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**IN THE COMPETITION**

Case No. 1047/3/3/04

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

1<sup>st</sup> March, 2005

Before:  
MR. JUSTICE MANN  
(Chairman)

MR. ADAM SCOTT TD  
PROFESSOR PAUL STONEMAN

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

Mr. Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer) appeared for the Applicant

Mr. Richard Fowler QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener.

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**CASE MANAGEMENT CONFERENCE**  
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1 THE CHAIRMAN: Thank you all for your very helpful skeletons. We all seem to be rowing in the  
2 same direction though not at quite the same anticipated page. It may be helpful if I indicate  
3 through you, Mr. Green, and invite observations from various of you in turn, the issues and the  
4 points on which we require some assistance and debate, and certainly some clarification – we  
5 will do it section by section.

6 The first is this, we would like some clarification of the positions of the parties – apart  
7 from Mr. Barling whose position we understand fully – in relation to witnesses. As we see it  
8 there are three potentially disputed areas of fact in relation to which witness evidence and  
9 cross-examination would be appropriate in theory – I am using a form of shorthand which I  
10 hope you will understand:

11 (a) whether there was any countervailing buying power at the date of the BT

12 Agreement, as to which there is a large measure of agreement,

13 (b) whether there was countervailing buyer power at any later date; and

14 (c) what I will call the “excessive costs’ point” as to which there is a lot of evidence  
15 addressed

16 and I hope you will all understand what I mean when I say that. Mr. Green, you will have the  
17 first opportunity to say not.

18 If I put Mr. Barling on one side for the moment, if he will allow me to do so, as we  
19 understand it the general shared view, which we understand and at the moment we are not  
20 minded to force a departure from, is that in relation to (a) which is the countervailing buying  
21 power at the date of and leading up to the BT Agreement is an issue which does not arise as an  
22 issue of fact as such because of the way in which you say Ofcom decided it, and I think Ofcom  
23 might agree that, and therefore no cross-examination would go to that point and I think we  
24 understand that.

25 In relation to (b) we are more puzzled because neither 3’s nor Ofcom’s skeleton  
26 argument really deals with that. One of you, I think it is you Mr. Green, tantalizingly refers to  
27 it – perhaps it is not you, perhaps I do you an injustice and I forget which way around it is.  
28 One of you tantalizingly refers to it and then does not deal with what evidence is required.  
29 We will want the parties’ position on that clarified. In relation to (c) – in fact, this is what  
30 I was thinking of – the costs point, Ofcom’s position is simply not made clear in relation to the  
31 cost point. I think that does tantalizingly mention it, but then not say what it expects to happen  
32 in relation to the evidence in relation to that.

33 We would like to hear from you in relation to (b) and (c) as to what you say about that  
34 and, in particular, we note that Miss Laurent has put in some evidence which deals with (b) on

1       behalf of 3, and that deals with the post-BT Agreement period. We do not know, and it may be  
2       that you do not know either, Mr. Green, whether that evidence is simply to be treated as right,  
3       it not being cross-examined on, or whether there is an oversight in the skeleton. So I think it  
4       would be convenient if we heard first of all from Mr. Green as to what his attitude is in relation  
5       to the evidence on each of those and then each of you sequentially after that. I think that  
6       would be the convenient way of dealing with it.

7       MR GREEN: If I take them one by one. First, countervailing buying power as of the date of the BT  
8       Agreement, I think there is agreement that we are relying upon Ofcom's assumption or stated  
9       position, namely, that Ofcom did not consider that to be a relevant issue at the time.

10      THE CHAIRMAN: "Assumption" or whatever it is on its true construction?

11      MR GREEN: Exactly.

12      THE CHAIRMAN: I think we understand the point.

13      MR GREEN: We say that the same applies to the position of countervailing buying power  
14         throughout the entire period of the Decision, the 18-24 months, there was not a point in time at  
15         which Ofcom examined countervailing buying power and we will rely upon that because it will  
16         be our submission that, as a matter of law, they should have done so. It was a relevant  
17         consideration and it vitiates the Decision not having done so.

18      THE CHAIRMAN: Does that mean you will not be putting forward Miss Laurent's evidence then,  
19         because it only goes to that period, does it not?

20      MR GREEN: We have put forward the evidence on a precautionary basis, largely as a result of the  
21         position the Tribunal took last time which was that it did not wish to close off a number of  
22         these issues, it wished to preserve them as a matter either of background and we have clarified  
23         that, were it to become necessary in extremis, we would argue it.

24      THE CHAIRMAN: I may have misread the debate last time, but I thought the debate last time was  
25         about not let us call it the "intervening period" but was about the negotiation period. I may  
26         have misread it, but I think Sir Christopher Bellamy's Judgment seemed to be referring at that  
27         point to the first of the periods not the second. Am I wrong about that?

