

1 not work. There is another point that when one interrogates a spreadsheet such as this, the
2 way one does it analytically is to work through and see what the relationship is between
3 different numbers, and if the whole thing was just blanked out it is certainly my
4 understanding that that would be much harder to do. I can take instructions from those who
5 are more expert in these matters than I am, but they are nodding vigorously behind me.

6 THE CHAIRMAN: What was the different way you would deal with the other four?

7 MR. PICKFORD: The approach we are suggesting in relation to the other models is somewhat
8 less invasive and we say that there are only two specific categories where it might apply,
9 and I can come on to those, but anticipating what I am going to say, it is in relation to
10 suggestions that are made that we might be able to see our competitors' volumes, and we
11 say "That is fine, we do not need to see any of that in order to be able to understand what
12 Ofcom has done", all of that can be aggregated so that there is no disaggregation to different
13 types of competitor and that would deal with that particular problem. There is also the
14 suggestion, as we have already canvassed, made by BT that there are potentially certain bits
15 of information that relate to specific contracts and again that could be aggregated. As we
16 understand it, the only specific contracts that are identified in the model at all are the salary
17 contracts for members of Openreach and its Executive, and we have no desire or interest to
18 see how those are broken down and again we are very happy for anything that is currently
19 detailed in that sense to be aggregated so that we simply see a total line. We say that that
20 would be a sufficient means of addressing those specific types of concerns, and it is a less
21 invasive approach than we are suggesting in relation to CF Final.

22 THE CHAIRMAN: Are those the only objections, or are those examples of the kinds of
23 objections that they have?

24 MR. PICKFORD: Madam, if I could return to an analysis of what they say, those are the only
25 ones that we can identify where there appears to be something that they might have a
26 concern about that we can easily address. Mr. Williams may tell you that there are others,
27 but we were not able to identify them from analysis of what Ms. Heal had said.
28 If one returns to Mr. Heaney's second statement, having set out what he said at para. 13 he
29 goes on to deal with the particular categories, and at 14 (a) he says that:

30 "In the case of Carphone Warehouse competing with Openreach to supply its own
31 WLR-like service a more detailed knowledge of the costs breakdown for WLR
32 will not, in practice, affect Carphone Warehouse's ability to compete..."

33 He says the price at which Openreach offers the service is a published price, and he then
34 notes in footnote 4 the point that I have just mentioned, in fact in cost terms BT operate a

1 different type of network so it is not going to be very helpful to Carphone Warehouse to see
2 any of that information.

3 Then in relation to providing voice and broadband wholesale services or retail line rental
4 services:

5 “... the cost of WLR/SMPF that is paid by BT Wholesale, BT Retail and/or other
6 operators is the published list price. Thus knowledge of the cost breakdown of
7 WRL/SMPF will be of no use in understanding the cost of competitors’ wholesale
8 or retail offerings, which is based on the ...”

9 and I would insert ‘the known price’ “... of WLR SMPF plus their own internal costs”,
10 which of course will not be revealed. So concludes:

11 “15. It is incorrect to suggest that, knowing the cost breakdown of WLR/SMPF will,
12 in practice, confer any competitive advantage on Carphone Warehouse given that
13 the price BT and others pay for WLR/SMPF is public...”

14 He then goes on to address seven new points that are raised by Ms. Heal. The first of those
15 is access to the Openreach profit and loss account where it is suggested that we might be
16 able to derive Openreach’s P&L and this information might confer some sort of competitive
17 advantage. First, Mr. Heaney sets out the point that Ms. Heal has made, she says that
18 Openreach’s own executive strategy team utilises the P&L statements to make assessments
19 of strategic options faced by the business. Then she suggests that Carphone Warehouse
20 might do the same. Mr. Heaney’s response is that he is not aware of any research or
21 analysis that is done within Carphone Warehouse as the basis for setting its strategy that in
22 any way considers Openreach’s P&L.

23 THE CHAIRMAN: That might be because they do not have access to it, but if they had access to
24 it ----

25 MR. PICKFORD: Well they do have access to it, the annual accounts do set out a fully audited
26 profit and loss account, and that is one of the points Mr. Heaney in fact goes on to make, he
27 says the type of information here is not an audited P&L it is produced on a different basis
28 for specific regulatory purposes, and is actually less useful than the audited published P&L
29 that is provided in the public domain by BT, so that is one point. They could rely on that if
30 they wanted to but they do not, and he explains why they do not, he says what they are
31 interested in is the performance of their major retail competitors, such as Sky, Virgin, and
32 BT Retail, and just to put the point in context he notes that only 3 per cent of Talk Talk
33 Group’s total business has got anything to do with the supply of WLR in potential
34 competition with Openreach. It is just not a material part of what they do.

1 He goes on, further since the majority of the revenues are internal he then makes the point
2 that I have just made about the published P&L being on a different and more valuable basis
3 and then explains that it is largely in the public domain.

4 He then goes on to address a point that was raised against us in relation to a service, for
5 example, called “RedCare” and says he simply cannot see how it would be in Carphone
6 Warehouse’s interest to be able to use that information but again he said that if there is
7 specific information here, this is the sort of information that could be dealt with by the
8 aggregation process that we have suggested.

9 Finally, he makes the point that this is old information in any event so it is not of particular
10 use, even if the other points that he makes were not accepted, but for the reasons I have
11 advanced, those are substantial reasons why it is not of any particular use to Carphone
12 Warehouse to have access to this information.

13 We then have the point about access to competitors’ volume information where he makes
14 the point first that much of this is in the public domain but insofar as there is a problem then
15 we are very happy for it to be aggregated so that we cannot see any of it. He then deals with
16 the point that it is suggested that detailed information is confidential *per se* and we explain
17 that there is not any reason for that as a *per se* approach.

18 He then deals with the point that is made against us in relation to NGA deployments, and
19 duct information in respect of them. He explains there that Ms. Heal suggests that if that
20 information was revealed it could provide an insight into costs, underbidding Openreach’s
21 and BT’s future plans for NGA and the RAV contains detailed confidential information in
22 relation to copper and duct assets and costs, and that information could provide Carphone
23 Warehouse with a clear insight into the unit cost and that information could provide
24 Carphone Warehouse with a clear insight into the unit cost-stacks for Openreach’s suite of
25 wholesale NGA products. Again, Mr. Heaney rejects that suggestion. He says it is simply
26 not realistic and he explains a number of reasons for that, first: the model only provides
27 aggregate data for “duct” and for “copper”, which is not disaggregated any further. As he
28 understands it, it is also related to past investment and does not cover the whole of the UK.
29 He then makes the point which relates to the point I have made previously that no potential
30 NGA investor would seek to attempt to replicate Openreach’s duct and network, and so
31 information about BT ducts would not be of any material use, because obviously BT is in a
32 very different position from the kind of competitors that we are talking about in terms of
33 Carphone Warehouse as having been the incumbent monopoly with its existing set of ducts,
34 and as he understands it unit cost data for duct and cable is not available in the model in any

1 event, and nor is volume. Further, if one really did want to get that kind of information you
2 could get quotes from suppliers, and that would be just as, if not more, valuable as the sort
3 of information we are talking about here.

4 THE CHAIRMAN: Yes, but you do not know the quotes they are giving you are the same as the
5 quotes they are giving ----

6 MR. PICKFORD: I have explained, for the reason that BT is the incumbent monopolist with a
7 vast network of existing ducts that has been built up to service its existing copper network.
8 BT's cost structure in relation to that is simply going to be something that is totally alien to
9 Carphone Warehouse or any other competitor in its position. So that, we say, deals with the
10 point about NGA deployments.

11 He then goes on to address the suggestion that is made that if there is disclosure that is
12 going to affect the willingness of customers to share information with Openreach and he
13 explains that those fears are also unfounded. First, the sort of information we have been
14 talking about, for the reasons already given, is of very limited commercial value and we say
15 essentially no real commercial value.

16 Secondly, customers already provide that information to Openreach in the knowledge of the
17 BT undertakings which permit their competitors within BT Group to see that information
18 and that has not prevented them, and we say Carphone Warehouse is in really no different
19 position

20 THE CHAIRMAN: That is the Annex 2 status ----

21 MR. PICKFORD: The Annex 2 point, yes, that was the point that I began with. Finally, he
22 addresses the point, although this is a point for legal submission, that it is suggested by Ms.
23 Heal that provision of the information would arguably constitute a breach of the BT
24 undertakings equivalents requirements not to share information with competing providers.
25 If one turns to clause 17.1 of the undertakings one sees there:
26 "Compliance with these undertakings does not affect the duty on BT and its respective
27 directors and officers to comply with any of its obligations ..." including under the
28 Communications Act 2003. This is obviously an appeal under the Communications Act.
29 The Tribunal's jurisdiction derives from the Communications Act, in particular s.192(3)
30 which permits it to apply its rules in relation to this appeal. We say it is plain that any order
31 that the Tribunal made pursuant to those powers to compel BT to disclose information
32 would protect it in relation to para. 17; it is impossible to see how compliance with a court
33 order in these circumstances could possibly constitute a breach, so we say that is a bad
34 point.

1 Mr. Heaney then goes on to make other comments on Ms. Heal's statement, essentially to
2 the effect that there are a lot of very generalised assertions about how Carphone Warehouse
3 might use this information to its competitive advantage, but in reality when scrutinised they
4 do not amount to anything; there is very little in the way of anything concrete there, which
5 BT is able to rely upon. So we say for all of those reasons, on proper scrutiny, the type of
6 information we are concerned with is not of the considerable degree of commercial
7 sensitivity that BT suggest. Even if it were, one has seen from the case law that I took the
8 Tribunal to at the outset, that is not a good reason for saying that, subject to appropriate
9 safeguards and making sure it only goes to the most limited number of people possible, it
10 should not be disclosed. We say that even if it was commercially confidential, there is still
11 a very good reason for disclosing it in the interests of fairness in this particular case, but we
12 do not accept BT's case in relation to the sensitivity of it.

13 Madam, if I might then turn finally to summarise the safeguards that we are willing to
14 offer? Whilst we dispute that disclosure of the information to Mr. Heaney would cause any
15 realistic or serious difficulties to BT we are obviously keen to seek to be as pragmatic as we
16 possibly can in order to allay BT's concerns, and we wish to be sensible in coming to a
17 satisfactory solution that can keep everyone tolerably happy. So I have explained firstly the
18 safeguards that we propose in relation to the CF Final model, and hopefully I have done that
19 in sufficient detail I do not need to go over that again.

20 It is worth just picking up what BT says in its submissions about that. BT does not say:
21 "That would not be good enough". All BT say is that it is unclear whether that proposal
22 would work or not, so we are not prepared to play ball in relation to that because we do not
23 know."

24 THE CHAIRMAN: What would be the position if BT had not intervened in this appeal which
25 they are not required to do, presumably then it would be up to Ofcom to carry out this work
26 of randomising the figures, or are you suggesting that it is your people who should
27 undertake this?

28 MR. PICKFORD: We are very happy to undertake to do that in collaboration with BT. Clearly it
29 is BT that needs to say what it thinks is commercially confidential, that is not something we
30 can do on its behalf. But if it tells us what it thinks is commercially confidential then our
31 experts, if BT does not want to go to the trouble of doing the randomisation process itself,
32 can carry out that process on BT's behalf to produce a version of the spreadsheet which no
33 longer contains any genuine commercially sensitive information in it.

1 But to answer, madam, your point about what would have happened had BT not intervened
2 to some extent, obviously, it is speculative, but I would submit that what would be most
3 likely to have happened is this, that had we got to this stage and it had then become
4 apparent that we needed access to this model and we did not have it, we would have applied
5 to the Tribunal, Ofcom would have written to BT to say: “What is your view?” and BT
6 would have done one of two things. It would have either, if it was sufficiently concerned
7 about it, have come to the Tribunal to make submissions and to intervene if only for that
8 purpose, or it would not have done if it did not think that it was sufficiently material for it to
9 bother. So we do not see any particular problem arises in relation to the hypothetical
10 situation where BT had not originally been intervener. There is no suggestion by anyone
11 here that BT would have been shut out from advancing a case on it had it wished to do so.
12 Returning to the point about BT’s response to our suggestion about randomisation, we say it
13 is not really satisfactory for BT simply to say: “we do not know whether that would work
14 and so we are not going to play ball or take that further forward”. It needs to form a view,
15 and we say there is absolutely no reason why it would not be satisfactory.

16 It may be helpful for the Tribunal to know that at Carphone Warehouse’s suggestion there
17 has been a meeting between the experts on either side. BT asked for that meeting to be
18 without prejudice, so I cannot disclose to you.

19 MR. WILLIAMS: That is not right, it was proposed on a without prejudice basis

20 THE CHAIRMAN: Well it was a without prejudice meeting in any event.

21 MR. PICKFORD: For whatever reasons – my instructions differ from that, but the essential point
22 is it was a without prejudice meeting, so I cannot say what did or did not go on. But our
23 position remains today that it would be entirely possible to do this and we are willing to
24 collaborate with BT in order to do it.

25 THE CHAIRMAN: That is the CF Final?

26 MR. PICKFORD: Yes, that is the CF Final, and we say that that is clearly the sensible way
27 forward in relation to that particular issue. In relation to the other aspects of the models I
28 have gone – at some speed – through the particular arguments that are raised against us and
29 Mr. Heaney’s responses to them and I have identified that where there might, and I have
30 emphasised “might”, be arguable confidentiality points they can be addressed through
31 aggregation of those specific items of data, and again we are very happy to collaborate with
32 BT in order to do that, and to do whatever work is required in order to effect that adjustment
33 to the BT model. BT simply has to tell us: “Here are the points”, and we will go away and
34 do the work in order to render the model safe from that point of view.

1 Furthermore, Mr. Heaney has obviously explained that naturally he is prepared to give the
2 undertakings that any member of a confidentiality ring would give, indeed, he goes further
3 than that to make clear that he is happy only to review the model on Carphone Warehouse
4 premises and not to take any copies of it to allay fears that this information might somehow
5 reside in his home, and thereafter not return at the conclusion of these proceedings. Indeed,
6 he is even willing, if BT want him to do it, to go on the BT training course that Annex 2
7 personnel are required to go on in order to understand how to deal with confidential
8 information. It may be thought that that is unnecessary, but if BT say “That is something
9 that our people would have to do” then Mr. Heaney is very willing to do it.

