

JUDGMENT : The Honourable Mr Justice McKinnon. Q.B.D. 5th July 2005.

1. This is a claim by the Claimant ("BT") under a Mediation Settlement Agreement of 3rd March 2000 ("the Agreement") entered into by BT, Localtel Limited ("Localtel") and the two Defendants. BT is the principal fixed line telecommunications network operator in the U.K. Since October 1998, BT has made available a product under the name of "*Calls and Access*", which enables third party companies known as Service Providers ("SPs") in effect to rent from BT telephone lines on a wholesale basis. The SPs then sell on the use of those telephone lines and "*bolt on*" telephone services under their own brand names. BT bills the SPs at wholesale charge rates for the telephone lines, and the SPs then set their own prices to their customers or end users.
2. The Defendants, Mr. Martin and Mr. Stokes, were (until they sold their shares during 2000) the sole shareholders in Localtel, and were also directors.
3. Between about June 1999 and March 2000, BT and Localtel were in dispute. Localtel complained that BT was failing properly to transfer customers to Localtel and/or to ensure that those customers would not suffer disruption to their service on and after transfer. BT claimed that it was owed money by Localtel for telephony services.
4. In November 1999 the dispute went to mediation. On 3rd March 2000, a settlement was reached between the parties, the terms of which are set out in the Agreement. The terms of the Agreement provide for the payment of money to BT as follows:
 - i) *Two fixed sums were payable to BT, by respectively, Localtel (Clause 2) and the Defendants (Clause 3) and*
 - ii) *A further variable payment obligation arose under Clause 5 by which the Defendants were to pay a sum not exceeding two million pounds to BT on or before 14th October 2000.*

Clause 5 so far as material provides as follows: "*Mr. Stokes and Mr. Martin shall pay to BT on or before 14 October 2000 a further sum calculated in the following manner, namely £150 for each Localtel customer in excess of 58,000 appearing as customers of Localtel in the Onebill to be issued by BT on or shortly before 30 September 2000 relating to August/September 2000 call traffic, such liability not to exceed the total sum of two million pounds.....*".

5. The issues between BT and the Defendants in this action concern the true meaning of the words "*customer*" and "*customers*" in Clause 5 and whether, if they mean telephone lines, the Onebill for August/September 2000 accurately sets out the number of active and live telephone lines then "*rented*" by Localtel from BT.
6. A "*Onebill*" is a consolidated BT invoice used by BT principally for its commercial clients which operate many telephone lines. It is the monthly bill which BT sends out to the SP for all the lines which the SP is renting for use by its customers or end users. The SP only rents a line if and when it has a customer or end user for that line. The Onebill consolidates into one bill for the SP BT's charges to the SP for the use of all the individual lines around the country which that SP is renting for its end users. The Onebill includes rent per line and call charges per line.
7. It is not necessary to go into great detail as to the steps in a Onebill's production. Put very simply, when an SP places a provisional order for a new customer through the BT SP Gateway (SPG) with BT's customer service system database via a limited access web-based facility, it uses a Customer Requirement Form (CRF) which contains certain customer details; in the case of a transfer order (whether from another SP or from BT Retail) further information to enable the correct telephone line to be transferred is required. The SP is only able to gain access to its own data in the CSS database by means of a digital certificate provided by BT; if the order is valid, it is validated and a unique reference number is instantaneously returned to the SP (which has its own identification number - SPID) for that order. The order is then automatically transferred into a queue in BT's Customer Management Centre (CMC) to wait its turn to be manually put into the CSS database by a CMC Agent. When the order has been successfully put into the CSS database its SPG status is that it has been approved. Each day the CSS database automatically generates an Effective Date Report (EDR) setting out all the lines that were transferred or provisioned to that SP on the previous day. Each day BT sends to each SP by encrypted e-mail a Daily Fraud Report containing Call Data Records (CDRs) of all calls that were made by the end users of that SP on that day. The CDRs contain the billing date of the calls but the cost of the call is not specified.

8. A substantial amount of detailed call information for possibly a large number of lines (e.g. over 70,000 in the case of Localtel) will be contained in a Onebill. The Onebill may in fact be divided into several invoices and the invoices are sent, not on paper, but on CD-Rom. For operational reasons, BT has put a limit on the number of telephone lines that can be contained in one invoice of approximately 15,000. When this limit is reached, BT will create a new invoice. An invoice has two files. "File 2" contains a summary of account and charging information and "File 3" all the detailed information. File 2 is also sent in paper form, over some several hundred pages.
9. Immediately after the Agreement was concluded, Localtel was acquired by World On Line Telecom Limited ("WOL"). Thereafter, WOL operated the Localtel network as, effectively, its own network until it came out of Calls and Access provision in July 2001. It is common ground that although BT continued to invoice Localtel, "Localtel customers" is to be interpreted as including WOL customers under the "Calls and Access" contract.
10. By September 2000, a Localtel Onebill comprised 6 invoices. Five of these invoices were issued on the 22nd of the month and one (the EA2-29) on the 4th of the next month. The five invoices dated 22nd September, 2000 are clearly part of the Clause 5 Onebill; there is no dispute about that. BT says that the sixth invoice is that dated 4th October 2000 (EA2 - 29/5) as relating to August/September 2000 call traffic to a much greater extent than the alternative which is the invoice for Localtel telephone lines dated 4th September 2000. That is in issue, the Defendants saying that the appropriate EA2-29 invoice cannot be that dated 4th October 2000 as it was not "issued on or before 30th September 2000" as provided in Clause 5.
11. BT puts its claim on two alternative bases, arguing that the number of "customers" within Clause 5 means the number of telephone lines. There are two starting points, namely:
 - i) 80,180 telephone lines (= customers), if the Onebill for Clause 5 is made up of the five invoices dated 22nd September 2000 (namely, EA12/19; EA19/14; EA20/14; EA21/11; EA22/8) and the invoice dated 4th October 2000 (EA29/5), or
 - ii) 71,288 telephone lines (= customers) if the Onebill for Clause 5 is made up of the 5 invoices dated 22nd September 2000 (as above) and the invoice dated 4th September 2000 (EA29/4).
12. As to the 80,180 figure, that is required to be reduced by:
 - i) 25 telephone lines because that is the number of telephone lines appearing on the invoices in relation only to telephone services for periods ending before 1st August 2000, and
 - ii) A further 5 telephone lines because that is the number of telephone lines whose telephone accounts ceased before 1 st August 2000.

The total reduction is therefore 30. 80,180 less 30 = 80,150.

