

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Nos. 1214/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3rd July 2013

Before:

THE HON. MR JUSTICE NEWEY
(Chairman)
ANDREW LENON QC
PROFESSOR JOHN BEATH

Sitting as a Tribunal in England and Wales

BETWEEN:

GLOBAL RADIO HOLDINGS LIMITED

Applicant

- and -

COMPETITION COMMISSION

Respondent

*Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Audio Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(info@beverleynunnery.com)*

Mr. Alastair Lindsay (instructed by Slaughter and May) appeared on behalf of the Applicant.

Mr. Robert Palmer (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Mr. Lindsay?

2 MR. LINDSAY: Sir, I appear on behalf of the applicant. My learned friend Mr. Palmer appears
3 on behalf of the Competition Commission. Sir, we have had a letter from a proposed
4 intervener, ISBA, whom I believe are not present here today and are not represented.

5 THE CHAIRMAN: Yes.

6 MR. LINDSAY: Sir, in terms of housekeeping, hopefully you have received a copy of a letter
7 from yesterday summarising the areas of agreement between the parties and small areas of
8 disagreement.

9 THE CHAIRMAN: Yes, thank you very much.

10 MR. LINDSAY: And also a skeleton argument from us this morning.

11 THE CHAIRMAN: Yes, thank you.

12 MR. LINDSAY: You should have in front of you a bundle of the relevant correspondence.

13 THE CHAIRMAN: That is the ring binder bundle, yes, thank you very much.

14 MR. LINDSAY: Since the letter from yesterday the matters in dispute between the parties have
15 narrowed because the issue about the confidentiality ring has been resolved through
16 correspondence. So we believe there are two issues outstanding, the treatment of the
17 proposed intervention and the fixing of the hearing date and consequential directions.

18 THE CHAIRMAN: Yes.

19 MR. LINDSAY: Sir, in terms of the interventions you will have seen from our skeleton argument
20 that we oppose the application by ISBA. There is nobody here to move that application. I
21 do not know, Sir, whether you would like to hear further from me on that.

22 THE CHAIRMAN: Let me just understand whether Mr. Palmer is going to take any position on
23 this. Mr. Palmer, are you ----

24 MR. PALMER: We are in a position of ultimate neutrality, Sir. We certainly do not object, we
25 are grateful for any support that is offered, but we will survive without ISBA's intervention
26 should the Tribunal be minded to not grant the application.

27 THE CHAIRMAN: I follow. So it is not that Mr. Lindsay has to argue against anything on your
28 side at the moment. Mr. Lindsay, your position is that you were opposed to it anyway, and
29 in the event ISBA is not here to persuade us that you are wrong. You would ask us to
30 refuse the application for permission to intervene?

31 MR. LINDSAY: Sir, yes.

32 THE CHAIRMAN: Would it make sense for us to do that on the footing that we are refusing it,
33 but they have liberty to apply in the future if they wish to?

34 MR. LINDSAY: Yes, I think that would be fair, given they are not here today.

1 THE CHAIRMAN: We will do that.

2 Before we leave the question of ISBA, you will have seen the letter that ISBA sent this
3 morning, which I think is essentially directed at my position. Both sides, as I understand it,
4 had a letter from the Tribunal a day or two ago. Does this come as news to you,
5 Mr. Lindsay?

6 MR. LINDSAY: We have seen the letter from the Tribunal identifying the issue that you are
7 describing, as to which we have no position. We have made no observations. We have not
8 seen ISBA's letter from this morning.

9 THE CHAIRMAN: I follow. You have not either?

10 MR. PALMER: Nor have we, Sir, but again we have absolutely no position or objection.

11 THE CHAIRMAN: What, broadly, ISBA were saying was that they had found that the lawyer
12 with whom they had previously had dealings had become unavailable for reasons of conflict
13 of interest and they wondered whether I was in any better a position. They do not, in terms,
14 object to my involvement and of course they are not here to sustain any objection. In the
15 event, we have just decided to refuse them permission to intervene for the time being. That
16 being so, I do not see any need to take that any further, at least for the present.

17 MR. LINDSAY: Sir, nor do we.

18 THE CHAIRMAN: So what does that leave us with? Is that just timetabling through to hearing?

19 MR. LINDSAY: Precisely, hearing date and timetabling consequential upon that. The parties,
20 subject to the Tribunal's availability, both have availability during the week of
21 23rd September, and have constructed a timetable that both are happy with to meet a hearing
22 in that period. Obviously, if the Tribunal is available then that would be perfect; if it is not,
23 we will need to consult diaries and work out how to deal with the timetable.

