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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1111/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

2 November 2009

Before:

VIVIEN ROSE
(Chairman)
THE HONOURABLE ANTONY LEWIS
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

- supported by -

BRITISH SKY BROADCASTING LIMITED

Intervener

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

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HEARING – APPLICATION TO AMEND

APPEARANCES

Mr. Meredith Pickford (instructed by Osborne Clarke LLP) appeared for the Appellant.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

1 THE CHAIRMAN: Good morning ladies and gentlemen. Our main if not only matter to
2 consider at this CMC is the application to amend the notice of appeal. You are going to
3 kick off, are you, then, Mr. Pickford?

4 MR. PICKFORD: I am, thank you, madam. As you can see audience figures are somewhat down
5 compared to our usual ratings for this particular hearing – such is the level of excitement of
6 Sky and BT that they have stayed away altogether and, indeed, we thought at the end of last
7 week that Ofcom might be as well, but luckily I have the pleasure of being opposite Mr.
8 Holmes today, who acts for Ofcom.

9 This is Carphone Warehouse’s application to amend its notice of appeal under rule 11 of
10 the Tribunal Rules. There are also some housekeeping matters concerning timing of the
11 next steps in the proceedings that it might be convenient for the Tribunal to touch upon at
12 the end of the hearing. How much we can decide in relation to those today but we will have
13 to wait and see.

14 Turning then to the amendment, the argument which Carphone Warehouse seeks to
15 introduce is that Ofcom’s consultation procedure was flawed, not only for the specific
16 reasons already identified in the notice of appeal, but also because it should have disclosed
17 the financial models underlying the price control. The amendment seeks to introduce para.
18 74A into the notice of appeal. If we might just go to the correspondence bundle, and look at
19 tab 1, and turn to p.22 of the draft amended grounds. We have here section 5 of the notice
20 of appeal, which sets out the existing grounds of appeal and they are divided into two. First
21 we have the non-price control matters, and those start at para. 69 and then we go on to the
22 price control matters, and they start at para.76. In relation to the non-price control matters
23 Carphone Warehouse currently pleads two separate points, and they both concern different
24 types of procedural flaw. The first point is that we say Ofcom’s decision to divorce the
25 setting of the WLR price control from the setting of the MPF price control was flawed, and
26 the second point is that we say the consultation was also inadequate. In relation to that
27 latter point we advance two arguments in support of it. First, we say that Ofcom’s failure to
28 consult on the draft measure rather than a range of possible measures was in error, and that
29 is at para. 73.

30 Then at para. 74 we identify failures to consult on some issues, we say at all, and by the
31 proposed amendment we seek to add a further third argument in support of the point that
32 there was inadequate consultation as set out at para.74A Paragraph 74A.1 sets out the
33 history of Carphone Warehouse’s requests for provision of information and the model.
34 74A.2 says that:

1 “Throughout the consultation process Ofcom refused to provide the models and
2 information described above, even on the basis of a confidentiality ring with
3 equivalent safeguards to those which Ofcom has readily agreed to in the context of
4 these appeal proceedings.”

5 74A.3:

6 “This prevented CPW from being able properly to test the robustness of the
7 modelling relied upon by Ofcom in determining the price control, including the key
8 assumptions underlining the models, the formula used in their construction and the
9 cost forecasts. It also prevented CPW from being able to carry out sensitivity
10 testing around the assumptions used by Ofcom, and from developing alternative
11 pricing proposals for WLR SMPF and MPF.

12 74A4:

13 “By reason of these failures Carphone Warehouse’s ability to make cogent and
14 well informed representations on a central element in Ofcom’s decision-making
15 process was materially compromised and the consultation was accordingly
16 inadequate.”

17 THE CHAIRMAN: In 74A.2 it says: “... refused to provide the models and information
18 described above”.

19 MR. PICKFORD: Yes.

20 THE CHAIRMAN: That information described above, what is that then?

21 MR. PICKFORD: The information is certain underlying financial information that was either, we
22 believe contained in the models or was an input into those models. Given that we had not
23 actually seen the models themselves, we did not know precisely where all the information
24 was that was driving the outputs. What we could see was the outputs of Ofcom’s modelling
25 process and what we were trying to get at were all the assumptions that we believed most
26 likely lay in the model that led you to those conclusions. So there is not a very clear and
27 discrete distinction necessarily between information and models, the point is it was
28 everything that was relied upon by Ofcom in its modelling process in getting to its final
29 answer, that is what we were trying to gain access to. We say that that amendment raises a
30 legitimate and important point concerning Ofcom’s procedures and Ofcom’s opposition to it
31 is not well founded and the scheme of the remainder of my submissions is a relatively
32 simple one. First, I intend to set out what we say is the general structure of Rule 11 and it
33 does merit careful consideration and then I apply that to the facts of this particular case.

1 THE CHAIRMAN: Perhaps it would help if I could raise two points on which we would
2 particularly welcome your help, they may be points that you are already planning to deal
3 with. One is the point about what effect does it have that there is no particular relief
4 attached to the inadequate consultation grounds, whether the ones that are already included
5 or this one, how does that affect things?

6 MR. PICKFORD: Yes.

7 THE CHAIRMAN: The second point, and this is something that I will also want Mr. Holmes to
8 address is particularly having regard to 74A.4 what is it that you say that you have to show
9 in order at the end of the day to make good this claim of inadequate consultation. You seem
10 in 74A.4 to be putting your case quite high by saying that the failures prevented you from
11 making cogent and well-informed representations and then that your ability to do those was
12 materially compromised. We will want to explore what actually you say you have to
13 establish in order to make good this plea, whether you are making a bit of a rod for your
14 own back there.

15 MR. PICKFORD: Thank you, madam, in relation to that point that you have just raised, I will
16 come on to deal with that more fully, but what I would say for the time being is that we say
17 all of those elements are actually satisfied relatively easily in the present case simply by the
18 fact that we were not provided by the model. We say that of itself meant that we were not
19 able to make cogent and well informed representations, that we were not able to make any
20 representations on something that we did not know about, so by definition they would not
21 have been cogent and well informed. We were able, obviously, to make a number of
22 representations about other elements of the process and we have no quarrel with that. We
23 say that there was one specific part of it that was missing, and it was a central element
24 because it was the financial element for the ultimate price controls and, for that reason, the
25 consultation process was flawed and effectively the adjectives that are used in para. 74A.4
26 are arguably, to some extent, superfluous, because the essence of it is that we were not able
27 to make representations on something that we could not see.

28 If we could turn to Rule 11, which is in the authorities bundle, it says:

29 “(1) The appellant may amend the notice of appeal only with the permission of
30 the Tribunal.

31 (2) Where the Tribunal grants permission under paragraph (1) it may do so on
32 such terms as it thinks fit, and shall give further or consequential directions as may
33 be necessary.

- 1 (3) The Tribunal shall not grant permission to amend in order to add a new
2 ground for contesting the decision unless –
3 (a) such ground is based on matters of law or fact which have come to light
4 since the appeal was made; or
5 (b) if it was not practical to include such ground in the notice of appeal; or
6 (c) the circumstances are exceptional.”

7 Ofcom contends at para.1(b) of its first submissions of 7th October, citing *Rapture*, that
8 under Rule 11(1) the Tribunal has a wide discretion as to whether the permit the amendment
9 which it will exercise in accordance with fairness and justice having regard to all the
10 circumstances.

11 Save to note that some circumstances may not, in fact, be relevant ones in the exercise of
12 the Tribunal’s discretion, we do not dissent from that. It is also common ground between us
13 that Rule 11(3) does limit the Tribunal’s discretion in a manner which does not have an
14 exact analogy under the Civil Procedure Rules. However, the Tribunal’s Rules do
15 nonetheless share the same overriding objective with the Civil Procedure Rules of enabling
16 the Tribunal to deal with cases justly. We see that reflected in the Guide to Proceedings
17 2005 at para.3.1. I do not need to take you to it, it is a very obvious point.

18 Where we part company from Ofcom is we say that Ofcom’s approach to Rule 11
19 substantially over-inflates the role of Rule 11(3) in a way which was never the draftperson’s
20 intention and would only serve to frustrate the Tribunal’s ability to deal with cases justly.
21 When read in its proper context with due regard to the purpose of the Rules it is quite clear
22 that limitation placed on the exercise of the Tribunal’s discretion by Rule 11(3) is itself, in
23 fact, a very limited one.

24 Can we then turn to the case of *Floe*. This is the cornerstone in many ways of Ofcom’s
25 submissions. It is relied on by them, simply for your note, at paras.2 and 16 of their first
26 submissions, and paras.24, 30, 31, 33, 34, 35, of their submissions of 13th October. We say
27 they are quite right to focus on it because it is, in fact, the key authority on Rule 11 and its
28 interpretation. However, we say that Ofcom has unfortunately misunderstood it. *Floe*,
29 together with *VIP*, has a very long running history, which you, madam, have recently had
30 the pleasure of becoming acquainted with. It concerns, amongst other matters, the legality
31 of telecommunications apparatus called GSM gateways. *Floe*’s original notice of appeal
32 contained the grounds that the Director General of Telecommunications had failed to base
33 his investigation on the legislation prevailing at the time. One sees that at para.51. That
34 was the terms in which the notice of appeal was originally articulated.

1 If one goes then to para.18, one sees the amendment that *Floe* sought to introduce.

2 THE CHAIRMAN: There was no particularisation of that plea in the original ----

3 MR. PICKFORD: As I understand it, there was not, madam, no. If one goes to para.18 one sees
4 the amendment that *Floe* sought to introduce. It was as follows:

5 “The Appellant ... contends that as a matter of law and application of the facts the
6 Respondent erred in coming to the conclusion that the GSM Gateway devices
7 owned or supplied by the appellant were being operated in contravention of section
8 1 of the Wireless Telegraphy Act 1949’.”

