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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st December, 2004

Before:
MARION SIMMONS QC
(Chairman)
MR MICHAEL DAVEY
MRS. SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Interveners

And

VIP COMMUNICATIONS LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

Supported by

T-MOBILE (UK) LIMITED

Intervener

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PROCEEDINGS

APPEARANCES

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

Mr. Mark Hoskins (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent

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

Mr. Meredith Pickford (instructed by Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Second Intervener, T-Mobile (UK) Limited

1 THE CHAIRMAN: Good morning. Can I just begin by thanking you for your skeletons, and the
2 sensible approach that everybody is taking to this hearing. Can I just take Floe first? I think I
3 have just four points to make. First, on page 2 of the written submissions of Ofcom, the
4 proposed steps in the investigation. The Tribunal wonders whether (c) should come after (a) –
5 so it is (a)(c)(b)?

6 The second matter on which we would like to hear submissions is the timing of the
7 investigation, and the third matter is, of course, costs – and we would particularly like to hear
8 the submissions from Ofcom because, quite understandably, there has been no skeleton,
9 whereas as to the others we know what is being submitted. The fourth matter will be the terms
10 of the order, which is of course dependent on what we decide in the other matters.

11 In relation to VIP the draft order is not quite in the form of the ABI order, and we are
12 presently minded, and subject to submissions, to follow the ABI order. The timing and costs in
13 VIP we will hear submissions on.

14 What we hope we will achieve today is a final order. So it may be that once the
15 principles have been decided that we adjourn for a short while while everybody agrees a final
16 order which we can then make so that we can conclude the matter today.

17 MR. HOSKINS: Can I add two other points to the Floe agenda?

18 THE CHAIRMAN: Yes.

19 MR. HOSKINS: It just struck me that there were two other matters that came out of the parties'
20 skeletons. First of all, it comes out of Floe's written submissions on the consequential orders
21 because at para.3 they refer to the "discrimination argument".

22 THE CHAIRMAN: Yes.

23 MR. HOSKINS: I certainly need to make submissions to you as to whether the discrimination
24 argument can and should form part of the remittal.

25 THE CHAIRMAN: Yes.

26 MR. HOSKINS: The second point, and it may well be covered by your fourth point about the terms
27 of the order, but just to flag it up as a specific point. T-Mobile have suggested that our
28 undertaking should include commitments as to the role that should be played by T-Mobile,
29 Vodafone, Floe and VIP and I need to address you on that as well, and the other matters I had
30 identified are ones that the Tribunal has listed.

31 Would you like me to start?

32 THE CHAIRMAN: Probably.

33 MR. HOSKINS: I think the first one logically is the discrimination point because it actually affects
34 the scope of the order, and I'll explain that as I get to it. But you will have seen from Floe's

1 written submissions – it is probably best to look at it – it is in their submissions concerning
2 consequential orders on Floe.

3 THE CHAIRMAN: Yes.

4 MR. HOSKINS: Paragraph 3 - the Appellant also wishes to clarify that the question of
5 discrimination, although not the subject of the amended Notice of Appeal will be considered
6 again on reconsideration of the original complaint where it was referred to. Our submission is
7 that it is no longer possible for that question to arise. Let me explain why.

8 In the Decision challenged (vol.5 tab 85) the Director General at paras. 62 to 69 found
9 that Vodafone had not discriminated as between Floe and other GSM Gateway operators. So
10 that was part of Floe's complaint to the Director. It was considered and it was ruled upon in the
11 Decision.

12 Floe did not appeal that finding in the Decision in its original Notice of Appeal. When
13 it applied for permission to amend its Notice of Appeal the proposed amendment included a
14 challenge to that finding that there had not been discrimination. But the President, Sir
15 Christopher Bellamy, ruled that that proposed amendment was not permissible, so the
16 discrimination argument therefore did not form part of the substantial appeal that the Tribunal
17 heard. It seems to us that two consequences must flow from that. First, it appears that the
18 Tribunal should not in fact therefore set aside the whole of the Decision challenged because, as I
19 have said paras. 62 to 69 of the Decision, which deal with the discrimination point were not in
20 issue in the Appeal, and therefore it seems that they must stand. What that would mean, I
21 think, is that the order setting aside the Decision should only set aside paras. 39 to 61, the first
22 two bullet points of paras.71 and para 72.

23 Madam, I apologise for the fact that we did not pick up on this fact when we put
24 forward our draft order. It was only when we saw Floe refer to the discrimination point that
25 we looked through and realised that in fact that part of the Decision had not been challenged
26 and therefore it seems to us the appropriate thing is quashing the Decision insofar as the
27 Judgment makes findings against Ofcom. Insofar as no findings were made it seems to us that
28 that part of the Decision must stand. Regardless of the mechanics of that part of the Decision it
29 seems to us that because the President decided that Floe was not entitled to raise the
30 discrimination point in its appeal that that submission cannot and should not form part of the
31 committal because it is not before the Tribunal.

