a 100 per cent basis, that is before any percentage

costs order reduction, should not exceed the £16.5 million.

MR JUSTICE WAKSMAN: Just pausing there, this point was raised for the first time in the skeleton argument.

MR MALLALIEU: It was.

MR JUSTICE WAKSMAN: How, if this was such an obvious point? It's concerning that when the initial correspondence between costs on costs was started, before and then on the 20 and 27 January, you never raised this point. Indeed, at that stage, I think, they said that the limit of BT's recoverable costs, because they were otherwise excessive, was £18 million.

MR MALLALIEU: Sir, that is correct. Subject, of course, to assessment, that identification of the 18 was really for the purposes of identifying an appropriate level of payment on account. It was not an agreement that 18 million was the ultimate reasonable figure.

I accept that. The simple answer is that, on further consideration, the point was identified that if that was correct and ultimately BT was to recover 18 million, that would exceed the level of ATE. Now, of course, the assumption on our side is that they won't get close to that level of 18 in any event, but I accept that this is a point that could have been flagged in the initial response.

MR JUSTICE WAKSMAN: On your case, it's a blindingly obvious point. I am not making any decision about it, but I am just saying. I can't understand how it didn't arise. Is it because the CR in any event is, in fact, wholly indemnified by other funding?

MR MALLALIEU: The CR is wholly indemnified although --

MR JUSTICE WAKSMAN: It's no different to the CR's own personal position, it is entirely protected here.

MR MALLALIEU: It makes no difference to his personal position, I accept that. There's no suggestion that the Class Rep himself would be subject to direct

enforcement against him. That is, we say, a long way from the end of the point. The Class Rep advanced the basis for certification which was reliant on the indemnity. He was obliged under the funding agreement to assist the funder in obtaining ATE insurance to cover that indemnity. He openly stated that the limit of what he understood the recoverable costs to be was 16.5 million. That was not disputed and he fulfilled his obligations under the funding agreement by assisting the funder to obtain a level of insurance to that limit which was then expressly and openly stated to BT, which they did not say was inadequate in terms of quantum, and that was the basis on which he went forward.

Now, there is an application today for a costs order. The application, as a matter of strictness, for the sake of the record, is against the Class Rep. This is not a section 51 application against the funder. The application is against the Cass Rep for costs in excess of that limit.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: I'm not in that saying the funder is in some different way vulnerable in a way the Class Rep isn't because we would say the funder is not. It would be unjust whether against the Class Rep or the funder for BT to now seek to recover a level of costs which is materially greater, they say, on their case, some £10 million nearly greater, than the level of costs that they allowed the parties to this case and the Tribunal to understand was the limit of the total recoverable costs that the Class Rep and the funder were likely to face at the conclusion of this case.

I take the point. I'm not avoiding the point. I take the point that this perhaps could and should have been raised earlier. The fact that it wasn't we say doesn't go to the merits of the point, the point is one, we say, of considerable merit and it's ultimately a matter of injustice.

It would arguably be unjust in any case if we had an order from a High Court litigation

claim where, for example, a defendant was asked to produce a budget for its costs, the claimant in response to that obtained ATE insurance to a specific level plainly relying on that budget, and then at the end the defendant popped up and said, "in fact, our costs are very substantially greater". We say even in a case of that kind it would be strongly arguable that the defendant should not be allowed to recover more than the limit of the ATE cover.

Cases of this kind have the purely additional feature that in order to even bring the claim, the Class Rep has to set out his understanding of what level of adverse costs he faces and on what basis he is going to meet it and the Tribunal has to be satisfied that that is adequate. That was all based on a maximum level of 16.5 million.

Sir, those are the reasons why we say that that should operate as the maximum level. It's what everybody understood. (Inaudible) difference, they never told anybody. We say that should operate as the maximum level.

The secondary point we take from it, as we set out in our skeleton, which I will deal with very shortly because it is a very short point, is that BT now is saying that in fact they have incurred at least 26 million without telling anybody all along that that, in fact, what was going on.

Now, either that reflects some sort of -- and I'm not saying this is the case, I'm simply identifying options -- that reflects some sort of deliberate decision to allow the Class Rep to take out £16.5 million or, rather, the funder on the Class Rep's behalf, to take out £16.5 million of cover and to have in place a deed of indemnity specifically by reference to that level of cover, whilst at the same time incurring costs substantially in excess of that. Or, it reflects that there has been, we would say, a lack of costs control and budgeting on BT's part such that they have allowed costs to get away from them to arrive at the level of 26 million.

If it's the latter -- and it's probably more likely to be the latter than the former -- then

we say that is directly relevant to your further question, sir, of what is, for the purposes of estimating a payment on account, the likely level of costs recovery.

If this is a position where everybody was working on the assumption of £16.5 million of costs, there's no good explanation put before you why it's now 26 million. We say that plainly indicates that BT, whether we are right or wrong about there being an effective cap, that BT is likely to face significant difficulties on assessment in getting close to the figure that it now advances. It would be more appropriate for the Tribunal, in any event, to work from the figure more akin to the 16.5 million for the purposes of payment on account.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: That's the point in relation to the ATE subject to any questions. That probably then takes us to the question of quantum more generally. In relation to that you have quite a detailed position that we've set out in our response to the costs application --

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: -- page 912 of the bundle. You have a response to it from BT in its skeleton argument. You will have seen the points that are taken, you will have seen the concerns that are expressed in relation, in particular, to the levels of costs incurred in relation to disclosure and expert evidence.

Of course, you, as a Tribunal, have tried this matter and therefore you will no doubt have a preliminary view at least in relation to those levels of costs. I don't want to take up the Tribunal's time unnecessarily, but equally I do not wish to appear presumptuous if I say that I'm happy to answer further questions or to make further submissions on points that the Tribunal would benefit from.

MR JUSTICE WAKSMAN: Let's see how BT deal with that and then, if necessary, you can come back and reply. We've got the basic points. You've set out very helpfully

a schedule where you said they should be marked down, as it were, and BT have come back and said why not.

MR MALLALIEU: To some extent that is a much more conventional "they want X, they explain why, we say why not" approach.

MR JUSTICE WAKSMAN: There is one matter that we could do with some assistance on, which is this: in one of the materials which you rely upon to say that the CR was at all times keeping the Tribunal and BT appraised of its own budget. There's the sixth witness statement of Ms Houghton and at paragraph 8, the purpose of this was to update the Tribunal and BT and it's from November 2023, so not long before the trial starts, where there was an increase in the budget and if I read it right, at paragraph 8, it says that the total updated budget excluding the ATE insurance fee is now £22 million, if you see that.

MR MALLALIEU: I do.

MR JUSTICE WAKSMAN: Paragraph 8. I just wanted to check because I thought I had read somewhere in the CR skeleton, but I may have it wrong, that in the skeleton it said the CR's costs were just under 17 million.

MR MALLALIEU: Sorry, sir, yes. The CR's costs including those in relation to - it is paragraph 20 of our response -- CR's costs including those in relation to the CPO application and certification appeal are less than 17 million. It may well be that there are aspects of the budget that may be, for example, the budget includes budget -- and I will take instructions -- for distribution which, of course, are costs that have not been incurred.

MR JUSTICE WAKSMAN: I'm curious because in some ways it may or may not assist on the question of your more general quantum analysis, because if you come and say "our costs were only 17 million, but their costs were 26 million".

MR MALLALIEU: I hadn't taken instructions, but my initial instinct was correct, having

seen a number of these budgets before, the budget includes all of the costs for distribution if the claim was successful. So there was a substantial element of the costs in here --

MR JUSTICE WAKSMAN: Costs of distribution. I see.

MR MALLALIEU: -- that have not been incurred that would have been occurred had the claim been successful and the budget is for the totality of those costs.

MR JUSTICE WAKSMAN: Hang on. Costs wouldn't be incurred if the claimant was unsuccessful?

MR MALLALIEU: Yes, that would only be incurred if the claim was successful.

MR JUSTICE WAKSMAN: It's £5 million worth of distribution costs.

MR MALLALIEU: The budget includes --

MR JUSTICE WAKSMAN: We have not seen it. That's why I asked.

MR MALLALIEU: -- VAT as it says.

MR JUSTICE WAKSMAN: No, in fact, I think it is actually exhibited in Ms Houghton's witness statement maybe somewhere.

MR MALLALIEU: It is the VAT and distribution costs.

