Neutral Citation Number: [2021] EWHC 2879 (Ch)

Case No: CP-2018-000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane,
London, EC4A 1N
Date: 28/10/2021

Before:

MR JUSTICE ROTH
(Hybrid hearing)

- -

Between:

PHONES 4U LIMITED (In Administration) **Claimant**

- and -

1. **EE LIMITED**
2. **DEUTSCHE TELEKOM AG**
3. **ORANGE SA**
4. **VODAFONE LIMITED**
5. **VODAFONE GROUP PUBLIC LIMITED COMPANY**
6. **TELEFONICA UK LIMITED**
7. **TELEFÓNICA SA**
8. **TELEFONICA O2 HOLDINGS LIMITED** **Defendants**

- -
- -

Kenneth MacLean QC, Owain Draper and Gideon Cohen (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the CLAIMANT

Laura John QC and David Gregory (Instructed by Clifford Chance LLP) for the FIRST DEFENDANT

Robert O'Donoghue QC and Hugo Leith (Instructed by Covington & Burling LLP) for the SECOND DEFENDANT

David Scannell QC and David Heaton (Instructed by Norton Rose Fulbright LLP) for the THIRD DEFENDANT

Ewan McQuater QC and Rob Williams QC (Instructed by Hogan Lovells International LLP) for the FOURTH AND FIFTH DEFENDANTS

Sarah Abram and Matthew Kennedy (Instructed by Mishcon de Reya LLP (Sixth defendant) and Linklaters LLP (Seventh and Eighth defendants)) for the SIXTH TO EIGHTH DEFENDANTS

Hearing dates: 13 & 14 October 2021

- -

Approved Judgment
(Expert Evidence)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE ROTH (EXPERT EVIDENCE)

Mr Justice Roth:

Introduction

1. The Claimant ("P4U") has applied to adduce expert evidence from Mr David Thomas, an economist who is also a chartered accountant, and currently acts as a specialist panel member at the Competition and Markets Authority. The Defendants all object to the application. At the conclusion of the argument, I said that I would grant permission but on a somewhat more limited basis than is sought in the application and by reference to specific issues. This judgment sets out my reasons and specifies the issues that the expert (and any expert evidence in response) may address.

The Proceedings

2. To explain how the matter arises it is necessary to put it in the context of these proceedings. The description which follows largely reproduces that given in my previous judgments in this action.

3. P4U was one of the two major retail intermediaries for mobile telephones in the UK until it went into administration in September 2014. The other major retailer of that kind was Carphone Warehouse ("CPW"), which merged with Dixons in mid-2014. These proceedings are principally concerned with the events of 2012-2014, leading up to what was effectively the financial collapse of P4U.

4. The First Defendant ("EE") was at the time a 50-50 joint venture ("JV") between the Second Defendant ("DT") and the Third Defendant ("Orange"). At the material time, EE, the Fourth Defendant ("Vodafone UK") and the Sixth Defendant ("O2") were all mobile network operators ("MNOs") providing connections in the UK. The Fifth Defendant is the parent of Vodafone UK, and it is common ground that these two defendants constitute a single undertaking for the purpose of EU and UK competition law. Similarly, the Seventh and Eighth Defendants were at all material times related companies to O2 and it is common ground that those three companies constituted a single undertaking for the purpose of EU and UK competition law. I shall refer to the Fourth and Fifth Defendants together as "Vodafone" and to the Sixth to Eighth Defendants together as "Telefonica".

5. P4U had a series of agreements with each of the Defendant MNOs for the supply of connections to retail customers ("Connections"), whereby P4U could arrange for a customer to 'sign up' for supply through one of the MNO networks. At various points between about January 2013 and September 2014, the agreements which each of O2, Vodafone UK and EE had with P4U either expired and were not renewed or the relevant MNO gave notice terminating or stating that it would not renew its agreement. P4U alleges, in summary, that these events were not the result of independent action by these competing MNOs but followed exchanges or commitments between the Defendants, which infringed the prohibitions on anti-competitive agreements or arrangements under UK and EU competition law; and that such conduct was at least the principal reason why the MNOs ceased to deal with P4U. Further, P4U contends that the MNOs would have continued to deal with it in the absence of such anti-competitive conduct, in which case P4U would not have been forced to go into administration.

