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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th September 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(In administration)

Appellant

supported by

WORLDWIDE CONNECT (UK) LIMITED

Intervener

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Interveners

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HEARING

APPEARANCES

Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellant.

Mr. Brian Kennelly (instructed by Taylor Wessing) appeared for the Intervener Worldwide Connect (UK) Limited.

Mr. Rupert Anderson QC, Miss Anneli Howard and Mr. Benjamin Lask (instructed by the General Counsel, Office of Communications) appeared for the Respondent.

Mr. Stephen Wisking (of Herbert Smith) appeared for the Intervener, Vodafone Limited.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared for the Intervener, T-Mobile (UK) Limited.

1 THE CHAIRMAN: Good morning. Before we start I will make a few comments on the material
2 which has so far come in. The Tribunal finds all the written submissions which have been
3 made extremely helpful. We have noted the remarks of Floe in the recent correspondence as to
4 the lateness of some of those submissions and the length of them. However, had they not been
5 put in writing they would almost certainly have been made today orally and that would have
6 extended the time of today's hearing, and also would not have given Floe the opportunity to
7 consider the submissions, so we do not actually share Floe's concerns about the written
8 submissions. Written submissions are very helpful for the expeditious conduct of these
9 hearings.

10 We have carefully considered the written submissions on costs and it may be helpful if I
11 outlined where we are at the moment before we hear any oral submissions. Our view – subject
12 of course to any oral submissions today – is that Ofcom's approach is the appropriate one,
13 namely that there should be no order as to costs. It seems to us that if a costs' order were to be
14 made against Floe in relation to the factual aspects of the Appeal it would then be necessary to
15 consider who should pay the costs of the legal aspects of the Appeal, and taking costs in the
16 round in relation to the case as a whole as I have indicated it seems to us on the basis of what
17 we read in the submissions so far that the most just result would be no order as to costs. If, of
18 course, the parties wish to make further oral submissions in addition to those which they have
19 made in writing then we will consider the matter further, but our preliminary view is no order
20 as to costs.

21 The next question is the subject matter of our Judgment. Both the Ofcom Decision and our
22 Judgment were concerned with the provision of services using GSM Gateways. The
23 construction of the legislation and the licence is, of course, generally applicable but the
24 consequences of the implementation of the legislation depends upon the individual facts and
25 circumstances. Even in relation to GSM Gateways our Judgment has left these matters open in
26 some very important respects. We do not fully understand Ofcom's concerns in relation to the
27 wording of the Judgment and/or any Order, and we will need to be addressed fully on those if
28 we are to make any precise order in the form that is being indicated by Ofcom.

29 Turning to VIP, it seems to us on the written submissions so far that there is a dispute of fact
30 which will need to be determined by the Tribunal. Our present view is that we should use
31 today as a case management conference to make the necessary directions so that that dispute as
32 to fact can be determined, and to timetable a hearing for that to be heard.

33 I think those are all the points. (After a pause) Do you want us to leave for a moment?

34 MR. PICKFORD: Yes, I was going to suggest that, I think in light of the Tribunal's comments it
35 might be helpful to have five or ten minutes to take instructions on some of the matters raised.

1 THE CHAIRMAN: About 10 minutes, but you will let us know?

2 (The hearing adjourned at 10.40 a.m. and resumed at 11.10 a.m.)

3 THE CHAIRMAN: Mr. Mercer?

4 MR. MERCER: Ma'am, would you like to hear about all three issues, or shall I just speak to you on
5 an issue basis?

6 THE CHAIRMAN: Would it be helpful if we did it on an issue basis?

7 MR. MERCER: I think that might be helpful. It requires a sort of canon going up and down the
8 bench but I am sure we will manage.

9 My submission on the costs' point, ma'am, is that the Tribunal adjourn a decision until we have
10 had a chance to put in some further representations in writing. As you repeated twice, ma'am,
11 you found the latest submissions very helpful and we would like to think that we could
12 produce something equally helpful.

13 (The Tribunal confer)

14 THE CHAIRMAN: All the submissions were helpful not just the latest ones. We are all here today
15 so that we could have oral submissions today.

16 MR. MERCER: We think that the matter could be dealt with by means of a written submission and
17 save court time this morning, and that is my submission, ma'am.

18 THE CHAIRMAN: How are we going to go down the line?

19 MR. KENNELLY: Ma'am, if I may, on behalf of Worldwide. We also apply for an adjournment on
20 the issue of costs on the basis that I certainly received the detailed submissions from Ofcom
21 this morning and those submissions were relied upon by the Tribunal and I have not had an
22 opportunity to deal with the issues raised ----

23 THE CHAIRMAN: Well, we have read them.

24 MR. KENNELLY: Of course, but the Ofcom submissions raise a particular point. They say that the
25 submission put in by Worldwide for its costs lacked particularity both in relation to the
26 submissions made and the extent to which they are relied upon by the Tribunal in making the
27 final decision.

28 Now, I have been recently instructed and I have sought to deal with that issue myself, but what
29 it requires is actually an analysis of the transcripts before the Tribunal because of course the
30 Tribunal recalls the skeleton arguments put in by the parties do not provide a full picture of the
31 full extent of the arguments before the Tribunal.

32 THE CHAIRMAN: But you are an Intervener?

33 MR. KENNELLY: Ma'am, yes.

34 THE CHAIRMAN: And it is unusual to give costs to an Intervener.

35 MR. KENNELLY: Yes, it is.

1 THE CHAIRMAN: So you have to show some exceptional circumstances.

2 MR. KENNELLY: All the more reason, ma'am, why we want time to put in written submissions to
3 deal with the points raised by Ofcom.

4 THE CHAIRMAN: But you came here today in order to deal with costs.

5 MR. KENNELLY: Ma'am, yes, we did, but I ask for two reasons. First, as I said, to deal with the
6 points raised by Ofcom I will need time, because there are specific questions about the lack of
7 particularity and simply to deal with that issue alone requires going through the transcripts
8 before the Tribunal, the skeleton arguments do not provide a full picture and we need time to
9 deal with that. Secondly, in order to do justice between the parties it is necessary for the
10 Tribunal to have the full picture and, at the moment, the Tribunal does not have the full
11 picture, and would not have it today even if we made oral submissions because, as I will
12 submit, this is best dealt with in my submission on paper because there the Tribunal can see the
13 extent to which submissions were made (and those are not the same as the ones in the skeleton
14 arguments) and the extent to which they assisted the Tribunal in its final decision with cross-
15 references. That kind of mechanistic exercise is the one that will best assist the Tribunal
16 because it is a complex decision in complex case. It is not possible to give a broad brush
17 analysis of this Decision and reach a general view on the costs. Ofcom is right when it says
18 that more particularity is required and that is exactly what we were trying to produce.

19 THE CHAIRMAN: But even if Ofcom had not said it should you not have come prepared today to
20 do that?

21 MR. KENNELLY: Ma'am, here I will have to accept that in the first instance and submit that
22 Worldwide (like Floe) is of limited resources and those resources are now available to deal
23 with the issue on paper, and hopefully on paper it will not be necessary to incur a great deal of
24 further costs on either side, because what I would submit to the Tribunal – my learned friends
25 may have different views – is that it would be possible for the Tribunal to resolve this issue on
26 paper also. But on the written submissions before the Tribunal it could make a decision on the
27 papers and that would not lead to further waste of time and cost and that would give a fuller
28 picture and a more just picture of where costs lie – if at all.

29 THE CHAIRMAN: So what you are suggesting, and it is for you and Mr. Mercer, is that we need to
30 divide up this case between facts and law and that in relation to facts Floe lost and therefore
31 costs should be awarded against them, but on law that is a different proposition, so I do not
32 know if we did decide to approach it in that way – and at the moment we were not minded to
33 do that – whether that is beneficial to anybody.

34 MR. KENNELLY: Ma'am, my submissions are on behalf of Worldwide alone, but I am sure that
35 Mr. Mercer (for Floe) will make a similar submission. This is simply a matter of undertaking a

1 proper analysis of the Judgment and the submissions made, and a proper analysis of the
2 submissions made cannot be made without going through the transcripts, and it is simply a
3 question of giving the Tribunal a full picture in order to make a just decision.

4 THE CHAIRMAN: But what about the exceptional circumstances?

5 MR. KENNELLY: It will be necessary to show, in Worldwide's submission, that they extent to
6 which they assisted the Tribunal was so exceptional that it is appropriate to grant an Order of
7 costs.

8 THE CHAIRMAN: But we know that Floe could have made the same submissions as you made.
9 We divided it up so that you made the submissions and Floe did not, so why are there any
10 exceptional circumstances here? If I remember rightly – you can correct me – you were only
11 allowed in on the basis that there was no duplication.

12 MR. KENNELLY: Ma'am, that is correct.

13 THE CHAIRMAN: So why are there any exceptional circumstances for you because you came in on
14 the basis that you were going to do a part of the case that floe could have done and that Floe
15 would adopt your submissions so I do not understand at the moment – and I am only talking
16 aloud – how there are any exceptional circumstances.

17 MR. KENNELLY: Ma'am, I can take the Tribunal through the case law. I accept I would need to
18 show exceptional circumstances and the general rule is that costs would lie where they fall.
19 But, ma'am, it will be my submission, assisted, I hope, by the transcripts when I have chance to
20 go through them that actually Worldwide's submissions went further than simply doing Floe's
21 job for it and on the Community Law aspect of this case, and the issue of the relevance and
22 application of the Community Law instruments that we examined, Worldwide provided
23 assistance ----

24 THE CHAIRMAN: Which Floe would not have needed to do.

25 MR. KENNELLY: Well possibly not, because Worldwide's submission went further, the Tribunal
26 recalls. Worldwide was making a submission in relation to the future conduct of Ofcom in the
27 regulation of GSM Gateways. I stressed before the Tribunal that our concern was not with the
28 past conduct of Ofcom but the future conduct in relation to GSM Gateways and I was roundly
29 opposed in that submission which was, in the end, upheld and that is the extra assistance that
30 Worldwide provided to the Tribunal; hopefully I can show that in writing by reference to what
31 took place before the Tribunal without wasting any further time or costs on the part of this
32 Tribunal or the other parties. Of course anything that I put in writing Ofcom would have an
33 opportunity to reply.

34 The point, ma'am, is the submissions Ofcom have made are cogent submissions which the
35 Tribunal received, they do make points which need to be addressed and cannot be addressed

1 today by Worldwide, I simply have not had an opportunity to deal with the issue of
2 particularity because it required an analysis of all of the documents, including the transcripts
3 and there has not been time as the document was received late last night. In my submission I
4 do not ask for anything exceptional in this respect – maybe the order for costs sought is
5 exceptional, but this short adjournment in order to deal with the matter on the papers is not
6 exceptional. I spoke to the other parties before the hearing and in principle they saw the sense
7 in the application although their views may have changed in light of what the Tribunal said this
8 morning, but that is their prerogative.

9 THE CHAIRMAN: Let us hear what they say.

10 MR. ANDERSON: Thank you very much, ma'am. Can I make a few points? We have set out in
11 some detail in our written submissions our position on costs in the light of your indication. I
12 do not propose to go over those in any detail, but if I could just make a couple of points. We
13 pointed out in our first submission that we thought the appropriate order was no order as to
14 costs and we pointed out that we could see no exceptional circumstances in the case of
15 Worldwide. Of course, I sympathise personally with my learned friend, Mr. Kennelly, if he
16 has only been instructed lately, but Worldwide has been made aware from the outset that our
17 position was “no exceptional circumstances”, and even today my learned friend has not been
18 able to identify (even in principle) any exceptional circumstances.

19 So far as the sequence of events is concerned we put in our indication that we thought the
20 appropriate Order was no Order for costs. Our more detailed written submissions are in
21 response to a submission put in by Floe and Worldwide jointly in which they set out specific
22 assertions such as 80 per cent. of their costs were incurred on points that they won and we
23 simply went through that and disagreed with it. We have nothing more we wished to add on
24 what we say would be the appropriate order. Even if one does not split it between facts and
25 law, even on some of the legal issues there is room for debate as to precisely how far ----

26 THE CHAIRMAN: Well you would have to split it on fact and law to start with ----

27 MR. ANDERSON: Yes.

28 THE CHAIRMAN: -- and then having split it on facts on law you would then have to look at the
29 law.

30 MR. ANDERSON: Yes, but we think we have demonstrated in our written submissions that taking a
31 broad brush approach, and the Tribunal is extremely well placed to take a view on this –
32 having sat through every case management conference and every day and minute of the case –
33 that broadly speaking no Order for costs is an appropriate Order.