9 That is the amendment.

10 Then the Tribunal’s analysis of the application and Rule 11 begins at para.28, and it is
11 worthy of careful consideration. They say:

12 “It seems to us that, in the High Court and most tribunals, permission would be
13 given to Floe to amend its notice of appeal in order to advance the Primary
14 Argument, subject as appropriate to terms as to costs, depending on the rules as to
15 costs in the particular jurisdiction in question.

16 We would see that approach to be in accordance with the overriding objective set
17 out in the Civil Procedure Rules (‘CPR’) Part 1 ...”

18 Just pausing there, that is the same overriding objective that the Tribunal shares –

19 “... and also in accordance with the rules governing amendments in CPR Part 17.

20 Thus for example:

21 ‘The overriding objective (of the CPR) is that the court should deal with cases
22 justly. That includes, so far as practicable, ensuring that each is dealt with not only
23 expeditiously but also fairly. Amendments in general ought to be allowed that the
24 real dispute between the parties can be adjudicated upon provided that any
25 prejudice to the other party or parties caused by the amendment can be
26 compensated for in costs, and the public interest in the efficient administration of
27 justice is not significantly harmed’ per Peter Gibson LJ in *Cobbold v. London*
28 *Borough of Greenwich*, August 9, 1999, CA.’

29 However, rule 11 of the Tribunal’s Rules is on its face more restrictive than the
30 practice in the High Court, having regard to the terms of rule 11(3). As appears
31 from paragraph 2.1 of the *Guide to Appeals under the Competition Act 1998*,
32 issued in 2000 by the Tribunal’s predecessor, the Competition Commission Appeal
33 Tribunal, the Tribunal’s Rules are intended to reflect the general philosophy of the
34 Civil Procedure Rules, including the overriding objective. At the same time, the

1 Tribunal's largely written procedure reflects the Rules of Procedure of the Court of
2 First Instance of the European Communities, as subsequently amended. The CFI
3 rules have been found from experience to be, in broad overview, a suitable model
4 for the kind of cases the Tribunal is asked to determine.

5 The CFI rules are, however, based on the continental system of pleading, which do
6 not have any system of 'amendment' of the kind familiar to the common law.

7 Article 48(2) of the CFI's Rules of Procedure provides that 'No new plea in law
8 may be introduced in the course of proceedings unless it is based on matters of law
9 or of fact which come to light in the course of the procedure'."

10 We see there the genesis of Rule 11(3). It then goes on to explain at para.32:

11 "It should be noted that the term 'plea in law' which appears in Article 48(2) of the
12 CFI's Rules of Procedure does not mean 'any legal argument' but is a term of
13 Scottish origin thought to be the nearest, albeit inexact, translation into English of
14 the phrase '*moyen nouveau*' which occurs in the original French version of Article
15 48(2). That term reflects the distinction in continental between '*le moyen*' (the
16 basic ground relied on) and '*les arguments*' (the arguments in support of the
17 ground). Thus '*le moyen*' is the basic plea, such as error of law, illegality,
18 discrimination, procedural failure, and so on, and '*les arguments*' are the
19 arguments in support of each such plea. In order to mitigate the apparent rigidity
20 of the continental system, they are some '*moyens*' which the Court can raise of its
21 motion if the parties fail to do so. Moreover, although a '*moyen nouveau*' cannot
22 be raised by the parties, there is no objection to the parties advancing additional
23 '*arguments*' in support of an existing '*moyen*'.

24 Rule 11 of the Tribunal's Rules is not intended to introduce the technicalities of
25 continental-type pleadings before the Tribunal. However, the basis thrust of rule
26 11 is to limit the possibilities of amendment after an appeal has been introduced."

27 Plainly, it is not intended to introduce all of the technicalities because we see from Rule
28 11(1) that there is a broad common law style discretion that is conferred upon the Tribunal,
29 but what this passage does enable us to see is precisely what was intended by the
30 introduction of Rule 11(3) and its extremely limited scope. All it is intended to do is
31 prevent an appeal which is based on, say, alleged procedural failings from veering off in a
32 totally different direction into an appeal based on, say, an error of law. That does not rob
33 Rule 11(3) of its substance as Ofcom alleges. All it does is to make clear that the ambit of
34 Rule 11(3) is a very limited one. Quite rightly so, we say, because it was not intended to

1 frustrate the ability of the Tribunal to exercise its discretion in a way that enables it to deal
2 with cases justly and to enable the real dispute between the parties to be adjudicated upon.
3 Nor was it intended, we say, to introduce the type of angels dancing on a pin approach
4 which Ofcom's approach is often prone to lead to because once one leaves behind the clear
5 lights of a ground of appeal in this context being equivalent to *le moyen*, one begins very
6 often to find oneself embroiled in deeply unproductive debates about whether a ground is an
7 argument or an argument is a ground. That is not a particular concern if one sticks to the
8 Tribunal's clear analysis in *Floe*.

9 Ofcom, for their part, say their approach is that a ground of appeal must specify in at least
10 broad terms the basis on which the procedural substance of a decision is alleged to be
11 flawed. Now, in one sense we do not quibble with that. If a notice of appeal is to satisfy
12 Rule 8(4), of course the grounds of appeal need to be supplemented by an explanation of the
13 basis on which the argument is brought forward. So, a notice of appeal needs both *le moyen*
14 and *les arguments*. Without *les arguments* the notice of appeal is clearly deficient and
15 insufficiently precise to enable the Tribunal to adjudicate on it. That is exactly why, in the
16 present case we need to amend our pleading to introduce the further arguments that we rely
17 upon. We are not saying that we could make these points free-standing without something
18 more concrete to anchor them in, but they are the arguments.

19 Ofcom's mistake is to read across that requirement for specificity that arises out of Rule 8,
20 which serves one purpose, into Rule 11(3) which, as the Tribunal's analysis in *Floe* makes
21 clear, serves an entirely different purpose, Ofcom's approach simply does not accord with
22 the explanation that is advanced by the Tribunal, including the President of the Tribunal
23 who was instrumental in developing the rules, in *Floe*.

24 Now, Ofcom's real difficulty, we say, is this - and it is a question that it persistently fails to
25 grapple with: the Tribunal is quite capable of exercising its discretion under Rule 11(1) to
26 enable it to act in the interests of the fair and just disposal of appeals. It does not require a
27 straight jacket in the form of an over-inflated approach to Rule 11(3) to assist it. Indeed,
28 quite the contrary - such a straitjacket would positive frustrate it in its ability to deal with
29 cases justly. Any arguments that Ofcom might want to advance it is quite capable of
30 advancing and the Tribunal is quite capable of adjudicating on them under Rule 11(1). The
31 Tribunal can take those points into account as appropriate in any give case.

32 THE CHAIRMAN: The point that you said a moment ago - "Well, the aim of this distinction and
33 the aim of Rule 11(3) is to stop the case veering off in a totally different direction" -- That
34 leads me to wonder that when you are examining this question, "Is it a *moyen*? Is it an

1 *argument?*”, is that something that you get looking just at the words or the structure of the
2 pleading, or is it something that you arrive at by saying, “Well, what would have to be done
3 by the parties in order to investigate this new ground? If those sorts of investigations, or the
4 kind of evidence that would be needed is something which is entirely different from the
5 kinds of investigations and evidence that would be needed for the existing pleading, does
6 that tell us anything about whether it is a new *moyen* rather a new *argument*, or is that just a
7 discretionary point?

8 MR. PICKFORD: No, madam, we say it does not. What enables you to distinguish between an
9 *argument* and a *moyen* is looking back to the origins of this rule as explained by the
10 Tribunal, and its basis in continental pleadings. One sees quite clearly from that that
11 *moyens* are exceptionally high level. They are error of law; procedure failure, and the other
12 grounds listed there - discrimination. They are those types of exceptionally high level point,
13 and for whatever reason continental systems of pleading developed on the basis that one had
14 to constrain one’s appeal as one went through the legal process to the original *moyens* that
15 were pleaded. Within that there is, in common with the common law, a considerable
16 discretion to permit amendments.

17 THE CHAIRMAN: But does it not later say that if you had a predatory pricing case -- In para.
18 42,
19 “-- cannot raise an appeal or a complaint of excessive pricing when the original
20 complaint was one of predatory pricing”.
21 Those might both be said to be an error of law if they arose from an interpretation of Article
22 82 ----

23 MR. PICKFORD: They might be. In any given case there may be fine distinctions that
24 ultimately the Tribunal is called upon to make. That was not, in fact, a distinction that the
25 Tribunal was being called upon to make in this particular case. It is illustrative that in the
26 *Floe* case the original pleading was in exceptionally broad terms and the Tribunal was quite
27 happy in that case to grant the amendment and it did not think that Rule 11(3) applied.
28 Now, I accept that there may be other difficult cases where one has to carefully dissect what
29 truly is a *moyen* from an *argument*. But, when I come on to deal with this particular
30 application, we say that it is very clear which side of the line this application sits - whether
31 or not there are other applications that would be less clear.
32 Now, Ofcom also refers to the cases of *Rapture* and *H3G*. I can deal with those, if
33 necessary, in reply, but our basic submission in relation to both of them is that they do not
34 add anything over *Floe*. They substantially relate to their own facts. They do not contain an

1 analysis of the origins of a Rule 11(3) which *Floe* does. Indeed, to that extent they are
2 essentially *per incuriam* because it appears that in both cases the Tribunal was not taken to
3 the analysis to which I have taken the Tribunal in *Floe*, which explains the distinction
4 between *moyen* and *argument*.

