

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN

JUSTIN LE PATOUREL

Class Representative

and

(1) BT GROUP PLC

(2) BRITISH TELECOMMUNICATIONS PLC

Defendants

RE-AMENDED REPLY

Introduction

1. This Re-Amended Reply (the “Re-Amended Reply”) is filed and served on behalf of the Class Representative, in accordance with the Tribunal’s Order of 27 July 2023 ~~19 October 2024~~. It responds to the Defendants’ (together “BT”) Re-Amended Defence dated 27 July 2023 ~~dated 3 December 2021~~ [date] in the form served on the Class Representative on 8 February and consented to by the Class Representative on 24 February 2023 (the “Re-Amended Defence”).¹
2. In this Re-Amended Reply, unless otherwise indicated:
 - a. The Class Representative adopts the defined terms used in his Re-Re-Re-Amended

¹ This Re-Amended Reply uses the past tense when responding to BT’s case on the alleged infringement and the loss and damage to Class Members. The use of the past tense in this Re-Amended Reply is for convenience only and no admission is thereby made that the alleged infringement and the loss and damage have ceased in relation to the Sub-class of BT Split Purchase Customers. Footnote 1 of the Re-Re-Re-Amended Claim Form is repeated.

Claim Form dated ~~24 June 2021~~ ~~3 March 2023~~ 6 July 2023 (the “**Re-Re-Re-Amended Claim Form**”). Insofar as this Re-Amended Reply adopts definitions and headings used in the Re-Amended Defence, it does so without making any admissions thereby.

- b. Paragraph references are to paragraphs in the Re-Amended Defence.
 - c. The contents of the Re-Re-Re-Amended Claim Form are not repeated.
 - d. The judgment of the Competition Appeal Tribunal (“CAT”) on the CPO Application in *Le Patourel v BT* [2021] CAT 30 dated 27 September 2021 is referred to as the “**Judgment**”.
3. Insofar as the Class Representative does not respond to matters raised in the Re-Amended Defence, he joins issue with BT and requires any factual matters to be proved.
 4. Without prejudice to the generality of the aforesaid, the Re-Amended Defence incorrectly paraphrases and/or mischaracterises the Class Representative’s case in a number of respects. The Class Representative relies on the full contents of the Re-Re-Re-Amended Claim Form.
 5. As to paragraphs 5(b), 10, 13(b)-(c), 14A, 52(a) (2nd and 3rd sentences), 52(j) (second and third sentences), 52(k) (first sentence), 52(l) (first sentence), and ~~53(b) and (d)~~, 58(c), the admissibility, relevance, and probative value of the Ofcom Materials are matters of law on which the Class Representative will make submissions at trial. For the avoidance of doubt, it is denied that the Ofcom Materials are inadmissible, irrelevant or of no probative value, and the Class Representative will rely on them for their full meaning and effect at trial. The Class Representative will, in that regard, rely on the Court of Appeal’s Judgment in the FX CPO Appeal,² which confirms that the Tribunal has a wide discretion as to the evidence to be admitted and that the weight to be attributed to prior findings is a matter for the Tribunal. It is further averred that the Tribunal found at Judgment paragraph 52 that:

... The PCR’s case is not that there is some automatic “read-across” of the [Ofcom] Review so as to found the claim. Rather, the PCR relies upon the Review as a piece of evidence. Given that the object of Ofcom here was to

² [2023] EWCA Civ 876.

consider the question of excessive pricing it would, in our judgment, have been very odd if, for present purposes, the PCR did not consider the Review as being highly relevant. It is, as the PCR submits, the most up-to-date and comprehensive body of evidence relating to the subject-matter in issue which is in the public domain; or, it is at least plainly realistic so to contend for present purposes.

6. As to paragraphs 5(c) and 13(d)(ii), the Class Representative relies on the summary of the Ofcom Materials in Parts II, III and IV of the Re-Re-Re-Amended Claim Form, and Part I of the Class Representative's CPO Reply of 28 May 2021 (the "CPO Reply") and will address the evidential significance of the contents of the Ofcom Materials at trial. The allegations that: the Class Representative mischaracterises and understates the extent to which SFV Customers were "informed decision-makers" at paragraph 13(d)(ii)(1); and a significant proportion of BT Split Purchase Customers considered that they were "optimising their purchase decisions" at paragraph 13(d)(ii)(4) are denied, for the reasons given in paragraphs 7A-F below.
7. Save as aforesaid, paragraphs 5 and 42 are denied for the reasons in the Re-Re-Re-Amended Claim Form and below.