32 THE CHAIRMAN: So what you are saying is that because that part of the Decision was not before
33 the Tribunal, the Tribunal cannot remit the whole of the Decision?

1 MR. HOSKINS: Precisely. It cannot quash the part of the Decision that was not part of the Appeal
2 before it.

3 THE CHAIRMAN: And therefore that part stands.

4 MR. HOSKINS: That part stands. As I say, I apologise that we had not picked up on that in our
5 draft orders. It is all buried in the five volumes, in the history. It does seem to us that that must
6 be the logical and correct outcome.

7 THE CHAIRMAN: Shall we just deal with that point to start with?

8 MR. HOSKINS: I think it is best to take these points as they come.

9 MR. MERCER: I must be prescient. It is entirely because I suspected that Ofcom would indulge in
10 this kind of salami slicing that I put the point in the submission, ma'am. My points are the
11 reverse of Mr. Hoskins' – nothing new in that. First, you quash the Decision – you quash the
12 Decision and you quash the whole Decision. Salami slicing and saying "Well, actually that bit
13 of the Decision is all right but that bit is not"... the whole thing went down. There were
14 certain Grounds of Appeal where Sir Christopher Bellamy (the President) did not think that we
15 should, or needed to pursue. If you read the transcript his reasoning was actually this was not
16 in the original Notice of Appeal – that is a point relating to discrimination, and he used words
17 to the effect: "Well, Mr. Mercer, if you had been allowed to present the Primary Argument, the
18 two alternative arguments, do you really need **this** as an adjunct to the second alternative
19 argument?" The answer was "Indeed not". It absolved the Tribunal from dealing with a
20 number of other points and at that time, in that context we were not unhappy for that to occur.

21 However, one of the things that the Judgment does is to re-examine a number of
22 interlinked areas, and one of the things that your Judgment does is to look at the interpretation
23 of the exemption regulations. It decides on an interpretation of the regulations in relation to
24 multi or unilateral users, which was not the one we would contend was in Vodafone's mind at
25 the time that it took the action to switch off my client's SIM cards. Therefore as the matter
26 was contained in the original complaint, and as that matter has now been affected by the
27 Tribunal's Judgment in related matters like the interpretation of the relevant regulations, it is
28 only fair that that matter should be looked at again. Fair, ma'am, because the marginal cost of
29 adding that item, if you like, to the cost of the exercise is marginal and the extra work is not
30 that bright. It is a matter originally raised, it is affected by the Judgment and, in all fairness, if
31 we are actually going to get the right result at the end of this process it needs to be examined
32 again.

33 I think that is all I can say to assist you on that point at the moment, ma'am.

34 THE CHAIRMAN: Thank you.

1 MR. HOSKINS: I think all I can do is repeat the point.

2 THE CHAIRMAN: Yes. I can see both ways of looking at it at the moment. I think Mr. Mercer's
3 point is that what we have decided might reflect on the way the discrimination point was
4 decided. If that is right then the discrimination point ought to be reconsidered, and we may
5 have to go back and look and see what the President said, what Mr. Mercer is suggesting is that
6 you only needed points 1, 2 and 3 to quash the Decision and then you do not need to argue
7 point 4, but you get the whole Decision quashed.

8 MR. HOSKINS: Madam, I think the way it was put is that there is an application for permission to
9 amend a Notice of Appeal to insert new points, and it does not matter what the reasoning was.
10 The reasoning was, as Mr. Mercer correctly said, twofold. It was "You did not pursue this in
11 the original Appeal", and "You probably do not need it anyway". But the punch line is: "I am
12 not going to give you permission to run the discrimination argument".

13 THE CHAIRMAN: Yes, but if, at the end of the day, what we have said affects the way that Ofcom
14 or its predecessors, considered the discrimination argument then I can see Mr. Mercer's point
15 in saying "The whole decision should be quashed."

16 MR. HOSKINS: The difficulty is that question because Mr. Mercer says "Oh, there are Rulings on
17 the interpretation of regulations in the Judgment" – correct, but Mr. Mercer has not shown with
18 which it interacts. Hand on heart I cannot tell you whether or not it interacts. But there is a
19 problem, and it is something we have raised throughout these proceedings, and the Tribunal
20 has made the point, for example in the *Freeserve* Judgment. One has to always remember that
21 one is dealing with a complaint, and the Tribunal has to be careful, according to the *Freeserve*
22 Judgment, not to transform itself into a First Instance Court. This is just an aspect of that
23 because a complaint was made, it was ruled on, the second part was not challenged. The
24 danger is, of course, that these things just keep running exponentially if one ignores the
25 "niceties" – I use that in inverted commas – of the procedure.

26 I have made the point, it seems to us that logically, because that point is not pursued it
27 is difficult to see how the Decision can be quashed and I will leave it at that. That is the way
28 we put it.

