



Phones 4u Limited (In Administration) v EE Limited and others

Day 1

October 13, 2021

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Wednesday, 13 October 2021

(11.00 am)

(Proceedings delayed)

(11.13 am)

Housekeeping

MR JUSTICE ROTH: I must start with a warning, because as

I understand it, although there are many in court, these proceedings are being conveyed by a video platform for those who are observing remotely, and an authorised transcript of the proceedings is being made. You can watch it through the screen, but it is strictly prohibited for anyone watching to make any recording, whether audio or video, of the proceedings.

We will also take a ten-minute break, although we started late, at about some time after 12 o'clock, when convenient, for the benefit of the transcribers, and I do have to rise promptly at 4 o'clock today for another commitment, but I think with two days, we should not be in difficulties on the timetable.

The other thing I have to say is that, for reasons that are not clear, I did not receive the link — the Opus link to the electronic bundles until 9.35 this morning, which meant that although you gave me a helpful reading list, I wasn't able to access most of the documents. My clerk did print out the skeleton

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arguments of C file, so I've read those, and obviously they're helpful and informative, and I was able to access some documents by searching around in the C file, but not the bundles in an organised way. So I've not done the extended reading I would normally do, which is unfortunate.

I think, Mr MacLean, there are four broad issues, as I understand it, on the agenda for today, or there were. There is first your amendment application. There is, covered in the materials, your application for a limited amount of further disclosure from Deutsche Telekom.

Can you just tell me, in the light of the letter that I saw from Deutsche Telekom's solicitors, is that still live?

MR MACLEAN: It is still live, but not as live as it was before further disclosure was provided and before further information was provided by Deutsche. Essentially, in relation to Mr Kniese, who we wanted to add as a custodian, Deutsche has provided the disclosure which we were seeking in relation to that, although we still would like them to produce a disclosure statement.

As far as Mr Höttges is concerned, where your Lordship will see that we wanted to extend the time period, and your Lordship will recall that your Lordship specifically ordered that Mr Höttges' documents be

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searched up until the time when he left the board as a member of the EE board, and we would like to extend that, in the light of what we've seen in the disclosure.

Now, what we've received from Deutsche —

MR JUSTICE ROTH: Well, I don't want you to develop it —

MR MACLEAN: Okay, sorry.

MR JUSTICE ROTH: — I just want to know whether it's still a live issue.

MR MACLEAN: There is still a live issue in relation —

MR JUSTICE ROTH: But it is more limited?

MR MACLEAN: It's more limited and it's related to Mr Höttges.

As far as the pleadings are concerned, your Lordship will have seen that there was an issue between my clients and Vodafone, in relation to a particular aspect of that. Now, there's been correspondence between the parties and I'm happy to tell your Lordship, as a result of that correspondence, we've agreed to provide further clarification of what it is that we are saying, in relation to that particular plea, and Vodafone has consented to that.

Now, Ms John for EE pointed out this morning to me that, of course, it affects her, but she indicated to me that she is prepared — that EE is prepared to consent to those proposed amendments, but she will want to say

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something about this at the very end, in relation to the timetabling.

MR JUSTICE ROTH: Yes.

MR MACLEAN: So the only live issue in relation to the amendments relates to the objections which are raised by Mr O'Donoghue on behalf of Deutsche, and we've cleared the rest out of the way. So that's the scope of that debate.

MR JUSTICE ROTH: Yes. And then there's the expert evidence?

MR MACLEAN: Then there's the expert evidence.

MR JUSTICE ROTH: And then there's the trial timetable.

MR MACLEAN: Then there's the trial timetable, which logically follows, once your Lordship has decided whether to permit us to call expert evidence at all.

MR JUSTICE ROTH: Would it not be sensible to deal with the expert evidence —

MR MACLEAN: Certainly, my Lord.

MR JUSTICE ROTH: — first?

MR MACLEAN: Yes.

MR JUSTICE ROTH: Because we can then deal with the trial directions.

MR MACLEAN: Yes.

MR JUSTICE ROTH: And if there is anything to be said about the Vodafone amendment, that can be done clearly very

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1 shortly, from what you've just told me, and at that
 2 point everybody, other than Deutsche Telekom, can be
 3 released.
 4 MR MACLEAN: Respectfully — I respectfully agree, my Lord
 5 that's a convenient way to proceed.
 6 MR JUSTICE ROTH: I assume people — they can stay, but
 7 equally they can watch it remotely.
 8 MR MACLEAN: Indeed. And your Lordship will recollect that
 9 a similar procedure was applied at earlier CMCs where
 10 Mr O'Donoghue had his own furrow to plough.
 11 MR JUSTICE ROTH: Yes. I mean, it's a substantive argument
 12 on the amendment and will involve going through, no
 13 doubt, the pleadings quite carefully.
 14 MR MACLEAN: Yes.
 15 MR JUSTICE ROTH: So that we — on that basis, if we start
 16 with the expert evidence, which is the major issue.
 17 Yes, Mr O'Donoghue?
 18 MR O'DONOGHUE: My Lord, forgive me for popping up. I've
 19 been informed that those attending by way of Teams
 20 cannot hear your Lordship and I don't know if there's
 21 a way for that to be investigated.
 22 MR JUSTICE ROTH: I was late coming in because I was told
 23 that they could not see me. That's probably rather less
 24 of a disadvantage. But if they can't hear me, that is
 25 a problem.

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1 MR O'DONOGHUE: A fundamental problem.
 2 MR JUSTICE ROTH: I don't know who is responsible for
 3 dealing with this. (Pause).
 4 Well, I don't think it's right to go on, although
 5 I don't know if they can hear you, Mr MacLean.
 6 MR MACLEAN: No one has indicated to me yet that they cannot
 7 hear me, but — I'm told I can be heard in the ether.
 8 MR JUSTICE ROTH: You can, but I cannot.
 9 MR MACLEAN: I can.
 10 MR JUSTICE ROTH: Yes, but I don't think that's
 11 satisfactory. I think, even if I try and keep my
 12 interruptions very limited, it's not viable.
 13 Very well. I will go away again and tell me when
 14 it's restored.
 15 (11.21 am)
 16 (A short break)
 17 (11.30 am)
 18 MR JUSTICE ROTH: I'm told that if I speak into this
 19 microphone, and not that one, it should work. I will
 20 keep looking that way.
 21 MR MACLEAN: I may not hear your Lordship, if your Lordship
 22 is looking at the microphone, but if I can't hear,
 23 I will make that point.
 24 MR JUSTICE ROTH: I'm just trying to see, because it's
 25 slightly awkward to look away from you when I'm speaking

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1 to you. Can it be confirmed that I can now be heard?
 2 I don't know what —
 3 MR McQUATER: My Lord, we are getting quite a lot of
 4 feedback from this direction, I don't know —
 5 NEW SPEAKER: Yes, I can hear you.
 6 MR McQUATER: It may be that others have their microphones
 7 on, that shouldn't.
 8 MR JUSTICE ROTH: If everyone else remotely could turn off
 9 their — they shouldn't have a live microphone — if
 10 they have a microphone, please turn it off.
 11 And if I was not heard previously, I should,
 12 therefore, just quickly repeat the warning that I gave
 13 to those who are attending remotely, that any
 14 unauthorised recording, video or audio, is strictly
 15 prohibited and would be a contempt of court. We are
 16 getting a lot of feedback and noise, and I don't know if
 17 anyone can look into that.
 18 MR MACLEAN: It may be, my Lord, that the people who are
 19 behind the curtain, as it were, are not muted. That's
 20 possible.
 21 MR JUSTICE ROTH: Well, they are not participating remotely
 22 in the hearing and speaking, so they should be muted.
 23 I'm told someone — well, shall we struggle on?
 24 Submissions by MR MACLEAN
 25 MR MACLEAN: Right. As your Lordship knows, this is the

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1 third CMC in a matter in which my clients, the
 2 administrators of Phones 4u, are claiming damages for
 3 alleged collusion on the part of three groups of mobile
 4 network operators, on the basis that they colluded to
 5 drive Phones 4u into administration.
 6 And as your Lordship may know, since we were last
 7 before your Lordship, we've had a trip earlier in the
 8 year to the Court of Appeal, where the second to seventh
 9 defendants challenged your Lordship's order in relation
 10 to the provision of — or to facilitate my clients
 11 having access to mobile phones and devices of a limited
 12 number of senior executives.
 13 Happily, from our perspective, your Lordship's order
 14 was upheld by the Court of Appeal, and in so doing, they
 15 noted that a number of the submissions made by the
 16 defendants had an air of unreality about them.
 17 Now, in our submission, the same air of unreality
 18 pervades a lot of what is being said repetitively across
 19 the skeleton arguments for these defendants.
 20 As your Lordship has indicated, your Lordship wishes
 21 to hear about expert evidence first, and that's what I'm
 22 going to address your Lordship on. We say that this is
 23 a surprising case for the defendants to object lock,
 24 stock and barrel to the calling of any expert evidence
 25 at all, and I say that for four reasons.

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1 First, in our submission, there can be no dispute —
2 no sensible dispute, that when one looks at the
3 pleadings in this case, those pleadings raise questions
4 of expert evaluation. There are disputes, for example,
5 my Lord, between the parties as to the market conditions
6 at relevant points in time, from 2012 to 2014, and in
7 2006 to 2009. There is a question as to whether the
8 market conditions in 2006 to 2009 were materially
9 different to the conditions in 2012 to 2014.

10 There are also disputes between the parties,
11 my Lord, as to the significance of various subjective
12 characteristics of Phones 4u and the MNOs. And the
13 upshot of those disputes is, in our submission,
14 a broader pleaded dispute; namely, we say that the MNOs
15 are in a situation in the market conditions in which
16 they find themselves, where an independent, as opposed
17 to a concerted refusal to supply Phones 4u, would be
18 irrational.

19 Now, the defendants dispute this, and I'll come on
20 to show your Lordship on the pleadings that dispute in
21 some more detail.

22 Second, we say that the defendants' stance is all
23 the more surprising, given that at least on the
24 pleadings, they acknowledged in their defences, some of
25 them, that expert evidence at least might be

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1 appropriate. And we've referred to that in our skeleton
2 argument at paragraph 84, and I needn't turn that up at
3 this stage.

4 Next, we say there is actually no challenge to our
5 proposed expert, Mr Thomas' expertise and ability to
6 give evidence going to the relevant pleaded issues. The
7 Telefónica defendants say, for example, that an expert
8 cannot give evidence as to what he would have done in
9 the MNOs' place. But that is not what the pleadings
10 call for, and that is not what the proposed expert
11 evidence amounts to.

12 Mr Thomas, we submit, is well placed to address the
13 rationality of any unilateral cessation of supply and to
14 draw out and analyse important material from the
15 documentary record of the defendants' decision-making.
16 And, in our submission, he can be trusted to provide
17 appropriately focused evidence.

18 Finally, my Lord, in litigation of this scale,
19 complexity and value, in our submission, there is an air
20 of unreality to the submission that expert evidence
21 would assist the court or even expert evidence that is
22 required for the equality of arms between the parties
23 should nevertheless be excluded because of concerns
24 about cost and inconvenience. In our submission, that
25 would be an extraordinary outcome.

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1 My Lord, I'm going to address you essentially in two
2 stages, in the light of the objections which have been
3 advanced by my learned friends.

4 The first question that the court has to consider
5 is: is expert evidence necessary or helpful in relation
6 to the pleaded issues in this case? As your Lordship
7 knows, we say that one of the —

8 MR JUSTICE ROTH: When you put it like that, you are eliding
9 two questions. Is it necessary? If it's not necessary,
10 end of story.

11 MR MACLEAN: No, my Lord.

12 MR JUSTICE ROTH: No, I'm sorry.

13 MR MACLEAN: No, my Lord.

14 MR JUSTICE ROTH: It's if it's not necessary, then you
15 ask: is it helpful?

16 MR MACLEAN: Yes, indeed. I'm agreeing with your Lordship.

17 Your Lordship has to ask first: is it necessary to the
18 pleaded issues? If it's not strictly necessary to the
19 pleaded issues, is it helpful? And if it's helpful,
20 then your Lordship has to conduct a balancing exercise
21 in relation to all the various features. And I'm going
22 to show your Lordship the decision of Mr Justice Warren
23 in the British Airways v Spencer case, which all
24 parties, at least most parties in this case, have
25 referred to, although we say, when your Lordship comes

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1 to look at it, it's apparent that the defendants have
2 actually misunderstood what it's that Mr Justice Warren
3 was saying in that case.

4 So that's the first stage, the stage that your
5 Lordship must consider. Look at the pleadings, is the
6 evidence necessary? If it's not necessary, is it
7 helpful? So that is the first stage.

8 Only if we get past that stage do we then — because
9 if your Lordship says, "Well, I don't find it necessary
10 to the pleaded case and I don't find it would be
11 helpful, and on a balancing exercise I exclude it", then
12 we don't need to consider what the terms of the proposed
13 questions are.

14 But I propose to address your Lordship on the
15 pleaded case, why we say it's necessary or helpful in
16 relation to the pleaded case, before I address your
17 Lordship on the questions which have been proposed and
18 are appended to the draft order.

19 MR JUSTICE ROTH: It's a bit of a chicken and egg, because
20 one's got to ask: what question is necessary and what
21 question is helpful?

22 MR MACLEAN: Your Lordship is correct. One can't entirely
23 divorce the second stage from the first stage, I accept
24 that. But in the light of the objections which are
25 made, and — the primary objection which is made to this

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1 evidence is that it does not go, as the defendants say,
 2 to the ultimate issue. That's their primary objection.
 3 Now, that objection is bad in law.
 4 MR JUSTICE ROTH: Well, I understand that, and I'll no doubt
 5 hear from the defendants. I see the point, that it's
 6 a question of: does it go to a pleaded issue or one
 7 might say a pleaded issue that's significant?
 8 MR MACLEAN: Well —
 9 MR JUSTICE ROTH: So as to justify the expense, and so on.
 10 There is also concern, and that goes to the scope of
 11 any such evidence, about timing because I am slightly
 12 puzzled, and no doubt you will help me on that, as to
 13 why this application was made, I think in mid—August —
 14 MR MACLEAN: It was made in mid—August.
 15 MR JUSTICE ROTH: — when the disclosure was heavily
 16 concluded in February with, no doubt, more care, but
 17 sufficiently for you to make an application some time
 18 after Easter, and that was resisted considerably —
 19 MR MACLEAN: Well —
 20 MR JUSTICE ROTH: — but I can see real problems, depending
 21 perhaps partly on what scope of the areas that the
 22 expert is covering.
 23 MR MACLEAN: Yes. Perhaps I can address your Lordship.
 24 MR JUSTICE ROTH: So at some point —
 25 MR MACLEAN: At some point in relation to the —

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1 MR JUSTICE ROTH: — I don't know what has gone on, because
 2 it seems to me, I have to say, rather unsatisfactory.
 3 It was floated, as you know, and it was pointed out at
 4 the original CMC, so it was always there —
 5 MR MACLEAN: It was always there.
 6 MR JUSTICE ROTH: — and I thought it would have picked up
 7 rather earlier than in the middle of the summer.
 8 MR MACLEAN: Well, if there is a criticism that the board
 9 hasn't been launched back into — on to the pitch
 10 earlier, then I will address that. But ultimately,
 11 ultimately, at the end of the day, I will be submitting
 12 to your Lordship, even if your Lordship considers that
 13 we have been slow, and I'm going to submit that we've
 14 not, that is not something which ought to deter the
 15 court from ordering expert evidence which is necessary
 16 and which will be able to be accommodated within the
 17 current trial timetable, which envisages the trial
 18 starting, I think, on 11 May 2022. So I'll come back to
 19 that.
 20 Now, obviously your Lordship — it's common ground
 21 that the court should only permit expert evidence that
 22 is reasonably required to resolve the proceedings, and
 23 that's the test in Part 35, Rule 1. Obviously itself is
 24 not a test of strict necessity, and, as we know, the
 25 requirement of reasonableness is a fact-sensitive one

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1 which depends on the facts in each individual case.
 2 But, as we say in our skeleton argument, what is
 3 reasonably required has to be reviewed in the light of
 4 the overriding objective, and we've referred to
 5 a decision of the Court of Appeal in a case called
 6 ES v Chesterfield for that proposition in our skeleton
 7 at paragraph 57 and it is, or ought to be,
 8 uncontroversial.
 9 But what does seem to be controversial from the
 10 skeleton arguments that we have received, is the
 11 importance of the pleaded issues to carrying out the
 12 assessment: is it necessary? Is it helpful? Because,
 13 as I've said, and as your Lordship has observed, all of
 14 the defendants have focused overwhelmingly on what we
 15 refer to colloquially as the ultimate issue: did in fact
 16 these defendants collude?
 17 Now, I can give you some examples of that. The
 18 first is in the witness statement of Ms Bridge, on
 19 behalf of the Telefónica defendants, at bundle C5,
 20 page 3 {C/5/3}. I don't know if we can have that up on
 21 the screen. C5, page 3.
 22 Paragraph 10:
 23 "The question whether expert evidence from the
 24 Economics Experts is reasonably required in order to
 25 determine the proceedings is largely a matter for

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1 submission. Fundamentally, however, the Proposed
 2 Questions are inapt for expert evidence because the
 3 central issue which the Court will need to resolve at
 4 the trial — ie [is] whether the MNOs colluded in
 5 respect of their decision to stop selling mobile network
 6 connections ... through P4U — [it's] a question of
 7 fact. The determination of that question will turn on
 8 the Court's evaluation of the extensive contemporaneous
 9 documents and factual witness evidence."
 10 So what they say is that the central issue, the
 11 ultimate issue, for the court's determination is: did
 12 they collude? But they make that submission without
 13 reference to the pleadings.
 14 MR JUSTICE ROTH: Well, I'm not impressed by that
 15 submission —
 16 MR MACLEAN: Yes.
 17 MR JUSTICE ROTH: — as I've indicated.
 18 MR MACLEAN: Okay.
 19 MR JUSTICE ROTH: If there are important issues on the
 20 pleadings, they will have to be resolved as part of the
 21 process of deciding the ultimate question —
 22 MR MACLEAN: Yes.
 23 MR JUSTICE ROTH: — then it seems to me that the relevant
 24 question on this application is: well, is expert
 25 evidence necessary or helpful —

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1 MR MACLEAN: Yes.
 2 MR JUSTICE ROTH: — for those important issues?
 3 MR MACLEAN: But what we've been facing in the skeleton
 4 arguments that your Lordship has seen from the
 5 defendants is an approach which focuses almost
 6 exclusively on this question at the first stage. They
 7 say: well, it's not going to help on the ultimate issue.
 8 And a similar point is made by Vodafone, it's made —
 9 a similar point is made by Deutsche, "The fundamental
 10 issue", says Deutsche, "before the court, is whether or
 11 not there was collusion".
 12 MR JUSTICE ROTH: Well, as I say, I'm not impressed by the
 13 short point, but I think that's not all they are
 14 saying —
 15 MR MACLEAN: That's not all they are saying.
 16 MR JUSTICE ROTH: — they're saying the sub-issues, if you
 17 like, or the issues, not — and the ultimate questions
 18 also, are either not necessary or helpful for them and
 19 (overspeaking) —
 20 MR MACLEAN: Well, yes, and I am going to —
 21 MR JUSTICE ROTH: So that's what I think we need to focus
 22 on.
 23 MR MACLEAN: Yeah. I'm going to show your Lordship what
 24 Mr Justice Warren said about that in the British Airways
 25 case, and I'm going to invite your Lordship to conclude

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1 that on the basis of his approach, which we commend to
 2 the court, which we say is right in law, that you —
 3 unless — unless the court can say at a stage like this
 4 that expert evidence cannot assist, logically cannot
 5 assist, then the court should allow expert evidence
 6 which is necessary to the resolution of a pleaded issue.
 7 So, in our submission, the defendants come nowhere near
 8 that, satisfying such a test on this case, they simply
 9 can't.
 10 And what essentially they invite the court to do is
 11 to pre-judge how important the evidence that we propose
 12 is going to be to the resolutions of the issue before
 13 the court, that's essentially what they are seeking to
 14 do, by excluding this evidence which goes, we say, to
 15 pleaded issues. Now, that, in our submission, in a case
 16 of this nature, in a case of this size and importance,
 17 would be an extraordinary thing for the court to do.
 18 Can I take your Lordship to Mr Justice Warren's
 19 decision, which one finds in bundle {H/17/1}, which is
 20 volume 3 of 6 in the hard copy.
 21 MR JUSTICE ROTH: Yes. I've actually — I don't have the
 22 hard copy bundles.
 23 MR MACLEAN: Right.
 24 MR JUSTICE ROTH: Except for the original pleadings.
 25 MR MACLEAN: Yes.