MR JUSTICE WAKSMAN: I see, so where it says 17 million, that is exclusive of VAT, is it?

MR MALLALIEU: That's correct.

MR JUSTICE WAKSMAN: The inclusive of VAT costs would be significantly more than 17 million?

MR MALLALIEU: That would obviously be correct.

MR JUSTICE WAKSMAN: I just want to check because it seemed such a big discrepancy I couldn't understand it.

MR MALLALIEU: Yes, the Class Rep's budget obviously works on the assumption that the successful claim and the totality of costs would been incurred.

MR JUSTICE WAKSMAN: Yes.

MR MALLALIEU: Of course, the claim wasn't successful, therefore the incurring of costs ceased at that point.

MR JUSTICE WAKSMAN: I follow that. That's helpful. Thank you.

MR MALLALIEU: Sir, thank you.

In terms of quantum, then, I have nothing further, but if I can come then to the question of payment on account.

MR JUSTICE WAKSMAN: It looks liked the parties are agreed and you seem to say in your skeleton that it shouldn't be anything more than 75 per cent of whatever is the starting point for costs.

MR MALLALIEU: Yes.

MR JUSTICE WAKSMAN: BT seeks 70 per cent, so 70 per cent appears to be common ground.

MR MALLALIEU: The way Mr Williams put it is 70 per cent of their total claim for costs and we put it as 75 per cent of the reasonable starting point. In other words, their total claim is not -- (overspeaking) --

MR JUSTICE WAKSMAN: I see. It's apples and oranges.

MR MALLALIEU: They may be a bit more similar than apples and oranges, but oranges and clementines -- (overspeaking) --

MR JUSTICE WAKSMAN: I see. You say 75 per cent of what I would describe as the starting point after you've dealt with the question of a percentage reduction, if any, on the question of --

MR MALLALIEU: Sir, if I can work my way through it to avoid any doubt. Both Mr Williams and I, I think, agree that if there is a percentage costs order, then obviously the payment on account is only the reasonable percentage of the costs figure net of that percentage costs order. Say the costs were only allowed at 50 per cent by virtue

of the costs order, then obviously that 50 per cent is the starting point.

Where we differ, I think, is that Mr Williams says when it comes to the payment on account, assuming there's no percentage costs order, so let's stick to that way for simplicity, the payment on account should be 70 per cent of what they are claiming in total. We say it should only be 75 per cent of what is likely to be a reasonable award on assessment.

Mr Williams wants 70 per cent of the total figure; we say that total figure must come down to reflect it is plainly unreasonable and disproportionate, and they are not allowing for the margin of error. So the sort of approach that Mr Justice Roth took in *Merricks* where he looked firstly at the costs figures, he said some of these figures are plainly excessive.

Probably the simplest case to look at in is his *Merricks* 24 judgment. What he did there, there was a claim for just short of £11 million in costs. He then went through and analysed that, for example he said the solicitors' profit costs were far too high because of hourly rates, some of the counsels' fees and experts' fees would come down. So he reduced, not on an assessment, but just on working out what the headline figure was, he reduced that headline figure down from 10.9 million to 6.75 million and then he reduced it by a further 15 per cent in terms of the payment on account for the risk of overestimating.

MR JUSTICE WAKSMAN: He ordered 85 per cent of that figure.

MR MALLALIEU: He ordered 85 percent off 60 per cent in effect.

MR JUSTICE WAKSMAN: That's helpful. Thank you.

MR MALLALIEU: We say that is the correct approach. The correct approach is to identify any substantial concerns about the claim for costs and reflect that in what you identify as the headline figure as the likely costs that might be recoverable on assessment and then, when you're working out the payment on account, the approach

identified in the authorities *Excalibur Ventures*, *Merricks*, is to then apply a discount to reflect the risk that you have overestimated with your first figure.

On that discount we say it obviously depends, again I think it was Sir Christopher Clarke in *Excalibur* at paragraph 23 said: when you come to that second discount point, the element of uncertainty will differ a lot from case to case. In one case you might apply 1 per cent discount to reflect the uncertainty, in another it might be different.

We say here we have a very, very large costs claim with very limited information where, for the reasons we've given, there are very substantial concerns as to BT's claim for costs and, therefore, that level of uncertainty is particularly high. Therefore, we say the correct approach is to identify the headline figure taking into account the concerns, then apply the margin for error, the margin for overestimation, which we say should be 25 per cent.

Where that takes us, sir, in terms of the figures, it depends what your headline figure is.

MR JUSTICE WAKSMAN: Of course.

MR MALLALIEU: For the reasons we've given, we say the headline figure should be no more than 16.5 million.

What then comes next is: does BT, as a matter of principle, our first argument, get 100 per cent of those or only a lower percentage? We say they should only get 50 per cent. So the headline figure would, therefore, be halved to 8.25 million. Then, for the purposes of a payment on account, you apply your margin for error, your overestimate point, which we say should be a 25 per cent deduction, therefore they would get 75 per cent of 8.25 million, which is about 6.25 million, which we rounded down to 6 million.

Beyond that, sir, in terms of the principles I don't think there's anything significant

between Mr Williams and myself. The point about 28 days for payment is agreed, and that would leave in terms of costs submissions just one point, which is our proposal that the detailed assessment, the thankless task some poor costs judge will have at some point of assessing this claim for however many millions pounds worth of costs, should be deferred pending the determination of the appeal or further order -- determination of any appeal or further order by this court or the appellate court. We've set out the reasons for that at paragraph 68 of our skeleton argument.

MR JUSTICE WAKSMAN: Just a second.

MR MALLALIEU: It is page 22 of the bundle. It's 69, not 68.

Mr Williams is, I think, essentially reserving his position to see what the court's position is on other matters before determining whether that's opposed or agreed.

MR JUSTICE WAKSMAN: Right, thank you.

MR MALLALIEU: Unless I can assist further, those are our submissions.

MR JUSTICE WAKSMAN: Mr Williams.

Submissions by MR WILLIAMS

MR WILLIAMS: Good afternoon, sir.

I am suffering even more acutely from imposter syndrome than I usually do because I'm acutely aware that, even if I had a month to read into this case, I couldn't possibly hope to replicate the Tribunal's knowledge and understanding of what the issues are and how they should impact upon what is essentially a discretionary and impressionistic question as to what is the appropriate costs recovery.

As the Tribunal is aware, we say that there is no reason to depart from the starting point, which is that we are the successful party and we should recover our costs.

Now, recognising what I've called imposter syndrome, I'm going to address this reasonably high level. As you've said, you have detailed submissions in writing

already. If there are any particular points of a more granular nature, Ms Mackersie, who obviously understands the case far better than I do, will assist in dealing, for example, with any point the Tribunal might want to put in respect of those. But it may be that she doesn't need to follow on with that, we will see where the argument takes us.

As far as the principles are concerned, I don't think there's a great deal between us. You have obviously indicated that you're very familiar with them, both with your Tribunal hat on but also with your commercial court judge hat on, so I am not going to labour them.

I think it is perhaps useful, particularly because Mr Mallalieu repeatedly said it doesn't matter that I'm not asserting unreasonable conduct, it is perhaps helpful to remind ourselves of the authorities. We synthesised them in the letter that we sent to the Tribunal which is in the hard copy bundle at -- relevant part of the letter is at page 920 of the hard copy bundle which is page 924 of the PDF.

MR JUSTICE WAKSMAN: That is the 31 January letter; is that right?

MR WILLIAMS: I believe that is the date, yes. I was going to take you to page 920 in the hard copy at the start of 1.3. Mr Mallalieu cites Lady Rose's observations or suggestion that this Tribunal has an increased readiness to depart from the starting the point. It does bear saying, obviously meaning in no sense to be disrespectful to Lady Rose, that is not in fact a statement that is reflected in any of the judgments of the Tribunal itself, which is why one always sees fact statements cited rather than any of the statements of the Tribunal, including in cases like *Merricks* where the Tribunal has gone out of its way to synthesise the position in its previous authorities to state the relevant principles and they don't identify that as a principle.

On the contrary -- and it's the indented quotation paragraph 1.3 -- in the *Merricks* decision, the most recent *Merricks* decision, Mr Justice Roth, as it were, imports into

this Tribunal the oft stated statement by Mr Justice Nugee, as he then was, in a case called Merck:

"Any issue of complexity is likely to involve sub-issues and sub-sub-issues on which one side or another had the better of the argument. That is not in itself a reason for departing from the general rule."