29 MR. MERCER: Ma'am, would it help if I explained the interaction?

30 THE CHAIRMAN: Yes.

31 MR. MERCER: Vodafone is taking certain action in respect of what it says were, by its definition at
32 the time, public gateways. At the same time Floe contends that it has evidence that there were
33 agents providing the intermediary type services that Floe was to single-user Gateways. Of
34 course, that action also would bring those intermediaries, in respect of that equipment, under

1 the ambit of the regulation. If that is true then clearly Vodafone was discriminating between
2 operators whose apparatus was not exempted by the regulations. I think that is the up and down
3 of the issue, ma'am.

4 MR. HOSKINS: Madam, can I return to the Decision, because this proves my point and it has been
5 my case throughout that this case keeps changing – new point after new point after new point.
6 So be it, that is where we are, but query whether we want to carry on in this vein.

7 THE CHAIRMAN: Where is the best place to find it?

8 MR. HOSKINS: It is in volume 5 – I am not sure what the internal reference is. It is behind tab 85,
9 and the section on discrimination begins at p.1626, para.62 where one sees the nature of the
10 complaint. The starting point, of course, is that all of this starts with the complaint and that sets
11 the limits for the proceedings.

12 “62. Floe’s complaints to the Director also alleged that Vodafone’s actions were
13 discriminatory in that Vodafone had suspended service provision for certain GSM
14 Gateway operators but not others. Floe named three other companies allegedly
15 providing public GSM Gateway services.”

16
17 So that was the nature of the complaint, and at para.68 one finds the way in which the Director
18 dealt with the problem. Floe says “Discrimination, look at these three other companies”.

19 “During the course of the investigation the Director required Vodafone to provide
20 details of any action it had taken against the companies named by Floe, Companies
21 A, B and C. In response Vodafone stated that it had no dealings with Companies B
22 and C at all, and that SIMs used by company A had been disconnected.”

23 So you cannot have discrimination because Floe is disconnected, and the other company was
24 disconnected. Now that is the evidence that Floe produced. They say three companies treated
25 differently, two of them Vodafone did not deal with at all, and the other one was disconnected.
26 So that is the basis for the finding of no discrimination. There is just nothing in it. Then it goes
27 on ----

28 THE CHAIRMAN: Yes, I am just reading on.

29 MR. HOSKINS: Yes, exactly, the Director actually went further than the complaint and looked into
30 correspondence between Vodafone and 15 other companies, but if the point ----

31 THE CHAIRMAN: Can I just read this?

32 MR. HOSKINS: I am sorry, Ma'am.

1 THE CHAIRMAN: I am just wondering about those 15 other companies, because that would
2 depend, would it not, on matters which had been considered in the Judgment as to how you
3 look at those letters?

4 MR. HOSKINS: It may do.

5 THE CHAIRMAN: So that that part of it would be material in the sense that the Decision on that
6 part may have been taken wrongly?

7 MR. HOSKINS: It may have been.

8 THE CHAIRMAN: Yes, I said “may” have been.

9 MR. HOSKINS: It depends how the Tribunal wishes to approach it. Although if it takes the view
10 that although this was not a specific ground of appeal, and indeed permission to raise this
11 ground had been specifically rejected, there may be matters in the Judgment which reflect on
12 the decision. It may decide to set aside the Decision, but that is the choice that is facing the
13 Tribunal. I do say that would be – I must choose my words carefully – odd procedurally in a
14 circumstances where permission to raise this argument had been rejected. That is the oddity.
15 But I do not want to push this, I have pointed out the procedural issue.

16 THE CHAIRMAN: No, thank you very much. I mean I think it is an interesting point. If it had only
17 been companies A, B and C, then it looks as if that may have closed the door, but the Director
18 went further than that, and in relation to where he went further it does look as if the Decision
19 might impinge on what he did.

20 MR. HOSKINS: Certainly, but that point was not appealed. We are going around in circles again.

21 THE CHAIRMAN: Whether that matters we will have to consider.

22 MR. HOSKINS: Indeed. The only point I would make is that it will feed into one of our other
23 points, but of course if the scope of the remittal is to be widened from the specific points in the
24 Judgment to also include discrimination I will also be making submissions when it comes to
25 timing, because that will obviously add to the burden that Ofcom has to deal with in the
26 investigating. It is all very well for Mr. Mercer to say there will not be very much more work,
27 but I am afraid that is not necessarily the case.

28 THE CHAIRMAN: If your first submission is right then it should not be too much more work.

29 MR. HOSKINS: No, but the point is if you were against me on that and say “Well, actually there
30 may be something in the Judgment” ----

31 THE CHAIRMAN: But we do not know. We do not know how that would reflect because we do not
32 know what investigations were done in relation to these 15 companies.

33 MR. HOSKINS: The first thing Ofcom will have to do is to go away and read through the Judgment
34 carefully. If you remit the discrimination part of the Judgment to Ofcom, we will have to go

1 through and read the Judgment very carefully in that context and then see whether further steps
2 are required in relation to the discrimination. Absolutely right, I cannot say “Oh, that means an
3 extra three months”, but nor can one say “Oh, that is no extra work”, there is a degree of
4 uncertainty when it comes to timing again, that is its highest, but we will come on to timing
5 separately.