In addition, BTs expert witness (Dr. Castell) identified that there are a number of duplicate mentions of telephone lines (i.e. the same telephone lines appearing more than once) in the invoices: the number is 2,950. Thus 80,150 less 2950= 77,200. This is 5,867 more customers than the number at which the Defendants reached the cap of their liability under the Agreement (= 71,333). Applying Clause 5 of the Agreement, 71,333 less 58,000 "customers" = 13,333 x £150= £1,999,950.
13. As to the 71,288 figure, that is required to be reduced by:
 - i) 85 telephone lines because that is the number of telephone lines appearing on the invoices in relation to telephone services for periods ending before 1st August 2000; and,
 - ii) 4 telephone lines because that is the number of telephone lines whose telephone accounts ceased before 1st August 2000.

The total deduction is therefore 89. 71,288 less 89 = 71,199. The total number of duplicate mentions of telephone lines here is 745. 71,199 less 745 = £70,454.
14. There are three principal issues:
 - i) Which is the relevant sixth invoice in the Onebill referred to in Clause 5 (that has been called the preliminary issue)?
 - ii) Is BT correct to have counted telephone lines instead of people, when the Agreement required it to count "customers"?

iii) If the Defendants are wrong on the first issue and telephone lines are to be counted as "customers", then is the number of telephone lines appearing in the relevant Onebill true and accurate?

I refer to "*telephone lines*" in the second and third issues; these are referred to in the papers before me and in the evidence, from time to time, as "Call Line Identifiers" (CLI's).

15. As to the first issue (the preliminary issue), Mr. John Whittaker on behalf of BT submits that EA29/5 dated 4 October 2000 is the more appropriate invoice. Clause 5 refers to the whole Onebill which was always known to be divided into a number of invoices for data management purposes. The relevant Onebill (relating to August/September 2000 call traffic) is reasonably seen as made up as to five-sixths by the 22 September invoices and as to one-sixth by the one invoice on 4 October. As Mr. Whittaker submits, the 4 October invoice is self evidently going to be more appropriate as relating to the August/September 2000 call traffic than an invoice dated 4 September. As Mr. Stack (one of BT's witnesses) says in his witness statement, the 4 October invoice relates to August/September traffic to a much greater extent than the 4 September because of the way BT bills in arrears - there is no dispute that BT was billing in arrears. Mr. Stack explained in cross-examination that EA/29 was not produced on the 22nd of the month like the other invoices because of system constraints: there were other customers i.e. SPs or other big companies, getting Onebills at the same time, and this one had to come later. If the officious by-stander had said to the parties on 3 March 2000, "*Suppose that there is growth in Localtel's business as contemplated by Preamble A, so that an additional invoice making up the Onebill is required, and that additional invoice is in fact issued early on in the next month, will you be taking it as part of the Onebill issued on or shortly before 30 September for the purposes of Clause 5?*" As Mr. Whittaker submits, one can reasonably assume that the answer would have been "Yes".

16. Mr. Paul Lowenstein on behalf of the Defendants submits that the invoice issued on 4 September 2000 (EA29/4) most closely accords with the contractual words which require the customers to be counted: "*....in the Onebill to be issued by BT on or shortly before 30 September 2000 relating to August/September call traffic...*".

This 4 September 2000 Onebill is the more appropriate since, as the contractual words require (i) it was issued by BT before 30 September 2000 and (ii) it did relate to August/September call traffic. BT's argument is incorrect, as Mr. Lowenstein submits, in that the October Onebill (EA29/5) was patently not issued by BT before 30 September 2000. The Defendants' construction is plainly apparent from the words of the Clause, is simply applied and requires no modification of the words of the Clause at all. And no absurdity arises. The September Onebill (EA29/4) was issued at the right time and does contain August and September call traffic. BT's construction requires (i) additional words to be implied into Clause 5 and (ii) words found in Clause 5 to be ignored. The words to be added are that the Court should select the Onebill which has the best or predominant fit with August/September 2000 call traffic; there is nothing in Clause 5 requiring such a selection. The words to be ignored are "*to be issued by BT on or shortly before 30 September 2000*".

My Conclusion on the First Issue

17. I prefer the submissions of Mr. Lowenstein. It seems to me that words "*to be issued on or shortly before 30 September 2000*" are entirely clear in their natural and ordinary meaning. They mean what they say and do not include a Onebill issued after 30 September 2000, here on 4 October 2000. There is a Onebill which was issued before 30 September 2000, namely, on 4 September 2000 and it did relate to August/September 2000 call traffic. To adopt that Onebill does not produce any absurdity or anything that may be regarded as flouting business common sense. I therefore find what has been called the preliminary issue in favour of the Defendants.

The second issue

18. As to the second issue, Mr. Whittaker submits that Clause 5 is to be interpreted so as to see what is the intention which is conveyed to a reasonable man knowing the relevant background. He refers me to Lord Hoffman in **ICS Limited v West Bromwich Building Society** [1988] 1 WLR 896 at 913C. Mr. Whittaker makes the following points:

i) The Onebill deals in and refers to telephone lines only. The persons behind the telephone lines cannot be counted, looking simply at a Onebill. Onebills were designed to be used to supply telephone line usage to SPs and not to be a ready source of information for identifying persons behind those lines.