10 We say that we really have bent over backwards to try to find sensible and pragmatic
11 solutions wherever possible, but those have to be borne in mind, and in the context of what
12 we say is a real pressing need to see this information and the fact that BT has not
13 established that it is commercially sensitive in the way that it suggests. In all the
14 circumstances we say it is fair, just and proportionate that an order should be made for
15 disclosure to Mr. Heaney with the parties to liaise in relation to the limited adjustments to
16 the models that I have just described.

17 **THE CHAIRMAN:** What do you say of the point that Ms. Heal makes about the risk of parties,
18 as she calls it “gaming” the system, that this Tribunal deals with a lot of these telecoms’
19 appeals in which all the parties are all the competitors in the market, and is there a danger
20 that if they should get a sniff of the idea that on the basis of an appeal if they attack the
21 model that Ofcom used then their executive director is going to have access to the
22 information that is claimed to be confidential on the part of the other parties, not necessarily
23 BT but all of them, information which, if the parties were to sit in a room and exchange it
24 amongst themselves they might risk substantial fine, that we would never hear the end of
25 these applications in which we have to dissect in great detail what the information is, what
26 the responsibilities of the relevant person who sought to disclose it is, what can be
27 aggregated or not aggregated, whether that would undermine the usefulness of it. At the
28 moment we have survived on the basis of fairly straight forward procedure, setting up these
29 confidentiality rings, but if one makes a breach in it then what do you say to the risk that
30 there will then be endless applications for disclosure of information to executives in these
31 companies.

32 **MR. PICKFORD:** There is a number of points we make in response to that. First, as Mr. Heaney
33 notes in his witness statement at para. 27(j), best practice for a Regulator would have been
34 to base the information that it used for its modelling on publicly available data. That is

1 what regulators ordinarily do; it is what is done in the water industry, it is also what is done
2 in a number of other contexts by Ofcom itself. One of the particular difficulties we find
3 ourselves in in relation to this case is the fact that Ofcom did not adopt that approach.
4 Indeed, in the statement as I recall it canvasses what the best means of modelling BT's
5 business is and it decides that in this case it will rely on BT's own internal confidential
6 planning documents because it thinks that those were more relevant in this particular case,
7 but that is not ordinarily what it does or what other Regulators do. So in most cases we say
8 this sort of situation will not arise because the essential modelling which we are trying to
9 get access to would already be in the public domain. That is the first point.

10 The second point is we would suggest it is deeply speculative that companies will really
11 want to game the system to incur all of the costs incumbent on litigation and, in particular
12 engaging in these detailed disputes in order to gain information of this particular sort in this
13 case because, as we say, in this case, the information really is not of the prime commercial
14 sensitivity that is suggested because of the nature of the competitive relationship between
15 Openreach and various other companies in the industry. The third point I would make is
16 that each case clearly needs to be assessed on its own merits, and one can see that for
17 example, in the context of mobile litigation where we are all very used to five mobile
18 companies all turning up in the Tribunal with their various armies flanked beside them, that
19 in those sorts of cases there might need to be particular safeguards because of the nature of
20 the competitive relationship between them, and it might be that it would not be possible in
21 those sorts of situations to engage in the sort of disclosure that we are seeking in relation to
22 this case, but that would be because of the facts of those cases rather than because there was
23 any general principle that should be applied across the board.

24 THE CHAIRMAN: Well in this case, for example, would you expect Sky would also need to see
25 the information that Mr. Heaney sees?

26 MR. PICKFORD: If I might just take instructions for one moment? (After a pause) Certainly
27 from our point of view we would not object to any application being made by Sky. We say
28 Sky are in basically the same position as we are in relation to the way in which they
29 compete or do not compete with BT, and the fact that they already know the prices, the
30 critical point, because those are in the public domain. It would really be for Sky to make
31 the case, to explain why it particularly needed that information to pursue its case, and I
32 would say without prejudice to any point that might ultimately be made in relation to this,
33 that one can see there is a distinction between Carphone Warehouse and Sky in that it is our
34 appeal that we have brought on the merits in this Tribunal and the role of an intervener is

1 necessarily a subsidiary one, so it might be that Sky were not able to persuade you that they
2 should see it, but we have no objection to them seeing it. Apart from the point I have made
3 about their respective positions in the appeal we fail to see why Sky would be any different
4 to Carphone Warehouse. They will obviously have to be prepared to give all sorts of
5 undertakings that we are prepared to give as well, but we do not see any particular opening
6 of the floodgates in relation to that one intervener, unless BT is able to explain why
7 disclosure to Sky would be somehow worse than disclosure to Carphone Warehouse and on
8 its face it is difficult to see why that should be.

9 Madam, if I could merely conclude by going back to the *Dyson* case with which I began my
10 submissions, which is that the onus is on BT to demonstrate why there should not be
11 disclosure, and we say that BT has failed to do that, it certainly failed to do that in the face
12 of the reasonable and pragmatic propositions that we make in order to preserve
13 confidentiality, alleged confidentiality, in relation to the specific points that it makes.

14 Madam, unless I can be of any further assistance.

15 THE CHAIRMAN: No, thank you very much, Mr. Pickford. Mr. Williams, do you need some
16 time?

17 MR.WILLIAMS: I wonder if you would say 2 o'clock, madam. We will get to 1 o'clock quite
18 quickly.

19 THE CHAIRMAN: How long do you think you are going to be.

20 MR.WILLIAMS: I would have thought about as long as Mr. Pickford. It may be because the
21 Tribunal has read Ms. Heal's statement, and seen some of the material beforehand I can be a
22 bit quicker, but I would anticipate being at least an hour.

23 THE CHAIRMAN: Can you usefully make a start now?

24 MR.WILLIAMS: Can I just have a quick think about that, madam, because I think your earlier
25 indication was that I would have a chance to react, so I have not thought about which bits of
26 my submissions I ----

27 THE CHAIRMAN: Yes, why do we not come back at half past twelve and then let us know
28 whether there is something you can usefully do before lunch.

29 MR.WILLIAMS: Yes, indeed.

30 (Short break)

31 MR. WILLIAMS: Madam, I am going to take my submissions slightly out of order in order to try
32 and make use of the time we have got before lunch.

33 THE CHAIRMAN: The alternative to that would be for us to break now and come back a bit
34 earlier at half past one or quarter to two. I do not want to interrupt your submissions.

1 MR. WILLIAMS: I do not think it will matter. I was simply going to deal with the issues of
2 confidentiality and competition before coming to the authorities because obviously the
3 authorities proceed on the basis that issues may arise on the facts. But, it really does not
4 cause me any difficulty to deal with the legal framework and then to come back to those
5 issues afterwards, by which time I will have had the opportunity to take instructions over
6 the lunch break.

7 Before coming on to that there are just some introductory observations that I wanted to
8 make. Then I will come onto five areas. The first will be legal framework, now,
9 corresponding to Mr. Pickford's opening submissions. Then I will deal with the
10 confidentiality of the information contained in the model. The Tribunal may be able to tell
11 me to what extent it has digested certain points from Ms. Heal's statement. I may be able to
12 take some of those points a little more quickly. Then, issues relating to competition. Then
13 the reasons why it is said that disclosure ought to be given to Mr. Heaney. Finally, CPW's
14 particular proposals.

15 If I could start by saying that you will have seen BT's submissions and its evidence, and it
16 should be clear to the Tribunal that this is an application which has very serious - and I hope
17 understandable - concerns on BT's part. If I could just put its position in the wider context
18 of BT as a regulated entity - price-regulated entity -- BT obviously recognises and
19 understands that because it is the provider of products which have been identified as SMP
20 products, it is price-regulated by Ofcom in relation to those products and for that purpose it
21 has to provide information to Ofcom - in some cases confidential information - in order that
22 Ofcom can exercise its functions. BT also obviously recognises and understands that if that
23 price control is challenged proceedings may be brought before this Tribunal and it is very
24 likely in that event that some sort of confidentiality ring arrangements will have to be
25 established. That has, indeed, happened in this case. BT made no objection to that.

26 But, what is now proposed is something really very different from the ordinary
27 arrangements as to confidentiality rings in proceedings of this type before this Tribunal.
28 That is the sharing of BT's cost modelling outside of the confidentiality ring of advisors - in
29 particular, with persons on the business side of Carphone Warehouse whom BT regards, as I
30 have said, as a competitor. It is proposed not only to give information on the business side
31 of Carphone Warehouse, but to a person who occupies the role of Executive Director of
32 Strategy within Talk Talk.

33 So, as the Tribunal observed during Mr. Pickford's submissions, we do say that this is an
34 exceptional application, certainly as far as this Tribunal is concerned. I will come on to

1 address the legal framework in just a few moments, but it is right to say that there is little or
2 no precedent for an order of the type sought today, and insofar as there is precedent - and I
3 am referring to the *National Grid* case - that suggests that the terms on which disclosure
4 might be given are very different from the terms which have been put forward by Carphone
5 Warehouse and I assume that terms of that sort would be entirely unacceptable to Carphone
6 Warehouse.

7 We do say that in making this application Carphone Warehouse has failed to grapple with
8 the character of the information in question. Its position in its letter of 17th November was
9 simply to deny that any issue of confidentiality arose and to deny that there was any
10 competition between BT and Openreach. Its more recent letter of 9th December continued
11 to say that there is no confidentiality at all in three of the four cost models, and went so far
12 as to characterise BT's position on the question of competition between Carphone and
13 Openreach as disingenuous, albeit that that was just put forward in a sentence. We say that
14 that was not correct, and we have provided evidence to explain what our position is. We
15 put forward our position in Ms. Heal's statement, and in my submissions, and, as I say, it
16 may be that I can show you more or less of that, depending on what will assist the Tribunal.
17 The other point I wanted to make by way of introduction is that we have seen a gradual
18 rowing back of what CPW is seeking. The application as originally formulated was simply
19 -- When I say 'unconditional', obviously Carphone have put forward certain safeguards,
20 but it wanted Mr. Heaney to have access to all of the information contained in all of the four
21 spreadsheets. That was its proposal, subject to the safeguards they have identified. Its letter
22 of 9th December proposed something quite different in relation to the CF Final spreadsheet
23 which corresponds to the Openreach strategic planning model. Gradually, as there has been
24 the further exchange of representations and correspondence, and submissions, we have seen
25 Carphone row its position back further and further and it is now making more and more *ad*
26 *hoc* proposals to deal with what may be particular points as to confidentiality. That, we say,
27 reflects the fact that this was not a carefully thought through application in the first place.
28 It is important to have in mind that what is now proposed in relation to CF Final in
29 particular is that disclosure should be given on terms which would allow Carphone to
30 examine the structure of the model.

31 That is obviously quite different from what was proposed in the original application, and
32 that suggests to us that disclosure for those purposes would plainly -- The fact that
33 Carphone has sought to justify disclosure by reference to a different purpose, a different
34 objective suggests that this really was not a carefully thought-through application in the first

1 place. Really it is a speculative application for which no compelling justification has been
2 identified. We see that with the shifting sands, with different justifications relied on over
3 time.

4 So, with those introductory observations I will move to the legal framework. I was going to
5 start with the jurisprudence of the Tribunal, if I may. Then I will come on to deal with the
6 patent authorities relied on by Mr. Pickford.

7 THE CHAIRMAN: I think you are set out in your submissions the Tribunal's jurisprudence. I
8 think it is common ground that it was only in that *National Grid* case that material has been
9 disclosed. That was on the basis that the person then was taken out of the business
10 effectively for the duration of the appeal and for some time after.

11 MR. WILLIAMS: It was for a period of twelve months. We obviously make the point that what
12 we have here are forward-looking costs models. So, to that extent one could not even
13 assume an undertaking of the sort given in *National Grid* ----

14 THE CHAIRMAN: It is not offered.

15 MR. WILLIAMS: That is right, madam.

16 THE CHAIRMAN: I think it is the *Dyson* case we are interested in.

17 MR. WILLIAMS: I will deal with that now. What I would say is that the decisions of the
18 Tribunal do take the approach that I have set out in our skeleton argument - in particular, the
19 *Sky* case really turned on the question of whether good reason had been shown for the
20 disclosure. Plainly, it was for the applicant - in that case, *Sky* - to show good reason for the
21 disclosure. I will explain in a few moments why it is that the dynamics and issues of onus
22 are different before this Tribunal. But, we say that is very clearly the way in which the
23 question was approached in *Sky*, and we say rightly so.

24 It is right to say that there is a difference of emphasis, at the very least, between the
25 approach taken in the patent cases which Mr. Pickford took you to this morning, and the
26 approach taken by this Tribunal. But, we say that insofar as there is a difference in
27 emphasis, that is explicable. Secondly, if one looks at the substance of the balancing
28 exercise that both the High Court and the Tribunal do, the same sorts of factors are given
29 weight in both contexts. So, we say that actually when it boils down to the facts, when it
30 boils down to the detail, actually there is not really a divergence between the two bodies of
31 jurisprudence.

32 I was going to comment on the patent authorities by reference to the *Roussel Uclaf* case
33 rather than by reference to the *Dyson* case because I think, as Mr. Pickford indicated, it was
34 that Court of Appeal case that Mr. Justice Laddie applied in the *Dyson* case. So, if the

1 Tribunal could go to that case which is at Tab 9 - I would like to pick that up in the
2 judgment of Mr. Justice Aldous on p.3., five paragraphs down,

3 “In patent actions it is not unusual that documents disclosed on discovery include
4 matters which a party considers contains valuable confidential information. The
5 procedure normally adopted I that disclosure is at first made in confidence to
6 counsel, solicitors, independent patent agents and independent experts. In many
7 cases this enables the parties to prepare and argue their case properly. Further, the
8 parties can often agree that all that is necessary to preserve the confidential
9 information is that certain parts of the documents are blanked out. Unfortunately
10 this has not proved possible in this case”.

11 Skipping over the next paragraph,

12 “Under the Rules of the Supreme Court, the normal procedure is that a party to an
13 action is entitled to inspect documents disclosed on discovery. However, it is well
14 settled that in certain circumstances the court may restrict such inspection to an
15 agent such as a solicitor. However, before that will be done, the party seeking
16 restrictions on inspection must establish that the restriction is necessary for the
17 proper administration of justice”.

18 So, the patent line of authority exists against the different procedural framework where
19 litigation is conducted on the basis of what is now referred to as ‘standard disclosure’. As
20 part of that process both parties are required to put forward lists of documents relevant to
21 the dispute. Madam, I am sorry. This will be ‘old hat’ to you, but I make the point just for
22 the other members of the Tribunal. The other parties are then entitled to inspect all of the
23 documents included in that list.