6 (The Tribunal confer)

7 THE CHAIRMAN: What we will do is hear the other submissions and then retire for a moment and
8 consider it.

9 MR. HOSKINS: Obviously I am in your hands as to which order you wish to take them.

10 THE CHAIRMAN: I do not think it matters, really.

11 MR. HOSKINS: The next point is perhaps the suggested T-Mobile amendment to our undertaking,
12 or the proposal that we should enter undertakings – I do not know if it is appropriate to take
13 that one next?

14 THE CHAIRMAN: Yes.

15 MR. PICKFORD: I am sorry, ma’am, if I may shorten this. I have just taken instructions on that
16 point and, subject to a little bit more whispering, I think the position is that we would actually
17 withdraw our proposed amendments.

18 THE CHAIRMAN: Well do you want a moment to whisper a little longer?

19 MR. PICKFORD: Yes, if I might.

20 THE CHAIRMAN: Why do we not leave that over and assume that you are going to withdraw it. If
21 you are not we can deal with that at the end.

22 MR. PICKFORD: Certainly.

23 MR. HOSKINS: The next item I had on my list was the timetable for the new investigation. You
24 will have seen from our written submissions that the undertaking we are offering to the
25 Tribunal is to use our best endeavours to complete the new investigation, within six months if
26 we consider that there are no grounds for an infringement Decision, and within 12 months if
27 we decide to issue an infringement Decision. You will have seen from our written submissions
28 that that reflects, admittedly the maximum, but it reflects the Ofcom guidelines for
29 investigations. Also, I must say it reflects the reality of the situation which is that whether one
30 likes it or not, Ofcom has limited resources which must be managed in light of all its
31 obligations and commitments. I do not want to make the point too strongly but it is important
32 that the Tribunal should be careful because obviously it does not have an overview of all
33 Ofcom’s commitments and again, I cannot put it any higher than to say that there should be a
34 degree of deference (with a very small “d”) in dictating to Ofcom exactly how it should pursue

1 its work streams, but obviously there is a margin of appreciation of both sides. The Tribunal
2 has to be content that we are behaving appropriately and we would ask for a certain amount of
3 appreciation of our practical position.

4 That is the undertaking that Ofcom has offered, and on the other side of the table, if
5 you like, there is Floe's submission which is that any investigation and decisions by Ofcom
6 should be completed by 28th February next year, which is effectively three calendar months. It
7 appears that that suggestion should apply both to a non-infringement position and also to an
8 infringement position, so there is no distinction made.

9 THE CHAIRMAN: I suspect that is because that point had not been considered, because there must
10 be a distinction between the two.

11 MR. HOSKINS: Then Floe might say a month and a half for non-infringement, I do not know.

12 There is a distinction to be drawn.

13 THE CHAIRMAN: I will hear what Mr. Mercer says on that.

14 MR. HOSKINS: Precisely. In our submission the Floe suggestion is inappropriate and you will not
15 be surprised to hear that our suggestion is appropriate for two main types of reason. The first
16 reason concerns the scope of the matters remitted and the second reason concerns the previous
17 practice of the Tribunal when it has indicated time limits on remittance. If I can deal with the
18 next point, the scope of the remittal. We submit that we should be allowed six months to
19 establish that there are no grounds for action, so the negative, for the following reasons. First,
20 the Tribunal has identified a large number of specific issues for us to consider. These are set
21 out at particular paragraphs, 287, 338 and 339 of the Judgment. I make again the obvious
22 observation that many of those issues are far from straightforward. There is, in our submission,
23 no merit in requiring Ofcom to rush through the process because if nothing else, I am sure
24 everyone has learned is that this subject matter in this area is not easy to deal with and rushing
25 it would not be of benefit to any of the parties involved.

26 The second point is that the Tribunal has suggested that Ofcom may feel it is
27 appropriate to invite comments more widely than usual, given the subject matter of this case.
28 Again, I make the obvious point that any effect of a meaningful consultation takes time.

29 The third point, and this is an important point, is that it is important to remember that
30 the Decision actually only focused on one particular element of Chapter II prohibition, which
31 was the question of abuse. It did not reach definitive findings on the other ingredients of
32 Chapter II infringement, in particular what is the relevant market definition, and is Vodafone,
33 and obviously T-Mobile and the VIP case dominant in that market? It may well be –
34 depending on the view taken – if Ofcom approaches this by saying let us look the question of

1 abuse again first of all, the view may be taken this time round – this is not on instructions, it is
2 just me hypothesising – they might say actually there was not objective justification for
3 refusing to supply, but it does not necessarily then follow that there has been a breach of the
4 Chapter II prohibition. Before reaching a decision of whether a “no infringement” or an
5 “infringement” decision is appropriate Ofcom would, in those circumstances, have to consider
6 the relevant market and consider the question of dominance. That is just to reach the stage of
7 whether there should be a “no infringement decision”, because of course if Vodafone is not
8 dominant around the market that is the end of the matter. So it is not simply going back to the
9 already many issues which are in the Decision and the Judgment, it is perfectly possible it
10 would be far more broad in scope for reconsidering and I do not need to remind the Tribunal
11 that any issues of market definition in particular, but also dominance, are not easy. They tend
12 to require quite a large amount of work in terms of information gathering, and one can imagine
13 that in this context it may well be very hotly disputed, certainly by the mobile operators what
14 the market definition is and whether they are dominant in it. That is a very important factor to
15 take into account when one comes to timetable.