Nature of the Class

- 7A. BT's averment at paragraph 24(b) that "a material proportion of the Class comprises customers who in fact made during the Claim Period and continue to make conscious and deliberate choices to purchase their chosen SFV Service, or to continue purchasing their chosen SFV Service, from BT" is denied, for the reasons pleaded below, including that remaining with BT was the default option which required no positive steps to be taken by them.
- 7B. In that regard, the Class Representative will rely at trial upon expert evidence from a behavioural economist who will address matters relevant to the proper interpretation of the conduct of Class Members in remaining with BT, in particular as regards BT's averments (each of which is denied) that Class Members: (i) made "conscious and informed choices not to switch" (see paragraph 7A above and paragraphs 25 and 52(d)); and (ii) considered that they were "optimising their purchase decisions" by remaining with BT (paragraph 13(d)(ii)(4) in respect of a "significant proportion of SPCs") and (iii) ~~made an active choice not to switch which "evidences the fact that they ascribed~~

economic value” to BT’s SFV services (paragraph 57(a)(iii)).

7C In particular, the Class Representative will rely, *inter alia*, on the following matters which have been put before the Tribunal in the Outline of the Proposed Expert Report of Professor Graham Loomes dated 2 September 2022 and the Second Outline of the Proposed Expert Report of Professor Graham Loomes dated ~~on~~ 12 April 2023, and which will be expanded upon in his full Expert Report in due course:

- a. Individual consumers do not generally behave like “Econs (orthodox rational agents)” but often as “Humans ... [who] make decisions that are less good for them than they might be if they had the powers of an Econ to compute and navigate the decision environment”.³
- b. Whereas an Econ would be expected to switch to a cheaper alternative service whenever the price disparity exceeds the cost of switching and any difference in the utility-bearing characteristics of the two services, the behaviour of a Human consumer “may raise a number of additional questions”.⁴
- c. Switching by a Human consumer requires some signal or trigger to make them aware that the status quo is no longer “satisficing”.⁵ So-called “status quo bias” is a common feature of Human behaviour. Otherwise, a Human consumer will continue to purchase their existing service as the “default option”⁶; not moving from the default option is not the same as actively choosing it.⁷
- d. Even if a consumer is presented with such a trigger or signal, there are numerous additional factors which are liable to affect the likelihood of switching, including (i) complexity,⁸ (ii) uncertainty,⁹ (iii) choice or information overload,¹⁰ (iv) ambiguity

³ First Outline Report, para 17.

⁴ First Outline Report, paras 21-22.

⁵ First Outline Report, paras 15, 23.

⁶ First Outline Report, paras 23-24.

⁷ First Outline Report, para 24.

⁸ First Outline Report, para 28.

⁹ First Outline Report, para 29.

¹⁰ First Outline Report, para 30.

aversion;¹¹ (v) loss/regret aversion;¹² (vi) omission-commission bias;¹³ and (vii) status quo bias.¹⁴ In the light of those factors, remaining with the status quo may not be a conscious or deliberate choice in the context of human decision-making.¹⁵

- e. Human behaviour which departs from the Econ model is widespread in many contexts.

7D. In the premises, the Class Representative will say (to be addressed in expert evidence) that:

- a. The principles and matters set out in paragraph 7C above are applicable to Class Members (or any of them), in particular because (i) each and every Class Member was an individual buying residential SFV Services from BT, and the large majority of Class Members were consumers; (ii) Class Members (or alternatively, many Class Members) generally behave according to the Human model; and/or (iii) many Class Members possessed certain characteristics which made them even less likely to switch (see Re-Re-Re-Amended Claim Form paragraph 80).
- b. Further or alternatively, many Class Members would have conducted themselves according to a Human, and not an Econ, model of decision-making. In the circumstances, BT was not materially constrained from overcharging Class Members by the prospect of a sufficient number of them switching away from BT SFV Services.
- c. Further or alternatively, there are particular features of the relevant markets and/or surrounding circumstances in respect of the supply of SFV Services to Class Members which are likely to inhibit and/or further inhibit switching by Class Members (or any of them).¹⁶ Those features include, but are not limited to, the following:
 - i. BT's SFV Service was the default option for Class Members (or any of them);

¹¹ First Outline Report, para 31.

¹² First Outline Report, para 31.

¹³ First Outline Report, para 31.

¹⁴ First Outline Report, para 31.

¹⁵ First Outline Report, para 31.

¹⁶ First Outline Report, para 35.

- ii. There was insufficient information available and/or no adequate trigger to draw the attention of Class Members to any price disparities (as alleged by BT) between their existing service or tariff with BT and alternative services or tariffs (either with BT or other service providers);
- iii. BT took positive steps to minimise publicity in relation to the relevant price rises and/or reduce the chances of the attention of Class Members being drawn to the relevant price rises: Re-Re-Re-Amended Claim Form paragraph 136A is repeated;
- ~~iv. Adequate cheaper substitutes were not available; paragraph 27(e) below is repeated;~~
- v. The process and/or steps involved in switching was/were not perceived to be straightforward and/or realistic to be undertaken by Class Members (or any of them); and/or
- vi. The fact that BT was a price leader in the market.
- d. The matters pleaded at sub-paragraphs (a) to (c) above (or any of them) refute BT's claims that Class Members (or a sufficient number of Class Members) made conscious, informed and/or deliberate choices to stay with BT and that their conduct in so doing reflects the value to them of BT SFV Services.