24 It is right to say that confidentiality is not a bar to disclosure or to inspection, but it is a
25 factor going to the exercise of the court’s discretion as to how that process ought to work.
26 Accordingly, one sees a confidentiality arrangements established in the high court, just as
27 they are established in this Tribunal. But, these authorities to start from this ‘cards on the
28 table’ approach, if you like.

29 It is probably worth me making the point at this stage, madam, and I make as well make it
30 now, that before this Tribunal the position as regards disclosure is different - and we say for
31 good reason. Disclosure is on the basis of specific orders made by the Tribunal. For
32 example, in these proceedings there has not been, so far as I am aware, any order for
33 disclosure. We say that is not at all surprising in a competition appeal Tribunal because the
34 nature of the subject matter means that the exchange of information between the parties

1 needs to be carefully managed. It is an iterative process. What one has seen in the
2 consistent practice of the CAT is disclosure managed on that pragmatic and iterative basis,
3 but always with one eye on the question of confidentiality and commercial sensitivity in the
4 context of competition, which is obviously a key issue in deciding what the proper ambit of
5 disclosure is in proceedings before this Tribunal.

6 So, we say that there is a different dynamic around disclosure before this Tribunal and in
7 the High Court, albeit that at the end of the day there is a balancing exercise to be done, and
8 the same sorts of factors weigh in that balancing exercise.

9 Turning over to p.4, I probably do not need to take you through the whole paragraph, but at
10 the top of the page there, in the long paragraph starting, “In the present case --“ the judge
11 sets out the concerns that were raised as regards the disclosure of the particular information
12 sought in that case, and he concludes in the second paragraph on that page,
13 “Upon that evidence, I conclude that the defendants are right that the restricted disclosure of
14 their process and documents is proper and I therefore turn to decide whether somebody in
15 Roussel should be allowed restricted inspection”.

16 So, as I explained a few moments ago, that is the court deciding that although there is a
17 general presumption in favour of disclosure, disclosure needs to be controlled.

18 It is really against that background that the paragraph in the middle of the page, which is
19 relied on very heavily by Mr. Pickford, and which has been cited in other cases, needs to be
20 considered. It is right to say that in the High Court the onus is on the respondent to an
21 application to show that there is a particular reason why inspection of documents ought not
22 to be granted to particular persons within the business structure of the other party, but this
23 Tribunal approaches the matter rather differently for the reasons that I have already
24 identified and, in a sense, there is almost judicial notice that these questions arise in
25 principle, and as a result the dynamics of disclosure are then managed on a different basis.
26 One does not have a presumption that information ought to be shared with everybody or
27 even with particular people on the business side of the other parties to a litigation.

28 However, in any event, one comes on to the following paragraph. It is probably worth
29 reading the whole paragraph.

30 “The plaintiffs and the defendants are the leaders in the field in the technology
31 with which this patent is concerned. They both have a wealth of knowledge in this
32 field of chemistry, some of which will be useful in the action. The plaintiffs’
33 advisers, having seen the defendants’ process of description, have devised and
34 carried out a programme of experiments which they believe will support the

1 plaintiffs' allegation of infringement. However, they cannot discuss those
2 experiments with anyone in the plaintiffs. They contend, and I believe reasonably
3 contend, that the action has reached stage where they will have to decide upon the
4 way that the case on infringement will be argued it seems that to establish
5 infringement they will need to rely upon experiment and they are unable to discuss
6 these with anybody in the plaintiffs although they have considerable knowledge in
7 the field.

8 A number of specific difficulties are raised in the evidence”.

9 I do not need to take you through all of the detail there, but we do emphasise and rely on the
10 significance of that factor in the balancing exercise that the court went on to do.

11 At the top of the following page,

12 “I believe that the difficulties of the plaintiffs’ advisers are real and that they are at
13 the moment hampered in the preparation of their case by the restrictions imposed
14 by the defendants. The documents and the process description are at the root of an
15 important part of the whole case and the plaintiffs are severely hampered in the
16 preparation and understanding of the case by the defendants preventing anybody
17 in the plaintiffs seeing the documents an the process description”.

18 I think I can probably leave the judgment of Mr. Justice Aldous there, save to note that he
19 then goes on to deal with the issue of safeguards.

20 Then, starting at the bottom of p.6, one has the judgment of the Court of Appeal. Lord
21 Justice Nourse starts at the bottom of the page. About half-way down p.7 I just note that
22 there is a paragraph that starts, “A large amount of affidavit evidence was put in on both
23 sides --” That is in rather start contrast to the way that Carphone has approached this
24 application.

25 Over to p.9, there is the paragraph that Mr. Pickford relied on, “Having listened with great
26 care to everything which Mr. Floyd has said, I have to say that he has wholly failed to
27 persuade me --”

28 I am not sure that that was the paragraph that Mr. Pickford relied on, but if you could read it
29 anyway, madam, members of the Tribunal --

30 “Having listened with great care to everything which Mr. Floyd has said, I have to
31 say that he has wholly failed to persuade me that there is any good ground on
32 which we could properly interfere with the learned judge’s order. He has not
33 satisfied met ht the judge took into account anything which he ought not to take
34 into account or that he left out of account anything which he ought to have taken

1 into account or that he erred in principle, far less that his decision was plainly
2 wrong. Mr. Floyd's complaints seem to me to amount only to this, that the judge,
3 in striking a balance, held that the plaintiffs; need outweighed the risk to the
4 defendants. That is not the basis upon which this court can interfere".

5 THE CHAIRMAN: I think it was the passage at the bottom of p.7 ----

6 MR. WILLIAMS: -- which is similar. I was simply going to draw your attention to that
7 paragraph next.

8 THE CHAIRMAN: It is the question about whether the statement in Mr. Justice Aldous'
9 judgment that it would be exceptional not to allow disclosure applies even when you are
10 talking about disclosure to the commercial people in the ----

11 MR. WILLIAMS: That point is plainly dealt with in this judgment, madam, and I am not seeking
12 to say that it is not. I am simply making the point, firstly, that the dynamics around
13 disclosure are different before this Tribunal for the reasons I have explained, and, secondly,
14 that one can see from the paragraph I have just taken you to, from the paragraph at the
15 bottom of the page under the heading 'Lord Justice Russell' and, again, over the page, the
16 Court of Appeal saw this ultimately as a balancing exercise. So, notwithstanding that Mr.
17 Pickford relies very heavily on the point that it would be an exceptional case, etc., etc., we
18 say that what one sees the court doing is weighing up the competing factors in that case --
19 the strength of the applicant's need to see the information as against the concerns that have
20 been raised as regards commercial confidence and sensitivity, and coming to a view overall
21 that the proper course was disclosure to a person within the applicant's business structure.
22 In other words, it is clear that notwithstanding that the court starts with the principle
23 outlined by Mr. Justice Aldous, it then goes on to do the sort of balancing exercise I have
24 talked about, and, in other words, the court was concerned to ensure that the reasons for
25 which disclosure was sought did, at the end of the day, outweigh the concerns that had been
26 raised by the respondent to the application.

27 One sees that in particular the judgment of Lord Justice Beldam is quite illuminating on that
28 point because - and the Tribunal may just want to read it - the paragraph I particularly rely
29 on is the one on p.10 which says,

30 "For my part, the aspect of Mr. Floyd's argument which carried greatest weigh
31 with me, and perhaps greater than it may have done with the judge, was that the
32 evidence filed by the plaintiff in support of the application did not establish that it
33 as necessary for the fair disposal of the action to disclose at that stage the
34 defendants' process beyond the disclosure to the experts advising them which had

1 already been made. However, merely because, had I myself been hearing the
2 application, I might have taken a different view of the weight to be accorded to
3 that evidence is beside the point”.

4 So, the jurisprudence seems to be that there is, in the High Court, a presumption that
5 disclosure will be on terms which allow the claimant, the appellant, or whoever the other
6 party is, access to the information. That will include somebody on the business side, but that
7 does not preclude a careful weighing of the arguments for disclosure against the harm that
8 might be caused by disclosure and the risks that attend that disclosure.

9 That is why I say, madam -- Madam, you frown.

10 THE CHAIRMAN: I am not frowning at that. I am frowning because I am thinking about
11 something - the point you were making, I think, about the difference in the dynamic, as you
12 described it here, compared to the High Court, because in both the *Roussel Uclaf* and the
13 *Dyson* cases you are talking about *inter partes* litigation. This case is different from the
14 *Dyson* case because in the *Dyson* case, Dyson was pursuing a claim for damages against
15 Hoover and saying, “We are suing you for however much money -- millions of pounds -
16 and yet we are not prepared to show you the information on the basis of which we are
17 putting forward that claim -- We are not prepared to allow the commercial people in your
18 business to do it”. Here, this is not an *inter partes* case between BT and CPW. It is a
19 challenge to the regulator’s decision. What I was looking for in this was, I thought there
20 was a reference in the case that Mr. Pickford took us to to inquisitorial and adversarial
21 proceedings.

22 MR. WILLIAMS: That was in *Dyson*, madam.

23 MR. PICKFORD: Paragraph 33 of *Dyson*, madam.

24 THE CHAIRMAN: Another difference here is what is it that the Competition Commission will
25 have access to when it is considering whether there is anything wrong with Ofcom’s
26 decision.

27 MR. WILLIAMS: Yes I do not rely particularly on the point that the Competition Commission
28 element of the process is more of an inquisitorial character. I say that. Nobody is jumping
29 up and down. That was simply an observation by me. I do not rely on that point. I am
30 simply making the point that although Mr. Pickford relies very heavily on the generalised
31 statement of principle that was articulated by Mr. Justice Aldous, one can see that ultimately
32 it is not a case that there is necessarily a rebuttable presumption or a close to irrebuttable
33 presumption (if I could put it that way). Even in the High Court one has to carefully look at
34 the arguments that are put forward for disclosure and the evidence that is advanced by the

1 party seeking disclosure in support of those arguments and to weigh that against the harm
2 that may result.

3 The point I am making - and it is not a grand point, madam - is that those are the sorts of
4 considerations that have influenced this Tribunal in establishing the sort of approach that it
5 has taken routinely to competition disputes. In fact, the way Lord Justice Beldam puts it
6 is precisely the way -- or, he uses the same sort of language that the President used in
7 *BSkyB*. So, we say this is not really a radical perspective. Ultimately, this case is going to
8 come down to the trade-off between the risks to BT and the reasons why Carphone
9 Warehouse says it need access to the multiple.

10 That may be a convenient point at which to break, madam. I can take stock over lunch.

11 THE CHAIRMAN: Have you finished your legal framework points?

12 MR. WILLIAMS: I think I have. I might just make a brief comment on the *Eisai* case. He has
13 argued about that case more than I have. We say that that case does not really inform this
14 application at all. I am not going to rely on legal differences because the legal differences
15 are obvious. It was concerned with what is required for a fair consultation rather than what
16 ought to happen on disclosure. But, there are two obvious differences. The first is that the
17 confidentiality claimed in *Eisai* was the confidentiality of the people that had created the
18 model. There were no issues around disclosure of commercially sensitive information to
19 competitors. So, it was an entirely different dynamic, if you like, again, around the issue of
20 confidentiality in that case. Secondly, in *Eisai*, nobody had seen - nobody on the
21 claimant's side, the applicant's side - had seen the executable version of the model. They
22 had only seen the model which did not allow the user to interrogate the model, and so on.
23 So, we say that really that case says nothing about the proper approach to disclosure in the
24 context of this application. It is just a very different case.

25 THE CHAIRMAN: Thank you very much, Mr. Williams. We will reconvene at two o'clock.

26 (Adjourned for a short time)

27 MR. WILLIAMS: Madam, if I could just start by recapping on where I had got to in my
28 submissions before lunch. Mr. Pickford presented his submissions on the legal framework,
29 I think more or less exclusively by reference to the patent line of authority and did not
30 address the jurisprudence of the Tribunal at all, the implication being that there is quite a
31 different approach taken. What I sought to do was to suggest that that is not really the case,
32 that in fact when it comes down to the nuts and bolts of a given disclosure issue one can see
33 that the same sorts of facts are given weight both by the High Court and by this Tribunal

1 and, specifically, that it is very important in both contexts for the party seeking disclosure to
2 be able to show that there is good reason for the disclosure sought.

3 We do make the point that if the thrust of Mr. Pickford's submissions were right and the
4 Tribunal were now to move to a practice whereby there is a presumption, if you like, in
5 favour of disclosure of competitively sensitive information in proceedings before this
6 Tribunal it would mark a sea change in the way that this Tribunal approaches disclosure; it
7 would be a very radical development, and one which – the Tribunal made the point – being
8 realistic it is going to have a significant impact in all manner of proceedings before this
9 Tribunal.

10 Madam, you put the question to Mr. Pickford: why is this case different from all of the other
11 cases we have dealt with? In my submission he really failed to answer that question. What
12 he said was: "This is a case where Mr. Heaney is very involved in the detail of the issues
13 and those issues feed into the model." Well I am sure this is not the first competition case
14 before this Tribunal where there has been someone very heavily involved in the detail of the
15 case, whether modelling issues or not, and I am sure that other parties to other litigation
16 could have made that sort of point, but ultimately this Tribunal has found that the balance
17 lies in all but the most exceptional cases in favour of disclosure to external experts where
18 one is dealing with this sort of information.

19 At that point I am going to come back to the issues of confidentiality and competition.
20 What I might do – madam, perhaps you can tell me if this is a good course – rather than
21 summarise what Ms. Heal says, which you have obviously read and it is clear that the
22 Tribunal has in mind, I thought I would make some observations and perhaps try and deal
23 with confidentiality and competition together by going through Mr. Heaney's statement,
24 making such comments as we have been able to develop over the lunch adjournment.

25 THE CHAIRMAN: Yes, thank you.

26 MR. WILLIAMS: As I say Ms. Heal dealt with both the issues of confidentiality and competition.
27 Dealing first with confidentiality, it is obviously important for us to stand back from all of
28 this and ask: "What is the purpose of this model?" The purpose of the model is, in the first
29 instance, to build up a picture of the entire Openreach cost base using real life business
30 plans, that is the source of the information, and then to derive the costs of the LLU products,
31 i.e. the products which are the subject of this appeal, from the total cost base, but it does not
32 – in terms of its content – deal only with the LLU products, it deals with the full range of
33 Openreach products because obviously if one is taking a global view of costs one then

1 needs to allocate that cost to something and so the model works on that across business
2 basis.