28      MR GREEN: Well I do not think anyone particularly focused upon the difference between the  
29         points in time at which countervailing buying power could have been examined. We will rely  
30         upon the fact that at no point in time did Ofcom examine the issue whether before the  
31         agreement, at the time of the agreement, or subsequently and, as far as we are concerned, it is  
32         effectively a single legal point. However, if and insofar as the Tribunal considered it was  
33         necessary at some stage to examine the issue we have put in evidence, but I think there will  
34         probably be quite a large measure of agreement that the primary focus of our submissions and

1 indeed of submissions in response operate from the legal inferences to be drawn from the fact  
2 that Ofcom did not do the exercise at all at any time and for any purpose.

3 THE CHAIRMAN: Well are you going to rely on Miss Laurent's evidence or not?

4 MR GREEN: Well we will do, as we have stated, if it becomes necessary, but we doubt it will  
5 become necessary. We are I something of a cleft stick because we have made it clear that it is  
6 not our principal argument – it is not even our secondary argument – we are largely content to  
7 rely upon Ofcom's position, but it would only be in the event that the Tribunal thought it  
8 necessary to go beyond that that we would be relying upon it. It is not our primary position we  
9 are going to invite you to rule upon whether there was or was not countervailing buying power,  
10 but the exchange does demonstrate the sorts of issues that Ofcom should have examined and if,  
11 for example, you were with us on the primary appeal, then you have a statutory duty under the  
12 Competition Act to consider what, if any, steps you should require Ofcom to take in the future.  
13 Therefore, having some understanding of what went on between BT and 3 might be relevant to  
14 that exercise. So we can see that it might arise as a relevant exercise, but it may well stop short  
15 of requiring the Tribunal to decide factually whether BT did or did not have countervailing  
16 buying power.

17 THE CHAIRMAN: Right, so your position is that it does not arise, and if your analysis is right then  
18 Miss Laurent's evidence is simply unnecessary?

19 MR GREEN: Well contextual, and it may have some relevance in guiding the Tribunal as to  
20 directions back to Ofcom were we to be successful on our substantive grounds. One of the  
21 reasons why Miss Laurent's statement was put in was because we have explained in that  
22 statement why we have not terminated or served a notice (OCCN) which was an allegation  
23 made against us – “You could have escaped this contract by serving a contract price revision  
24 notice”. We have put in evidence explaining that that simply just was not realistic in the  
25 circumstances; and Miss Laurent's evidence does go to that and it meets a point raised against  
26 us by BT and, indeed, by Ofcom. So it is primarily focused on that. So we very much doubt  
27 you are going to have to be concerned with it so far as countervailing buying power is  
28 concerned.

29 It is true to say, and Mr. Barling has made it clear to me just a few moments ago, that  
30 Mr. Locker has not yet seen that statement, or indeed the relevant parts of it because, as you  
31 know, there is a confidentiality understanding between BT and 3. That is something we can  
32 very easily resolve. We had rather anticipated that Mr. Locker would see that. There are parts  
33 of the statement which have some confidential information that we are just checking, but we  
34 can resolve that one very easily and if BT feel that they have to reply to the one paragraph in

1 Miss Laurent's statement, then so be it, that is not going to add to time cost or expense. That is  
2 the position so far as countervailing buying power is concerned.

3 So far as excessive costs are concerned, you will have seen the exchange in particular  
4 between Mr. Mickel and Mr. Myers.

5 THE CHAIRMAN: Just so I am not thought guilty of bluffing, I have not because I personally have  
6 not yet got into that amount of detail.

7 MR GREEN: The issue is a very short one. Again our primary position will be to rely upon  
8 Ofcom's position as set out in their amended defence, which is that at no point in time did they  
9 ever consider whether the embedded price was excessive; they do not allege that it was  
10 excessive, they did not examine the costs either at the beginning or at any time over the 18 to  
11 24 months. Now once one has those concessions/admissions in mind a lot of the debate then  
12 becomes largely irrelevant because it is designed to demonstrate that on no sensible or rational  
13 basis could Ofcom have either concluded that costs could have collapsed so much over the  
14 course of 18 months that it would have brought costs to at or below the contract price. Ofcom  
15 do not allege that; it is not their case, they did not investigate it, and they say it was not  
16 necessary for a variety of reasons.

17 What the exchange does demonstrate, again perhaps with regard to any directions the  
18 Tribunal might make in due course, is the sort of issues that would need to be examined, and  
19 both experts say "This is very complex, and these are the parameters of the dispute", but  
20 Ofcom say "we did not do it", and our experts say "you would have to do it, we accept you did  
21 not do it and it has these sorts of parameters to it", and there are a variety of factual matters  
22 which are referred to in the statements. On that I think one can be almost utterly confident that  
23 the Tribunal will not wish to determine that almost on any basis it is horrendously complex. It  
24 is going to take Ofcom a very considerable period of time, and it is not the sort of exercise  
25 which the court can grapple with *de novo* without actually having had the Regulator take the  
26 decision and then come back as a question of principle, and Ofcom has not done the exercise.  
27 We will almost certainly be relying on Ofcom's stated position in its amended Defence as to  
28 what it did and what it did not do.