7E. As to BT's denial at paragraph 24(a) that the fact that a proportion of the Class have the particular characteristics pleaded at Re-Re-Re-Amended Claim Form paragraph 80 is relevant to their ability to make "conscious choices about whether to take advantage of the opportunities, which were available to them in practice, to switch their service provider or tariff":

- a. It is averred that, in addition to the matters pleaded at paragraphs 7A-D above, the characteristics pleaded at Re-Re-Re-Amended Claim Form paragraph 80 are a further reason why Class Members with those characteristics did not make conscious, informed and/or deliberate choices to remain with BT as their incumbent provider of SFV Services;
- b. The Class Representative will rely on Professor Loomes' expert evidence in respect of these matters, as allowed by the Tribunal on 18 November 2022 and 3 July 2023;

- c. The Class Representative also relies, in this regard, on the Table of Relevant Characteristics of Sub-Classes filed on 2 December 2022. The Class Representative notes that in paragraph 24A of the Re-Amended Defence, although BT has not admitted the factual matters set out in the aforesaid document it has adduced no positive case to dispute them.

7F. As to BT’s averment at paragraph 25 that “the customer group comprising purchasers of SFV services ... comprises customers who often make conscious and deliberate choices about whether to switch their tariff or supplier”:

- a. To the extent that the term ‘comprises’ is intended to connote that all Class Members made a conscious and deliberate choice not to switch away from BT SFV Services during the Claim Period (for the period of time during which any Class Member bought that service), the averment is denied;
- b. Alternatively, if it is alleged that some Class Members made such conscious and deliberate choices, then it is denied that there were a sufficient number of such customers within the class so as materially to constrain BT’s ability to charge prices significantly above the competitive level ~~(without prejudice to the Class Representative’s position that adequate cheaper substitutes were not available; paragraph 27(e) below is repeated).~~

7G. BT’s “averment” that business customers should be excluded from the Class is impermissible: while BT raised various objections in relation to the harm suffered by business customers within the Class at certification, which were rejected by the Tribunal, BT did not object to their inclusion within the Class as certified at the CPO stage. It is an abuse of process for BT to seek to bring a further challenge to certification in respect of business customers which BT could have brought at the CPO stage.

Market definition

8. As to paragraphs 5(d) and 46, while market definition will be the subject of disclosure and evidence, including expert evidence, the ‘anticipated’ market definition pleaded by BT at paragraph 46 is denied – save that, it is noted that BT has, in the Re-Amended Defence, withdrawn its prior allegation that standalone mobile access and calls services are within the relevant market. Re-Re-Re-Amended Claim Form paragraphs 124-126 are repeated. The following averments on market definition at paragraphs 9-11 below are

without prejudice to the generality of the aforesaid.

9. Paragraphs 47 (1st sentence), 48A(a)¹⁷ (second sub-clause of the first sentence), 48A(c), 48B (second sentence), and 50(a) are denied. Bundled services (which, for the avoidance of doubt, include Dual Play and other multi-play services) did not form part of the relevant market(s) before or after the Commitments (however defined) because they did not materially or sufficiently constrain the prices charged to VOCs and/or SPCs during the Claim Period. In particular ~~during the Claim Period:~~

~~a. — Bundled services (which, for the avoidance of doubt, include Dual Play services), do not form part of the same economic market as SFV Services supplied to VOCs and/or have not acted as a material or sufficient competitive constraint on the prices of SFV Services supplied to VOCs, including for the following reasons:~~

aa. VOCs ~~customers~~ do not use and/or want to buy a broadband service, either at all or in a bundle.

ab. BT was able to demand prices for BT SFV Services supplied to VOCs which were well above competitive price levels (and which, for the avoidance of doubt, were more than a small but significant and non-transitory increase in price (“SSNIP”) above competitive price levels), notwithstanding the prices which it charged for bundled services.

ac. ~~Ofeom found that~~ BT’s internal documents ~~did do~~ not indicate any concern on the part of BT that line rental price rises would reduce BT’s profitability by causing VOCs to switch away from BT SFV Services in favour of bundled services.