3 Standing back from all of this, we say it is not a surprising proposition that BT should
4 regard much of the information contained in that model and, in some instances, the sum of
5 the parts, as confidential and giving an insight into its confidential business plans. We have
6 been surprised by the push-back that we have received from Carphone Warehouse on that
7 point. We do sense that their commitment to that push-back has waned, although Mr.
8 Pickford said that Carphone Warehouse has been pragmatic in its current position. I think
9 the language that it used in its letter last week was that “We accept that there maybe certain
10 confidential information”, so we say that that position has moved and that they do now
11 accept that at least up to a point the contents of the model are going to be confidential.

12 THE CHAIRMAN: Well in the CF Final.

13 MR.WILLIAMS: In the CF Final that is right, the point is made in that context. But, as I say, we
14 think that is a much more realistic position given the character of these models and what
15 they do.

16 In terms of the four models, I am going to deal with all but the Output model in part by
17 dealing with Mr. Heaney’s statement, but I thought I should probably say something about
18 the output model just to clarify the position because, as Mr. Pickford said, BT has agreed
19 that Carphone Warehouse can have access to hard copy redacted versions of the Output
20 model, and the redactions deal with the fact that the Output model deals with a range of
21 properties as I have already explained, not just those within the scope of the appeal, and so
22 disclosure is not going to be given. The agreement was that they would have developed
23 material rather than cost material relating to other products.

24 THE CHAIRMAN: Is that an agreement that was made after you received this application or is
25 that ----

26 MR.WILLIAMS: No, no, that was the correspondence that Mr. Pickford showed you from
27 October, and early November. He said BT had been slow to respond to that
28 correspondence.

29 THE CHAIRMAN: Is that the red box then in this note of review?

30 MR.WILLIAMS: Mine is black and white.

31 THE CHAIRMAN: Oh dear”

32 MR.WILLIAMS: Yes, it is the top red box, I think.

33 THE CHAIRMAN: Outputs 2003, yes.

1 MR.WILLIAMS: But I do not think this point is really contentious. The criticism that was made
2 was that BT had not provided that yet. I think BT's position has been that the request of
3 19th October was made to Ofcom but because the request raised the question of whether
4 Ofcom could share BT confidential information with Carphone Warehouse BT inevitably
5 became involved in dealing with that request, and so BT gave its consent to certain versions
6 of the hard copy, redacted versions of the model being given to Carphone Warehouse. BT
7 have not understood that it was going to provide those versions itself, but were happy to do.
8 All I would say is that there was a two week period during which BT considered its position
9 between 19th October. Madam, I should say this point is not relevant to anything before
10 you, it is simply that Mr. Pickford made the point that BT had been difficult about this.

11 THE CHAIRMAN: So what you are saying is that there is agreement between the parties to
12 disclose a redacted version of Outputs 2003 ----

13 MR.WILLIAMS: Hard copy, not the model. Not the model for the sorts of purposes that I think
14 are ----

15 THE CHAIRMAN: Redacted, the redactions exclude information that relates to products which
16 are not part of the appeal. What I am not clear about then is whether Carphone
17 Warehouse's complaint is that they have not received that and it does not interest us
18 particularly why, or whether they are saying that that is not enough, they need the rest of it.

19 MR.WILLIAMS: I think they are saying the latter, but they are making two points. They are first
20 of all saying: "Pursuing this appeal is very difficult for us, we do not have information, and
21 we have sought to reach agreement, even as regards non-confidential information with BT,
22 and BT has been difficult about that." That was the first point, so that was a sort context
23 point, I think, for the application, and I am simply seeking to explain to you that we took
24 two weeks to consider our position. We recognise that actually probably that decision could
25 have been made a bit quicker but there were other pressures on time at the time, most
26 notably the fact that our statement of intervention was due at or around that time.
27 Following the arrival at a consensus position BT had not understood that BT was going to
28 provide the models, it thought it was giving its consent to a request that had been made of
29 Ofcom, but which raised issues in relation to BT's position. I am afraid this is a storm in
30 teacup, madam, but I just wanted to tell you ----

31 THE CHAIRMAN: Yes, well just putting that point on one side then, what is the other point that
32 is still in issue?

33 MR.WILLIAMS: I think that even on the basis that it is going to get redacted hard copy versions
34 of the output model, Carphone Warehouse is applying as part of this application for Mr.

1 Heaney to be given access to a suite of models which he will then be able to work in as
2 models rather than simply to look at hard copy documents. The point I am making to you,
3 madam, is that the output model contains a great deal of costing information relating to
4 products nothing to do with this appeal, so they are not relevant; they are also confidential
5 to BT in the sense that that costing information is not in the public domain, and it includes
6 information relating to products which, as Ms. Heal has explained, give rise to concern
7 around potential competition, if not actual competition.

8 THE CHAIRMAN: But do they accept – or perhaps Mr. Pickford can answer this; they are not
9 happy with just the hard copy of a redacted version, they want the model that they can
10 work, but do they want also the information for more products than were included in the
11 hard copy?

12 MR. PICKFORD: Madam, as I understand it, the answer to that is so long as we can see the basis
13 on which the allocation of central costs has been made, because our concern obviously in
14 our appeal is that the allocation of costs to the core rental services was too great relative to
15 the allocation of costs to other services, so long as we can see that we have no need
16 whatsoever to see any of the other information and, again, acting pragmatically and
17 responsibly we are quite happy for that information to be removed, redacted in whatever
18 manner satisfies BT's concerns in relation to it.

19 MR. WILLIAMS: In relation to that all I say is that there is an agreement they can have it in hard
20 copy. I am not sure that Mr. Pickford has made any case at all as to why Mr. Heaney needs
21 to be able to interrogate that model given that it is an output model, so I am not sure that
22 disclosure of that model would achieve anything. Questions might arise out of severability
23 of technical questions which I am not in a position to deal with now, but it sounds like in
24 substance this bit of the application is not necessarily very important, although Mr.
25 Pickford will tell you if I am wrong about that.

26 THE CHAIRMAN: Yes, you can make a point in reply if you want to.

27 MR. WILLIAMS: So that is the output model, madam, I was going to deal with the other three
28 models in the round, if you like, by looking at Mr. Heaney's second statement. I perhaps do
29 not need to overemphasise the point but we are reacting to this at incredibly short notice,
30 and I made all of the points about why we feel that this is evidence which really ought to
31 have been put forward sooner, if not on the detail on the broader picture.
32 Picking it up at para. 4 – I have not had a chance to compare this to Mr. Heaney's first
33 statement but I think that the language is broadly the same, and we have simply made the
34 point that if one looks at that description, that characterises Mr. Heaney's role in the most

1 general terms in relation to the matters for which he is responsible. In correspondence
2 Carphone Warehouse have sought to say “Oh, but it’s actually only really next generation
3 access”, well there is no evidence to support that. What we do have is the language of para.
4 4.

5 So picking the statement up at para. 9 I think probably, madam, you can tell me whether I
6 need to address you in any detail on this because you did make a point which it seems to me
7 goes to the heart of what Mr. Heaney says in paras 9 to 15 in the course of Mr. Pickford’s
8 submissions, which is this really: Carphone Warehouse competes with BT both at the
9 wholesale and at the retail level by taking MPF from Openreach and adding its own
10 platform, its own network, to make up the full package of broadband and telephony
11 services. Where it does that it is competing directly with BT Wholesale and BT Retail in
12 respect of the telephony element which will be taken on a WLR basis from Openreach. It is
13 obviously right to say that the total cost of WLR, MPF and SMPF is in the public domain
14 by virtue of the transparent process by virtue of which Ofcom sets those prices and so on.
15 But that is not the point we were making. The point we were making is that within the total
16 cost there are elements in respect of which Openreach and BT on the one hand and
17 Carphone Warehouse on the other hand are directly competing and it would plainly give
18 Carphone Warehouse a potential advantage to be able to see a detailed breakdown of the
19 costs incurred by BT or Openreach in respect of the element where there is direct
20 competition. It is quite a straightforward point; that is the point Ms. Heal made.

21 THE CHAIRMAN: So you take issue with the first sentence of para. 13, that you do not agree I
22 take it ----

23 MR.WILLIAMS: We absolutely do not agree with that.

24 THE CHAIRMAN: -- that because everybody knows what the price is – well everyone knows the
25 price at which BT is acquiring the services from Openreach because it is the same as the
26 price that everyone else is acquiring.

27 MR.WILLIAMS: Yes, madam.

28 THE CHAIRMAN: But you say the costs that go to make up that price might be useful to a
29 competitor ----

30 MR.WILLIAMS: That is seeking to use its own network to provide part of the service that might
31 otherwise be taken from BT. Madam, the way you put the point to Mr. Pickford was to say:
32 “Would it not be useful to see how you were doing against them in respect of costs within
33 the stack”, and that is the point, madam.

1 That really, in our submission, means that all of paras 9 to 15, although they are presented
2 as a rebuttal to what Ms. Heal says, they actually miss Ms. Heal's point for the reasons I
3 have just given.

4 Dealing then with the P&L, the first point I would make is that the P&L demonstrates that it
5 is not right for Carphone Warehouse to present the issue as to whether BT can demonstrate
6 on a cell by cell basis, whether the information in particular cells is looked at in isolation
7 confidential. We say the combination of information in both the oak model, and the CF
8 Final model, the aggregation of information up to a level which shows the Openreach P&L
9 on different bases constitutes confidential information; it is confidentiality of a different
10 character to detail granular information but nevertheless it is commercially sensitive
11 information in itself. So that is the reason why the approach which is suggested by
12 Carphone Warehouse that one needs to drill into the models on a cell by cell basis and
13 identify why this piece of information is confidential, followed by that piece we say that
14 misses the point. Both Oak and CF Final it is the sum of the parts that raises concerns in the
15 same way that some of the detail does. That is an overarching point about the P&L issue.
16 Dealing then with some of the points made under para. 16. Madam, you made one of my
17 points for me in the course of Mr. Pickford's submissions, when Mr. Pickford said "This
18 information is not used by Carphone Warehouse", you said "They do not have it". Mr.
19 Pickford said "Yes, they do", but what they have of course is historic P&L information that
20 is revealed through the regulatory accounts. Madam, what they do not have is a four year
21 forward looking forecast of the P&L.

22 THE CHAIRMAN: I see, so when we refer to the Openreach P&L here, what you are talking
23 about is a forecast P&L for the next four years?

24 MR. WILLIAMS: The effect of the four year cost model is to present P&L figures over the four
25 year period which the cost model shows. Obviously that is information the Carphone
26 Warehouse does not have, and although Mr. Pickford is saying: "We do not work with this
27 information", well it does not work with historic information, what would it do with
28 forward looking information?

29 There is a figure of 3 per cent in the last couple of lines, all we would say is we obviously
30 have not had an opportunity to consider that figure as a figure, but we notice immediately it
31 does not deal with the issues of our potential competition that we raise, for example, in
32 relation to Ethernet and ISDN services, which certainly would not be within that figure as
33 presented.

1 So then if I can move on to para. (b) is that in essence the P&L is presented on a different
2 basis that being CCA (current cost accounting) rather than HCA (historic cost accounting).
3 As a result of that it would not really be of any interest to Carphone Warehouse. Actually
4 that point is wrong on its own terms. The Oak model is presented on a CCA basis but the
5 CF Final model is presented on an HCA basis, so that point is wrong. Not only that, both
6 models are based on information which is not in the public domain, so in a sense it does not
7 really matter – if I may say so – in what form Carphone Warehouse is used to encountering
8 profit and loss account information. The point is that through the revelation of these models
9 to Mr. Heaney it would be presented with additional new information of the quality and
10 sensitivity that I describe and which would allow him to do the sorts of exercises that are
11 described in Ms. Heal’s statement.

12 Moving on then to (c) he says: “The majority of the P&L information is already available in
13 the public domain”. I should say, madam, these points I think are all covered, the thrust of
14 them is all covered by Ms. Heal’s evidence, I am just now presenting them in a rebuttal way
15 rather than as they are set out at the statement. So (c)(i):

16 “the vast majority of the revenues relate to services for which information has
17 already been disclosed as part of the Leased Line Charge Control, LLU...”

18 It is interesting the choice of the word “information”. It does not say it is the same
19 information, and it is not the same information, madam. Some information is available, but
20 it is new and different information and it is at a different level of detail.

21 Then over the page at subparagraph (ii), this is the point that I have already made:

22 “an even larger proportion of Openreach’s P&L relates to services for which
23 information is provided in the regulatory financial statements.”

24 - but that is historic information rather than forward looking.

25 Subparagraph (d) – an interesting approach has been taken in this paragraph:

26 “I cannot envisage how knowledge of revenue and cost for other services (e.g.
27 RedCare) could, in any way, be used to further Carphone Warehouse’s interests as
28 suggested.”

29 Well, we did not make any suggestion that they could use the information in relation to
30 RedCare, we made the suggestion they might use it in relation to, for example, Ethernet and
31 ISDN which are areas where there is actual competition in relation to ISDN, and we say
32 potential competition in relation to Ethernet, so really that, it seems to us, is an attempt to
33 evade our point rather than to deal with it.

34 Finally:

1 “(e) The information in the model is probably at least 15 months old and thus is of
2 limited commercial relevance.”

3 That is wrong, the information was updated as at March 2009 and as I have already
4 explained it is four year forecast information so the fact it was formulated at a particular
5 point in time, obviously business moves on, but one has to have regard to the fact that it was
6 a forecast intended to cover the four years from that point. So we say that even in the
7 limited time we have had available to deal with Mr. Heaney’s statement there are a number
8 of very obvious objections to the points that he makes.

9 Perhaps I should just recap, madam, the first issue I dealt with, paras. 9 to 15, as we have
10 explained in Ms. Heal’s evidence, those points go to the confidentiality of the Oak model
11 because it is the Oak model that shows the detailed breakdown of the costs that I have
12 described, and I say that because obviously the Oak model is one of the models which
13 Carphone Warehouse has maintained is not confidential, subject to isolated exceptions.

14 THE CHAIRMAN: Is that Oak final and Oak ----

15 MR.WILLIAMS: It is both Oak final and Oak ancillaries, that is right madam. The P&L point,
16 as I have already explained, applies to both the Oak model and the CF Final model, albeit
17 that the two models are presented on a different basis – HCA v CCA. The points we have
18 made there go to the confidentiality of the Oak model and, as I said, the P&L point goes to
19 the confidentiality of the model as a whole rather than on a cell by cell basis.

20 Coming back to para. 17: “Ms. Heal asserts that the access to the model will provide me
21 with volume information ...” and so on. Paragraph (a) deals with a point which is not in
22 dispute and which we have never relied on. We have never said that there is commercial
23 sensitivity around the volumes for the core rental services, as opposed to ancillary services.