29 We say that if you are going to conclude that 3 had significant market power, and one  
30 of your points is that you had the potential to increase your price over time to an excessive  
31 level, and one of the ways in which the price might become excessive is because costs collapse  
32 and therefore price is very substantially above the proper cost level. If that is the allegation,  
33 and that is part of their reasoning for concluding SMP then they have to do their homework,  
34 and we know that they did not. It may boil down to a much shorter and simpler point. So we

1 are not asking for any cross-examination on that, we think the range of issues which are  
2 covered by the statements are fairly clear, but we do not think it is something which the  
3 Tribunal is really in a position to resolve at this stage.

4 THE CHAIRMAN: Yes, I think we understand the position on it. I think on this particular one it is  
5 Mr. Fowler's silence in his skeleton which we found a little more puzzling. Thank you,  
6 Mr. Green. I think Mr. Fowler next, please.

7 MR. FOWLER: Sir, so far as countervailing buying power is concerned, on the position at the time  
8 of the BT Agreement, our position is that we did not investigate whether they did have  
9 a countervailing buying power. We considered that they might have had countervailing buying  
10 power but it was not relevant going forward, so we do not see that as being a relevant issue.

11 THE CHAIRMAN: So you will not be seeking to cross-examine or indeed adduce positive evidence  
12 on that?

13 MR. FOWLER: No, and if we are wrong in our approach on that we are wrong in our approach on  
14 that, but that was our approach.

15 THE CHAIRMAN: If you are wrong then everybody is wrong for the purpose of this hearing, yes.

16 MR. FOWLER: So far as the later period is concerned our position is that BT did not have  
17 countervailing buying power and that we found in the Decision, and we found that on the basis  
18 of the clarification of their universal service obligation and their obligation to interconnect all  
19 round, that that deprived them of any buying power that they might have had. That is the basis  
20 on which we took that view. Again, either we are right in that approach or we are wrong, but  
21 the evidence of Miss Laurent does not go to that issue.

22 MR. SCOTT: There is the point that arose at the last CMC about the inaction of Hutchison 3G in  
23 relation to making any change to the Agreement, or making any reference to Ofcom, and she  
24 does advert to that and in the second supplementary witness statement of Mr. Westby, he  
25 returns to that in 7(b) and talks about "serious inconvenience" and "interruption" that  
26 a reference to Ofcom would have involved, and one of the questions that may arise in our  
27 minds is whether you had in mind to leave those statements in place or whether you would  
28 wish to question those?

29 MR. FOWLER: Well we do not challenge those statements as statements of their position. They are  
30 simply not relevant to the question of the countervailing buying power.

31 THE CHAIRMAN: What I think it boils down to is this, are you going to seek to challenge anything  
32 that Miss Laurent says in her witness statement?

33 MR. FOWLER: We are not.

34 THE CHAIRMAN: You are not.

1 MR. FOWLER: If it goes to their thinking we are not in a position to challenge it. If that is their  
2 thinking that is their thinking, but we do not challenge the statements as statements.

3 THE CHAIRMAN: Yes, very well, so you will not be seeking to cross-examine her on that. If that  
4 statement goes in and is evidence before us, we will simply treat it as unchallenged evidence?

5 MR. FOWLER: We recognise that if we do not cross-examine that will be the position, yes.

6 THE CHAIRMAN: I think we might find that a little surprising but ultimately that is a matter for  
7 you and we will have to see how the hearing pans out. There are one or two things in there one  
8 would have thought might have fitted into your case, but I am not going to tell you what your  
9 case is, Mr. Fowler. I want you to tell me that so we know where we are. Then in relation to  
10 the costs issue?

11 MR. FOWLER: In relation to the costs issue, there is no dispute that we did not investigate the  
12 costs. The evidence, such as it is, shows – as my friend Mr. Green says – that it is a very  
13 difficult issue, and it has not been investigated and to investigate it would be very complex.  
14 That being so, insofar as it still remains any part of 3's case that their prices were constrained  
15 below cost, as we understand it they are not advancing any positive evidence in support of that  
16 claim, because they recognise that the costs have not been analysed. Our position is that we  
17 did not base our finding of SMP on the fact that they were pricing excessively. That was  
18 certainly not the basis of our finding and that the basis of our finding was as set out in paras.  
19 321 and 322 of the Decision which made no reference to the question of excessive pricing.

20 I have just noted from my instructing solicitors that they would like further time to  
21 think on the question of Miss Laurent.

22 THE CHAIRMAN: So all that costs' evidence you are not seeking to challenge that. You will not  
23 be seeking to cross-examine on that, and nor are you expecting any of your people to be  
24 cross-examined on it themselves?

25 MR. FOWLER: No, Sir.

26 THE CHAIRMAN: And effectively we can simply all ignore that, can we?

27 MR. FOWLER: Other than as background which I think is how ----

28 THE CHAIRMAN: Ah, background!

29 MR. FOWLER: -- which is I think how the President was regarding it, because it shows the  
30 complexity of the issue. It does not in any way resolve, or purport to resolve, the issue. It  
31 simply shows, as I think all parties are agreed, that it is a jolly complex issue.

32 THE CHAIRMAN: Yes, I think we can all agree that, Mr. Fowler.

33 MR. FOWLER: I have just been advised by my instructing solicitors that we would like to  
34 reconsider the question of Laurent.