5 So, coming on to the question which was just troubling the Tribunal, if we apply this
6 analysis now to the facts of this case we have two points. Our first point is that *le moyen* in
7 the present case is procedural failure, as identified as a *moyen* in *Floe*. *Les arguments* in
8 support of that are currently those set out in the notice of appeal - that is, the de-coupling
9 point; the need to consult on the measure not a range; the failure to consult on certain
10 discreet, albeit we say important, issues. The latter two we have grouped together as
11 challenges to the adequacy of Ofcom's consultation. On that basis we say that the proposed
12 new argument that Ofcom failed to disclose its model is simply another argument in support
13 of an existing *moyen* - namely, procedural failure. That is our first point.

14 We say that in any event, even if we apply Ofcom's approach, which is another step down,
15 we still meet that test. To remind the Tribunal, they say that a ground of appeal must
16 specify, at least in broad terms, the basis upon which the procedural substance of a decision
17 is alleged to be flawed. On that approach we have two procedural grounds of appeal. The
18 first basis on which we say there is a procedural failure is the de-coupling point. The
19 second basis on which we say there is a procedural failure is that the consultation was
20 inadequate. In relation to that point we currently raise two arguments in support and the
21 amendments will be the third argument in support. We say that whichever approach one
22 takes, we are the right side of the line - whether it is our approach or Ofcom's approach.
23 Turning then to Rule 11(1) - the exercise of the Tribunal's discretion - we say that at the
24 heart of the new argument lies the following point: is the respondent in the position of Talk
25 Talk Group, whose business model depends critically on the inputs it buys from a monopoly
26 provider such as BT, required to appeal to this Tribunal in order to scrutinise the models
27 underpinning that price control when it now appears that those models could have been
28 disclosed, we say, with appropriate confidentiality arrangements during the consultation
29 procedure itself. We say that raises an important point of principle, and it is one that should
30 be adjudicated on.

31 To deal with one of the points that the Tribunal raised with me at the outset, we say that
32 there are very real practical ramifications for that point. One of those is that Ofcom is about
33 to embark on the same process of consultation in relation to the same price controls as they
34 would apply from April 2011. Now we have not asked for a declaration from the Tribunal

1 but in advancing this point we are anticipating that the Tribunal will give a judgment in
2 relation to it and we would hope that that judgment could be relied upon to inform the
3 future approach of Ofcom to these matters. So they are very real because they are about to
4 come and hit us again.

5 There is a second respect in which we say that there are practical ramifications from this
6 point which is that it should inform the approach that the Competition Commission takes in
7 scrutinising Ofcom's modelling, because we say the failure to disclose it during the
8 consultation process means that now is the very first opportunity for parties such as
9 Carphone Warehouse to subject that model to proper scrutiny, and we say that means the
10 Competition Commission as it goes through analysing the price control needs to be
11 particularly alert to the fact that there was not a final round of consultation when parties
12 were able to bring forward arguments in relation to the model previously and now really is
13 the time for that detailed scrutiny. So we say there were those two respects in which this
14 point as important practical ramifications notwithstanding that we have not sought any sort
15 of declaration in relation to it.

16 What are Ofcom's objections under Rule 11.1? They are essentially threefold. Firstly, they
17 say that they are prejudiced by having to do additional work, secondly they say that the
18 point will be sterile if there is no accompanying price control matter arising out of it and,
19 thirdly, they say that we should not be permitted to chop and change our case at least
20 without explaining, more properly than we have done, why.

21 In relation to the first issue, it is notable that Ofcom do not argue that they could not be
22 compensated in costs should the amendment be allowed. That is not their position, they say
23 that misses the point. They say that they will nonetheless be prejudiced by the fact that
24 they would have to do additional work in order to respond to the point. Ofcom are
25 somewhat unclear about the extent of that additional burden on them. They say at para. 16
26 of their second submissions of 13th October, that it is hard to quantify.

27 But if one then turns to para. 17, at tab 10 that encapsulates the essence of Ofcom's
28 concerns. It may be worthwhile turning to that just to read it. They say this ----

29 THE CHAIRMAN: I am sorry, which bundle?

30 MR. PICKFORD: It is tab 10 of the correspondence bundle, para. 17:

31 "To say that such additional burdens 'can be compensated in costs' is to miss the
32 point. Price control appeals pose a significant strain on Ofcom's resources: they
33 are typically highly complex pieces of litigation, raising a myriad of points over an
34 extended period. Ofcom is currently involved in two such appeals and a third

1 appeal (in respect of WLR) has been described by CPW’s counsel as ‘very likely’.
2 Ofcom must combine its role as Respondent in these appeals with its ongoing
3 regulatory responsibilities, which, in the case of price controls, constitute an
4 almost continuous cycle of consultations and market reviews. Any increase to the
5 burdens of litigation may therefore carry a cost in terms of Ofcom’s general
6 effectiveness in discharging its functions which goes well beyond the direct
7 expense of litigation itself.”

8 So that is Ofcom’s point and we have four points to make in response to that. The first is in
9 fact that there is no additional burden in this particular case caused by the amendment at all,
10 and the reason for that is that we intend to appeal the WLR decision. We have the right to
11 bring the same point about the failure to disclose the model in relation to that decision and
12 so if it is not permitted now it will be inevitably something that Ofcom has to deal with
13 later, and all that Ofcom’s current resistance to the introduction of the point is achieving is
14 delay, which we say is the precise opposite of the principles that should guide the Tribunal
15 in the exercise of its discretion. That is the first point we make in response.

16 The second point is that, even within the context of these proceedings, we say that the point
17 we are raising is an issue of principle about whether Carphone Warehouse needs to wait
18 until and incur the costs of an appeal to this Tribunal in order to scrutinise a model which
19 we say it should have had, and could have had access to during the consultation procedure.
20 We say that is not a difficult point on which Ofcom will need to serve reams of evidence.
21 Now Ofcom say that in fact the point may be somewhat complex and difficult, though as I
22 have pointed out they are not entirely sure about how much it will require of them in terms
23 of additional evidence. But they rely on the case of *Easai v National Institute for Health*
24 *and clinical Excellence* which is at tab 2 D of the authorities bundle, and that illustrates how
25 the point that we rely upon is in fact a heavily factual and context specific one. The first
26 point worth noting here – this is a decision of the Court of Appeal, on appeal from the
27 Administrative Court, and they overturned the decision of the Administrative Court. It is
28 worth just briefly noting that of course the Administrative Court does not engage in lengthy
29 factual investigations, still less does the Court of Appeal do so, and yet it was quite
30 comfortable overturning the decision of the Administrative Court, so that of itself
31 immediately suggests that this is unlikely to be a case that depended on a very heavy and
32 extensive lengthy factual analysis.

33 THE CHAIRMAN: I think the point they were making, in the Judgment there is a reference to
34 quite a number of different witness statements that they considered.

1 MR. PICKFORD: We do not deny that Ofcom may wish to advance some evidence in relation to
2 the point. We say they have over stated how big the point is, but it is no part of my case to
3 persuade the Tribunal that this will not involve Ofcom in material effort. We quite accept it
4 will involve them in some effort, what we say is that they themselves are not even sure
5 about how much effort and we suggest that, in fact, it is not likely to be as great as they are
6 leading the Tribunal currently to fear.

7 What we do say in relation to *Eisai*, notwithstanding Ofcom say that they are going to need
8 to advance lots of evidence about all the information that we were given and how that fits
9 into the context of the price control generally. We say very similar arguments were in fact
10 advanced in the *Eisai* case by the National Institute, and they were rejected by the Court of
11 Appeal. If one turns simply to look at para. 49 we see in the Judgment of Lord Justice
12 Richards the following:

13 "I accept that Eisai was given a great deal of information and was able to make
14 representations of substance. It knew the assumptions that were being applied and
15 could comment on them. It knew what sensitivity analysis had been run and could
16 make comments on those. It could and did make an intelligent response, as far as
17 it went. In my judgment, however, none of that meets the point that it was limited
18 in what it could do to check and comment on the reliability of the model itself."

19 - that, we say, is the essence of our point too. Indeed, it is *a fortiori* in our case because in
20 the *Eisai* case Eisai was provided with a copy of a model, it simply was not an executable
21 version of the model that you could change the assumptions. In our case we were not
22 provided with a copy of the model at all.

23 So in response to the question the Tribunal asked me at the outset, in terms of the hurdle
24 that we need to cross in order to prove this point. We say it is not a high hurdle at all,
25 because it follows necessarily from the fact that we were not provided with the model and
26 that the model is clearly a central part of the price control, that there was a material flaw in
27 Ofcom's consultation procedure because at the time it was suggested, "This is all too
28 difficult and confidentiality reasons prevent us from disclosing it". We have now seen that,
29 in fact, those confidentiality reasons do not provide a good reason for not disclosing the
30 model because it has been disclosed to a confidentiality ring, just as we asked for during the
31 consultation procedure. That is our second point in response to Ofcom's point about the
32 burden.

33 The third point we make ----

1 THE CHAIRMAN: You do not accept then that, in order to make good this point, you have to
2 show that there was, in fact, something wrong with the model that you would have pointed
3 out to them?

4 MR. PICKFORD: No, we do not, and if I may I will come on to that point, because that is
5 Ofcom's next answer, their next attempted answer, to our application. They say this is all
6 sterile, and I would like, if I may, to deal with that in due course.
7 Sticking for the time being with this present ground which is that they say, "This will cause
8 us material additional effort".

9 Our third response is this: we say Ofcom's focus on its resources and other demands as
10 guiding the exercise of the Tribunal's discretion under Rule 11(1) is, in fact, misconceived
11 and it is unprincipled. We say that the Tribunal's primary function in considering
12 amendments is not one of protecting Ofcom from being exposed to additional work. The
13 Tribunal's role is to hold Ofcom to account where an appeal is brought pursuant to statute,
14 and approaching the issue of amendment it must have regard to the need to deal with cases
15 justly; and in particular to allow the real dispute between the parties to be adjudicated upon.
16 That was quoted in *Floe*.