24 THE CHAIRMAN: I am assuming the reason that 23rd September is suggested may be related to
25 the availability of people through the summer months?

26 MR. LINDSAY: That is correct, yes.

27 THE CHAIRMAN: I am afraid the follow on to that is that it probably will not come as any
28 surprise to you that I would not normally expect to be around in the last week of September,
29 whereas I would be perfectly available from 2nd October onwards. Is there a compelling
30 reason why this cannot wait until the beginning of October, as opposed to the end of
31 September?

32 MR. LINDSAY: Sir, there is no urgency reason why the hearing needs to be held two weeks
33 earlier than otherwise. The matter is urgent in general, but it is not urgent for that two week
34 period, so we are not able to press it to that extent.

1 Sir, in terms of early October, can we clarify the potential dates?

2 THE CHAIRMAN: The dates that would certainly be manageable from our point of view are any
3 two day slot from Wednesday, 2nd October, through to the end of the following week,
4 11th October.

5 MR. LINDSAY: Sir, from our point of view we would be available on 2nd, 3rd, 4th, 7th and 8th, but
6 I believe the Competition Commission has a problem certainly in the week of 2nd October,
7 so perhaps I should let Mr. Palmer comment.

8 THE CHAIRMAN: Mr. Palmer?

9 MR. PALMER: Sir, the difficulty we have for that week is the availability of my leader,
10 Mr. Beard QC. It is possible that that difficulty could be managed. The hearing that he has
11 is currently floating. I cannot say that he will not be available, all I can say is that he may
12 not be available.

13 THE CHAIRMAN: The hearing that he has got is floating over what period?

14 MR. PALMER: I understand only a half day.

15 THE CHAIRMAN: A half day hearing?

16 MR. PALMER: A half day hearing floating over that week.

17 THE CHAIRMAN: When you say the week, do you mean the week of 30th September or do you
18 mean the week of 7th October?

19 MR. PALMER: I mean the week of 30th September. As I understand it, the following week is not
20 convenient either, but that week is our second best option. The preferred option was the
21 week of 23rd September, in which we can manage any days. If that is not convenient to the
22 Tribunal, I think the next best would be Wednesday 2nd to Friday 4th October, any two days
23 there.

24 THE CHAIRMAN: In terms of that three day slot, would you have a preferred two days out of
25 the three days?

26 MR. PALMER: Not that I am aware of. That hearing is floating and I do not think any one day is
27 more likely to be affected than another.

28 THE CHAIRMAN: Yes, I see. In which court is it floating?

29 MR. PALMER: I understand the Court of Appeal.

30 THE CHAIRMAN: I see. The Court of Appeal may be less amenable to fitting in with other
31 courts and tribunals than others might be.

32 MR. PALMER: If it were possible to retain some flexibility over that three day slot and we could
33 perhaps use that information to press for a firmer date from the court ----

1 THE CHAIRMAN: So you would suggest that we should direct, subject to conferring with my
2 brethren, that it should be heard for two days in that three day slot?

3 MR. PALMER: Sir, that would be our preference if the Tribunal were able to accommodate that.

4 THE CHAIRMAN: I suppose, even if the worse came to the worst and the Court of Appeal said
5 that it has to be the 3rd, Thursday 3rd October, if Mr. Beard could bear it he could potentially
6 be here on Wednesday, 2nd and we could resume on Friday, 4th October.

7 MR. PALMER: Mr. Beard is a man of remarkable stamina.

8 THE CHAIRMAN: He will have had his batteries renewed over August and September.
9 Mr. Lindsay, can you live with that?

10 MR. LINDSAY: Yes, I am fine with that, Sir.

11 THE CHAIRMAN: In which case, we will direct that it be heard over two days during that three
12 day slot.
13 That just leaves us with the timetable up to the hearing, does it not?

14 MR. LINDSAY: Yes, that is right, and we have a provisional agreement on the timetable that is
15 at p.10 of the bundle that is on your desk. Paragraph 8 at the bottom of p.10, Sir, we would
16 suggest that items (1) and (2) should remain as they are.

17 THE CHAIRMAN: Yes.

18 MR. LINDSAY: Item (3), the timing of the skeleton arguments and the eight calendar days and
19 the five calendar days, was partly driven by a wish on our part to have the ability to work on
20 our skeleton during September. Given that the date of the hearing is a little bit later, we can
21 perhaps stretch out the periods of skeleton argument perhaps to have our skeleton argument
22 two weeks before the first hearing date you proposed and the Competition Commission's
23 one week before.