6. Hence the Particulars of Claim ("POC") state, in the summary of P4U's case at para 3(j):

> "… P4U avers both as a primary fact based on the existence of the "commitments" and as a reasonable inference from the commitments and the other pleaded circumstances that the Defendants (or some of them) unlawfully colluded:
>
> (i) to each cease trading with one or other of the retail intermediaries in the UK market (which intermediary, in the event, was P4U);
>
> (ii) alternatively, to cease trading with P4U specifically; and/or
>
> (iii) further or alternatively, to put P4U out of business and then to acquire the whole or parts of P4U's business and/or assets at a fraction of their value once P4U was placed into administration."

7. As there indicated, P4U relies in support of its case on collusion at this stage both on certain facts and on inferences. A significant inference is based on what has been called P4U's 'economic case' that it would otherwise have been irrational for the MNOs to allow the arrangements with P4U to come to an end.

8. Generally, a finding of collusion between competitors is the result of an investigation leading to a decision by a competition authority. These proceedings are unusual in that the allegation is being pursued by a private action brought by the administrators of P4U. As I observed in another judgment delivered just after I heard argument on the present application, a private claimant, however well-resourced, lacks the considerable procedural armoury available under statute to a competition authority to investigate what, in the nature of things, is likely to be a covert arrangement. Moreover, because of the lengths to which commercial parties engaging in anti-competitive collusion go to conceal such activity, the relevant documents are often sparse and fragmentary and it may be appropriate and necessary to draw inferences from the surrounding circumstances: see the Amendment Judgment in this case at [3] and [15]-[16].

9. In the present case, following extensive disclosure P4U has now pleaded significantly more factual information which it contends supports its case, by an Amended Particulars of Claim ("APOC"). But the economic case referred to above remains an important aspect of the case it will advance at trial. Hence there is a section of the APOC headed "Economic analysis", commencing at para 124 which states:

> "No MNO Defendant acting rationally and/or in its own commercial interests would choose unilaterally to cease dealing with P4U in circumstances where P4U was likely to have one or more continuing commercial relationships with other competitor MNO Defendants (or another major MNO), because to do so would cause such MNO Defendant to lose significant market share of Connections to other MNO Defendants. An MNO Defendant that unilaterally ceased to deal with P4U could not have had sufficient confidence that its competitors would also to cease [sic] dealing with P4U and so cause P4U to cease trading (which, it is averred, was necessary in order for the decision to

> cease supplying to result in a net benefit to the MNO). In particular, without prejudice to the expert economic evidence that P4U will serve in due course, P4U avers as follows: …"

There follow seven sub-paragraphs and this section of the pleading (which has been only slightly amended in the APOC) continues to para 129. Thus P4U envisaged from the outset that it would seek to call expert economic evidence, although its application to do so was issued only on 19 August 2021.

The Governing Principles

10. Pursuant to CPR r. 35.4, a party requires the Court's permission to call expert evidence. Rule 35.1 states that expert evidence "shall be restricted to that which is reasonably required to resolve the proceedings."

11. In his judgment concerning expert evidence in *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch), Hildyard J noted, at [11], that there are two elements to the requirement under CPR r. 35.1: "(i) is the evidence admissible, and (ii) is the evidence reasonably required to resolve the proceedings?".

12. Hildyard J conveniently summarised the first element, at [14]:

> "whether there is a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the Court has to decide."

13. An economist, and similarly a chartered accountant, clearly has the requisite expertise for various issues, and evidence of economic experts is of course regularly admitted in competition cases. Here, the Defendants suggested that economic expertise is not relevant to at least some of the matters on which P4U seeks to adduce expert evidence and that, to that extent, expert evidence is not admissible. But their main objections, as I understood them, came under the second element of the test and it is convenient to consider any questions of relevance at the same time as addressing those.

14. A decision on permission to admit expert evidence must of course be taken having regard to the overriding objective under the CPR. Counsel for P4U relied in their skeleton argument on those aspects of the overriding objective emphasised in this context by Brooke LJ (with whom Kennedy LJ and Holman J agreed) in *ES v Chesterfield and North Derbyshire NHS Trust* [2003] EWCA Civ 1284 at [17]: ensuring that the parties are on an equal footing, and dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. Unsurprisingly, the Defendants did not take issue with that approach.