- ii) In order to match persons to telephone lines, one needs the CRF completed by the SP for the purpose of placing an order for a line to be that SP's line. There is one CRF for each line ordered by the SP. It will show the name and address of the person whose line it is. The CRFs are generally electronic but not invariably. If the Gateway is not working, or in any event, in certain limited situations, the CRF is sent manually by separate e-mail. It can reasonably be said that there is never going to be a set of Gateways CRFs covering all orders.
 - iii) Mr. Bell's view (he is the Defendants' expert) is that in order unambiguously to count persons, you need to use the CRFs and the EDRs.
 - iv) One of the main complaints of Localtel to Oftel in Autumn 1999, leading to the second Provisional Order made by Oftel on 26th October 1999 was that the Gateway was inadequate for its purpose (see the second Provisional Order paragraphs 15/16 in Bundle 3 pages 310 - 311). By early 2000, BT had remedied the working of the Gateway for the future. But it must be highly unlikely that Clause 5 was intended to be reliant on CRFs or e-mail order forms used at a time when Localtel, at least, considered that the Gateway was inadequate for its purpose.
 - v) The number of telephone lines in the Onebill issued by BT to Localtel next before the mediation settlement Agreement dated 5 March 2000 (made up of 5 invoices dated 22 or 23 February 2000) was 58,796, in round terms, 58,000. It is unlikely to be a coincidence that this is the figure in Clause 5. That, Mr. Whittaker said, is a material background fact.
 - vi) Suggestions have been made by Mr. Lowenstein, without any supporting evidence, that in March 2000 there was in actual commerce, or in Localtel marketing terms, a distinction between lines and persons because of internet use. When some actual evidence on this finally appeared (from Mrs. Holloway, in particular in re-examination), it was to the effect that the Localtel marketing pitch in Spring 2000 was that the end user could have telephone and internet use on the same line: it was only in October 2000 (after some vicissitudes with the customer base) that end users started, to any degree anyway, taking second lines. As Mrs. Holloway said, "Before then, people just had one line as they got free weekend calls".
 - vii) There was the difficulty, anyway, of matching telephone lines to customers. Mr. Reith, (one of BT's witnesses) did not say that it was an easy process. Dr. Castell said that it would take some time to run the necessary programme which would need checking and double checking. A reasonable assumption must be that the parties did not intend a determination of the numbers of customers by complicated reference to other material such as CRFs and EDRs.
 - viii) The intention is clearly to refer to the numbers as appearing in the Onebill. It is a telephone line (not an individual or body) that is the economic unit. It makes sense that the Agreement was talking in terms of economic units.
 - ix) The reference in Clause 5 of the Agreement to "call traffic" is wholly consistent with it being telephone lines that are referred to.
19. Mr. Lowenstein submits on the second issue that the proper test is to seek to ascertain the plain and ordinary meaning of the relevant word or words: if that is possible, the matter should rest there. If there is ambiguity, then it is legitimate for the Court to consider the particular word or words in the context of the remainder of the contract under consideration. Only if there is remaining ambiguity should the Court look at extrinsic evidence of the surrounding or commercial position i.e. the relevant factual matrix. Mr. Lowenstein refers me to the ICS Limited case and Lord Hoffman at pages 912 -914.
20. Mr. Lowenstein submits that the proper construction of the word "*customers*" is easy to get at since it requires the Court to do no more than to have regard to the simple and ordinary meaning of the word "*customer*". A customer is a person. Clause 5 requires the number of people who were customers of Localtel in August/September 2000 to be counted. Clause 5 does not require the number of telephone lines to be counted. If that had been the intention of the parties they could perfectly easily have said so in the Agreement but they did not. It simply cannot be said that a customer equates to a telephone line. It is plain and obvious that a customer is a person because it is to the customer that the telephone company looks for the payment of its bills. By looking at the file 2 Onebill, one can see that BT's "customer" is identified by

name as "Localtel Limited": BT looked to Localtel/WOL to pay its bills just as Localtel looked to its customers to pay its bills. The evidence has established that a Localtel customer (person) may have more than one telephone line. Thus if BT is counting telephone lines it will reach a significantly overstated result, since it ignores individual customers' rental and use of multiple lines. There is no ambiguity. As to BT's point that telephone lines can be got out of the Onebill itself whereas people cannot, in fact it was necessary only to cross-check with the CRF files, in order to derive the number of customers from the number of lines. Localtel/WOL was able to send out bills to its customers having received the Onebill: as Mr. Simmerling (the Defendants' witness) said, he had carried out the cross-check in 2001 using WOL's database (a similar exercise) and it had taken two to three hours plus another two to three hours for validation. Both Mr. Reith and Dr. Castell accepted in cross-examination that this task would not be onerous and could probably have been completed in a day or less. And, it was to be noted, BT itself had looked outside the simple list of telephone lines included in the Onebill to cross-check the data to ensure that there was no duplication and that only live or active telephone lines were included. Mr. Lowenstein submits that there is no assistance to be derived from the remaining words in the Agreement.

21. As to the commercial factual matrix (which only arises as a consideration if "customers" has no plain and ordinary meaning and no assistance is to be derived from the balance of the Agreement), then Mr. Lowenstein makes a number of submissions:
- i) As the evidence establishes, Localtel was offering free internet access (of differing degrees at different times) in return for customers (people) transferring all their telephony to the Localtel network.
 - ii) This was the dial-up era where many customers made long internet calls to the 0845 Localtel internet access number. Whilst an internet dial-up call was in progress, a customer would be unable to make or receive voice calls. It was accepted by BT witnesses during cross-examination that such customers would be likely to have more than one telephone line.
 - iii) It was Mr. Simmerling's evidence in cross-examination that he counted customers (persons): it was customers (persons) that had the economic value.
 - iv) The background to the 1999/2000 mediation and Localtel's complaints to Ofcom as reflected in the Ofcom Provisional Orders was that BT failed to take appropriate measures to ensure that Localtel could take over responsibility for serving "end users" (i.e. people) without the end users suffering any disruption to their service - Clause 5 reflected such contentions and in the mediation Localtel asserted a claim supported by an expert report which ascribed a value to each lost Localtel customer. Mr. Langan (one of BT's witnesses) knew about this.
 - v) As to the 58,000 point, it is not known whether this may be explained by coincidence. It was not a point that was dealt with in evidence. BT did not put its case on the point.
 - vi) BT's entire case is based on the calculation of the number of Localtel customers in August/September 2000 by reference solely to the number of telephone lines. BT had no alternative case which counts the number of actual customers (people or end users) of Localtel in August/September 2000. The evidence has shown that many customers would have had multiple telephone lines. Thus, it is likely, at least, that there were many more or, at least, significantly more, telephone lines than customers or end users (people).
 - vii) Mr. Lowenstein pointed out that the Defendants had paid £720,000 to BT based on their positive case that the number of Localtel customers (people) in August/September 2000 was 62,800. If it is right that a customer is a person (and not a telephone line), then BT advances no case on the question of how many customers there were. The Defendants do advance such a positive case to arrive at the number of customers (people) i.e. 62,800.

My conclusions on the second issue

22. I am entirely clear that the words "customer" and "customers" in Clause 5 refer to the people or end users to whom Localtel sold on telephone lines. The words do not, in my judgment, refer to the telephone lines themselves. I reach that conclusion for the following reasons:
- i) The ordinary and natural meaning of the words is that they refer to people or end users.