16 The final point, and probably the least important of the four, is that Ofcom will have
17 to deal with Floe and VIP cases at the same time, and whilst they have many common features
18 they are not identical. So that is why we say that six months for a decision of no infringement
19 is actually an appropriate timescale. I should say that still looking at this question of scope, let
20 us assume that Ofcom decides to go to the next stage which is it decides that an infringement
21 decision may be appropriate because there are then other factors which have to be taken into
22 account, and again I am looking there for the 12 months. As well as the six month factors
23 already identified if Ofcom decided that an infringement decision was going to be appropriate
24 it would, of course, have to follow the procedural requirements which are set down in
25 particular in s.31 of the Competition Act as amended, and also Rule 5 of the Office of Fair
26 Trading Rules (2004 version). In particular that requires a Statement of Objections to be issued
27 and an opportunity to be given to make representations to the persons affected or likely to be
28 affected by the decision. So that is another factor which has to be taken into account. So we
29 say that given all those factors, that is why six months and twelve months is appropriate, it is
30 not simply revisiting old grounds.

31 THE CHAIRMAN: Do we need for the time being to think about what would happen if an
32 infringement decision is taken because at that point one could then consider how long that is
33 going to take. We really only need to consider the period up to the time that a decision as to

1 either a no infringement or infringement decision is taken, and then one can look in the context
2 of what happens in the next period of time. Do you think that would be a sensible approach?

3 MR. HOSKINS: It is essentially a question for the Tribunal. Obviously my clients would like as
4 much freedom as possible to organise their affairs. It depends to what extent the Tribunal wants
5 to try - my primary submission is micro-management is not appropriate, but the extent to
6 which the Tribunal wants to – “control” is the wrong word – survey what is going on,
7 obviously if any parties are concerned about the scope of the investigation then they can raise
8 their concerns but as a first instance perhaps with the Tribunal but my primary submission is
9 that the Tribunal should basically trust Ofcom. We have given our undertaking we will use our
10 best endeavours and that really is an appropriate relationship between the Tribunal and a
11 responsible public body.

12 THE CHAIRMAN: But at the present stage it is very difficult to know if an infringement decision is
13 taken how long would be necessary because one does not know what the decision is and
14 therefore how appropriate and how difficult it is for the regulator etc., and who is going to be
15 involved, etc. and so to set that timetable up now is looking very much in the dark.

16 MR. HOSKINS: If I could take some instructions?

17 THE CHAIRMAN: Yes.

18 MR. HOSKINS: (After a pause) I do not think we have any further submissions to add, save that
19 because of the concerns about being able to manage our resources, if you like, the undertaking
20 that we have offered is the one that we are offering and that is why we think it is appropriate,
21 for the reasons I have described, that if we offer an undertaking in accordance with our
22 guidelines, I accept it is at the maximum level but I have explained why we think it should be
23 at the maximum level, that is the position.

24 I am sorry, I still have not developed the previous Tribunal Decisions which I wanted
25 to show what the practice has been in relation to setting timetables. I preface this by saying that
26 obviously each case has to be considered on its own merits, which is what I have just done.
27 However, it may be useful to look at what the Tribunal has done, certainly in the two other
28 cases I am aware of where this has arisen, and I should hand up copies of the relevant
29 Judgments. (Documents handed to the Tribunal)

30 The first Judgment I have handed up is one of the Rulings in *Freeserve* and Floe
31 refers to this Ruling in its written submissions. I think the best thing is if I ask the Tribunal to
32 read paras. 16 and 17 and then I can make submissions on them.

33 THE CHAIRMAN: Yes. (After a pause) Yes.

1 MR. HOSKINS: The position in *Freeserve* was that there was a non-infringement decision that was
2 challenged, and what the Tribunal said was that normally in that circumstance a period of three
3 months would be appropriate in normal circumstances to allow the Regulator to decide that
4 there was no infringement. I am drawing that distinction between no-infringement and
5 infringement – three months normal. However, in the circumstances of that case a period of
6 six months was allowed.

7 THE CHAIRMAN: The history of this case...this is an extension of time?

8 MR. HOSKINS: It is. Initially Ofcom had itself offered to deal with the matter within three months,
9 and when it realised that three months was not going to be sufficient, it came back and asked
10 for an extension of time which would have taken up to seven and a half months, and the
11 Tribunal in the end said “We will give you six months”.