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1 MR JUSTICE ROTH: And that's —
 2 MR MACLEAN: We'll do it on the screen, my Lord.
 3 MR JUSTICE ROTH: — what I've been reading. But I have got
 4 Mr Justice Warren's judgment in hard copy.
 5 MR MACLEAN: In hard copy?
 6 MR JUSTICE ROTH: Yes.
 7 MR MACLEAN: Ah. Does your Lordship have a hard copy of the
 8 Pensions Law Reports version?
 9 MR JUSTICE ROTH: No, I've got it in — but it's
 10 paragraphed.
 11 MR MACLEAN: Yes, that's fine. I'm told the paragraphs are
 12 the same.
 13 Now, by way of background, my Lord, the case
 14 involved a claim by British Airways against —
 15 challenging the decision made by British Airways pension
 16 fund trustees to award increased pensions to BA
 17 pensioners. And the nub of the complaint by British
 18 Airways was that the trustees' decision was unlawful as,
 19 amongst other things, the trustees had pre-determined
 20 the issue of whether to award increased pensions, and it
 21 appears that the amount at stake was very large —
 22 potentially very large, hundreds of millions of pounds.
 23 Now, the Deputy Master had refused BA's application
 24 to adduce expert actuarial evidence, and when one reads
 25 the report, one sees that the principal ground on which

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1 refusal — the Deputy Master refused to grant permission
 2 was that the evidence did not go to the ultimate issue.
 3 Mr Justice Warren dealt with BA's appeal, BA arguing
 4 that the Deputy Master had applied the wrong approach,
 5 and he should have investigated whether the expert
 6 evidence was either necessary or helpful in relation to
 7 the pleaded issues.
 8 Now, the ultimate issues in the case, which one can
 9 see from reading paragraphs 2 through 8, I can summarise
 10 as this.
 11 The first question was whether the pension trustees
 12 had power to amend the rules of the pension scheme to
 13 give themselves a power to grant pension increases.
 14 And, secondly, assuming that such power had been validly
 15 created, was it validly exercised by the trustees when
 16 they decided to increase the pensions on a discretionary
 17 basis?
 18 Now, one of the key arguments run by BA in this case
 19 was that the trustees had not genuinely acted on
 20 professional actuarial advice when deciding to make the
 21 pension increases. They had pre-determined the increase
 22 should be made and then took and relied on such advice
 23 as supported the decision that they had already taken in
 24 substance.
 25 Now, you can see from paragraph 16 of the learned

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1 judge's judgment, if one can get that, that's H17,
2 page 5 {H/17/5}. Your Lordship has paragraph 16 in hard
3 copy.

4 MR JUSTICE ROTH: Yes.

5 MR MACLEAN: "BA's case is that Mr Pardoe's [he was the
6 advising actuary] advice changed and became
7 progressively less and less prudent and more and more
8 unorthodox. The AMT methodology which was eventually
9 arrived at purported to reconcile what, on BA's case,
10 are irreconcilable elements with the result that
11 Mr Pardoe did not, in the end, advise against the grant
12 of discretionary increases when his original advice had
13 been against it. Mr Tennet says that the way in which
14 this advice changed will assist BA's case on
15 predetermination; and to understand the way in which
16 this advice changed and the reasons for it can only be
17 elucidated in the light of expert evidence going to the
18 sort of advice which an actuary in Mr Pardoe's position
19 could properly have given."

20 Paragraphs 23 and 24, my Lord, echo a point which is
21 made by the defendants.

22 MR JUSTICE ROTH: Sorry. Mr Pardoe was one of the trustees?

23 MR MACLEAN: No, my Lord. Mr Pardoe was the actuary on
24 whose advice the trustees had purported to act.
25 (Pause).

21

1 MR JUSTICE ROTH: Yes.

2 MR MACLEAN: Now, I was going to say, paragraphs 23 to 24 of
3 the judgment refer to the — what Mr Justice Aikens said
4 in the Springwell case, in relation to the adduction of
5 expert evidence.

6 And you will see in paragraph 24 that:

7 "Mr Tennet ... did not, in his oral submissions, go
8 so far as to suggest that BA should be entitled to
9 adduce the expert actuarial evidence which it wishes to
10 rely on simply to help the judge understand some of the
11 actuarial matters ..."

12 Now, that, of course, is right. We don't dispute
13 that simply adducing evidence to assist in digesting
14 material or explaining things that should be
15 uncontentious or capable of agreement, it's not
16 necessary. But in this case, we say it's important not
17 to stretch that proposition to something rather more
18 dramatic and wrong, and we suggest that it does not
19 preclude the court ordering expert evidence where it's
20 necessary and where the expert's evidence will involve
21 scrutiny or analysis of the context for — for the
22 content of contemporaneous documents, as we envisage in
23 this case.

24 Now, your Lordship sees at paragraph 26, the learned
25 judge starts a very detailed analysis of the pleaded

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1 issues in the case, and I'm not going to go through this
2 in detail, because it's very involved.

3 MR JUSTICE ROTH: Mm—hm.

4 MR MACLEAN: And I don't — my submissions don't depend on
5 establishing there is an exact parallel between the
6 issues which arose in that case with the issues which
7 arise in this case, because they are very different.

8 But there is one parallel that's worth noting in
9 this case. All of the defendants deny that a unilateral
10 decision to cease supplies to Phones 4u would have been
11 irrational and, to a greater or lesser extent, they pour
12 scorn on that idea.

13 Now, we obviously disagree with that, but let's
14 assume for the purposes of argument that there was
15 a reasonable basis for what the defendants say.

16 At paragraph 50, my Lord, if one can look at that,
17 which is on {H/17/10}, Mr Justice Warren refers to
18 a particular paragraph in the particulars of claim and
19 defence:

20 "PoC 275 admits PoC 240, although it is denied that
21 the Trustees' decision to grant discretionary increases
22 was inconsistent with the SFO."

23 That's the subsidiary funding objective.

24 "PoC 276, whilst emphasising that the SFO was always
25 a subsidiary objective, admits part of PoC 241. As to

23

1 the remainder ... it is admitted that getting to
2 self-sufficiency was and is an important objective, but
3 it is denied ... that (i) it was the sole or overriding
4 objective for the Trustees acting rationally for
5 prudently or (ii) it precluded the exercise of
6 discretion under Rule 15 ... If BA contends that
7 getting to self-sufficiency should have been
8 an overriding objective of the Trustees (a proposition
9 which is just about pleaded) then it would be of
10 assistance to have expert evidence to that effect (and
11 precisely what is meant) although I am bound to say that
12 it is a pretty startling proposition that it would be
13 perverse or irrational not to have had that as the sole
14 or overriding objective. Again, if it really is BA's
15 case that benefit increases costing £12 million were
16 inconsistent with that objective, then actuarial
17 evidence would assist in establishing that, again
18 startling, proposition. I am, of course, conscious that
19 startling propositions are sometimes correct."

20 Now, as your Lordship sees from the approach taken
21 by the learned judge, whether at a preliminary stage,
22 a pleading stage, he could take the view that the
23 proposition was startling or not wasn't an answer to the
24 desire by British Airways to call expert evidence which
25 was necessary to decide the case which was pleaded.

24

1 In this case, we submit, the independent rationality
2 of the MNOs' decisions are squarely in issue; whatever
3 the defendants say. So are a number of other sub—issues
4 for which the defendants in their skeleton arguments
5 seek to disparage the relevance of.

6 But even if, in our submission, the defendants were
7 on solid ground for pouring scorn on the likely
8 importance of those issues at trial, which we say they
9 are not, they are still pleaded issues which call for
10 determination and which call for expert evidence in
11 order to assist that.

12 And if I could ask your Lordship then to turn on to
13 paragraph 61 of Mr Justice Warren's judgment. That's at
14 H17, page 13 {H/17/13}.

15 You will see that Mr Tennet, who was representing
16 British Airways:

17 " ... submits that expert evidence need only be
18 helpful in resolving an issue justly."

19 And then he refers to the decision of
20 Mr Justice Evans—Lombe in Barings v Coopers and Lybrand.
21 And the learned judge, Mr Justice Warren, remarked:

22 "What the judge actually said is that evidence can
23 be excluded if the court comes to the conclusion that it
24 would not be helpful in resolving an issue which needs
25 to be decided where it is one of law or one on which the

25

1 court can come to a fully informed decision without
2 hearing such evidence but, whichever way one looks at
3 it, evidence is admissible, if it might be helpful. But
4 that is not, in my view, to say that it must be admitted
5 even if helpful because it may be disproportionate in
6 the light of the overriding objective to admit it.
7 I accept, of course, that evidence can be helpful even
8 if it's not determinative of any issue ..."

9 Paragraph 63 {H/17/14}, my Lord, is a key paragraph
10 and it draws a distinction between evidence that is
11 necessary and evidence that is helpful. You see the
12 learned judge says:

13 "This, it seems to me, is saying something very
14 different from the proposition that, because expert
15 evidence may prove of assistance, it should be admitted.
16 A judgment needs to be made in every case and, in making
17 that judgment, it's relevant to consider whether, on the
18 one hand, the evidence is necessary (in the sense that
19 a decision cannot be made without it) or whether it's of
20 very marginal relevance with the court being well able
21 to decide the issue without it, in which case a balance
22 has to be struck and the proportionality of its
23 admission assessed. In striking that balance, the court
24 should, in my judgment, be prepared to take into account
25 disparate factors including the value of the claim, the

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1 effect of a judgment either way on the parties, who is
2 to pay for the commissioning of the evidence on each
3 side and the delay, if any, which the production of such
4 evidence would entail (particularly delay which might
5 result in the vacating of a trial date)."

6 Then paragraph 64:

7 "Let me get one point out of the way. CPR 35.1
8 refers to 'the proceedings' ..."

9 Forgive me, my Lord.

10 MR JUSTICE ROTH: Would it be helpful for me, because
11 I haven't looked at it before, rather than you just
12 having to read it all out, have it read. Obviously 68
13 is important and —

14 MR MACLEAN: 64 is too, my Lord.

15 MR JUSTICE ROTH: So can I read 64 to 68, or do you want me
16 to go ...?

17 MR MACLEAN: I'm going to — yes. Read 64 to 68, my Lord,
18 if you kindly would, then I will have some more
19 paragraphs to refer your Lordship to.

20 MR JUSTICE ROTH: Yes. (Pause).

21 Yes.

22 MR MACLEAN: I'm grateful, my Lord.

23 Now, your Lordship will appreciate, for obvious
24 reasons, I rely particularly on what the learned judge
25 said in paragraph 66 in relation to issues which cannot

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1 affect the outcome.

2 Now, in this case, in our submission, any attempt by
3 the defendants to suggest that the pleaded issues to
4 which we suggest the expert evidence we seek goes,
5 cannot affect the outcome of the case, is hopeless.
6 Absolutely hopeless. Nor, indeed, have any of these
7 defendants, since these matters were ventilated in the
8 pleadings, sought to come to court to say: judge, please
9 exclude these issues, pursuant to the case management
10 powers, from consideration. So that is an extremely
11 important feature of the learned judge's judgment.

12 And the court will, of course, if it permits expert
13 evidence to be given, retain control of the process
14 throughout. So one might envisage a circumstance where,
15 if your Lordship is minded to give permission to the
16 claimants to adduce expert evidence, as we seek, that
17 the court still has the power at the trial stage to
18 say: well, in the light of what I have seen in the trial
19 witness statement, it's all in light of the evidence,
20 which I have heard in the trial, I'm not minded to allow
21 this expert evidence to be given. That is all within
22 the case management powers of the court.

23 But, in our submission, it would be extraordinary
24 and wrong, as a matter of law, to exclude or preclude
25 evidence which my clients seek to adduce in relation to

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1 issues which are pleaded, which are necessary to their
2 case, in circumstances where none of these defendants
3 have attempted to persuade the court that these issues
4 cannot affect the outcome of the trial.

5 And respectfully, my Lord, your Lordship doesn't
6 have a crystal ball. Although your Lordship has
7 enormous experience in these types of cases, your
8 Lordship cannot know, at the end of the day, what
9 evidence is going to be given by these defendants. They
10 may turn up and give no evidence at all, if your
11 Lordship decides that we shouldn't have permission to
12 adduce expert evidence which, in our submission, is
13 going to establish the prima facie rationality of
14 a decision to terminate Phones 4u unilaterally, unless
15 they knew that the other MNOs were going to do likewise.

16 MR JUSTICE ROTH: Don't we have to look, and that's what

17 Mr Justice Warren is potentially saying, at identifying
18 the particular issues —

19 MR MACLEAN: Yes.

20 MR JUSTICE ROTH: — which you say expert evidence is either
21 necessary or helpful —

22 MR MACLEAN: Of course, my Lord.

23 MR JUSTICE ROTH: — and then assess whether, actually,
24 expert evidence goes materially to that issue, and
25 that's the exercise we have to carry out?

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1 MR MACLEAN: That's the exercise your Lordship has to carry
2 out, but it's not an exercise, in my submission, that
3 the defendants really have carried out in the way in
4 which we have. What they've sought to do, for example,
5 in relation to — your Lordship will recollect, there is
6 an issue as to whether the experience or actions of
7 Three, one of the non-defendant MNOs, whether that its
8 decision to cease selling through Phones 4u is
9 a comparator. That is a point which is raised by the
10 defendants, some or all of them, and they say: well,
11 look, the fact that Three decided not to sell through
12 Phones 4u shows you that your argument that MNOs
13 couldn't leave unilaterally is wrong, and they all rely
14 on that. So that's an argument they raise.

15 And we say: no, no, no, that's wrong for a host of
16 reasons which depend on Three's position in the market,
17 for example.

18 And your Lordship may see, in Orange's skeleton
19 argument, that it's said that it's most unlikely that
20 the court will have to determine whether Three is
21 a close comparator for the other MNOs. But that's
22 a surprising submission, given that it's a point which
23 is raised by the defendants, not Phones 4u, and put
24 forward as a potential defence to our claim.

25 Now, if they're saying: okay, we'll simply drop that

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1 argument, that may take the position of Three off the
2 table. But until they do so, it's a pleaded issue which
3 is going to have to be explored through expert evidence.

4 So the "most unlikely to affect" is well below the
5 standard that we say Mr Justice Warren identified in
6 paragraph 66. They can't say, and they don't seek to
7 say, that that issue cannot affect the outcome of the
8 case, and indeed some of them maintain it as part of
9 their defence.

10 Now, it may be that, if I could invite your Lordship
11 to — could I invite your Lordship to look at paragraphs
12 76 to 77 as well?

13 MR JUSTICE ROTH: British Airways?

14 MR MACLEAN: The British Airways, my Lord, yes. For those
15 who are following electronically, {H/17/16}. (Pause).

16 Now, thank you, my Lord. I'm not clear whether your
17 Lordship wants to take a break. I'm very happy to press
18 on, but your Lordship did indicate that there might be
19 scope for a break at this time, but it's a matter for
20 your Lordship, obviously.

21 MR JUSTICE ROTH: I think, because we started late, it's not
22 so much for my benefit. We'll press on until 1 o'clock,
23 but —

24 MR MACLEAN: I'm grateful, my Lord.

25 MR JUSTICE ROTH: We will have a break in the afternoon,

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1 but —

2 MR MACLEAN: Of course, of course, my Lord.

3 Now, as far as 76 and 77 are concerned, the
4 reason — your Lordship will obviously appreciate why
5 I referred to these paragraphs, because the defendants
6 all make a virtue of the fact that they are going to
7 call witnesses who can speak to the modelling, for
8 example, which was done in order to justify the
9 decisions which were taken. Your Lordship may recollect
10 that EE says that their decision, which was taken on
11 21 May 2014, was based on an iteration of the models.
12 And the models, when one looks at them, are not easy,
13 without the benefit of expert evidence, actually to
14 understand or to see what assumptions were underlying.

15 Now, they say: oh, well, you can simply — we will
16 call these people. And we say to that: well, how we
17 know you will? But even if you do — they
18 effectively — what they're going to do is to give
19 evidence of fact and quasi expert evidence, based on
20 their supposed skill and experience. And there's
21 inevitably going to be a blurring of the distinction
22 between what they actually know and what they seek to
23 justify, based on their experience and knowledge.