17 If Ofcom had insufficient resources to carry out all its functions under the Communications
18 Act properly we say that that constitutes potentially a failure on its part properly to exercise
19 its powers under s.38 in setting its industry levy. We say it is certainly not an important
20 factor for this Tribunal to take account of in exercising its discretion under Rule 11(1).

21 It is worth just pausing for thought for a moment to test it, because Ofcom's approach, if
22 they were right, would have the following implications: supposing an appellant happens to
23 bring an appeal when things are a little slow for Ofcom. On Ofcom's world view, that
24 would be a factor in favour of the Tribunal exercising its discretion in their favour under
25 Rule 11(1), because if they have not got too much to do they might as well do this as do
26 anything.

27 Conversely, if you are unlucky enough to bring an appeal when Ofcom are feeling rather
28 put upon and feel they have got rather a lot to do, then according to Ofcom that is
29 unfortunately your bad luck because that is something they say, when it comes to the
30 Tribunal exercising its discretion, should be taken into account under Rule 11(1), and we
31 say that that approach is unprincipled and it is wrong.

32 Our final point in response to Ofcom's argument about the resource implications is that
33 their position is, in fact, rather short sighted, because we say disclosure of underlying

1 modelling during the consultation process should assist in better informed decision making
2 by Ofcom, thereby reducing the likelihood of time consuming and expensive appeals.

3 That is the first point that Ofcom advance and our answers to it.

4 The second point is that they say that, without any price control matters arising out of
5 Ofcom's failure to disclose the model accompanying, the point is sterile. This is the point,
6 madam, you anticipated. We say in response to that three things: first, we say that in so far
7 as Ofcom are saying that an amendment cannot constitute a legitimate basis for contesting
8 the decision in its own right without those accompanying price control matters they are
9 wrong. Ofcom themselves rely on the classic exposition of the requirements of a proper
10 consultation in the *Coughlan* case and that is at tab 2E of the authorities bundle. I simply
11 wish to quote the principal paragraph that Ofcom rely on there, which is para.108, and here
12 the court said this:

13 "To be proper, consultation must be undertaken at a time when proposals are still
14 at a formative stage; it must include sufficient reasons for particular proposals to
15 allow those consulted to give intelligent consideration and an intelligent response;
16 adequate time must be given for this purpose; and the product of consultation must
17 be conscientiously taken into account when the ultimate decision is taken ."

18 There is no additional requirement that there is a need to demonstrate how the decision
19 maker would have taken a different decision had the consultation been adequate. Indeed,
20 we cannot possibly say, we cannot know what would have happened in the counterfactual
21 world, where we had had the models disclosed to us and we had made representations on
22 them, what Ofcom's response might have been.

23 If I might develop that point, Ofcom in their defence in response to our notice of appeal say
24 that there are lots of points that we raise which are ones that simply concern the exercise of
25 their discretion. They say they are not points that give rise to an error of law. We do not
26 accept in relation to any of the points that we have raised that they are in that category. Let
27 us suppose for the sake of argument that there are points that do fall within that category,
28 there are points where Ofcom has a discretion which it exercises and it would be impossible
29 to say that whichever way they exercised it they were right or wrong. Nonetheless, in
30 denying us the ability to comment on the model we were denied the ability to influence
31 Ofcom in that decision that it ultimately took. Therefore, it follows necessarily, we say, that
32 matters could have been different and the suggestion that you have to have some
33 accompanying substantive ground has no basis in general public law principles at all.

1 THE CHAIRMAN: The big difference between this case and a general public law case is that the
2 end result, if you manage to establish inadequate consultation, is that the case gets sent back
3 to the original decision maker. Of course, it is always open to the original decision maker,
4 once they have made good the procedural unfairness, to come to the same substantive
5 decision. The difference here is that that is not what you are asking for because part of this
6 appeal is a merits investigation by a different body into the result at the end of which we
7 will know whether there was anything wrong with the model or not.

8 MR. PICKFORD: We will know whether there was anything wrong with it, but we will not
9 necessarily know in fact whether Ofcom might have exercised its discretion differently had
10 representations been made to it during the consultation process. We have been throughout
11 this procedure pragmatic in that we have not asked, as appellants before us have asked in
12 relation to the same jurisdiction, "If we identify a procedural error the whole thing has to go
13 back". That had been advanced on previous occasions. That is not our case because we
14 want to see a practical solution to the problems that we identified.

15 We could have asked for that, we could have said that there is something so fundamentally
16 wrong that the whole thing needs to go back and Ofcom should start again. The problem
17 with Ofcom's approach is that it would effectively make it immune to all sorts of procedural
18 challenge. It could raise the same point in relation to any procedural challenge. It could
19 say, "Unless you can identify a point of substance then it is sterile and we do not have to
20 deal with it". Indeed, if you look at the logic, the logic falls down because even if you do
21 identify something substantive that is related to it they can still say the same thing. They
22 can still say, "Well, that does not add anything to your substantive point. Therefore, we do
23 not need to deal with it". So, on Ofcom's logic it is actually sterile either way. That is why
24 we say it is actually bad logic because ultimately these are points which the Tribunal is
25 entitled to adjudicate upon and we are entitled to raise before it. As we explained before,
26 we have reasons for wanting it to do so because it will inform the approach that the
27 Competition Commission takes to these matters. If we convince you that in fact Ofcom
28 should have provided the model and it did not, then we say that should inform the approach
29 that the Competition Commission takes during its investigations for the reasons I explained.

30 THE CHAIRMAN: Explain again if there is a link between that point and the point you are
31 making about Ofcom's claim that certain of the complaints that you make are points within
32 their discretion. Is there a link between those two?

33 MR. PICKFORD: Well, certainly it might be argued that where Ofcom were unable to take
34 account of points in exercising their discretion when they should have done, then that

1 enables the Competition Commission a greater latitude effectively in exercising its
2 discretion to correct the fact that Ofcom never exercised its discretion properly at the last
3 stage because it did not have the benefit or the material that it should have had. In essence,
4 the failure of consultation leads to a situation in which Ofcom had inadequate material
5 before it on which to take its final decision because it did not have all the representations.

6 THE CHAIRMAN: So, is another way of saying what I think you are arguing that insofar as
7 Ofcom would want to argue that even in a merits appeal there is some margin of
8 appreciation to be given to them by us, or by the Competition Commission, because they, as
9 the regulator have chosen one of a number of perfectly acceptable ways of doing something,
10 that that margin of appreciation may be eroded in a situation where there was inadequate
11 consultation?

12 MR. PICKFORD: Indeed, madam, if I may say so, that very succinctly puts the point that I am
13 trying to advance. It is certainly, we say, eroded, and it may be eroded effectively to nothing
14 so that the Competition Commission has to take that element of it again. But, we do not
15 need to debate here, now, exactly how far it has eroded. The point is that it is eroded.
16 That is our first answer to the complaint that this is sterile.
17 The second answer also is the one that I have just explained - that not only is it wrong as a
18 matter of principle, but there are real practical ramifications from this point, both in relation
19 to the Competition Commission's approach and - because we hope to secure a judgment
20 which informs the approach which Ofcom will take in the future, including in relation to
21 exactly the same price controls that it is about to embark upon consulting on again.
22 The third point is that we say in any event the factual premise for this argument is not a
23 good one because we can confirm - and we can come on to deal with the ramifications of
24 this later in terms of procedure - to the Tribunal today that we do intend to rely upon
25 failures that have become apparent to us as a result of our investigation of Ofcom's model.
26 Indeed, a number of the other points that we have already raised in our notice of appeal we
27 say are reinforced by the disclosure of the model. So, ultimately we say that this argument is
28 in fact sterile because there will be substantive points in any event, albeit we do not accept
29 that there needs to be in order for the Tribunal to adjudicate on it.

30 THE CHAIRMAN: We may come to the question of when we are going to see these ----

31 MR. PICKFORD: Indeed, madam. I can say now - although, again, there are other points we
32 need to discuss later - we propose to do that within fourteen days of today's date. I can
33 explain all the efforts that we have been engaged in to try to bring forward those points as
34 soon as we can.

1 Now, Ofcom's final point in resistance is this: they say, for its own reasons and with the
2 benefit of expert legal advice, CPW chose not to pursue the challenge in its notice of appeal
3 as originally lodged. They say that at para. 11 of their original submissions which are at Tab
4 3. Then they build upon that in their subsequent submissions, and they say that as a
5 consequence CPW should not be - in its words - 'permitted to chop and change its case,
6 taking up points which had previously been discarded without offering a good explanation
7 why'. That is their third point.

8 We have four points in response to that. The first is that an argument which proceeds on the
9 basis that by failing to put something in your notice of appeal, that raises a *prima facie*
10 justification for the Tribunal exercising its discretion against you is a nonsensical one. So,
11 to that extent there cannot be any *prima facie* objection to the amendment. So, what we then
12 have to turn to, is the next element of Ofcom's argument, which is that they say, "Well,
13 there needs to be at the very least a very good explanation as to why you are doing what you
14 are doing now" -- In relation to that point we say that that requirement for an explanation
15 would be to import into Rule 11(1) the requirements of Rule 11(3). Rule 11(3) is all about
16 explanations as to why something was not originally pleaded and is now pleaded. We say
17 there is no such requirement in Rule 11(1) and it is certainly wrong to import Rule 11(3)
18 into Rule 11(1) - at the very least. So, that is our second point.