- ii) There is no sensible alternative meaning. Neither is there any ambiguity or absurdity arising from the words referring, as I find they do, to people.
 - iii) I regard the meaning contended for by BT that the words refer to telephone lines as an unnatural meaning. A telephone line is not a customer. BT does not look to a telephone line for payment of its bills: it looks to Localtel. Equally, Localtel does not look to a telephone line or lines for payment of its bill: it looks to the customers/end users/people identified on the CRFs with a name, installation address and postcode.
 - iv) If it had been the intention of the parties to count telephone lines, they could easily have said so in the Agreement. They did not do so.
 - v) By looking at the Onebill, it can be seen that BT's customer is identified as Localtel: it is true that Localtel's customers are not identified in the Onebill itself but it was perfectly possible after September 2000 by cross-checking with the CRFs and EDRs to arrive at an accurate count of Localtel customers (people) with active or live telephone lines in August/September 2000. That would not have been a particularly difficult task and it was obviously one done by Localtel every time it billed its customers.
 - vi) It is sufficiently clear that a substantial number of customers (people) may have had more than one telephone line so that a count of lines would (if used to calculate the number of customers) overstate the number of customers (people).
23. I arrive at the conclusion set out in (vi) relying upon the evidence of Mr. Langan, Mr. Reith, Mr. Coley and Mrs. Holloway. It was accepted by Mr. Langan, Mr. Reith and Mr. Coley that some of Localtel's customers were likely to have more than one telephone line: it was impossible to put a percentage on it. Although Mrs. Holloway (giving evidence for the Defendants) said that the majority of Localtel customers had only one telephone line, she also said that more people had more than one line from October 2000. It was implicit in her evidence that some people, at least, before October 2000 had more than one telephone line. From the nature of the business of Localtel and the services it offered to its clients, it is clear on a balance of probabilities that an appreciable number of its clients had more than one telephone line. I do not accept Mr. Whittaker's submission that the effect of Mrs. Holloway's evidence (or the evidence taken as a whole) was that there was in August 2000 little, if any, difference between the number of telephone lines and the number of customers.
24. I do not derive any assistance from the words "*call traffic*", as those words are perfectly consistent with customers referring to people. It may also be said that they are equally consistent with customers referring to telephone lines. Thus, those words take the matter no further.
25. I do not see that any assistance is to be derived from the remaining terms of the Agreement.
26. I do not need to look at the underlying factual matrix but I propose to do so as a check and in deference to the submissions of Mr. Whittaker. I do not accept that the underlying factual matrix calls for any different interpretation of the words "customer" and "customers". It does not, in my judgment, call for a construction of those words so as to relate them to telephone lines.
27. Dealing with Mr. Whittaker's points in turn, I do not accept that the form of the Onebill in any way suggests that a customer should be taken to be a telephone line or that in some way the wrong words were chosen in Clause 5 so that "telephone lines" should in effect be substituted for "*customers*". It is not suggested that Localtel/WOL had any difficulty in identifying its customers from a combination of the Onebill, the CRF and EDR forms whenever it billed its customers. I do not accept, as Mr. Whittaker appeared to suggest, that there would not be available a complete computer record of all CRFs whether entered electronically or sent separately by e-mail. The evidence was by Mr. Reith that you could check the identity and thus the number of customers by looking at the CRFs. It is true that among Localtel's complaints to Oftel was the suggestion that the Gateway was inadequate for its purpose. It is also true that Localtel complained about the Onebills and the number of telephone lines. Thus there is no oddity in the Agreement referring to customers as people when a not very difficult cross-check of the information on the Onebill with that on the CRF and EDR forms would produce the relevant number of people.
28. As to Mr. Whittaker's point that the figure of 58,000 in Clause 5 may be taken as referring to telephone lines because a very similar figure as the number of telephone lines appeared in the February 2000 Onebill just

before the March 2000 Agreement, it is not known whether this is a matter of coincidence as the point was not put to or developed by any witness. Indeed, the figure close to 58,000 only appears in an Appendix A to the Report of the Defendants' expert, Mr. Bell. The February 2000 figure may be a relevant background fact, but its significance may be said to relate rather more to a claim for rectification which is not sought in this case.

29. Accordingly the Defendant must succeed in this action because I find that the words "customer" and "customers" refer to end users/people and not telephone lines. As it is sufficiently clear on the evidence that a significant number of customers (end users/people) may well have had more than one telephone line, BT is unable to establish the correct number of customers at the material time. The evidence would indicate that the number of customers (people) was significantly less than the number of telephone lines with the result that BT is unable to prove how many customers (people) there were at the material time. The Defendants have, through Mr. Simmerling, sought to establish that the number of customers (people) at the material time was 62,800. On that footing, as I have already indicated, the Defendants have paid £720,000 to BT, calculated in accordance with Clause 5 of the Agreement.

The third issue

30. The question arises as to whether it is necessary for me to decide the third issue which only arises if customers mean (or are equivalent to) telephone lines. Is it necessary for me to decide whether the number of telephone lines (CLIs) appearing in the relevant Onebills is true and accurate? On balance, I do think that I should do so, should it be found elsewhere that I have incorrectly interpreted Clause 5 of the Agreement.
31. It is common ground that the number of telephone lines must be truly and accurately set out in the relevant Onebills and the telephone lines concerned must be live and active. In his submissions, Mr. Lowenstein sets out the presentation of BT's case from the Amended Particulars of Claim at paragraph 8G, the evidence of Mr. Stack (particularly his re-examination), the Report of Dr. Castell and finally BT's opening Skeleton Argument. As Mr. Lowenstein submits, there is a wide divergence between the various figures contended for. The Onebill "raw" telephone lines total was not accurate and true. On both BT's cases, the figures of 80,180 and 71,288 telephone lines require substantial manipulation. Mr. Stack accepted that the claim was based on figures he had produced which significantly failed to take into account multioccurrences of telephone lines; further, it turned out that paragraph 4.1 and 4.2 of his third witness statement were alternatives.
32. The number of telephone lines had to be accurate and true and the customers must have been live customers at the time. It is for BT to prove their case, not for the Defendants to disprove it. As Mr. Lowenstein submits, the evidence has demonstrated that there were serious, consistent and unresolved issues as to the validity of billing data feeding into the Onebills. And it was the evidence of Mr. Bell that, on the strength of his analysis of the figures as between and within the Onebills (using the carried forward/brought forward method), the level of non-reconciliation was so great as to render the Onebills unreliable for the purposes of the Agreement. Mr. Lowenstein relies upon Mr. Bell's Report at paragraphs 71 and 72 where he said:

"71. Every aspect of my analysis indicated that in terms of CLI [telephone lines] quantities, inaccuracies were present in the Onebills and this was particularly the case for August and September when the discrepancy could have been as great as 8574.

72. The only means of assessing the actual extent of these inaccuracies would be by gaining access to either the CRFs or EDRs, both of which are now destroyed".

Mr. Lowenstein further relies upon paragraph 86 of Mr. Bell's Report:

"86. My attempts to reconcile the quantity of CLIs contained within the successive Onebills proved unsuccessful. This clearly indicated to me that even if one Localtel CLI were to equate to one Localtel customer, the level of inaccuracy in the total quantity of Localtel's CLIs, which was contained within the Localtel Onebills and particularly the August/September Onebills, were so great as to be totally unreliable for the purposes of the Mediation Settlement Agreement".

33. Mr. Lowenstein submits that the serious, consistent and unresolved issues as to the validity of billing data feeding into the Onebills was evidenced in particular by four principal matters, The first relates to the open

entry in Mr. Langan's Issues Log. The entry reads: *"Billing - Derrick Martin has requested a statement from BT concerning the timing of the Onebill and the validity of the data within the Onebill"*.