~~b. — Bundled services do not form part of the same economic market as SFV Services supplied to SPCs and/or have not acted as a material competitive constraint on the prices of SFV Services to SPCs during the Claim Period, including for the following reasons:~~

ba. BT has been able to demand prices for BT SFV services supplied to SPCs which are well above competitive price levels (and which, for the avoidance of doubt, were more than a SSNIP above competitive price levels), notwithstanding the

¹⁷ The CR notes that the numbering of the sub-paragraphs in paragraph 48A of the Re-Amended Defence has been struck through. The CR assumes that this has been done in error and that the numbering stands.

prices which it charged for bundled services. ~~Ofeom found that~~ BT's internal documents ~~did do~~ not support BT's claims that price rises in SFV Services would cause SPCs to switch to Dual Play or other bundled services in sufficient numbers materially to constrain SFV prices.

bb. Any similarity in characteristics between SPCs and customers of bundled services and/or between the services purchased by those groups of customers has have not caused a material sufficient number of SPCs to switch to bundled services materially to constrain SFV prices. See the averments at CPO Reply paragraph 8(d).

~~iii. — It is averred that Ofeom's analysis covered both list prices and promotional prices.~~

10. As to paragraph 48B, the allegation in the second sentence that SPCs and VOCs remained in the same product market after the Commitments is denied, Paragraphs 48(e) and 49(a)(ii) are denied. At all material times during the Claim Period, the supply of SFV Services to VOCs and the supply of SFV Services to SPCs comprised distinct economic markets, including for the following reasons:

~~a. — Ofeom found that BT had the ability to price discriminate between VOCs and SPCs throughout the Claim Period.~~

b. From 1 April 2018:

i. BT has price discriminated between those two groups of customers by applying a discount to the price of BT SFV Services for VOCs, but not for SPCs, as required under the BT Commitments, and continues to do so. Paragraph 124B(b) of the Re-Re-Re-Amended Claim Form is repeated.

ii. BT has been able to maintain a price differential between the two sets of prices at all material times, which is well in excess of a SSNIP.

c. In the premises, the prices which VOCs pay for SFV Services have not materially or sufficiently constrained the prices which SPCs pay for SFV Services since 1 April 2018 to date.

d. Further and in any event, even if (which is denied) a single market for these two customer groups was is defined for the period after the Commitments prior to April

~~2018 (when BT charged the same prices to each customer group) or at any time during the Claim Period~~, it is the Class Representative's case that BT has occupied a dominant position on that single market at all material times, which it has abused, for the reasons particularised in the Re-Re-Re-Amended Claim Form and this Re-Amended Reply.

11. Paragraph 50(e) is denied. BT's non-admission, at paragraph 50(c), of the Class Representative's allegation that mobile services are not within the Relevant Markets is incoherent in the light of its withdrawal at paragraphs 5(d) and 46 of its prior allegation that mobile services are within the Relevant Markets. Mobile services do not form part of the same market as SFV Services supplied to either VOCs or SPCs, because *inter alia* In any event, the prices of mobile services did ~~do~~ not sufficiently or materially constrain ("potentially" or at all) the prices of SFV Services charged to VOCs and/or SPCs during the Claim Period. Paragraphs 37(c), 65(b)(iv)(iii) and 126(c) of the Re-Re-Re-Amended Claim Form are repeated.

Dominance

12. Paragraphs 5(e) and 51 are denied. Dominance will be the subject of disclosure and evidence, including expert evidence: see Re-Re-Re-Amended Claim Form paragraphs 127-130 and CPO Reply paragraphs 8(b) and 8(c). While BT puts the CR to proof as to the size of BT's market shares at paragraph 52, BT has failed in its Re-Amended Defence to set out its own pleaded case on BT's shares of the relevant market(s) over the course of the Claim Period.

12A. The allegation in paragraph 52(d) that customers who did not switch were "actively engaged in the market and made conscious and informed choices not to switch" is denied for the reasons pleaded at paragraphs 7A-F above, and paragraph 80 of the Re-Re-Re-Amended Claim Form. Consequently, the fact that Class Members remained with BT as their incumbent provider of SFV Services does not support BT's contention that it was not capable of behaving independently of those customers. Further or alternatively, Class Members did not have countervailing buyer power: see Re-Re-Re-Amended Claim Form paragraph 128.

13. As to the allegation in paragraph 52(e)(i) that BT's impugned SFV prices are not / were not exploitative on the basis that they "were a rational response to the evolving competitive landscape ..." in bundled services, it is denied that the state of competition

in the relevant market(s) on which bundled services are supplied is relevant to the assessment of the prices charged for SFV Services, including for the reasons pleaded at paragraph 9 above.