34 THE CHAIRMAN: Are you saying we should not adjourn this to give them an opportunity at their
35 own cost to try and persuade us that no Order for costs is wrong?

1 MR. ANDERSON: We have said all that I want to say on that. It is essentially a matter for the
2 Tribunal as to whether they persuaded you that there is a case for adjourning the matter, but we
3 have said all that we wish to say on the question of costs at this stage, subject to anything the
4 Tribunal may say, or anything that may be said in response were the Tribunal to adjourn. But
5 that is our position in the light of the indications the Tribunal has given this morning.

6 MR. WISKING: We had hoped, in the light of the Tribunal's comments this morning, that we would
7 be able to resolve the questions of costs between ourselves and Floe, and unfortunately that is
8 not the case. So we are in a position where we are content to deal with the matter today orally,
9 but equally we are content to proceed on a written basis. I think we have said all we would
10 like to say in writing on that and the Tribunal has our submissions. But given that we do not
11 know what is to come from Floe we would obviously need to reserve our position to put
12 something else in writing ----

13 THE CHAIRMAN: Well you have also got this "exceptional circumstance" problem.

14 MR. WISKING: Indeed.

15 THE CHAIRMAN: I am not sure – were you intending to make some oral submissions on
16 exceptional circumstances?

17 MR. WISKING: I am prepared to do so. In a sense they run together, if the Tribunal finds there are
18 exceptional circumstances in relation to Worldwide then those items run across to our position
19 as well.

20 THE CHAIRMAN: Your position is very different because you are the person complained of, the
21 person who was the alleged infringer.

22 MR. WISKING: Indeed, our position is, if anything, stronger than Worldwide's because the relief
23 sought by Floe and the nature of the allegations that were made against us by Floe. As I say, I
24 am happy for the Tribunal to proceed on the papers that it has subject to having the ability to
25 respond to any new material advanced by Floe on that question.

26 THE CHAIRMAN: Well the difficulty is that Mr. Kennelly is not in a position to proceed today
27 because he wants to do this detailed analysis which he has not had an opportunity to do for
28 whatever reason.

29 MR. WISKING: Indeed. As I say, I would have hoped we could have resolved the matter this
30 morning, but unfortunately ----

31 THE CHAIRMAN: I think the Tribunal hoped that we could resolve it as well.

32 MR. WISKING: That is all I needed to say.

33 THE CHAIRMAN: Mr. Pickford?

34 MR. PICKFORD: I have no submissions to make on costs.

35 THE CHAIRMAN: Mr. Mercer?

1 MR. MERCER: As is usual you get five lawyers and you get six different opinions, but I have not
2 heard anything from the other advocates that gives them a great fear and loathing of the
3 application that I have made for what we say would be a relatively short adjournment.

4 THE CHAIRMAN: What is it that you want to address? Mr. Kennelly has explained what he would
5 like to address, what is it that you want to address in these written submissions?

6 MR. MERCER: What we had here, ma'am, was a situation where the real submissions did not come
7 out in the first round.

8 THE CHAIRMAN: Well what is it that has come out in the second round that need time to answer?

9 MR. MERCER: We want to look and strengthen the argument in relation to the primary reason we
10 say that we all ended up before this Tribunal.

11 THE CHAIRMAN: Do you accept that if we go down this line there is going to be a precedent that
12 the Appeal is effectively dismissed, that you lost on the facts, and that therefore there are
13 strong reasons why a Tribunal would say that on the facts you ought to pay the costs?

14 MR. MERCER: I can see that, ma'am. Our analysis is that the costs of dealing with the facts when
15 balanced against the costs of dealing with the law are significantly outbalanced.

16 THE CHAIRMAN: Well there is another way of looking at it. Had the facts been properly set out,
17 and that we have not had to decide them by having oral evidence that would have been the end
18 of the case and the law would not have had to have been gone into because the case would
19 never have been brought. Therefore, although because it is a public interest case and all the
20 law has been dealt with at the end of the day this case could have stopped on the facts and if
21 your clients knew what the facts were – because that is the way that cases go, we find the facts
22 and they must always have been there – and therefore had those facts been set out at the
23 beginning you would not have had a case. Therefore, on that basis the question of arguing the
24 points on law might not have arisen.

25 MR. MERCER: Yes, an interesting analysis, ma'am, but not one that fits this case. If you look at the
26 fundamental reason why we are all here today, what single fulcrum fact causes us all to be here
27 today? It is Ofcom and Vodafone's analysis of the legal position of commercial Gateways.

28 THE CHAIRMAN: You say that, but I think if you read our Judgment that is not the way we looked
29 at it.

30 (The Tribunal confer)

31 MR. MERCER: I can see the Tribunal's view. The problem that has always existed has been the
32 Ofcom view.

33 THE CHAIRMAN: No, because if those facts had been known at the beginning you could not have
34 appealed. If those facts had been elucidated by Ofcom at the start there would not have been

1 any grounds to appeal, therefore the law would never have had to have been looked into and
2 you would never have been able to bring the Appeal.

3 MR. MERCER: Equally, ma'am, if the analysis of the law had been correct we would not have got
4 past the first Decision letter. We would not have felt any necessity to examine appealing it.

5 THE CHAIRMAN: No, but if you had known the facts from the start there would have been no first
6 Decision. There would have been no grounds to put the matter before Ofcom, none of this
7 would have happened. It may have been a very useful exercise and we have explored the law
8 in this area but at the end of the day who pays the costs for that? Ofcom are saying “no order
9 as to costs” and having regard to what I just said ----

10 MR. MERCER: Well, ma'am, I can only say I take a different view which is that it is only when the
11 analysis of the law that has been arrived at is made that the facts (and the individual facts of the
12 case) take on a different significance. I can see that I am not convincing the Tribunal.

13 THE CHAIRMAN: No. I just wonder whether you want a few minutes to consider what I have
14 said and how I put it? We are open to persuasion that we are wrong, but having regard to what
15 I have said whether you want to think about whether we do need an adjournment and further
16 written submissions.

17 (The Tribunal confer)

18 THE CHAIRMAN: Would you like a few minutes to consider what we have said – or what I have
19 said which the Tribunal agree with – before you consider ----

20 MR. MERCER: It has been considered, ma'am, I withdraw my application for Floe.

21 MR. KENNELLY: Ma'am, I maintain my application for an adjournment on the issue of
22 Worldwide's costs.

23 THE CHAIRMAN: Well on that basis we are going to ask you to address us today on exceptional
24 circumstances because there is no point in going through that exercise ----

25 MR. KENNELLY: Yes.

26 THE CHAIRMAN: -- if there are no exceptional circumstances, and I think we need to look back as
27 to how you got permission to be here, and as I remember it – and I can be corrected – it was on
28 a very narrow basis. It was on the basis that there would be no additional costs because you
29 were going to present parts of an argument that were not going to be presented by Floe, and
30 they were going to adopt your submissions and that is what happened. In those circumstances
31 you are going to have to persuade us that there are some exceptional circumstances in which
32 you ought to get your costs, because that was not my understanding of the basis upon which
33 you would be given permission to intervene.

34 MR. KENNELLY: Well, ma'am, since that is effectively rejecting my application for an
35 adjournment ----

1 THE CHAIRMAN: I am not, I am just telling you that you have to explain to me why none of that is
2 right.

3 MR. KENNELLY: Ma'am, indeed, well then I will need five minutes to discuss the implications of
4 that with my client. I am sorry to delay the proceedings further, but I will need a short period
5 of time to discuss that.

6 THE CHAIRMAN: Just to make it clear, we have rejected your application in relation to
7 exceptional circumstances for an adjournment.

8 MR. KENNELLY: That is what I understood, yes.

9 THE CHAIRMAN: Do you want to go on or do you want your five minutes now?

10 MR. KENNELLY: I would be grateful if I could have it now, it may be better to resolve this one
11 way or the other now.

12 (The hearing adjourned at 11.35 a.m. and resumed at 11.45 a.m.)

13 MR. KENNELLY: Ma'am, Tribunal, I am grateful for the time, I am sorry I took longer than five
14 minutes. Ma'am, as I said, in order to deal with the issue of exceptionality I would have to
15 address the lack of particularity that Ofcom identified, and on the basis that that is not possible
16 I will withdraw the application on behalf of Worldwide for its costs.

17 THE CHAIRMAN: Thank you, on that basis, Mr. Wisking, I assume that you are content?

18 MR. WISKING: Well I did clarify with Floe that the application against Vodafone is withdrawn and
19 on that basis we would be content with a no Order as to costs as between us and Floe. I do
20 want to say that our application was not simply a tit-for-tat application, and that it was
21 substantial as set out in our submission.

22 THE CHAIRMAN: I think that is a very sensible solution. So it is no Order as to costs.

23 MR. ANDERSON: Would it be helpful if I now dealt with the second issue, which was the question
24 of the clarification of the terms of the Order – the second issue?

25 THE CHAIRMAN: We have been talking a little bit about it – would it assist that if instead of the
26 Order itself dealing with those parts of the Decision that we had effectively quashed, in other
27 words those parts of the Judgment which are inconsistent with the Decision, we did it on the
28 basis of a recital at the beginning of the Order and then the order just dismissed the Appeal?

29 MR. ANDERSON: What form, might I ask, would those recitals take?

30 THE CHAIRMAN: We would have to consider that, but what was going through our mind, and it
31 has only just been thought of, was that in that way one might be able to do it a bit more
32 generally than one can do it in an order, because an order has to be much more clear.

33 MR. ANDERSON: I think, if I may, our concern probably was to move away from doing something
34 too general to being a little more precise.

1 THE CHAIRMAN: Well we could do it precisely, it depends, but at the moment even your order is
2 not terribly precise.

3 MR. ANDERSON: I accept that and we found, if I may say so, your observations at the start of this
4 morning very helpful. We have had indicated to us informally that one way forward might be
5 for us to give a little more time to formulating something more precisely and we would
6 certainly welcome that opportunity if the Tribunal were to provide it to us. We think it should
7 take no more than 14 days to try and formulate a way in which the Tribunal's views on areas of
8 disagreement could be resolved.

9 THE CHAIRMAN: You can understand, and I think you have realised this because of your first
10 submission and your second submission, that we cannot just dismiss it without taking account
11 of the fact that there are inconsistencies between the Decision and the Judgment, because that
12 would effectively not be transparent as to those inconsistencies.

13 MR. ANDERSON: We recognise that, yes.

14 THE CHAIRMAN: So we need to do something to recognise that.

15 MR. ANDERSON: Equally, we would welcome an opportunity to perhaps formulate something a
16 little more precisely, a little more helpfully for the Tribunal and submit it to the parties and to
17 the Tribunal. There is, of course, one slight wrinkle to that, this exercise is in a sense designed
18 to assist us and the other parties in informing any decision on whether or not to appeal and we
19 are conscious that the appeal time runs from the date of handing down the Judgment so we
20 would request an extension for the period in which to request permission for, say, a month
21 after this order is finally drawn up.

22 THE CHAIRMAN: There is a difficulty about appealing because we are hypothetical again.

23 MR. ANDERSON: Well I recognise that. We had rather thought that the way the Tribunal was
24 moving would be to have an operative part of the order which set aside part of the Decision
25 which would then be, if you like, the relief that were we to appeal we would be seeking to ----

26 THE CHAIRMAN: Yes, but it is completely hypothetical. The Judgment has decided the facts and
27 said that really is the end of it because all these matters were addressed between the parties so
28 any appeal on your part is completely hypothetical.

29 MR. ANDERSON: It may be. That may be the position, in which case the Court of Appeal may
30 take the view that the conclusions of the Tribunal on these questions of law, because of the
31 Tribunal's findings of fact, are *obiter dicta*. It may take the view that it may be academic or
32 hypothetical but it is worth some sort of declaratory relief if nothing else confirming the views
33 of the Tribunal.

34 THE CHAIRMAN: Then you get back into the problem about the costs of the Appeal.

35 MR. ANDERSON: Yes.

1 THE CHAIRMAN: If you got that far.

2 MR. ANDERSON: Yes, I see that, but it is important, it has implications beyond this case as you
3 appreciate, and we would welcome a little more opportunity to consider these sorts of issues
4 and if we could have 14 days or so with, of course, the proviso that time for appeal ----

5 THE CHAIRMAN: -- be extended, yes. Mr. Mercer?

6 MR. MERCER: I have read submissions that Ofcom put in yesterday evening, and read them and re-
7 read them and I do not quite understand what all the fuss is about, I really do not. What we
8 have not heard, ma'am, is what is the problem? What are the very important implications for
9 the management of the radio spectrum? What hole is blown by this? I am at some loss to see
10 that. I too went straight back to the Judgment – my constant companion in my brief case –
11 straight away and looked at the paragraph reference numbers and the Judgment appears to me
12 to refer to “user stations” because that is what it says in the Statute and that is what it had to
13 say when it was being interpreted, and if that catches other things then so be it. What Ofcom
14 appears to be trying to do is to put the Genie back in the bottle after it has escaped.