That is something which is very much part of this Tribunal's jurisprudence. As we say, and more generally in costs matters, this Tribunal usually very closely follows the approach of the civil courts. That is hence, for example, the Tribunal has adopted the starting point of the successful party gets costs because that's a principle in the Civil Procedure Rules. It is not a principle spelt out in the Tribunal's rules.

The Tribunal's rules, of course, go out of their way to say that when costs come to be assessed, for example, the Civil Procedure Rule principles would apply. Civil Procedure Rule judgments are most pertinent as is shown by the citation by Mr Justice Roth in the Tribunal and Mr Justice Nugee in the Chancery Division.

Also, I know this is a citation you will doubtless have seen many times before, as she was then, Mrs Justice Gloucester's synthesis of the position in a case called *Kidsons*, which we recreate at paragraph 1.4. Lately it has been approved by the Court of Appeal. Mrs Justice Gloucester says:

"No automatic rule if a successful party loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues."

She cites Lord Justice Simon Brown in a case called *Budgen* to the effect that the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues.

Perhaps most pertinently it does go to this one point of distinction between my learned friend and myself, the citation of Mr Justice Clarke, as Lord Clarke then was:

"If the successful claimant has lost out on a number of issues, it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed unless the points were unreasonably taken. It is the fortunate litigant who wins on every point."

Then we lastly cite again a well-known passage from Lord Justice Jackson in the *Fox* case. The significance of this passage, if I respectfully say so, is in essence Lord Woolf introducing reforms in 1999, from the costs perspective a major part of those reforms was a departure from the relatively blind "costs follow the event" principle.

It is widely felt that over the succeeding decade, the costs reforms introduced by Lord Woolf are amongst the least effective part of the new approach to civil litigation and that leads to Lord Justice Jackson being commissioned to revisit those principles. Having revisited them, Lord Justice Jackson to some extent proposes a turning back of the clock to say that for policy reasons -- and having in mind the experience of the previous decade -- the court should be slower to depart from the "follow the event" principle than it had been. It is the last passage I take you to in this letter, it is at the top of the next page. I accept this is a personal injury case, but no one is suggesting the reasons he gives are particular to personal injury.

He says it's just -- if I can, before quoting him, remind you of that famous statement, that lovely statement by Voltaire that "the best is the enemy of the good". In essence, that's what Lord Justice Jackson is saying, this is what experience has shown that these very delicately case specific costs orders where you delve into percentages and such, that's a quest for perfect justice but at huge policy disadvantage because of the huge additional costs to the parties and the pressure on other litigants because of the strain it puts on the court and the tribunal system itself.

Obviously, we find ourselves here today and now in the second hour of the hearing

that was initially listed for only 90 minutes, but we're still only debating primarily this question about costs.

I do pray all those principles in mind. I pray that you have all those principles in mind. Also, I would respectfully counsel the Tribunal, if it is minded to go down this path, to be very cautious also about using things like pages in submissions or the days spent at a hearing as vectors that enable the Tribunal to come to what I would characterise as a spuriously precise way of divvying things up between issues.

Firstly, as we attempt to demonstrate in our skeleton and indeed in the primary submissions and I won't repeat it all, it's completely artificial to do that because issues overlap, they are cumulative or sequential, and even if an issue is conceded, a lot of the information in respect of it still needs to be considered and such like.

Secondly, and even more obviously, to attribute costs or to apportion costs just with reference to what a Tribunal or a court sees going on before it, that's a bit like trying to scale an iceberg by only looking at the bit that is above the water. Of course, a huge amount of the costs of litigation, as you, sir, I know will appreciate very well, are costs that are not really attributable to issues at all. They are, if I can colloquially call them, the engine room costs. They are the costs of overcoming the inertia of this enormous stationary object and getting it moving in the first place.

Most costs are attributable to things like disclosure, witness statements and expert reports. Just to give the example of disclosure here -- and it's really an example I seize on for two reasons -- firstly because it's perhaps the purest illustration of a very substantial cost that simply has to be incurred and isn't, can't just be divvied up to a particular issue.

Secondly, it's in this case, when it's said there's an inequality of costs between the parties, disclosure is a very obvious area where the burden upon my client was infinitely higher. Disclosure, sir, £5.45 million worth of our costs, around a fifth of them,

are attributable to disclosure. Of that, 70 per cent of the costs, more or less, are actually not solicitors' costs at all, they are the costs of disbursements; 3.25 million to Deloitte alone for its structured data services.

In terms of the burden of disclosure, again I won't labour it, it's set out in our skeleton at paragraph 42(a), a manual review of 62,165 documents. That's after technology had got it down from over 3 million documents and 25 to 30 terabytes of structured data which is really synonymous to 25 to 30 million documents therefore if you assume a document is a megabyte each.

It is an enormous burden, it is all on BT to basically have to review the finished projects. That isn't apples and oranges, I'm not even sure if it's a nutmeg and pumpkin, but it is certainly talking about things which are massively out of kilter.

Obviously, the points, what I've called the inertia costs, the costs of getting the show on the road, that's obviously equally true for pleadings, for the case management hearings, for the evidence and in respect of evidence, for example, again all the lay evidence from BT, the expert evidence and the trial preparation.

As far as the evidence expert is concerned, it is obviously correct to say that in certain respects you didn't accept all of the analysis of BT's experts as you -- the Tribunal, I should say, obviously did not accept certain aspects of BT's case. In very few instances did that entail simply as a sort of Newtonian opposite of that you accept in the whole of the Class Representative's case rather -- and you describe it quite vividly in the judgment. You take elements from every aspect of the expert evidence and you find your own path relying upon what you've heard from both sides. It's obviously the case that you commend all the experts for doing their best to assist the Tribunal for ultimately enabling the Tribunal to come to its conclusion.

Even in respect of Dr Jenkins, for example, whose analysis that granted in certain respects was rejected. Clearly there's never a suggestion that it is an unreasonable

analysis and you also, of course, specifically note that in other ways Dr Jenkins was of commendable assistance to the Tribunal by going out of her way to consider alternative approaches and alternative viewpoints and setting out other possible routes the Tribunal might take, which you indicated was of assistance to you.

Those are some of the higher level points. What we also say, building on that, is, in our respectful submission, before there can be any issue of percentage adjustment, it should only be where you can isolate essentially a but for causation of costs that would have been avoided altogether that there may be case for adjustment. Because, as I say, insofar as the vast amount of the costs of this exercise is going to be the common costs, the costs are always needing to be incurred. Yes, not common costs in the sense that people much more learned than I debated, but maybe I should call them the generic costs, that are going to be the generic costs of the litigation always being incurred.

If you just test my learned friend's proposition, just ask yourself: suppose BT conceded some of the points that in hindsight it's said it might have conceded, would the costs of this litigation really have been 50 per cent less? I would respectfully submit there's a pretty obvious answer to that rhetorical question.

I also do say -- and it takes me back to the exposition of the principles that I started with and, in particular, the one point of difference between my learned friend and myself -- I grant that the authorities say that unreasonable conduct is not a jurisdictional requirement for percentage adjustment.

With respect, when my learned friend says the absence of unreasonableness is not an answer, he overstates his case. It is quite clear on the authorities that it may be an answer and that is ultimately a matter of your discretion. Because, as I already showed you that passage quoting Mr Justice Anthony Clarke, the success -- it may well not be appropriate -- it may well be inappropriate to make separate orders in

respect of issues on which -- unless the points were unreasonably taken.

Whilst misconduct of some description may not be a jurisdictional requirement, it does remain highly pertinent to what is a discretionary exercise, particularly having regard to those points made by Mrs Justice Gloucester, Mr Justice Nugee, Mr Justice Clarke and Lord Justice Jackson.

Perhaps -- and I don't want to overstate matters myself -- perhaps unreasonable conduct is something which one should be especially concerned about -- the absence of unreasonable conduct is perhaps something one should be especially concerned about in the case of a defendant who is not an elective participant in this litigation and in essence was met by a joint venture in which of course the interests of the class were represented, the stakeholders that facilitate the joint venture, the lawyers and above all the funder are engaged on the commercial speculation in suing BT in the hope of huge rewards for themselves.

Now, let me make it clear, I don't make those observations, which firstly I appreciate are obvious, but secondly, I don't mean them pejoratively. Allowing commercial speculation in litigation is a policy decision that was made for access to justice reasons and we have to live with that.