24 MR JUSTICE ROTH: You see, the modelling is rather
25 a different thing. If you look at the detail of the

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1 modelling, Mr Pardoe is an actuary —
 2 MR MACLEAN: Yes.
 3 MR JUSTICE ROTH: — and, therefore, with a specialist
 4 skill —
 5 MR MACLEAN: Yes.
 6 MR JUSTICE ROTH: — with a professional skill. There is
 7 a question whether his methodology as an actuary was
 8 a prudent one —
 9 MR MACLEAN: Yes.
 10 MR JUSTICE ROTH: — and, therefore, BA wanted to have
 11 expert actuarial evidence to test that.
 12 MR MACLEAN: Yes.
 13 MR JUSTICE ROTH: Mr Thomas is an economist —
 14 MR MACLEAN: He is.
 15 MR JUSTICE ROTH: — and what — he will be looking into
 16 this business modelling and business planning, that's
 17 not particularly what he's concerned with. And if he is
 18 to give evidence about that, that's a very detailed
 19 examination of going quite granularly into the modelling
 20 and the way it's done. Where I really am concerned
 21 that's coming much too late, we've known about that
 22 modelling since the defences.
 23 MR MACLEAN: Well —
 24 MR JUSTICE ROTH: If he wants to understand the question of
 25 just interpreting the law and understanding them, first

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1 of all, you write to ask, and if you don't get a proper
 2 answer, you can serve a request for further information,
 3 so you can understand them.
 4 But whether that is something (a) within Mr Thomas'
 5 expertise and (b) appropriate at this point, I don't
 6 know if you are saying anyway that the modelling is
 7 imprudent.
 8 MR MACLEAN: No, we're not saying the modelling is
 9 imprudent, no.
 10 MR JUSTICE ROTH: What —
 11 MR MACLEAN: We're wanting to identify what assumptions
 12 underlie the modelling. As your Lordship knows, it's
 13 our case that unless these MNOs assumed that Phones 4u
 14 would go out of business, unless that was an assumption
 15 they had, then the decision to unilaterally terminate
 16 Phones 4u was irrational, because it was likely, in the
 17 circumstances of the market, to be loss-making and it
 18 was certainly likely to be loss-making in the light of
 19 the previous experience which they had.
 20 Now, it will need — I simply can't hold up
 21 a spreadsheet and say to the court: look at the
 22 spreadsheet. And say to the witness: why is your
 23 assumption here that EE will retain all of the customers
 24 and clients that it had through Phones 4u, in the
 25 circumstances of terminating Phones 4u?

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1 Our pleaded case, which I'll come to in due course,
 2 is that unless EE knew what the other MNOs were likely
 3 to do, it would be irrational because they could not
 4 expect to retain anything like 100% of the sales which
 5 they had achieved through Phones 4u. We put at — they
 6 would need to expect to retain approximately 65% of the
 7 sales which they had made, and our economist will say
 8 that that is — unless you assume Phones 4u was going
 9 out of business, it's simply not an assumption which
 10 makes sense.
 11 Now, we need expert evidence to say that.
 12 There are a number of aspects to this.
 13 First of all, it's our pleaded case, and we need
 14 positive evidence to support our case —
 15 MR JUSTICE ROTH: Well, can we just — I think it would help
 16 me to just look at — rather than picking bits here and
 17 there, as you are doing, and as indeed, I must say, of
 18 course, the defendants have done in the other way, just
 19 to look at and identify on the pleaded case what are the
 20 points where you say that the evidence is necessary or,
 21 if not necessary, helpful.
 22 MR MACLEAN: Helpful. Yes, certainly. Well, let's turn to
 23 the pleadings. I wasn't —
 24 MR JUSTICE ROTH: I know you were coming to that.
 25 MR MACLEAN: No, I definitely was coming to that.

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1 MR JUSTICE ROTH: That seems to me the critical point. It
 2 was clear, subject to what the defendants may say, it's
 3 not about the ultimate question whether the judgment
 4 goes this way or that way, it's about the issues that
 5 may be necessary to decide — I say "may be", picking up
 6 your point that one cannot be sure at this stage, cannot
 7 be sure at this stage —
 8 MR MACLEAN: Absolutely.
 9 MR JUSTICE ROTH: — and that it's an issue focusing on the
 10 issues, as Mr Justice Warren says. But let's just look
 11 at that.
 12 MR MACLEAN: Right. Let's do that.
 13 So we have set out in our skeleton argument, and we
 14 needn't look at it, a detailed list of the various
 15 pleaded issues which we say expert evidence is necessary
 16 to be helpful. I'm not going to go through all of them.
 17 But let's start at the particulars of claim at
 18 paragraphs 124 to 129, which is at {B/3/68}. If we
 19 could have {B/3/68} up on the screen, please.
 20 Now, your Lordship sees, under the heading "Economic
 21 analysis", we say:
 22 "For the reasons explained in paragraphs 38 to 39
 23 above, it was only by an unlawful collusive
 24 agreement ... that each of the MNO Defendants could
 25 rationally and/or without intolerable commercial risk

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1 cease to supply P4U. No MNO Defendant acting rationally
 2 and/or in its own commercial interests would choose
 3 unilaterally to cease dealing with P4U in circumstances
 4 where P4U was likely to have one or more continuing
 5 commercial relationships ... because to do so would
 6 cause such MNO Defendant to lose significant market
 7 share of connections to other MNO defendants."
 8 Now, pausing there. It's in dispute between the
 9 parties as to what the nature of the market was, in this
 10 sense. Was this a saturated market? Was it — was the
 11 nature of the competition within these MNOs
 12 oligopolistic or not.
 13 So there is a dispute between the parties as to the
 14 precise nature and circumstances of the market at the
 15 time. I just mention that at this stage while we are
 16 going through it.
 17 MR JUSTICE ROTH: I think that is exactly the kind of point
 18 that I'm trying to identify.
 19 MR MACLEAN: Right.
 20 MR JUSTICE ROTH: So that's not to do with the individual
 21 decisions —
 22 MR MACLEAN: No.
 23 MR JUSTICE ROTH: — it's the nature and circumstances of
 24 the market —
 25 MR MACLEAN: Correct.

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1 MR JUSTICE ROTH: — and was it saturated, such that the
 2 points you make in — and highly constrained(?), the
 3 point you make in subparagraph (a) is correct.
 4 MR MACLEAN: Correct, yes. Exactly.
 5 So paragraph 124 isn't divorced from the factual
 6 pleas which precede it, which builds on a series of
 7 averments as to the market conditions, the nature of the
 8 competition between these MNOs and the basic economics
 9 of ceasing to supply a major retail intermediary, and
 10 Phones 4u in particular.
 11 I mean, can we look at the subparagraphs under this
 12 paragraph, which your Lordship has been looking at, and
 13 if I could have it up on the screen, please, and the
 14 following page.
 15 I think that must be {B/3/69}. Yes. So (b):
 16 "Each MNO Defendant, in considering its commercial
 17 relationship ... would compare the net present value of
 18 its customers in the ... scenarios that either (1) it
 19 did or (2) it did not continue its commercial
 20 relationship ... in this respect:
 21 "(i) Where a customer purchased a connection through
 22 P4U, each MNO Defendant would share with P4U the revenue
 23 and costs associated with that Connection."
 24 And we identify the relevant cashflows.
 25 "The NPV of a customer who joined an MNO Defendant

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1 network indirectly ... was less than the NPV of
 2 a customer who joined an MNO Defendant network
 3 directly."
 4 So one of the incentives for an MNO to get rid of
 5 Phones 4u essentially was that the value of a connection
 6 to the MNO, through Phones 4u, was less than the value
 7 of a connection which it could establish directly.
 8 And then (c) we say this:
 9 "It would only have been commercially rational for
 10 an MNO Defendant to terminate its commercial ..."
 11 MR JUSTICE ROTH: Sorry to interrupt you —
 12 MR MACLEAN: Sorry, my Lord.
 13 MR JUSTICE ROTH: — just pausing there. That's a question
 14 of fact —
 15 MR MACLEAN: It is.
 16 MR JUSTICE ROTH: — which may not be in dispute; if you
 17 have to share the revenue with an intermediary —
 18 MR MACLEAN: No, that is —
 19 MR JUSTICE ROTH: — that is its value.
 20 MR MACLEAN: At that level, that is not in dispute,
 21 absolutely. But it is a building block for
 22 understanding why it is that these MNOs might be
 23 motivated to get rid of Phones 4u. So that is
 24 a positive incentive to get rid of Phones 4u, because
 25 they're not as valuable or profitable to the MNO.

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1 MR JUSTICE ROTH: Yes.
 2 MR MACLEAN: Sorry, my Lord. I'm going to try and find —
 3 I find it easier to have the pleading in hard copy,
 4 rather than on the screen, because I can't scroll
 5 down —
 6 MR JUSTICE ROTH: No.
 7 MR MACLEAN: — in my mind.
 8 MR JUSTICE ROTH: I'm with you on that. (Pause).
 9 MR MACLEAN: Right. Looking at subparagraph (c) and perhaps
 10 (d) {B/3/70}. As far as (d) is concerned, that is in
 11 dispute, I believe, what the approximate NPV was.
 12 What is certainly in dispute in paragraph (e) is
 13 that:
 14 " ... only if, after termination of their commercial
 15 relationships with P4U, EE and/or Vodafone UK could
 16 expect to retain through alternative sales channels
 17 approximately 65% or more of the customers who had
 18 joined their networks via P4U, would it have been
 19 prospectively beneficial in NPV terms for EE and/or
 20 Vodafone UK to terminate their commercial relationship
 21 with Fiona P4U."
 22 Now, that is denied and disputed by the defendants.
 23 They say that's just not right.
 24 Also, they dispute is subparagraph (f):
 25 "It was extremely unlikely that, acting

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1 independently, each of EE and/or Vodafone UK could have
2 expected to retain anything like 65% of customers who
3 had joined their networks via P4U in the event that they
4 terminated their commercial relationships "

5 In particular, one sees that EE and Vodafone had
6 a share of the market for connections, which was
7 significantly below 65%.

8 EE's average share was 32 — I'm looking at the
9 amended version — 32% and Vodafone's average share was
10 20%. Those figures have been changed in the amended
11 pleading, my Lord.

12 EE and Vodafone each had a share of high street
13 stores selling connections significantly below 65%, and
14 EE's shares of high street store selling connections in
15 the UK was around 21%, and Vodafone's share was around
16 11.

17 And the key point in this regard, in this analysis,
18 is that they would broadly only be able to expect and
19 retain the percentage which reflected their proportion
20 of customers when Phones 4u was in existence. If
21 Phones 4u was not in existence, then the game would
22 change. But if Phones 4u was in existence and continued
23 to sell connections for another MNO, none of these
24 operators could expect to Hoover up a significant share,
25 unless Phones 4u was no longer in existence, and that is

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1 what this analysis seeks to establish.

2 Now, that is essentially summarised in
3 subparagraph (g) that there was no rational basis on
4 which the MNOs could expect to achieve the necessary
5 retention rate to make this not loss-making by
6 terminating, unless they assumed that Phones 4u would go
7 out of business. That in turn —

8 MR JUSTICE ROTH: You see, it's not apparent from the
9 questions in your application, but what you are seeking
10 to do, if that is what you are seeking to do, is to call
11 expert evidence to address and testify to what is
12 pleaded, and pleaded under the heading of "Economic
13 analysis", and pleaded by implicit reference to expert
14 economic evidence, given the last line of the main
15 paragraph before we get to subparagraph (f), and that's
16 what you are seeking to do.

17 MR MACLEAN: Yes, it is what we are seeking to do.

18 MR JUSTICE ROTH: So you've put in this, by way of evidence
19 from someone who's looked at the NPV and carried out
20 this calculation and says, "Well, that's what I say the
21 position is", and then the defendants can cross-examine
22 him and say, "No, that's wrong, because you haven't
23 taken account of this or that".

24 MR MACLEAN: Yes.

25 MR JUSTICE ROTH: And that may, therefore, include the state

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1 of the market, because obviously it's based on the
2 premise about the degree of saturation and concentration
3 of the market, which I can see is a matter where expert
4 evidence is helpful and perhaps one — you may say
5 necessary.

6 MR MACLEAN: I would say it's necessary.

7 MR JUSTICE ROTH: And then there are some qualifications
8 that you develop about customer loyalty and how they
9 might affect the calculations but to put that forward,
10 which has always been there, through an expert opinion.

11 MR MACLEAN: Yes.

12 MR JUSTICE ROTH: But is that all? There are some other
13 specific points —

14 MR MACLEAN: Well —

15 MR JUSTICE ROTH: — that you are seeking to do? That is
16 why I think I said at the very first CMC, it may be that
17 this is something on which you might need expert
18 evidence.

19 MR MACLEAN: Yes, you did. The sensitivity of the analysis,
20 for example to the matters which your Lordship sees in
21 paragraph 126, for example, network and losses, that
22 itself, whether the customers of Phones 4u, if I can put
23 it crudely, didn't really care who the MNO was, but were
24 very keen — were very aware of the flashy handsets that
25 they were getting from Phones 4u and the service they

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1 got from Phones 4u, that itself is in debate and in
2 issue between the parties. And how is the analysis
3 affected, how is it sensitive to that, is a matter which
4 is in dispute.

5 And we say, in subparagraph (c) on 126 {B/3/72}:

6 "There was no reasonable basis on which the MNO
7 Defendants could expect to retain such a high proportion
8 of customers ... [again] unless they were proceeding on
9 the assumption that Phones 4u would cease trading
10 following the cessation of supply."

11 But to take your Lordship's point: what are these
12 questions that you have drafted intended to do? Well,
13 the questions are intended to allow expert evidence to
14 address the issues which we say are both necessary and
15 helpful, which we identify in the pleading at
16 paragraph 124 onwards, because what question 1 boils
17 down to is this: what was the state of the market at the
18 relevant time? What were the incentives, on
19 an objective basis, which would attach to an MNO in
20 deciding whether to stay with or —

21 MR JUSTICE ROTH: That is a much more general question.

22 MR MACLEAN: Well —

23 MR JUSTICE ROTH: I mean, if you are saying that you want
24 expert evidence to address the pleaded case at
25 paragraphs 124 to — we will have to look at that.

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1 MR MACLEAN: It goes to 129, my Lord.
 2 MR JUSTICE ROTH: Wherever it's.
 3 MR MACLEAN: 129.
 4 MR JUSTICE ROTH: I will have to look at 128.
 5 MR MACLEAN: Yeah.
 6 MR JUSTICE ROTH: That seems to me — and perhaps there's
 7 an additional point about the change since 2006/2009,
 8 because of that experience, which is dealt with
 9 elsewhere —
 10 MR MACLEAN: Yes.
 11 MR JUSTICE ROTH: — but those are particular issues, that
 12 does seem to me a much more focused and rather different
 13 proposition, if I may say so, from the sort of
 14 broad-ranging expert evidence in the application.
 15 MR MACLEAN: Yes. Now, if we have failed to formulate the
 16 questions in relation to evidence which is necessary to
 17 resolve what are the issues on the pleadings, then we
 18 are at fault, and I will put up my hand on that basis.
 19 But we are not intending, by virtue of those
 20 questions, to permit of an abstract — as my learned
 21 friends say, an abstract expert report, no. If the
 22 expert is going to give evidence about the issues which
 23 we say arise in those paragraphs, first of all, he has
 24 to set out what the state of the market was, and that's
 25 what question 1 is designed to achieve.

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1 MR JUSTICE ROTH: Well, I don't myself see why you can't
 2 address the — be instructed to address the assertions
 3 and calculations and evaluation in these paragraphs of
 4 the pleading.
 5 MR MACLEAN: Yes. Well, that's certainly —
 6 MR JUSTICE ROTH: That is what he is asked to do, and it
 7 obviously depends — I may not say(?). But that does
 8 narrow it considerably and it focuses it much more
 9 precisely. And —
 10 MR MACLEAN: If your Lordship —
 11 MR JUSTICE ROTH: — one suspects that these paragraphs
 12 indeed may have been drafted with some expert
 13 assistance.
 14 MR MACLEAN: If your Lordship is saying to me — and
 15 obviously your Lordship has not heard from my learned
 16 friends — go away and try again and make something more
 17 focused in relation to the pleadings, then we will do
 18 that. We have not been seeking, and I can assure your
 19 Lordship, to produce questions which are designed to
 20 range far and wide beyond the pleaded issues. That is
 21 certainly not what we are intending to do. On the
 22 contrary, we are trying to encapsulate, in perhaps
 23 a more general form, the issues which we say arise on
 24 the pleadings, in relation to this aspect of the case.
 25 Now, one of the things that we are wanting to adduce

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1 evidence for the court is that when one looks at the
 2 models that the defendants rely upon by way of response,
 3 and my learned friends for Vodafone are particularly
 4 vociferous in making this point, they say that unless
 5 you suggest that the model and the documents which we
 6 relied on are shams and you haven't said that — and we
 7 don't say that — then your case can't succeed.
 8 But that's misconceived. They seek to put us into
 9 a false binary. We will say that, given the state of
 10 this market, and given the circumstances in which
 11 Phones 4u found itself, being one of the two main
 12 indirect retailers, and how the MNOs facing competition
 13 from one another found themselves, we're going to say
 14 that the assumptions which must have been built into
 15 these models can only have been on the basis that
 16 Phones 4u was going to go out of business.
 17 Now, how would you assume that Phones 4u was going
 18 to go out of business? If you left unilaterally, you
 19 would find yourself having the experience that you had
 20 in 2006 to 2009. It caused loss and it caused loss by
 21 reason of the structure of the market, which is why we
 22 plead, my Lord, that they are once bitten, twice shy,
 23 effectively.
 24 And what seems to have happened is that they could
 25 get over their fear of loss by projecting substantial

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1 profits, by virtue, we say, of the consultation which
 2 took place between the parties. Otherwise, the
 3 assumptions which underlie the model, which need to be
 4 interrogated and analysed, don't make any sense.
 5 Now, as I say, we don't need to say these models
 6 were shams or anything like that. We need to
 7 interrogate and analyse what underlies them. Was your
 8 assumption — what was your assumption as to the
 9 retention rate, for example? The retention rate is: how
 10 many customers will you retain, as a result of getting
 11 rid of Phones 4u? Will you, as we suggest in our
 12 pleading, never reach the retention rate of 65% or will
 13 you project that you are going to reach a retention rate
 14 of 100%? A retention rate of 100% can only mean that
 15 Phones 4u is going to go out of business.
 16 MR JUSTICE ROTH: Well, those are questions you can put.
 17 MR MACLEAN: Yes.
 18 MR JUSTICE ROTH: You don't need an expert to call. What
 19 you need the expert for is to say that with Phones 4u in
 20 the market the reasonable retention rate is 65%.
 21 MR MACLEAN: Yes.
 22 MR JUSTICE ROTH: That's the calculation —
 23 MR MACLEAN: And what these —
 24 MR JUSTICE ROTH: — or whatever it has been amended to.
 25 MR MACLEAN: And looking at these models which are put

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1 forward as the basis for the decision, I can tell you
 2 that the retention rate which is assumed in the models
 3 is far, far superior to that. That's something which
 4 I can't identify.
 5 MR JUSTICE ROTH: Yes. So I can see that that is something
 6 that — the pleaded point you make here and build a lot
 7 on, of course, that's very important —
 8 MR MACLEAN: Yes.
 9 MR JUSTICE ROTH: — the estimated retention rate.
 10 MR MACLEAN: Now, an important feature that your Lordship —
 11 when it comes to another aspect of the questions your
 12 Lordship put to me: why is this also so late? As
 13 a matter of fact, and if you read Mr Greeno's eighth
 14 witness statement, and I'm not going to turn it up now,
 15 if you read Mr Greeno's eighth witness statement, it's
 16 not correct to say that we've had the models or we've
 17 known about the models all along. True it is that in
 18 the pleadings, EE said: oh, we relied on models. And
 19 your Lordship will recollect that EE resisted providing
 20 the models and we got an order from your Lordship that
 21 they did, but it turns out that the documentation, which
 22 they — this was way back when, before disclosure — but
 23 it turns out that when we look at the disclosure, the
 24 models weren't all it, in this sense —
 25 MR JUSTICE ROTH: The models weren't all?