1 THE CHAIRMAN: Well this is the afternoon, or the moment for you to do it, Mr. Fowler, because  
2 we need to know, and I am sure that 3 would quite like to know whether you are going to be  
3 cross-examining her on that. I would not wish us to be seen to be pushing you into doing  
4 something you do not want to do. It just did not quite gel with what we had thought that part  
5 of the case was about that her witness statement was going to go unchallenged, and if there is  
6 going to be a think, or rethink about it, we would like to know from this afternoon where we  
7 are going.

8 MR. FOWLER: I think for present purposes one should proceed on the basis that we will be  
9 cross-examining Miss Laurent.

10 THE CHAIRMAN: So she is the one exception and you would wish to be cross-examining her.  
11 Right, thank you, Mr. Fowler. Mr. Barling, life is quite easy for you, is it not?

12 MR. BARLING: It is quite easy subject to only one point which relates to the Mr. Laurent issue as  
13 well. Yesterday, of course, we got the third statement of Mr. Westby who basically in quiet  
14 sort of way criticises – there is an implicit criticism – for example, in para.7(b) he refers to  
15 Miss Laurent’s evidence, and then says: “... to which Mr. Locker does not refer” – Mr. Locker  
16 being BT’s witness on this matter. There are other references there also to Miss Laurent’s  
17 evidence.

18 Mr. Locker has not of course been able to see Miss Laurent’s evidence up until now,  
19 because Miss Laurent’s evidence was effectively redacted – almost totally – from the  
20 statements supplied to BT. Just before Christmas, there was an agreement – to try and cut  
21 through this whole problem of confidentiality – between ourselves and Hutchison 3G. The  
22 process under that would be that if we thought it was necessary we would ask their permission  
23 basically and seek to reach agreement. As Mr. Green has said, we have had a word about that  
24 beforehand, and Mr. Green is taking instructions from his clients on whether there is any  
25 problem with Mr. Locker having sight of Miss Laurent’s evidence. All we would ask is that  
26 we be allowed to pursue that with Mr. Green and his client – maybe they can give us an answer  
27 now? Obviously in view of the comment about that in yesterday’s witness statement we would  
28 ask permission to show it to Mr. Locker and to take his instructions and, if appropriate, to file  
29 a further witness statement. He has not seen it and therefore cannot comment and it is right to  
30 say that the contents of Miss Laurent’s statement are in general terms not wholly  
31 unpredictable. Those kinds of issues have been touched on by Mr. Locker already but he has  
32 never been, as it were, able just to see the specific points that she makes. It may be that having  
33 seen them there would be nothing for him to add to what he has already said. As you know,  
34 our position is that the question of countervailing buying power is never likely to arise in



1 effect. However, it is true to say of course that Miss Laurent is dealing, as your Lordship has  
2 said, with the later period and so we would obviously have to have a very short window to  
3 ensure that any further witness statement was expeditiously produced so as not to effect any  
4 timetabling.

5 THE CHAIRMAN: Mr. Locker has not yet dealt with the later period, has he? He deals only with  
6 the negotiation of the interconnection agreement?

7 MR. BARLING: He has made two witness statements. My recollection is that he has touched on the  
8 issue of whether H3G could have issued a charge change notice under the contract in general  
9 terms – we can find the specific passages, I think it is para.11 of his second witness statement,  
10 where he deals with what is called the “OCCN” – the contract charge notice. He basically  
11 says there was nothing stopping them from doing so, in a nutshell. So Miss Laurent’s evidence  
12 is relevant to that point. We would be very surprised for our part if there would still be any  
13 need for cross-examination of her. But we do think it is fair to Mr. Locker that he be allowed  
14 at least to have the opportunity of commenting.

15 THE CHAIRMAN: Right. So far as the second period is a live period, which on Ofcom’s case it is,  
16 then Mr. Locker’s evidence does go to that as well as the dead earlier period, to at least to  
17 a very limited extent.

18 MR. BARLING: It does, yes.

19 THE CHAIRMAN: So what are you asking for?

20 MR. BARLING: Assuming there is no problem in showing it to Mr. Locker, we would ask for  
21 a pretty short period to show it to him, to take instructions and file any witness statement. We  
22 just have to check Mr. Locker’s availability to look at it, but given that we have got time ----

23 THE CHAIRMAN: How much time you have will depend on what directions we are going to make  
24 as to skeleton arguments.

25 MR. BARLING: That is right. Perhaps we could just leave the exact timing, I cannot believe in  
26 principle anyone will object to him having the opportunity to comment briefly.

27 THE CHAIRMAN: Well I will find out.

28 MR. BARLING: That is the only point we would make.

29 THE CHAIRMAN: That is the only point you make. Would you be seeking to cross-examine  
30 Miss Laurent?

31 MR. BARLING: I would find it very surprising if we wished to, but it does depend to some extent  
32 upon Mr. Locker’s reaction. It may be that a time limit can be put on that as well, an  
33 indication given within a short time as to that.