14. Further or alternatively, even if, *quod non*, the prices of bundled services are somehow relevant to the assessment of BT's SFV prices under the Chapter II Prohibition during the Claim Period, it is denied that those prices can be explained / justified as a rational (or lawful) response to competition in bundled services, including for the following reasons:
 - a. It would not be commercially rational for BT to set its prices with the aim of moving customers from a more profitable product (SFV Services) to a less profitable product (bundles).
 - b. Nor would the purported strategy of charging higher prices for SFV Services in order to encourage the uptake of bundled services (as alleged at paragraph 52(h)(ii)) be commercially rational given the risk that any SFV customer who was thereby incentivised to switch to a bundled service (which is denied for the reasons pleaded at paragraph 9 above) could opt to purchase bundles from a provider other than BT.
 - c. ~~Ofeom found that~~ BT's internal documents ~~do not~~ support BT's purported justification that the increase in its prices for SFV Services was intended to encourage migration to bundled services.
15. Without prejudice to paragraphs 13-14 above, whether or not BT genuinely believed its prices for SFV Services to be a 'rational' response to competition in bundled services (which is denied for the reasons above), BT's prices for SFV Services during the Claim Period are nonetheless excessive and/or unfairly high in violation of Chapter II, for the reasons pleaded in Part IV of the ~~Re-Re~~-Amended Claim Form and herein.
16. As to paragraph 52(e)(ii), it is denied that the increase in line rental (i.e. SFV access) price can be explained by competitive rebalancing between SFV access and SFV calls as alleged by BT. Without prejudice to the generality of the aforesaid, it is averred that a break-even constraint (which is faced where the undertaking in question, here BT, could not profitably operate the relevant services in the face of a reduction in the price of one of those services without rebalancing its charges) is a necessary condition for competitive rebalancing, and BT is put to proof that it faced such a break-even constraint at all

material times.

17. The references to BT's "*retail level*" and "*overall profitability in the retail segment*" at paragraphs 52(e)(iii) and (h) are too vague to understand. BT is put to proof as to which products and/or services are included within those categories.
18. As to paragraphs 52(e)(iv):
 - a. Insofar as BT claims that its excessive and/or unfairly high prices for SFV Services are not exploitative of Class Members because, by charging those high prices, BT was merely implementing a strategy that aligned with the Government's focus on digital inclusion, that claim is incoherent.
 - b. Without prejudice to the generality of the aforesaid, it is denied that BT's prices for SFV Services are justified by a purported strategy of alignment with the Government's focus on digital inclusion. In particular, it is not plausible that the exploitation of Class Members during the Claim Period by charging them excessive and/or unfairly high prices for SFV Services was motivated by a desire to promote the policy of digital inclusion, or could ~~by~~ be justified on that basis; whereas charging competitive prices for bundles (which include broadband) would be obviously consistent with a policy of encouraging digital inclusion.
19. As to paragraph 52(h), it is averred that BT's profitability for the access or access and calls services purchased by SFV customers ~~per fixed voice line~~ is a relevant and appropriate metric for assessing the profitability of BT's SFV Services, and was accordingly relied upon by Ofcom for those purposes: see in particular the Class Representative's averment at Re-Re-Re-Amended Claim Form paragraph 128(h) that "BT's profitability per fixed voice line has been high and increasing over time". Further, BT's claim that "BT's overall profitability in the retail segment ... is a more relevant profitability metric" for the purposes of assessing BT's SFV prices under the Chapter II Prohibition is denied, including for the reasons pleaded at paragraphs 8 to 11 above regarding market definition in relation to the supply of SFV Services. In any event, BT is put to proof as to:
 - a. The relative profitability to BT of customers of SFV Services, customers of bundled services and the profitability of the services and products other than access and calls which are within the alleged category of the retail segment; and

- b. The supply-side efficiencies faced by BT's rivals, as alleged at paragraph 52(h)(2); for the avoidance of doubt, it is denied that any such efficiencies can explain the excessive and/or unfairly high prices of BT SFV Services adequately or at all.

Abuse

20. Paragraphs 5(f)-(h) and 55 are denied:

- a. As to paragraph 55(i), paragraph 16 above is repeated.
- b. As to paragraph 55(ii), paragraph 14 above is repeated.
- c. As to paragraph 55(iii), paragraphs 17 and 19 above are repeated.
- d. As to paragraph 55(iv), paragraph 18 above is repeated.