24 THE CHAIRMAN: Which model does this volume information relate to?

25 MR.WILLIAMS: It is in the CF Final for this purpose, madam. It is suggested in para. B1 that
26 this information does not give any additional information over and above the volumes for
27 the core rental services which are already in the public domain. We say that is not right,
28 madam, and we have dealt with that in Ms. Heal’s evidence at para. 71. I will not take you
29 to it now, but in essence what is said is that looking at the detail of which ancillary services
30 a customer is purchasing will give you an insight into changes in customer behaviour being
31 their movement between different providers, and their movement between different
32 technologies – I was going to say “platforms”, but I think the right word is “technologies”,
33 and one does glean additional insight from seeing movements in the volumes for those

1 specific services, which one does not get from the volumes for core rental services. As I
2 said, the reference is para. 71 of Ms. Heal's statement.

3 The other point I wanted to make in relation to volumes is that there has been a suggestion
4 for the first time in this morning's witness statement that this could be dealt with through
5 aggregation. As I say, it is not a suggestion that has been made before. We are reacting to
6 that on the hoof, but nevertheless it does seem to us that it is not really a straightforward
7 matter because one would need to start to reconstruct the model because the model is
8 currently constructed on a BT and other volumes basis and what is being suggested is that
9 they would need to be brought together and that would involve rebuilding that part of the
10 model. I cannot say any more about what that would entail now, but it does strike us that it
11 would be a significant piece of work.

12 I am not really going to say anything about paras. 19 and 20 because that mischaracterises
13 the position that Ms. Heal takes in her statement. We say that we have explained what it is
14 about the detail that gives rise to concern and notably the first example at 19(a) relates to
15 the detail within the Oak model relating to cost stacks, and I have already dealt with that
16 point, para. 9 to 15, so it is an unfair characterisation of Ms. Heal's position.

17 In relation to the RAV model we do stress in relation to para. 22(b) that this model is also a
18 forward looking cost model.

19 THE CHAIRMAN: Is this the duct information?

20 MR.WILLIAMS: "... the data relates to the past investment and ongoing maintenance ..." so
21 there is an attempt to inject a flavour of historic quality to that but I am making the point
22 that it is a forward looking model in the same way as the other models.

23 THE CHAIRMAN: This duct information, which model does that relate to?

24 MR.WILLIAMS: This is the RAV model, so I have dealt with outputs before I came to Mr.
25 Heaney's statement, and explained the position in relation to that. I have explained some of
26 the concerns in relation to the Oak model. The CF Final model, madam, as you have
27 already noted is in a different category because Carphone Warehouse have made a proposal
28 in relation to that but the volume information is in that model and now I am dealing with the
29 RAV model. But really I was not going to say very much, madam, because you made my
30 best point which is the Carphone Warehouse suggestion that this is not confidential
31 information because one can go out into the market and ask for quotes. The very point is
32 that this model would allow them to compare the quotes with what BT is spending.
33 I do not think I can really say very much about paras. 23 and 24 which are really a clash of
34 views between Ms. Heal and Mr. Heaney, save to say that Ms. Heal expressed real

1 concerns. She has been around Openreach from its previous life as an integrated part of the
2 BT business, and its current life as a functionally separate entity, and I am not giving
3 evidence but in a sense I have not been given any choice, she says to me over lunch that this
4 is a real point, that because of the functional separation of Openreach customers are more
5 willing to share information with Openreach than they would otherwise be, because they
6 have that confidence that it is separate. So in a sense there is a clash of views, but that is
7 Ms. Heal's view communicated through me.

8 That, madam, I think makes most of the points I wanted to make about confidentiality and
9 competition albeit by way of rebuttal. I am just going to go back to my script, if I may.

10 Pulling the points on confidentiality together, I hope we have made it clear to the Tribunal
11 why we say that this information -- that each of the models for different reasons constitutes
12 confidential information which rightly belongs in the confidentiality ring, and we say that
13 really that being the case it is really over to CPW to understand why it is that they say that
14 exceptional provision should be made for Mr. Heaney to have access to the material. We
15 also say that in considering whether there ought to be that sort of relaxation, it is highly
16 relevant to have regard to the competitive overlap between BT and Carphone Warehouse,
17 and that is a factor which militates very strongly against the sort of order which is sought.
18 That is a consideration which in my submission underpins the Tribunal's entire approach to
19 this issue.

20 I perhaps do not need to labour the point about our particular concerns as they relate to Mr.
21 Heaney. Madam, you made the point which is the double-edge quality of Mr. Heaney's
22 expertise in the field - his ability to interrogate the model to understand it, to gain insight
23 from the information that is there. That is the source of concern, combined with his role as
24 Director of Strategy and the wide-ranging influence he might have within the Talk Talk
25 business.

26 There was a suggestion in Carphone's correspondence that his role was more limited than
27 that, but that point has not been dealt with in this statement. As I have said, it has not been
28 dealt with by Mr. Pickford. So, I think that is the basis upon which the Tribunal has to
29 proceed.

30 The other issue on competition that I wanted to deal with was this issue of the undertakings
31 because, leaving aside Annex 2, the exceptions, I hope that the position is clear to the
32 Tribunal, which is that as part of the regulatory framework within which Openreach has
33 been created, there are prohibitions on the flow of confidential information between BT and

1 Openreach. I do think I need to labour that point, but I think that is a clear illustration of
2 the prima facie concern about risk to competition.

3 Mr. Pickford's submissions concentrated on Annex 2, and he suggested that, in a sense,
4 Annex 2 blows a hole in that point and that in fact it militates in favour of the application
5 that his client is making. In our submission that is wrong, and misunderstands what Annex
6 2 does and what it is there to do. Annex 2 exists because Openreach is not a separate legal
7 entity, but part of the BT group. So, what it does is that it permits the flow of information
8 from Openreach, as a business, to the group of which it forms part. That is inevitable,
9 madam. I hope the reasons for that are clear. What is suggested by Mr. Pickford is, "Well, if
10 one looks at group strategy, which is one of the categories in Annex 2, well what is all this
11 fuss about strategy? Annex 2 contains strategy". In our submission, the key word there is
12 'group'. It is group strategy which is included in Annex 2. Mr. Heaney works for the Talk
13 Talk group which forms part of the Carphone Warehouse group. But, Talk Talk
14 corresponds to BT Retail or BT Wholesale. If Mr. Heaney worked for BT, he would be
15 working for one of those businesses - possibly straddling both of them.

16 THE CHAIRMAN: I see. In Annex 2, those people are the strategy people for BT retail and BT
17 wholesale ----

18 MR. WILLIAMS: In Annex 2 it is BT Group - not BT Retail ----

19 THE CHAIRMAN: I am saying they are not included.

20 MR. WILLIAMS: That is right, madam, yes. Actually, the point can be illustrated in this way -
21 and, again, forgive me for giving evidence, but we are dealing with the point in a rebuttal
22 way - Ms. Heal is Director of Strategy for Openreach. She is not on Annex 2 because the
23 restrictions flow in both directions. She is not entitled to see information relating to BT
24 Group ----

25 MS. HEAL: BT Wholesale and other parts of the company.

26 MR. WILLIAMS: BT Group, still less BT Retail and BT Wholesale.

27 THE CHAIRMAN: Yes. I see the point.

28 MR. WILLIAMS: The suggestion that Annex 2 permits the flow of information in circumstances
29 where the flow of that information might give rise to a risk of competition is just not
30 correct, madam. That is to misunderstand the portals which it opens up and how they work.

31 THE CHAIRMAN: If the information was disclosed to someone in Group Strategy, are they then
32 restricted in passing it back down to BT Retail and Wholesale?

33 MR. WILLIAMS: Yes, madam.

34 THE CHAIRMAN: There is a lot of nodding going on.

1 MR. WILLIAMS: I cannot tell you precisely what the legal machinery by which that takes place,
2 but we discussed this point at lunch, and, yes, that is right, madam.

3 I think Mr. Pickford characterised the reference to Annex 2 as 'oblique'. It is not oblique,
4 madam. It is clearly dealt with in our witness evidence. But, that, I think, explains why the
5 Annex 2 point is not the point which Mr. Pickford said it was.

6 I think I can then move to the reasons why Carphone Warehouse says that Mr. Heaney
7 needs to have access to this material. As I said at the outset, the notable feature of the
8 application is that the justification for the disclosure sought has been something of a moving
9 target - implicitly, if not explicitly - because the sort of disclosure and what it would permit
10 Mr. Heaney to do has changed over the course of the application. We do say that that is
11 very telling. It does say that this is not an application which started with a particular
12 compelling justification and has stuck to the guns. In a sense, it has moved with what
13 seems pragmatic at the point in time, depending on what arguments are levelled against it.
14 Mr. Pickford can say, "Well, we are just being pragmatic. We are trying to arrive at a
15 solution", but if one is trying to understand what it is that Carphone Warehouse says that it
16 needs to do, then, in a sense, that ought to be the starting point. As I say, the shifting sands
17 are telling in our submission.

18 It is worth re-capping on the course of the correspondence. The point made in Carphone
19 Warehouse letter of 17th November was that Mr. Heaney needed access to the model to
20 allow him to consider the consistency of the model with Ofcom's published documents. We
21 have not heard mention of that point since then.

22 THE CHAIRMAN: I think, to be fair, that is still their case - that it is these discrepancies that
23 they have noticed between various points that are expressed or described in the statement
24 and how the model deals with them that has then alerted them to possible new avenues to
25 explore.

26 MR. WILLIAMS: Perhaps it is a reformulation of the point. Perhaps that is a fairer way of
27 putting it. But, it is certainly a difference of emphasis in our submission when one comes to
28 consider the new proposal, for example, that Mr. Heaney ought to be able to look at the
29 structure of the CF model. I am simply making the point that it is a different sort of proposal
30 for a different purpose.

31 The letter of 17th November went on to give three examples of the points which are relied
32 on. I do want to look back just very briefly to those points because in a sense I think the
33 fact that Carphone had not really stuck to those points -- or, at least, that the points can be
34 rebutted is material in understanding the fact that there really is not much at the heart of this

1 application. The letter is at AEH1. I will try and take this briefly because it is not quite the
2 way the application has been put today. The first example given was at p.4 - the
3 implementation of efficiency assumptions. It says,

4 “The main analysis of Ofcom’s approach to efficiency assumptions was carried
5 out by Andre Heaney and is set out in his witness statement as described above.
6 The operational knowledge from within industry (in this case CPW) that was
7 drawn upon to support this analysis is, by its nature, not fully available to advisers
8 outside the industry, such as those within the confidentiality ring. The inability of
9 those analysing the model to discuss operational experience with experts outside
10 the confidentiality ring has hindered the analysis of the model”.

11 But, really, in his statement, Mr. Heaney relied on his own operational experience to
12 suggest that the efficiency targets that had been suggested by Ofcom for Openreach were
13 too low. They went to the level of the efficiency targets based on his operational experience.
14 There is not a clear relationship between his operational experience and his ability to then
15 interrogate the model.

16 In a sense, madam, that point is illustrated if one looks at the second paragraph, which is the
17 gross versus net point that Mr. Pickford drew to your attention this morning. What is then
18 said is that an issue has arisen in relation to whether the model properly implements
19 Ofcom’s decision as regards the efficiency targets to which Openreach has been subjected.

20 But, that point has been picked up by CPW’s experts from their review of the model.

21 THE CHAIRMAN: Is this the same point about the fault?

22 MR. WILLIAMS: No, it is not - I do not think. No, it is not the same point. I am going to come
23 to the fault point.

24 The first paragraph under (a) says that Mr. Heaney’s operational experience is very
25 important, but then, actually, the example that is given is a point which has been identified
26 by CPW’s experts who do not have that operational experience. The point I am making is
27 simply that it is not really clear how Mr. Heaney’s operational experience better enables
28 him to assess whether there are discrepancies between the model and what Ofcom decided.
29 As I said, the proof of the pudding, if you like, is that this is a point which has been put
30 forward by CPW. It has been pleaded. It is part of their appeal. They obviously believe in
31 it. They have identified that point and pursued it without Mr. Heaney having been able to
32 interrogate the model.

33 THE CHAIRMAN: Let us see where this takes us. You say that they have identified it. They
34 have been able to plead it. Presumably Ofcom is able to respond to that pleading because

1 they, of course, all have sight of everything. Then the point is to be determined by the
2 Competition Commission. The Competition Commission and their staff will presumably all
3 have access to the whole model because they are presumably all within the ring ----

4 MR. WILLIAMS: I think that is too important to be subject to such things as the confidentiality
5 ring.

6 THE CHAIRMAN: I am sorry?

7 MR. WILLIAMS: I think they are too important to have to worry about things like
8 confidentiality.

9 THE CHAIRMAN: Yes. But, they are certainly to be trusted with absolutely everything. So,
10 they get to see it. They are told, "Well, what about this point about these discrepancies
11 between the information as set out in the decision and the information in the model?" Now,
12 they then have to decide whether they think it is a good point, whether there is a problem
13 there. Now, what would happen if they were to put further questions to CPW and CPW
14 might say, "Well, we cannot really answer those because we would need our experts to
15 discuss it with Mr. Heaney". I am just thinking aloud whether this is a possible scenario
16 that might arise, or whether the Competition Commission can make up their own minds
17 having looked at the model themselves.

18 MR. WILLIAMS: The question is simply whether the model functionally gives effect to Ofcom's
19 decision as regards the application of gross efficiency margins or net margins. It is a
20 mechanical question, I think. It is a question about the mechanics of the model. Really I
21 am making two points. First of all, it is not clear how Mr. Heaney's operational experience
22 is relevant to that sort of mechanical question, which deals with the relationship between the
23 statement and the model. Secondly, insofar as it is suggested that the current arrangements
24 put CPW into difficulty, this point has been identified by its experts, and in our submission
25 we do not find that surprising because it is a point of mechanics rather than operational
26 experience. So, we are simply saying that this point does not really fortify the idea that
27 Carphone Warehouse is hamstrung in its ability to put up the case. We would say the
28 converse - it is a point which has been identified. Also, it tends to suggest this operational
29 experience point is not really material either.

30 (b) I will deal with, I hope, very briefly. Ofcom's approach to ancillary services. This is a
31 question about suggested inconsistencies between the volumes used in the rentals part of the
32 model and the ancillaries part of the model. The short answer to this point is that it was at
33 one stage para. 118(a) of the notice of appeal, and it is a point which Carphone have
34 decided not to pursue even with this application pending. So, they have obviously come to a

1 view about whether it is a point worth pursuing, or not. We say that that further tends to
2 suggest that Carphone is able to make decisions on these sorts of points under the current
3 arrangements.