19 The third point we make is that, as it happens, we say the background to the introduction of
20 this point is perfectly understandable. In contrast to the, we would say, somewhat leisurely
21 13.5 weeks that Ofcom has taken to develop its defence, CPW brought forward its
22 application within the tight timeframe of two months permitted under the Tribunal's rules.
23 We brought the application to amend when we did, just four working days after having been
24 told by Ofcom that it would disclose its model - and, indeed, only one working day after
25 receiving that model. The reason why we brought it then is because it then came to us that
26 what we had previously been told during the consultation process when we had said, "Well,
27 can't you disclose this to a confidentiality ring?", and we had been told, "No, that's not
28 appropriate" -- But, then, suddenly, the model was disclosed to a confidentiality ring. We
29 say that that change of position -- Obviously the two situations are not necessarily identical,
30 but we say that nonetheless there was a change of position, and we say that that demands an
31 explanation and that we could not have known, prior to Ofcom's decision that it was going
32 to disclose to a confidentiality ring -- that it would do so. That is what prompted the
33 amendment which we say we made extremely promptly, having received that new
34 information.

1 Now, Ofcom's argument in response to this, they say - and this is at para. 28 of their second
2 set of submissions at Tab 10 is that CPW has no reasonable basis for supposing that by
3 disclosing the model during the appeal, Ofcom has thereby accepted that disclosure should
4 have been made at any earlier stage. That is their answer. But, we say that Ofcom's
5 argument proceeds on a false premise. We are not arguing that Ofcom has conceded the
6 point. What we are saying is that its change of position really brings to light the very
7 essence of the point which I have made previously, which is: Why should we have to appeal
8 to get disclosure of a model to a confidentiality ring when it appears to us that we could
9 have had that all along?

10 If it were necessary - which we say it is not - we say those recent events would in fact
11 justify the Tribunal in applying Rule 11(3)(a), which entitles it to introduce a point even
12 where 11(3) is engaged when there are new facts arising. We say we do not need to,
13 because, as I have explained previously, we said we are firmly within Rule 11(1) territory.
14 But, if the Tribunal were not persuaded by that, it could nonetheless go down that route.

15 Our fourth and final response to Ofcom's point about us having discarded, abandoned this
16 point is again that it simply proceeds on a false factual premise. Carphone Warehouse
17 never discarded the point that Ofcom's LLU decision is procedurally flawed because it
18 failed to disclose the models it relied upon. The simple reason why it never discarded it is
19 because it was never in its notice of appeal in the first place. We say that Ofcom does not
20 have any right to expect the privileged advice that has been provided by CPW's lawyers to
21 it to be disclosed as part of the justification for an application. But, what I can say, and
22 confirm unequivocally to the Tribunal, is this: CPW was never advised to discard this point
23 and never chose to discard it. We say, therefore, that the premise for Ofcom's point that it
24 did is a false one, and the point therefore falls away.

25 So, we say that in all the circumstances the proposed amendment is a proper one. It raises
26 an important point of principle and the Tribunal should reject Ofcom's attempts to prevent it
27 from adjudicating upon it, and from holding Ofcom to account.

28 I hope, madam, I have dealt in the course of those submissions with the two points that you
29 asked me at the outset. Unless there are any other ----

30 THE CHAIRMAN: Well let us see how Mr. Holmes puts his case and then you may need to deal
31 with things in reply.

32 MR. PICKFORD: Thank you madam.

33 THE CHAIRMAN: Thank you very much, that is very clear, Mr. Pickford. Mr. Holmes?

1 MR. HOLMES: Madam, today Carphone Warehouse seeks the Tribunal's permission not amend
2 its notice of appeal in order to advance an additional challenge. The complaint that
3 Carphone Warehouse now wishes to advance is that Ofcom did not provide enough
4 information to Carphone Warehouse during the extensive consultation which preceded the
5 price control decisions at issue in this appeal and that in consequence its ability to respond
6 to the consultation was materially compromised. You asked, madam, if this set the bar too
7 high and if Carphone Warehouse had perhaps made a rod to beat its own back. We say
8 that that is the correct test, there was no error in the pleading and that that is what Carphone
9 Warehouse would need to show if this amendment were to be admitted.

10 I will refer to this proposed complaint as the "disclosure challenge" as I have done in my
11 written submissions for today. We are told now that there will be other applications to
12 amend, but that Carphone Warehouse is still not able to bring those forward and has given
13 no indication as to what those amendments may involve.

14 Our primary submission today is that Carphone Warehouse should not be permitted to
15 expand its case in the manner sought. Carphone Warehouse's submission would raise an
16 additional ground of appeal within the meaning of Rule 11(3) and none of the conditions for
17 the application of that rule are met in this case. But whether the case is considered under
18 Rule 11(1) or 11(3) we take issue with Mr. Pickford as to whether there are good reasons
19 for allowing the amendment. We say that the interests of justice are against allowing the
20 amendment at this stage.

21 In the alternative, if permission is to be given today we say it should be made conditional on
22 two things. First, upon Carphone Warehouse applying for and being permitted to advance
23 further price control arguments arising out of Ofcom's models, that is to say the further
24 amendments to which Mr. Pickford has referred, but has not specified the contents of and
25 upon Carphone Warehouse further particularising the proposed disclosure challenge which,
26 as currently developed, we say is insufficient to enable Ofcom to respond to it properly.

27 Our opposition, madam, is not borne out of any desire to avoid hard work, as has been
28 suggested today. There is no shortage of that for Ofcom and having just assisted in settling
29 the defence I can assure you that Ofcom does not shirk from its responsibilities before this
30 Tribunal, and the Competition Commission as well as its ongoing regulatory duties under
31 the common regulatory framework. Nor, madam, do we seek to evade judicial scrutiny.

32 However, we do have a number of concerns about the nature and content of Carphone
33 Warehouse's amendment which we feel it appropriate to raise with the Tribunal today. In
34 particular, it appears to us to risk a complex detour of limited if any relevance to future

1 cases or to the outcome of these proceedings. It is raised late and, we say, in the specific
2 circumstances in which it is raised that the explanation give for it is not adequate. Finally, it
3 seems to us to be insufficiently supported or particularised.

4 I propose to divide my submissions into three parts. First, I will identify various aspects of
5 the proposed amendment which we say are relevant to the question of whether or not it
6 should be admitted. I will then turn to Rule 11 and the rather theological debate about how
7 one classifies points between grounds and arguments and, in conclusion, I will develop my
8 submissions as to why we say the application should be refused or alternatively granted
9 only subject to conditions.

10 I will start with the proposed amendment itself. The Tribunal has already been taken to it
11 but I think it would be helpful to look at it a little further. It is behind tab 1 of the
12 correspondence bundle. As Mr. Pickford has noted, it falls within the non-price control
13 matters of Carphone Warehouse's appeal which begin at p.22, the amendment itself is at
14 p.24 and consists of the underlying text in new para. 74A.

15 The first point to note about the amendment is that Carphone Warehouse's challenge has a
16 history to it. This emerges from para.74A.1, where Carphone Warehouse makes various
17 references to the correspondence which passed between Ofcom and CPW during the
18 consultation stage. The disclosure challenge is not the result of a sudden inspiration during
19 the course of the appeal. It was pursued with vigour throughout the consultation process,
20 and Carphone Warehouse could easily have included it in the notice of appeal, despite the
21 strict two month's time limit within which the appeal had to be brought.

22 The second salient feature of Carphone Warehouse's proposed amendment goes to the relief
23 sought in respect of it, a point which you, madam, raised with my friend, Mr. Pickford.

24 You will see in the opening sentence of para.75 that:

25 "CPW does not seek to have the LLU Decision set aside for failures of
26 consultation alone. It recognises that it can ask the CC to review the underlying
27 subject matter on the merits and pursues that avenue as its primary remedy."

28 This is, to say the least, unusual. We are not aware of any other cases before the Tribunal in
29 which grounds of appeal had been pursued without any specific remedy being sought in
30 respect of them. Grounds of appeal are normally brought in order to obtain a practical
31 outcome, whether in the form of a remittal or variation of the contested decision. By way of
32 example, the non-price control matters pursued by Hutchison 3G in the recent mobile call
33 termination litigation would, if successful, have resulted in the removal of any price control
34 from the appellant. This is not the case with Carphone Warehouse's disclosure challenge.

1 They could have said that these errors merit the decisions being sent back to Ofcom as the
2 primary decision maker to rectify the consultation process of any errors which occurred, and
3 to arrive at a decision informed by the results of consultation. That is not what they said.
4 Instead they do not seek any specific relief of this nature, and we say that Carphone
5 Warehouse's application requires careful scrutiny by the Tribunal. Before permission is
6 granted the Tribunal should be satisfied that there are solid reasons to justify devoting time
7 and resources to it despite the lack of any specific remedy being sought in respect of it.

8 THE CHAIRMAN: It does raise a problem that they allude to at the end of their submissions,
9 which is what role, if any, do complaints about the procedure followed by the original
10 decision maker have in a situation where there is an appeal on the merits, particularly an
11 appeal which is quite clearly because of this rather unusual structure that we have involving
12 the Competition Commission, meant to be quite a detailed examination of what the end
13 result was. Are you saying that they need to choose effectively in their appeal? They can
14 either raise procedural points and ask for their case to be remitted if those points are
15 successful, or they can raise substantive grounds in which case it goes off to the
16 Competition Commission, but that they cannot combine procedural and substantive
17 complaints?

18 MR. HOLMES: We do not go that far, madam. What we say is that if a procedural complaint is
19 adjectival or ancillary to a substantive question so that determination of that procedural
20 point is genuinely relevant to the way in which the substantive matter is to be dealt with,
21 then it would be legitimate for that procedural question to be considered without any
22 requirement for an appellant to seek remittal. We accept that procedural challenges can be
23 brought in the context of a merits' appeal. One alternative would be for an appellant to seek
24 remittal. Another alternative would be for an appellant to show that the procedural ground
25 in some way related to the substantive matters and was justified for that reason. What we
26 say is not permissible is to have a sort of retrospective inquiry in relation to the procedures
27 adopted if that does not lead to any substantive outcome, either in terms of remittal or in
28 terms of an impact on the consideration of the price control matters.