15. The considerations relevant for the second element of the test received extensive consideration in the judgment of Warren J in *British Airways PCL v Spencer* [2015] EWHC 2477 (Ch) ("the *BA* Case"), on which all parties relied. That was an appeal against the decision of a Deputy Master (the "DM") to refuse BA permission to call evidence from an actuarial expert. In his judgment, Warren J set out the position as follows:

> "63. …. A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).
>
> 64. Let me get one point out of the way. CPR 35.1 refers to "the proceedings". In the present case, a large number of pleaded issues arise. It may, in the end, be unnecessary to resolve some, perhaps many, of those issues and I rather suspect that that will be the case. But it is only at the trial that it will become apparent what issues actually need to be decided. I say "trial" but that needs to be qualified because the court can, in the exercise of its case management powers, restrict the issues for determination at a CMC: see CPR 3.1(2)(k). But no one has sought, thus far, to exclude any of the pleaded issues from consideration. Accordingly, it cannot be said, at present, that it will not be necessary to decide any particular pleaded issue in order to resolve the proceedings. It must follow that, if expert evidence is reasonably required to resolve a pleaded issue, it will also be reasonably required to resolve the proceedings. However, unless the evidence is <u>necessary</u> in order to resolve an issue, whether it should be admitted needs to be assessed in the context of the resolution of the proceedings as a whole. There would be nothing inconsistent in accepting that particular evidence ought to be admitted in resolving an issue within the proceedings if that issue stood alone but deciding, in the context of the proceedings as a whole, that such evidence was not reasonably required in resolving the proceedings (unless that evidence was necessary to resolve the issue).
>
> 65. Thus in *Mitchell*,[1] the expert evidence was not necessary but it was, or might have turned out to be, helpful. Because the issue to which it went was central to the case and because the evidence might be conclusive, it was admitted. But if in another case a similar issue were to arise which, instead of being central, was merely peripheral, the court might take the view that the expert evidence was not reasonably required to resolve the proceedings.

[1] *Andrew Mitchell MP v News Group Newspapers Ltd* [2014] EWHC 3590 (QB)

The balance could come down in favour of refusing to admit that evidence.

66. In the context of the points I have just made, Mr Rowley [counsel for the Respondents] submits that if the actuarial outcome of an issue cannot affect the outcome of the ultimate case, then you do not admit the evidence. I would agree if it is possible to say that the outcome of an issue cannot affect the outcome of the ultimate case. But in that case, the issue should not feature at all: it should be struck out or be excluded from consideration. In any case, no argument has been advanced that any pleaded issue cannot affect the ultimate end result of this litigation so Mr Rowley's submission takes us nowhere.

67. In the present case, I have a great deal of sympathy with the view, which the DM obviously held, that resolution of the central issues will not turn on whether Mr Pardoe's advice was right or wrong. They will turn on what his advice actually was, and how it changed, and on how the Trustees (i) understood that advice and (ii) put pressure on him to give the advice which would allow them to award discretionary increases. And they will turn on the critical question of whether the Trustees had predetermined that they would grant increases and that, come what may, they would find a way to justify that course. I agree with the DM that, if one looks at the case that way, the court will be well able to resolve the proceedings without the expert evidence which BA seeks to adduce and possibly that the court would not even find the evidence of assistance.

68. But that is not the correct approach to the admissibility of the evidence. Instead, it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions:

(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in *Mitchell* the court would have been able to resolve even the central issue without the expert evidence).

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to

> resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary.
>
> 69. Further, although CPR 35.1 does not refer to issues, but only to proceedings, if evidence is not reasonably required for resolving any particular issue, it is difficult to see how it could ever be reasonably required for resolving the proceedings. I therefore see a test directed at issues as a filter. That, at least, is an approach which can usefully be adopted."

Applying those principles, Warren J reversed the decision of the DM and granted BA permission to call actuarial evidence.

16. While counsel for P4U and for the various Defendants placed emphasis on different passages in Warren J's judgment, no one suggested that his approach and elucidation of the principles was wrong. I respectfully agree with what Warren J said in the BA Case and will follow it.