15 THE CHAIRMAN: But we do not know at the moment exactly what they are trying to do and what
16 they are asking for. Do you have an objection to giving them more time to sort it out?

17 MR. MERCER: It would ill behove me to deny anybody something I was seeking myself only a few
18 minutes ago, ma'am.

19 THE CHAIRMAN: I think that is the only question, Mr. Mercer.

20 MR. MERCER: In fact, the phrase “two-faced” would spring to mind, so I do not think I could quite
21 do that. But what I do ask for, ma'am, is more explanation as to why this is so important? If
22 one understood that one might be able to understand better what was being sought.

23 MR. DAVEY: Mr. Anderson, you are asking for more time for appeal, am I right in thinking that
24 there are consultations going on in this GSM Gateway area?

25 MR. ANDERSON: There are.

26 MR. DAVEY: Are there things happening? Would they be continuing while ----

27 MR. ANDERSON: Could I just take instructions?

28 MR. DAVEY: Surely.

29 MR. ANDERSON: (After a pause) Yes, we are asking for two things. We are asking for 14 days
30 in which to put in written submissions on the form of the Order and then a month – as provided
31 for in the Rules – starts to run from that time. Yes, there has been a consultation on the future
32 regulation of GSM Gateways. That was put on hold pending this case and, of course, what I
33 have requested would freeze that for a further two weeks beyond the ordinary Rules, but it is
34 just one in a whole raft of other consultations and reviews that Ofcom undertakes.

35 THE CHAIRMAN: Why does it need to freeze it pending?

1 MR. ANDERSON: Because there were legal issues arising in that that were being addressed in this
2 case.

3 THE CHAIRMAN: No, but now that you have the decision why is the consultation being frozen? It
4 may not be a matter for me and you may tell me that.

5 MR. ANDERSON: I do not think there is a great deal more that I can say other than there were
6 issues raised that we will of course be considering arising out of your decision and any further
7 action that we could take.

8 THE CHAIRMAN: I thought you were just saying that it had been frozen until our decision but now
9 it has to be frozen for another 14 days before the order?

10 MR. ANDERSON: I simply mean by that that to the extent that it has been put on hold while we
11 were resolving this case. Until the form of the Order has finally been resolved ----

12 THE CHAIRMAN: Why would the form of the Order make any difference to the consultation?

13 MR. ANDERSON: Because that in turn may have implications on whether the case is taken further
14 or not.

15 THE CHAIRMAN: And then you are going to freeze the consultation until the Appeal?

16 MR. ANDERSON: I am not saying that we are going to do that, I am just saying that that is what the
17 position to date has been and all that I am requesting today, the most that that in itself can have
18 an effect on is another two weeks after seven months. It may well be that it does not have that
19 effect and we are, of course, conscious of all that you have said in your Decision.

20 THE CHAIRMAN: It is more than 14 days because it is 14 days for you to do a draft and explain it,
21 and then all the other parties (that is another 14 days) so we are talking about another month or
22 five or six weeks, and it may be not a matter for me but one of the reasons we said in our
23 decision that we were not remitting was because it is being dealt with in the consultation. Our
24 decision has taken a while to come out but, having come out, the public would anticipate that
25 action would be taken.

26 (The Tribunal confer)

27 MR. ANDERSON: We hear, of course, what you say and we will be considering what to do in the
28 light of what has happened with the case of course. But simply in answer to your question the
29 consultation was effectively put on hold and we will, of course, review how best to proceed in
30 the light of the decision.

31 THE CHAIRMAN: All right. Is anybody else making submissions on these 14 days?

32 MR. WISKING: Save to say we would welcome more time to consider Ofcom's request.

33 MR. PICKFORD: We would agree with that as well.

34 MR. KENNELLY: Similarly for Worldwide, 14 days would be sufficient for us to reply.

1 THE CHAIRMAN: All right, in 14 days you are going to provide a new draft Order and some sort
2 of explanation.

3 MR. ANDERSON: Supporting submissions, yes.

4 THE CHAIRMAN: So provide a new draft Order together with supporting submissions. I do not
5 know whether or not this is helpful but it is not a question of just going to paragraphs and
6 crossing them out and putting our decision which is why everybody has had difficulty with
7 this. There needs to be some analysis of actually where our Judgment differs from the
8 Decision. In fact is that what you are going to try and do?

9 MR. ANDERSON: That is exactly the point that we have been grappling with and why it has been
10 rather difficult to have done it fully in the time for today's hearing, but yes that is an aspect of
11 it.

12 THE CHAIRMAN: But that is what you are going to do so we will come up with something that
13 identifies exactly the differences.

14 MR. ANDERSON: We will certainly be putting in what we would be suggesting is the appropriate
15 way of dealing with the fact that the Tribunal has disagreed with us in a meaningful way that is
16 apparent, yes.

17 THE CHAIRMAN: As long as it is either in the supporting submissions or somewhere we can
18 understand exactly what the differences are – or what you are saying the differences are?

19 MR. ANDERSON: Yes, it may be that this process will require some degree of liaison between us
20 and the parties and the Tribunal to resolve.

21 THE CHAIRMAN: Yes, we can see whether or not we can do it on paper, if we cannot then we will
22 have to have another hearing.

23 MR. ANDERSON: Yes.

24 THE CHAIRMAN: Right, if you do it in 14 days, do you want some order as to the time at which
25 there is a response that? And if there is a response to it does it have to be sequential? I am not
26 sure who is supposed to be involved in this.

27 MR. ANDERSON: Well we see this as primarily an issue concerning us but, of course, if the other
28 parties wish to put in observations on what we have said and they are, of course, parties to the
29 Appeal and this is the Order in this ----

30 THE CHAIRMAN: Well why do I not give everybody 14 days after that to put in submissions in
31 response to the Ofcom submissions? So 14 days for Applicant and Interveners to provide any
32 responses (if so advised) to Ofcom draft Order and supporting submissions. Then you would
33 probably want to answer those?

34 MR. ANDERSON: Well probably answer either in writing or suggest the appropriate course is to re-
35 list it for a hearing before you.

1 THE CHAIRMAN: Right, so then shall I give you seven days – do you need more than seven days?
2 MR. ANDERSON: I think we may need more than seven days because this could, as I say, have
3 certain implications.
4 THE CHAIRMAN: I understand that it has. 14 days for Ofcom.
5 MR. ANDERSON: And we will indicate in that response whether or not we believe a hearing is
6 required.
7 THE CHAIRMAN: Yes, but you would have to put in written submissions anyway. Written
8 submissions in response and to indicate whether they request a further oral hearing to be fixed,
9 and depending on what everybody else has said I do not know if it will be necessary for
10 everybody to come because, as you say, it concerns you. I think Floe will be here but it is up
11 to everybody else whether they need to be here.
12 MR. ANDERSON: The only other consequential matter on all of that is the time for request for
13 permission to appeal ----
14 THE CHAIRMAN: Yes, why do I not extend time for appeal until the Order?
15 MR. ANDERSON: Or 30 days after the Order.
16 THE CHAIRMAN: Well I will reconsider it at the time of the Order, until the Order is drawn up or
17 further ----
18 MR. ANDERSON: I think you may need to grant the permission before the 30 days before 31st
19 August has expired, otherwise the time ----
20 THE CHAIRMAN: If I extend the time for application for permission to appeal until the Order is
21 drawn up or further order and then we can revisit it.
22 MR. ANDERSON: We need a period of time after the Order ----
23 THE CHAIRMAN: I appreciate that but I will revisit it – I will revisit it when we draw up the order
24 as to what we do.
25 MR. ANDERSON: If you revisit it and decide not to grant any further time then the time will have
26 expired on that day.
27 THE CHAIRMAN: Until further order – how about that? If I extend time until further order then
28 we can revisit it at some point, generally extend it?
29 MR. ANDERSON: If I could just take instructions?
30 MR. PICKFORD: Ma'am, if I could just add one further point, there is another complication which
31 is that there is clearly an interrelationship between the Floe Appeal and the VIP Appeal ----
32 THE CHAIRMAN: I am coming on to that.
33 MR. PICKFORD: -- and therefore any order that you are contemplating making and any extension
34 of time in relation to appeal the Floe matter need to be taken into account, so that it needs to
35 run from your order in VIP.

1 THE CHAIRMAN: Until further order.

2 MR. ANDERSON: Yes.

3 THE CHAIRMAN: Mr. Pickford has just made a point that actually was in my mind and that is one
4 of the reasons why I am saying “until further order”, because depending on what happens in
5 the VIP appeal you might want the whole thing extended so that you could run the two
6 Appeals together.

7 MR. ANDERSON: Absolutely I think that is very sensible to leave the matter up in the air.

8 THE CHAIRMAN: So I think one needs some flexibility about this.

9 MR. ANDERSON: Yes, certainly.

10 THE CHAIRMAN: Nothing that I have said indicates that we would give permission for appeal, we
11 have not considered that.

12 MR. ANDERSON: No, of course not, these are only applications for time in which to make the
13 application for permission.

14 THE CHAIRMAN: I just thought I had better say that.

15 MR. ANDERSON: No, no, absolutely.

16 THE CHAIRMAN: So we have extended time for the application for permission to appeal until
17 further order. Are you unhappy about that?

18 MR. MERCER: No, it is nice to look forward to have something to do in the autumn, but there is
19 one observation I would make: I have no idea yet what Mr. Anderson’s point is and I would
20 like the Tribunal to bear in mind that there is a limit to altruism, particularly by administrators
21 or liquidators and what state this company will be in by then I do not know because
22 administration comes up for renewal at the end of this month and its status may well change or,
23 indeed, it might be proposed that it is dissolved.

24 THE CHAIRMAN: In any event it is a hypothetical Appeal.

25 MR. MERCER: I just bring that to your attention, ma'am, as time goes on. Also, in terms of the
26 interaction with VIP if what is proposed could have some influence on the way which the
27 analysis of that matter was dealt with then we would want that to be decided before we started
28 proceeding down the route of preparing for hearings.

29 THE CHAIRMAN: What hearings?

30 MR. MERCER: Well those that I am just about to make some submissions about.

31 THE CHAIRMAN: You mean the VIP hearings?

32 MR. MERCER: Yes, ma'am.

33 THE CHAIRMAN: Sorry, what would you want resolved before the Judgment?

1 MR. MERCER: I am not entirely sure that I know what Mr. Anderson is planning to say or suggest
2 and my fear is that something he says or suggests affects the analysis of the legal position one
3 might take in respect of the hearings going forward.

4 THE CHAIRMAN: Well what I said at the outset, the indication was that there is a dispute in
5 relation to VIP on the facts. That has nothing to do with these matters at all and I at the
6 moment do not see that the resolution of that matter – the facts in VIP – has to be delayed
7 while we sort out what the terms of this order should be and whether it should be in the form of
8 it all being in the order or being in recitals or however one does it?

9 MR. PICKFORD: Ma'am, if I might assist, T-Mobile and VIP – I am not quite sure whether or not
10 Mr. Mercer was making representations on behalf of VIP or Floe.

11 THE CHAIRMAN: You are here for VIP today, are you not?

12 MR. MERCER: Yes, I think so, ma'am, yes. (Laughter)

13 MR. PICKFORD: T-Mobile and VIP are I think of one mind in relation to this point and the reason
14 why there is a relationship between the decision that the Tribunal might take on the facts in
15 VIP and the decision that it might take in relation to the order in the Floe case is because there
16 may well be a bearing on the ultimate decision in the VIP case depending on what is ultimately
17 decided on a matter of law in relation to Floe. So it appears to be, for instance, an appeal from
18 Floe. It might well be sensible and we would suggest it would be sensible, for that to be dealt
19 with and for the law to be properly established before one gets into any further consideration o
20 the facts, and how the law is applied to the facts in VIP.

21 THE CHAIRMAN: Why?

22 MR. PICKFORD: Because otherwise one has to go into a factual analysis in VIP which may well be
23 completely redundant. If the Tribunal's findings in Floe were appealed and were upheld, then
24 it would not matter.

25 THE CHAIRMAN: But it is not the facts that are going to be appealed, it is the law.

26 MR. PICKFORD: Quite.

27 THE CHAIRMAN: And at the moment Ofcom says, and I think you say, that the facts are
28 effectively the same – they are different but they have the same consequence.