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1 MR MACLEAN: Weren't all it. Weren't the final answer.
 2 We've had to — we've had, in the course of the last
 3 couple of months, been seeking to obtain from the
 4 defendants precisely what it is they say amounted to the
 5 models on which these decisions were based, and the
 6 disclosure has been ongoing. I think the disclosure was
 7 given in September by one of the MNOs. So it's not fair
 8 to say — for the defendants to say — nor with great
 9 respect to your Lordship is it fair to say: oh, you've
 10 taken a long time to do all this. Because we are facing
 11 models which are, to a great degree, opaque, which
 12 require an expert to look at and analyse, and the
 13 process of disclosure in relation to those has been
 14 an ongoing one.
 15 MR JUSTICE ROTH: Well, I say, to clarify, that's not
 16 unusual. To understand somebody else's modelling or
 17 data you have to ask questions. There may be
 18 correspondence and if you don't get proper answers, you
 19 can apply for an order by way of further information.
 20 MR MACLEAN: Yes, of course.
 21 MR JUSTICE ROTH: And it may be that you will want your
 22 expert to look at them and then explain them to you.
 23 But that doesn't mean EE has to give evidence.
 24 If he gives his evidence about what is a reasonable
 25 retention rate, if that becomes, as it seems, it's

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1 a very important point —
 2 MR MACLEAN: It's, my Lord, and — so —
 3 MR JUSTICE ROTH: — EE can consider, on the part of that,
 4 the way they have come up with the retention rate. But
 5 again, I think that's somewhat removed from the more
 6 wide-ranging questions that have been put forward.
 7 You've taken me to these paragraphs. There is also
 8 somewhere — you say there's what you call the "once
 9 bitten, twice shy" point, namely the experience in 2006
 10 to 2009. Now, that's pleaded somewhere. Where is that?
 11 MR MACLEAN: I think it's in 37, B, my Lord. Your Lordship
 12 can appreciate that I'm having slight trouble
 13 manipulating the various bundles, for which I apologise.
 14 MR JUSTICE ROTH: Yes. (Pause).
 15 MR MACLEAN: If one starts, my Lord, at paragraph 37. 37,
 16 which is in {B/3/21} for those following electronically.
 17 Your Lordship sees, we allege that the defendants were
 18 aware of the commercial risks inherent to any unilateral
 19 decision:
 20 "In the market conditions described above, a MNO ...
 21 that ceased supplying ... would anticipate that many of
 22 its customers would thereafter be lost to the other MNOs
 23 it still sold Connections through Phones 4u.
 24 "Furthermore, there was fairly recent experience of
 25 the negative effects of the unilateral decisions not to

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1 trade with the other major retailers."
 2 MR JUSTICE ROTH: Right. So we then want to look at the
 3 defence to that statement.
 4 MR MACLEAN: Yes, certainly.
 5 MR JUSTICE ROTH: And what it said about —
 6 MR MACLEAN: Let me — yes. Let's look at — is it
 7 paragraph 109?
 8 MR JUSTICE ROTH: I think EE came a bit later, didn't it?
 9 MR MACLEAN: Yes. I mean, if one looks at the EE defence,
 10 at paragraph 62c, which is at {A/3/21}, so it's
 11 paragraph 62c.
 12 MR JUSTICE ROTH: Yes. The market conditions were not the
 13 same as they had been in —
 14 MR MACLEAN: Exactly:
 15 "For example, the use of online retail had
 16 significantly expanded."
 17 Then Vodafone, perhaps if one looks at that,
 18 {A/6/17}.
 19 MR JUSTICE ROTH: Just a moment. (Pause).
 20 Yes. And then you want to go to —
 21 MR MACLEAN: To Vodafone, which is {A/6/17}.
 22 Paragraph 31.4, if we can get that up in the Vodafone
 23 defence, please {A/6/17}. (Pause).
 24 Ah, now I've got it.
 25 So there your Lordship sees a fairly lengthy and

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1 detailed riposte to the notion that earlier experience
 2 was relevant. And it says that the analysis — or an
 3 analysis is wholly deficient. (Pause).
 4 MR JUSTICE ROTH: Yes. So there's a specific issue as to
 5 whether the change in the circumstances of the market,
 6 and there clearly was change, that's obvious, between
 7 2006 to 2009, and I suppose 2013 to 2014, set out by the
 8 defendants such that the experience of what happened in
 9 2006 to 2009, that you refer to at paragraph 37, was not
 10 relevant.
 11 MR MACLEAN: Yes, or was material.
 12 MR JUSTICE ROTH: Or not —
 13 MR MACLEAN: Not material.
 14 MR JUSTICE ROTH: Not material, yes.
 15 MR MACLEAN: Absolutely.
 16 MR JUSTICE ROTH: So that's ...
 17 MR MACLEAN: Those are a range of issues which, in my
 18 respectful submission, we say expert evidence is
 19 necessary to resolve.
 20 MR JUSTICE ROTH: Yes.
 21 MR MACLEAN: And even if it were not necessary, as a matter
 22 of fairness from the perspective of my client, they
 23 ought to have the benefit of putting a report which
 24 establishes a factual — establishes a case, which
 25 supports the pleaded case, through expert evidence.

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1 But I mean, suppose, my Lord, that I'm
 2 cross-examining one of O2's witnesses — take O2, for
 3 example — to the effect that the contemporaneous
 4 documents — and O2 may be a bad example because O2 has
 5 destroyed a lot of documents — but suppose I'm
 6 cross-examining O2 and the witness says, "Well, the
 7 failed experiment had no real relevance to this",
 8 because the circumstances had changed dramatically
 9 between 2006 and 2009, so it was no longer relevant. We
 10 want to explore, my Lord, whether the changes were
 11 significant and material to the decision to cease
 12 supplies. What am I supposed to do when the witness
 13 says, "Ah, well, we didn't have any regard to it or we
 14 didn't think it was relevant for the following reasons"?
 15 How am I to challenge the reasons which are given,
 16 unless I have some basis in an expert report?
 17 So as I came to the end of the trial and we've done
 18 very well with the witnesses and your Lordship didn't
 19 think that the witness had done very well, nevertheless
 20 one can anticipate the submission that can be made by my
 21 learned friends: well, that's all fine and dandy, but
 22 where is the evidential foundation for what Mr MacLean
 23 says in this pleaded case? And the evidential
 24 foundation will be in the expert —
 25 MR JUSTICE ROTH: No, I understand that, that specific point

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1 about changing market conditions and they are keen
 2 that —
 3 MR MACLEAN: The same point, my Lord, goes to the
 4 significance or otherwise of Three. Now, let me see if
 5 I can give your Lordship the reference.
 6 Now, Three comes the other way round. This is
 7 a point raised defensively against us, and they
 8 say: what you're saying in relation to unilateral
 9 decisions is blown out of the water or is shown not to
 10 be correct by the experience of Three, which left
 11 unilaterally. And one can go back to the Vodafone
 12 defence at 31.4.
 13 MR JUSTICE ROTH: 31.4?
 14 MR MACLEAN: I think it is in the penultimate sentence.
 15 MR JUSTICE ROTH: Just a moment. (Pause).
 16 MR MACLEAN: Your Lordship sees the —
 17 MR JUSTICE ROTH: Yes.
 18 MR MACLEAN: The penultimate sentence of paragraph 31.4
 19 {A/6/17}:
 20 "The dispensability of indirect distributors had
 21 been demonstrated by Three ..."
 22 Leave aside O2's position at the moment. So that is
 23 advanced as a reason why we are wrong.
 24 Now, the same point is made explicitly in Deutsche's
 25 defence at paragraph 32(a). That's at {A/4/16}.

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1 MR JUSTICE ROTH: Three terminated in about April 2012,
 2 didn't they?
 3 MR MACLEAN: That's correct, my Lord, yes.
 4 MR JUSTICE ROTH: Yes.
 5 MR MACLEAN: Deutsche's defence, paragraph 32(a), which is
 6 at bundle {A/4/16}.
 7 "It is denied that, in the absence of any unlawful
 8 conduct by the Defendants, the risk of termination of
 9 dealings with P4U was 'very small'.
 10 MR JUSTICE ROTH: Just a moment.
 11 MR MACLEAN: Sorry, my Lord. This is Deutsche's defence,
 12 paragraph 32(a). So this is a response to the pleading
 13 in relation to what we've been looking at:
 14 "It is denied that, in the absence of any unlawful
 15 conduct by the Defendants, the risk of termination of
 16 dealings with P4U was 'very small'. There are obvious
 17 circumstances where such terminations may well make
 18 sense as a unilateral matter ... For example:
 19 "In the UK, Three has long since terminated dealings
 20 with indirect distribution."
 21 So that's said to demonstrate that our case as to
 22 irrationality is not right.
 23 And then if we look at our reply, my Lord, to
 24 Deutsche's defence, which is in our reply in bundle
 25 {A/9/4} at paragraph 12.

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1 MR JUSTICE ROTH: {A/9/4}?

2 MR MACLEAN: If we could have that up on the screen, so —

3 MR JUSTICE ROTH: Paragraph 12.

4 MR MACLEAN: We say, this is our reply:

5 "It is admitted that Three exited indirect

6 retail ... including by ceasing to supply ... Three was

7 in a materially different position from EE, such that

8 its conduct does not shed light on the incentives that

9 applied to EE (or the other defendant MNOs) in the

10 relevant period."

11 And we go to identify a number of features of EE.

12 For example, they had a much smaller market share. At

13 the time of its decision to cease supplies, its share

14 was 9%. It made only a small proportion of its sales

15 through indirect retailers, compared to an average at

16 the time of 44% for the other defendants. It didn't

17 have sufficient infrastructural capacity, etc, etc.

18 So how are we supposed to, in my submission, deal

19 with this satisfactorily and fairly at trial, unless we

20 have expert evidence which supports this? (Pause).

21 Now, my Lord, there are other issues which we've

22 identified, pleaded issues which we've identified in our

23 skeleton argument at paragraph 81, which we say call for

24 expert evidence as a matter of necessity. And even if

25 we're wrong about that, they would be helpful, in order

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1 for these issues to be dealt with at trial. For

2 example, in our skeleton argument, paragraph 81(g).

3 MR JUSTICE ROTH: Yes, the downward to pressure on price.

4 MR MACLEAN: Yes. Now, that is not agreed between the

5 parties, but it's relevant as an incentive, which we

6 were seeking to identify, at contributing to the MNOs'

7 desire to effect what is euphemistically referred to in

8 the documents as "market repair". And so the economic

9 incentive to market repair is in issue between the

10 parties and, in my submission, requires or at least

11 allows for the admission or the adducing of expert

12 evidence.

13 MR JUSTICE ROTH: Yes.

14 MR MACLEAN: And if your Lordship goes back in paragraph 81,

15 you will see, to an extent, that I've already dealt with

16 those subparagraphs in addressing your Lordship. 2006

17 to 2009 is the failed experiment.

18 MR JUSTICE ROTH: Just a moment. Let me — that is said to

19 be about paragraphs 3(d) and 27 and 28.

20 MR MACLEAN: Oh, sorry, your Lordship is looking for the

21 pleading reference?

22 MR JUSTICE ROTH: Yes. (Pause).

23 So it's really 27(a) and 27(b)?

24 MR MACLEAN: Yes.

25 MR JUSTICE ROTH: Effect of intermediaries on price

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1 competition. Yes.

2 MR MACLEAN: If your Lordship reads through all of these

3 points, under subparagraph 81, I do submit that these

4 are issues which arise in the pleadings which do require

5 expert evidence. Take, for example, subparagraph (e),

6 where we say that an important incentive to stay with

7 Phones 4u —

8 MR JUSTICE ROTH: Well, I think we've covered that, haven't

9 we? That's the saturated —

10 MR MACLEAN: Yes.

11 MR JUSTICE ROTH: And that's in the paragraphs we've been

12 looking at, isn't it? It's in 124 and ... (Pause).

13 MR MACLEAN: Well, the attractiveness — the out-performance

14 of Phones 4u in attracting other customers in fact

15 appears at paragraph 36, which is anterior to the

16 paragraphs that your Lordship was looking at, at 37, 38

17 and 39. It's another fact ...

18 MR JUSTICE ROTH: Paragraph ... (Pause).

19 MR MACLEAN: Yes. And then the attractiveness of Phones 4u

20 to the younger customers is one of the factors which is

21 referred to back in paragraph 128(a), when your Lordship

22 gets to those paragraphs, 124 through 129.

23 MR JUSTICE ROTH: Yes. It's 12 — that's what I had in

24 mind, 128(a) and it goes with 36.

25 MR MACLEAN: Yes.

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1 MR JUSTICE ROTH: So it goes to the calculations(?).

2 MR MACLEAN: It does. (Pause).

3 And, finally, before I anticipate your Lordship may

4 wish to rise, perhaps your Lordship would look at

5 paragraph 81(h), where one of the allegations that is

6 made is that Phones 4u wasn't a viable business, or

7 wouldn't be a viable business, if one of the MNOs left.

8 MR JUSTICE ROTH: 81(h) in the?

9 MR MACLEAN: In the skeleton, my Lord.

10 MR JUSTICE ROTH: In the skeleton.

11 MR MACLEAN: Now, these are issues which obviously are

12 raised by the defendants, which remain in issue, but

13 it's relevant to the question of: in the market

14 circumstances, what are the incentives, operating on

15 these MNOs to retain or get rid of Phones 4u? And they

16 say: well, if, in those circumstances, one MNO left, you

17 wouldn't have a viable business. And your Lordship

18 sees —

19 MR JUSTICE ROTH: That's a rather different question that

20 looks at your client and whether it could operate with

21 only one MNO.

22 MR MACLEAN: Well —

23 MR JUSTICE ROTH: So that's a quite different issue, isn't

24 it? Just focusing on you.

25 MR MACLEAN: Yes. I mean, this —

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1 MR JUSTICE ROTH: That's not neatly covered by your
2 question.
3 MR MACLEAN: Well, it is.
4 MR JUSTICE ROTH: Is it?
5 MR MACLEAN: It is covered in the incentives.
6 MR JUSTICE ROTH: Well, is it? Yes, but the question —
7 unless, do you accept that it wouldn't have a viable
8 business, if it's supplied by only one?
9 MR MACLEAN: Certainly not.
10 MR JUSTICE ROTH: No. So, I mean, that's a matter that
11 would have to be explored, looking at your commercial
12 operation.
13 MR MACLEAN: Not just our commercial operation. It raises
14 a broader question as to what — consumers in the
15 market, who buy these phones, what is the importance to
16 them of being able to choose between different MNOs in
17 an indirect retailer.
18 MR JUSTICE ROTH: Yes, but all I'm saying is that the
19 pleading here is, they concede that it would no longer
20 be a credible operator in those circumstances. And
21 whether that's a rational view is a separate question.
22 Could you operate —
23 MR MACLEAN: Sorry, my Lord?
24 MR JUSTICE ROTH: — with only one MNO?
25 MR MACLEAN: They certainly assert that, and they may assert

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1 that they believe that. But we don't accept they're
2 right about that. But they are seeking to put that
3 forward as an explanation, as a defence to the claim
4 that no rational MNO would leave, unless they knew what
5 the other MNOs were going to do, they seek to put that
6 forward as part of their defence.
7 MR JUSTICE ROTH: Yes, but looking at your questions, that
8 is not covered at all.
9 MR MACLEAN: Well —
10 MR JUSTICE ROTH: It is an entirely different area of
11 enquiry, whether Phones 4u could viably operate if it
12 was supplied by only one MNO.
13 MR MACLEAN: Well, it is not — I accept, it's not set out
14 there in black and white, but we say it falls within the
15 umbrella term "the incentives".
16 MR JUSTICE ROTH: No, I don't think — forgive me. I don't
17 think it does. You can say that if you were no longer
18 in the market, then to what extent would that benefit
19 the MNOs? That's quite a different question from
20 whether, on your actual operations, it would have that
21 effect. What you put in your question is: assuming that
22 you would exit the market, then how would that work
23 as — what significance would that have?
24 MR MACLEAN: Well, if your Lordship looks at question 2(b),
25 the existence or non-existence of another MNO sending

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1 supplies to Phones 4u, and let's assume that EE decides
2 to leave and it doesn't know that Vodafone is going to
3 leave, then Phones 4u will retain the benefit of
4 a supply from Vodafone, unless EE knows or anticipates
5 that Vodafone will leave.

6 The question then is: is the offering of Phones 4u
7 such that another MNO, it will say inevitably and
8 rationally: ah well, Phones 4u, as a stand-alone
9 business, cannot succeed or cannot survive on the basis
10 of simply having one MNO.

11 So in other words, if EE says: we'll leave
12 independently, the defendants are saying that the market
13 position — so it's looking at the market position of
14 Phones 4u, the market position — wouldn't be credible.
15 Well, that's a matter which we are entitled to explore,
16 in my submission, through expert evidence.

17 MR JUSTICE ROTH: But the matter being what, precisely?
18 Whether Phones 4u would be credible?

19 MR MACLEAN: Yes. So it's a market perception; the
20 perception in the market. It's not our internal
21 finances that we're looking at here.

22 One of the considerations would be: well, what role
23 would MVNOs, these are the virtual mobile operators,
24 have to the perception in the market, as to the
25 viability or credibility of Phones 4u? It doesn't

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1 depend on examining Phones 4u's internal finances.
2 That's not the point.

3 MR JUSTICE ROTH: I don't quite see where —

4 MR MACLEAN: It is a perception question.

5 MR JUSTICE ROTH: The market perception is a question of
6 economic expertise.

7 MR MACLEAN: Well, first of all, you have got to examine
8 what the state of the market was and what the perception
9 of the market would be, in the event that these MNOs
10 perceived that there was only one supplier. How is its
11 position in the market affected, in the event that it
12 only has one supplier?

13 It is, to an extent, connected to the issue of
14 network agnosticism which I've already been running the
15 houses on.