29 THE CHAIRMAN: So on your case he has to establish his point about, well, it would affect how
30 the Competition Commission looks at the substantive issues in order to be able to bring this
31 amendment?

32 MR. HOLMES: Yes, madam, although I should clarify that Ofcom is the primary decision maker
33 here and we may yet take the position that if procedural error were shown the appropriate

1 course would be to remit. That is a risk that I think an appellant who raises procedural
2 matters in the interests of affecting the Competition Commission's deliberation must face.

3 THE CHAIRMAN: Say that again?

4 MR. HOLMES: I do not wish to foreclose the possibility that Ofcom, when these matters are
5 heard, when the non-price control matters are heard, may itself wish to argue that if a
6 procedural error is shown the appropriate course is not for some intensive standard of
7 review to be applied in the Competition Commission, but that the appropriate course would
8 be for the thing to come back before Ofcom for a short consultation to rectify any
9 procedural errors and to proceed on that basis. I am not saying that is what we will do, I am
10 simply alerting the Tribunal to the possibility that that might be a course that Ofcom would
11 consider pursuing.

12 CPW's justification for pursuing both the proposed disclosure challenge and the two
13 existing procedural challenges is then developed at paras.75.1 to 75.4. One of those
14 justifications we had thought before today, and I think also today, can be put aside
15 immediately, and that is the justification at para.75.3. These were the justifications that
16 CPW initially advanced in order to explain why it should nonetheless be permitted to
17 advance its original procedural challenges despite the lack of any request for relief in the
18 form of remittal. One of the arguments that was originally advanced is at para.75.3. If the
19 Tribunal agrees with CPW that the *LLU* decision should be set aside and the matters
20 remitted to Ofcom for an integrated decision on *LLU* and *WLR* prices it may be noted that,
21 to some extent, this would merely give effect to what should have been a further state of
22 consultation by Ofcom on its proposed price control.

23 MR. PICKFORD: Madam, I hesitate to interrupt, but I can confirm, to assist Mr. Holmes, that we
24 are not relying on that point in support of this application.

25 MR. HOLMES: That is very helpful, and, madam, the reason why that is not available to CPW is
26 because this is a reference to the relief originally sought in relation to CPW's other non-
27 price control matter, the so-called "decoupling" matter or *WLR* challenge. The Tribunal
28 will recall that CPW has signalled within a few weeks of lodging its notice of appeal that it
29 was not now proposing to pursue the relief originally sought in relation to the *WLR*
30 challenge. It is unclear whether it still maintains the *WLR* challenge at all, Mr. Turner
31 having reserved CPW's position on that, and we pleaded to it in case it is pursued. Given
32 that remittal is now not sought, this justification, as Mr. Pickford says, is not available in
33 support of this or the existing procedural challenges being heard.

1 The primary reason given for pursuing the procedural challenges is the one which CPW
2 develops first at para.75.1 and which it returns to at para.75.4. CPW's procedural
3 challenges are said to be connected with the conduct of the price control matters which are
4 the main focus of CPW's appeal. Thus, at para.75.1, CPW says that the publication of the
5 *LLU* decision was the first time that those in the position of CPW were able to scrutinise
6 certain of the parameters that Ofcom had chosen to derive its price control. Accordingly,
7 the approach of the Competition Commission needs to be particularly intense to compensate
8 for Ofcom having failed to consult properly on its intended price control.

9 A similar point is then made in relation to costs at 75.4. There CPW says that it is entitled
10 to the costs of its appeal because, had Ofcom consulted properly, there may have been no
11 need for what is, in effect, the final stage of consultation being played out at great cost in
12 the Tribunal and the Competition Commission.

13 So again the argument is that the procedural grounds are connected with the substantive
14 matters raised before the Competition Commission in relation to which CPW says that it
15 should be given both intensive review and costs.

16 In relation to CPW's main existing procedural challenge and its price control case, the link
17 is very clear from para.74 where the failure to consult point is developed. You will see that
18 CPW alleges that Ofcom manifestly failed to consult on certain issues at all. Merely by
19 way of example, we now know that these are the only matters relied on. The following
20 points arose for the first time in the *LLU* decision with no prior consultation in either the
21 first Openreach consultation or the second Openreach consultation. Skipping over the first,
22 which relates also to the WLR challenge which may or may not be pursued, one sees at 74.2
23 to 74.5 that in relation to each of these failures to consult there is a reference forward to
24 specific paragraphs in which the price control matters are developed, and this is the link –
25 this is where it is said that the failures to consult are connected with the price control
26 matters before the Competition Commission. This is the justification for why these matters
27 are being argued now by CPW. They say that in relation to these matters the Competition
28 Commission should apply intensive review because these matters were not properly
29 considered by Ofcom, there was not a proper consultation process, so they should be
30 decided entirely *de novo* by the Competition Commission as though it were a primary
31 decision maker. That is the case. Equally, the costs of conducting that examination before
32 the Competition Commission should be met by Ofcom because of its alleged failures of
33 consultation.

1 We do not accept that if procedural errors were shown this should have any necessary
2 consequences for standard of review or costs, but even if the premise for CPW's
3 justification were accepted we say that the justification is currently not available in relation
4 to the proposed disclosure challenge. This is because there are at present no substantive
5 challenges being pursued which arise out of Ofcom's modelling. There is therefore nothing
6 in relation to which CPW can presently argue that more intensive scrutiny should apply or
7 costs should be given on the basis of the disclosure challenge. There is nothing in the
8 nature of those failures to consult which is before the Competition Commission, which the
9 Competition Commission should look at carefully or which costs should be granted in
10 respect of.

11 We know today for the first time that amendments apparently will be forthcoming in two
12 weeks today, 16th November. We say in relation to those that the Tribunal simply cannot
13 rely on those today in deciding whether to admit this challenge. If you are with me on the
14 difficulties which arise in relation to remedy from the lack of a substantive challenge, we
15 say you cannot take CPW's word that there will be valid and substantial matters that will
16 ultimately be admitted to go forward before the Competition Commission. These matters
17 may turn out to come to nothing, they may be based on simple errors or misunderstandings,
18 and the letter which CPW sent on Friday already gives us some cause for concern in that
19 regard. You may have seen that CPW raised one specific point which we have not yet had
20 an opportunity to address, but we think that there is nothing to that point and we will write
21 as soon as we are able during the course of this week to explain why we think there is
22 nothing to it.

23 Until we see the amendments really they cannot be weighed in the balance. If the Tribunal
24 thought that there was a good basis for admitting the current amendment, the proposed
25 disclosure challenge on the basis of those other things it would have to wait and see what
26 they looked like.

27 So we say then that the primary justification for the non-price control matters cannot
28 presently be prayed in aid in support of this application.

29 To be clear, we are not suggesting that procedural challenges can only be brought if some
30 error is ultimately shown. That is not our position. When Mr. Pickford attacks that, he is
31 attacking a straw man. Clearly, whether there is a procedural error or not stands to be
32 determined whether or not any errors would have come to light had the procedural error not
33 occurred. Our point is rather that grounds of appeal and arguments should be connected
34 with relief. They should have some connection with the outcome of the case. So, therefore,

1 if the justification for advancing a ground is because of implications for the substantive
2 matters arising in the appeal, there must be substantive matters for that justification to bite
3 on.

4 THE CHAIRMAN: But why do you say that there has to be some specific relief resulting from
5 the procedural unfairness?

6 MR. HOLMES: The Tribunal is not in the business of giving advisory opinions. Its task is to
7 dispose of appeals and to decide whether relief should be granted in respect of them.

8 THE CHAIRMAN: Yes. But, if we look at s.195 ----

9 MR. HOLMES: S.195 - the disposal of the appeals.

10 THE CHAIRMAN: Yes. So, under s.195(2) we have to decide the appeal on the merits and by
11 reference to the grounds of the appeal set out in the notice of appeal. Then we have to
12 decide what, if any, is the appropriate action for the decision-maker to take.

13 MR. HOLMES: Then you have to, of course, remit the decision after you have decided.

14 THE CHAIRMAN: Then we have to remit the decision. But, why do you say that if we accept
15 one of the grounds of appeal as being well-made, that we then have to provide some remedy
16 for it?

17 MR. HOLMES: Madam, the scheme of s.195, we say, places the emphasis very clearly on the
18 provision of remedies. The Tribunal has to consider what directions to give in each case
19 and must then remit the decision. It has clearly anticipated that there will be actions --
20 expects that there will be some remedial consequence deriving from the appeal. I see,
21 madam, that you smile - because this argument is not altogether new to the Tribunal. It is
22 one that we have all grappled with before. You no doubt have in mind the hearing on the
23 disposal of the appeals in the recent 'calls to mobile' case where the Tribunal of course
24 emphasise exactly these passages in support of the proposition that the purpose of an appeal
25 is to produce relief. At least in a price control appeal there will always be some relief sought
26 at the outset. It may be that over time the significance of that relief will be eroded and there
27 is a risk that the significance of that relief will be entirely eroded by the end. But, a litigant
28 does not begin without a claim for relief. To test the proposition one has to ask how the
29 Tribunal would have reacted if CPW had brought only the procedural challenge which it
30 now seeks to pursue without any of the other material in which the proposed ground is
31 currently nestled, and came to the Tribunal and said, "We do not seek remittal. What we
32 are looking for is guidance for future cases". The Tribunal would not in that case be
33 prepared, I think - it would obviously be a matter for argument -- The Tribunal would

1 surely have significant reservations in entertaining a challenge without any relief of that
2 nature.