29 MR. PICKFORD: We do indeed and ----

30 THE CHAIRMAN: VIP say "No, no, no, the facts are very different from Floe".

31 MR. PICKFORD: Yes.

32 THE CHAIRMAN: Then we have to set out what those facts are, what happened, so that one can
33 then see what those facts are. You then look at the law – either the law that we have set out or
34 the law that the Court of Appeal set out – and see whether it has an effect, but would it not be
35 useful to have those facts analysed and decided to start with?

1 MR. PICKFORD: We would submit not in the first instance because it might well be whatever the
2 facts were there was no case that VIP could possibly get off the ground, depending of course
3 on the outcome on the law in relation to any possible Appeal. So one might go through an
4 entire process of establishing the facts in VIP only to find that it did not matter what the facts
5 were because, as a matter of law, the facts that they were seeking to establish were not going to
6 get them anywhere.

7 THE CHAIRMAN: On what legal basis – which bit of the Decision?

8 MR. PICKFORD: For example – purely hypothetically – if the Floe case was appealed and the
9 Court of Appeal decided that the decision of the Tribunal in relation to the construction of the
10 licence was not correct they might take the view that, in fact as Ofcom, Vodafone and T-
11 Mobile had argued, the provision of COMUGS was unlawful and even Vodafone and T-
12 Mobile could not have provided COMUGS if they had wanted to. In that case we would
13 submit it follows that it does not matter what facts VIP attempts to establish it is not going to
14 get them any further because the Tribunal's Judgment on objective justification makes clear
15 that if, in fact, the provision of COMUGS is unlawful then competition law cannot require a
16 party to assist in the commission of an unlawful act. That is just one example, but that is one
17 example of the way that the decision on the law in Floe may well have a material bearing on
18 the outcome in VIP and to race off and try to establish ordinary facts in VIP might well lead to
19 a waste of costs.

20 (The Tribunal confer)

21 THE CHAIRMAN: Mr. Mercer, what do you say about this? Do you want it heard now or do you
22 want it adjourned – with your VIP hat on?

23 MR. MERCER: With my VIP hat on, I quite see the difficulties that could occur in the future but my
24 instructions are to ask for the hearing to go ahead.

25 MR. PICKFORD: Ma'am, I should just clarify that my suggestion was that any continuation of the
26 substantive Appeal in VIP, if you are not with me on my submission that I intend to make
27 today that in fact the Appeal should simply be dismissed today, but it is that that should be put
28 on hold.

29 THE CHAIRMAN: I do not think we can dismiss it because clearly there is a question to be
30 determined on the facts. We would have to hear both parties on what the facts are so I think
31 we have got to deal with that.

32 MR. PICKFORD: Well at an appropriate juncture I would like to address you on that and I can do
33 so now if it is convenient.

34 THE CHAIRMAN: You say that we can deal with it now and dismiss it?

35 MR. PICKFORD: I do.

1 THE CHAIRMAN: Well you had better address us.

2 MR. PICKFORD: Well I am very grateful for the Tribunal's preliminary indication of its views and
3 clearly I am standing at the bottom of a very steep hill in trying to persuade you otherwise, but
4 I do have four points that I would like to make in an attempt to do so.

5 First, we say the question of whether or not there is a material distinction in fact or in law
6 between the Floe and the VIP Appeals can only be objectively judged by reference to the
7 respective notices of appeal in those cases. If I could just expand on that point? It is, of
8 course, the notice of appeal that sets out the scope of and the basis for any appeal and Rule 8 of
9 the Tribunal's Rules provide very clearly:

10 "(4) The notice of appeal shall contain –

11 (a) a concise statement of the facts;

12 (b) a summary of the grounds for contesting the decision, identifying in particular
13"

14 and then:

15 (ii) to what extent (if any) the appellant contends that the disputed decision
16 was based on an error of fact or was wrong in law."

17 and VIP and Floe are both represented by a very experienced solicitor advocate and we are
18 certainly not in a situation where special allowances need to be made because we are dealing
19 with a litigant in person, for example.

20 THE CHAIRMAN: The VIP notice of appeal was that put in by Taylor Wessing ----

21 MR. PICKFORD: Yes.

22 THE CHAIRMAN: -- or was it put in by VIP?

23 MR. PICKFORD: Certainly the amended notice of appeal ----

24 THE CHAIRMAN: Well maybe we ought to look at the notice of appeal.

25 MR. PICKFORD: -- was most definitely submitted by Taylor Wessing because it is a virtually
26 verbatim reproduction of the appeal in Floe. I am here, of course, referring to the document
27 that has been entitled, I think, amended notice of appeal which relates to ----

28 THE CHAIRMAN: That was Taylor Wessing, I have it here.

29 MR. PICKFORD: -- which relates to the second decision.

30 THE CHAIRMAN: Yes.

31 (The Tribunal confer)

32 THE CHAIRMAN: The question is whether Vodafone and Worldwide want to stay. If they want to
33 go, if we are only dealing with VIP now – the only question that might arise is in relation to the
34 appeal period, but I do not think that is particularly significant.

35 MR. WISKING: We are content to stay.

1 MR. KENNELLY: Likewise, ma'am, we are content to stay.

2 MR. PICKFORD: I am delighted that my learned friends are so keen to hear my submissions!

3 THE CHAIRMAN: We have the further amended notice of appeal. Everybody wants to hear how
4 you are going to do this.

5 MR. PICKFORD: Right. (Laughter) I will continue. Despite Mr. Mercer seeming to be slightly
6 unclear as to the authorship of this document it does appear to have emanated from Taylor
7 Wessing, and they are clearly well able to articulate what their clients' cases actually are. We
8 say that really no other approach to determining the scope of appeal is legitimate, because if
9 you take another approach it effectively it allows VIP to make up its case as it goes along. It
10 allows Mr. Mercer to say to the Tribunal "You do not like what we have said so far, do not
11 worry about that notice of appeal – the second one – that we put in ----"

12 THE CHAIRMAN: Well let us look at the notice of appeal, why do you say this notice of appeal
13 does not cover the facts?

14 MR. PICKFORD: We say it is absolutely identical in its terms. Mr. Mercer will be unable to point
15 to and certainly has not attempted to point to a difference in the pleadings of fact and the
16 pleadings of law as between the VIP appeal and the Floe appeal because save for the fact that
17 "Vodafone" is crossed out and "T-Mobile" is inserted in its place in relation to one appeal the
18 two notices of appeal state the same proposition.

19 THE CHAIRMAN: If that is right then if in the Floe appeal the facts were relevant then in the VIP
20 appeal the facts are relevant and therefore we need to determine the facts. You cannot say that
21 what has happened is they have said the same facts are relevant to both appeals.

22 MR. PICKFORD: Well they have, their notices of appeal set out the same facts. They are now
23 saying "Here is our new spin ----"

24 THE CHAIRMAN: But they have to now prove in relation to VIP that those were the facts.

25 MR. PICKFORD: But they set out exactly the same allegations of fact and the same allegations of
26 law as they set out in relation to Floe and they were not sufficient to get them home in Floe so
27 my point to you is that they cannot be sufficient to get them home in VIP.

28 THE CHAIRMAN: The points of law were only not sufficient to get them home because of the
29 facts.

30 MR. PICKFORD: Quite, so one has to look at the VIP facts.

31 THE CHAIRMAN: You cannot say that VIP are bound by the facts which have been determined in
32 the Floe appeal they are bound – "bound", I think we would all say that it is all the same, so
33 that you are effectively bound by our legal result, but the factual result cannot be the same, it
34 depends on the facts in VIP. If you are saying they are identical if it was sufficient in the Floe
35 appeal that we had to look at the facts then we must look at the facts in the VIP appeal.

1 MR. PICKFORD: My submission, ma'am, when one asks the question "Where does one go to for
2 the facts?" then the document one goes to is the notice of appeal because that is a document
3 that is supposed to contain not only a concise statement of the facts but, in particular, the extent
4 to which (if any) the appellant contends the disputed decision was based on an error of fact.

5 THE CHAIRMAN: Does para.9 do that?

6 MR. PICKFORD: Not in a way that is any different from the equivalent paragraph in the Floe notice
7 of appeal.

8 THE CHAIRMAN: Yes, and in the Floe notice of appeal it allows us to do it, so if in the Floe
9 notice of appeal it allows us to do it, it would not be very fair now to say that in the VIP notice
10 of appeal it does not allow us to do it.

11 MR. PICKFORD: My point, ma'am, is that if one does not base one's assessment on what is the
12 factual basis for a case on the notice of appeal then it effectively allows Mr. Mercer (or VIP) to
13 make up its case as it goes along. He can say "Well, you did not like what we said before, we
14 are now going to have some new facts, and maybe we can dream up a new case which you
15 might prefer and of course you cannot dismiss the appeal now because you do not know
16 whether you are going to like it or not". That is a constant moving target that not only leads to
17 confusion, but it impossible ----

18 THE CHAIRMAN: I still do not understand. Can you look at the notice of appeal? You are saying
19 that the notice of appeal does not raise the issue. Now, if you look at para.9 why does para.9
20 not raise the issue?

21 MR. PICKFORD: I can only repeat my point that it does not raise any fact that is different. If one
22 were to turn back to the Floe document, the equivalent passage in that, it does not raise any
23 fact that is specific to VIP or specific to T-Mobile which could differentiate this appeal from
24 the Floe appeal.

25 THE CHAIRMAN: But in para.9 the issue is: on what basis was the supply made? We determined
26 in the Floe appeal the basis on which the supply was made. The question is whether in VIP it
27 is the same basis or some other basis factually and until one knows factually what actually
28 happened and how the supply was made, what the parties knew, you cannot go on to look at
29 the law because you have no facts to apply the law.

30 MR. PICKFORD: Well, ma'am, clearly you are not with me on my first point ... (laughter). One can
31 only fairly address these points by reference to the particular pleaded facts in the notice of
32 appeal. But in response to the question that you have just raised, I would say in fact that one
33 can deal with and determine the VIP appeal without reference to those particular facts pleaded
34 at para.9 and that is because of the Tribunal's view on objective justification in the Floe
35 appeal, because I would submit that the Tribunal made it entirely clear that even if Floe had

1 been correct about its case on authorisation – so let us assume now that, putting it at its best
2 VIP gets home on the facts in para.9 that Floe was unable to establish – even if it can do that,
3 the Tribunal made it clear that there was an objective justification that would be available to
4 Vodafone for a refusal to supply and there were two bases that gave rise to that objective
5 justification. The relevant para. of the Decision is para. 354, but I am sure the Tribunal is very
6 familiar with its reasoning. The two bases were that (a) Vodafone was the sole licensee
7 authorised to provide the service; and (b) it was objectively justified on the basis of Article 10
8 of the Licensing Directive, and taking those two points together the Tribunal held that even if
9 there had been a legitimate request Vodafone would still have been objectively justified in
10 refusing to supply. We say that those two conditions that were identified by the Tribunal,
11 namely Vodafone being a sole licensee, and the application of Article 10, apply equally in
12 respect of T-Mobile. There is no factual difference between the cases of Floe and VIP which
13 would mean that Vodafone would be objectively justified where T-Mobile would not be.

14 THE CHAIRMAN: This is all to do with whether there had been a request for supply. If there had
15 been a request for supply then ...

16 (The Tribunal confer)

17 THE CHAIRMAN: Yes, sorry, this is to do with a refusal to supply if there had been a request.

18 MR. PICKFORD: Yes.

19 THE CHAIRMAN: But in your case there had been a request and an acceptance to supply, not a
20 refusal.

21 MR. PICKFORD: Well my submission is, as a matter of competition law, that cannot make any
22 difference. As a matter of contract it might possibly have some implications but if Vodafone
23 could be objectively justified in refusing to supply then so could T-Mobile in deciding that it
24 was no longer going to supply because the objective justification, the reasoning for the
25 objective justification is the same in each case and it does not depend on anything particular
26 about the facts pertaining to Vodafone. It simply depends on two circumstances which apply
27 equally, or in fact one circumstance really that applies equally to T-Mobile which is that it is
28 the sole licensee. It also depends on Article 10 of the Licensing Directive. But neither of
29 those conditions differed as between the two appeals. It is worth pointing out that, moreover,
30 the Tribunal went on to say, of course, that even if it were wrong on its analysis of the licence
31 then Vodafone would have been objectively justified because Competition Law does not
32 require the furtherance of a criminal act. So for that reason it does not matter whether, for
33 example, Ofcom were hypothetically to appeal the Tribunal's decision about the scope of the
34 licence because whatever the facts, we say, Vodafone would always have been objectively
35 justified and the same is true of T-Mobile.