12 THE CHAIRMAN: In fact it gave an additional three months to the original three months?

13 MR. HOSKINS: Exactly. There are three important facts, normal three months in the circumstances
14 of this case, six months, for a non-infringement decision. However, what para.17 shows is that
15 if the Regulator then considers that it is appropriate to move on to an infringement decision
16 then more time is needed over the six months.

17 THE CHAIRMAN: That is what I said, maybe at this stage, we do not know where we are for the
18 second, and in *Freeserve* was it a dual order, or was it a single order?

19 MR. HOSKINS: I must take instructions on that. (After a pause) I will need to take instructions on
20 that. Certainly, from reading the Judgment it appears that it was a timetable that was set for no
21 infringement. There is no discussion here of whether there was a timetable for infringement. I
22 suppose that is not surprising, because they were coming back for extra time.

23 THE CHAIRMAN: It may be putting the cart before the horse to set what we could call “dual”
24 timetables, but in *Freeserve* the Tribunal was faced with having given three months, and at the
25 end of the three months the work had not yet been done and therefore they had to give more
26 time, and the question was “how long?” and another three months was given.

27 MR. HOSKINS: That is correct.

28 THE CHAIRMAN: So as regards this Decision I can see you might say that shows that these things
29 take about six months – July.

30 MR. HOSKINS: Yes. What this case shows I say is that one should be very careful inserting time
31 limits. In my submission the Tribunal should be very slow to take up a situation where it is
32 micro-managing an investigation. I have to put it strongly because Ofcom feels very strongly
33 and we actually submit it is not appropriate for the Tribunal, which does not have an overview

1 of Ofcom's workload, to try to micro-manage. That is why we have offered the undertaking in
2 accordance with our guidelines.

3 THE CHAIRMAN: Well it is not in accordance with the guidelines, because the guidelines show a
4 maximum of six months.

5 MR. HOSKINS: Well, with respect, it is in accordance with the guidelines, because we say this is a
6 case which is at the maximum. So we do say it is in accordance with the guidelines. We accept
7 it is at the maximum, but for the reasons I have explained, which I am not going to go over
8 again, our submission is it is very clear that this is not a run of the mill case – that leaps out
9 from the Judgment itself.

10 THE CHAIRMAN: What has happened in *Freeserve*, was the decision taken by July?

11 MR. HOSKINS: I am instructed that there was a dual order in *Freeserve* of three months extended
12 to six, and then six months. What has happened in *Freeserve* is that a non-infringement
13 decision was issued within six months, and that non-infringement decision has now been
14 appealed before the Tribunal.

15 THE CHAIRMAN: Thank you.

16 MR. HOSKINS: The other example is the *Association of British Insurers*' case.

17 THE CHAIRMAN: Which has not ...

18 MR. HOSKINS: Well there is no Judgment, the *Associated British Insurers*' was a very odd case,
19 because the Appeal Notice was put in and the normal time ran for the OFT to put in a defence,
20 and rather than put in a defence the OFT indicated that it did not wish to defend its decision, so
21 there was simply then a short hearing followed by directions for remittal, so there was no
22 substantive hearing. Again, it is important to note that the approach taken by the Tribunal in
23 terms of the remittal was actually a very cautious one. If I could ask you to look at the terms of
24 the order. It is appendix 2 to our written submissions, the undertaking is on the second page –
25 you see about half way down:

26 "Now therefore, the OFT hereby gives the Tribunal the following undertaking. The
27 OFT will consider for the purpose of sections 2 and 25(2) and (6) of the Competition
28 Act (as Amended) whether there are reasonable grounds for suspecting that the GTA
29 may affect trade from the United Kingdom and has, or has had, as its object to affect
30 prevention, restriction or distortion of competition within the United Kingdom having
31 regard to the following factors..."

32 Now it is very important to understand that sections 25(2) and (6) of the Competition Act, they
33 are the ones that were inserted in the amendments which took place in the last year, are the
34 sections which deal with the decision of the Office whether to open an investigation or not. So

1 what the Tribunal was saying is that the OFT has six months in which to use its best
2 endeavours in order to decide whether to open an investigation or not, not six months to decide
3 whether to adopt a non-infringement decision – simply six months to decide whether to
4 investigate or not. So the timetable in ABI was (we say correctly) a very cautious one.

5 THE CHAIRMAN: Is that correct? If you look at the end of para. 1: “And accordingly decide
6 whether they should propose to make a decision and take the action they consider appropriate”,
7 because it says s.2 and s.25 and s.31.

8 MR. HOSKINS: I am sorry, if you give me a second. (After a pause) Madam, I agree the order is
9 ambiguous.

10 THE CHAIRMAN: I can probably clarify it within the Tribunal. I think my understanding is that it
11 is not the limited way you put it.

12 MR. HOSKINS: I have to confess I was actually counsel for the OFT in that case. It is with full
13 disclosure I say that I think that that order is ambiguous, because as I have said the heading
14 relates only to s.25(2) and (6), but the tail refers to s.31.