~~21.— As to paragraph 57(a)(i), paragraph 19 above is repeated.~~

~~22.— As to paragraph 57(a)(ii), it is denied that competitor SFV Services are a reliable or appropriate comparator because, contrary to paragraph 52(f), the evidence contained in the Ofcom materials shows that, during all or most of the Claim Period, BT acted as the price leader, with other communication providers following BT's price increases for SFV Services, in terms of timing and/or magnitude. See CPO Reply paragraph 122.~~

~~23.— As to paragraph 57(a)(iii):~~

- ~~a.— It is denied that each and every member of the Class was an “informed decision-maker”. Paragraphs 7A-F above, Re Re Amended Claim Form paragraphs 44, 64, 70 and 80, and CPO Reply paragraphs 8 and 43-44 are repeated.~~
- ~~b.— It is denied that each and every member of the Class “chose” to pay BT's prices for its SFV Services given *inter alia* (i) the essential nature of SFV Services for any or all Class Members (ii) BT's market power (iii) BT's price leadership, as pleaded at paragraph 22 above, and/or (iv) the consequent dearth in competitively priced SFV Services by communications providers other than BT, and (v) the matters pleaded in paragraphs 7A-F above.~~
- ~~e.— Further or alternatively, it is denied that the fact that Class Members paid the prices which BT demanded for its SFV Services is relevant to the analysis of whether those prices were excessive and/or unfairly high. A customer's willingness to pay~~

~~the prices charged by a dominant firm does not show those prices to be at the competitive level, in particular in the circumstances of this case, including the considerations pleaded at sub paragraph (b) above.~~

- ~~d. As to BT's averment that the fact that Class Members bought SFV Services from BT "evidences the fact that they ascribed economic value to them", insofar as BT is alleging that the conduct of Class Members in remaining on their existing service or tariff indicates that they placed economic value on BT's SFV Services which justified the prices charged by BT, that allegation is denied for the reasons pleaded at paragraphs 7A-F above. Further or alternatively, in a market that is not effectively competitive, economic value cannot be equated with what a consumer is willing to pay for a product / service; the fact that a consumer will or must pay the price that a dominant undertaking demands is not an indication that the price paid reflects a reasonable relationship with economic value. Accordingly, the Class Representative joins issue with the Defendants insofar as they rely on the allegations at paragraph 57(a)(iii) as evidence that BT's impugned prices were not excessive and/or unfair.~~

23A. The Class Representative does not reply to paragraphs 57A-E on abuse which variously (inter alia): (i) fail to plead BT's case on the applicable methodology, including the benchmarks, costs and margins on which BT relies to support its defence to the claim of excessive / unfair pricing; (ii) deny detailed aspects of the Class Representative's methodology which are matters for economic evidence, not statements of case; (iii) assert matters which are not relevant to the pleaded issues (see paragraph 57A); and (iv) plead propositions of law which are matters for legal submission (see paragraph 57B(a)).

23B. As to paragraphs 57F and 57G, BT's denial of loss on the part of business customers is vague, unparticularised and not understood. In particular, BT has not explained why business customers who, BT alleges, were not "entitled" to receive SFV Services (as to which the Class Representative joins issue with BT) suffered no loss in circumstances where they paid unlawful overcharges to BT. In the premises, the Class Representative is unable to plead in reply. For the avoidance of doubt, it is the Class Representative's case that business customers within the Class who paid BT's unlawful overcharges on SFV Services suffered harm and should be compensated.

23CA. As to paragraph 59A:

- a. BT’s averments as to “pricing changes” for undefined “BT products” during the relevant period being “notified to customers” and being “made publicly available in advance” in subparagraph 59A(a) (repeated in paragraph 59A(b)) are vague and insufficiently particularised. In particular, it is wholly unclear:
- i. which relevant “BT products” this encompasses; and/or
 - ii. precisely how, when, in what manner and to which customers “pricing changes” were “notified” and “made publicly available in advance” of their coming into effect as alleged.
- b. Further, subparagraph 59A(a) (repeated in sub-paragraph 59A(b)) is vague and embarrassing. The Class Representative cannot determine:
- i. whether BT relies on the General Conditions (as defined in the Re-Amended Defence) ~~and, if so, precisely which ones,~~ as a defence to the Class Representative’s claim in paragraph 136A of the Re-Re-Re-Amended Claim Form; and/or
 - ii. whether BT alleges that it complied at the relevant times with any such General Conditions.
- c. In the premises:
- i. it is not admitted that pricing changes for BT SFV Services and/or BT SFV access services specifically were notified to customers (sufficiently effectively or transparently and/or in advance of their coming into effect) and/or were made publicly available in advance of their coming into effect (whether at all, or sufficiently effectively or transparently in either case).
 - ii. if and insofar as BT seeks to rely on compliance with identified General Conditions, it is not admitted that BT has, at all relevant times, complied with any relevant Conditions. On 23 January 2023, Ofcom opened an investigation into the compliance of BT with its obligations to provide customers with contract information and a contract summary before they enter a contract as a result of suspected breaches by its subsidiaries EE Limited (EE) and Plusnet Plc (Plusnet) pursuant to General Conditions C1.3 to C1.7 and C5.16.

- d. Even if (which is not admitted) BT did comply with the General Conditions, it is denied that BT therefore acted transparently towards Class Members in relation to its impugned price rises. Paragraphs 136C and 136D of the Re-Re-Re-Amended Claim Form are repeated.