1 If one just reads the opening sentence of para.354 I would respectfully submit that the
2 Tribunal's reasoning on objective justification is independent of what went before, because it
3 says: "We now turn to consider whether Vodafone would have been objectively justified in
4 refusing to supply Floe if contrary to our findings." So it is a separate part of the reasoning.
5 THE CHAIRMAN: If Floe had made a proper request.
6 MR. PICKFORD: Yes, and we are hypothesising in our case that VIP has made a proper request.
7 Ma'am, those are my points. I should add just for completeness that ----
8 THE CHAIRMAN: I thought you had four points?
9 MR. PICKFORD: Yes, my fourth point was ----
10 THE CHAIRMAN: No, I thought we were on the second?
11 MR. PICKFORD: Well it may be that we have elided points two and three ... (laughter) ... given the
12 current resistance to my second point.
13 THE CHAIRMAN: What was your second point? (laughter)
14 MR. PICKFORD: I am sorry, the Tribunal's apparent resistance to my first point, I think I have
15 elided points one and two.
16 THE CHAIRMAN: Oh, I see. The first point was the notice of appeal.
17 MR. PICKFORD: Yes.
18 THE CHAIRMAN: And the second point is that we have decided it in para.354.
19 MR. PICKFORD: Yes.
20 THE CHAIRMAN: And your third and fourth points have disappeared.
21 MR. PICKFORD: Well my third point, for completeness, although I cannot see that the Tribunal
22 will be with me on it if they were not with me on my first point, is that even if one has regard
23 to the allegations contained in the VIP letter of 11th September 2006 they still could not
24 possibly establish the facts that were necessary in order to make out an abuse, because no
25 agreement had ever been provided by VIP and it is quite plain from Condition 8 ----
26 THE CHAIRMAN: Yes, I was going to ask you – I have not looked back to see whether Condition
27 8 ----
28 MR. PICKFORD: It requires written authorisation and VIP has been unable to point to any written
29 authorisation. So one can have an extensive debate about what may or may not have passed
30 orally between different executives at VIP and sales' staff at T-Mobile but we submit it would
31 not actually take the Tribunal anywhere because that could not possibly satisfy Condition 8.
32 THE CHAIRMAN: That was your second point, so we have resurrected your second point, have
33 we?

1 MR. PICKFORD: For completeness, yes, ma'am. My fourth point was simply to say that I no
2 longer pursue the time point, and I am very grateful to the Tribunal's Referendaire for
3 providing with the relevant ----

4 THE CHAIRMAN: And that is your fourth point?

5 MR. PICKFORD: That is my fourth point. If I could just take instructions to check that there are no
6 other points that those instructing me would like me to make. (After a pause) No, those are
7 my points, unless I can be of any further assistance.

8 THE CHAIRMAN: Mr. Mercer?

9 MR. MERCER: Right, dealing with points three, six and twelve ... (Laughter). The big point here
10 is that there is a different factual matrix. If you read the two second decision letters you can
11 see that there is a big difference in the factual matrix simply in respect of what Ofcom itself
12 investigated and wrote down there. That needs to be applied against the template of the law as
13 it stands following the Judgment in Floe and to look at what exactly the facts are, prove those
14 where necessary and put it against there to get the right result.

15 On the facts we say that there was authorisation – we do not know where it is now maybe, but
16 then we did not lose it, T-Mobile did. We would say that there was estoppel from relying
17 perhaps on objective justification and we would say, most importantly of all, that withdrawal
18 does not equal refusal. There is a big difference here. We did not read s.354 as cutting off
19 everybody's chances, and simply because it says "... in those circumstances", the
20 circumstances of the Floe case and that it was not meant to cut off everybody's chances in
21 every factual situation.

22 As to objective justification we would note, for example, in para.360 of the Judgment the use
23 of the word "could" rather than "must always in every circumstance" in terms of whether or
24 not Vodafone had been objectively justified. It could have been, not automatically in every
25 case it would have been.

26 So, ma'am, my submissions simply are that we do not think that we are cut off, we think there
27 is a substantial difference and that factual matrix needs to be established properly and put to
28 the Tribunal. In that regard, ma'am, I have a request to be made today for some assistance in
29 getting to that factual matrix from T-Mobile that my client requires. Perhaps you would like to
30 deal with the question *simpliciter* first, ma'am, and then come back to a procedural point?

31 THE CHAIRMAN: Yes, we have got rather out of order here, because Mr. Anderson has not had an
32 opportunity ----

33 MR. MERCER: Yes, but I just give you notice that if we do get that far there is a procedural point I
34 would like to deal with.

35 THE CHAIRMAN: Mr. Anderson?

1 MR. ANDERSON: Very briefly, ma'am. We have heard, put very eloquently by Mr. Pickford, the
2 reasons why the appeal should be dismissed. We would consider the objective justification at
3 354 being the most compelling reason, it is the reason we identified in our observations, but
4 there is nothing more we would wish to add.

5 (The Tribunal confer)

6 THE CHAIRMAN: I think we need to adjourn to consider your point. I am just debating whether
7 what we ought to do is to come back at 1 o'clock, or whether we should just adjourn until 2
8 o'clock, and I suspect that it would be better that you do not hang around and then go off.
9 There are other matters – there may be the disclosure application depending on what we
10 decide, and that may take more than five minutes, I do not know.

11 MR. MERCER: I doubt that is going to take more than five minutes.

12 THE CHAIRMAN: What is the opinion?

13 MR. PICKFORD: We are quite amenable to whatever would assist the Tribunal.

14 THE CHAIRMAN: Say it takes us until 1 o'clock and we came back, we could sit until a quarter
15 past one, or twenty past one, but the whole point will be defeated if we are more than 20
16 minutes – we may as well have come back at 2.

17 MR. PICKFORD: Whilst the application for disclosure may be dealt with relatively shortly there
18 may be some further argument. Supposing that I have been unsuccessful in my application ----

19 THE CHAIRMAN: And then we have to deal with timetable, I think we have to come back at 2.
20 We will now adjourn until 2 o'clock.

21 (The hearing adjourned at 12.45 p.m. and resumed at 2 p.m.)

22 THE CHAIRMAN: We are asked by T-Mobile to dismiss the Appeal by VIP on a summary basis
23 and without further investigation of the facts. To do so we must assume that VIP can establish
24 a factual scenario most favourable to them. That factual scenario appears to us to be:

- 25 (i) VIP requested T-Mobile properly to supply SIMS for COMUGS
- 26 (ii) VIP were supplied SIMS by T-Mobile for COMUGS
- 27 (iii) T-Mobile gave authorisation to VIP to use the SIMS for commercial multi-use
28 GSM Gateway Services; and
- 29 (iv) T-Mobile disconnected the SIMS on the basis of illegality.

30 It is submitted that on the basis of para.354 of our Judgment in Floe T-Mobile would in all
31 circumstances have been objectively justified in disconnecting. We do not accept that
32 submission. Paragraph 354 was considering the position of a refusal of a request to supply.
33 On the factual basis which we are considering for this summary application there would have
34 been a request to supply which had been accepted and agreed and the supply would have been
35 made. The question is then whether subject to that acceptance and supply Competition Law

1 would permit a supplier then to disconnect. That issue is not decided in para.354 and in those
2 circumstances we cannot dismiss the Appeal on a summary basis.

3 The issue which will need to be decided, if the facts are established, is whether and in what
4 circumstances a supplier can disconnect notwithstanding an existing agreement to supply and
5 an authorisation under condition 8 of the licence. There may be a further issue as to whether a
6 disconnection can be objectively justified if the factual scenario was that T-Mobile did agree to
7 supply VIP but T-Mobile did not in fact provide a written authorisation. Under Condition 8 of
8 the licence this may raise a question of whether, for the purposes of Competition Law,
9 T-Mobile can rely on what would then be its own failure to comply with its licence as an
10 objective justification.

11 So that has dismissed your application, so where do we go from here?

12 MR. PICKFORD: Now, ma'am, we clearly need to deal with the process going forward. There
13 again remains the complication that the Floe and VIP cases are somewhat interrelated, and this
14 comes back to a point I was making before the ----

15 THE CHAIRMAN: It is a chicken and egg situation. It is whether we should wait for the outcome
16 of the Order in Floe and any appeal in Floe (if there was one) before we decide the facts, or the
17 other way around. Mr. Mercer submitted, as I understand it, that he would ask us to proceed
18 now with the VIP facts so that those facts have been decided and VIP know where they are
19 and, having regard to their financial situation, that may be very important, because if they
20 cannot establish the facts then they know how to proceed thereafter; and if they can establish
21 the facts then the situation is that they will have effectively caught up with Floe and if there
22 was an appeal there can be an appeal in both so that there is no problem.

23 MR. PICKFORD: Ma'am, I might suggest that there are three possibilities. One is, as you have just
24 indicated, that the entire matter of a VIP appeal is stayed until any appeal has been decided in
25 Floe, that is at one extreme. The other is that we get straight on with the VIP appeal now, that
26 is at the other extreme, and what I would suggest would be an appropriate compromise is that
27 we at least wait until we have the order in relation to Floe and the parties have been able to
28 assess whether an application for permission to appeal is likely to be made at that point.

29 THE CHAIRMAN: But I do not understand at the moment that what is going on in relation to the
30 Floe order has anything to do with the decision on the facts in VIP. They seem to be two
31 separate points. For my part at the moment it seems to me that subject to commercial
32 considerations – and the commercial considerations seem to support what I am going to say –
33 that the better course would be for VIP to catch up with Floe on the facts, so that everybody
34 can consider. It may raise different legal points, and if there was an appeal to the Court of
35 Appeal then the Court of Appeal can deal with the whole matter and not in bits.

1 MR. PICKFORD: It is clearly envisaged by Ofcom that the nature of the Order may have some
2 bearing on their views on appeal because that is one of the points that Mr. Anderson has made
3 and he is very keen therefore to be completely clear about the nature of the order before they
4 have decided whether to appeal.

5 THE CHAIRMAN: Absolutely, yes. If they also have the advantage in the meanwhile of having the
6 facts determined in VIP that may assist them as well. The real party who ought to be
7 addressing me is Ofcom because this is an appeal against an Ofcom Decision.

8 MR. PICKFORD: I am very happy to give way to Mr. Anderson for him to do so.

9 MR. ANDERSON: I am not sure that you will be very happy to give way to me because we are
10 really rather neutral on this. Our concern, of course, is to address, as Mr. Pickford has rightly
11 identified, the points of principle in the wider scope. The question of whether or not an
12 authorisation was granted, or it was objectively justified are, from our point of view as the
13 regulator, and the competition regulator, more questions of fact. We would see ourselves as
14 actually playing a relatively minor role in the T-Mobile case, the VIP case proceeding. We
15 are, of course, keen that that process does not delay consideration of the substantive issues in
16 Floe, but I would have thought, with respect, it was really a matter for the Tribunal, T-Mobile
17 and VIP as to whether that should all be put off ending any Floe appeal, or should proceed, “in
18 tandem” if you like, with a view to it catching up if matters do go further.

19 THE CHAIRMAN: It does have a consequence because if it is decided that you wish to appeal, and
20 if you got permission to appeal, it might be more appropriate and a better use of resources if
21 you did it in both the VIP and Floe so that the two sets of facts were dealt with on the law, so
22 after the appeal you knew exactly where you stood in relation to both sets of facts.

23 MR. ANDERSON: Well I cannot see there being any objection to the parties in the VIP and
24 T-Mobile appeal intervening in any appeal in the Floe case if that is appropriate in the Court of
25 Appeal, but I do not at the moment see that the appeal in Floe is likely to raise directly at least
26 any of the factual disputes that arose between the parties, and I cannot at the moment see why
27 the T-Mobile case is likely to raise any factual matters that will really be of relevance to the
28 issues before the Court of Appeal.

29 THE CHAIRMAN: No, but what I am suggesting is that then you would know, because we would
30 know what the facts were and one would then know whether that was relevant to the T-Mobile
31 situation and the T-Mobile Decision whereas otherwise it is all left at large and then you do not
32 know what the consequence is of that thereafter, whereas it is all on the table.

33 MR. ANDERSON: I see the point you are making, ma'am, but as I say we would regard that to be a
34 fairly insignificant factor in determining matters. The particular facts of these two refusals, or

1 withholdings, whatever one characterises them as is not really at the heart of our wider
2 concerns.