1 THE CHAIRMAN: We will hear what Mr. Green says first of all. Is there anything else you want to  
2 add at this point?

3 MR. BARLING: No, on these points that is all we have to say.

4 THE CHAIRMAN: Thank you very much.

5 MR GREEN: Just to deal with the question of the OCCN ----

6 THE CHAIRMAN: Just hold on one second, if you would.

7 (The Tribunal confer)

8 THE CHAIRMAN: Mr. Green?

9 MR GREEN: In relation to the counter notice it is not part of the impugned Decision. Mr. Fowler  
10 explained there were two reasons which were relevant to the ongoing question of  
11 countervailing buying power. One was the universal service obligation; and secondly was the  
12 end to end connectivity – an obligation on BT to interconnect. It has not been part of Ofcom’s  
13 case that the failure to serve a notice was a relevant issue. It was posed as a rhetorical  
14 question: “Why did they not serve a notice?” but it is not part of the Decision, and it is the  
15 Decision we are challenging. On Mr. Fowler’s logic, to say that Ofcom’s position in relation  
16 to end to end connectivity, for example, is that it negates 100 per cent. of the possibility of  
17 buyer power we find an extraordinary comment. It is repeated in the Defence. But the  
18 question of the counter notice is, in our submission, something of a red herring. Of course, if  
19 Mr. Fowler wishes to cross-examine on it so be it, if the Tribunal permits him to do so, but I do  
20 not think it is going to loom very large as an issue.

21 THE CHAIRMAN: Well if it is a red herring ----

22 MR GREEN: It was an issue raised by them. They said why did we not serve a counter notice and  
23 we put in evidence saying “Well it would be loopy to do so for the following reasons.”

24 THE CHAIRMAN: Right. But you are not withdrawing that witness statement?

25 MR GREEN: We are not withdrawing that witness statement.

26 THE CHAIRMAN: Since it is a witness statement, and since it appears Mr. Fowler will want to  
27 cross-examine, and Mr. Barling may – in fact, Mr. Barling may wish to serve some additional  
28 short evidence to deal with that, do you have any objection – subject to timing – to  
29 Mr. Barling having that right?

30 MR GREEN: No, none whatsoever. I think all we would need to do is to reserve our position on  
31 whether or not if Miss Laurent is going to be cross-examined, the tit for tat position, which is  
32 that Mr. Locker would need to be cross-examined – I doubt it, but it is at least possible.

33 THE CHAIRMAN: Do you have any observations on timing? I suppose anything that is sensible  
34 you will agree with?

1 MR GREEN: Anything that is sensible we will agree with providing it agrees with our timetable.

2 THE CHAIRMAN: Do you share Mr. Barling's optimism about being able to sort out the  
3 confidentiality point?

4 MR GREEN: Oh yes. I do not think there is going to be any difficulty there.

5 THE CHAIRMAN: Mr. Barling, just one moment.

6 (The Tribunal confer)

7 THE CHAIRMAN: Mr. Barling, what we are minded to do is to give you seven days to serve any  
8 further evidence from Mr. Locker in response to Miss Laurent. It is to be limited to that issue  
9 only.

10 MR. BARLING: Yes.

11 THE CHAIRMAN: Just to prevent any wider ranging inquiry.

12 MR. BARLING: Yes. If he happens to be in the Antarctic for the next week we would obviously  
13 come back very quickly to people, but subject to that there should not be a problem – also,  
14 subject to getting the necessary permission.

15 THE CHAIRMAN: We are assuming that the confidentiality position can be sorted out pretty  
16 swiftly and then you will have seven days to serve and to lodge.

17 MR. BARLING: On that basis, close of play this time next week.

18 THE CHAIRMAN: Close of play today next week, yes.

19 MR. BARLING: Thank you.

20 MR GREEN: Could we have an indication within the same time frame of whether, in the light of  
21 Mr. Locker's comments, they wish to cross-examine Miss Laurent?

22 THE CHAIRMAN: I am loath to start making complicated directions like that. Mr. Barling, I am  
23 sure good sense will prevail, and you will notify as soon as possible as to whether they can  
24 expect something. If it becomes clear they should not expect anything then can we rely on the  
25 good sense of your side to indicate that, rather than making formal directions?

26 MR. BARLING: Of course, as soon as the decision is made we will ...

27 THE CHAIRMAN: We will leave it there, Mr. Green, on that particular issue. Subject to that we  
28 can assume there is a possibility of cross-examining both Mr. Locker and Miss Laurent, is that  
29 right?

30 MR GREEN: It is a possibility.

31 MR. BARLING: Just to complicate matters, of course most of Mr. Locker's evidence goes in  
32 response to Mr. Westby's evidence.

33 THE CHAIRMAN: Mr. Locker on what we will call "the Laurent points".

34 MR. BARLING: "The Laurent points", yes, so his cross-examination would be restricted to that.

1 THE CHAIRMAN: His cross-examination will be restricted to that. In fact, I think we can usefully  
2 make an order to that effect, so it is clear that any cross-examination of Mr. Locker will be  
3 confined to those parts of his evidence which anticipate or deal with the Laurent points.