4 Finally, over the page at p.5 - Ofcom's approach to the calculation of the share of costs that
5 are compressible. I hope I can deal with this again briefly. The point here is that in its
6 defence Ofcom says that the level of non-compressible costs for MPF services, as opposed
7 to all operating costs, is more like 75 percent than 60 percent. What this point says is that,
8 well, actually there is a disagreement between Mr. Heaney and Ofcom because Ofcom has
9 put forward this figure of 75 percent and Mr. Heaney thought the number was 60 percent.
10 But, there is no disagreement. They are just talking about different things. Mr. Heaney has
11 identified - and it would appear from Ofcom's defence correctly - that the percentage of
12 non-compressible costs is 60 percent across the whole operating costs base, but is more like
13 75 percent, Ofcom says, if you just look at MPF. So, there is no disagreement. But, if
14 Carphone Warehouse does not understand that point -- does not understand Ofcom's
15 position it can ask Ofcom in the first instance to explain how it gets to the number and the
16 issue can be developed in that way. So, this point, in our submission, does not suggest
17 actually -- It is not a good illustration of Carphone in difficulties. We thought, reading that
18 letter, that it appeared to us that Carphone was struggling, if I can put it that way, to identify
19 particular problems, concrete problems, that it was encountering in the preparation of its
20 case because all of those three examples one could see through them pretty quickly.
21 Against that background we noted that the letter of 9th December, which is at AEH6,
22 approached the matter very differently. This is at the bottom of p.3. I am sure the Tribunal
23 has read it, but I just wanted you to have it in front of you while I make my submissions,
24 which is that this is an entirely generalised explanation of the difficulties that Carphone
25 claims to be encountering. It is put at the most general level. There are no particular crunch
26 issues which Carphone is struggling with. They simply say Mr. Heaney is uniquely placed
27 and the Tribunal has already picked up that that point is of itself double-edged for them.
28 So, we say that this letter marked a notable retreat from the effort to really explain what
29 were the crunch issues. We made that point in strong terms in our submissions on Monday.
30 Following those submissions we have received Mr. Heaney's witness statement. The
31 question of why he needs to see the model is dealt with at para. 27. (a) is familiar stuff. It
32 is just his role. Paragraphs (b) and (c) say that he has not got the whole picture without the
33 model. We note in (c) that there is considerably more detail in the models and that has
34 been one of our points on confidentiality. (d) is, again, generalised. (e) is, again,

1 generalised. What one has then at (f) and (g), and (h) and (i) are really two examples of
2 suggested concrete difficulties. I can deal with (i) quite easily. That is the ancillary service
3 volumes point that I have already dealt with. So, that is a point which has already gone
4 away. So, that point does not really add anything.

5 THE CHAIRMAN: That is already dealt with in the 17th November letter.

6 MR. WILLIAMS: In (f) one has the fault rates point. All I can say about the fault rates point at
7 the moment, madam, is this: it is a point which it seems to us a point which arises from the
8 CF Final model, which is the model in relation to which Carphone has accepted that there
9 may be modifications made to protect BT's confidentiality. This is a point which relates to
10 the content of the numbers. It does not appear to us to be a point about the structure of the
11 model.

12 THE CHAIRMAN: Are you saying then that if they got the CF Final model with the numbers
13 randomised, they would not be able to deal with this point?

14 MR. WILLIAMS: No - and I think that illustrates, if you like, the crux of this, madam, which is
15 that we say that what Mr. Heaney really wants to be able to do is to work with the content
16 of the model in order to look at the substantive question of what costs have been allocated
17 to Openreach and whether those costs are justified. But, that is a matter of content. There
18 may be issues of structure, but a lot of it will be content, and a lot of it would depend on his
19 ability to interrogate the content of the model. The one example that he has given which, in
20 our submission, remains live - and, as I say, we are reacting to this at short notice - is a
21 point about content, not structure.

22 So, we say that CPW has arrived at a position where the application which it makes and
23 maintains in relation to the CF Final model is not really a productive or worthwhile
24 application. It does not really enable them to do what Mr. Heaney wants to be able to do.
25 We say that it is really just an attempt to salvage something from an application which was
26 made in far too broad terms in the first place, and which they have now scaled back,
27 recognising that they had probably gone too far in the first place. So, we say that although
28 Mr. Pickford presents it attractively, and seeks to say, "We are just being pragmatic", we
29 say that actually one has to drill down and say, "What would this really achieve? What
30 would it enable you to do?" What we see is that the one example of a point which they give
31 where there might be productive dialogue between the experts and Mr. Heaney, actually
32 that could not happen on the basis of the disclosure they propose. That all goes back to our
33 key point, which is that there is not really a good reason for it -- It has not been justified, or

1 rationalised, or explained. In those circumstances it is not something that the Tribunal
2 ought to accede to.

3 But, we do make a further point about the proposal that is made in relation to CF Final,
4 which is this: It is not entirely clear to us what is mean by Mr. Heaney being able to
5 examine the structure of the model. For example, I am not sure whether it encompasses the
6 point that has been made about net and gross efficiency gains. If it is, if that is an
7 illustration of a point arising from the structure of the model, that point has already been
8 identified by the experts. What we say really is that if one is looking at mechanical
9 questions of that kind, then there really is not a reason to think that CPW's experts are not
10 able on the basis of the very, very substantial work they have done, to identify points of that
11 sort. You may have seen, but not read, madam, members of the Tribunal, the second
12 witness statements submitted by Mr. Hoopis and Mr. Kelly as a result of their review of the
13 model, and which deal with points arising exclusively from their very detailed review of the
14 model. I stress that those points go to the non-price matters, but they are concerned with the
15 very question of how the model relates to Ofcom's decision in the context of whether
16 Carphone would have been able to make additional representations had it had access to the
17 model. But, it is all about the interplay between the model and the statement decision that
18 has been made, and the issues that Ofcom was looking at.

19 So, those are issues which have been explored in great detail and dealt with in evidence in
20 great detail, and presented in very detailed new amendments, which the Tribunal has seen in
21 a different context and which I do not need to take you to now, I do not think.

22 We say that these issues have been explored. We are now well into the case ----

23 THE CHAIRMAN: Are the Hoopis and Kelly witness statements limited to the confidentiality
24 ring, or are they ----?

25 MR. WILLIAMS: I presume they are. We could check that. But, the point I make is that it is that
26 piece of work, madam. As I say, if this point about gross and net efficiency margins is said
27 to be a point about the structure of the model, then it is already out there. So, that work has
28 been done. So, we ask ourselves the question, "What is it that Mr. Heaney would really add
29 to this?" We say it is really speculative, madam, to suggest that allowing Mr. Heaney to
30 examine the structure, the mechanics of the model, would yield additional benefit over and
31 above that which has already been derived from the very, very substantial work of
32 Carphone's experts. Those experts make the point in their evidence that they have been
33 selected partly having regard to their telecoms experience. That point is played down in the
34 context of this application, but it has obviously been played up by the experts in the context

1 of their evidence and in the context of the issue of how much weight ought to be given to it.
2 So, we say that Carphone is playing a little bit fast and loose with that question. We do say
3 that it is speculative to suggest that Mr. Heaney looking at the models on a purely structural
4 basis is really going to achieve anything.

5 Madam, I can make the point in passing - and it is not a major point for today's purposes -
6 that BT's expert evidence in connection with the model which has been presented by
7 Deloitte contains a structural analysis of the model of the very type which has been
8 proposed. They come to the conclusion that the models work as one would expect, and so
9 on, and so forth. We are simply saying that our external experts have done that sort of
10 exercise, looking at the model on a 'model as a model' basis. They have done that work,
11 and they have managed to express their own opinions about it. So, in a sense, we do not see
12 why Carphone's experts cannot do the same thing.

13 We say that that sort of speculation about whether there might conceivably be some sort of
14 extra point that they would spot is not really a basis for the Tribunal to make this sort of
15 exceptional order.

16 When I say that it is exceptional I should make two additional points really. The first point
17 is that we do not concede for today's purposes that a randomisation exercise, certainly of
18 the type that is proposed by Carphone, would necessarily do the job that it says it would do,
19 i.e. protect BT's confidentiality. It was very interesting that in his submissions Mr. Pickford
20 started off by saying, "Well, what we have in mind is something that would completely
21 obliterate BT's confidentiality, and put it beyond any possible visibility". He started off
22 with very general words, but then said, "But, actually, we would like the parameter to be
23 around 0.75 and 1.25 so that we could retain some ability to have insight into the relativities
24 of the figures". Again, madam, what that brings us back to is that Mr. Heaney does want
25 visibility of the contents of the model up to a point. As I say, the application has been
26 scaled back, in our submission, for good reason, but one can see actually that that further
27 casts doubt on the idea that what Mr. Heaney wants to do is to look at the structure of the
28 model. Again, it suggests that what he is really interested in is getting to grips with its
29 content.

30 The second point I wanted to make is that the proposal in relation to creating this shell
31 model, if I can put it that way, made by Carphone last week, suggested that it would be a
32 relatively straightforward solution - and I think 'straightforward' is the word used in
33 Osborne Clarke's letter of 9th December. We do not accept that. We have explained in the

1 evidence that although Carphone uses the word 'spreadsheet' - the CF Final spreadsheet, it
2 is actually twenty-seven spreadsheets.

3 THE CHAIRMAN: Is this still the randomisation point?

4 MR. WILLIAMS: It is still the randomisation point.

5 THE CHAIRMAN: So, what is it that comprises twenty-seven spreadsheets? The CF Final?

6 MR. WILLIAMS: The CF Final. Twenty-seven tabs. I probably should not call it twenty-seven
7 spreadsheets.

8 THE CHAIRMAN: I know what you mean.

9 MR. WILLIAMS: Again, if I could just pick up the note produced by Carphone's experts on 2nd
10 November, which Mr. Pickford took you to - the red and blue box diagram; the first
11 paragraph says: "These consist of four large and complex spreadsheets", and then
12 underneath the diagram:

13 "The four larger spreadsheets are (a) a costs forecast model which calculates the
14 total cost of the Openreach business including the labour inputs required for
15 approximately 50 different activities, the spreadsheet contains 33 individual
16 worksheets".

17 And you might as well just pick up in (b) the last line: "The RAV model 16 separate
18 sheets", and then the complexity of the Oak model is described in para. (c), 37 individual
19 worksheets.

20 Over the page:

21 "These spreadsheets contain worksheets which are both large and complex using
22 long and complex formulae to calculate and allocate costs."

23 So we just make the point that the idea that this would be a straightforward exercise really
24 is not borne out by the material that Carphone themselves have produced and put before the
25 Tribunal.

26 THE CHAIRMAN: Well the amount of spreadsheets – sometimes things can still be done in half
27 a nanosecond; I do not know whether that is the case if one just puts in an instruction:

28 "Multiply everything by ..." I do not know how you do this "... by a number somewhere
29 between 0.75 and ----"

30 MR. WILLIAMS: The first point to make about that is Carphone's position, we are only entitled
31 to do that randomisation exercise in relation to specific cells within the model whereby we
32 can justify a claim of confidentiality in relation to those cells. So it is obviously not just a
33 matter of applying a factor to the entirety of the model, and we say that point is important
34 for this further reason: Carphone has been very clear that if we do go down the route of

1 creating this randomised model it would reserve the right to challenge the assertion of
2 confidentiality in relation to any given point. We say it is not difficult to foresee where this
3 exercise will go; it will generate an enormous amount of satellite dispute in relation to
4 particular issues of confidentiality on a cell by cell basis. With the best will in the world it
5 is clear that the parties are a long way apart on the extent to which this information is
6 confidential and BT can claim confidentiality over this material. So although Carphone's
7 solution may seem convenient today it is something which would inevitably give rise to
8 significant work and significant cost and we say that that has to be taken into account in
9 deciding whether this is an appropriate solution and one has to weigh all of that in the
10 balance with what would Carphone get from the exercise. We say that that weighs very
11 heavily against going down this road, generating all this additional work, potentially time
12 consuming, a huge distraction from the issues before the CC in circumstances where we say
13 not having access to the model Carphone has not really identified a good reason for it.
14 I will just deal very briefly with the safeguards that were proposed by Carphone in relation
15 to the other models – Oak outputs to some extent, and RAV. We are concerned that those
16 models do contain information, certainly Oak and RAV that may be relevant to competition
17 between BP and Carphone Warehouse and we are not satisfied that the safeguards proposed
18 which consisted of the undertakings plus provisions like Mr. Heaney must attend its
19 advisers' offices, we think those are entirely inadequate to deal with the very real concerns
20 that we have expressed, and we say that the approach of the President in *Sky* is very much
21 along those lines.

22 We are conscious that during the course of his submissions this morning and through Mr.
23 Heaney's second statement, Mr. Pickford made a number of more specific proposals as to
24 how particular issues relating to confidentiality may arise, one was aggregation of volumes,
25 and another was dealing with particular contracts. There is also the general question of
26 whether randomisation using the priorities put forward by Mr. Pickford, or some other set of
27 parameters, would be effective. We say that unfortunately this matter has come before the
28 Tribunal at a point in time when it is not possible for BT to put forward firm submissions as
29 to what would and would not adequately protect its confidentiality, what is and is not
30 practical, what would and would not be time consuming, and I am thinking of the
31 aggregation of volumes point. We say that in the time that has passed since 9th December it
32 just has not been possible to get to that point, so we do say that whatever is the outcome of
33 this application the Tribunal is not in a position to make any detailed order dealing with the
34 confidentiality. Our primary case is that that issue does not arise for all the reasons I have

1 given, but we do say that if the Tribunal is against us on any of that, that we are not in a
2 position where the Tribunal can make a specific order that disclosure on particular terms
3 ought to take place. Carphone Warehouse really has not grappled with the issues that arise
4 in relation to Oak and RAV and in our submission we just are not at that point yet.

5 Those are my submissions.

6 THE CHAIRMAN: Thank you very much. Yes, Mr. Pickford.

7 MR. PICKFORD: Madam, I have quite a few points to make in response, and I will take them in
8 the order that Mr. Williams made them and I will try to be as brief as I possibly can.

9 The first point that Mr. Williams makes, and it is something of a light motif of his
10 submissions, he said it repeatedly, there have been shifting sands and this just goes to show
11 how this is not a good application in the first place because it is ill thought through, and we
12 do not really know what we want.