Mr. Langan accepted in his evidence that this entry addressed precisely the issue which the Defendants contend is relevant in this action i.e. *"...the validity of the data contained within the Onebills..."*. The Issues Log was opened in May 2000, well before the August/September 2000 Onebill was issued. It remained opened for 15 months until 2nd August 2001, some five months after WOL came out of the Calls and Access market. Mr. Langan confirmed that an open Log item would be receiving attention until it was closed; here, that means that the validity of the data issue was receiving attention for some 15 months. Mr. Langan would have forwarded, he said, the issue to Mr. Stack. He believed that Clive Smith and Richard Santiago (neither of whom was called as a witness) would have been involved in this. As he put it, multiple entries etc. would have been covered; there were also other billing issues.

34. The second matter relied upon by Mr. Lowenstein arises out of the evidence of Mr. Coley. He accepted in his evidence that the sorts of issues that he referred to in his evidence were just those that would be covered by Mr. Langan's open issue as to the validity of billing data in his Issues Log for some 15 months. He confirmed the suggestion put to him in cross-examination that there were regular instances of data validity issues arising during the period which might have affected the validity of the WOL CSS data. These issues arose both as a result of WOL communications and as a result of complaints from other SPs, whose issues were then discovered to apply to all SPs. Mr. Coley said in cross-examination that these issues extended from about May/June 2000 through to the next year - exactly the period covered by the open entry in Mr. Langan's Issues Log. Mr. Coley accepted that there was a pattern whereby until an issue arose, BT would continue to believe that its data was accurate; once such an issue had arisen via a complaint from an SP, BT would investigate and would apply a team to correct the issue; this would typically take a couple of weeks and would result in "fixes" such as re-writing the CSS operating software; the fix would resolve that issue for all SPs; then BT would believe that all was well. The number of telephone lines that he had listed at paragraph 12 of his witness statement was based on the numbers recorded in his diary for the relevant dates and had not been adjusted to reflect subsequently discovered data inaccuracies; his record was in the nature of an uncorrected snapshot for particular days.
35. Mr. Lowenstein relies upon the evidence of Mr. Reith who accepted that there was a manual input stage before CRF data could be registered on the CSS database, thus introducing an element of human error.
36. Mr. Lowenstein relied heavily upon the evidence of Mr. Simmerling as to the ongoing data-cleanse process, explained by Mr. Simmerling at paragraph 14 of his second witness statement:

"14. Many of the complaints raised by OfTel were investigated by BT by undertaking what is known as "data cleanse" processes. As the name suggests, this is a process whereby relevant underlying data is reviewed and a process of verification is undertaken. If, for example, BT were checking the number of live customers at a particular time, they would check the underlying data to see if there had been any cessation instructions given in respect of the list of customers they were reviewing and if some ceased customers appeared in that list, they would be removed. Hence the data would be cleansed. Such data cleanse processes were commonplace at BT and I liaised with BT on a regular basis in relation to them".

It had always been the Defendants' pleaded case (and part of Mr. Simmerling's evidence since October 2001) that many of the billing data issues were addressed during the course of this ongoing data-cleanse. BT has consistently denied that any such data-cleanse occurred. In fact, as the evidence established:

- i) There was a constant dialogue between WOL and BT personnel at several levels for at least 15 months concerned with the removal of erroneous data from the billing records and in the run up to the exit of WOL from the Calls and Access market.
- ii) Just as Mr. Simmerling had said in his evidence, there was a particular effort paid to the removal of erroneous data in the run up to the WOL exit from Calls and Access in the spring and summer of 2001. This was accepted by Mr. Coley to have been part of the process which was taking place against the background of the 2001 WOL complaint to OfTel and the subsequent WOL/BT litigation (which the BT witnesses accepted concerned billing issues).
- iii) Mr. Coley's evidence in cross-examination concerning the "contingency plan" (noted in his diary at 14 May 2001) was that the contingency plan was to ensure that customers of a defunct SP had somewhere

to go and that these customers would be of interest to BT because of its "win back" efforts. There then took place this exchange between Mr. Lowenstein and Mr. Coley:

Q: *For the contingency plan, BT would need to know who the customer was in order to be able to win them back?*

A: *We needed the phone number.*

Q: *It is important that there should be de-duplications at this stage?*

A: *I don't recall any investigations regarding duplications but it will be natural to check the end user to know what was needed to be dealt with.*

Q: *The service provider [SP] had an obligation to have all data correct to enable them to tell customers of the options available to them?*

A: *Well there must have been actual obligations between the end user and the service provider otherwise Oftel would get involved.*

Q: *If World On Line wished to exit calls and access, that would be the time to ensure that its billing date integrity was clear?*

A: *Yes.*

Q: *So, if Mr. Simmerling had carried out a data-cleanse at that stage, that would be accepted?*

A: *I don't know his evidence.*

Mr. Lowenstein submits against that background that the Court should find that Mr. Simmerling was correct in his recollection as to the ongoing data-cleanse and that BT's witnesses were incorrect not to have accepted that this was occurring. Mr. Lowenstein particularly relies upon paragraphs 5 and 6 of Mr. Simmerling's first witness statement:

- "5. Between June 2001 and the end of September 2001 World On Line has, with my assistance, undertaken a data-cleanse relating to its customer base for the purposes of effecting the cessation of the Calls and Access contract which World On Line has with BT. All accounts were cross-referenced (with assistance from BT) to identify all active customers so that those customer accounts could be ceased and to allow the customers to transfer to another service provider.*
- 6. During the data-cleanse process it was noted that there were a number of inaccuracies in the BT Onebill. For example, the BT Onebill for the period in question contained charges to World On Line in respect of customers who were not actually customers of World On Line/Localtel in August or September 2000".*

Mr. Lowenstein also relies upon paragraphs 26 to 28 of Mr. Simmerling's second witness statement:

- "26. In relation to many of these issues, I and my colleagues dealt with Dennis Langan (who was the WOL BT account manager), Clive Smith and their colleagues, one of whom I recall was Richard Santiago. Minor issues tended to get resolved but the major points tended to roll on without any real resolution -just as in the Localtel days.*
- 27. The CAIG [the Calls and Access Group] attempted to put pressure on BT through its liaison with Oftel. On behalf of WOL, I was involved in an ongoing data-cleanse which, from memory, ran from about June 2000 until after WOL withdrew from its Calls and Access relationship with BT, which was in or about the middle of July 2001.*
- The ongoing data-cleanse endeavoured to deal with the concerns of WOL one of which was that they were receiving incorrect billing information from BT. WOL was concerned that it was being billed by BT in respect of customers which were not actually customers of WOL or that had been customers but were no longer and BT's records had not been updated....*
- 33. As I recall, in or about mid-July 2001, WOL withdrew from the Calls and Access service. The ongoing legal dispute between WOL and BT was also compromised at around the same time".*

It was Mr. Stack's evidence that he did not have any recollection of the data-cleanse referred to by Mr. Simmerling taking place. Mr. Langan was "certain" at paragraph 12 of his witness statement that if he had been involved in a data-cleanse he would have been able to remember it. However, in cross-examination he gave evidence to the effect that had there been such a data-cleanse, he would not himself have been involved. He said this: "I can confirm that column headings in the Log [his Issues Log] included the date closed. The dates were my in-puttings as were the only details. Both large and small Issues. I agree with the entries - a data-cleanse can be time consuming. I wouldn't get involved in databases. An Issue will not be finished with until it was closed. If World On Line had raised an Issue regarding billing/validity of data, it would have been dealt with".