4 MR. BARLING: We may just have to check that Mr. Westby does not deal in part with the Laurent  
5 points. I confess now that ----

6 MR. SCOTT: Unfortunately he now does, and has joined in the latest submission ----

7 MR. BARLING: In the latest one, yes, of course he does.

8 MR. SCOTT: -- in 7(b) he has joined issue which does slightly complicate the matter.

9 MR. BARLING: Yes, so we might have to add Mr. Westby into the frame theoretically, but  
10 obviously everyone will hope that this does not come about.

11 (The Tribunal confer)

12 THE CHAIRMAN: In light of the slightly “bar of soap” nature of the issue as to whether or not  
13 there is going to be cross-examination, at the beginning of the full trial we will want the  
14 parties’ indications so far as they are going to seek to cross-examine anybody of their proposed  
15 timetable, of the time they will take, because we will want to try to limit time for cross-  
16 examination if it appears that it will start eating significantly into the amount of the hearing  
17 time. You can rely on sensible degrees of flexibility in relation to any time limits that are laid  
18 down (if they are), and we will not lay down any limits at this stage because it will be unfair to  
19 do so particularly since we do not actually know fully what the evidence is, and it is rather  
20 better that an informed judgment be taken. But those who are going to seek to cross-examine  
21 anybody should be prepared to indicate for how long they would wish to cross-examine them  
22 so we can make sure it is not going to be for too long.

23 (The Tribunal confer)

24 THE CHAIRMAN: Mr. Green, Mr. Scott has a point to raise.

25 MR. SCOTT: Mr. Green, you mentioned the end to end connectivity point, and at the last CMC, as  
26 I understand it, we considered the situation before and after the guidance and you were  
27 concerned to maintain the position that BT was not under legally enforceable obligation and, as  
28 I recall, we considered whether BT was under an effective obligation because of the first  
29 implied and then explicit threat of regulatory action following the guidance. The question in  
30 our minds is whether at this stage, and in relation to a forward looking decision, you take the  
31 view that the end to end connectivity guidance did provide an effective obligation on BT, or  
32 did not provide an effective obligation on BT? Whether, given the intervening time, you have  
33 had a chance to consider that? It is your understanding it goes to the ongoing countervailing  
34 buying power, whatever the earlier countervailing buying power situation was?

1 MR GREEN: Like the other issues, it is an issue with a number of slices to it, because our principal  
2 position is as set out in the Decision and as set out in the amended Defence, Ofcom takes the  
3 view that because there is end to end connectivity it has the effect of dissipating all, 100 per  
4 cent., of the countervailing buying power, it is a binary choice for Ofcom – zero or 100 per  
5 cent. Our answer to that is even if it is true, and there is some obligation whether regulatory or  
6 legal, nonetheless it cannot possibly be right that it negates 100 per cent. of the countervailing  
7 buying power – for example, see the issue in relation to delay which just never crossed  
8 Ofcom’s radar. So a lot of our challenge will be as to the thought process which Ofcom  
9 engaged in as revealed by the amended Defence and the Decision.

10 The classification of the nature of the obligation – whether it is a legal obligation or  
11 a *de facto* obligation is not, on our submission, going to be a key matter. There was some  
12 obligation, whether it was regulatory or statutory, it may have had different degrees of  
13 compulsion attached to it, but Ofcom’s view was that it was a complete and total answer which  
14 we say is just not commonsense. They did not investigate further. If they had stripped that  
15 point away and said “It only negates let us say, for the sake of argument, 50 per cent. of the  
16 countervailing buying power what residual power is there left? We had better examine.” The  
17 answer is they did not. That is really the main thrust of the way we were putting the point, and  
18 again I do not think we are going to be asking you to delve into BT’s disclosure box to see how  
19 they perceive the obligation on themselves.

20 MR. SCOTT: Yes, thank you.

21 THE CHAIRMAN: Right. We think that deals with everything which relates to witnesses and  
22 cross-examination. Does anybody have any outstanding case management points in relation to  
23 witnesses and cross-examination? No? Good.

24 Then working our way through the points which have been raised in the skeletons and  
25 the agenda, the suggestion is made that we should have agreed chronologies, and an agreed  
26 statement of facts. We think that both of those would be helpful, and the date that we think is  
27 appropriate for the lodging of those documents would be the date on which the last skeleton in  
28 the order which we are going to suggest is filed, because by that time it will have become  
29 apparent what facts and dates everybody thinks are important. These are, of course, not the  
30 only relevant dates and facts in the case, these are the agreed ones. So we are proposing to  
31 order those documents, an agreed chronology and an agreed statement of facts to be lodged on  
32 the date of the last of the skeletons to be filed, which we will come to in a moment.

33 Does anybody want to make any submissions about that?

1 MR GREEN: Only in relation to the timing of the chronology, because having discussed this within  
2 our own team we think the chronology is likely to end up looking very similar to the core  
3 bundle, and we do not think it is a terribly complicated bundle to put together, and we can  
4 probably produce it within a very short period of time, and it may therefore be helpful to have  
5 paginated bundle of the chronological documents which will include the Ofcom consultation  
6 papers, the Decision, the European Commission's opinion, and so on, the BT Agreement, at an  
7 earlier stage.