Causation / Loss and damage

24. BT's case on causation and/or loss and damage is insufficiently particularised. The Class Representative reserves the right to amend the Re-Re-Re-Amended Claim Form and/or the Amended Reply following disclosure and/or expert reports and/or factual evidence.
25. Paragraph 60(a) is denied for the reasons in the Re-Re-Re-Amended Claim Form and above.
26. As to paragraph 60(b):
- a. Paragraph 60(b)(i) is denied. Absent BT's unlawful conduct, the prices which Class Members would have paid for SFV Services would have been lower. Re-Re-Re-Amended Claim Form paragraph 138 is repeated. In the premises, BT's unlawful conduct caused the loss and damage claimed.
 - b. The claim in paragraph 60(b)(ii), that "*the behaviour of the Class Members constitutes a novus actus*" is vague and embarrassing. Without further particulars, the Class Representative cannot understand the allegation made and cannot plead to it.
 - c. As to 60(b)(iii), it is denied that "*any damage suffered is too remote*". It was reasonably foreseeable (and indeed obvious) that, by charging Class Members excessive and/or unfairly high prices for the provision of SFV Services, BT would cause them loss and damage in the form of the unlawful overcharges.
27. As to paragraph 60(c), it is denied (if alleged) that, in the context of an award of aggregate damages, the Tribunal is required to conduct any assessment of whether individual Class Members took steps to mitigate their loss. Further and in any event, it is denied that the duty to mitigate is engaged in the circumstances of the Class Representative's Claim, or that Class Members failed to take reasonable steps to mitigate their losses. Without prejudice to the generality of the aforesaid:
- a. The duty to mitigate (to the extent it applies, which is denied) is not a demanding

one.

- b. Class Members did not act unreasonably in paying BT the prices which it demanded for the provision of BT SFV Services and/or in not switching to other products or services and/or other providers of SFV Services ~~(even if there were any, or any adequate, cheaper alternatives available, which is denied)~~, given in particular (i) the extent of BT's market power throughout the Claim Period and (ii) the ~~other~~ considerations pleaded at paragraphs 7A-E, 23(a) and 23(b) above. On that basis alone, the plea of mitigation should be rejected. Accordingly, the Class Representative joins issue with the Defendants insofar as they allege that the Class Members unreasonably failed to mitigate their loss.
- c. Further or alternatively, ~~T~~the burdens, costs and/or disincentives to switching by SFV customers, and the low numbers of SFV customers which have switched to other services / providers, are relevant to what can reasonably be expected of Class Members in terms of mitigation.
- d. ~~BT took steps to obscure price rises and/or to prevent or inhibit customers from switching to cheaper services, for example by notifying price increases during a bank holiday period so as to minimise press coverage. See CPO Reply paragraph 113(a).~~
- e. ~~Class Members had no, or no adequate, cheaper alternative SFV Services available to them. Paragraph 22 above, as regards BT's price leadership during the period, is repeated. In particular:~~
- ca. ~~i.~~ Any alleged duty to mitigate does not require Class Members to switch away from SFV Services in favour of bundled services, including because SFV Services and bundles are in separate markets for the reasons pleaded in the Re-Re-Re-Amended Claim Form and at paragraph 9 above.
- cb. ~~ii.~~ As to paragraph 60(c)(i), it is denied that BT's Home Phone Saver ~~constituted any, or any adequate, alternative. In any event, BT is put to proof that Home Phone Saver was "a cheaper alternative" which~~ was readily available and/or brought to the attention of Class Members, sufficiently or at all. It is the Class Representative's case that the said tariff was not prominently advertised, that a relatively small portion proportion of BT's customers obtained BT's Home Phone Saver tariff

and/or that it was, in any event, difficult for Class Members to access that tariff in the light of their characteristics and vulnerabilities.