37. Mr. Lowenstein also relies upon the evidence of WOL's Ramsgate Call Centre Manager, Mrs. Holloway, as corroborated by Mr. Simmerling, who referred to an email of 29th August 2000 (bundle 3 at pages 349 - 350) which contended that WOL at that time was experiencing such severe problems with historic call data from BT that approximately four months' worth of calls would have to be put on the next round of bills affecting some 55,000 or so customers. Mrs. Holloway expanded on this in cross-examination saying that the nature of the problem was so severe that it had caused the August 2000 bill run to be stopped. The problems extended to such matters as historic call data, select services, stops before starts, stops the same day as starts, and other anomalies, including wrongful billing.
38. Mr. Lowenstein relied upon BT's unexplained failure to call Mr. Clive Smith (who still works for BT) and who was Mr. Stack's Manager or to have given disclosure of the records kept by him. Mr. Clive Smith features regularly in Mr. Coley's diaries and in his evidence. BT had also failed to call other BT personnel who were identified as having had an involvement in billing data validity issues, e.g. Richard Santiago (named by Mr. Stack) as well as Keith Newby and Jeanette Smith (both named by Mr. Coley) or to have given disclosure of the records kept by them. Mr. Lowenstein further made a number of points relating to BT's disclosure of documents.
39. Mr. Lowenstein refers to the fact that BT places emphasis on WOL having paid the August and September 2000 Onebills without questioning them. As he submits, there is very little in this argument because a very substantial dispute arose between WOL and BT within months of those bills being paid in which WOL challenged some millions of pounds worth of historic bills on the basis that they were erroneous and that dispute ended in a settlement. He refers to the fact that it was not the Defendants who paid the bills, but WOL. Further, it was Mr. Simmerling's evidence that the number of customers appearing in the relevant Onebills was much less than BT contended; Mr. Simmerling said in paragraphs 4 and 7 of his witness statement:

"4. Whilst working at World On Line, I together with other World One Line employees, compiled account data relating to the number of customers at World On Line in August and September 2000. We did this upon the instruction of Derrick Martin who was a director of World On Line. The data was compiled as accurately as we could at the time with the information available and in the time period available and without any assistance from BT..

7. In the light of the data-cleanse [between June and September 2001], the number of accounts correctly reconciled for the months of August and September 2000 were 61,711 and 63,889 respectively. The average of those two months is 62,800".

Mr. Simmerling explained in his evidence that those figures relate to World On Lines' customers (people).

40. Mr. Lowenstein makes a number of criticisms of the way in which Dr. Castell gave his evidence. Dr. Castell's analysis of duplications was accepted. His cross-check of the Onebill telephone line numbers by reference to CSS Archive Records of start/stop data produced results set out at page 21 of his Report (in bundle 3 at page 31). The average telephone lines for August 2000 were 70,594 and for September 74,652 and up to and including 6th October 2000, 76,349. Mr. Bell accepted that he had no issue with the raw figures set out by Dr. Castell. Dr. Castell, during his evidence and without warning, said that his conclusion on page 21 that "these figures provide a good pattern of corroboration" applied to all the numbers on page 21 and not simply a comparison with the figures set out in bold in the lines immediately above (which relate to the average figures only). Further, Dr. Castell found this "good pattern of corroboration" of the Localtel Onebill telephone line figures as pleaded by BT based upon the figures falling within "a band which is no more than approximately minus 4.5% to plus 6% different to the BT pleaded figures, i.e. within approximately 10% thereof overall". Mr. Lowenstein submits that that is remarkable because Mr. Castell later accepted that, had he been instructed on behalf of an SP receiving a bill with a 10% margin of error, he would have advised that SP to get it checked. Dr. Castell accepted in cross-examination that this was the only part of his Report where he seeks to verify the Onebill numbers of telephone lines by reference to any extrinsic data.
41. Mr. Bell gave his opinion as to the reliability of the records within and as between the Onebills (quoted above). He did not attempt to count the number of telephone lines in the Onebills. Mr. Lowenstein then

made detailed submissions as to Mr. Bell's report, Mr. Stack's evidence in answer to it and Dr. Castell's Supplementary Report. It is not necessary to set them out.

42. Accordingly, Mr. Lowenstein submits that if the Agreement requires telephone lines to be counted as customers, then the number of telephone lines contained in the Onebills is too unreliable to support the numbers claimed by BT. Since the onus of proving the true and accurate number is upon BT, the debt is not made out and BT's claim fails.
43. Mr. Whittaker submits that realistically, the evidence is overwhelming that the invoices are accurate (or accurate to an acceptable degree) as to the number of Localtel's telephone lines. There has been previous little complaint about the number of telephone lines billed for. As Mr. Whittaker submits, probably the key evidence is Dr. Castell's analysis of the "start" and "stop" dates of Localtel telephone lines. That analysis had been done from information extracted from the CSS Archive Database. Dr. Castell's table at Bundle 3 page 371 shows, by using the stop and start dates, the number of active/provisioned Localtel lines on any one day. The averages are set out on page 371 (below the Table); they are the averages of the numbers for any one day. Invoices to Localtel covering a period of a month are going to show more telephone lines than appear for one day on the Table because those invoices will include lines which have started on any day covered by the invoice period and will also include lines which were active, but then ceased during the invoice period. The point sought to be made by Mr. Lowenstein in cross-examination regarding the three lines right at the bottom of page 371 (*"In my view, these figures provide a good pattern of corroboration..."*) that Dr. Castell was saying that a Onebill within a 10% overall margin of accuracy was adequate, is a false point. That is not what Dr. Castell was saying: a Onebill for a month (not for a single day) will include more CLIs than are active on any single day in that month.
44. The wholly separate, contemporaneous and fortuitous diary entries of Mr. Coley, made by adding up the totals of Localtel CLIs from the Control Files for each of BT's 29 CSS databases, is strong supporting evidence that the number of CLIs on the Onebill are in the right region. Mr. Coley made clear in cross-examination these numbers were of separate (non-multiple) active CLIs.
45. Mr Bell's contribution as an expert is to introduce into the case a management tool for checking Onebills. The *"differences"* shown in his spreadsheet are just that; they do not necessarily represent inaccuracies - they may or they may not. Mr. Bell's spreadsheet approach, identifying differences, is a tool to lead a manager to question why there are the differences. He would expect the manager (including a manager of a Service Provider receiving Onebills from BT) to investigate any differences. Mr. Bell effectively agreed with the description of his approach given by Dr. Castell, namely, that it provided a "sanity check" on the Onebill invoices in question. Mr. Bell's conclusion was that, using his approach, one cannot say that the Onebill is accurate; and, equally, one cannot say that it is inaccurate. In other words, it does not give you an answer.
46. Dr. Castell accepted the corrections to the figures in his note on Mr. Bell's spreadsheet (referred to by Mr. Lowenstein as Dr. Castell's Supplementary Report). Those corrections led to a *"discrepancy"* of 6,226 telephone lines. Mr. Bell in cross examination accepted (in addition to the general point that the *"differences"* do not necessarily represent inaccuracies) that this discrepancy could be accounted for, at least in part, by *"multiple"* entries (in addition possibly to "S" coded CLIs and CLIs held in a "holding invoice"). The *"discrepancy"* of 6,226 CLIs is over a period of 7 months/40 invoices (not from a clean start). Of those 40 invoices, we know that 7 invoices had 3,650 multiples; it is correct that a large number of these was in one invoice only (EA29/5): nevertheless it is quite possible that multiples in the other 33 invoices could on their own account for the remaining *"discrepancies"*, namely, 2,576 (i.e. 6,226 minus 3,650). None of this means that the Onebill is inaccurate.
47. Mr. Whittaker submits that we are only concerned about the number of telephone lines and there is a great absence of complaint about the number of telephone lines billed for. Localtel/WOL paid the invoices the subject matter of this action, meaning that they were paid by the people who were checking them. BT wholly accepts that there were serious teething problems for all initial SPs using the Calls and Access service. That led to the two Provisional Orders in August and October 1999. However, in December 1999, Oftel stated that the Calls and Access Service was now *"fit for purpose"* and the issues and areas of disagreement between BT and SPs identified by Oftel in its consultation document on quality of service standards for Calls and Access Service in June 2000 did not identify billing SPs for the wrong customers as