16 MR JUSTICE ROTH: I'm not persuaded on that, but I think
17 it's time we'd better take a break perhaps, and you can
18 say something more about that briefly after the short
19 adjournment and I will come back at 2.05.

20 MR MACLEAN: Right.

21 MR JUSTICE ROTH: And then how much more do you have on this
22 point? Because obviously we started at 11 and we have
23 a lot of defendants.

24 MR MACLEAN: Maximum half an hour.

25 MR JUSTICE ROTH: Yes. I've got your basic point on the

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1 principles. I've said that I am concerned about the
 2 nature of the questions that are put out.
 3 And I'm looking at a more focused question of expert
 4 evidence, looking at these particular issues on the
 5 pleadings; and I'm not sure, at the moment —
 6 particularly having regard to timing, which does concern
 7 me — that it should be something that we should be
 8 scrutinising, in an expert report, the modelling that's
 9 actually done by the defendants. The expert can help
 10 you understand that modelling and there may be some
 11 questions you want to put by way of cross-examination,
 12 but I think the expert evidence that, it's going through
 13 my mind, if that assists you and assists the defendants,
 14 may be helpful or potentially necessary, is to support
 15 and make good, as you would wish, the assertions that
 16 you put in the pleading about the market and about the
 17 necessary number of retentions and likely level of
 18 retentions, and so on.
 19 MR MACLEAN: My Lord, yes.
 20 MR JUSTICE ROTH: And that's effectively your own modelling
 21 that you've done, to some extent.
 22 MR MACLEAN: To some extent. But I mean, ultimately, the
 23 defendants say what matters is their modelling.
 24 MR JUSTICE ROTH: Well, no. I know they say that. But you
 25 say that if this is the right model, then they can

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1 credibly believe their model, save on the assumption
 2 that Phone 4u —
 3 MR MACLEAN: Yes.
 4 MR JUSTICE ROTH: — that's okay, Phones 4u will exit the
 5 market —
 6 MR MACLEAN: Yes, that's right.
 7 MR JUSTICE ROTH: — so that is why you've got to support
 8 what you say here —
 9 MR MACLEAN: Yes.
 10 MR JUSTICE ROTH: — in your own pleading.
 11 MR MACLEAN: Exactly.
 12 MR JUSTICE ROTH: Well, I hope that gives you all some
 13 indication of the way my mind is working at the moment.
 14 Right. 2.05.
 15 (1.11 pm)
 16 (The short adjournment)
 17 (2.05 pm)
 18 MR JUSTICE ROTH: Yes, Mr MacLean.
 19 MR MACLEAN: My Lord, in the light of your Lordship's
 20 indications before the adjournment, there are two points
 21 that I wish to make as relatively briefly as I can. And
 22 the first relates to the form of the questions. And
 23 I preface this, this is an assumption that your Lordship
 24 is persuaded that some expert evidence is necessary or
 25 would be helpful in relation to the issue. And your

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1 Lordship's already indicated to me that you consider
 2 that the way in which these questions are expressed is
 3 too broad — potentially too broad.
 4 Now, one thing I would suggest is that if ultimately
 5 your Lordship comes to the conclusion that expert
 6 evidence is necessary or is helpful and on balance
 7 should be permitted, then the way — a way, subject to
 8 what your Lordship thinks, in which your Lordship's
 9 concerns could be addressed is to identify from the
 10 pleadings the particular aspects which we say are
 11 already captured by the broad questions which your
 12 Lordship has identified. But those questions would be
 13 narrowed, in effect, by restricting them to the
 14 particular elements, in the particulars of claim, that
 15 your Lordship considers should be the subject of expert
 16 evidence.
 17 Now, we are happy to take on board the preparation
 18 of such a —
 19 MR JUSTICE ROTH: Just a moment. My transcript is not
 20 working. Do others have that problem? No.
 21 MR MACLEAN: It may be a log-in issue, my Lord. My screen
 22 is working. (Pause).
 23 MR JUSTICE ROTH: I think I have lost the Internet
 24 connection.
 25 MR MACLEAN: Ah. (Pause).

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1 MR JUSTICE ROTH: Can I ask, will this affect the documents
 2 as well, or is it just the transcript? Well, maybe we
 3 should — while you are attempting to sort that out,
 4 maybe we should press on. We've got a transcriber, so
 5 it's just those ...
 6 MR MACLEAN: As your Lordship pleases. I'm happy to press
 7 on.
 8 MR JUSTICE ROTH: I think perhaps we should.
 9 MR MACLEAN: Absolutely.
 10 So the point I'm making is that, insofar as your
 11 Lordship considers that the questions are too broad,
 12 they can be narrowed.
 13 MR JUSTICE ROTH: Yes.
 14 MR MACLEAN: And that process of narrowing the questions
 15 ought not to take too long, and we, subject to obviously
 16 your Lordship concluding that expert evidence should be
 17 given, and subject to any steer that your Lordship may
 18 give to the parties, we would obviously proceed to get
 19 such reformulation before the other side by, say,
 20 Friday. And then your Lordship would obviously consider
 21 within what period of time any objection should be taken
 22 to the reformulation, and that would obviously be
 23 a short period of time.
 24 Now, if your Lordship were persuaded that the
 25 reformulation is appropriate, in order to encapsulate

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1 the issues which I've identified to your Lordship in the
 2 pleadings, then that ought not to have any knock-on
 3 effect on the trial timetable. Of course, that's —
 4 MR JUSTICE ROTH: If I am persuaded, and I haven't
 5 obviously —
 6 MR MACLEAN: No, I understand that, of course.
 7 MR JUSTICE ROTH: — heard the defendants, so I haven't
 8 decided, but if what I have in mind is to deliver
 9 a short judgment setting out the specific —
 10 MR MACLEAN: I see. Okay. Fine.
 11 MR JUSTICE ROTH: — issues on which it can and cannot be
 12 admitted —
 13 MR MACLEAN: Then that solves —
 14 MR JUSTICE ROTH: — it won't actually put necessarily
 15 all (?) the questions, but you can then very rapidly —
 16 MR MACLEAN: (Overspeaking) Yes, that solves the issue of
 17 us having to produce something by Friday. So that's the
 18 first point I wanted to make to your Lordship.
 19 The second point is this, and it relates to the
 20 question of the modelling relied on by the other side to
 21 show —
 22 MR JUSTICE ROTH: Yes.
 23 MR MACLEAN: — which your Lordship, as I understand from
 24 what your Lordship said to me, is not attracted to the
 25 idea that we should have expert evidence which analyses

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1 the modelling. But let me make a number of brief
 2 further submissions in relation to that.
 3 First of all, we say it puts the claimants at
 4 a position of considerable difficulty and unfairness
 5 potentially at trial, if we do not have an evidential
 6 foundation to explain to the court what the assumptions
 7 are underlying the model on which the claimants rely
 8 and, my Lord, underlying the models on which they do not
 9 rely.
 10 And the reason that that is important, my Lord,
 11 I wonder if I could show your Lordship a passage from
 12 our proposed amended pleading, which your Lordship
 13 hasn't yet given permission for, but which, as I say,
 14 the only substantial objection being taken to that
 15 pleading is by Mr O'Donoghue, and that is at bundle
 16 {B/3/46}. I don't know if your Lordship has the
 17 proposed amended —
 18 MR JUSTICE ROTH: I've now got it here.
 19 MR MACLEAN: You've got it, fantastic. {B/3/46},
 20 subparagraph 68L:
 21 "The knowledge and/or expectation was the context
 22 for a sharp change in EE's thinking regarding
 23 [Phones 4u]. On 10 April ... EE's analysis showed that
 24 discontinuing EE's relationship with P4U would cost EE
 25 £58 million in EBITDA (per annum). By 16 May 2014, EE

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1 had produced a new analysis, which showed that
 2 discontinuing EE's relationship with P4U would have
 3 a positive effect on EE's EBITDA, in the amount of
 4 £202 million over the period from 2015–2019. One
 5 component of this new analysis was that 'indirect retail
 6 consolidation' would 'facilitate handset cost
 7 efficiencies'. It is to be inferred that this new
 8 analysis, which culminated in a recommendation that EE
 9 should discontinue its relationship with P4U, was
 10 informed and/or influenced by the communications with
 11 Vodafone UK and/or Vodafone Group pleaded above."
 12 Now, as I say, EE doesn't rely on the anterior
 13 analysis in April. But we say it is very surprising, in
 14 the absence of something inappropriate occurring, the
 15 analysis would switch from discontinuing a relationship
 16 from Phones 4u, costing £58 million per annum, switching
 17 within a matter of weeks to producing a positive EBITDA
 18 of over £202 million.
 19 Now, we want to be able to produce evidence to the
 20 court which analyses and explains the assumptions which
 21 lie behind that, and that is not something that we can
 22 do without the benefit of expert evidence.
 23 And we are not envisaging an exercise which goes
 24 beyond that. We want to be able to tell the
 25 court: these are the assumptions which lie behind this.

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1 Now, the significance of those assumptions may be
 2 a matter for further debate; but we at least want to
 3 have before the court the evidence that these were the
 4 changes in the assumptions; and that is a concrete
 5 example of the sort of thing that we say we need expert
 6 evidence in order to achieve. Now —
 7 MR JUSTICE ROTH: Can I just try and understand this? You
 8 will obviously be asking about that in
 9 cross-examination.
 10 MR MACLEAN: Yes.
 11 MR JUSTICE ROTH: Maybe by a request for further information
 12 of what is meant by "indirect retail consolidation",
 13 etc. So you can explore what EE says on the
 14 assumptions, from how the change came about.
 15 MR MACLEAN: Yes.
 16 MR JUSTICE ROTH: Now, what is the expert opinion involved
 17 in doing that?
 18 MR MACLEAN: Well, the expert will identify — your
 19 Lordship, I anticipate, is suggesting that we would ask
 20 questions of the defendants; and they would cooperate,
 21 in answering those questions, as to the basis of the
 22 assumptions underlying the models. That is what
 23 I assume lies behind your Lordship's suggestion.
 24 Now, that is one way in which this could be
 25 achieved.

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1 MR JUSTICE ROTH: Well, they could be ordered to answer the
2 questions.
3 MR MACLEAN: Yes, they could be ordered to answer the
4 questions if they failed to cooperate. The history
5 suggests that it may take time in order to get this to
6 fruition, not least because of the blanket approach
7 which has been taken in relation to the expert evidence,
8 and not least because the modelling has only been coming
9 out in dribs and drabs.
10 MS JOHN: My Lord, I have to interrupt here. We have never
11 been asked any questions about our modelling and, as
12 Mr MacLean said, they have had our models since
13 March 2020. So I have to just interrupt to make that
14 clarification.
15 MR JUSTICE ROTH: I assume they have had this for a while,
16 because it is in the pleading that was prepared in
17 August.
18 MS JOHN: Exactly.
19 MR JUSTICE ROTH: So insofar as you don't understand it, but
20 you want to look at the assumptions behind it, you want
21 to say that that assumption cannot support this switch
22 when properly analysed, when properly calculated. As
23 a matter of scrutiny, it may be that that is something
24 that you need expert assistance on, which is a rather
25 narrow point, and I can see that possibility.

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1 MR MACLEAN: One of the points I'm making, my Lord, with
2 reference to paragraph 68L, is the fact that it must be
3 the case that there had been a change in the assumptions
4 underlying the projections between April and May, and we
5 also wish to understand why those changes happened,
6 whether those changes were referable to market
7 conditions or whether they were referable to something
8 more sinister.
9 MR JUSTICE ROTH: Yes, but the first thing you do is you ask
10 EE.
11 MR MACLEAN: Yes. Suppose, my Lord —
12 MR JUSTICE ROTH: They don't get somebody outside
13 hypothesising. And the only question then is, for you,
14 whether the new assumptions actually can support, on the
15 figures, a change of that magnitude.
16 MR MACLEAN: Yes.
17 MR JUSTICE ROTH: And that is a matter of analysis, and it
18 may be, as I understand it, Mr Thomas is an accountant,
19 as well as an economist.
20 MR MACLEAN: Yes, he is.
21 MR JUSTICE ROTH: That that would involve looking at the way
22 the figures work and that specific point. I'm not sure
23 you have reached that stage yet, because you haven't
24 asked the question. But just to take the two models and
25 then say to an expert to try and work out what the

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1 assumptions must have been, surely the first step is to
2 ask what EE says the assumptions were.
3 MR MACLEAN: Right. Let's assume, my Lord, that that is the
4 course which we adopt, and let's assume that they either
5 don't answer them or they don't answer them
6 satisfactorily, then we would need a mechanism to compel
7 them to answer those questions or, alternatively,
8 produce evidence to make clear to the court what we say
9 the factual position or the underlying position was.
10 MR JUSTICE ROTH: I mean, it's something you could have
11 done, as Ms John points out, a while ago. As we are now
12 close to witness statements, as I think this is not
13 objected to by EE, this amendment —
14 MR MACLEAN: No, it's not.
15 MR JUSTICE ROTH: — presumably EE will then address it in
16 their witness statements, because it's a fairly obvious
17 point, so one would expect that, in short order, you
18 will get an explanation. If it's not addressed in the
19 witness statement, no doubt that would attract comment.
20 So maybe at this stage, that's no longer necessary to
21 serve the request for further information. All I'm
22 saying is that you could have done that a while ago.
23 MR MACLEAN: Well, that's certainly not the case in
24 relation — the criticism can't be made in relation to
25 a number of the iterations of the model and the

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1 documents which have been disclosed within the last
2 number of weeks. You can't ask — sensibly ask
3 questions about what the underlying assumptions were if
4 you haven't been given the documents.
5 MR JUSTICE ROTH: But this one, you have.
6 MR MACLEAN: I mean, I am concerned that we will find
7 ourselves in some supposed procedural bind, where it's
8 said: oh, well, this is a pleading against me EE but
9 Vodafone may take a different view and they may refuse
10 to answer questions in relation to their modelling, were
11 we to pose in the correspondence. And they would
12 say: well, it is not an interrogatory, it's not
13 a request for further information, it's not on the
14 pleadings, what do we do about that? What rule do we
15 apply under? Do the court's management powers extend to
16 compelling them to answer questions of that nature?
17 To avoid and obviate the necessity of these
18 procedural wranglings, and this case is not free of
19 procedural wranglings, we submit that the appropriate
20 way is to give permission for Mr Thomas to produce
21 a report stating what he says the underlying assumptions
22 are in these various models, and we do submit that that
23 is necessary and it is a matter which he should be
24 entitled to opine on.
25 My Lord, I have made the points on that score and

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1 unless your Lordship wants me to repeat it, that is what
 2 I propose to say about that. (Pause).
 3 MR JUSTICE ROTH: Why do you say that the Part 18 request
 4 cannot seek information of what are the assumptions
 5 about the development of the market underlying this
 6 model?
 7 MR MACLEAN: Why do I say that Part 18 isn't --- are we
 8 talking about EE at the moment?
 9 MR JUSTICE ROTH: Yes.
 10 MR MACLEAN: Part 18 would allow --- well, that's our
 11 pleading, so we're not asking ---
 12 MR JUSTICE ROTH: As I understand it, they've all relied on
 13 their modelling in their pleading.
 14 MR MACLEAN: Yes, they are relying on them.
 15 MR JUSTICE ROTH: It is quite broad ---
 16 MR MACLEAN: It is.
 17 MR JUSTICE ROTH: --- for further information. It replaced
 18 the interrogatories.
 19 MR MACLEAN: It is a broad power. What about --- forgive me,
 20 my Lord. What about, I ask rhetorically, the models on
 21 which they do not rely? Now, your Lordship may say,
 22 well, they are going to have to respond to that.
 23 I don't know. Maybe they will, maybe they won't. All
 24 I'm concerned to ensure is that we don't find ourselves
 25 not able to advance a positive case because we haven't

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1 had the benefit of Mr Thomas' report stating it in black
 2 and white so we can all see what it is underlies, in his
 3 opinion, these models.
 4 Now, if all the defendants are going to tell your
 5 Lordship, "We will answer any questions that the
 6 defendants raise as to the assumptions which underlie
 7 the models on which we rely and the models on which we
 8 don't rely, and we'll submit an order to that effect",
 9 then fine, but I don't imagine they will.
 10 MR JUSTICE ROTH: What is the relevance of models on which
 11 they don't rely?
 12 MR MACLEAN: Well, here the relevance is to show that they
 13 have changed dramatically in a period of weeks. It was
 14 loss-making, 58 million per annum, and suddenly,
 15 a matter of weeks later, it was £202 million ---
 16 MR JUSTICE ROTH: Yes, well, I understand in this case, but
 17 that's about the model on which they do rely, in the
 18 light of the previous model. Well, I think we have
 19 explored that.
 20 MR MACLEAN: The last point I want to make about this is
 21 that the terms of identifying the underlying assumptions
 22 will not require a significant amount of expenditure, in
 23 terms of work or analysis. Nor will it, from the
 24 perspective of the defendants, who themselves don't need
 25 the same amount of assistance that we do, because they

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1 must know what evidence underlies their analysis, so we
 2 are the ones who are in the dark, not them. (Pause).
 3 My Lord, those are my submissions unless I can
 4 assist you further at this stage.
 5 MR JUSTICE ROTH: Thank you. There is, of course, a lot of
 6 duplication in the defendants' skeleton argument on this
 7 point and it affects you all, so I hope you've agreed
 8 between you that one advocate, as it were, take the lead
 9 for all if any supplementary points.
 10 MR McQUATER: My Lord, happily we've agreed that the
 11 sequence certainly that I should go first, take the lead
 12 on this application, my Lord, and that other defendants
 13 will come in a sequence agreed. It is Tef, then EE,
 14 then Orange, then DT. But picking up points --- any
 15 additional points as points that are specific to them.
 16 MR JUSTICE ROTH: Yes, but only additional points, not ---
 17 MR McQUATER: And they will be defendant-specific points as
 18 well, my Lord, and it may be that if I've missed
 19 something, one of my colleagues will very kindly bring
 20 that up as well.
 21 Submissions by MR McQUATER
 22 MR McQUATER: Your Lordship's very helpful indication, as
 23 I think before lunch and the way the argument has gone,
 24 my Lord, has enabled us, I think, to streamline our
 25 submissions, if I can say so.