The Present Application

17. P4U's amended application seeks to adduce expert evidence covering the following questions:

> "1: Given the economic structure and characteristics of the UK mobile telephony market in the period from 2012 to 2014, which factors would have tended to incentivize an MNO to make sales through an indirect retailer with the characteristics of P4U, and which factors would have tended to discourage an MNO from making such sales?
>
> 2: What impact, if any, would the following have on the significance of any of those factors, as they would apply to any given MNO (specifically, Vodafone UK, EE, O2 and Three UK) over that period:
>
> a. The individual characteristics and market position of the relevant MNO.
>
> b. The extent to which other MNOs and MVNOs have distribution agreements in place with the relevant indirect retailer.
>
> c. Whether the UK mobile telephony market would include (i) one major indirect retailer, or (ii) two major indirect retailers.

> 3: How, if at all, would the answers to questions 1 and 2 have been different in respect of the period from 2006 to 2009?
>
> In responding to these questions, the expert shall have regard to such contemporaneous documents as the expert considers shed light on the MNOs' decision-making in relation to their supplies to P4U, including financial modelling and any other relevant analyses and projections produced by the MNOs and/or provided to the MNOs by independent third-party data providers."

18. It is apparent that the framing of those questions is expressed in broad terms, which would in my view potentially lead to wide-ranging expert evidence. That was one of the grounds of the Defendants' objection. Moreover, they submitted that in the skeleton argument of counsel for P4U (served on the Friday before the hearing) the focus for the proposed expert evidence had shifted to particular pleaded issues (see the skeleton at para 81), which were still much too extensive but constituted a different approach. In any event, they argued that expert evidence was not *necessary* to resolve those issues, since witnesses from the MNOs and from P4U were all familiar with the UK market for mobile telephony and could address those questions. Mr McQuater, making submissions adopted by all the other Defendants, realistically accepted that there were some pleaded issues for which expert economic evidence might be helpful, but argued that it was not proportionate to admit it. The essential questions facing the Court are whether each of the Defendants or Defendant groups considered at the time that it was commercially rational to cease dealing with P4U, not whether an *ex post* analysis by an economist showed on an objective basis that, with hindsight, it may not have been a commercially rational decision. Moreover, the Defendants submitted that some of the issues referred to in para 81 of the P4U skeleton were peripheral, adopting the approach used in the *BA* Case. And the Defendants emphasised that the application was made very late, in a case where the pleadings had closed by late October 2019. They submitted that allowing wide-ranging expert evidence to be introduced at this stage, with the consequent need for them to adduce expert evidence in reply, would cause them real difficulties and prejudice the timetable to trial, which is due to commence on 11 May 2022.

Analysis

19. The ultimate question at the forthcoming trial is whether the Defendants colluded as regards their decisions to terminate dealing with P4U.[2] That is of course a factual question not a question for expert opinion. But as the BA Case makes clear, the decision to admit expert evidence should be based on the relevant issues which arise in the case leading up to a decision on the ultimate question. On that basis, I turn to consider the issues raised on the pleadings.

20. Mr MacLean for P4U drew attention to the agreed list of issues, where issue 14(f), under the head of "Alleged collusion", is expressed as follows:

> "[I]n the absence of collusion, would it have been irrational and/or intolerably commercially risky for the MNO Defendants

[2] This is a split trial: whether such collusion, if it occurred, caused P4U to go into administration is reserved for a later trial.

> (or any of them) to cease supplies to [P4U]. This is a pleaded issue but [the Defendants] do not accept that it is necessary for the Court to resolve it."

21. I note the Defendants' expressed proviso regarding this issue. But as Warren J pointed out, if an issue is properly raised, it is often difficult for a judge to say with confidence at an interim stage that the court will be able to resolve the case at trial without deciding that issue. It is true that if collusion were to be clearly established as a matter of fact, this issue would not need to be addressed. But that is obviously not the point the Defendants are making. If the facts lend themselves to different interpretations, I can see that it might be very relevant to consider whether it would have been irrational for an MNO Defendant to decide independently to cease supplying P4U. As the skeleton argument for P4U points out, if the Court were to find that this would have been a commercially irrational decision, that might provide significant support for the inferences which P4U seeks to derive from the documents. And equally, if the Court finds that this would have been a rational decision, that may be relevant to rebut any suggested inference. I certainly do not feel confident that it will be unnecessary to address this part of P4U's pleaded case.