3 THE CHAIRMAN: If you have concerns?

4 MR. ANDERSON: If we have concerns, of course.

5 MR. PICKFORD: Ma'am, might I make a point on the commercial arrangements of VIP. If the
6 Tribunal is minded to rely upon the potential commercial implications of waiting or not
7 waiting for VIP it should do so on the basis of clear evidence about the commercial
8 arrangements of VIP, particularly the funding arrangements.

9 THE CHAIRMAN: We know they are in administration.

10 MR. PICKFORD: They are in administration. The Tribunal were then copied in, I believe, on a
11 letter that T-Mobile has written to VIP – the letter is certainly no secret, asking for disclosure
12 of the funding arrangements of the VIP appeal ----

13 THE CHAIRMAN: I have not taken that on board.

14 MR. PICKFORD: -- because it does appear from the application for interim measures that was made
15 by Mr. Tom McCabe, that in fact at least some elements of the appeal would have been funded
16 not by the company in administration – that clearly has some bearing on the Tribunal's
17 decision, were it to rely upon the commercial imperative to move the case forward.

18 THE CHAIRMAN: It may be another reason for moving the case forward.

19 MR. PICKFORD: Whether it is a valid reason or not that should be determined on the basis of some
20 clear evidence from VIP rather than a somewhat generalised assertion when we are not in
21 possession of the full facts as to the funding arrangements of VIP.

22 THE CHAIRMAN: I am not sure that the funding arrangements and the financial situation of VIP
23 are the same thing. The financial situation of VIP, the commercial consideration, is that they
24 are in administration and there is an administrator, and the administrator has certain duties and
25 has to weigh in the balance whether it is more appropriate to delay the administration for the
26 outcome of this or not. That is the commercial consideration as ----

27 MR. PICKFORD: And notably we have not heard from the administrator here.

28 THE CHAIRMAN: Well I assume that the administrator is being instructed by Mr. Mercer – sorry
29 (Laughter) Mr. Mercer is being instructed by the administrator.

30 MR. MERCER: I think you might have been more correct than you believe the first time!

31 (Laughter) It is true to say that at this moment in time there is no funding arrangement in
32 place. Nobody has offered to pick up all of the costs at this present time. One of the
33 considerations as to whether or not there may be such an arrangement is the possibility of
34 managing to despatch this matter quickly.

1 THE CHAIRMAN: I do not think for the time being that we are concerned with whatever funding
2 arrangement there is, although I can see that any directions we make if there is no funding they
3 may not be met, so that is a problem in relation to how we proceed today.

4 MR. MERCER: Yes, ma'am, my only point was that there are no funding arrangements, it is a
5 matter to be taken into account but that is not something about which I am making submissions
6 to the Tribunal that you should do one thing or the other.

7 THE CHAIRMAN: But, Mr. Mercer, if you are saying that we ought to get on with it today and we
8 make directions for witness statements etc. and disclosure – you are asking for disclosure –
9 that timetable has to be met and if you have no funding, which is not a matter for me (at the
10 moment any way) then how are you going to meet it?

11 MR. MERCER: The first thing, I suppose, is that that is a matter for the administrator who would be
12 responsible for the expenses of administration in any event, and as to looking to a funding
13 arrangement the fact that there is a process underway will concentrate the party's minds in that
14 regard. Far be it from me to tell somebody from your Chambers, ma'am, about insolvency law,
15 but I think you know the practical way that these things ----

16 THE CHAIRMAN: Absolutely, yes. One also appreciates that having regard to what has happened
17 here and the submissions that are made today about funding there are duties on the
18 administrator.

19 MR. MERCER: Yes, ma'am.

20 THE CHAIRMAN: And the position in relation to costs – I do not know what the position in
21 relation to costs at the end will be, but the considerations may be different.

22 MR. MERCER: Yes, ma'am.

23 (The Tribunal confer)

24 THE CHAIRMAN: Has everyone made the submissions they want to make on this?

25 MR. PICKFORD: Yes, ma'am.

26 THE CHAIRMAN: You say leave it until after we have decided the order in Floe and possibly after
27 the appeal. Mr. Mercer says, as I understand it, that we should get on and decide the facts and
28 that is both appropriate because effectively the VIP case will have caught up and everybody
29 will know what the position is and then can apply whatever law there is and it will be finished,
30 and the administrator will be in a position where he will know what the position is as well, and
31 he is not hanging around for an undue length of time not knowing what his position is and
32 having to find funding for the administration when, depending on which way the decision
33 goes, he may or may not want to do that, so that it is quite important, he says, for his
34 administration.

1 MR. PICKFORD: I say additionally that to the extent that the Tribunal is minded to rely on these
2 commercial considerations it really should not merely base its judgment on what it is told
3 today but actually have evidence, and firm evidence, from the administrator.

4 THE CHAIRMAN: Mr. Pickford, I think the matters that I have just rehearsed are not matters which
5 pertain particularly to this company but they are the duties of administrators generally, and it is
6 the considerations of administrators generally that we are looking at, and it is not saying that
7 there is something special in relation to this. It is saying that this is the administrator's duty
8 and he has to get on with the administration and to leave this thing over for months and months
9 and months or years is not appropriate.

10 MR. PICKFORD: Well I hear the Tribunal, those are my submissions.

11 THE CHAIRMAN: Mr. Mercer.

12 MR. MERCER: I think, ma'am, there is also a public law point here which is that in terms of
13 looking at this as a public law rather than a private law matter, had there been the position
14 where, if it were necessary, two appeals at the end of the day could go forward together on
15 what we would say are two quite different sets of facts would be of great use to the industry –
16 or that part of it which is interested. As for Mr. Pickford's third way, it may be that something
17 arises when Mr. Anderson pulls his rabbit out of his hat in 14 days' time that causes us to
18 rethink, but at the moment we do not know of anything that causes us to do so. That is where
19 we stand.

20 (The Tribunal confer)

21 THE CHAIRMAN: We consider that the facts should be determined now. T-Mobile have not
22 provided any reason which justifies to us a delay in the VIP proceedings. VIP is in
23 administration and by determining the facts now it will know at the earliest opportunity
24 whether or not its appeal is well founded and will then be able to assess the prospects of
25 success. In proceeding in this way it will also mean that if there is any appeal of the Floe
26 Judgment this appeal can proceed also with regard to the VIP case. Accordingly, it seems to us
27 that to proceed in the way we are suggesting produces finality of both appeals at the earliest
28 opportunity.

29 So I think we are on to timetable, are we? We have looked at our diaries and we could hear
30 this on Wednesday, 13th December. We have chosen a date in December because we think
31 there will have to be some exchange of submissions, there is the disclosure and there are the
32 witness statements, and that must take about eight weeks, so with a bit of flexibility that
33 appeared to be an appropriate date.

1 MR. PICKFORD: Ma'am, I can well see the interest in trying to settle on a specific date for the final
2 hearing now. The only difficulty with that is I am not convinced at the present juncture that
3 one day will necessarily be sufficient to hear the entirety of the Appeal.

4 THE CHAIRMAN: How long do you think it will take?

5 MR. PICKFORD: Well I do not know because I have not seen VIP's amended statement of case. I
6 have not seen VIP's evidence, we do not know how many witnesses they are going to be
7 relying on.

8 THE CHAIRMAN: Is it going to take more than two days?

9 MR. PICKFORD: It is probably unlikely to take more than two days.

10 THE CHAIRMAN: Right, well there is no problem then because we will make sure we have set
11 aside two days.

12 MR. PICKFORD: I say it is unlikely but until one has actually seen what evidence VIP intends to
13 rely upon and therefore we have taken a view on what evidence we are going to need to
14 produce in order to rebut it one does not know how many witnesses we are going to have,
15 which is obviously the key driver of how long ----

16 THE CHAIRMAN: We have got some precedent in the Floe case as to how long the witnesses took,
17 and I do not think it is going to take more than one day, but it is certainly not going to take
18 more than two days. It is only on the factual scenario. Once one has the witness statements
19 and sees what people say the cross-examination cannot take more than an hour per witness.

20 MR. PICKFORD: One would hope that was the case.

21 THE CHAIRMAN: It is a very small point, it is a **very** small point.

22 MR. PICKFORD: Well we would obviously hope that too.

23 THE CHAIRMAN: Well if it turns out that when we get nearer to the time this case is going to take
24 four weeks we will re-assess the date. Mr. Mercer, are you happy with 13th December?

25 MR. MERCER: Yes, ma'am.

26 THE CHAIRMAN: Do you think this is going to take more than one day?

27 MR. MERCER: I can only speak for myself, ma'am, but yes, I think it is going to take one day – that
28 is assuming that the Tribunal adopts its normal policy that we might sit over until 5 if
29 necessary, I think this is easily doable in one day. We are not talking about a massive fire
30 fight, we are not talking about expert witnesses, we are talking about fact.

31 THE CHAIRMAN: We will proceed on the basis that it is a one day case, however, in our diary we
32 will keep the second day free. that does not mean that we expect it to run for two days. So I
33 suggest that everybody who is involved also keeps – I am sorry?

1 MR. ANDERSON: Those behind me have asked me to point out that Ofcom – though not me
2 personally – is involved in a rather heavy CMC on the 12th, so if there is flexibility in that
3 week.

4 THE CHAIRMAN: There is not actually any flexibility in that week, unfortunately, because if we
5 were going to reserve two days they were the only two days. You are not involved in the
6 other matter?

7 MR. ANDERSON: I am not involved in that, but more than one of those behind me are involved in
8 that.

9 THE CHAIRMAN: It is not the law, it is only the facts, so are those sitting behind you so desperate?

10 (The Tribunal confer)

11 THE CHAIRMAN: You know much more about this than I do, but as I understand it, it is only a
12 CMC and it is not going to have any live issues in it effectively, except to give directions – is
13 that right, or not? I mean they are not going to decide anything?

14 MR. ANDERSON: As I say, those behind me are better placed to help you than I am, but it is my
15 understanding it is at the moment an effective CMC, it may not be by the time one gets
16 there ----

17 THE CHAIRMAN: I think we are going to have to leave Wednesday, 13th in the diary. We are all
18 putting in the diary the 14th as well just in case. If it turns out that it is only one day, or half a
19 day, and it would be easier to move to the 14th we can be flexible about it. It may be that the
20 CMC on the 12th might be very short, or might get adjourned, and **this** is something where we
21 are going to decide something so I think let us leave this in the diary as the 13th, and if there is
22 a problem we will try and work around it, but not work around it so that this goes out to
23 another date, this will be heard that week on the basis of what we know at the moment – is that
24 all right?

25 MR. ANDERSON: Thank you.

26 MR. PICKFORD: Ma'am, the only other point I was going to make in relation to the date – and this
27 is not a reason why it cannot be the 13th but it does have some bearing on the timetable when
28 one works backwards ----

29 THE CHAIRMAN: That is why I gave you the date.

30 MR. PICKFORD: -- it is that I have paternity leave at some point occurring during November.
31 Hopefully it will be the beginning of November, it should not upset this timetable too much,
32 but babies are never entirely reliable in relation to these matters, and so when one works
33 backwards it will be necessary to ensure that we are able to meet that timetable – given the
34 length of time that I have been involved in this case for T-Mobile it would be deeply
35 unfortunate if they had to swap counsel at very much the last minute.

1 THE CHAIRMAN: But apart from the relevant day or two days when you will not be available does
2 your paternity leave mean that you are not available at all for a period of time?

3 MR. PICKFORD: Well it was supposed to ----

4 THE CHAIRMAN: Well what is supposed to and what actually happens are two different things.

5 MR. PICKFORD: Indeed, but since this is a public transcript (Laughter) it was supposed to last for
6 at least two to three weeks. Obviously I am craving the indulgence of the Tribunal to bear that
7 in mind, but it is a consideration that is relevant personally.

8 THE CHAIRMAN: So that is the first three weeks in November, is it?

9 MR. PICKFORD: Yes.

10 THE CHAIRMAN: So we will have to see whether our timetable fits around that somehow.

11 MR. PICKFORD: Indeed.

12 THE CHAIRMAN: Mr. Mercer?

13 MR. MERCER: I am not expecting to have to take any paternity leave of which I am aware at the
14 moment, ma'am - but you can never tell on circumstance, can you? (Laughter) Mr. Pickford
15 and I had a small discussion on this and what that issue boils down to is a period really for
16 getting witness statements in and the timetabling for that.

17 THE CHAIRMAN: And some submissions.

18 MR. MERCER: And some submissions as well.

19 THE CHAIRMAN: You said there was disclosure – you had an application for disclosure, you said?

20 MR. MERCER: A minor one I will come to in a moment, but the first thing is that we have not
21 actually, as we have done in the Floe case for example on both occasions, seen the Ofcom file
22 which is usually the non-confidential version which has been passed across to us.