13 We have made it quite clear in Mr. Heaney's evidence and in correspondence the reasons
14 why we seek this information. We say we have been far more concrete in relation to that
15 than we have heard from Mr. Williams in relation to why there were problems with that
16 disclosure.

17 But I return to a point I made in my opening remarks which is that we are trying to be
18 sensible and practical, and indeed Mr. Williams himself said that this whole case turns on
19 the question of balance, it is all about balancing the interest, and that is entirely what we are
20 trying to do when we provide accommodations to reflect the concerns that BT has raised.

21 But we could not, with the best will in the world, have anticipated precisely what concerns
22 were going to be raised until they were raised, and they were first raised in a concrete
23 fashion that enabled us to respond concretely, with the kind of suggestion that we do in Mr.
24 Heaney's statement, on Monday, and that is why these matters have progressed. In my
25 submission, it is not a good basis for turning down this application, the fact that we are
26 simply doing our level best to find an accommodation which balances both parties' interest,
27 that is surely what the Tribunal should call upon us to do.

28 The next point that is made against us is in relation to the test in law. It is said that in the
29 Tribunal disclosure is dealt with very differently to in the High Court; as I think Mr.
30 Williams described it: "The dynamics differ", and that was a point he made a number of
31 times.

32 Of course, the one reason why there has so far been no order for disclosure in these
33 proceedings is because Ofcom made disclosure. Ofcom, as any public authority in public
34 law proceedings is under a duty of candour itself, it is not the same as in party and party

1 litigation, but that does not mean that there is not disclosure, and there has been disclosure,
2 and what we have arrived at now is a situation where we are asking the Tribunal for an
3 order for disclosure because there is now an impasse.

4 The difference is between this public law litigation and party and party litigation should not
5 be exaggerated. For a start, in many ways, this litigation is being fought out like party and
6 party litigation because we have BT here, we have ourselves here, we do not even have
7 Ofcom in the Tribunal today.

8 THE CHAIRMAN: That is just for this application.

9 MR. PICKFORD: Yes, but it is this application that we are concerned with today.

10 THE CHAIRMAN: Well no, I think the point that is being made is it is a different dynamic
11 because this is not commercial litigation in which this idea that the Judge refers to in the
12 *Dyson v Hoover* judgment of the parties being on an equal footing, an equality of arms, and
13 that kind of consideration, are to the fore, whereas here the parties are Ofcom and Carphone
14 Warehouse and there is not really a question of them being on an equal footing because
15 Ofcom always has access to a lot more information than Carphone Warehouse does, as does
16 the Competition Commission when it comes to investigate it.

17 MR. PICKFORD: Madam, with respect, we would say that the philosophy underlying there
18 being an equal footing is equally applicable in this jurisdiction because this is an appeal on
19 the merits, this is not mere judicial review, and in order to advance an appeal on the merits
20 to enable the Tribunal and to enable the Competition Commission to engage in the rigorous
21 and intensive scrutiny that it is required to engage in, we need to have essentially an
22 equality of arms in relation to the information that we have before us. It is not appropriate
23 for the litigation to be carried out on the basis of Ofcom having large amounts of highly
24 relevant information that it is not possible to share with, in our case, the key person who is
25 responsible for advancing our case on certain aspects of the decision, so we say that there
26 are actually very close parallels with party and party litigation given the underlying
27 principles for why it I required. Madam, you correctly record the comments in *Dyson* at
28 para. 33 which refer to the inquisitorial nature of some proceedings and the adversarial
29 nature of others, and the comment made there is it does not matter which you are concerned
30 with, the underlying principles remain the same. It is worth just repeating what was said in
31 that particular case:

32 “Whether one is considering the inquisitorial or the adversarial system, it is
33 essential that the court puts in place procedures which allow the parties to litigate
34 on an equal footing and with full knowledge of the materials before the court.”

1 Then there is a very important point that is made at para. 27 which, in my submission
2 relates to a point that you, madam, addressed with Mr. Williams about whether he can rely
3 upon the Competition Commission to effectively fill the gap here. At para 27 it is said:

4 “In my view, it is a fundamental part of the conduct of fair proceedings that all the
5 parties before the judge should have access to the same material that the judge
6 himself has access to for the purpose of coming to his conclusion.”

7 Now in relation to the Competition Commission stage of this case, the Judge is the
8 Competition Commission. We have very great faith in the Competition Commission, that it
9 will do an excellent job, but ultimately it is still our appeal and we need to be able to
10 advance our best case to persuade the Competition Commission, we cannot simply rely
11 upon the Competition Commission naturally reaching the right result without our
12 endeavours to persuade it and that is why Carphone Warehouse has employed the
13 consultants and lawyers that it does to act on its behalf. So we think there really is not the
14 kind of difference that Mr. Williams has tried to persuade you that there is between these
15 proceedings and the proceedings, for example in *Dyson*.

16 The next point that he made, very briefly he, as I understand it, tried to distinguish the *Eisai*
17 case on the basis that the confidential information was different in that sense because it was
18 the confidential information of the National Institute of Clinical Excellence itself. It is
19 worth just noting very briefly what is said about confidentiality in that case, and it is at para.
20 59. Again this is in the judgment of Lord Justice Richards, and he deals with the
21 confidentiality point and then concludes in relation to it:

22 “The argument concerning confidentiality is not one to which I would attach any
23 weight”, and the reason for that in this case is because he did not think that there
24 were confidentiality concerns. “It should not in my view have a material effect on
25 the court’s decision as to whether procedural fairness requires the fully executable
26 version to be disclosed to consultees. I should add, though I do not think it arises,
27 that even if disclosure were *prima facie* a breach of confidence ...”

28 - which was what being said in this case it was not merely that it was confidential
29 information and they did not want to disclose it, it was that actually it was a breach of
30 confidence to disclose it.

31 “Mr. Giffin conceded that NICE would have a public interest defence available to
32 it if disclosure were necessary in order to meet the requirements of procedural
33 fairness.”

1 It is a point that is well taken by Mr. Williams; it is a different context here, but again what
2 this does illustrate is fairness is paramount, and fairness can ultimately trump confidentiality
3 concerns. In this case there is no need for a trump card to be played, because when one
4 looks at the balance that Mr. Williams urges you to look at you see that the balance then
5 firmly comes down in my client's favour, but it is worth noting what is said there in any
6 event.

7 The next point that was taken against us is that this order we are seeking is unprecedented in
8 the Tribunal, and I tried to meet that beforehand, madam, when you raised that point with
9 me. The only additional point I would make is to remind the Tribunal that in the calls to
10 mobiles litigation where there was no such order for disclosure to the parties beyond their
11 external advisers, the reason for that is because there was a model that was disclosed in that
12 case, it was based upon an efficient competitor, and that model was taken as a proxy for all
13 of the mobile operators and it was a substantial and detailed model, and there was no need
14 to go behind that because that was the model that was the basis for the decision and it was a
15 publicly available one, as I understand it, it was not even disclosed in the proceedings. It
16 was a model that Ofcom had always made publicly available. That is one of the issues that
17 did not arise in those proceedings, and merely because it did not arise then does not mean
18 that it will never arise, and this is a case where it has.

19 THE CHAIRMAN: No, but there was lots of other information within the confidentiality ring in
20 those cases to which none of the executives had access.

21 MR. PICKFORD: That is true, but none of it really had any particularly crucial bearing ----

22 THE CHAIRMAN: No, that is the point that you make.

23 MR. PICKFORD: -- on the issues in the case, and in particular the central model that
24 underpinned it was actually publicly available even if there were extra bits that each party
25 itself was able to see.

26 The next point made by Mr. Williams, I think it was suggested that in some way we were
27 trying to distinguish the CAT and the High Court but we are plainly not. We say that there
28 was a clear read across and that is why I relied on the authorities that I did, so insofar as I
29 have correctly understood that, that is obviously not a point that we are taking.

30 Mr. Williams also said there simply cannot be a presumption in the same way as there is in
31 the High Court here because otherwise the whole system in the Tribunal will be turned on
32 its head. We do not need to rely upon a presumption, it is clear that the Judge in that case
33 thought that the underlying interests of fairness required such presumption, but in this case

1 we are quite happy, we can deal with this on the basis of balance, and we say where we are
2 in relation to that issue.

3 The next point that Mr. Williams made was in relation to the correspondence, and he said
4 in relation to the letter that was provided at AEHg, which is when BT said that it would
5 provide non-confidential versions. He said “Well we never said that we would do anything
6 more ourselves, we were simply waiting for Ofcom to do something”, but if one looks at
7 that letter what they say in the concluding line is:

8 “We propose to liaise with Ofcom to prepare such a version of the outputs 2003
9 spreadsheet which can then be disclosed outside the confidentiality ring in hard
10 copy.”

11 Then in relation to point 4, they do not know whether there is a non-confidential version of
12 the KPMG report, if not they will review the confidential document and identify any BT
13 commercially confidential information that needs to be redacted from the non-confidential
14 version. They do not say to you, madam, that they have done that and sent it to Ofcom and
15 Ofcom have not done anything with it. Indeed, and I do not need to take you through it, one
16 sees from the following correspondence that those instructing me have followed up on
17 numerous occasions to BT saying: “When are we going to get this information?” and they
18 have not had the response: “We thought this was all in Ofcom’s domain”. Typically we
19 have not had a response to those letters at all, so it really is not, we say, sustainable to
20 suggest that the reason why we have had six weeks at least of delay in relation to this is
21 because this was all on Ofcom’s head, and the blame can all be laid at Ofcom’s door. We
22 are only too willing to lay the blame at Ofcom’s door where it is appropriate, but we do not
23 do so in relation to this point.

24 The next point that is made by Mr. Williams is in relation to the Outputs 2003 spreadsheet
25 and he says “We have already offered a hard copy”, but he has not explained at all why they
26 could not offer a soft copy, which is what seek, there has been no particularisation of why
27 that would cause them any difficulties at all. It is, however, plain on our side that if one can
28 see a soft copy of something you can see how one cell relates to another cell and interrogate
29 the structure in a way that you cannot do if all one has is a series of numbers then you
30 cannot see the relationships between them. The relationships are obviously an integral part
31 of any model.

32 The next point is that his entire case, as I understand it, on the confidentiality in response to
33 the points that Mr. Heaney makes at paragraphs around 13 to 15 of his witness statement,
34 the point is that it is the cost stack that matters he says, and because there is a cost stack that

1 we will see we can benchmark ourselves against it. He did not address at all the response
2 that I gave to you, madam, when I explained that that was not of any use to us, that our
3 system is based on a completely different technology, so BT's costs based on their old
4 technology are not going to assist us in any way, shape or form. That was a point he simply
5 did not address.

6 Also, he claims that the point about costs and being able to benchmark against costs meets
7 all of our points on competition, but that is simply fallacious. To the extent that it could
8 meet any point it is only relevant to the alleged competition at the highest level which is
9 between Carphone Warehouse and Openreach itself, which, madam, you will recall is the 3
10 per cent of Openreach's business, and that is the only point that that goes to. If you, for
11 instance, consider retail competition, the competition between Carphone Warehouse and BT
12 Retail or Sky, all that matters there is: what is their input cost from BT Wholesale, which
13 we know, and the other costs of those competitors at the retail level which we do not know.
14 The cost stack argument there, the benchmarking argument does not stack up at all, it is
15 simply not relevant to that lower level of competition and so he does not have an answer to
16 our response on those issues.

17 The next point he takes is in relation to four year forecasts. He says that we have said that
18 the profit and loss account is already available. That is wrong because what we are focused
19 on here is four year forecast and that is more valuable. In fact, what Mr. Heaney refers to at
20 para.16(c)(i) of his witness statement is forecast data. He says there:

21 "The majority of the P&L information is already available in the public domain:

- 22 (i) the vast majority of the revenues relate to services for which information
23 has already been disclosed as part of the Leased Line Charge Control,
24 LLU Decision and WLR Decision."

25 Unfortunately, I do not have the LLU Decision to hand. I do not know what decisions the
26 Tribunal has to hand, but I can give you the reference.

27 THE CHAIRMAN: This is in the Leased Line Charge Control?

28 MR. PICKFORD: That is right and also the LLU Decision and the WLR Decision. What I have
29 currently in the documents before me today is the WLR Decision, because that is the
30 decision that Mr. Heaney makes the point about fault rates in relation to, and in the WLR
31 Decision, if the Tribunal has it, at p.79 it is in Ofcom's defence at DF3, tab 31, we say for
32 instance in table 7.6, a profit and loss account based on "CCA costs and revenues for WLR
33 rentals, assuming prices remain fixed in nominal terms before adjustment for enhanced
34 service costs." One sees there it is a profit and loss account and it projects from 2007/08 up

1 until 2012/13, so the point that is taken against me that the only information in the public
2 domain is historic, and that is what is unique about the information that we are seeking
3 access to, is a bad one because this is a clear illustration of Ofcom publishing forecast profit
4 and loss style information.

5 The next point that is taken against us is in relation to volumes for ancillary services and it
6 is suggested in response to our proposal to aggregate where we do not know how difficult
7 that might be, but the point is we are happy to do that, all they have to do is tell us what
8 they want to be excluded and we will do the difficult bit, the aggregation for them, and
9 allow them to approve it. So it is not really any answer to say it might be difficult. We do
10 not think it is going to be particularly difficult and that is why we are quite willing to
11 undertake the task.

12 I should add in relation to that point that I would invite the Tribunal to approach this on a
13 model by model basis in that if the Tribunal is not with me that our entire application should
14 succeed, for instance supposing that it was persuaded that there was a particular issue that
15 arose in relation to the RAV model, the appropriate course would be to say: "We have been
16 persuaded that it is appropriate for you to see the RAV model, but we will allow you to see
17 the other models subject to the terms on which you have sought access to them, rather than
18 to dismiss the application as a whole.

19 It is said against me next that Mr. Heaney's expertise is a double-edged sword but as I think
20 I responded to you, madam, that is a point that is made in the *Dyson* case (para.38)

21 The next point that is taken is in relation to annex 2. Mr. Williams has done his best in
22 relation to Annex 2, but we say that his answer is still unsatisfactory. He suggests that there
23 is no problem with the inclusion of personnel from group strategy in the Annex 2 list
24 because they deal with group strategy, but if one pauses for a moment to think about what
25 does group strategy involve, group strategy is not some abstract concept it is strategy for the
26 entire BT group, i.e. all of its various businesses including its businesses such as BT Retail -
27 the business that we are concerned with in this case.