15 THE CHAIRMAN: I am looking at s.31, it does not seem to have anything to do with it.

16 MR. HOSKINS: I think the Purple Book is now out of date. The Competition Act was amended
17 within the last year, so s.25 and s.26 deal with whether the OFT has reasonable grounds for
18 suspecting that there is an infringement, so as to cause it to open an investigation; and s.31
19 relates to decisions following an investigation, i.e. the issuing of a Statement of Objections and
20 the ability to give representations. Madam, we do not have to worry too much, it is probably
21 more for the OFT to worry about what that particular Order means. But what it does show is,
22 again, at least a cautious approach because six months are given for a non-infringement
23 decision on one reading of the Order, and I think that is as far as we need to take it for our
24 purposes this morning.

25 Madam, unless I can help you further those are our submissions, but again I
26 apologise for repeating myself, but I do have to say that Ofcom’s position is that the proper
27 relationship between the Tribunal and Ofcom is that Ofcom should have a sufficient margin of
28 appreciation to organise its own affairs, and we submit that six months and 12 months in the
29 context of this case is clearly appropriate.

30 THE CHAIRMAN: You handed up the permission to amend judgment in this case – did you intend
31 to hand that up? Is it in relation to another point?

32 MR. HOSKINS: I think that is an error on my part. It may be useful to have it, but I have already
33 referred to that in the context of the discrimination argument, but it may be useful for the
34 Tribunal to have that when it deliberates the discrimination point.

1 THE CHAIRMAN: We will hear Mr. Mercer.

2 MR. MERCER: As Mr. Hoskins said, ma'am, each case must be looked at on its own merits, and
3 what may be applicable in a competition dispute between two monoliths in the industry is one
4 thing, and where poor old Floe comes in is another point altogether. I ask you to look at the
5 dates when the original complaint was made back in 2003 and look how long it has taken us to
6 get here. We were not given any interim measures although we applied for them. When the
7 company started with its complaint it was not in administration – it now is – and Mr. Hoskins
8 asks for more time. He reiterates a point I have heard given before by Ofcom that how we deal
9 with these things is our affair. The next point, the relationship between the CAT and Ofcom is
10 that it is remitted and then “we will look after it”. I do not think the interests of justice would
11 be served by that.

12 I think in this case if Mr. Hoskins really thinks that there is a difficulty with market
13 definition in a case where Vodafone controls network termination on its own network – I will
14 not go back to the part SIMs play in that, ma'am – but I think the question is much easier than
15 he imagines, and there has been lots of work in that area in relation to other matters that have
16 been before the courts.

17 We are at an interesting point in terms of the regulation of electronic communications
18 services in this country, because we have, along with the rest of Europe, to decide whether or
19 not competition law is really a route for regulation, or whether we should have sectoral, direct
20 regulation. I do think it does the argument that it should be left to competition law no good
21 whatsoever to have a prolonged fight. We need, in the case of small companies developing in
22 new markets, speed. That has been said in public for some years. I remember back in 1994/95
23 when Mr. Cruickshank (the then Director General of Telecommunications) was having
24 hearings about whether or not to insert a fair competition provision in people's licences, people
25 standing up then and saying that it is all very well putting conditions in licences, etc. but unless
26 we get speed of regulatory action there is no point, and in this case as time goes on, ma'am, the
27 Appellant will just not be there any longer, and will not be in a position to come out of
28 administration and take advantage of any decision it gets. I apologise if Mr. Hoskins was
29 uncertain as to what I meant by “decision”. In fact, I clarified that in a set of supplementary
30 submissions, in fact headed “VIP” because it was in response to something in that matter
31 yesterday, what I meant was the decision as to whether or not there has been an infringement.

32 THE CHAIRMAN: I thought that is what you meant.

33 MR. MERCER: I, like you, ma'am, then think that that, like any subsequent issues, may have to
34 come back to the Tribunal, and we may have to look at the timetable then going forward, but

1 we need to know what is happening. I think it is a matter of the interests of justice that this is
2 dealt with quickly. I have to say that the view was put to me, when I was secretary of a
3 statutory corporation which was a Regulator, that pleading poverty was never a defence to not
4 doing something, or not doing something quickly enough. If Ofcom does not have the
5 resources, then it should go back to its sponsoring departments and sort that out, and maybe it
6 should look at its priorities.

7 It is a standing point amongst people in both the broadcast and telecommunications'
8 industries that every day another consultation document comes from Ofcom, and whether all of
9 these it has to produce, ma'am I do not know, I have not done the analysis, but I suspect that it
10 is doing some work voluntarily according to work programmes where resources could be
11 diverted, and it must make those choices. You only have to look at its website to see the
12 number of consultations and, when it decides it is right it can foreshorten consultations, even
13 on very, very important matters like digital replacement licences very recently. It foreshortened
14 its normal consultation periods in respect of those licences when it thought it had good need. It
15 can do all these things, ma'am, it should do all these things, and it should do it very quickly.
16 The only question on which I would show some leeway is if Ofcom were to decide that this
17 whole matter needs a thorough shaking out before they begin considering the matter again. I
18 think there is an argument, ma'am, that Ofcom might be allowed a period of time – put in the
19 vernacular – to get its act together. That is perhaps giving a period of general thought, and
20 discussion before they look at the precise decision. Even so, ma'am, I would imagine that the
21 first stage of the decision making process as to infringement or not could take place by April.