3 THE CHAIRMAN: There was a slightly analogous situation in the preliminary issue that we
4 heard in the Orange appeal where the question was whether the decision of Ofcom to accept
5 jurisdiction over a dispute under s.185 was a decision which had to be appealed within the
6 time limit from that decision or whether it was a point that could be erased in a challenge to
7 the ultimate disposal of the dispute. The position there was that well-advised clients were
8 always going to bring a protective appeal so as not to be out of time. So, it was always
9 going to be a hypothetical question whether, if they had not brought a protected appeal, they
10 would have been precluded from arguing lack of jurisdiction as one of the grounds of
11 challenging the ultimate disposal of the dispute. We did, I think, with Ofcom's
12 encouragement, decide that point for the benefit of future parties because it was a point that
13 needed to be decided. Now, could one not say here that it is a bit tough to put a claimant to
14 an election, in effect, between a procedural complaint and a substantive complaint, but that
15 it is important for future cases to know whether Ofcom should disclose this model as part of
16 its consultation process?

17 MR. HOLMES: The circumstances of that particular issue in relation to ... which I must admit I
18 had forgotten - it was buried in the back of my memory, but it now comes back to me when
19 you mention it - were quite specific in that there was a particular adjectival question which
20 arose in the context of a clearly well-founded - an appeal in relation to which relief was
21 clearly sought. We do not say that there will never be any scope, particularly with the
22 agreement of all parties for the Tribunal to venture opinions on matters of that kind. But,
23 that is really a league apart from the situation we are faced with here where there is a
24 substantial ground of challenge which it is now proposed to advance with significant factual
25 debate associated with it, and in relation to which we say no relief is sought at all.
26 However, madam, even if you were not with us on the notion that there would never be
27 scope for the Tribunal to give an advisory judgment of that kind - and, of course, the
28 Tribunal will be reluctant ever to say, "Never" because one never knows what may be
29 around the corner - we say that where this is the only available justification the Tribunal
30 should embark on a exercise of this nature with great caution and should at least be satisfied
31 that the matter is of sufficient importance to merit this investigation without remedial
32 consequence. I will come on now to make submissions as to why we say that is not the case
33 here.

1 The third feature of the amendment is CPW’s central complaint and whether this can be
2 said to amount to an important point of principle as contended. Returning to para. 74A of
3 the proposed amended notice of appeal on p.24 of Tab 1 we say that the real meat of the
4 case is at paras. 74A.3 and 74A.4. There CPW says that,

5 “Non-disclosure of Ofcom’s modelling prevented CPW from being able properly
6 to test the robustness of the modelling, including the key assumptions underlying
7 the models, the formulae used in their construction and the costs forecasts. It also
8 prevented CPW from being able to carry out sensitivity testing around the
9 assumptions used by Ofcom and from developing alternative price proposals per
10 WLR, SMPF and MPF. By reason of these failures CPW’s ability to make cogent
11 and well-informed representations on a central element in Ofcom’s decision-
12 making process was materially comprised and the consultation accordingly
13 inadequate”.

14 In our submission, this core issue does not turn on any significant point of principle, but is
15 likely instead to involve a careful consideration of the facts and circumstances of each
16 individual case. This is clear from the case of *Eisai* in the Court of Appeal. I cavil slightly
17 at Mr. Pickford’s description of this as being a case on which Ofcom relies. This case was,
18 of course, raised by CPW first of all in support of its application. The point at issue in that
19 case – this is at tab 2 D of the authorities’ bundle. The point at issue in that case is
20 developed at para. 2 of Lord Justice Richard’s judgment:

21 “The point is a relatively narrow one, though arising in a context of some
22 technical complexity. In its consultation process NICE made available to
23 consultees, including *Eisai*, a read-only version of an economic model, in the form
24 of an Excel spreadsheet, which was used to assess the cost-effectiveness of the
25 drugs. *Eisai* requested but was refused a fully executable version of model.
26 *Eisai*’s case is that the non-provision of a fully executable version rendered the
27 consultation process unfair and the decision to issue the guidance was in
28 consequence unlawful.”

29 The judgement of the court was given by Lord Justice Richards with whom Lords Justice
30 Tuckey and Jacob agreed. Lord Justice Richards set out the legal principles from para. 24
31 onwards of the Judgment. He begins at para. 24 noting that it was not disputed that NICE
32 was subject to the general principles of procedural fairness. Paragraph 25, he then sets out
33 the key passage of Lord Woolf’s Judgment in *Ex parte Coughlan* as helpful statement of
34 general principle, and Mr. Pickford took you to:

1 “108 ... To be proper, consultation must be undertaken at a time when proposals
2 are still at a formative stage: it must include sufficient reasons for particular
3 proposals to allow those consulted to give intelligent consideration and an
4 intelligent response ...”

5 We emphasise, madam, “sufficient reasons for ... intelligent consideration and an
6 intelligent response.”

7 “... adequate time must be given for this purpose, and the product of consultation
8 must be conscientiously taken into account when the ultimate decision is taken.
9

10 112 ... It has to be remembered that consultation is not litigation: the consulting
11 authority is not required to publicise every submission it receives or (absent some
12 statutory obligation) to disclose all its advice. Its obligation is to let those who
13 have a potential interest in the subject matter know in clear terms what the
14 proposal is and exactly why it is under positive consideration, telling them enough
15 (which may be a good deal) to enable them to make an intelligent response. The
16 obligation, although it may be quite onerous, goes no further than this.”

17 Now, we say that that frames the legal principle at issue in this case, and in applying that
18 legal test, it will clearly be necessary for the Tribunal to grapple with the question of what
19 was sufficient in this case, was more material required for intelligent response and, if so,
20 why. We say the way in which it is pleaded at 74A.4 puts the matter absolutely right – if
21 we could go back to that, tab 1, p.25, where it is said:

22 “By reason of those failures, CPW’s ability to make cogent and well-informed
23 representations on a central element in Ofcom’s decision-making process was
24 materially compromised, and the consultation was accordingly inadequate.”

25 That seems to us to be simply a gloss on the language of Lord Woolf in *Coughlan*. There is
26 this question of sufficiency, of whether enough has been given and whether in consequence
27 intelligent response was possible. That is the key issue of principle which arises in all of
28 these cases, the key legal point on which these cases are to be decided.

29 THE CHAIRMAN: I am just trying to think through what the process that you are saying one
30 needs to go through in order to make good this?

31 MR. HOLMES: I will come to that if I may, madam. It is something we have been very alive to
32 because obviously we have been reflecting on how we could plead to this if the amendment
33 were admitted so it is a point that I propose to develop in a moment, if I may. Just to finish
34 off on *Eisai* first, however. Lord Justice Richards then goes on to explain at para. 27:

1 “What fairness requires depends on the context and the particular circumstances ...” and at
2 the end of the paragraph:

3 “... the various cases cited to us provide illustrations of that, without adding materially to
4 the statements of principle in *ex parte Coughlan*.”

5 Then he concludes the legal debate at para. 33 over the page.

6 “Such debate as took place between counsel in relation to the authorities amounted
7 in my view to minor skirmishing. Overall, as it seems to me, this case depends
8 not on the resolution of any real dispute about the legal principles, but on the
9 application of well established principles to the particular context and particular
10 circumstances of NICE’s appraisal process.”

11 We say that exactly the same is true here, the disclosure challenge if admitted would turn on
12 the application of well established principles to the particular context and circumstances of
13 this case. It might be helpful at this stage to just correct an incorrect impression that may
14 have been given inadvertently by Mr. Pickford. Ofcom did not say that during the
15 consultation process, and has never said, that this was all very difficult and disclosure was
16 not being made primarily for reasons of confidentiality. Our position has always and
17 consistently been that set out in the statement itself, that sufficient material was provided to
18 enable intelligent response. So we base ourselves firmly on this legal test developed in
19 *Coughlan*. We understand Mr. Pickford’s client based itself similarly on that test when it
20 sets out the hurdle that it needs to surmount in para. 74A.4, that we say is the legal test that
21 would need to be applied. Lord Justice Richards then proceeded to consider the application
22 of the general legal principles to the facts of the case in *Eisai*, which may give us some clue
23 as to what type of factual inquiry would be necessitated if this amendment were admitted.

24 You see at para. 37 that he records:

25 “There is significant disagreement between the experts about the extent of
26 disadvantage to a consultee if NICE provides it with only a read-only version of its
27 model.”

28 At para. 38 in the final sentence they also note that Eisai’s expert, Professor Martin Knapp,
29 of the London School of Economics, is recorded in the final sentence of that paragraph:

30 “.... Identifies some important areas where alternative data assumptions or modifications to
31 the model structure should in his view be tested.”

32 So what Eisai were saying in this case was not that there was an open-ended fishing
33 expedition that could be done in relation to the model, it was said that the model was needed

1 for certain specific tasks, certain important calculations that required to be performed, and
2 that was how the debate was framed in *Eisai*.

3 At paras. 43 and 44 the court then turned to decide how the evidence was to be left, and you
4 see there that there was disagreement between the experts and the significance of the
5 inability to track formulae automatically in the read-only version. Unsurprisingly, perhaps,
6 the court had no great appetite to wade into that factual dispute and concluded that it was
7 not in a position to resolve it.

8 In the following paragraph, however, and this we say is the crucial paragraph, it is
9 said that “In relation to sensitivity analyses, however, there is no relevant
10 disagreement: it was found by the Appeal ----”

11 THE CHAIRMAN: Wait a minute though, just looking at para. 43, the court does not seem to
12 have felt that it needed to decide how important a disadvantage it really was to have only
13 the “read only” version in order to decide that there had been a breach of procedural fairness
14 in not ----

15 MR. HOLMES: But only madam, we would say, because in the following paragraph there was
16 the disadvantage on which it relied, the sensitivity analysis.

17 “In relation to sensitivity analyses, however, there is no relevant disagreement: It
18 was found by the Appeal Panel, and is common ground, that such analyses cannot
19 be carried out with the read-only version. Further, I do not see anything in
20 NICE’s evidence to contradict what *Eisai*’s witnesses say about the importance of
21 sensitivity analyses in checking for problems in a model. It is not surprising,
22 therefore, that Mr Pannick put the main focus of his submissions on the inability
23 to carryout sensitivity analyses rather than on t he problem of checking the
24 formulae.”