8 THE CHAIRMAN: Well I am coming to that, the core bundle, in a moment. If anybody wants to  
9 produce an agreed chronology before the date which we think is the longstop date then of  
10 course we should be delighted to see it.

11 MR GREEN: We rather suspect the chronological bundle will form the core bundle – just thinking it  
12 through what will go into that bundle is likely to be that which would go into ----

13 THE CHAIRMAN: We are talking about the chronology not the chronological bundle, Mr. Green.

14 MR GREEN: Yes, a chronology – well, the chronology with a bundle attached to it of the  
15 documents referred to in the chronology is what we had contemplated.

16 THE CHAIRMAN: I do not want to anticipate the form of the chronology. Anyway, we will leave  
17 the order where it is and if you manage to get ahead of time – it will probably be a first – but  
18 you will manage to get ahead of time.

19 MR GREEN: I make no promises.

20 THE CHAIRMAN: Next, associated with that, can we deal with skeletons and core bundles. Our  
21 provisional view, subject to submissions that Mr. Green may wish to make, is that it would be  
22 appropriate in this case to have sequential provision of skeleton arguments. That has a couple  
23 of merits. The first is that the latest skeletons can contribute to a more informed debate, and  
24 will be fuller and therefore will assist us. Secondly, it will avoid the need to have an amended  
25 reply which strictly it might be thought we ought to have in this case where there have been  
26 reasonably comprehensive amendments of the pleadings, but we think we can avoid that.

27 Having looked at the timing, and looked at the suggestions what we had in mind was  
28 this, that the first thing that should be done is the preparation of the core bundle, and we have  
29 anticipated Mr. Green's point, we think it should be relatively easy for a core bundle to be put  
30 together, and it would be useful from our point of view if it were prepared first, because then  
31 the skeletons can be prepared by reference to the core bundles rather than some rather more  
32 voluminous bundles. The timetabling which we provisionally had in mind is this: the core  
33 bundle by 15<sup>th</sup> March, 3's skeleton by 17<sup>th</sup> March, Ofcom's skeleton a week later, 24<sup>th</sup> March,  
34 which I think is Maundy Thursday, and BT's skeleton by 1<sup>st</sup> April, which means that BT may

1 feel it has to work over the Easter holiday and we are very sorry about that, but we think the  
2 timetable is going to have to be something like that.

3 I will go down the line again, but that is our provisional view, subject to submissions.

4 Mr. Green, do you wish to say anything about that?

5 MR GREEN: Yes, I am not thrilled, but I will do it. (Laughter)

6 THE CHAIRMAN: Mr. Barling?

7 MR. BARLING: I was just wondering if I could beg until the 4<sup>th</sup>?

8 THE CHAIRMAN: We are not so keen on that because we want to get everything in and out to the  
9 people who have to start reading comprehensively – by “people” I mean the three of us. But  
10 you would like to pray for the 4<sup>th</sup> because otherwise ----

11 MR. BARLING: It just gives us the weekend and Monday, and another reason I happen to know  
12 that my learned Junior is in America until 2<sup>nd</sup> April, but if it cannot be done it cannot be done.

13 THE CHAIRMAN: Subject to that you have no observations to make?

14 MR. BARLING: No.

15 THE CHAIRMAN: Good. Mr. Fowler?

16 MR. FOWLER: That is fine by us.

17 THE CHAIRMAN: Right.

18 (The Tribunal confer)

19 THE CHAIRMAN: Mr. Barling, we would have liked to have helped, but the other commitments of  
20 Members of the Tribunal are such that sooner rather than later is not only desirable but  
21 necessary in respect of your skeleton. So I am afraid, unhelpful though it may be, the 1<sup>st</sup> it has  
22 to be.

23 MR. BARLING: It may be therefore that you get it more or less simultaneously with my learned  
24 friend's on the 24<sup>th</sup>.

25 THE CHAIRMAN: How distressing! (Laughter)

26 MR. BARLING: It obviously will not be able to take account of it.

27 THE CHAIRMAN: Those then will be the dates. Can we have not only paper copies but also  
28 emailed copies in Word format of all skeletons and a combined bundle of authorities lodged,  
29 please, by 6<sup>th</sup> April? I am sure that is completely uncontentious, everybody will know what  
30 their authorities are by then since all the skeletons will be in. The last point is merely an  
31 observation, we note what is said in everybody's skeleton about confidentiality and that  
32 a successful regime has been put in place and we are sure it will be dealt with sensibly. There  
33 is just one caveat from the Tribunal that I think more than one Member of the Tribunal has  
34 been puzzled about the extent to which confidentiality has been claimed in this case in respect

1 of matters which we have some difficulty in seeing are confidential. The more material in  
2 respect of which confidentiality is insisted upon the greater the chances that something will  
3 accidentally leak out. We may all have to live with that, but if anybody takes a wholesale view  
4 that a lot of the claims of confidentiality is not going to be insisted after all, which would no  
5 doubt be helpful in terms of expedition in this case, we will live with what we will live with,  
6 but if life gets too difficult then I think we just put down a marker that we may start taking  
7 a view about confidentiality if we think we need to have a debate in a form which is not  
8 conveniently permitted by the present fairly wholesale claims of confidentiality – we will cross  
9 that bridge when we come to it but we thought it useful to mention that at this stage.