22. However, that does not mean that it is relevant or proportionate to have expert economic evidence expressing an opinion on this broad issue. The rationality issue, in my view, comprises considerations well beyond matters of economic expertise and involves other aspects of commercial decision-making. Accordingly, in agreement with the Defendants, I consider that the way the questions are framed in the Application, quoted above, is much too broad. In my view, it is necessary to go further and look to the particular matters raised as being relevant to the rationality issue. That reflects the more focused approach adopted in P4U's skeleton argument. The paragraph references below relate to the APOC except as otherwise stated.

23. At para 22, P4U pleads as follows:

> "In the period from early 2012 to early 2014, the UK market for Connections was highly saturated, i.e. most consumers in the UK already owned a network-connected mobile phone. It was also highly concentrated and, in that sense, oligopolistic. As a result, competition between MNOs focused on gaining market share at the expense of the other large MNOs, rather than increasing the size of the total market. In this commercial environment, MNOs competed both to acquire new customers, principally from each other, and to retain existing customers."

24. That in effect links to para 124(a), where P4U asserts:

> "The MNO Defendants were in competition with each other for new Connections. In a highly saturated and highly concentrated market, they sought to obtain market share at the expense of another major MNO rather than increase the size of the total market. If the MNO Defendants could not retain the majority of customers who had joined their networks through P4U, then they would lose market share in the event that they ended their relationship with P4U, unless P4U itself ceased trading."

25. As to para 22, many of the Defendants present a rather different picture of the state of the market and of competition within it in 2013/14 (see e.g. DT Defence, para 21; Vodafone Defence, para 18; Telefonica Defence, para 45). Furthermore, as regards para 124(a), EE denies the third sentence: Defence, para 125(d). DT does not plead to paragraphs 124-130 in any detail other than by a general denial of the specific points set out therein in support of the rationality allegation, stating at para 84 of its Defence:

> "The operation of the market and the commercial incentives facing EE and the other MNOs will be a matter for factual and expert economic evidence."

Orange does not plead specifically to the allegation in para 124(a), simply asserting that it is irrelevant, inter alia because Orange's decision "was the subject of contemptuous, real world, economic analysis and modelling": Defence para 57. Vodafone also does not plead specifically to the allegation, but expressly denies "both the content and relevance" of the economic analysis set out in that and the other paragraphs of the "Economic analysis" section of the APOC: Defence, para 109.2. Further Vodafone states that this part of P4U's pleading:

> "does not rely on or allege relevant facts and will be a matter for evidence, including potentially expert evidence, in due course": Defence, para 109.1.

By contrast, Telefonica pleads specifically and in some detail to the allegation, stating that it sought also to increase the size of the total market and, specifically, that for various reasons the loss of market share from O2 ceasing to deal with P4U was likely to be "relatively modest."

26. Therefore the position on the pleadings is that P4U will have to prove the matters alleged in paras 22 and 124(a), to a greater or lesser extent as against the various Defendants.

27. For reasons I have already explained, I think that the rationality of the MNOs' decisions, considered objectively, may well be a relevant issue which the Court will have to consider. The specific points made in paras 22 and 124(a) go to that issue. They concern the state of the market at the time, the nature of the competition between the MNOs in that market, and how that related to the likely consequence for market share of discontinuance with P4U. In my view, those are matters which an economist is well qualified to address. Of course, the MNO Defendants will be able to call in-house factual witnesses to express their views on this, although I consider that they are matters of assessment rather than simple fact. But they are frequently the kinds of matter addressed by expert economic evidence and, having regard to the expert's specific obligations of independence and to assist the court, which of course do not apply to party witnesses, I have no doubt that expert evidence on those matters is likely to be of considerable assistance to the court.

28. Another aspect of the market is the effect which indirect retailers had on the price of Connections and whether it was likely that this would alter if P4U left the market. That is relied on by P4U, as I understand it, as going to a potential motive for collusion, and I think that could be a relevant issue for the Court to consider. P4U alleges at para 3(d) that retail intermediaries exerted downward pressure on the retail prices of Connections

and that is developed at para 27. The response of the Defendants to this allegation varies: e.g. Vodafone admits it only to a limited extent: Defence, para 23.1-23.3; Orange denies the allegation in part and puts P4U to proof as regards the rest: Defence, para 19. Again, for analogous reasons to those set out in para 27 above, I consider that the effect of retail intermediaries in general and of P4U in particular on the price of Connections is a relevant factor on which expert evidence can appropriately be given. They are essentially matters of assessment since they involve consideration of what would have been the likely effect as to those prices in the absence of retail intermediaries or if only one major retailer (CPW) remained in the market.