- f. Without prejudice to the generality of sub-paragraph (b) above, Tthe characteristics of many Class Members are relevant to what can reasonably be expected of them, if anything, in terms of mitigation. The aforesaid characteristics include but are not limited to Class Members' levels of engagement; socio-economic status; age; awareness of lower priced alternatives; access to the internet; and/or ability to switch. Re-Re-Re-Amended Claim Form paragraphs 44, 64, 70 and 80 and CPO Reply paragraphs 8 and 43-44 are repeated.
 - g. Further or alternatively, any failure to mitigate on the part of Class Members (which is denied) was limited in scope and/or effect in terms of losses sustained by the Class and should not therefore be reflected in the amount of damages awarded to Class Members. Sub-paragraphs (c) to (f) above are repeated.
 - h. As to paragraph 60(c)(iii), BT's averment that the fact that some or all of the Class Members were "disengaged" supports BT's contention that Class Members failed to mitigate their loss is denied. In particular, in the circumstances of this case, Class Members were not reasonably required to realise that they were facing abusive charges, and then to take positive action to switch to a different product or provider (if such products or providers exist, which is denied). The matters pleaded at paragraphs 7A-F are repeated.
28. As to paragraph 60(d), it is denied (if it be alleged) that, in the context of an award of aggregate damages, the Tribunal is required to conduct any assessment of whether individual Class Members were contributorily negligent. Further and in any event, it is denied that there was any contributory negligence on the part of Class Members, either as a matter of law or of fact. Paragraph 27 above is repeated.
29. As to paragraph 61, the allegation of pass-on is vague and unparticularised. It is noted that BT intends "to adduce evidence in due course as to the likely number of business customers within the Class". The Class Representative will respond to any such evidence in due course. Without prejudice to the aforesaid, it is denied (if alleged) that, in the context of an award of aggregate damages, the Tribunal is required to conduct any assessment of whether individual Class Members who are businesses passed on any loss, in the circumstances of this case. Further and in any event, it is denied that there was any

or any material degree of pass-on of losses caused by BT's unlawful overcharges by Class Members who were businesses, including for the following reasons:

- a. At all material times:
 - i. Class Members who were businesses were, in general, competing with businesses which were not on the same domestic tariffs for landline rental and were not therefore paying excessive and/or unfairly high prices for SFV Services; ~~and/or~~
 - ii. The unlawful overcharges paid to BT for its SFV Services by Class Members who are businesses represented a small part of the overall cost base of their business and/or their revenues;
 - iii. Class Members were unaware of the overcharge (or, alternatively, the level of that overcharge) and/or specific increases in the cost of BT SFV Services or components of those Services e.g. BT SFV access services;
 - iv. BT has not identified any direct or materially direct relationship and/or association between the BT SFV Services (and/or BT SFV access services) on which the overcharge was incurred and the product and/or services whose prices have allegedly been increased as a result of any pass on; and/or
 - v. BT has not identified any claims by identifiable purchasers of products / services from Class Members who were businesses in respect of losses caused by the overcharge.
- b. In the premises:
 - i. It is unlikely that the unlawful overcharges imposed by BT had any or any material impact on the prices charged by Class Members who were businesses at the material times; and
 - ii. An aggregate damages award should be calculated on the basis that there was no pass-on of loss by Class Members.
- c. Further and in any event, given the likely small number of affected business customers, the impact of any pass-on on overall damages is *de minimis*. Footnote 70 of the Re-Re-Re-Amended Claim Form is repeated.

29A. BT's denial in paragraph 63 that the Class Representative is "as a matter of law and fact entitled to claim for compensation for "inflation"" is vague and embarrassing for want of particularisation. Paragraph 30 below is repeated.

30. As to the denial of the claim for compound interest at paragraph 65:

- a. All Class Members suffered loss or damage including compound interest on the unlawful overcharges. Class Members are entitled to full compensation for the loss caused to them by BT's breach of statutory duty.
- b. It is denied (if alleged) that, in the context of an award of aggregate damages, the Tribunal is required to conduct any assessment of interest on an individual basis; and/or
- c. Class Members were kept out of, and denied the use of, their money which should be compensated on a compound basis, irrespective of whether the individual Class Member during the Claim Period would have increased savings, and/or reduced debt and/or increased expenditure (or any combination of the foregoing), including for the following reasons:
 - i. Since saving and/or investment instruments accrue compound interest, Class Members who would have saved any or all of the money paid to BT in unlawful overcharges would have earned compound interest on those amounts;
 - ii. Since debt instruments charge compound interest or incorporate interest calculated on a compound basis, Class Members who would have reduced their borrowing by any or all of the money paid to BT in unlawful overcharges, would have avoided compound interest on borrowed amounts; and/or
 - iii. Class Members who would have spent any or all of the money paid to BT in unlawful overcharges should be compensated for their lost purchasing power taking account of increases in prices due to inflation which are compounded over time.

RONIT KREISBERGER QC

NIKOLAUS GRUBECK

JACK WILLIAMS

7 January 2022

RONIT KREISBERGER KC

DEREK SPITZ

JACK WILLIAMS

MATTHEW BARRY


Amendments: 3 July 2023

Statement of Truth

I believe that the facts stated in this Amended Reply are true.

Full name: JUSTIN LE PATOUREL

Signed:



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(Applicant / Proposed Class Representative)

Dated: 5 July 2023

RONIT KREISBERGER KC

DEREK SPITZ

JACK WILLIAMS

MATTHEW BARRY

Re-amendments: 8 September 2023

Statement of Truth

I believe that the facts stated in this Amended Reply are true.

Full name: JUSTIN LE PATOUREL

Signed:

John G. Hill

(Class Representative)

Dated: 8 September 2023