I do say that, however, one shouldn't turn a Nelsonically blind eye to that that's the reality of the position here that BT has faced a joint enterprise in the hope of commercial gain by the stakeholder whose facilitated it. I ask, rhetorically, what is the injustice in requiring those stakeholders who facilitated litigation that would never otherwise have been pursued, requiring them to pay the entirety of the reasonable costs in circumstances where their speculation was a failure.

Equally, when a defendant faces that sort of concerted commercial speculation and I do say the court should be very slow to penalise it for taking points reasonably but unsuccessfully.

MR JUSTICE WAKSMAN: Look, I follow that and I think I have your points on this. Are we able to move to the question of -- is there anything more - your broad point is there's no case for any reduction, here, that's your point -- (overspeaking) --

MR WILLIAMS: Obviously you were actually stopping me in what was my sort of final peroration on that part of my submissions, so I was about to move to the 16.5 million.

MR JUSTICE WAKSMAN: Yes, please.

MR WILLIAMS: Sir, I do start with this actually in a place where, if I can say, sir, you've slightly spiked my guns because you've already taxed Mr Mallalieu on it. I do say it's a pretty striking fact here that it takes some three weeks to identify this point - and I don't make that as a sort of jury point and I understand Mr Mallalieu's riposte to you sir, "that doesn't go to merits".

In my submission, Mr Mallalieu is wrong about that, it's goes to the plausibility of this point. Mr Mallalieu is essentially asserting -- and it is pure assertion, there's no evidence from the funder or anybody else -- that it relied on what it thought we were silently representing about our ATE position and, therefore, thought the ATE he had was enough fully to protect it. Even though it has previously made a very substantial increase to its own budget and supported that with a statement of Ms Houghton which you have referred to which explains how their budget has increased by over £2 million because of the proliferation of experts and, for example, the number of contested CMC's, which were not apparent at the beginning of the case.

Now, it must be equally obvious that BT's costs would have been impacted by that sort of thing as well. I do say it's pretty startling that it takes them three weeks and perhaps not coincidentally the substitution of Mr Mallalieu for Mr Bacon before this point appears for the first time. I do say that really does throw -- in my respectful submission, the Tribunal should be very cautious of simply accepting the assertion "oh well, we've relied on this for ATE purposes". I'm afraid it has the hallmarks of a point that is an ex

post facto lawyers' construct rather than something that was perceived at the time because if they had been relying confidently that they were fully protected by their ATE only for them to tell us them, on 19 January, that our costs were £10 million more than they thought, you really might have expected them to express some kind of indignation within less than three weeks.

I would also submit that what is also tellingly absent here is that it's not suggested that at any point Mishcon de Reya advised or warned BT it was relying on its non-objection to ATE cover to determine that the funder was always and everywhere protected by £16 million worth of ATE. Nor was BT ever asked or interrogated about the impact of the litigation developments which, as I have already said, the defendant itself -- sorry, the Class Representative himself relied on to come to court for a substantial increase in his budget. They never interrogated us about the impact of that, or simply asked us to keep them updated by giving them occasional cost budgets and -- I mean costs estimates.

MR JUSTICE WAKSMAN: I follow all of that, but the point is put against you that you knew and it goes to the justice of the situation, they say, that you knew because they told you in terms and while you had interrogated other aspects of your costs protection, you hadn't interrogated the quantum. That is all they had and surely, if that was something that was going to concern you, that's something you should have raised in any event, and either, for some reason, you chose not to or, as Mr Mallalieu says perhaps more likely, there was just no control of costs and no considering this point.

MR WILLIAMS: It's certainly the case that it's an issue that ultimately the issue of protecting BT against costs -- against an inability to recover its costs is an issue which came -- which we were initially concerned about -- and Mr Mallalieu showed you some of the correspondence -- but the answer is, as a result of that correspondence, it is a matter that ceased to concern BT.

The reason for that is that it ultimately is in a position of having a limited interest in this subject, firstly because under the litigation funding agreement, irrespective of the ATE position, Harbour is indemnifying the Class Representative, as accepted, without limitation. That is clause 42.1.

Secondly, even if it weren't the position, then in the current state of the law -- again, as you will sort of appreciate, there would be an almost as night follows day entitlement to a costs order against Harbour itself, as it were, for whatever reason to withhold its indemnity of the Cass Representative.

Thirdly, and perhaps most pertinently --

MR JUSTICE WAKSMAN: Do you mean the third party costs?

MR WILLIAMS: Yes. Yes. Insofar as BT just seemed to be reckless about guarding their own position, we weren't because the funder -- we are told that the Class Representative has an unlimited indemnity. Even if he doesn't have an unlimited indemnity on the state of the law, as I said, it's a sort of sun rises in the east level of certainty that you get costs order against funders, if they have unsuccessfully speculated in litigation.

Then that takes me to the third point that in response to BT raising the issues, which Mr Mallalieu is quite right to say we raise, we received repeated representations that Harbour was able to meet its costs -- to meet any costs liability of the Class Representative: "Irrespective of the ATE policies". That is a quote from their letter of 29 April 2021 which I will turn up, if I may.

MR JUSTICE WAKSMAN: Yes, please. Is that also in the bundle or do we need to go somewhere? It's one of the late additions.

MR WILLIAMS: It may be something which you don't have. It's been added in the PDF it's page 944.

MR JUSTICE WAKSMAN: Just a moment.

MR WILLIAMS: This is the point that we are interrogating and making demands because we're not satisfied with the ATE insurance about indemnity.

We're also saying we want to have proof of your asset position. What they -- and this is a letter from Mishcon where they say -- and I (inaudible) I will just pick out a few passages -- if I can take the second substantive paragraph:

"HFV is a US$416 million fund in the Cayman Islands.

"It's the largest privately owned litigation funder in the world. It is headquartered in London… regulated by the FCA… ranked Band I by Chambers and Partners."

…[It is] a founding member of the Association of Litigation Funders."

Then we're told:

" [It] has funded 120 cases worldwide with a [combined]… value of US$19 billion."

Never leverages its funds. "The entire budget for each case… is ring-fenced so… funds are always available to meet its commitments and are not dependent on other cases succeeding."

Then it assures us that it complies with capital adequacy requirements of the Association of Litigant Funders. Then it encloses a letter from a sort of auditor and I will come to that letter just in a moment.

Confirming -- that letter confirms it has commitments of 417 million-odd of which 17.57 had been drawn down, so it has undrawn capital of just under $400 million.

Then, this is the passage I quoted:

"It is therefore evident that HFV has more than sufficient resources to meet any potential adverse costs order made against the PCR, irrespective of the ATE Policies that it has secured in relation to the proceedings."

Then it tells us essentially:

Stop pestering us. "Harbour has now provided your client with more than sufficient evidence of its ability to pay the defendant's recoverable costs if ordered to do so."

In addition, at that stage, they spent a million on ATE and:

"[We don't] intend to engage in further correspondence on this point wasting unnecessary time and costs."

Sir, I said there was this letter from MUFG, just for completeness, you will find that, assuming it's been added to your bundle a few pages on at 940.1.

MR JUSTICE WAKSMAN: I'm not sure I have that.

MR WILLIAMS: Right. In essence, it's been --

MR JUSTICE WAKSMAN: Yes, I have it. I have it, I am sorry.

MR WILLIAMS: It's a very short letter, sir, and you will see the final paragraph in essence says what Mishcon have essentially summarised to say.

MR JUSTICE WAKSMAN: Yes. Yes.

MR WILLIAMS: I can quite see that if this had been some sort of -- if we had been - if this case had taken a different shape, if there was a direction, as you sometimes get certainly in the courts in group litigation, for the parties to regularly exchange and update costs estimates or costs budgets or if we were being interrogated from time to time about "is £16 million still sufficient in circumstances where we've had to increase our budget by over £2 million".

We simply don't have any of that and, in my submission, when you add that to the way in which -- this does seem to have all of the hallmarks of a clever point by a lawyer rather than a true exposure of a rank and justice being committed on the funder, in our respectful submission, it's a point which emerged late and, frankly, shouldn't have emerged.

If you were to be against me on that, I would also just make a few subordinate points. The first is to say that really this ought not to be in any circumstances any sort of final order in your judgment that places a cap on my client's recovery. Because this is, as you will have perceived, really akin to something like a rather weak estoppel argument.