10 (The Tribunal confer)

11 THE CHAIRMAN: There is one point which has arisen which we just want to go out and discuss  
12 for a moment, and we will revert to you in a few minutes, but before we do that we think we  
13 have covered the ground raised in respect of skeletons, is there any other point which any of  
14 you have in relation to the matter in your skeletons or otherwise? Mr. Green – no? Mr. Fowler,  
15 Mr. Barling? No, then we will rise for a few minutes.

16 (The hearing adjourned at 2.50 p.m. and resumed at 3.10 p.m.)

17 THE CHAIRMAN: Having reflected we have nothing fundamental to suggest or to require in  
18 addition to what we have already required. We have one point in the nature of a request rather  
19 than a formal direction, and it is this. We would find it helpful if you could make sure that the  
20 authorities' bundle address as fully as we are sure they will on the definition of SMP. In that  
21 context, and of particular interest to the Members, but certainly of interest to all of us, will be  
22 that part of the definition of SMP in the framework directive which refers to the interests – the  
23 last three words – “ultimately the consumers”. We are not sure “ultimately the consumers”  
24 part of this case has had a lot of attention but we would be assisted by fuller submissions and  
25 full citation of authority on the definition of SMP, and if I am asking you to do something that  
26 you were going to do anyway then I am sorry about that but we would be grateful if your  
27 submissions could do that.

28 Has anybody thought of anything else while we were out?

29 MR. BARLING: Just one short point I am afraid. It emerged while you were out, but my instructing  
30 solicitor said that there were two people at BT in addition to Mr. Locker who probably are as  
31 appropriate – if not more so – to take instructions from. I have given their names to Mr. Green  
32 and his instructing solicitors and I would therefore ask that the confidentiality arrangements  
33 when we take instructions be extended to those two as well.

34 THE CHAIRMAN: Are you asking me or Mr. Green?



1 MR. BARLING: Well I am just reporting really. I suppose I am really inviting, if possible, there to  
2 be no difficulty with that, that these arrangements are going to work.

3 THE CHAIRMAN: Well I am sure Mr. Green has heard what you have said.

4 MR GREEN: Well I have heard it, I am not certain that I am particularly sympathetic to it. What is  
5 now being suggested is that we may have another witness statement from someone who has  
6 not been involved in this case, partly as a response to observations made by Mr. Westby.  
7 Westby's third was served very recently but the first two statements were served in July and  
8 December of last year. All Mr. Westby says is that Mr. Locker did not reply to Miss Laurent.  
9 Miss Laurent was served last December, and it is a blindingly obvious and true statement that  
10 he did not reply. That now seems to be used to open the door for the production of a response  
11 from Mr. Locker and now potentially two other people, so we are concerned that this is getting  
12 out of hand.

13 THE CHAIRMAN: Well in principle what we have decided, and I think we decided without  
14 opposition, was that there should be a very limited time for Mr. Barling's client to respond to  
15 the Laurent material – let me put it that way. When he was on his feet Mr. Barling thought that  
16 that would come from an existing deponent. If it has to come from a not yet existing deponent,  
17 subject to that person being appropriate in confidentiality terms, does it make any difference,  
18 Mr. Green?

19 MR GREEN: Well it does to this extent, that this was triggered by Mr. Westby in para.6(b) saying:

20 "Clare Laurent addressed in her witness statement (to which Mr. Locker does not  
21 refer) ..."

22 Now Mr. Locker has had two months to respond to Miss Laurent's statement, and we thought  
23 it was just, as it were, as Mr. Barling put it an opportunity for Mr. Locker to say "Well, I do"  
24 or "I do not have a problem with the point, but I have not responded to it". We understood it to  
25 be a very narrow point not something which now new people are going to express a view on  
26 substantive matters.

27 THE CHAIRMAN: Yes, of course Westby three is not something for which you have permission  
28 yourself yet.

29 MR GREEN: Well evidence was put in by the other parties after the due date to which we have  
30 simply responded.

31 THE CHAIRMAN: Well there has to be an end to this. Just give us one moment.

32 (The Tribunal confer)

33 THE CHAIRMAN: There has to be an end to this and the end will be this, that Mr. Barling's seven  
34 days (subject to the resolution of the confidentiality problems) appropriately be extended from

1 Mr. Locker to any other appropriate person who can give evidence on the point. Our direction  
2 is not confined to Locker and then we will have a proper set of evidence on which we can then  
3 try the issue so far as we need to try it. If there is a problem about the confidentiality point you  
4 will have to make some appropriate application, but I think we are as confident as we can  
5 reasonably be that will not be necessary, but if there is you will have to make an application.

6 MR. BARLING: Thank you.

7 THE CHAIRMAN: Is there anything else? Good, well thank you very much and we look forward  
8 to your written submissions.

9 (The hearing concluded at 3.20 p.m.)