23 THE CHAIRMAN: Is that the disclosure you meant?

24 MR. MERCER: That is one of the disclosures I meant, ma'am, and I do not think we have seen that
25 at all in this case as yet, because we stopped before that stage.

26 THE CHAIRMAN: Is the Ofcom file going to be relevant – I suppose it might be.

27 MR. MERCER: Yes, ma'am, because there are some letters between Ofcom and T-Mobile that are
28 referred to that we would very much like to see, and because we did not know what was going
29 to happen today in any event we have in fact in respect of that material already served a
30 Freedom of Information Act request on Ofcom in that regard.

31 THE CHAIRMAN: When did you serve the request?

32 MR. MERCER: Last Thursday, ma'am.

33 THE CHAIRMAN: Has it reached them? Does it reach direct?

34 MR. ANDERSON: They have served a request under the Freedom of Information Act that has been
35 passed to the relevant department that deals with the Freedom of Information Act – well, you

1 laugh, but that is a separate department dealing with separate issues because we have
2 obligations under Part 9 of the Enterprise Act and that is being considered by the appropriate
3 people. We have not had any request for any disclosure in the VIP case and therefore I am not
4 in a position to respond to any request made off the cuff by Mr. Mercer today. He needs to
5 formulate a request for disclosure, serve it on us and we will respond to it.

6 THE CHAIRMAN: What do you say about that, Mr. Mercer?

7 MR. MERCER: If that is Mr. Anderson's position then we will comply but it would seem, given the
8 past practices of Ofcom in terms of handing the file over (the non-confidential version of it)
9 why we could not just do that again.

10 THE CHAIRMAN: I think they want to consider whether or not they will be doing that but they
11 want the request to start with.

12 MR. MERCER: Well we will make that ----

13 MR. ANDERSON: Mr. Mercer has not even had the courtesy to come up to me before this moment
14 and say he wants to make such a request, so it comes as a complete surprise to us.

15 MR. MERCER: Factually that may be true.

16 THE CHAIRMAN: Let us take it from where we are today. At the moment you need to make a
17 request on Ofcom, Ofcom need to consider that. Am I right in thinking, Mr. Anderson, that
18 the normal practice would be to make the file available?

19 MR. ANDERSON: Subject to questions of confidentiality and so on ----

20 THE CHAIRMAN: Yes, absolutely. How long does it normally take?

21 MR. ANDERSON: And of course it depends on the facts in issue. I have not reviewed the file, I
22 think the appropriate first course is for Mr. Mercer to make an application, if his application is
23 for the entire file we will then consider, but it ought to be an application made in the context of
24 any amended notice of appeal in which the issues in this Appeal are identified. They are, of
25 course, more limited than in the Floe case.

26 MR. MERCER: I think we are making a bit of a mountain out of a molehill, ma'am. Something
27 which appears from my memory certainly to have occurred almost automatically before on the
28 two occasions that I have been through it with Floe – we will make a formal application as
29 soon as we can, ma'am.

30 THE CHAIRMAN: That is a request to them rather than a formal application here?

31 MR. MERCER: Yes.

32 THE CHAIRMAN: All you need to do is to send a letter to Ofcom today saying you want that file
33 and we will see what happens.

34 MR. MERCER: The second matter, ma'am, concerns T-Mobile and a name that you are going to
35 hear again, I suspect, in this matter is the name of one David Power. Mr. Power was a

1 T-Mobile employee at the relevant time who dealt with the VIP account. Mr. Power, we
2 understand, has left the employ of T-Mobile (UK) Ltd., and now resides in South Africa. We
3 would very much like to trace Mr. Power for obvious reasons. We have been informed by a
4 set of private investigators that they could not undertake that task without having his date of
5 birth, so a request was made in writing to T-Mobile for Mr. Power's date of birth, which we
6 had rather hoped would still be on their HR records. T-Mobile have refused to give VIP that
7 date of birth. I leave it to Mr. Pickford to explain the reasons for that; as I understand it a
8 reason given is that of privacy, but of course this is a matter related to the administration of
9 justice and therefore an exemption from the usual principles according to the Data Protection
10 Act. We would very much like to have that date of birth because we would very much like to
11 interview Mr. Power and take a statement from him, and we think that in the interests of a
12 swift despatch of this matter it would be very useful to be able to take a statement from the
13 person who dealt with VIP during the relevant period. That is my application, ma'am.

14 THE CHAIRMAN: And you have no other applications in relation to disclosure vis-à-vis T-Mobile?

15 MR. MERCER: Not at this moment, ma'am.

16 THE CHAIRMAN: Thank you.

17 MR. PICKFORD: Ma'am, it is of course correct that there are very serious Data Protection Act
18 issues relating to the disclosure of personal information about an ex-employee. We would
19 suggest that if Mr. Mercer, or rather VIP, wish to make a formal application for disclosure then
20 they should put it in writing and explain in writing the precise basis on which ----

21 THE CHAIRMAN: As I understand they have put it in writing to you is what they have said.

22 MR. PICKFORD: They made a somewhat informal application by email for this particular
23 information which was refused.

24 THE CHAIRMAN: But you know why, this is just delaying it. I am not saying whether you should
25 disclose it or not, but just to say they had to make a formal application, you know that they
26 have made an application, you know why they want it because you know who Mr. Power is.

27 MR. PICKFORD: Mr. Mercer has done no more, with respect, than say administration of justice
28 overrides data protection, which seems to be the essence for the request. He has not articulated
29 clearly and precisely the basis on which he says he is actually entitled to this information.

30 THE CHAIRMAN: But you are the one that is refusing it, do you not have to say the grounds for
31 refusal? If you are saying it is under the Data Protection Act, you cannot give this information
32 then you ought to provide chapter and verse for that so that he knows why you are refusing it,
33 otherwise we are just going to go around in circles.

34 MR. PICKFORD: In which case we can provide that.

35 (The Tribunal confer)

1 THE CHAIRMAN: What we are wondering is this, that often these matters get resolved not by the
2 employer giving the information out but by the person who wants the information sending a
3 letter to the ex-employer for the ex-employer then to pass it on to the ex-employee, and then it
4 is for the ex-employee to get in touch or not. Now, that often happens – it happens with banks,
5 does it not? It is one way of getting around the confidentiality and the privacy.

6 MR. MERCER: My understanding of my instructions is that Mr. Power is known to be in the
7 Republic of South Africa, but nobody has a forwarding address for him.

8 THE CHAIRMAN: Your understanding is that T-Mobile does not have a forwarding address either?
9 They have been able to tell you that, have they?

10 MR. MERCER: They have not said that to us but we would not be surprised if they did not have an
11 accurate one.

12 THE CHAIRMAN: I think the whole application raises a number of rather difficult issues in relation
13 to privacy, also in relation to the position of parties as to whether they need to help you find
14 your witness.

15 MR. MERCER: It is just another piece of information as far as I am concerned, ma'am. It just
16 happens to be about an individual who no longer works for them, and I think I have made the
17 point I needed to about ----

18 THE CHAIRMAN: That is why I suggested that possibly if T-Mobile said why they were not going
19 to produce it we would know where the lines are drawn.

20 MR. PICKFORD: Our position is that there has been a request, we have said “no”. If VIP would
21 like to articulate why we are obliged and must provide that information then they are free to do
22 so and we can then respond to that, but our view is that this is private, personal information
23 and we do not see that it should be disclosed. Clearly, if they can persuade us otherwise then
24 we will reconsider, but so far all we have had is a simple request for the information. I should
25 add that we are very happy, subject to being able to do so, to pass on a letter and to take the
26 Tribunal’s ----

27 THE CHAIRMAN: Subject to you having the address?

28 MR. PICKFORD: Yes.

29 THE CHAIRMAN: The last known address, you must have an address. I think you are going to
30 have to resolve this a bit further between yourselves, or you are going to have to set out why
31 you say that T-Mobile have to give you this information.

32 MR. PICKFORD: Yes, ma'am.

33 THE CHAIRMAN: I think that is as far as we can take it.

34 MR. ANDERSON: Could I make one further point on disclosure in the interests of truncating
35 matters and moving quickly?

1 THE CHAIRMAN: Yes.

2 MR. ANDERSON: A letter from Mr. Mercer, or Taylor Wessing in general terms saying “Can we
3 have access to the file?” we submit is not going to advance matters very constructively. The
4 files are huge, the same as they were in Floe ----

5 THE CHAIRMAN: Sorry, we are back on the Ofcom file?

6 MR. ANDERSON: And his request. You suggested to him that today he could send a letter to
7 us ----

8 THE CHAIRMAN: Well that is because that is what you asked.

9 MR. ANDERSON: Well, no I did not, I asked for him to formulate a request for disclosure, and
10 what I am suggesting is a request as in general terms as that based on his belief, which I am
11 instructed is not a correct belief, that access to the file is automatic, is going to be time
12 consuming and expensive and unlikely to assist. It would be far better if he were to formulate
13 the issues on which he believes there may be documentation in Ofcom’s possession that might
14 be relevant and request that. The issues that you, ma’am, identified namely whether VIP
15 requested T-Mobile, whether VIP were supplied with SIMs, whether T-Mobile gave
16 authorisation and whether T-Mobile discontinued on the basis of illegality, are really matters in
17 which the relevant documentation should be in the hands of those two parties. Embarking on
18 an exploration of all the documents in the file and going through confidentiality exercises on
19 the issues that involve, for example, the pronouncements of the Radio Telecommunications
20 Agency, the misrepresentation – all that – which is what is in the file is just too huge a task to
21 be justified in the context of this much narrower case.

22 THE CHAIRMAN: Yes, I can see for the moment, but subject to what everybody says that it should
23 be confined to what we are going to deal with at the moment. I have not looked closely at the
24 Decision in this case as to how much Ofcom considered – if I can put it – the contractual
25 position, the relationship between the two. I assume they did, and it was not Ofcom anyway.

26 MR. ANDERSON: That is why, if I may respectfully say, that the appropriate course would be for
27 VIP to look at the Decision, look at its notice of appeal, see what precisely is in issue and ask
28 for (if appropriate) disclosure in relation to any documentation in our possession relevant to
29 those specific issues, it is far better than simply saying: “Can we have access to the file?”

30 THE CHAIRMAN: Mr. Mercer?

31 MR. MERCER: That task is not beyond us, we could undertake it.

32 THE CHAIRMAN: It is a very short letter – do they have any documents that are relevant or
33 material to the issue which we are going to decide on 13th December?

1 MR. MERCER: Well my comment about that is the exercise that they have to do in filleting the file
2 is going to cause them expense and difficulty and probably rather more so than just sending the
3 lot down to a photocopying shop ----

4 THE CHAIRMAN: That would be a matter for them.

5 MR. MERCER: -- and, for example, I presume – from memory – that there will have been, as there
6 were with Floe and VIP, a number of interviews between ----

7 THE CHAIRMAN: Can I say this? I think this is a matter between you. I do not think it is anything
8 to do with us at the moment. There is no proper application before us and the foundation for
9 such an application has not been made out, so I think you must liaise with Ofcom and see how
10 this can be resolved between the two of you, and Ofcom, I am sure, are not going to delay the
11 process so that the 13th December is a date that we cannot hold; so I am sure they will get on
12 with expedition insofar as that is reasonable in the circumstances.

13 MR. MERCER: Very good, ma'am. As for future timetable, to try and fit this in between 13th
14 December, it is going to have to move quite quickly to give everybody the chance to have
15 materials, to look at them and consider them and do something with it. The first thing that
16 needs to happen is for us to amplify the notice of appeal. The notice of appeal stands as a
17 document by itself, but it needs to have a factual base for that, described and added in.

18 THE CHAIRMAN: I think that has been accepted by everybody so far.

19 MR. MERCER: And that is going to take us at least four weeks.

20 THE CHAIRMAN: Four weeks?

21 MR. MERCER: If we are to deliver all of the witness statements we want to ----

22 THE CHAIRMAN: Oh, I see, you mean deliver ----

23 MR. MERCER: -- because the general rule is that you should deliver the witness statements with
24 your ----

25 THE CHAIRMAN: Oh I am sorry, I thought you were just going to amplify and that was going to
26 be it.

27 MR. MERCER: No, I could do that by Friday morning, ma'am, although I was rather hoping you
28 will not order that.

29 THE CHAIRMAN: That is what I wondered.

30 MR. MERCER: But if we are to stick to the rule of actually supplying the witness statements with it
31 we are going to need four weeks, and then we would expect, whatever the next document is to
32 be called – “Defence”----

33 THE CHAIRMAN: Four weeks takes us to 11th October.

34 MR. MERCER: Yes, ma'am.

35 THE CHAIRMAN: Then T-Mobile may want to put some witness statements in in answer.

1 MR. PICKFORD: Indeed, and the slight difficulty with the four week timetable – assuming that we
2 were also permitted four weeks – would fall very much slap in the middle of the beginning of
3 November.