an area of disagreement. The main areas of disagreement were BT's "save" and "win-back" activities and BT's contractual ability to change the contract terms unilaterally. Further in August 2001, closing the complaint made by WOL, Oftel concluded that on the evidence provided by WOL it appeared that there was no case to suggest a systematic failure of the billing process resulting in a licence breach.

48. Mr. Whittaker submits that, insofar as this case is concerned with the general accuracy and reliability of Onebills, it is concerned with the issue of billing for the correct customers, and of not billing Localtel for telephone lines which were not Localtel's. It is not concerned with issues of call charges, or special services etc.. As Mr. Whittaker submits, there was no evidence of BT billing Localtel for the wrong telephone numbers. It is clear that - as one would expect - Localtel was checking its Onebills; and that it raised issues. Mr. Simmerling in cross-examination agreed that somebody in Localtel/WOL was ensuring that it was being billed correctly, and that, if WOL had an issue with BT over the accuracy of a Onebill, it would take the issue up with BT. Mr. Simmerling says that he liaised with BT on a regular basis in relation to data-cleanse processes and that he spoke to Mr. Stack fairly regularly. There were a number of examples of Localtel/WOL liaising with Mr. Stack. Mr. Langan, the Client Manager for Localtel, said in cross-examination that he had regular contact with Localtel, and he referred to daily conversations. He said that the main complaints went to him first. He also said that the Issues Log looked complete as to the issues raised by Localtel. The evidence of Mr. Coley fully and frankly shows problems which (probably inevitably) arose with and for SPs, and how they were tackled. The general picture which emerges is one that a great deal of effort was being made within BT to address any problems identified and to ensure that all telephone lines were allocated at all points to the correct SP and, further, that (as one would expect) BT was liaising with SPs. Mr. Coley's conclusions as to the impact on Localtel of problems which were identified is set out in paragraph 43 of his witness statement to the effect that there was minimal (if any net adverse) effect on Localtel. That remained his conclusion at the end of his evidence.
49. Mr. Whittaker submits that if WOL was being billed in September 2000 for too many telephone lines, WOL would have raised it. There is no evidence from the Defendants that the September invoices were billing Localtel/WOL for too many telephone lines, nor that WOL said that they were. And we know, from Mr. Simmerling, that Mr. Martin, one of the Defendants, was taking an interest in these invoices. There was an e-mail at the end of August 2000 which was concerned with whether charges were being produced by BT too late; that is a different issue. Back billing for call charges appears to have been the principal issue for WOL but that is not an issue as to the number of telephone lines (or people).
50. As Mr. Whittaker put it, much was sought to be made in cross-examination of Mr. Langan's Issues Log referring to "*...the validity of the data contained within the Onebill ...*", opened 18 May 2000 and not closed until 2 August 2001. Mr. Langan explained in re-examination that Mr. Martin was saying that he could not trust everything in the Onebill if there was one inaccuracy. The issue could not be closed until Localtel agreed. Mr. Whittaker submits that the Defendants cannot hang a challenge to the accuracy of the number of telephone lines in the September invoices on this one line entry in the Issues Log. Mr. Whittaker submits that this is one of a number of areas of evidence where the absence of anything from Mr. Martin is noticeable. The Issues Log does not show that there were inaccuracies in the Onebill in respect of the number of telephone lines.
51. Mr. Whittaker submits that BT had called four responsible, material witnesses who could speak to the relevant matters and who could reasonably be said to have had the most involvement at the time. The four BT witnesses were straightforward and honest: Mr. Langan - Client Manager, Mr. Stack - Billing Consultant, Mr. Reith - Head of Service Provider Products and Mr. Coley - Product Development Manager in BT Wholesale. The presence of those four BT witnesses is to be contrasted with the absence of both Mr. Martin and Mr. Stokes. Mr. Martin, at least, was clearly still active in WOL until well into 2001; he was giving instructions to Mr. Simmerling for a count of customers in August and September 2001 and he signed the letter from WOL to Oftel in April 2001 complaining of BT's failure to deliver sufficient quality of service for its Calls and Access product but not referring to any allegation of BT charging for the wrong number of telephone lines.
52. Mr. Whittaker refers to the fact that there was no evidence from Mr. Martin as to (a) the apparently very important issues emanating from him in the Issues Log ("*billing - Derrick Martin has requested ...*"), (b) the

exercise which he instructed Mr. Simmerling to carry out in August/September 2000 to count customers, which was clearly connected to the Defendants' liability under Clause 5 of the Agreement or (c) as to differences between BT and WOL at any time up to and including the letter he signed to Oftel in April 2001.