"We detrimentally relied on a silent representation that your costs didn't increase from our initial prediction of them."

Now, you can't, in my respectful submission, determine an estoppel argument -- meaning no disrespect to my learned friend, Mr Mallalieu -- on the Friday before the hearing asserting a new point in a skeleton argument. If there's to be an assertion of something very much like an estoppel, that is something that should be dealt with in evidence and with an opportunity to test the evidence, and the natural place for that is the detailed assessment and it's a matter that, therefore, should be left to the costs Judge.

Can I also give you some what might be some solace, if you have any interest in that point, it's also in front of the court, but in the Civil Procedure Rules there's actually a section of the costs practice direction that says what -- as you know, of course, in civil -- in most civil cases these days one puts in costs budgets, and Practice Direction 44 addresses how the court should go about matters if a party asserted that it relied on an inaccurate budget and detrimentally relies against a quasi estoppel.

What the costs Practice Direction makes clear, it is paragraph 3.3 -- and I am sure Mr Mallalieu would have said if he disagrees with this:

"If a paying party claims to have reasonably relied on a budget filed by the other party ... the paying party must serve a statement setting out the case in respect of that."

And then it's a matter which is explicitly to be dealt with on a detailed assessment, it's not a matter that's dealt with by a trial Judge or obviously translating that into this forum by the Tribunal itself.

I would say that even there -- the obvious point might have legs, at most it should be a matter that you direct the costs judge to examine and it should not go further than that.

The very last point, sir, I would make -- and without being presumptuous, I hope that I

don't need to because there is likely to be an arbitrary £16.5 million cap a day -- but I think I would make three more points.

Firstly, there's an element of having one's cake and eating it here because if they had been -- on their own analysis, "if you had told us what was going on, we would have got more ATE", but as we've seen from Houghton 6, their existing ATE cost them £4 million.

If they're saying we unreasonably failed to do something, you can't take into account what they say they would have reasonably done in response to it. They would have gone out and spent who knows how much more, it is a counterfactual that will need to be looked into. That is another reason for leaving it to the assessment and it's another reason that it can't possibly be right to limit us to 16.5 million because that way they would keep their cake and eat it too.

The second point is also they themselves don't suggest that they thought 16.5 million was our actual costs. They use the term "our recoverable costs". So, in essence, they have already -- they have already -- there is already an element in there where they're taking some risk that well, sometimes your recoverable costs are 80 or 90 per cent, sometimes they get reduced some more, so there is an element of risk there.

Lastly -- and I don't know if Mr Mallalieu still puts his case in this way, but in the skeleton there seemed to be a suggestion that if you were to impose a percentage costs order, so it was the 50 per cent, for example, that's being asked for, the 16.5 million cap you are being asked to impose should become an £8.25 million cap because the percentages should be adjusted pro rata.

With respect, even on Mr Mallalieu's analysis, that is a completely misconceived proposition because all of his eggs are in the basket, "well we have been left unfairly exposed because we don't have ATE". Well, they have £16.5 million ATE so it can't be in any circumstances appropriate to reduce my client's costs below that 16.5 million,

even if you only gave my client 1 per cent of their costs.

There is no injustice, even on their own case and to the point at which my client's costs exceed 16.5 million. The suggestion which is certainly there in the skeleton -- I didn't think it was pursued orally, and it's -- it's not -- that would not be a -- that would not be a sound point.

MR JUSTICE WAKSMAN: I've got to give the transcriber a short break, so what you have to deal with --

MR WILLIAMS: The interim payment really.

MR JUSTICE WAKSMAN: -- is really the interim payment. You have made your points about quantum on the more general aspect.

MR WILLIAMS: Yes. As with Mr Mallalieu, I was really going to say, I appreciate the transcriber needs a break, you have the argument and the counterargument --

MR JUSTICE WAKSMAN: We do. We do.

MR WILLIAMS: -- and the interim payment is such an impressionistic exercise and so I was simply going to say -- and, sir, I note they are both in this Tribunal and when sitting in court, it's something that you have experienced multiple times. You will have an impressionistic view. We all know, on detailed assessment, costs are properly reduced by 20 per cent on a good day, more than that on a bad day. You'll allow a percentage which some allows some head room that in due course there will be a detailed assessment. Really, we propose 70 per cent for the reason we give in our skeleton. But if you think that in this case that it's more doubtful than that, then clearly that's entirely a matter for your discretion to impose the relevant --

MR JUSTICE WAKSMAN: Let's just take a break for the transcriber now, please.

(3.39 pm)

(Short break)

(3.54 pm)

MR JUSTICE WAKSMAN: Yes, Mr Williams.

MR WILLIAMS: Sir, I will try to be finished within two minutes.

On the interim payments, it is not a science. You have heard or read the competing issues on quantum and you'll take a view as to whether or not it should be a percentage of the order that we seek or something lower. Mr Mallalieu obviously tries to go very low indeed, that's partly a product of his other argument.

I do say that in circumstances where their own case, in a different part of their argument, is that they expected our recoverable costs to be 16.5 million, why an interim payment should be lower than that, even if you're not with me on the 70 per cent.

MR JUSTICE WAKSMAN: Thank you.

MR WILLIAMS: Sir, as far as the detailed assessment is concerned, we would simply say that an order from this court staying it is unnecessary and that we don't know what will happen in the appellate process if permission to appeal is obtained. Then clearly at that point my client will have to decide whether it makes commercial sense to proceed with an assessment and if it decides to do so and the appellant says that that is unreasonable, it can apply to the costs judge for the assessment to be stayed.

In our respectful submission, there's no need for this court to make a direction today and it's certainly not in our experience something which a court usually does, simply because in those (inaudible) PTA application.

MR JUSTICE WAKSMAN: Thank you.

Mr Mallalieu, do you want to say anything briefly in reply?

Submissions in reply by MR MALLALIEU

MR MALLALIEU: Sir, thank you. Just very briefly a few short points and apologies for the scattergun in the nature of a quick reply.

Sir, firstly on the question that appears to be the only point between us in terms of the approach to the principle costs order, the question of unreasonable conduct, just two short points.

The first is the point from Lord Justice Jackson about departures. I addressed that originally, I won't go into it in great detail. Of course, there may well be a general principle that departs from the starting point are unwelcome because of the generation of satellite litigation and therefore it's disproportionate. In a case of this kind where we are talking about levels of costs of this level, that, in my submission, is not a good objection to the point that is being taken.

The second point is in relation to the relevance of reasonableness and it's the only point where I'm going to invite you, sir, to consider one of the authorities that you've been taken to and that is the *Merricks* authority, which is at page 15, the relevant part of which, it is 2024 *Merricks*, 1518 and 1519 of your authorities bundle.

MR JUSTICE WAKSMAN: Is this the one where they say if it's a reasonable point, but they lost, they can't recover their own costs. If it's unreasonable, they may have to pay the other side's costs as well?

MR MALLALIEU: That is broadly the point. There are two points, and I will just flag them very briefly.

One is at paragraph 20. The extract from the *Pigot* case that BT rely on. Subparagraph (2) of that extract makes the point that:

"[An issue-based] costs order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred."

Then it says:

"Such an order may also be appropriate if the overall costs… increased by the unreasonable raising of one or more issues."

These are alternative ways to get to potentially get to the same point.

Then at paragraph 21, Mr Justice Roth, the point you made flags up that:

"Unreasonable raising of a point may justify an adverse costs order."

So effectively making the other side pay, not only got their costs, but pay the other side's costs of the issues as opposed to the general approach where a point is taken, an unsuccessfully discrete point, which is an issue to be reflected in the overall costs order. That's the point.

In terms of the more general points where Mr Williams tried to introduce some sort of rigid causation test into this, that's not supported in any of the authorities. The overall test for you is to do justice.

Equally, it is also clear in the authorities that at this stage it is of necessity a relatively broad brush exercise. It's for the Tribunal to sit back and say "well, we can see that these issues were raised and taken and they were done so unsuccessfully, there must be a substantial level of costs attached to that, not merely of the trial, but in terms of the preparation and everything that went before, and it is a classic doing the best we can in all the circumstances exercise."

Sir, the next point is in relation to the point about the £16.5 million. I understand entirely, not least in light of the court's questions, the Tribunal's questions, why Mr Williams floated the point that this was an idea thought up by me. I can assure the court it's not. The point was live when I was is instructed to take this case on in Mr Bacon's absence. Also, the court can rest assured that I have never been accused knowingly of taking a clever point. It's not my point, it is a point though that we say has merit. In terms of the merit, I have addressed you in detail in relation to that.