29. A further aspect relevant to P4U's economic case concerns the nature of P4U's customers. P4U alleges that it outperformed the market in attracting young customers, who were the most lucrative source of Connections for MNOs, and that the average monthly line rental of a new P4U customer was approximately £5 higher than the average for the remainder of the market: paras 36 and 128(a); and that most of its customers were "network agnostic", i.e. that they placed relatively little importance on which MNO supplied the connections: para 38(c). These allegations are important elements for P4U's argument about the effect on MNOs of ceasing to deal with it. The assertions and allegations are either not admitted or denied to varying degrees by the different Defendants: e.g. EE Defence, para 61; Vodafone Defence, para 30; Telefonica Defence, paras 57 and 59.5. To the extent that these assertions concern the nature of P4U's customers, they can be supported by factual evidence from P4U's witnesses and are not matters of expert evidence. But insofar as the allegations involve comparisons between the nature and value of P4U's customers and MNO customers obtained by other channels, that is typically a matter of independent analysis, drawing on published sources and disclosed documents, that is conducted by an expert. It is certainly a matter on which I consider that expert evidence would be of great assistance to the Court.

30. At para 124(d), P4U asserts:

> "The average NPV to EE and/or Vodafone UK of customers who joined either of their networks via P4U was approximately 65% of the average NPV of customers who would be expected to join the EE or Vodafone UK network following the termination of the relationship with P4U (and so necessarily through another sales channel)."

On that basis, it is alleged in the original para 124 (e) that:

> "It follows that only if, after termination of their commercial relationships with P4U, EE and/or Vodafone UK could expect to retain through alternative sales channels approximately 65% or more of the customers who had joined their networks via P4U, would it have been prospectively beneficial in NPV terms for EE and/or Vodafone UK to terminate their commercial relationships with P4U. This 65% threshold was the minimum proportion of P4U customers which EE and/or Vodafone UK would each have needed to expect to retain in order for the loss of the commercial relationships with P4U not to destroy value for EE and/or Vodafone UK."

31. In response, EE denies the facts in para 124(d) "to the best of EE's knowledge" and states that para 124(e) is over-simplistic and in any event denied: Defence, para 125(d)(iv)-(v). Vodafone Group does not admit that the 65% figure is correct or relevant and does not accept the conclusion drawn from it: Defence, paras 109.2 and 109.7. In the APOC, para 124(e) is amended and the last sentence is replaced with a more qualified analysis (including reference to the period over which customers would be expected to be retained and/or gained and/or lost). But the position remains that this is an analysis and assessment that is typically provided by an expert in competition cases. Moreover, if the parties are to be placed on an equal footing, I think it is necessary that P4U should be able to present this evidence by its economic expert.

32. Following from this, P4U pleads at para 124(f):

> "…if EE or Vodafone UK independently terminated its commercial relationships with P4U, it would have expected to retain a proportion of P4U customers which broadly reflected and/or approximated its existing market shares and/or existing share of high street stores."

And the shares of the market for Connections and of high street stores are then set out. The pleading proceeds at para 126 to state that this expectation would vary according to whether customers were more loyal to a particular network or more loyal to P4U; and alleges, on the basis of the nature of P4U's customers set out above, that the MNO Defendants would have expected to retain a smaller proportion of P4U customers following termination of supply through P4U.[3] Apart from minor adjustment to the pleaded market shares, these assertions are essentially denied by the relevant Defendants: see e.g. EE Defence, paras 125 (d)(vi) and 127; Vodafone Defence, para 109.7.

33. In short, it seems to me that these parts of P4U's case essentially set out a modelling of the expected effect on the MNO's market shares and profitable customer volume of a decision to cease supplying Connections through P4U. The Defendants of course dispute that the approach put forward in this part of the pleading is correct or realistic; indeed many assert that it grossly over-simplifies the position. But in my judgment, this is just the kind of analysis that the Court would expect to be advanced by an economic expert as opposed to a witness of fact. It involves an analysis of expected effect, taking into account the nature of the competition, the character of the customers and the overall market conditions. Indeed, I consider that for analysis and projections of that nature expert evidence is necessary.