53. Mr. Whittaker submits that, on the basis that it is the telephone lines in the Onebills which are to be - accurately - counted, there is clearly sufficient data to do this: in particular, the "start" and "stop" dates for each telephone line i.e. the dates when each telephone line was provisioned as active on BT's system as a Localtel number and when it ceased to be such. This data has been obtained from BT's Customer Service System Archive. The Defendants were afforded supervised access to the database. A meeting took place with the Defendants' first expert but no request was made for such access for their second expert, Mr. Bell. In any event, Mr. Bell said that he has no reason to doubt the "start" and "stop" dates in Dr. Castell's Report.
54. Mr. Whittaker refers to the CRFs (Customer Request Forms), being the forms completed by the SP for the purpose of placing an order for a new customer. The EDRs are the daily reports telling the SP which customers have been provisioned as their customers on the previous day. These were deleted automatically in order to avoid data overload. Heavy criticism has been made of BT for not having retained these. Indeed, at one stage, it appeared almost to be suggested that BT was intentionally destroying litigation documents. As Mr. Whittaker submits, in a perfect litigation world, BT would have retained all of Localtel's CRFs and EDRs but one can understand the reality of this not having happened. Mr. Whittaker makes two points. First, the potential dispute over Clause 5 which arose in later 2000 was not with Localtel/WOL, but with two individuals who were (or had been) directors of that Company. As Mr. Reith said in his evidence, he was told (correctly) that the dispute with Localtel was settled and he was not concerned with a dispute with such individuals. Second, it is quite clear that BT always saw Clause 5 as concerned with telephone lines, as appears from the correspondence in Bundle 2 at pages 300-316. There was no challenge made to this in principle by the Defendants in the correspondence. The telephone lines versus persons distinction only became articulated by paragraph 8D of the Amended Particulars of Claim served in October 2003 and paragraph 5(v) of the Re-Amended Defence, respectively in October and December 2003. On the opening day of the hearing, Mr. Lowenstein accepted that the Defendants pleading on this question was not the clearest pleading. The Defendants did not say, until the hearing, that BT was proceeding on the wrong basis; BT was not aware of that allegation until the hearing started. In the light of the criticisms of BT, Mr. Whittaker says that it is worth noting that Mr. Martin (and Mr. Stokes) must equally have been aware of a potential dispute in late 2000. Nevertheless, they have produced no documents from that time, and although Mr. Martin anyway was clearly active in WOL, well into 2001, and he and Mr. Stokes were directors until July 2001, they appear to have taken no steps to see that WOL preserved any documents. No explanation has been offered as to why they apparently kept no documents relating to their liability from the exercise that Mr. Simmerling was asked to carry out in August/September 2000.
55. Accordingly, Mr. Whittaker submits that the Onebill invoices are reliable as to telephone lines being properly billed to Localtel in August/September 2000.

My conclusions on the third issue

56. It seems to me that I should accept Mr. Whittaker's submission that the Onebill invoices are reliable as to the number of telephone lines being properly billed to Localtel/WOL in August/September, 2000.
57. The exercise carried out by Dr. Castell is largely accepted by Mr. Bell. Mr. Bell says, in the end, from the exercise he himself carried out, that he cannot say one way or the other whether the relevant Onebills are accurate as to the number of telephone lines. As it seems to me, a combination of Dr. Castell's helpful report, the figures fortuitously entered in Mr. Coley's Diary and the fact that Localtel/WOL paid the relevant invoices without demur, never actually raising the point that they were being billed for the incorrect number of telephone lines does result in it being right that I should accept, as I do on a balance of probability, that the number of active telephone lines does appear accurately in the relevant Onebills. I am not persuaded that Mr. Bell's report in any sense undermines that conclusion: all he says, in effect, is that he cannot confirm or dispute it. I am clear that Dr. Castell's Note (or Supplementary Report) and the discussion arising out of it does not undermine my conclusion.

58. In arriving at my conclusions, I have taken into account Mr. Langan's Issue Log, Mr. Coley's evidence as relied upon by Mr. Lowenstein, as well as the evidence of Mr. Simmerling. I have reached the firm conclusion that those matters do not, in the end, undermine BT's case as to the accuracy of the Onebills. As to Mr. Langan, Localtel/WOL did not directly articulate the issue in this action as to the accuracy of the number of telephone lines billed until the hearing had started. I do not see it as a reasonable inference that the issue was raised in Mr. Langan's Issue Log or, indeed, anywhere else. Mr. Coley's evidence did not, as I see it, relate to that issue either and, to the extent that it may have done, any inaccuracy could only properly be regarded as insignificant. Mr. Simmerling's evidence went to undermine BT's case as to the number of customers (people) and, by implication (although this was by no means clear) the number of telephone lines appearing in the relevant Onebills. I do not see his evidence as a satisfactory basis on which to find that the relevant Onebills were inaccurate as to the number of telephone lines. He was concerned with the number of customers (people); he arrived at an average figure and BT has been paid on that basis. Mr. Simmerling has to rely entirely upon his memory. I accept Mr. Whittaker's criticism of him as an unsatisfactory witness; little reliance could be placed on his evidence. He was unconvincing in respect of precisely to what time his figures for customers of 61,711 and 63,889 related and, at one stage in his evidence, he said that these figures "would have" represented the totality of people who had been customers of WOL at any time during the relevant months (i.e. live for at least a day in August and September 2000) as opposed to people who were with WOL at the end of the month (or any other possibility). At all events, he was adamant that he did not count telephone lines and did not seek to relate customers to telephone lines.
59. The plain fact is that no clear, documented complaint emerges from any of the matters referred to by Mr. Lowenstein that BT was to any or any significant extent billing Localtel/WOL in respect of telephone lines that were not theirs at any relevant time. It seems to me that it is of great significance that neither of the Defendants:
- i) Has given evidence in support of their case as to the correct numbers of telephone lines; and,
 - ii) Has not, apparently, taken any steps to see that WOL preserved any documents, including any supporting the evidence of Mr. Simmerling.

At best, the Defendant's case is vague, undocumented and unspecified (apart from Mr. Simmerling). Most surprisingly, Mr. Simmerling was constrained to rely solely upon his memory and Mr. Simmerling's exercise, if it really did throw up inaccuracies as to the number of telephone lines billed, did not lead to any documentation at all or, at least, any that has been preserved. Of course, the Defendants do not have to disprove BT's case. In my judgment, BT have proved their case that the relevant Onebills are accurate as to the number of telephone lines and the Defendants have not raised any matter which can reasonably be said to call into question or undermine that case.

BT's claim fails

60. As BT have failed on the second issue as to the proper interpretation of Clause 5, and have not been able to prove how many customers Localtel/WOL had at the relevant time, BT's claim in this action must fail.
61. I propose, if at all possible, to deal with any consequential matters such as costs in writing. If consequential matters are agreed, please send to my clerk a draft/agreed order. If not agreed, please send to my clerk skeleton arguments dealing with any matters in dispute.

JOHN WHITTAKER (instructed by BT Group Legal Services) for the Claimant
PAUL LOWENSTEIN (instructed by Lawrence Stephens) for the Defendants