25 Then one finds the conclusion at para. 49 which Mr. Pickford already took you to:

26 “I accept that *Eisai* was given a great deal of information and was able to make
27 representations of substance. It knew the assumptions that were being applied and
28 could comment on them. It knew what sensitivity analysis had been run and could
29 make comments on those. It could and did make an intelligent response, as far as
30 it went. In my judgment, however, none of that meets the point that it was limited
31 in what it could do to check and comment on the reliability of the model itself.”

32 That, madam, is a reference back to the important sensitivity analyses in para. 44 on which
33 Mr. Pannick, counsel for *Eisai*, rested his case and which the court accepted.

1 With great respect, the fact that this is a Court of Appeal Judgment and the fact that it was
2 an appeal from an Administrative Court Judgment makes no difference to the fact that this
3 was a conclusion grounded in the evidence. There was a difference of view as to the
4 significance of the evidence between the Administrative Court and the Court of Appeal.
5 There was a huge body of evidence which both courts waded through and it had to decide
6 matters on the balance.

7 THE CHAIRMAN: So they did not go into the question of whether, had they had the executable
8 model, they would have been able to persuade the decision maker to do something different,
9 nor did they have to go into the question of whether the sensitivity in the analysis in the
10 model was actually wrong, but they did have to decide, you say, that sensitivity analysis
11 was an important plank in the whole process and that there was not other material either in
12 the read-only model or elsewhere in what they had been provided with that enabled them to
13 carry out a sensitivity analysis. Is that a summary of where we are with it?

14 MR. HOLMES: Madam, that is an invaluable lesson in learning not to interrupt the Tribunal,
15 because you put the point much better than I could put it myself. We entirely agree with
16 that and that is Ofcom's position.

17 THE CHAIRMAN: And the amount of evidence that was needed in order to establish that
18 sensitivity analysis is important, it was common ground that it could not be carried out with
19 the read-only version and one assumes common ground that there was nothing else that
20 enabled them to do it?

21 MR. HOLMES: Yes, madam. I will leave that point there.

22 As you say, Lord Justice Richard's conclusion was based on considerable conflicting
23 evidence and was firmly embedded in the facts of the case before him. Particularly there
24 was evidence about specific sensitivity analyses that Eisai's experts were unable to carry
25 out as to the importance of those exercises. That was a fact specific conclusion and the
26 factual context required to arrive at it was substantial. The *Eisai* case does not lay down
27 any general principle in favour of the disclosure of modelling material, it simply applies the
28 well established principles of *Coughlan* to the facts of the case.

29 In its submissions in support of the application CPW advances an alternative point of
30 principle which is said to arise under the disclosure challenge, and this point is put most
31 clearly in CPW's reply submissions of 14th October at tab 12. The point is at p.3, para.4.2:

32 "Ofcom simply fails to address the point to address the narrow point which lies at
33 the heart of the proposed amendment: why should a respondent in CPW's position
34 be put to the vast expense and trouble of bringing an appeal before the Tribunal in

1 order to scrutinise key modelling at the heart of the decision making process which
2 could have been provided to it during the consultation procedure?”

3 That is their simple point of principle which they say lies at the heart of the amendment.
4 As to this we say that CPW appears to us to be trying to pull itself up by its bootstraps. The
5 fact that the modelling has now been disclosed does not dispense with the need for CPW to
6 show that the modelling should have been disclosed at a prior stage, or at all. Our
7 willingness to disclose the modelling does not show in any way that we concede the
8 relevance or need for CPW to have access, or to have had access, to the modelling. We
9 disclosed it because BT, whose confidential material is contained in the modelling, did not
10 raise the same objections that they had during the consultation phase.

11 So this point of principle pre-supposes what CPW will have to prove, namely that it needed
12 to have the modelling at all. The fact that it has been disclosed now does not demonstrate
13 that appellants have to go to the vast trouble and expense of appealing in order to get to the
14 modelling. We say that they have no need of the modelling in order to make an intelligent
15 response.

16 That is the core point, as is apparent from *Eisai*, with which they will still have to grapple if
17 they are going to make good their proposed disclosure challenge.

18 The fourth and final aspect of CPW’s proposed amendment concerns the character of the
19 disputed fact and degree which we say would really lie at the heart of the disclosure
20 challenge.

21 How would this factual inquiry be conducted in relation to the disclosure challenge, if
22 admitted? Unlike *Eisai*, there is no witness evidence offered in support of the challenge to
23 make good CPW’s claim that its ability to respond to the consultation was materially
24 comprised. CPW does not explain what would be involved in the sensitivity testing, to
25 which it refers at para.74.83 and on which the court in *Eisai* had clear and specific evidence;
26 nor does CPW explain which are the key assumptions which it says are not adequately set
27 out and explained in the second consultation. The Tribunal will recall that the second
28 consultation and the *LLU* statement both contained detailed accounts of the assumption on
29 the basis of which Ofcom proceeded in revising Openreach’s costs projections. This is not
30 a case in which Ofcom has provided no detail at all and its modelling is a “black box” to the
31 appellant.

32 The debate with CPW is really about the level of granularity of detail CPW needed to have
33 and whether it needed to see very specific individual data which BT claimed as confidential
34 and declined to disclose. All that we have currently in support of the disclosure challenge is

1 a reference to some correspondence which passed between CPW and Ofcom during the
2 course of the consultation process and a letter from RGL Forensics which was appended to
3 the second consultation.

4 I will not try and take you through the CPW correspondence now, although, having read it, I
5 can assure you that there is nothing more concrete or specific in it regarding the modelling
6 than appears in CPW's current proposed amendment.

7 I have with me a copy of the RGL Forensic letter, which I would like to hand up to the
8 Tribunal, if I may. It is in the appeal bundles, but I think it is easier to give you a copy of it.
9 (Same handed) You will see that the letter mentions two specific models, BT's 'OAK'
10 model and BT's 'RAV' model in the lower part of the first side. In relation to the latter, it
11 notes that a meeting has been arranged for RGL to view the RAV model at Ofcom's office.
12 That meeting did, in fact, take place and RGL were shown the RAV model at that meeting.
13 Then over the page you will find a single paragraph at the top of the page where RGL
14 states:

15 "… without access to the outstanding information and queries, it is not possible to
16 come to a conclusion as to the reasonableness or otherwise of the unit costs set out
17 in the consultation document."

18 In relation to the factual basis of the proposed disclosure challenge we say that the
19 challenge would involve complex and contested factual questions about whether CPW
20 needed more information than was provided, why it needed that information and whether it
21 could have used the information to material effect. CPW's case, as currently pleaded ----

22 THE CHAIRMAN: Just a minute, what was that last bit, whether it could have used ----

23 MR. HOLMES: Whether it could have used the information to material effect. That, I agree, is
24 ambiguously couched. We are not there implying that any errors would, in fact, have come
25 to light. We are asking whether there is anything in the nature of the models which might
26 have enabled a material response to be made if error were disclosed.

27 CPW's case, as currently pleaded, gives so little away that it would be very difficult for
28 Ofcom to plead to it as presently developed. At the very least, we would expect it to
29 explain what sensitivity analyses CPW has in mind, which key assumptions CPW says were
30 not set out in the second consultation, what alternative pricing proposals for WLR, SMPF
31 and MPF CPW says it would have been able to develop with the benefit of the model, and
32 why CPW says that the lack of access to the model had a material impact on its ability to
33 respond intelligently to the consultation.

1 As a practical matter, and as nothing more than that, we note that discussion of these issues
2 will, in fact, turn on the amendment once it comes forward. There is no doubt that once
3 these issues have been crystallised, when we are assessing what might have been material
4 for CPW to raise, we will have to look and see what they have, in fact, raised. We are not
5 saying that is a necessary stage of the analysis, but the practical forensic reality is that when
6 we are debating - if the amendment is admitted - that will constitute an important part of the
7 discussion. We say that if admitted, Ofcom should not be expected to meet the disclosure
8 challenge until those other matters are brought forward.

9 THE CHAIRMAN: You mean until they have brought forward proposed amendments arising
10 from the model?

11 MR. HOLMES: Yes, madam.

12 THE CHAIRMAN: So. You say that if there are no amendments -- If there were no amendments
13 brought forward -- if they have said, "Well, actually, now we have had a chance to look
14 through the model we see in fact there is nothing there to which we take exception", would
15 you argue that that automatically makes their challenge devoid of any purpose it might
16 otherwise have?

17 MR. HOLMES: We say firstly that that goes to remedy. One should not embark on a remedial
18 debate about a point of principle unless there really is a clear point of principle upon which
19 guidance will be valuable for future cases. I understood Mr. Pickford to have confirmed
20 today that amendments will be forthcoming. So, we can now proceed on the basis that there
21 will be substantive amendments although there may be a debate as to their admissibility.
22 That concludes my examination of the proposed amendment itself.

23 I would like now to turn to Rule 11 and the legal framework in accordance with which the
24 application is to be determined.

25 I would like to take you back to the rules, if I may, at Tab 1B of the authorities bundle.

26 Madam, I am aware of the time. I suspect I will overrun by about ten or fifteen. I hope the
27 Tribunal will accept my apologies.

28 Rule 8 concerns the time and manner of commencing appeals. Rule 8(1) provides that an
29 appeal to the Tribunal must be made by sending a notice of appeal to the registrar so that it
30 is received within two months of the disputed decision. Rule 8(4) then lays down various
31 things that the notice of appeal must contain. Rule 8(4)(b) specifies that it should contain a
32 summary of the grounds for contesting the decision. Rule 8(4)(c) requires a succinct
33 presentation of the arguments supporting each ground.

34 So, there we have the distinction introduced between arguments and grounds.