34. There are two discrete issues raised by the pleadings on which P4U seeks to adduce expert evidence:

    i) P4U relies on the fact that Vodafone UK and O2 had engaged in failed experiments at exclusivity in 2006-09. It relies on those as evidence showing that a unilateral decision to cease dealing with a major retail intermediary was not in an MNO's interests, and that the MNOs would have been aware of that: para 37(b). Some of the Defendants who plead to this assert that the events of

[3] That allegation is not specifically limited to EE and Vodafone UK; see in any event Telefonica's Defence, paras 57 and 129.

2006-09 are irrelevant since the market had changed substantially between then and 2013-14: EE Defence, para 62(c); Vodafone Defence, para 31.4. P4U disputes that the market conditions in 2014 were materially different for this purpose: Reply to Vodafone Defence, para 11.

ii) Several of the Defendants rely on the fact that a non-defendant MNO, Three, ceased to supply P4U in April 2012. P4U does not suggest that Three's decision was other than unilateral, and the Defendants contend that this shows that such a decision can be rational: DT Defence, para 32(a)(i); Vodafone Defence, para 31.4. P4U responds that the circumstances of Three are materially different: Reply to DT Defence, para 12; Reply to Vodafone Defence, paras 7 and 12(a).

35. The Defendants submitted that these are both peripheral issues. There has been no disclosure about the market conditions in 2006-09 and to allow expert evidence on the significance of the earlier withdrawals would open up avenues of inquiry that would be disproportionate to the significance of those issues, drawing attention to the judgment in the BA Case at [65].

36. I have considerable sympathy with that view. I suspect that they will not feature to a material extent at trial. However, the difficulty is that these are both issues raised on the pleadings and the relevant parties (P4U in the case of 2006-09; and the Defendants in the case of Three) have not offered to withdraw them. I find it impossible to say that neither is an issue which the Court will need to decide as part of the process of resolving the proceedings. They are both questions on which I consider that expert evidence may not be absolutely necessary but is likely to be of great assistance, the more so as it concerns, as to (i), general market conditions, and as to (ii), the circumstances of a company that is not a party giving evidence. Accordingly, it seems to me that the proportionate course, having regard to the overriding objective, is to admit expert evidence on those two matters but to restrict it as follows:

i) As regards 2006-09, the evidence is limited to the question whether the specific differences in market circumstances between 2006-09 and 2014 pleaded at para 31.4 of the Vodafone Defence, one of which is reflected in the last sentence of the para 62(c) of the EE Defence, are correctly asserted; and if so, whether those differences would, objectively viewed, be material to the decision of an MNO as to whether to withdraw supply from a retail intermediary like P4U. If they would be material, then I think it is not likely to be of assistance to seek to assess the extent of that materiality compared to other factors where the market circumstances had not changed.

ii) As regards Three, the evidence is limited to the question whether the characteristics of Three pleaded in the passages of P4U's Replies cited above are correctly asserted; and if so, whether those characteristics mean that, objectively viewed, there would be some materially distinct circumstances affecting Three's decisions to cease supplying P4U and CPW. If there would be materially distinct circumstances, then I think it is not likely to be of assistance to seek to assess the extent of that materiality compared to other factors where Three's position may be similar to that of the Defendant MNOs.

37. Additionally, the skeleton argument for P4U refers to the issue of whether P4U could maintain a successful or viable commercial business if supplied by only one MNO.

That is indeed an issue raised by several of the Defences, in the passages referenced in P4U's skeleton. But in my judgment it is certainly not necessary to have expert evidence addressed to that issue. In the first place, as viewed from the perspective of P4U, that is a commercial matter which the P4U witnesses should be well able to address. Insofar as it concerns the business planning and financial arrangements of P4U, I very much doubt that it is an issue to which the expertise of an economist is relevant at all. I recognise that there is a different aspect to this point, i.e. whether a retail intermediary which could offer Connections to only one MNO would be likely to be able to compete in the market. That is an aspect on which the opinion of an economic expert could be helpful, but I do not consider that such evidence is reasonably required. It seems to me self-evident that a retail intermediary that could offer its customers Connections to only one of three major MNOs will be, to at least some degree, a weaker competitor to the other major retail intermediary (CPW) that could supply all three. And I consider that it is almost inevitable that assessment of the allegation of collusion will pay less attention to the circumstances once P4U was being supplied by only one MNO but focus on the circumstances when it was being supplied by two or three MNOs. Accordingly, to the extent that the Defendants' pleading of this point is disputed by P4U, I find that the balance comes down against admitting expert evidence on this issue.