4 THE CHAIRMAN: Well then maybe you should not have four weeks on that basis. (Laughter)

5 MR. PICKFORD: But unfortunately in order to fit it in we would have to compromise by saying
6 two weeks which would be somewhat unfair, so I would suggest that the appropriate way of
7 doing it would be to divide it three weeks and three weeks.

8 THE CHAIRMAN: Why should VIP be curtailed because you have a personal ----

9 MR. PICKFORD: I am not suggesting that is the reason why they should. The reason why I am
10 suggesting it is that they do not need four weeks and if we can do it in three weeks they can do
11 it in three weeks.

12 THE CHAIRMAN: You are saying you can do it in three weeks?

13 MR. PICKFORD: We are saying we can do it in three weeks after three weeks that would be
14 allowed for Mr. Mercer, yes.

15 (The Tribunal confer)

16 THE CHAIRMAN: I am afraid we do not see the connection between the length of time that
17 Mr. Mercer does it and your other commitments so it is four weeks for Mr. Mercer and three
18 weeks for you. So that takes us to 25th October.

19 MR. PICKFORD: In which case can I ask for four weeks. I mean three weeks and four weeks fall
20 equally in an inconvenient period, so we might as well have four.

21 THE CHAIRMAN: Right, 2nd November. (After a pause) 2nd November only gives you three
22 weeks actually, so it is 2nd November.

23 MR. PICKFORD: So 9th November would be four weeks.

24 THE CHAIRMAN: Is that going to work on the rest of our timetable, because if it makes no
25 difference – you are going to have to sign it off, and if you are off by then ----

26 MR. PICKFORD: Well I am going to have to try but, of course, as I said, one does not know exactly
27 what dates are going to be the dates ----

28 THE CHAIRMAN: I am not going to take into account – I think this is going to get ridiculous
29 because it is such a sliding scale.

30 MR. PICKFORD: I quite hear that, I understand that point, but if one puts that point completely to
31 one side, what I am saying is that if four weeks is permitted for Mr. Mercer, we should be
32 allowed four weeks as well. It may be quite some task, we do not know what particular
33 elements we are going to have to meet, we may have also difficulties in terms of finding the
34 relevant employees.

1 THE CHAIRMAN: Let us just work the timetable out. After we have all the witness statements
2 what is the next thing? You are not putting in any evidence in relation to this, are you?

3 MR. ANDERSON: I do not know, I should not suspect so for a moment, but what I would say is
4 that when Mr. Mercer has put in his amplified notice of appeal, by which he means really
5 “re-amended notice of appeal” it may be that Ofcom does wish to put in a defence to that
6 re-amended notice of appeal because of course there have been no pleadings in VIP since the
7 original notice of appeal.

8 THE CHAIRMAN: Well that can all happen at the same time, can it not, so that we can have
9 defence to whatever the latest notice of appeal, or “amended”, or whatever it is called, defence
10 to the notice of appeal and witness statements from T-Mobile and, query, Ofcom, and that
11 gives everybody a chance to do whatever they like.

12 MR. ANDERSON: Yes, and presumably then also T-Mobile’s statement of intervention which
13 would be its response to the now amended notice of appeal, so everything then comes in in
14 reply to VIP at the same time.

15 THE CHAIRMAN: And that all comes in at the moment on 9th November.

16 MR. PICKFORD: It may well be that it is supplied earlier than that.

17 THE CHAIRMAN: Does that mean that you will not sit on it until the 9th, but you will supply it
18 before?

19 MR. PICKFORD: We will supply it as soon as we are able to supply it, but clearly it would be better
20 to have the leeway that is provided by four weeks.

21 THE CHAIRMAN: If we say the 9th – I am just going to work back – what is the next thing we need
22 to do?

23 MR. MERCER: Given this is a very truncated process, I would suggest it is exchange of skeletons.

24 THE CHAIRMAN: That is what I thought. So exchange of skeleton arguments – we could have
25 three weeks for that, which would be 30th November, and that leaves the hearing on 13th.

26 MR. MERCER: Which gives the Tribunal two weeks’ reading time on that.

27 MR. PICKFORD: Ma'am, in the Floe case we had sequential exchange and I would suggest that that
28 would be appropriate here also, particularly as there has been a tendency for the way in which
29 the case has been put to shift from pleading to pleading.

30 THE CHAIRMAN: I think that was because of the law, I do not think on the witnesses it makes any
31 difference. I think it was because of the law, and it was useful that people were answering
32 each other on the law; it was not the facts. The skeleton arguments on facts must be very short
33 anyway because we can read the witness statements and there is very little else to say.

34 MR. PICKFORD: Ma'am, am I to understand that the hearing that we are contemplating having will
35 have no submissions on law at all? It was contemplated by the Tribunal that there was an issue

1 of law, and there were a number of issues of law, as to whether, for example, a refusal to
2 supply once a supply has been provided should be treated for objective justification purposes
3 in the same manner as a refusal to supply when there has been no supply, and that is a point of
4 law. I am quite happy simply to have a hearing which is purely on the facts, but this hearing
5 may well not be contained in that particular way if one wants to deal with all the issues
6 relevant to VIP.

7 (The Tribunal confer)

8 THE CHAIRMAN: The remarks I made about that were in relation to your application that we
9 should dismiss the Appeal outright, and I was saying for various reasons, including your
10 submission that the paragraph was the reason it should be dismissed, that that paragraph does
11 not necessarily go to the point.

12 The first question in this is: what are the facts? We do not know what the facts are yet and so
13 we do not know what the issue of law is, and our feeling at the moment, but this is subject to
14 everybody making submissions on it, is that we ought to decide what the facts are. Having
15 decided what the facts are there maybe an issue of law, there may not be an issue of law – it
16 may be the issue of law that I have identified, or it may be something else. So we should
17 decide the issue of fact. If there is a narrow point of law which arises from it, if that is
18 ascertained during the course of the preparation, if it becomes clear, then we can think about
19 putting it into 13th December. If it is not clear what that issue of law is, we ought to deal with
20 that as a separate point afterwards because we do not quite know what it is going to be. I have
21 said that we cannot make a summary disposal of this because there are issues of law, but we do
22 not know what the issue of law is because we do not know what the factual scenario is.

23 MR. PICKFORD: Could I just take instructions. (After a pause) Ma'am, we do foresee some
24 potential difficulties here in that there may be issues which are combined issues of fact and
25 law. As one example what constitutes a written authorisation under a licence and whether
26 whatever was or was not provided in this case is sufficient combines those issues of fact and
27 also issues of law, and we may find that we just get into a rather sticky position if we try to
28 divorce the two.

29 THE CHAIRMAN: Can I make a suggestion? We are going to know all of that by 30th November,
30 you can put it in your submissions and then, if necessary, either in writing or otherwise we will
31 have to resolve it. We do not know what the position is yet as to where we are.

32 MR. PICKFORD: Right.

33 THE CHAIRMAN: But the VIP case at the moment is that they are going to find some sort of
34 written authorisation. If they do not find the written authorisation then we are going to have t

1 find the facts on which they can rely on: what actually did happen? Then we are going to have
2 to consider what the position is. I think we should take this in stages.

3 MR. PICKFORD: Just so I am clear, is the Tribunal's current view that subject to further
4 submissions it does not intend at the substantive hearing on 13th December to decide issues of
5 law but only issues of fact?

6 THE CHAIRMAN: What I am suggesting is that we leave the matter open until we know what the
7 witness statements say. When we know what the evidence is on which we are going to
8 determine the facts we can then have another look at whether or not it is appropriate to decide
9 any particular issues of law. Therefore, at the moment I would have thought that the place to
10 do that is in the exchange of skeleton arguments. We will still have a fortnight to decide it.

11 MR. PICKFORD: The only slight difficulty there is if we are having simultaneous exchange we
12 (T-Mobile) will now know whether we are supposed to be meeting points of law that VIP is
13 intending to rely upon or not.

14 THE CHAIRMAN: So we had better put in something else after 9th November and before 30th
15 November?

16 MR. PICKFORD: Or at least have sequential exchange of skeleton arguments. Clearly with the
17 sequential exchange we can see what case is being pleaded, both as a matter of fact and a
18 matter of law.

19 THE CHAIRMAN: No, I do not see that, because it seems to me that it depends on what the facts
20 are. The parties will say "We think this is the law that needs to be decided. This raises this
21 issue of law". You do not need sequential exchange for that because you will look at the
22 witness statements and you will say, for example, "There is no written authorisation. There no
23 authorisation at all." So then you have an issue as to what the consequences of that are. You
24 do not need to know whether or not Mr. Mercer has included that in his skeleton for you to
25 take the point.

26 MR. PICKFORD: I am content if that is the way the Tribunal wishes to proceed.

27 (The Tribunal confer)

28 THE CHAIRMAN: What I am going to do is to put in between 9th November and 30th November –
29 subject to whatever everybody says – the 20th November, which gives everybody 10 days, to
30 notify the Tribunal whether or not there are any issues of law to be determined on 13th
31 December and, if so, to identify them – to notify the Tribunal and each other – then we will
32 have a look and through the usual channels behind we can try and sort it out. Is that amenable
33 to everybody?

34 MR. MERCER: Yes.

1 MR. ANDERSON: Yes, if I could just point out that of course in the amplified, or re-amended
2 notice of appeal, when that is being drafted and served at the same time as VIP's witness
3 statement they would know what they say the facts are and if they say that we got the Decision
4 wrong by reason of some error of law arising out of those facts it should be identified in the
5 notice of appeal. The notice of appeal should not be confined only to points of fact that have
6 been taken, it should include all matters being relied on.

7 THE CHAIRMAN: I was only concerned with what we are going to decide on 13th December rather
8 than what was going to go into the notice of appeal, but Mr. Mercer you have heard what Mr.
9 Anderson said?

10 MR. MERCER: Yes, but I think putting the added process in will help to refine things, the process
11 starting on 20th November.

12 THE CHAIRMAN: Yes.

13 MR. MERCER: That process could start as we draft the amplified notice of appeal.

14 THE CHAIRMAN: Yes. Does that satisfactorily deal with it.

15 MR. ANDERSON: Yes, we will wait and see as it unfolds over that eight weeks.

16 THE CHAIRMAN: That is all we can do.

17 MR. PICKFORD: There is a further comment that needs to be made in relation to the amplified or
18 amended notice of appeal which is that it should be constrained merely to identify the
19 particular differences of fact in relation to VIP, and the implications in law.

20 THE CHAIRMAN: I do not think we want to have a notice of appeal which says "In Floe these
21 were the facts, the differences in VIP ..." I think we want a notice of appeal that says "These
22 are the facts in VIP".

23 MR. PICKFORD: I entirely agree, ma'am. My concern is what there should not be is an opportunity
24 for VIP to go away and, irrespective of whether these new legal arguments depend on a
25 difference in fact between VIP and Floe, for VIP to come away and say "Okay, well we have a
26 new way of putting the point that the Tribunal did not like last time – nothing to do with a
27 difference in fact, but here is our new legal argument", which is effectively what we had as
28 between the first Appeal and the second Appeal, and we re-litigated certain issues
29 effectively ----

30 THE CHAIRMAN: We did not spend very much time re-litigating those issues.

31 MR. PICKFORD: But it is important that we do not have that situation again this time.

32 THE CHAIRMAN: I think Mr. Mercer has the point.

33 MR. MERCER: Yes, I mean he has seen through the ploy there is no point in trying it now!
34 (Laughter)

1 THE CHAIRMAN: Is there anything else? (After a pause) Thank you all very much and we will
2 see you on 13th December. In relation to resolving the Order, that is going to take some weeks
3 as I understand it ----

4 MR. ANDERSON: Yes.

5 THE CHAIRMAN: -- and we will deal with that through the usual channels.

6 MR. ANDERSON: Yes. I think that would be appropriate because it may depend on what other
7 people say and, of course, obviously the Tribunal will have its own views and if we need to
8 have another hearing we will have another hearing.

9 THE CHAIRMAN: If we need to have a hearing we will have to find another date, but we should
10 not be trying to put something in now for that?

11 MR. ANDERSON: I think not at this stage, no. Thank you.

12 THE CHAIRMAN: Thank you all very much.

13 (The hearing concluded at 3.15 p.m.)