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1 Your Lordship already had, and rightly, expressed
 2 concerns about the questions and the way the questions
 3 were framed in this application. And there has been
 4 a distinct lack of clarity on the application and the
 5 scope of the exercise envisaged by those questions, and
 6 what it is intended that the experts should actually do
 7 in this case. And that lack of clarity has come from,
 8 first of all, the formulation of the questions
 9 themselves and the mismatch with the explanation we were
 10 given in Greeno 6 and Greeno 8, as to what Phones 4u
 11 considered the experts should be doing.
 12 And then the skeleton ---
 13 MR JUSTICE ROTH: A mismatch between Greeno 6 and Greeno 8?
 14 MR McQUATER: Yes. A mismatch between the formulation of
 15 the questions themselves, Mr Greeno's explanations of
 16 what he considered the experts should do, and then the
 17 skeleton itself from Phones 4u last Thursday evening,
 18 which took the exercise in a different direction again,
 19 and took it off to certain specific identified issues in
 20 the pleadings.
 21 And similarly, my Lord, the purported justification
 22 for expert evidence has moved around between Greeno 6,
 23 Greeno 8, which we got on Thursday evening, and the
 24 skeleton which we got, I think, on Friday, which was
 25 different even from Greeno 8 which you'd had on Thursday

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evening. And so determining what the justification for this application is has been like trying to nail treacle to the wall.

There are, in addition, as your Lordship has already observed, serious issues with the timetable. Those are largely of Phones 4u's making, which I will come to, if necessary. But there are serious issues which makes one question whether an expert timetable is workable at all, but particularly if one is going to get involved in a granular detailed modelling evaluation, looking at the respective MNOs' models, critiquing them, producing rival models, having the MNO experts have a counter case on that.

And I observe, my Lord, that if expert evidence — there is to be any expert evidence in this case, given the limited time there is available for trial and the burden that is already on the parties, then there is absolutely no room for ships in the night scenario. And it is to be — it would have to be very clear what the exercise was and there would have to be clarity, not only as to the scope of that exercise, but also the materials to be relied on.

And, my Lord, we have none of that. In fact, what we have is Phones 4u and Mr MacLean effectively saying, "Can I reformulate my questions again by Friday?" So

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there has been an utter lack of satisfactory thought and clarity about this application.

As to the — I won't dwell on this, because I think your Lordship has the point and some of this may be water under the bridge, but as to the scope of the exercise that has been envisaged, just in summary, very short summary, my Lord.

First of all, in the questions themselves, those seemed to invite an abstract and rather generalised economic discussion which could — which immediately to our mind gave rise to the risk of a wide-ranging and, by the look of it, costly exercise which was going to become a major distraction with little or no assistance to the court.

We then, in Greeno 6, at 31.2, had a rather different scope. It didn't seem to bear relation to the questions, where it was said that the expert was going to engage in detailed modelling and evaluation of the MNOs' analysis and their assumptions. So it didn't really remotely, to our mind, correspond with the formulation in the application.

And then when we get to the skeleton that was served on us, and paragraph 81 of that skeleton, which is at {G/1/20}, it starts at the foot of the page and over through to page {G/1/22}, on which there was some focus

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this morning, one gets the case put — the scope put somewhat differently again, because we then see focus on a number of specific and, Phones 4u says, pleaded issues around the indirect market. And that's really the exercise that your Lordship has come to focus on in this application is to the extent to which there are specific pleaded issues as to which some form of expert evidence, not in the terms of questions 1 to 3, but some form of expert evidence might be justified. And I will come to that.

But, my Lord, it's pretty unsatisfactory that Phones 4u has served two witness statements in support of this application, one as late as Thursday evening, neither of which bears any resemblance to the paragraph 81 points that are now pursued. So what we are — essentially is happening is that we are dealing with a new application, with a very different definition and scope. And, of course, had we had an application, a focused application, identifying specific pleaded issues on which objective market or economic evidence was sought, then one would have engaged in a rather different way, and we would have taken those issues identified in paragraph 81 and considered very carefully exactly the extent to which those were really in dispute, and so forth.

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But those matters, and I think your Lordship has the point, were never previously put as the target of this expert evidence.

Now, just to deal — and before I come to what has now really become the crux of the matter, which is some of these specific pleaded issues, but before I come to that, I mean, there was some comment about our focus on collusion and the collusion issue in the debate this morning.

My Lord, the reason we got so distracted about the collusion issue, and quite a lot of ink was spilled on it, was because the factual issue of collusion was the core justification given in Greeno 1, at 31.1, to support the application for expert evidence. It was said that this evidence would support inferences of fact in relation to the collusion claims. He said in terms that it would help the court to decide who was more likely to be right or wrong on those issues of fact. And that was the central way in which the application was put. It was that it was not really surprising in those circumstances that we engaged with that and said well, actually, collusion is an issue of fact and we don't agree that evidence would be either necessary, on an issue of fact, not opinion, expert evidence would be necessary on an issue of fact, not opinion, and in any

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1 event, if you were to be going down that route, which it
2 seems they are not because that didn't feature in
3 Mr MacLean's presentation this morning, but if you were
4 to be going down that route, at a minimum you would have
5 to focus on the actual decisions of the MNOs and apply
6 a rationality standard, and you don't even do that in
7 your questions.

8 So that was how that particular line evolved. It
9 was really because that's how the application was put.
10 And we — and your Lordship has the point that insofar
11 as it were to be based on — put on a basis that this is
12 all about inferences that can support the collusion
13 case, in the end a question of fact, not necessarily.
14 Would it assist the court? No, especially if you are
15 not even focused on the actual reasons, and you're not
16 even focused on a standard of rationality, and so on.

17 So that is really the —

18 MR JUSTICE ROTH: As I understood it, but I have the
19 disadvantage that, for reasons I explained at the
20 outset, I haven't read Mr Greeno's sixth witness
21 statement, but the whole case of the claimants, the
22 ultimate question is collusion. If they can actually
23 show on the factual direct evidence that there were
24 conversations and exchanges and emails, then — which
25 you will deny — then this may not be necessary at all.

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1 But insofar as they can't, they do rely and plead quite
2 heavily on various inferences —

3 MR McQUATER: Yes.

4 MR JUSTICE ROTH: — and I think what they are saying is
5 that the inferences are supported by fact, whether the
6 court should draw such an inference or not.

7 MR McQUATER: Exactly.

8 MR JUSTICE ROTH: You say it shouldn't draw such
9 an inference. And they say, well, it's relevant to
10 whether an inference can be drawn as to whether an MNO
11 would rationally take this action without collusion.

12 So that's how it fits together, as I understand it.

13 MR McQUATER: Well, that was the argument, and —

14 MR JUSTICE ROTH: And I think that's why it's relevant, so
15 it goes to whether it's appropriate or not to draw such
16 inferences.

17 MR McQUATER: Well, it may be that if one were to get
18 permission for some of the pleaded issues, the outcome
19 of those pleaded issues might be said to help with
20 inferences.

21 MR JUSTICE ROTH: Yes, quite.

22 MR McQUATER: But what it doesn't justify is the
23 wide-ranging expert foray into all the matters that
24 might have come within the compass of questions 1 to 3,
25 to then try and say, "Well, I can draw this inference

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1 from — based on this inference and" —

2 MR JUSTICE ROTH: Yes, I see that and, as I indicated to
3 Mr MacLean, I wasn't attracted by those questions, both
4 because of the wide-ranging nature of the enquiry and
5 even if at some point that might have been less of
6 a concern, it is more of a concern because, as you
7 rightly pointed out, we are now in a fairly tight — by
8 "we", I mean all of you, are under a fairly tight time
9 frame.

10 MR McQUATER: Absolutely, and there is already a lot to do,
11 never mind the burden of the expert evidence. And when
12 we do come to discuss the timetable, which may be
13 tomorrow now, but when we do come to discuss it, I think
14 your Lordship will see exactly how there was really no
15 flexibility in the time that we have remaining in the
16 timetable. There really isn't. So if we are going to
17 embark on any expert evidence exercise, it has to be
18 very closely defined and it can't, in our submission,
19 encompass large, granular, detailed modelling exercises,
20 because that just isn't, in our submission, feasible in
21 the time frame available, particularly — Phones 4u
22 might think it's feasible. If their expert is working
23 on models for many months, they might think it's
24 feasible, but it is certainly not feasible as far as our
25 side is concerned. We've got a standing start when we

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1 see their expert report as to what we are aiming at
2 that's certainly not feasible.

3 To move, my Lord, to the paragraph 81 issues, if
4 I can call them that, that is the specific pleaded
5 issues that Phones 4u has now lighted on as being
6 effectively the basis of their remaining application.

7 I have made the point. This is a very different
8 application to questions 1 to 3 and Greeno 6 and
9 Greeno 8. And when your Lordship does have access to
10 the documents and is able to look at those witness
11 statements, your Lordship will see exactly what I mean,
12 because there is not a hint in those witness statements
13 that the application was going to be put on this narrow
14 and rather different basis.

15 So the first point to make is that, of course, these
16 pleaded issues could not possibly justify the
17 wide-ranging report that seems to have been the
18 intention in this case.

19 Now, I said it's not helpful that we were
20 effectively led to believe the target for this
21 application was something different, so that meant that
22 there hasn't been, perhaps, the sharp focus that there
23 could otherwise have been on the extent to which expert
24 evidence might be necessary on these rather narrower
25 issues, some of them market issues.

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1 So having received the skeleton on Friday, we did
2 look to see the extent to which some of these issues
3 identified in 81(a) to (h) are seriously in dispute.

4 I mean, I'll deal — I'll take the 2006 to 2009
5 question in (a) separately because that gives rise to —
6 that's been the subject of a separate argument.

7 But insofar as the others are concerned, just to
8 take a few of them.

9 81(c), the network agnostic point. That doesn't
10 really seem to be in serious dispute. I mean,
11 phones 4u's business was essentially that they were able
12 to offer a one-stop comparison shop between network
13 deals, so it's hard to think that it's going to be
14 ferociously disputed as a general proposition.

15 So far as 81 —

16 MR JUSTICE ROTH: Let me just — this is in the skeleton?

17 MR McQUATER: 81. Yes, I'm in the skeleton at page 21,
18 my Lord. And that is the network agnostic point.

19 MR JUSTICE ROTH: Yes. What's said, and I haven't chased it
20 through the footnote, is that the defendants, to varying
21 degrees, deny or don't admit this point.

22 MR McQUATER: Yes, there are some non-admissions.

23 MR JUSTICE ROTH: So when you say it's not seriously in
24 dispute, you mean if that's the position, Phones 4u has
25 to prove it.

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1 MR McQUATER: Well, yes, although —

2 MR JUSTICE ROTH: And you say, well, that's something where
3 expert evidence about the nature of competition and the
4 nature of consumer preference in the market is relevant.

5 MR McQUATER: No, I see that argument, my Lord.

6 MR JUSTICE ROTH: If you now admit it, then one doesn't need
7 it.

8 MR McQUATER: Well, it's not admitted. We don't admit this
9 on the pleading —

10 MR JUSTICE ROTH: Some people apparently — we can chase
11 through all the references but I don't want to take time
12 with that and nor do you, so that's —

13 MR McQUATER: Well, that's —

14 MR JUSTICE ROTH: I mean, it can be clarified subsequently
15 in correspondence, and I'm sure everyone would be happy,
16 not least the claimants, if it's said, well, no, you
17 don't need your expert to address that because that's
18 accepted.

19 MR McQUATER: I take the point that admissions could be made
20 and it's possible, in the light of the discussion that
21 has been had, that a fresh — there would be a fresh
22 impetus to scrutinise some of these points very
23 carefully to see what role they play in this case to see
24 if dispute — any dispute remaining can be narrowed.
25 But even if there is a dispute on the pleadings,

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1 a non-admission on the pleadings, that doesn't
2 necessarily mean, and I will come to this, that evidence
3 on each of them is necessary. And if it comes to
4 a question of: well, would it assist and is it
5 reasonably required? Then the question of its
6 peripheral importance or the fact that there might not
7 be a very serious dispute about it would become
8 relevant.

9 Now — and on necessary, my Lord, I do pause to
10 suggest that necessity must be a pretty high threshold,
11 because, as we saw in the British Airways v Spencer
12 case, if you get over the necessity test, all
13 proportionality is out of the window. So necessity
14 really has to be quite a high test. And in this case,
15 it won't have escaped your Lordship's attention that
16 there inevitably will be, among the witnesses, many
17 people with lots of market expertise in the indirect
18 market, and indeed there were quite a number of senior
19 people who were actually you running Phones 4u, because
20 quite a lot of these points are about Phones 4u's own
21 business. So you will have Mr Whiting, chief executive
22 throughout the relevant period. If you haven't got
23 Mr Whiting, I don't know what we are all doing here,
24 because he's the author of the controversial
25 January 2014 email.

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1 We know they've got Mr Kassler, he's in the
2 confidentiality ring, who was the subsequent CEO. And
3 we know that, in their case management information
4 sheet, Phones 4u have said they've got at least eight
5 witnesses. And, of course, one will have market
6 witnesses from all the other MNOs as well.

7 So it's not as though the court will be without
8 evidence in these areas. It will have evidence and it
9 will have the disclosure as well. So if one was
10 addressing a necessity test, is expert evidence
11 indispensable to a decision on these issues, the answer,
12 in our submission, is, no, it's not, it's not necessary.

13 You then get on to whether we think it would be
14 helpful and is it reasonably required, which will draw
15 in some further matters, which I will come to.

16 But I was on the question of network agnostic. Just
17 to give you — I won't dwell on this, because your
18 Lordship will probably come back with the same answer on
19 most of these, which is to say: well, you haven't
20 admitted it.

21 But insofar as 81(d) is concerned, the market
22 saturation, which was debated to some degree this
23 morning, I mean, we have admitted that most consumers in
24 the UK had a network-connected mobile phone, so that's
25 not in dispute. There seems to be, when I trace through

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1 the pleadings, a bit of a debate with Tef about what
2 "saturated" means, but that's what it comes to, so
3 I can't imagine it will be a point of huge controversy
4 in this case.

5 And if we take the (g) — the example in (g) over
6 the page, page 22 {G/1/22}, which is that retail
7 intermediaries put downward pressure on pricing, well,
8 that's something we do admit, actually. Not
9 an astounding proposition that if you have a competitor
10 it may put downward pressure on your pricing.

11 So in some of these, you — it looks as though, even
12 on the pleadings as they stand today, there may not be
13 a huge amount of dispute.

14 That is not true on all of them, but coming to the
15 question of: well, is expert evidence necessary on these
16 issues? I have touched on this a moment ago. But
17 my Lord, the — four of them relate directly to
18 Phones 4u's own business. By that, I mean 81(c), the
19 network agnostic point. In 81(e), the youth market
20 price. 81(f), the fraud point, and the per customer
21 profitability point, which may —

22 MR JUSTICE ROTH: Can you — because I don't have
23 a transcript — just give me those references again?

24 MR McQUATER: Yes.

25 MR JUSTICE ROTH: 81?

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1 MR McQUATER: I'm going by Phones 4u's skeleton —

2 MR JUSTICE ROTH: Yes.

3 MR McQUATER: — and 81(c) was the first one, the market
4 agnostic point.

5 MR JUSTICE ROTH: Yes.

6 MR McQUATER: 81(e), the youth market point.

7 81(f), which is the customer fraud and per customer
8 profitability point. That also brings in the Dixons
9 merger, which would be a question of how the Dixons
10 merger was likely to affect Phones 4u's business.

11 The last of the points that I was going to say —
12 suggest to your Lordship were related directly to
13 Phones 4u's own business. It is point (h), which is the
14 point about whether it could survive, with one MNO only.

15 Now, effectively what has been said to you is that,
16 "Phones 4u would please like an expert to tell us all
17 about our own market, and tell us all about our own
18 finances", and so forth, which doesn't seem to me to be
19 very —

20 MR JUSTICE ROTH: Yes. Well, I've said to Mr MacLean
21 I don't think they should on any view have an expert as
22 to whether in the hypothetical of Phones 4u having only
23 one MNO it could maintain a commercial business, which
24 is a factual enquiry looking at Phones 4u from the
25 access to funds, and so on, so the balance sheet, the

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1 P&L. I don't think that's appropriate or indeed
2 necessarily relevant.

3 What may be relevant is market perception. That,
4 I don't think, is something for an economic expert.

5 MR McQUATER: Yes.

6 MR JUSTICE ROTH: So on that one, I don't see that there
7 should be expert evidence. I'm not being persuaded on
8 that, you needn't address me. But that's (h),
9 I haven't —

10 MR McQUATER: That's (h).

11 MR JUSTICE ROTH: That's not the other ones you are talking
12 about.

13 MR McQUATER: Leaving aside for the moment, as I said, '06
14 to '09 for a moment. There's another three. One is
15 82(b), which is a dispute about Three — the competitor
16 Three and the fact that it disengaged with Phones 4u,
17 not asserted that was in any way anti-competitive. But
18 just to identify them. (d) — 81(d) is the saturated
19 market point. And (g) is the intermediates and the
20 pressure on prices. Those three remaining —

21 MR JUSTICE ROTH: Well, let's just to test this, saturation
22 of the market you may say there's not much issue about
23 it, fine. But if there is an issue about it, to the
24 extent that there is, to what extent is the market
25 saturated? To what extent was competition for new

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1 customers or for switching customers at the time?

2 I mean, that is a classic question for an economic
3 expert. Of course, your clients will have their view,
4 and they put it, and the claimants or former employees
5 of the claimant will give evidence of their view. But
6 that's no different from a dispute about what's the
7 relevant market where participants will give their view,
8 it may be very relevant, but you still can benefit and
9 indeed may need an economic expert who can look at it
10 objectively.

11 MR McQUATER: Yes. My Lord, I see that, and I can't say
12 that you couldn't in principle have useful economic
13 evidence about that. And, indeed, if the application
14 could be framed in a way to say, can we have some expert
15 evidence from an economist on that specific point, we
16 would probably have taken quite a different view to the
17 application.

18 MR JUSTICE ROTH: I understand.

19 MR McQUATER: But I do come back — on that individual one,
20 I do come back to the question of whether it actually is
21 necessary on that fairly high threshold, given all the
22 other evidence that your Lordship will have in the case.
23 I'm not suggesting that you couldn't have a report that
24 was helpful on the point, but necessary, I would
25 suggest, given the other evidence, not.

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And then when you come to "reasonably required", I mean, maybe another way to put it is whether, on something like that, Mr Thomas is going to be able to give your Lordship any more useful evidence than Phones 4u's witnesses themselves could give, and no doubt will give. And if you have that evidence in front of you, it may be that your Lordship would think: well, actually, it's not necessary to have, in fact it's not even reasonably required, given how much evidence I have. And if you do get to the question of "reasonably required", because your Lordship takes the view that it's not strictly necessary, you've then got to ask yourself how important these issues are in the case and whether some of these issues are quite peripheral.

It doesn't apply if your Lordship takes the view that it's necessary, but if your Lordship takes the view that they might be of assistance, perhaps, of an expert, then one can look and see whether some of these issues are actually quite peripheral in the case. And proportionality considered and those matters, one could certainly — one could decide these issues on such evidence of fact as we have.