28 THE CHAIRMAN: Yes. But, I think the point is that they are not deep down in the detail. They
29 are looking at the big picture as to how the overall group should develop. They are not
30 going to be interested in the minute detail that we are going into here that the BT Retail
31 people would be. I think that is the point that is being made. There is a distinction between
32 the group strategy and BT Retail or BT Wholesale strategy. Madam, my instructions are,
33 as I said previously, that the sort of people we are talking about who would be involved in

1 group strategy carry out exactly the same role as Mr. Heaney carries out for Talk Talk
2 group or Carphone Warehouse.

3 MR. WILLIAMS: For Talk Talk group. Then there are operating divisions.

4 MR. PICKFORD: It is true that Carphone Warehouse has other businesses such as selling mobile
5 phones through shops, but Talk Talk group is the business that is concerned with
6 telecommunications access networks. It is in relation to the Talk Talk group that all of the
7 various competition concerns that are raised by Mr. Williams are said to arise. It is not in
8 relation to other aspects of Carphone Warehouse.

9 THE CHAIRMAN: No. That is the point, I think. That is the point - that if we were talking about
10 disclosure to someone who was in charge of overall strategy for the Carphone Warehouse
11 global business, then that might not be such a problem because they would not glean from
12 this information the kind of detail that would be useful in that kind of overview role,
13 whereas Mr. Heaney's role is particularly in relation to these products, and that is why the
14 information, it is said, would be useful to him in the development of these products - not,
15 "Where are we going more generally in the telecoms sector?" sort of approach.

16 MR. PICKFORD: Madam, in my submission it is very difficult to make that differentiation
17 between group level strategy and strategy lower down the line. Ultimately, strategy is
18 strategy. By its nature it is not concerned with the absolute level of detail. It is concerned
19 with what kinds of business strategies; what kind of product should be developed. It is
20 highly revealing that in relation to BT itself members of the BT group are able to see that
21 kind of information, notwithstanding that they will have, one would hope, an absolutely
22 essential role in shaping the strategies of the constituent parts of BT because if they do not,
23 then it would be very perplexing what particular role they carry out in that function. It is
24 not possible to draw the sort of clear dividing line that Mr. Williams attempts to do. Indeed,
25 he does not advance a submission that the group strategy personnel do not have that kind of
26 role. He simply says, "Well, look, they are group strategy".

27 Turning to the point about the need that we have for the information, we have been highly
28 specific about this - as specific as we can be - in a combination of the evidence of Mr.
29 Heaney at para. 27 and correspondence leading up to it. The point that is taken against us
30 is one where, in my submission, Mr. Williams really tries to have his cake and eat it,
31 because he says on the one hand, "Look what you have done. You have done these things.
32 You did not need Mr. Heaney to have access to whatever you have done. But, whatever you
33 have not done so far, well, that is clearly totally speculative". It goes without saying that we
34 obviously cannot know what we currently do not know. We cannot know precisely what it

1 is that Mr. Heaney may, or may not, discover in relation to that. What we do know, and
2 what we are quite clear about, is that Mr. Heaney has considerably more expertise and is
3 considerably more able to engage with these types of issues than the particular consultants
4 on which he relies. That is the best we can really say.

5 THE CHAIRMAN: Those are two very different approaches, Mr. Pickford. In the
6 correspondence that we have seen, and in the 17th November letter there are three (what are
7 called) examples put forward as to concrete instances where the experts who have seen the
8 model have been hampered, you say, because they cannot discuss what they think they have
9 unearthed with Mr. Heaney. Then, in para. 27 there is another example - the fault rates
10 point. Now, are you saying that Mr. Heaney wants to have access to these models so that
11 where particular points are identified by the experts that they need to have his input on, they
12 can ask him those questions and he can see the models for that purpose? Or, are you saying,
13 “No, he wants to see the models because he, going through them all, might see all sorts of
14 things that even the experts have not noticed, and might throw up a whole extra lot of points
15 which they, despite their professed expertise, have not been able to identify”? Now, those
16 are two very different exercises which Mr. Heaney might do. Which are you saying is ----?

17 MR. PICKFORD: Both - and other reasons as well. We rely on both of those points, but we also
18 rely on other respects. It is not so much always that the experts themselves have been
19 inhibited in what they can do, but, overall, Carphone Warehouse has been inhibited in its
20 ability to prosecute -- to carry forward its case in the way that it would like to.
21 The ancillary services point is an illustration of a different kind of difficulty, which is that
22 we had to take a decision about whether to continue with a particular point or not. One of
23 the issues is: Was it really likely to be material? Mr. Heaney was not able to see the models
24 or to see actually what numbers we were talking about. He had to rely on a value judgment
25 of his experts, about whether they thought that it might be material. That was one of the
26 considerations that informed whether we would continue with that point or not. But, Mr.
27 Heaney was never able to form his own view about whether he thought it was material
28 because he could not see that. So, that is an illustration of a different type of point where,
29 when a key decision-maker who is also integrally involved in the Carphone Warehouse
30 team does not have access to the same sort of information. Those problems of course are in
31 addition to the problems that you, madam, identified as well.
32 There are two further concerns. There is the logistical difficulty that Mr. Heaney was the
33 primary person who set out the analysis on, for instance, efficiency costs. The situation has
34 now moved on, essentially, since he did his original witness statement. We know, to some

1 extent, he was aiming at a slightly false target. Now, he cannot update that himself. We
2 are now reliant. We have done the best we can because we need to pursue this appeal to the
3 best of our ability. But, we have now had to switch horses to someone who did not carry out
4 that primary analysis, who does not have the same expertise as Mr. Heaney, and can now
5 only do their part of the story. So, when we then come to deal with that issue in the
6 Competition Commission we are going to have this very uncomfortable situation where part
7 of it will potentially still be Mr. Heaney's domain, and then other aspects of it will be issues
8 where Mr. Heaney has to leave the room. It is in relation to that that we say we encounter a
9 real practical difficulty. It is also in relation to the point that I made about getting access
10 even to non-confidential versions of materials from BT. The point we made was not merely
11 context setting; it was that there are genuine difficulties when someone as central to our
12 case as Mr. Heaney is exclude because we can find that weeks - not to say months - go by
13 before he is given access to even non-confidential versions of what everyone else can see.
14 Madam, I am nearing the end, but progressing through the points Mr. Williams took against
15 me.

16 The next one was in relation to para. 27(f) of Mr. Heaney's statement. It was said that if all
17 we are going to get is the structure of CF Final, that will not help us with the difficulty that
18 we identify at 27(f). My clear instruction is that we think it will help us. It is, to some
19 extent, our look-out. If, ultimately, that is what we get out of this hearing, and we are not
20 assisted by it, then we will have to live with that. Mr. Williams raises the spectre that we
21 will be coming back continually to apply for more and more disclosure. But, we would do
22 so very advisedly because whilst I cannot say exactly what may or may not happen in the
23 future, we are well aware that if we continue to come back again and again for further
24 disclosure we would almost certainly try the Tribunal's patience. So, that is a matter that is
25 raised interorem but, it is not, we say, something which should influence the Tribunal's
26 decision on this particular application. Those applications, should they ever occur, which is
27 unlikely, but who knows, are a matter for another day.

28 Madam, a point that came up again, but I think I have made it already, is that Mr. Williams
29 addressed later in his submissions again the point that it is said the changes we want to
30 make are straightforward, but they do not know that they are. As I have said, we will do
31 that.

32 A final point. BT says, "We cannot necessarily say exactly today what our view is on the
33 anonymisation that you suggest in relation to CF Final". That would certainly not be a good
34 reason for dismissing this application if that is their position. The only implication of that,

1 we say, would be that the Tribunal should make our order conditional upon -- or potentially
2 provisional upon the parties engaging to seek to agree the types of redactions that would be
3 satisfactory in this case.

4 One final point that Mr. Heaney would like me to emphasise is in relation to his role within
5 the Talk Talk group. There are a number of units within the Talk Talk group, including a
6 business called Opal, which is, to some extent, like BT Global Services. There is a
7 residential business within the Talk Talk group which deals with residential customers.
8 There is a wholesale business that is like BT Wholesale. There are a number of quite large
9 and disparate parts of the Talk Talk group. Mr. Heaney's role is as Strategy Director in
10 relation to all of them. He does not have the sort of day-to-day precise role that is being
11 suggested in relation to particular businesses. He is group Strategy Director across all of
12 those different aspects of the Talk Talk group.

13 THE CHAIRMAN: This point about the randomisation of the figures in the Carphone final
14 spreadsheet - whether you are envisaging that only the cells for which BT can properly
15 assert confidentiality should be randomised rather than everything in the tabs should be
16 randomised? What do you say about that?

17 MR. PICKFORD: What we say about that is that we are not probably talking about sales so much
18 as cost categories - because it is very unlikely that there is going to be an argument about
19 this year's sell as opposed to next year's sell if we are generally agreed in relation to costs.
20 Indeed, whole costs categories are something that we say, with sensible co-operation on
21 both sides, could almost certainly be agreed. Indeed, our starting position is that we are
22 happy to allow BT to say what costs categories it says are confidential because our key
23 concern in relation to that particular model is to be able to analyse its structure.

24 Now, we cannot obviously commit ourselves to ruling out that there might be some
25 disagreement between us about whether something is properly confidential or not, but we
26 do not anticipate currently that we are going to be returning to the Tribunal in relation to
27 that because we would hope it would be something that, with goodwill on both sides, could
28 be accommodated - because we accept the principle that we are not going to see everything
29 in relation to that spreadsheet.

30 Now, I do not think I can really commit Carphone Warehouse beyond that, other than that
31 we do consider that this is something that is capable of being worked out sensibly and
32 agreed between the parties - or at least between their experts possibly with the advantage of
33 not having lawyers present. That might be conducive to reaching some sort of agreement.

34 Madam, unless I can assist any further?

1 THE CHAIRMAN: Than you very much, Mr. Pickford.

2 MR. WILLIAMS: Madam, there is one thing I should have said in my submissions. It is a very
3 small point and a very short one. I have no right of reply.

4 THE CHAIRMAN: Speedily, Mr. Williams.

5 MR. WILLIAMS: The first point I should have made in connection with the undertakings is that
6 when ... drew attention to the possibility of BT being in breach of the undertakings, I should
7 have made the point on that which is that BT's concern is that in the absence of ...

8 THE CHAIRMAN: I understand.

9 MR. WILLIAMS: So, in terms of this application that is a consideration. I should make that
10 point.

11 The other three points I wanted to make -- The first is in relation to the Annex 2 point. Just
12 for clarity, I did mean to say - and I thought I did say - that it is the role of BT group to
13 micro-manage BT Retail and BT Wholesale.

14 THE CHAIRMAN: I think we understand what your point is on that, and what Mr. Pickford's
15 response is.

16 MR. WILLIAMS: The other very short point that I should have made is that it is not a
17 satisfactory proposal as far as BT are concerned, for Carphone Warehouse's experts to take
18 this away and sort the problem out. That is a point that I should have made.

19 Finally, in relation to the redacted version of the Output ... what I meant to say about that is
20 that it was an issue which had somewhat fallen between two stools. We accepted that we
21 ought to have dealt with it by now. We will take it away and make sure that we deal with it.

22 THE CHAIRMAN: Thank you very much.

23 I had hoped when we started out this morning that we would be able to deal with this today
24 in terms of telling you what the result is. But, it has got rather late, and I think it is therefore
25 unlikely that we are going to be able to do that.

26 But, there are other matters of a case management sort that we need to refer to. The first is,
27 as I understand it, that we are in the process here of drawing up the order granting
28 permission for the amendments to be made to the notice of appeal. There is also, as I
29 understand it, a timetable around for the hearing of the non-price control matters. As far as
30 dates are concerned, the Tribunal is considering fixing it for the week that was suggested -
31 so, Thursday and Friday, 25th and 26th March with a possible date in reserve on 29th,
32 although we would not be able to sit long into the afternoon on 29th. But, it is going to be
33 that end of the week rather than the front end of that week.

34 Are there any other case management issues?

1 MR. PICKFORD: Madam, that reminds me. I think there is one outstanding issue in relation to
2 the service by Carphone Warehouse of its reply on the legal framework for the appeal going
3 forward to the Competition Commission. It is possible that we do not even necessarily have
4 to serve such a reply any more because the Commission have said, "We would like skeleton
5 arguments on the legal framework to be served in the New Year". We are quite happy to
6 deal with it on that basis, to incorporate whatever we would say in reply in those skeleton
7 arguments. Alternatively, we can still serve a reply in these proceedings, but I am not sure
8 that any particular purpose is served in relation to that.

9 THE CHAIRMAN: Is it now the situation that Ofcom are content for you to serve a reply on the
10 non-price control matters, because originally that was disputed as to whether that was
11 appropriate?

12 MR. PICKFORD: In relation to non-price control, I am afraid I am not entirely sure what
13 Ofcom's outstanding position is on that. My submissions were directed towards the price
14 control reply where what we had proposed originally was that we would serve ----

15 THE CHAIRMAN: Yes. If you do not want to include that -- if you want to deal with that in
16 your skeleton before the Competition Commission, that seems to make eminent sense. The
17 question then is: if you are not lodging a reply in the Tribunal for the price control matters,
18 is there anything that you want to lodge for non-price control?

19 MR. PICKFORD: Yes On non-price control matters we had proposed in the joint letter -- It
20 came from Ofcom, but it was after Ofcom and Carphone Warehouse and, indeed, BT and
21 Sky had liaised with one another. We proposed a timetable there in relation to the non-price
22 control matters.

23 THE CHAIRMAN: Yes. So, 26th February CPW to file and serve a reply and accompanying
24 evidence on the non-price control matters.

25 MR. PICKFORD: Yes. My apologies, madam. I had implicitly taken it from the approval of the
26 hearing date that the steps leading up to that were also considered to be appropriate, but
27 those are the steps that all of the parties propose in relation to non price-control matters.

28 THE CHAIRMAN: We will make an order in those terms. The dates that we will fix for the
29 hearing of the non-price control matters will be 25th and 26th March, and at least the
30 morning of 29th in reserve.

31 MR. PICKFORD: I am grateful, madam.

32 THE CHAIRMAN: One final point. Is it agreed, or have the parties had an opportunity to turn
33 their minds, as to whether there is anything in the amendments to the notice of appeal that
34 needs to tweak the questions that have been sent to the Competition Commission?

1 MR. PICKFORD: Madam, we sent a letter to the Tribunal, I think at the end of last week, saying
2 that there were no amendments that were required. As I believe it, so did Ofcom.

3 THE CHAIRMAN: Good. Thank you very much everybody. We will be in touch in due course
4 when we have made up our minds.

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