38. P4U's application, by a recent amendment, further seeks to specify that the expert should have regard to the internal modelling conducted at the time by each Defendant that it asserts underlay its individual decision to cease supplying P4U. The Defendants submitted that expert evidence regarding their contemporaneous modelling is irrelevant since it is not alleged that their models were a sham and the question is not whether they were sound, as assessed *ex post*, but whether they were believed by the relevant decision makers at the time. I am not persuaded by that submission. The issue to which expert evidence is sought is the question of the underlying assumptions about market developments on which the contemporaneous modelling was based, including specifically whether there was an assumption that other MNOs would cease supplying P4U or that P4U would exit the market. I accept that this would be relevant. But I do not think that such evidence is necessary. The focus here is on scrutiny and analysis of the respective Defendant's internal documents. The explanation of those documents can be explored by cross-examination of the relevant Defendant's witnesses.

39. I acknowledge that analysis of those models by an economic expert, in particular one with accountancy expertise such as Mr Thomas, could be of assistance to the Court in determining the basis of the modelling. Faced with evidence from P4U's expert, no doubt the Defendants would wish to call, as they would be entitled to do, their own expert evidence on this issue in response. However, to embark on exploration of this issue by a succession of experts would in my judgment be an elaborate process which would turn the expert reports into evidence of a very different character from that dealing with the other matters discussed above. In that regard, I am very mindful of the delay which this would cause. Although the timing is tight, I consider that expert evidence addressing the other matters set out in this judgment above is practicable. But I think that extending the process to include close analysis of no doubt detailed financial models and surrounding documents is likely to cause significant difficulties in terms of the timetable to a trial due to start in mid-May 2022.

40. I was not given a satisfactory explanation as to why P4U left it until mid-August 2021 to take out its application. I appreciate that P4U may be said to be at a disadvantage in scrutinising the models since it has to do so from the outside, whereas each Defendant has access to the individuals involved in preparing the models and so, in effect, has in-house expertise. But the legal team of P4U can draw on the assistance of its expert in preparing cross-examination and making submissions. In my view, taking all these factors into account, the balance is to be struck against admitting expert evidence on this matter.

41. Finally, some of the Defendants in raising objections of proportionality referred to the substantial cost of expert evidence, especially when it has to be prepared in a tight timeframe. I have no doubt that it will prove expensive. But this is litigation on a grand scale, with a very substantial claim for damages. Expert economic evidence is common in competition litigation and, as the extracts from the pleadings quoted above indicate, several of the parties envisaged from the outset that it was likely. There can be no question but that each of these Defendants has the ability to cover the cost of expert evidence. Having regard to the likely cost of the litigation overall, the complexity of the issues and the amount at stake, I do not consider that the cost of such expert evidence is in this case a material factor in reaching my decision on the application.

Conclusion

42. For the reasons set out above, I will permit P4U to adduce expert evidence from its chosen economist, and each Defendant if so minded to admit evidence from an economist in response, directed to the following issues:

i) the nature of competition in the relevant market in 2012-14, including the role and effect of retail intermediaries such as P4U (including the effect on the price of Connections) and the likely consequences for such competition if P4U left the market and only one major retail intermediary remained;

ii) the nature and value of P4U's customer base as compared to customers of the MNOs derived from other sources;

iii) the NPV to the MNOs of customers as specifically alleged in the APOC, and the likely effect on the respective MNO's share of P4U customers, its profitable customer volume and its overall market share of its decision to leave P4U;

iv) the changes in the conditions of the market between 2006-09 and 2012-14, limited to the terms set out in para 36(i) above;

v) the difference in the position and characteristics of Three from the Defendant MNOs, limited to the terms set out in para 36(ii) above.

43. I accept that it is not practicable at this stage to direct that there should be a single joint expert on any of these issues. Nonetheless, I hope that on some of the more general market issues set out above there can be liaison between the Defendants' experts so that one takes the lead in dealing with specific aspects. It is not proportionate or conducive to the effective conduct of the trial to have a series of experts covering the same ground in much the same way.