An example of a more peripheral issue might be the dispute about Three, about this other company which

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ceased relations with Phones 4u. I mean, that has the feel to us of something of a side dispute. It's something that could be the subject of some market evidence, to — on the question of whether Three had the same characteristics, and so on, it could. But one gets a strong sense that that isn't actually going to play a very large role in this case.

And I think what our main fear is with these specific areas, my Lord, is that if your Lordship would be persuaded to go down this route, one needs to define very clearly what the issue is, such that it isn't inviting some wider exercise of modelling or economic analysis that becomes this sort of Trojan horse that the claimants use to get in the analysis that they obviously have in their back pocket and want Mr Thomas to give in the first place, a wide-ranging analysis bringing in all sorts of inferences from modelling and so forth, which it's going to be impossible to deal with.

So one needs to be very clear about what one is focusing on. And if one decides that, actually, it is necessary to have a bit of evidence about Three, a bit of evidence about the saturated market, then that should be very clearly prescribed in any order that gives permission.

And what one can't do, in our submission, is simply

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to pick out large passages of the pleading, the amended particulars of claim, like paragraph 124 and following and say, well, you can have permission in relation to those paragraphs, because that's just an open invitation to get involved in all sorts of economic analysis and theories that are put in those paragraphs.

MR JUSTICE ROTH: Well, 124, and what's put there, is obviously based on, it's agreeing at the market launch(?), what is the retention rate, what are the consequences of that retention rate, as opposed to a higher retention rate, that has been, since the outset, the claimant's case. So —

MR McQUATER: Yes, it has.

MR JUSTICE ROTH: So why is not a case that they can — and it is a case based on the analysis of certain factors, regarding the MNO business, resting on a certain understanding of how the market operates — why is that not something, then, that cannot be properly addressed and may need to be properly addressed by an expert, as opposed to a factual witness who doesn't work for an MNO, saying, "Well, that's my understanding of how I think an MNO would operate"?

MR McQUATER: My Lord, I'm not suggesting that one couldn't — that expert evidence on that would be inadmissible, and I'm not suggesting that you couldn't

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craft a properly prescribed issue for expert evidence to go to, so far as that's concerned, because my immediate last point was simply let's not have a far-ranging permission that just refers to compendious references in the pleadings. But, yes, that is possible.

Interestingly, the 65% NPV doesn't even feature in Phones 4u's skeleton on Friday as a justification for this application. It simply doesn't feature in Greeno 6 and Greeno 8, so it has only just raised its head as to a grounds and scope for expert evidence in this case. It's certainly evidence one could have, potentially, if properly prescribed.

Insofar as the pleading — insofar as Vodafone is concerned, it is a bit incoherent, so far as this point is concerned, when I was following it through, because — and this is on {B/3/73} of the draft amended APOC — because so far as the pleading against us is concerned at (b)(iii) on that page, which is tab 3, page 73, it's suggesting that we would have lost customers to O2. But at the time that we terminated, of course, Phones 4u had already terminated and was gone.

MR JUSTICE ROTH: (b)?

MR McQUATER: (b)(iii) on page — internal page 72 of the pleading, my Lord.

MR JUSTICE ROTH: Is that the amended pleading?

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1 MR McQUATER: Yes, this is the amended pleading, my Lord.
 2 (Pause).
 3 MR JUSTICE ROTH: 124(b)?
 4 MR McQUATER: Sorry, 127, my Lord. So in the internal
 5 numbering, it is actually page 72.
 6 MR JUSTICE ROTH: Yes.
 7 MR McQUATER: And it's (b)(iii). And I was observing the
 8 incoherence of the case against us that we — so far as
 9 this is a pleading against us, that we —
 10 MR JUSTICE ROTH: But this is not about expert evidence —
 11 MR McQUATER: Well, this is — it's about the coherence of
 12 the case we are meeting. It's about that.
 13 And as I've indicated, my Lord, I'm not saying that
 14 you couldn't, in principle, have expert evidence, and
 15 your Lordship might think it useful to have, I don't
 16 think it's necessary, given the witnesses we've got, but
 17 your Lordship might think it's useful to have. This
 18 hasn't featured so far. If it were properly prescribed
 19 in a suggested question, then we would obviously take
 20 a look at that constructively.
 21 MR JUSTICE ROTH: Yes.
 22 MR McQUATER: The one — one of the subparagraphs in 89 that
 23 I haven't addressed your Lordship on is (a), which is
 24 the 2006–2009 period, which has been the subject of
 25 a separate debate.

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1 MR JUSTICE ROTH: Yes.
 2 MR McQUATER: And your Lordship, I'm sure, will have picked
 3 up from the skeletons that there are limits to how much
 4 any evidence on 2006–2009 can go in this case, because
 5 by consent, disclosure from the MNOs relating to this
 6 period was not pursued. So there is no material before
 7 the court, and will be no material before the court, as
 8 to the actual facts relating to the MNOs' decisions to
 9 either start this experience they had between 2006 and
 10 2009 or to exit that experience so as to the terms they
 11 were trading under, indeed as to terms which might have
 12 been on offer when they ceased this arrangement in 2009.
 13 So what one couldn't have, and obviously couldn't
 14 have in those circumstances, is any meaningful exercise
 15 in the form of question 3 that was originally put in the
 16 application of 2006–2009, because you couldn't have any
 17 evidence that was actually going to engage — it would
 18 be such an abstract exercise, it would just become just
 19 an expensive sideshow and it didn't really assist
 20 anyone.
 21 Now, it's refocused itself in the course of
 22 discussion to a question of whether one could have
 23 evidence of objective market conditions and whether
 24 objective market conditions had changed, rather than
 25 having some more interactive exercises which seem to

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1 have been proposed by question 3.
 2 And so far as that is concerned, I accept — your
 3 Lordship was shown our pleading, the Vodafone pleading
 4 at paragraph 31.4, which is back at A1, tab 6, page 17
 5 {A1/6/17}, where we do plead certain ways in which
 6 things have changed in the market, the SIM-only point,
 7 the expensive smartphones point, the growing e-commerce
 8 point. And I think Three was mentioned as well in that
 9 context. But I do — even so far as this is
 10 concerned — well, obviously if there were to be
 11 evidence in this area, which we are very sceptical
 12 about, it would have to be on market — objective market
 13 conditions.
 14 Now, we really do query whether Mr Thomas is
 15 an appropriate expert for that, as an economist, and
 16 whether he would add anything to what Mr Whiting and
 17 Mr Kassler, and so on, would have to say, because he
 18 is — having looked at Mr Greeno's evidence about
 19 Mr Thomas' CV, he is an economist and an accountant, but
 20 we are really struggling to discern market expertise in
 21 the telecoms retail sector for Mr Thomas. And it may be
 22 worth just showing your Lordship a letter that was —
 23 because Mr Thomas did some work at Ofcom —
 24 MR JUSTICE ROTH: Yes.
 25 MR McQUATER: — for a couple of years, from 2004 to 2006,

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1 and that was queried by Covingtons for the second
 2 defendant, as to what that was in the context of
 3 a possible conflict. The answer was quite revealing
 4 that came back. Which is in — I believe it is in F,
 5 tab 45. It is a letter.
 6 MR JUSTICE ROTH: F/45?
 7 MR McQUATER: F/45. This should be a letter from
 8 Quinn Emanuel of 21 September this year {F/45/1}.
 9 MR JUSTICE ROTH: Yes, indeed.
 10 MR McQUATER: The relevant passage is at 3, so {F/45/3}.
 11 I'm just waiting for that one to come up {F/45/3}.
 12 MR JUSTICE ROTH: {F/45/3}.
 13 MR McQUATER: Perhaps shall I start reading it to your
 14 Lordship while we — there we go, and it is
 15 paragraph 8.2, which perhaps to save me reading it out,
 16 your Lordship could just read that subparagraph 8.2.
 17 (Pause).
 18 MR JUSTICE ROTH: Yes.
 19 MR McQUATER: So the work that Mr Thomas seems to have done
 20 at Ofcom was really focused as being head of profession
 21 overseeing the work of the regulatory finance team, and
 22 seems to have had nothing to do with the telecoms retail
 23 sector, and they say this did not concern the retail
 24 activities of the MNOs. So as a result, we are
 25 struggling to see the utility of having Mr Thomas'

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1 opinion, as opposed to — which your Lordship will
 2 have — evidence from Mr Whiting, and so forth, and
 3 others who were directly involved in —
 4 MR JUSTICE ROTH: I suppose if he did have an involvement in
 5 the telecoms retail, you would have objected on the
 6 grounds that he was conflicted, wouldn't you?
 7 MR McQUATER: We didn't take the conflict point. I will
 8 leave Mr O'Donoghue to deal with that issue, but we
 9 didn't take a conflict point. But as it is, he isn't,
 10 he didn't deal with that, and so the point we can
 11 validly take is: well, what's his market expertise,
 12 then? And is his opinion worth — or any advancement
 13 on, for example, Mr Whiting who was running Phones 4u at
 14 the time?
 15 MR JUSTICE ROTH: Well, he's independent.
 16 MR McQUATER: Well, save — but his independence, of itself,
 17 doesn't save him if he hasn't got the expertise, because
 18 his opinion —
 19 MR JUSTICE ROTH: No, I accept that. But economists, as you
 20 know, in competition cases, they give evidence
 21 concerning a lot of different markets, they don't have
 22 industry expertise in all these markets that —
 23 MR McQUATER: No, I understand that. I understand that the
 24 boundaries are pushed in that respect, my Lord, and
 25 I understand that they very often try to find public

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1 data on these things and crunch the data and give one
 2 great graphs, and so forth. But I do question the value
 3 of that over the value of people who are actually
 4 operating in the market on the relevant dates.
 5 MR JUSTICE ROTH: Yes.
 6 MR McQUATER: So, yes, it's really an industry knowledge
 7 issue.
 8 MR JUSTICE ROTH: Yes.
 9 MR McQUATER: And so necessary because of the other
 10 evidence? We say, no. Would it assist, in the sense
 11 that is it reasonably required for a sound decision? We
 12 say, no, for the reasons I have just mentioned.
 13 And I should perhaps also just add this on the
 14 question of "reasonably required", evidence of — expert
 15 evidence about 2006–2009, is that this issue has not
 16 loomed large on the pleadings, following disclosure.
 17 This goes to the question of how important or marginal
 18 an issue it is, my Lord, on a "reasonably required"
 19 test.
 20 There's certainly the very substantial amendments
 21 put in the amended particulars of claim have introduced
 22 nothing from disclosure about this issue and the role it
 23 might have had in the decision-making process. So
 24 there's no particulars that have appeared as to any role
 25 this might have played in the actual decisions, which

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1 I suggest in the context is quite telling that this is
 2 receding in importance. If it ever had any importance
 3 at all, that that is receding. It doesn't help if your
 4 Lordship thinks it's necessary evidence but, of course,
 5 if it comes to a question of how useful or reasonably
 6 required, there is that.
 7 And just before I get on to some broader "reasonably
 8 required" considerations, my Lord, your Lordship also
 9 had a debate with Mr MacLean about the modelling and
 10 an allegation against EE in the amended particulars of
 11 claim, which is at paragraph 86L of the draft amended
 12 particulars. That was at {B/3/46}.
 13 MR JUSTICE ROTH: Yes.
 14 MR McQUATER: Yes — sorry. It's 68L, is the reference I'm
 15 after. Sorry.
 16 MR JUSTICE ROTH: Yes, that's correct, 68L.
 17 MR McQUATER: Yes, 68L.
 18 Now, Ms John rightly intervened about this question,
 19 in relation to EE. But in relation to Vodafone, can
 20 I just add this, that there is no equivalent pleading
 21 against Vodafone in respect of our modelling or our
 22 analysis. And, of course — so there are no pleaded
 23 issues here against Vodafone, in respect of which
 24 permission could be given.
 25 Phones 4u have asked us one question about our

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1 modelling in correspondence, and this is covered in
 2 Greeno 8, and we responded by explaining their query,
 3 much in the manner that your Lordship had envisaged in
 4 the discussion earlier, and that resulted in no further
 5 criticism for Vodafone.
 6 So, much as you would expect, they had a query about
 7 our modelling, how it worked, what it represented. We
 8 explained and the matter, as it seems, was left there.
 9 So there isn't any justification for a pleaded issue
 10 against Vodafone, so far as this is concerned. And
 11 I would suggest that if — that ultimately, if there's
 12 a real point here, it has to be pleaded properly against
 13 the defendant and then permission asked for. But that
 14 should really have been done already, and if it happens
 15 in the future, I can well see your Lordship saying,
 16 "Well, I'm sorry, that's just too late".
 17 My Lord, I have a few points to make about
 18 "reasonably required" in the general, but I'm being
 19 invited to ask your Lordship if the transcribers might
 20 have a ten-minute break.
 21 MR JUSTICE ROTH: Yes, indeed. So we will return at 3.30.
 22 Just to remind you all that I have to rise at 4 o'clock,
 23 we may not complete this today. We will consider where
 24 we are at five to 4.00.
 25 (3.17 pm)

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1 (A short break)
 2 (3.30 pm)
 3 MR JUSTICE ROTH: Yes.
 4 MR McQUATER: My Lord, I will be brief. I'm aware that
 5 others have to speak as well.
 6 Some more general points on "reasonably required".
 7 The first one, your Lordship I think has on board,
 8 which is the pre-trial timetable makes any substantial
 9 expert exercise really unworkable. Just two quick
 10 points on that.
 11 There's pressure at the front end, obviously,
 12 because it puts undue pressure on us to respond from
 13 a standing start, as I've mentioned before. And, as far
 14 as the pleadings are concerned, there's going to be some
 15 further time taken for that, so they're going to push
 16 the times further out already at the start, because, as
 17 your Lordship will have picked up, we only yesterday,
 18 after 4 o'clock, received a further version of the
 19 amended particulars of claim in relation to the
 20 allegation that Vodafone and EE unlawfully exchanged
 21 information indirectly via third parties.
 22 MR JUSTICE ROTH: Well, that's just the one paragraph, isn't
 23 it?
 24 MR McQUATER: It's a short-ish addition --
 25 MR JUSTICE ROTH: Yes, you've had time to work on everything

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1 else.
 2 MR McQUATER: Yes, my Lord. That will hold up our amended
 3 defence, because there are quite a lot of enquiries have
 4 to be made about allegations which are seven and a half
 5 years old, with unidentified persons in Vodafone said to
 6 be involved, and that is not an easy enquiry, and it's
 7 not something that we will be able to respond to
 8 immediately. So it's going to mean that we will need
 9 a bit more time for our amended defence at the front
 10 end.
 11 We can come to that on timetabling, my Lord, but
 12 I've just highlighted that to show you an example of the
 13 kind of pressures the timetable is already under. And,
 14 of course, when you look at Phones 4u's proposed
 15 timetable, it gets very tight at the back end as well,
 16 because of the 7 April date for supplementaries, which
 17 is too close to trial.
 18 When we come to timetable, I've got some
 19 suggestions -- if your Lordship is going to direct some
 20 expert evidence I've got some suggestions, but I won't
 21 take time up on that now.
 22 MR JUSTICE ROTH: Shall we do that at the end after we've
 23 heard everyone on expert evidence?
 24 MR McQUATER: If your Lordship is happy to do it, yes.
 25 And the second point on "reasonably required" I was

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1 going to make is the pressure on the trial itself,
 2 because if your Lordship directs expert evidence, that's
 3 likely to mean effectively four experts. You're going
 4 to get -- Mr Thomas can be multiplied and, given the
 5 groupings of the defendants around the MNOs, that means
 6 probably another three experts. It's not, in my
 7 submission, realistic to suggest that we could share
 8 experts, because each of the MNOs has its own story and
 9 its own case, and indeed there might be potential
 10 conflicts.
 11 And also, to be frank, time is too tight to herd the
 12 eight defendant carts around one expert, it's just not
 13 really feasible to do that. So this can't be a shared
 14 expert situation, so we are going to have four experts.
 15 That's going to put pressure on the trial timetable,
 16 which -- and from the case management information
 17 sheets, the parties have said potentially up to 30
 18 witnesses of fact in that period already. It's going to
 19 be tight. The --
 20 MR JUSTICE ROTH: But could some aspects -- take the one you
 21 were raising, market saturation, I mean, is that not
 22 something -- or change in -- if that's to be covered
 23 a change in conditions in the market as between 2006 to
 24 2009 and 2013-2014 that are relevant to a decision
 25 whether to use a retail intermediary, could that not be

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1 covered by a common expert, though not MNO-specific?
 2 MR McQUATER: I take your Lordship's point that you might
 3 find discrete issues that might be capable of being
 4 dealt with, with commonality. I can think of other
 5 issues which wouldn't --
 6 MR JUSTICE ROTH: They could have a common expert dealing
 7 with those and then some --
 8 MR McQUATER: No, I absolutely --
 9 MR JUSTICE ROTH: -- reports dealing with specific points.
 10 MR McQUATER: Yes. I mean, obviously if one has a common
 11 expert at all, it takes time to agree instructions,
 12 common -- well, one has, in this case, quite a number of
 13 defendants.
 14 MR JUSTICE ROTH: Yes, there's a bit of time -- I can see it
 15 takes a little extra time there, but it saves a lot of
 16 time at trial.
 17 MR McQUATER: Well, it does. But one's principal concern
 18 here in process is how one is going to arrange the
 19 reports in the first instance --
 20 MR JUSTICE ROTH: Yes.
 21 MR McQUATER: -- and to do that you -- instructions to
 22 a joint expert are going to have to be agreed with --
 23 how many sets of solicitors? Five sets of solicitors,
 24 and clients take -- taking instructions from eight
 25 clients, so the -- that, one knows from experience, is

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1 going to take time. I mean, the shared experts is
2 a very laudable target and laudable aim, one knows that,
3 but when one gets down to the practice, it's very hard
4 to get things to move forward. And, as I am reminded,
5 one can have particular problems with competitors if
6 they happen to have a different view on who might be the
7 right experts and how the question ought to be put or
8 what information the expert might be given.

9 So I was making a point, my Lord, about the pressure
10 on the trial itself.

11 A related point is cost, of course, because
12 Phones 4u have said 1.9 for their expert. That is going
13 to be multiplied several times, realistically, if that
14 is indeed the scale of evidence. That may go down, and
15 in fact it might well go down if your Lordship is very
16 careful about narrowing the issues that go to the
17 experts and narrowing the scope of the expert exercise,
18 because no doubt Phones 4u —

19 MR JUSTICE ROTH: Well, it's a very big trial. There's
20 a lot of money and a lot at stake. I think the cost —
21 I'm very sympathetic to the point one shouldn't ever
22 overlook cost, but I think in this case, the
23 proportionality on the costs point is rather less
24 fraught.