24 THE CHAIRMAN: Mr. Palmer, you are content with that?

25 MR. PALMER: Yes, Sir, that was our initial preference. We accommodated a shorter period
26 only for the reason that Mr. Lindsay has outlined. If that goes, then a more normal
27 timetable would be appropriate.

28 THE CHAIRMAN: I assume there are no comments to my left or right. No. So Global's
29 skeleton two weeks before the hearing and the Competition Commission's one week before
30 the hearing.

31 MR. LINDSAY: Yes, and I would suggest no change to items (4) and (5) over the page, p.11 of
32 the bundle.

33 THE CHAIRMAN: Yes. Just coming back to (2) for a moment, that provides potentially for
34 further evidence. There is not thought to be a need for a formal reply in addition to that?

1 MR. LINDSAY: At the moment the direction contemplates that we may put in a reply. Our
2 current thinking is that we would prefer not to put in a reply because we have developed a
3 full notice of application. We are going to do a skeleton argument and having three
4 documents is perhaps excessive. The concern we would have is if there were, as it were,
5 any pleading point that we needed to respond to, or if there were something new. The
6 Competition Commission says that it does not think that we will need to file evidence in
7 response, but obviously until we see their evidence, if any, it is difficult for us to come to a
8 view on whether they are correct or not.

9 THE CHAIRMAN: Just so I understand, what (2) refers to is evidence in reply. Is it your
10 thinking that that will incorporate any pleading? Are you envisaging further evidence or are
11 you envisaging a further pleading?

12 MR. LINDSAY: Our main issue is further evidence, which is what (2) deals with. What we
13 could do, instead of having permission to file a reply, would be to direct that our skeleton
14 should stand as our reply, and that would avoid the need for us to file a reply for pleading
15 purposes.

16 THE CHAIRMAN: Let me see whether Mr. Palmer has a view on that?

17 MR. PALMER: Sir, very little view. In our experience, in a judicial review context, it is very
18 unusual to have a reply or indeed evidence in reply. At the moment we apprehend no
19 possible reason why there would be a need for either. The possible pool of evidence is
20 limited to the material that was before the CC, and we have an awful lot of that already.
21 That may be supplemented by the Defence to the extent that anything is missing. Beyond
22 that, we look forward to the skeleton arguments.

23 THE CHAIRMAN: Just in practical terms, is the upshot that really you are quite happy with what
24 you had agreed already, which is (2), and skeletons under (3), and you will take your
25 chances?

26 MR. PALMER: Yes, Sir, we are quite happy to live with that. We have made clear in (2) our
27 own reservations as to the appropriateness or necessity for that to be used. On the
28 assumption that, if it is used, there will be some justification put forward explaining why it
29 is necessary, for the moment we leave it there.

30 THE CHAIRMAN: Mr. Lindsay, should I simply leave it with what you agreed in the first place?

31 MR. LINDSAY: Yes, subject probably to having a direction that our skeleton argument should
32 be directed to stand as any reply. I entirely hear what my friend says. It may be that there
33 is nothing in the skeleton by way of reply, but I do not want to face a pleading issue at the

1 eventual hearing that says, “You did not reply and so you are now shut out, it is not a point
2 for a skeleton argument, it is a point for reply”.

3 THE CHAIRMAN: Let me just be quite clear what Mr. Palmer’s position on that is. Are you
4 content that there should be a direction to that effect, of whatever significance it may have?

5 MR. PALMER: Sir, I am quite content. If there is a point which comes as a genuine surprise to
6 the appellant in our defence I see no reason why it could not be raised in correspondence at
7 an earlier stage than the end of September. I am bound to say, Sir, that if there genuinely is
8 a new point I would expect to be given notice of it even before the skeleton arguments, but
9 again, in a judicial review context, it is unusual to be taking pleading points, which is what
10 seems to be motivating Mr. Lindsay’s concern.

11 THE CHAIRMAN: Yes, I follow.

12 I think we will include the suggested additional direction suggested by Mr. Lindsay with
13 whatever significance or otherwise it may prove to have.

14 MR. LINDSAY: I am obliged, Sir.

15 THE CHAIRMAN: Is there anything else that we ought to be dealing with this afternoon?

16 MR. LINDSAY: Not on our side, Sir.

17 MR. PALMER: Nor here, Sir.

18 THE CHAIRMAN: In which case, thank you very much.

19