When Mr Williams criticises, in my respectful submission, without substance, absence of evidence of reliance on my client's part, we say that is obvious, it's the points that were addressed by the Tribunal in exchanges with Mr Williams as to the circumstances in which this came about. We told BT in terms of what we were doing

in relation to this. They interrogated in terms of provision, they didn't interrogate the quantum and we obviously were entitled to proceed on that.

Where Mr Williams's response to this is weak is when he says that after the giving of the indemnity, BT ceased to be concerned about the level of costs effectively that they were incurring. Well, that's not or, rather, the level of the indemnity, we say that's not a good answer. In terms of the correspondence, you were taken to, you were taken to a letter whereby there is reference to Harbour evidencing its ability essentially to meet any costs order that might be made of whatever level.

Can I just seek to put that in context? I think it was page 940 and 941 of the bundle. If, sir, you would be kind enough to come to the previous letter, 937 and 938, because that sets the context.

MR JUSTICE WAKSMAN: Just a moment.

MR MALLALIEU: It should be a letter of 9 April 2021.

MR JUSTICE WAKSMAN: I have seen it. Sorry, the 9 April, is it?

MR MALLALIEU: It should be 937 --

MR JUSTICE WAKSMAN: Yes, 9 April.

MR MALLALIEU: I am grateful.

Sir, that sets the context, 9 April 2021. This is where we've put forward the ATE, they're not happy with the terms of the ATE and being satisfied that it is adequately in place. There's then discussion about resolving this by virtue of Harbour giving an indemnity and then the point I want to make is over the page we see the heading 2:

"ATE Insurance

"BT remains of the view that absent a satisfactory indemnity [so that's the direct indemnity from Harbour to BT in the sum of the insurance] the ATE insurance is insufficient."

The argument that is going on is you've got ATE insurance, we're not taking any issue

with quantum of that, but it is insufficient absent the direct indemnity and we have proposed an indemnity, BT are, one might say, nitpicking about the terms of it. Perhaps in a degree of frustration, we then write back and say "Look, why are you moaning about essentially the terms of the indemnity? Harbour is plainly good for the money", is basically what we are saying.

This is all in the context of this issue only arising because BT's only issue is with how secure is the £16.5 million being provided by the ATE process. That is the only context of it. It is not in the context of BT saying -- and you were not taken to any part of this where BT say or suggest in some way "well none of this matters, the 16.5 million doesn't matter, because we are just going to go after Harbour for the full sum." That is not the background, it's not the context and it's not the basis on which the claim is certified.

Sir, against that background, I won't repeat all of other points that we've made. In terms of your approach to making a costs order, the other suggestion was essentially to kick all this off to the costs judge in terms of taking into account the £16.5 million.

Sir, we would say the point is a good one, there's no good reason not to deal with it now and that would give the parties the certainty of knowing what the position is in relation to that point. Frankly, if there is to be a detailed assessment at any point down the line in relation to this, it would save the parties probably quite a lot of time and money in terms of the presentation of the claim in its assessment and responses it to.

Undoubtedly -- and if you were minded not deal with it now, we would invite you to make clear that the point is left open to the costs judge. Undoubtedly, it could be dealt with by the costs judge, but the fact that it could be is not a good reason not to deal with it now if it can be and we say should be dealt with by this Tribunal.

Sir, finally, subject to any questions, the stay of assessment. You have our position. We say the point here is either permission to appeal will be granted by this Tribunal

or, if it is not, it will be sought elsewhere and if it is to be granted, it will be granted and that will be resolved in relatively short order, or it will be refused on final basis.

If it is granted, then the idea that this assessment of £26 million, which would no doubt take years to complete anyway and be very, very costly, would proceed we say is highly fanciful.

If permission to appeal is refused, then of course the basis for the stay and any stays that would be put in place now by this Tribunal would collapse and the detailed assessment could proceed. Our order also contains provision that if, for example, BT thinks it's all just taking too long with a stay in place, they would have liberty to apply to seek an order for it to continue.

If no stay is put in place now, then in principle, BT's ostensibly three-month timetable for getting their bill of costs up and running starts today. I can't imagine that's really what they want or indeed what anybody would want in the circumstances of this case.

MR JUSTICE WAKSMAN: Thank you.

MR MALLALIEU: Sir, unless you have any questions.

MR JUSTICE WAKSMAN: Just one moment.

(Judge confers with the Panel)

Thank you very much.

What we going to do, given the hour, is we are simply going to give you our decision so far as costs are concerned because in any event, both in relation to this and what we decide to do on permission to appeal, there will be a reasoned order coming tomorrow or the next day and because time is ticking on and we can't sit late, I'm literally going to do no more than give you the result and the reasons will appear tomorrow.

Submissions by MS KREISBERGER

MS KREISBERGER: I'm grateful. I'm obviously in the Tribunal's hands. To the extent that there are points that the Tribunal is not with me on, it would be helpful to understand that by the end of my submissions, but I will keep them brief.

BT's main attack in the light of our application and skeleton is that the application doesn't raise errors of law, so with your permission, sir, I was going to draw out a few key points that show very clearly that these are errors of law as well as being errors of law with good prospect of success on appeal.

If there's time, I will address you briefly on each of the grounds, but I suggest we see how we go.

MR JUSTICE WAKSMAN: It's not just a matter of seeing how we go, we allowed an hour and a half and part of the reason we have gone longer is because of this 16.5 point which was raised after we had set the timetable. We can't go on indefinitely today.

Normally, of course, there wouldn't be an oral hearing in the competition cases. I adverted to that at an earlier stage and it seemed to me proper in the circumstances just to allow a short session to pick up any points.

We cannot really sit much longer than about 4.40 and I have got to bear in mind the shorthand writer.

MS KREISBERGER: I will be extremely brief, sir.

Ground one, in my respectful submission, there were two central errors of law. The first is that the Tribunal misdirected itself as to the burden of proof borne by BT. It couldn't be clearer that this is a matter of law because the ground of appeal is that the Tribunal failed to have regard to the legal principle identified by the Supreme Court in *Sainsbury's* as to where the burden of proof lies. That was a point that was raised in

the CR's written closings, that paragraph 371, citing *Royal Mail*, from the Court of Appeal which in turn cites paragraph 216 of *Sainsbury's*.

What the Supreme Court ruled in that case was there in relation to chapter one and interchange claims that precisely the same analysis applies here with greater force that the claimant bears the legal burden, translating it in the interests of speed to our situation, the Class Representative bears the legal burden of proving unfair pricing.

BT, as defendant, bears a heavy evidential burden to provide evidence on their costs, and the reason for that is that the costs data is, of course, exclusively in BT's hands. That was a finding which the Tribunal made. They were the only party that could have produced that information. The Supreme Court in *Sainsbury's* held that where that's right then the data must be produced to forestall adverse inferences being drawn.

To crystallise the point, I say that the Tribunal was, with respect, wrong to reject the Class Representative's submission that adverse inferences should be drawn, we made that submission, and went on to misdirect itself as to where the evidential burden lay. That's the first point on the legal principle.

The second point is its application. The second error of law. The Tribunal was wrong, we say, to permit BT to plug that hole in its direct evidence on indirect costs, including common costs with opinion evidence from an external expert. An external expert who, as well as not being a telco costs expert, wasn't given access to BT's underlying costs data.

The error is that the Tribunal should have found that BT failed to discharge the heavy evidential burden on it when all it had to offer was opinion evidence from Dr Jenkins which involved her using her own judgment to score the likelihood of a cost being common or incremental unaided, as she was, by either internal data, or witness evidence from BT.

Now, the Tribunal was alive to that problem, but it misunderstood its significance for

its own assessment of common costs. If I could just draw your attention to paragraph 362 of our written closings, page 473, Mr Ridyard raised that point with Dr Jenkins and said "how can we know what you have done is right or wrong? Do we have to go through every single judgment and make our own judgment on them in order to know whether these are reasonable or not?"

The submission, crystallised, is the Tribunal should have found in those circumstances that the burden of proof was not discharged by BT. The Tribunal's failure to do so was, with respect, an error of law and the Tribunal then went one step further by relying on this opinion evidence in determining that there were substantial common costs essentially accepting BT's evidence on the point.