25 MR McQUATER: Well, it is a substantial sum when one

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1 multiplies it by the number of defendants —

2 MR JUSTICE ROTH: Oh, yes, it is clearly a very substantial
3 sum and I'm not sure the total costs are an even more
4 substantial sum.

5 MR McQUATER: I'm sure they are, my Lord. But costs are
6 again a very important reason why one would be keen to
7 be very specific and indeed we would say narrow the
8 issues one prescribes — in the exercise one prescribes
9 here for the experts.

10 And, finally, my Lord, on equality of arms, which
11 has been cited by Phones 4u. Your Lordship has the
12 point that they have already Mr Thomas advising them or
13 experts advising them on the case for some time already
14 explaining — able to explain the documents and
15 modelling. They've been able to ask us questions about
16 it. They've got their own witnesses of fact with market
17 experience and extensive disclosure.

18 On equality of arms what we are most worried about
19 is being dumped with some monster report that they have
20 been working on for months and having to respond to it
21 within eight weeks, or whatever the current suggestion
22 is, which doesn't seem very equal to us. And really, as
23 your Lordship has observed, there isn't an excuse for
24 having this exercise so late, which is putting pressure
25 on us for our time to respond.

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1 My Lord, I'm aware that others need to speak.

2 I wasn't going to address your Lordship further on this,
3 unless your Lordship wishes me to.

4 MR JUSTICE ROTH: No, thank you.

5 MR McQUATER: I'm very much obliged.

6 MR JUSTICE ROTH: Yes?

7 Submissions by MS ABRAM

8 MS ABRAM: So five points from me, my Lord.

9 The first, a discrete point addressing — just
10 picking up something that Mr MacLean said during his
11 opening submissions in respect of document preservation
12 on the part of my clients.

13 Now, before your Lordship tells me that that's
14 a matter for trial, may I just make two points as to
15 inaccuracies in what Mr MacLean said?

16 First, there is no criticism of my client, O2, so
17 Telefónica UK, in respect of document preservation. So
18 in targeting that complaint against O2, Mr MacLean,
19 I think, doubtless misspoke.

20 And, second, in respect of my other two clients,
21 Telefónica SA and the holding company below it, there is
22 no basis for the allegation that any deliberate step was
23 taken to destroy any document by either of those
24 clients, and that will be the case that we put forward
25 at trial, but it is important, of course, to my clients

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1 to put the record straight, as I understand it. Thank
2 you.

3 So then to turn to my second point, which is on the
4 substance and on the modelling analysis aspect and the
5 substance.

6 We do have a number of serious concerns about
7 Phones 4u being able to put in expert evidence on what
8 I will call the paragraph 124 to 7 issues. And to show
9 you what those are, could I ask you to turn up that part
10 of the pleading again, please, my Lord.

11 So I will look at the amended draft — the draft
12 amended version, which the relevant section starts at
13 {B/3/68}, and it is page 67 in the internal numbers of
14 the pleading, if you've got a paper copy.

15 MR JUSTICE ROTH: Yes.

16 MS ABRAM: So I want to make two submissions to you about
17 this bit of the pleading, my Lord, and if I could just
18 tee them up at once and then — so I won't have to come
19 back to it.

20 So for the purpose of a point I'm going to come back
21 to, if you could look four lines down from the start of
22 paragraph 124. You will see that it's pleaded:

23 "No MNO Defendant acting rationally and/or in its
24 own commercial interests would choose unilaterally to
25 cease dealing with P4U in circumstances where P4U was

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1 likely to [keep dealing with other MNOs]."
 2 And then over the page, at the top of page 68 in the
 3 internal numbering:
 4 "In particular, without prejudice to the expert
 5 economic evidence that P4U will serve in due course, P4U
 6 avers as follows."
 7 I want to come back to that passage in respect of
 8 the scope of expert evidence and the scope of what's now
 9 sought.
 10 But the point in respect of O2, in respect of
 11 Telefónica specifically, just in a nutshell, my Lord, is
 12 that the bit of Phones 4u's case that it would be
 13 necessary for an MNO to retain about two-thirds of its
 14 Phones 4u customers, in order to make leaving Phones 4u
 15 rational, is not pleaded against my clients. So there
 16 is no basis, in these paragraphs of the pleading, for
 17 the posited positive modelling-based case by Phones 4u,
 18 in respect of Telefónica leaving Phones 4u. So if this
 19 is the scope of the expert evidence application now
 20 made, it just doesn't stack up against one of the three
 21 MNOs at all, and I'll show you that.
 22 So it starts with a kind of general description, but
 23 the point starts being teed up at point (b)(ii), page 68
 24 {B/3/69} of the internal numbering:
 25 "Nonetheless, the profits obtained by the MNO

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1 Defendants as a result of customers joining their
 2 networks via P4U were substantial."
 3 And then some example figures that Phones 4u have
 4 said to have generated in gross profit for EE and then
 5 Vodafone and not, my Lord will note, for O2.
 6 The point continues over the page, my Lord, at point
 7 (d) {B/3/70}:
 8 "The average NPV [so net present value] to EE and/or
 9 Vodafone UK of customers who joined either of their
 10 networks via [Phones 4u] was approximately 65% of the
 11 average NPV of customers who would join through direct
 12 means."
 13 So, again, not pleaded against O2.
 14 And then at subparagraph (e):
 15 "It follows that ..."
 16 In summary, EE or Vodafone would need to expect to
 17 retain at least 65% of their Phones 4u customers, in
 18 order to make it sensible and rational for them to leave
 19 Phones 4u.
 20 And there's the additional text — the reason I'm
 21 showing you this, in the draft amended version, is
 22 because this is really the height of Phones 4u's case,
 23 and what you'll see is that they then go on to see in
 24 the red underlined text:
 25 "However, any such analysis of expected customer

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1 retention (for O2 [as well as the others]) would always
 2 be subject to the need ..."
 3 For the MNO to consider a number of different
 4 factors. But that's not the same as pleading a positive
 5 case against O2 as to what level of customers we would
 6 need to retain, so it's not so much that the pleading is
 7 ragged against my clients, it's that it's totally absent
 8 in this respect.
 9 And just to tie that up to the punchline. That
 10 comes at point (g) on page 70 {B/3/71} of the internal
 11 numbering:
 12 "It follows that realistic expectations as to
 13 retained Phones 4u customers were far below the 65%
 14 threshold and there was no rational basis on which EE or
 15 Vodafone could have expected to retain that number of
 16 customers."
 17 Now, of course, it's to be inferred that while
 18 Phones 4u were amending their pleading, including that
 19 passage, if they had a like case against O2, they would
 20 have advanced that case against O2. And in my
 21 submission, the fact that they don't do so, it's not
 22 just — I'm not just raising a pleading point, I'm not
 23 trying to be difficult, but it actually stems from
 24 a fundamental difficulty with Phones 4u's case that we
 25 have been seeking to explore with them in correspondence

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1 for about 18 months.
 2 So my Lord has seen, in my skeleton, that about
 3 18 months ago we sent them a request for further
 4 information, asking: what are the counterfactual terms
 5 that you say that O2 essentially was weighing up against
 6 the idea of leaving Phones 4u? Because, of course, the
 7 question of how many customers you need to keep hold up,
 8 in order for it to be better to stay in Phones 4u,
 9 depends on whether Phones 4u were going to pay us £300
 10 a connection or we were going to lose £50 a connection,
 11 for example.
 12 And Phones 4u took eight months to answer, and then
 13 they said, "You don't need us to answer at all".
 14 And, again, I'm not seeking to raise a pleading
 15 point, it's a point of real substance, because it means
 16 that if Phones 4u were sent off to show us their
 17 positive case on the modelling, it appears that they
 18 don't have any positive case on what the threshold would
 19 be against which O2 were judging the decision to leave
 20 Phones 4u, and certainly we don't know what that
 21 positive case is.
 22 And my Lord has seen in the authorities referred to
 23 in my skeleton, particularly London Executive Aviation,
 24 that there are significant warnings — judicial warnings
 25 against the prospect of allowing expert evidence in

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1 circumstances where the basis for the expert evidence
 2 depends on factual permutations, the nature of which
 3 won't be determined until trial, because it just means
 4 in practice that the expert evidence is much, much less
 5 likely to be useful or even usable.
 6 And in a sense, that is a theme that runs through
 7 what we say and what we've always said about Phones 4u's
 8 posited modelling approach, the idea that — the idea
 9 that any MNO would judge whether or not to leave
 10 Phones 4u against what they would call the net present
 11 value of each customer brought to the MNO by Phones 4u.
 12 We've said from the beginning, look, O2 just didn't look
 13 at it in that way. We didn't do an analysis by
 14 reference to the kind of technical accounting concept of
 15 net present value.
 16 And that's important to this question, and it's also
 17 important to the trial, because, my Lord, at the trial,
 18 the trial judge, whether it's your Lordship or someone
 19 else, will be thinking: well, actually, why did these
 20 MNOs decide to leave Phones 4u? And looking at that by
 21 reference to a totally different analytical approach,
 22 particularly by reference to judged by threshold that we
 23 don't need to know what they are, just won't be of any
 24 assistance at all to the trial judge.
 25 So what we would say is that the analysis of the

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1 modelling — and we do accept there needs to be analysis
 2 of the reasons for the MNOs leaving Phones 4u, of course
 3 that's fine, and, of course, it's fine for Phones 4u to
 4 want to understand our modelling and reasonable for them
 5 to want to ask its questions about it. But as my Lord
 6 commented in your interventions, it's difficult to see
 7 why expert analysis of our modelling analysis is likely
 8 to be helpful, in terms of an expert report process. Of
 9 course, it may inform questions being asked behind the
 10 scenes, but that's a totally different process.
 11 So we say, actually, either way you approach it, you
 12 don't need expert evidence, because if you look at
 13 Phones 4u's positive case, that's irrelevant and based
 14 on an unidentified threshold and no pleaded case. And
 15 based on our modelling analysis, you don't need expert
 16 evidence, because it's a question of understanding what
 17 we've done and why. (Pause).
 18 That was my second point, my Lord.
 19 My third point is that we are also seriously
 20 concerned about mission creep beyond the scope of the
 21 issues identified in paragraphs 124 to 127, and I'm not
 22 going to repeat what Mr McQuater said about that,
 23 although we share and adopt those concerns. But the
 24 purpose of me showing you the opening words of
 25 paragraph 124, at the beginning of my submissions, was

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1 just to draw to your Lordship's attention that really
 2 what Phones 4u are seeking to get out of their economic
 3 analysis section, vis-à-vis EE and Vodafone, is that it
 4 wouldn't have been commercially rational — that's the
 5 punchline — it wouldn't have been commercially rational
 6 for EE and Vodafone to leave Phones 4u, according to
 7 their case.
 8 And what we really don't want is for the broad
 9 rationality question to come creeping back in, through
 10 the backdoor, on the basis that the expert is thought
 11 entitled to set out some kind of modelling approach and
 12 then to tie that up to what he says would be rational.
 13 And my Lord has my submissions on rationality, which
 14 I've set out extensively in my skeleton argument, but
 15 you've seen that I say that evidence that goes to
 16 credibility alone is not admissible. Evidence that
 17 an expert subjectively would have done something
 18 different is not admissible. And if what you're talking
 19 about really is a competition economist saying, "Well,
 20 if I'd been CEO of a major UK business, I would have had
 21 a different appetite for risk", that's highly unlikely,
 22 with the greatest respect to Mr Thomas, or any other
 23 competition economist, to be of any material assistance
 24 to the English court, because it's a question that was
 25 decided by businesses, based on their own internal risk

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1 appetites and their own decision-making processes.
 2 So we strongly resist the prospect of mission creep
 3 and towards rationality.
 4 And then on the paragraph 81 factors, I won't repeat
 5 what Mr McQuater said about the paragraph 81 practice,
 6 but we respectfully share Vodafone's concerns on those.
 7 I don't know, would it be useful for me to take your
 8 Lordship to one worked example of the way — the sort of
 9 way that the paragraph 81 points come up in a pleading,
 10 so that you can see the kind of nature of the issues
 11 between the parties on them?
 12 MR JUSTICE ROTH: Well, this is your point 4, is it?
 13 MS ABRAM: This is my point 3. Points 4 and 5 are happily
 14 short.
 15 MR JUSTICE ROTH: Well, give me your points 4 and 5, and we
 16 will come back to this point.
 17 MS ABRAM: I'm grateful.
 18 So point 4 is the 2006–2009 period, so that specific
 19 question. And I respectfully adopt what Mr McQuater had
 20 to say about that suggested question, and I just want to
 21 illuminate that with one further point.
 22 Mr McQuater said that the court isn't going to be in
 23 a position to tell whether the market had changed from
 24 '06–'09 to '12–'14, including because there had been no
 25 disclosure. Now, Telefónica, for our part, in a sense

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1 we've got very little skin in that game, because we've
 2 got no positive case on the reasons for the 2006–2009
 3 decisions. We just say that we just thought it was the
 4 right thing to do to leave in '13 and '14.
 5 But if we were going to want to look back to
 6 '06–'09, all parties on all sides and the court would
 7 need to know what the decisions that the MNOs were
 8 actually taking at that earlier time were. And in order
 9 to do so, they would have to have substantial
 10 disclosure, including, in particular, the terms that
 11 were on offer when the MNOs walked away from Phones 4u
 12 and the terms that were offered in order to induce them
 13 back to Phones 4u. You can't just compare '06–'09 with
 14 '12–'14 in the abstract, in a kind of macro market
 15 sense, without actually knowing what the decisions were
 16 that were being —

17 MR JUSTICE ROTH: I thought the pleading about that is put
 18 precisely in that way.

19 MS ABRAM: I'm sorry, my Lord. I didn't hear you.

20 MR JUSTICE ROTH: I thought some of the pleading on '06–'09
 21 from some of the defendants, maybe not your client, is
 22 put in general market way.

23 MS ABRAM: So far as Telefónica is concerned, and it may be
 24 that I'm in a particularly good position on this point,
 25 we just say that '06–'09, we've got no position — we've

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1 got no position on it. We believe that we did leave and
 2 come back in '06–'09. It's so long ago, we even
 3 struggle to confirm that. But certainly we're not
 4 relying on that as the reason to justify the rationality
 5 of the decision in '13 and '14.

6 MR JUSTICE ROTH: No. I think it's the case, isn't it, that
 7 the claimants rely on it, and several defendants have
 8 responded, not saying, "Oh, but the terms on offer were
 9 such that it wasn't attractive", but by saying there
 10 were certain conditions in the market then that meant
 11 that it was a very different situation. That's how the
 12 case was put, and so that's how it arises.

13 MS ABRAM: Yes, yes, my Lord. But in order to know whether
 14 it was a different situation, again you have really got
 15 to know what the offer is. It's not just —

16 MR JUSTICE ROTH: Well, that's not how the case has been
 17 pleaded. So if that's not the basis put forward for
 18 saying it's a different situation that's how the
 19 defendants have chosen to distinguish it. In which
 20 case, you look at the conditions in the market. If they
 21 had pleaded saying that there were particular terms that
 22 made it unattractive and then revised terms that made it
 23 more attractive, yes, then I would take your point. But
 24 that's not what has been advanced.

25 MS ABRAM: Yes. I suppose from the perspective of my

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1 clients, if expert evidence were to be permitted or were
 2 in danger of being permitted in respect of that
 3 question, we would want to bring in those questions, and
 4 I just say that — because we haven't had disclosure on
 5 that, it's not possible —

6 MR JUSTICE ROTH: Well, it depends how the question arises,
 7 yes.

8 MS ABRAM: I'm grateful. The fifth point was on the common
 9 experts, my Lord. In my submission, this is unlikely to
 10 be a case where having a common expert on market issues
 11 will save time or money, particularly so close to the
 12 trial, if there is to be any expert at all. It's a bit
 13 different from, for example, the trucks case, which your
 14 Lordship and I were discussing yesterday, where there is
 15 a common downstream expert and then separate upstream
 16 expert. It's very difficult to distinguish out the
 17 issues from one another, particularly where you'd have
 18 to be giving instructions from competing businesses may
 19 concern confidential information or sensitive
 20 information, and also quite a long time period as well,
 21 because my client left Phones 4u significantly before
 22 the other MNOs. And so, although wholly understandably,
 23 the genesis of the suggestion — and, of course, we are
 24 particularly keen to save costs wherever possible, we
 25 submit that it's unlikely to promote efficiency in this

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1 case.

2 MR JUSTICE ROTH: Yes. Right. I've got that point. And
 3 then you said that there's one of the paragraph 81
 4 factors.

5 MS ABRAM: Yes. Just in case it is interesting —

6 MR JUSTICE ROTH: Which one is that?

7 MS ABRAM: Just in case it is interesting to see how they
 8 come out. So let's look at Telefónica's defence.

9 MR JUSTICE ROTH: Which factor?

10 MS ABRAM: Oh, it's just the young customers, I've chosen at
 11 random essentially. So the idea that Phones 4u say they
 12 were particularly strong at selling to the youth market.

13 MR JUSTICE ROTH: I am sure you do nothing random, Ms Abram.

14 MS ABRAM: You're very kind. So the relevance of this
 15 pleading is it's our defence, so it is at {A/7/5}. And
 16 there are two short extracts to show you. I don't think
 17 I need to show you what we're pleading back to. And the
 18 relevant passage is —

19 MR JUSTICE ROTH: Page 75?

20 MS ABRAM: No, tab 7, page 5, and paragraphs 11 and 12.

21 MR JUSTICE ROTH: Yes.

22 MS ABRAM: And if I could just ask you to read paragraphs 11
 23 and 12, and then I'll take you to one other very short
 24 extract as well, just to show you the point.

25 MR JUSTICE ROTH: Yes. Well, I'll just make a note of it

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1 and I'll read it before tomorrow.
 2 MS ABRAM: I'm grateful.
 3 So the other extract that kind of pulls the point
 4 together is paragraph 30.2, and that is on page
 5 {A/7/10}.
 6 MR JUSTICE ROTH: Yes.
 7 MS ABRAM: And my point on that is just that there may be
 8 pleaded issues on these paragraph 81 points, in the
 9 sense that they feature in the pleading, so in a sense
 10 the ink has been spilled on them, but it doesn't follow
 11 that it would be appropriate at all for the parties to
 12 go away and spend hundreds and thousands or millions of
 13 pounds on expert evidence, on points that really, at the
 14 very best, are matters of background. That's all
 15 I wanted to say, my Lord.
 16 MR JUSTICE ROTH: So it's peripheral. Right. I think if we
 17 start at 10.00 tomorrow, if that doesn't inconvenience
 18 everyone, that will give us a bit more time. So
 19 10 o'clock tomorrow morning.
 20 (4.00 pm)
 21 (The hearing adjourned until 10.00 am on Thursday,
 22 14 October 2021)
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