The Tribunal should have acknowledged, we say, that the only cost allocation performed by the business before it was the 2009 RFS and should have relied on that, noting that Mr Duckworth's assessment of all indirect costs attributable to SFV services was around £32, just under £33, was lower than the Tribunal's estimate of common costs.

Finally, the Tribunal's approach here to the evidential burden and its departure from the *Sainsbury's* principle plainly has ramifications for other competition infringement cases. That's not just excessive pricing cases, but it includes them, any case which involves a comparison of the firm's costs and it's price. Of course, that's particularly acute in the CPO context, collective claims, where there's a fundamental asymmetry of information.

The risk, the danger, is that it excused the incentives of dominant firms to produce costs data, not only in the litigation context, but in the ordinary course of business.

That applies forcefully here, given that BT was the target of intense regulatory scrutiny, but continued to charge the high prices to SPCs. It couldn't satisfy itself that it wasn't in breach without measuring its costs. My respectful submission is that for this

specialist Tribunal to take such a tolerant approach to BT's failure to meaningfully assess whether its prices were excessive compared to costs is contrary to the policy underlying the competition prohibitions, and you will recall in the *Trucks* judgment, the Court of Appeal emphasised that competition damages claims engage the public interest, so this approach threatens to undermine the public interest in bringing to book dominant firms who over charge consumers. It undermines the deterrent effect.

I am not going to address you on ground two save to say that the core of the error is that the Tribunal found Dr Jenkins's approach to SAC Combi to be unreliable, and also inconsistent with a prior finding of the Tribunal in the PPC judgment, and the error was not to reject that evidence altogether, but seemingly to rely on it by beginning -- and I have in mind paragraph 906 of the judgment onwards, where the Tribunal appears to reason downwards from Dr Jenkins's figures. What we say the Tribunal should have done is found that BT again hadn't proven its case, it hadn't discharged the burden by reference to this unreliable evidence.

Now, ground three, there are obviously a number of errors that we cite in ground three and I'm not going to go through them all. Again, focusing on the question of what is the error of law, my submission is that the Tribunal again misdirected itself as to the test for fairness under limb two, and that misdirection is principally found in the way in which the Tribunal equates economic value of the SFV service with mere difference. That's via this concept, it's a new concept of distinctive value.

We say that sets the bar under limb two far too low as to become essentially meaningless because most consumer markets, retail markets, are differentiated markets, so one can always point to the difference between sellers' offerings when one is not talking about homogenous commodity. There will often be brands.

Now, we say that cannot be a sufficient justification for charging prices which are significantly and persistently excessive. That's a diluted version of the legal test which

could in practice render excessive pricing claims in consumer goods claims practically impossible, and of course the consumer is at the heart of the collective action procedure in the Tribunal.

Rewriting limb two on that basis is contrary to section 18(2)(a) to the prohibition on unfair pricing in chapter 2, and contrary to the public interest in ensuring there's compensation for unlawful overcharging.

Then, just to complete the point on ground three, concerning limb two, that error then translates into the Tribunal's assessment of the evidence which we say again with respect was wrong in law. It's best illustrated -- and so I will only refer for today's purposes -- to the assessment of the gives.

Now, the Tribunal, as you recall, doesn't take an approach which attempts to quantify or gauge either cost or the value of the give and having not done that, of course the Tribunal wasn't in a position to take the next step of comparing cost or value to the overcharge. Now on the Tribunal's assessment the overcharge is substantial, it's 675 million cumulatively which, incidentally, is more than the original amount claimed at the CPO stage pre-disclosure.

Instead, the approach that the Tribunal took to the value of the gives was indeterminate. The observations, the conclusions, took the form of findings that certain product features three of the gives had some positive value. My submission is that that's not the nature of the exercise correctly performed under limb two. As we set out in the skeleton, it's not the approach Ofcom took and we say that's the right approach, which was to look at the cost of these features and weigh them against, relative to the overcharge, the excessive price.

So that you have it, sir, three distinct legal errors that I want to bring to your attention today, too low a threshold for value, an indeterminate approach to the identification of value and then no assessment of value by reference to the unlawful overcharge. So

those are three distinct errors.

Again, I come back to policy considerations and the public interest. That approach is going to undermine, or at least risks undermining, and deterring future excessive pricing claims because if dominant firms can simply point to the existence, the existence of add-on features and say "well, all I need to show is they're different, or they have some positive value, consumers like them, that will enable dominant firms to escape liability and will disincentivise these claims all together.

So you have it -- and I'm not going to develop the point at all -- in my submission, the same errors arise in relation to brand value and the willingness to pay fallacy. The summation of the point is treating consumer loyalty to a brand as value under limb two is capable of undermining the application of *United Brands* in relation to branded retail goods because it would make those kinds of claims practically impossible as long as one can point to brand and say consumers like it.

Similarly, if one treats the fact that consumers paid excessive prices as proof of value, well that's an error of law, that is contrary to *Phenytoin* in the Court of Appeal because it does fall into the willingness to pay fallacy.

On ground four, you have the point, it's covered in the skeleton at application that we say the Ofcom pricing trends report has been misconstrued and because it doesn't show price dispersion, it's averaged across all providers, so one can't see price dispersion in the market. To the extent that there are different lines for promotional prices and list prices, those are prices charged to the same customers.

MR JUSTICE WAKSMAN: If you take, just on that particular point, if you take what you've got is an average of what the suppliers are doing, the actual disbursement between different suppliers is like to be greater, isn't it?

MS KREISBERGER: One can't see any dispersion from an average by virtue of the fact -- the only difference you see on that chart is there's a line for list price and a line

for promotional price. So, the same customer will start on the promotional price and then move to the list price, but you may recall, sir, customers generally only paid the promotional prices given the competitive nature of the market.

What that chart doesn't tell you anything about is price disbursement, i.e. different prices charged by different sellers, it is aggregated, so it doesn't illuminate that question at all.

MR RIDYARD: (Inaudible - no microphone) ... show that half the customers were getting the commercial price and half are paying the list price.

MS KREISBERGER: But in any event, the price dispersion point, the argument on price dispersion, is different sellers sell at different price points and you can't see that from that chart because it's a straightforward average.

MR RIDYARD: Half the customers are paying the list price and half are paying the commercial price (inaudible).

MS KREISBERGER: Well, you can see on average differences between list prices and promotional prices, but a customer can simply move -- customers get stuck on the list price because they haven't taken up a promotion. What you saw is the churn customers move from the list price to the promotional price.

BT's argument wasn't you can get a better promotional price as long as you don't sit on the same tariff. They were saying "when you see a spread of prices in the market from different sellers, so price dispersion is normal", but you can't take that from that chart, which is an average, for all sellers for each type of price. It doesn't illuminate price dispersion between sellers.

I wouldn't want to it to be lost that the central question which arises, both in relation to ground four and ground three, is not what I describe as a more peripheral question of price dispersion, but actually would BT have been able to demand to extract the £675 million, on the Tribunal's workings, excessive overcharge in conditions of

workable competition? That's what the Court of Appeal said in *Phenytoin* is the correct proxy for economic value. Whether there's a dispersion is a subordinate question to what is the competitive price and we say you don't see that being asked in the judgment.

That is all I was proposing to say on ground four, unless I can help on that. On ground five you have the point --

MR JUSTICE WAKSMAN: Can I, just before you finish, just two questions of fact: going back to the point, the ground one ground of appeal, where you say it's wrong to rely on simply opinion evidence, I just wanted to check that if have the chronology right. That whole point about one should not rely on the unassisted opinion evidence of Dr Jenkins in relation to common costs. Was that something that was in the -- did CR have that in their opening?

MS KREISBERGER: I don't have the --

MR JUSTICE WAKSMAN: I do recall it, but I don't want to make a mistake about that.

MS KREISBERGER: I think I may ask those next to me to check that. I can give you the reference to the closings.

MR JUSTICE WAKSMAN: I know about the closings.

MS KREISBERGER: It is also something that the Class Representative wrote to BT about on multiple occasions and you might remember I took the Tribunal to that correspondence during trial and we were told repeatedly that BT doesn't do it this way, the data doesn't exist.

MR JUSTICE WAKSMAN: The other point was -- and it is a very small point -- one of your subpoints there was: if you allow that, then this is an incentive to companies which would be the subject of abuse of dominant position claims to sit back and not produce this evidence. Was that incentive -- I couldn't find that incentive point as such in your closing and again I just want to -- perhaps that can just be checked.

MS KREISBERGER: Yes, I think we will need to check that.

Sir, you have the point, it goes beyond even dominant firms. Any firm has to show cost relative to price.

MR JUSTICE WAKSMAN: Thank you very much indeed. That's been very succinct.

MS KREISBERGER: I'm grateful.

MR JUSTICE WAKSMAN: Ms Mackersie.

Submissions by MS MACKERSIE

MS MACKERSIE: Sir, I am not going to try your patience.

MR JUSTICE WAKSMAN: You can have the same amount of time if you wish to.

MS MACKERSIE: I hope not to use it.

The first point -- I will address the main points that Ms Kreisberger touched on -- is the adverse inferences point. On that in BT's submission it is very important to draw a distinction here between the obligation to provide contemporaneous evidence and a putative obligation to create new material. Ms Kreisberger's referred a couple of times in her submissions there to missing costs data or a failure, I think she said, to provide the underlying data. As again I think Ms Kreisberger recognised at the end of her submissions, and they certainly do in paragraph 11 of their skeleton argument, BT did not have contemporaneous accounts that identified and allocated indirect costs. For the same reason it couldn't show witness statement of fact dealing with actual allocation of common costs and it couldn't do that because it did not as a matter of fact do it.

Miss Kreisberger refers the Tribunal to the authorities in *Royal Mail* and in *Sainsbury's*. In my submission -- I won't go to them -- it is very clear that those authorities are dealing with the absence of contemporaneous evidence. Mr Ridyard, you will recall in *Trucks*, for example, the question was whether DAF ought to have called somebody

who was actually involved and could speak to the operation of the cartel at the time. It's about contemporaneous evidence. In *Sainsbury's*, when it comes to the pass-on question, the Supreme Court says in *Sainsbury's* that the relevant evidence about what a merchant has actually done to cover its costs will be exclusively in the hands of the merchants. Again we're talking there about contemporaneous evidence. That is paragraph 216 of *Sainsbury's*. It is cited in the Class Representative's skeleton argument.

We do say that the complaint isn't and cannot be in this case that BT failed to adduce contemporaneous evidence. And sir for your reference you know your own judgment better than me, I am sure, at paragraph 703 of your judgment you recognise that this would have been an after the event exercise. We do say that there is absolutely no basis in the law cited by the Class Representative for this adverse inference and the Tribunal was right to reject that argument in their judgment.

The second point, very briefly again, distinctive value. The skeleton argument suggests that the Tribunal diluted economic value to mere difference in its judgment and therefore the Tribunal departed from the concept of distinctive value as set out by the Tribunal in *Hydrocortisone*. I would simply say that if the Tribunal reminds itself of what it says in paragraph 83 of its judgment, it is in my submission very clear that that did not happen. What the Tribunal says there is that the test is the ascription by the customer value in the product -- I'm paraphrasing -- and what you're looking for is something to which the customer ascribes subjective value which could include brand value and we say that's entirely on all fours with *Hydrocortisone*.

Two more references for the Tribunal's note if I may: the judgment puts the point beyond doubt at paragraph 956 where you expressly say you did adopt the test articulated in *Hydrocortisone*. Finally, it is in my submission also evident from the analysis of the gives themselves, for example, on Right Plan, you will recall Right Plan,

that was a BT specific offering. It was different from that which came from BT's competitors. So we have the difference, and the Tribunal concludes at paragraph 1005 of its judgment that it was overall of very limited value. So we have an example of the Tribunal not ascribing value to something that was different.

The final point - very briefly on the question on quantification of value, the Tribunal probably has this, the suggestion is made that Ofcom did it. It didn't. In that paragraph 28 in the Class Rep's skeleton they're talking about costs and not value.

MR JUSTICE WAKSMAN: Just a moment. That was in paragraph 28 of the skeleton argument for today.

MS MACKERSIE: For this hearing they cite Ofcom and they say Ofcom did this quantification. And if you read the extract it is about costs. It's not about value. They quantify the costs of certain agreements. They express no view on the value.

Then since I'm standing up I should probably very briefly say something about expedition which we haven't addressed in writing.

MR JUSTICE WAKSMAN: Yes.

MS MACKERSIE: The Class Representative has asked for an indication from the Tribunal that it would be appropriate for an appeal to be expedited which I understand happened at the CPO stage.

MR JUSTICE WAKSMAN: Yes.

MS MACKERSIE: BT recognises that a portion of the class is elderly. We are also, however, very mindful and to some extent concerned about the fact that the Court of Appeal's position is that it won't have regard to the availability of counsel when hearing the appeal as expedited. I know that listings are by no means done for the convenience of counsel exclusively, but in our experience, counsel availability is at least taken into account in the ordinary course.

In this case we do say that would be particularly important if permission to appeal were

to be granted because these grounds advanced by the Class Representative engage very heavily in the detail of the evidence, hugely complex economic evidence, and obviously a judgment that is very long and detailed and thorough. We do say that there's a real risk that BT would be prejudiced if it couldn't at least have regard taken to the availability of its trial counsel team for the appeal.

MR JUSTICE WAKSMAN: Thank you very much. Ms Kreisberger, do you want to say anything just on that question of expedition in response to the particular point that's been made?

Submissions in reply by MS KREISBERGER

MR KREISBERGER: Well, sir, you have our point this has now been running for some time and we just don't think that counsel's convenience is a good reason to hold matters up. So, given at least a proportion of the class are elderly, and they are members to whom these damages payments, if they had been made, would be very valuable, they shouldn't have to have a further hold up and risk never receiving anything if a different decision were arrived at.

MR JUSTICE WAKSMAN: Thank you very much.

We're going to take the same approach here as we did with costs given the hour. In other words, we will give you our decision and then the reasons will all be set out in a reasoned order which will follow today or the next day.

I'm sorry to say, Miss Kreisberger you're going to have to go to Court of Appeal if you want permission to appeal. We are not going to grant it. All I'm going to do for now is simply give one or two headline points but without in any way descending into the detail. There's no need to because it will all appear in our reasoned order. And we do consider that essentially here the grounds of appeal don't amount to more than disagreements with the findings that have been made by a specialist and expert

Tribunal on the evidence in what was a complex and highly fact-sensitive case. That is despite the fact, as we recognise, that the claimant seeks to characterise such disagreements often as indicating perversity or irrationality on the part of the Tribunal so as to constitute an appeal as a matter of law.

In relation to what I might describe as the more pure errors of law that have been sought to be advanced in the written documents and today, we don't consider that they are in truth errors of law and, in any event, any appeal would not have a real prospect of success. So that is the reason why we refuse permission in relation to the first possibility of appeal. There is no real prospect of success.

So far as the final point made by the CR which is that, in any event, there is a compelling reason for an appeal, we don't agree that there is. We recognise these are collective proceedings involving claims for damages for an abuse of dominant position. We consider that the key areas of law have been well established for some time. We have noted the CR's references to other CAT decisions which may or may not be the subject of appeal. We're concerned with this case and we can see no compelling reason for an appeal.

So that is our decision on permission to appeal. So far as expedition is concerned we recognise that at the very early stages we did request or suggest to the Court of Appeal it's not a matter for us that the appeal should be expedited. We understand why that argument is made again, but we do think that the situation is different here, not least because we do take account of the point made by Ms Mackersie, that in a case of this kind, where if there was to be an appeal, if permission is sought from the Court of Appeal, if it grants it, this is a case which is going to require a fairly intense look at a trial which took a couple of months and in the context of a judgment which was just over 300 pages, we would consider it highly advisable that counsel that undertook the trial should be those to represent their respective clients on an appeal. So, we're not

going to say anything about expedition when we give you the document refusing permission to appeal.

MR KREISBERGER: I'm grateful, sir.

Just on a matter of practicality, we would ask the Tribunal to make a direction as to the time for applying for permission to appeal and the Appellant's notice and we would ask for 21 days from the Tribunal's reasons which is the default.

MR JUSTICE WAKSMAN: 21 days is normally the default. That's agreed so it we will put that in the order. It should be today, but if not today tomorrow, the order will put in an actual date in by which the application should be made.

MR KREISBERGER: I'm grateful.

MR JUSTICE WAKSMAN: It just remains for us to thank you all very much as always for your assistance and we will rise now.

(The hearing adjourned at 4.44 pm)