22 THE CHAIRMAN: That is five months.

23 MR. MERCER: Three months for a decision and a period of six to eight weeks for perhaps looking
24 at the matter more generally. There is also an argument that actually those two things could go
25 hand in hand. I am not going to go back across the authorities, ma'am, because as I started by
26 saying this is a matter of what is right in each individual circumstance, and what is right here –
27 where you have a very small company – up against a very large company is that speed is of the
28 essence, and that is to be followed through, and enforced or it diminishes and demeans the use
29 of competition powers as a means of settling these disputes. As, ma'am you are undoubtedly
30 aware, in the original complaint there was reference to Ofcom by Floe. There was reference to
31 both sectoral regulation and competition regulation and Ofcom made the decision to go down
32 the competition route, and the only appeal against that decision ma'am is by way of judicial
33 review. So we did not have a great deal of choice, Hobson's choice indeed, as to what route
34 was taken, and we should not have to suffer because they have gone this particular way.

1 Thank you, ma'am.

2 THE CHAIRMAN: Mr. Hoskins, you have put forward a number of hypotheticals which you rely
3 on for saying that it is going to take or may take a long time. First of all, whether consultation
4 happens or does not happen is a matter for Ofcom; whether it is decided that it is necessary at
5 the outset to deal with the relevant market and dominance - those matters have not, from your
6 submissions, yet been considered, so one does not know whether or not one should timetable
7 them in, or timetable them out. That is the first thought that was going through my head.

8 The second thought that is going through my head is this. This is not a case where
9 Ofcom are starting from scratch, they have done a huge amount of work (a) originally in the
10 Decision; and (b) for the purposes of these hearings in this Appeal, so one is not starting from
11 the guideline point with a clean sheet and having to build, one is starting from the position
12 where a lot of the information has been obtained.

13 Also, this is a case where the matter has been dealt with once. Floe, the complainant,
14 has had to come here, a decision has been taken and on the basis of the Judgment the matter is
15 remitted and Ofcom are asked to consider the matter again. Now, those circumstances it seems
16 to me at the moment are very different from the circumstances of a first initial investigation.
17 Mr. Mercer refers to priorities, and I think it would be helpful to know how Ofcom consider
18 the priorities of a re-investigation as against an initial investigation.

19 MR. HOSKINS: There are six points there. First, if we are looking at what is necessary to be fair to
20 all involved, and I include Ofcom in this, Mr. Mercer said that five months is appropriate.
21 Now, if Ofcom is asking for six months, and Floe says that five months is appropriate then,
22 with respect, we should only be arguing about the difference between five months and six
23 months because that should be the primary interest here, in fairness, as between the parties.

24 There is a classic "Catch 22" for the Regulators here. Mr. Mercer referred to the
25 initial complaint having been made in 2003. Now, what happened, in fact, was that Ofcom did
26 deal with this matter very quickly initially. It reached its non-infringement decision within four
27 months. It tried to act speedily. So what happens, the Regulator gets a complaint, it deals with
28 it on a practical basis as quickly as possible, it reaches a non-infringement decision which the
29 complainant does not like, and then we have an Appeal which takes as long as an Appeal takes
30 - there is no criticism there, that is what an Appeal takes - but you cannot have your cake and
31 eat it. You cannot say to a Regulator "We want you to investigate this to the nth degree and we
32 want you to do this immediately." Now, what has happened is that Ofcom reached what it
33 considered to be an appropriate decision. It said it was going to issue a decision in a period of
34 four months. We have had proceedings before the Tribunal, we have had a Judgment but, with

1 respect, the Judgment does not actually decide many of the matters. It decides the contractual
2 dispute, but what the Judgment does – and again no criticism intended – is to say that if this is
3 going to be resolved you need to go back and look at a long list of things.

4 Yes, there has been an initial investigation but there are a large number of new
5 matters, difficult matters, that have been raised, so one can say “yes”, it has already been
6 started, but that does not really help us. The question is “How do we go forward from here?”
7 and the bottom line is that there is a substantial amount of work to be done, and there is no
8 point in that work being rushed, because what one might say, and certainly Ofcom does not say
9 it, but the initial decision of four months did not consider everything because the Tribunal has
10 told us it did not. So what is the point in now saying to Ofcom “you must do this very, very
11 quickly”. The interest should be in saying “You, Ofcom, must do as thorough job as possible
12 to take account of the matters that we have raised”.

13 In terms of the hypotheticals, if you like, consultation in the relevant markets, I start
14 from the position that there are already a large number of points that have to be considered,
15 because they come out of the Tribunal’s Judgment, they said “You must consider these things”.
16 My point is that depending on the view taken in relation to those points, which only go to the
17 question of abuse it may, in order to reach a non-infringement decision, be necessary to go into
18 the market definitions. We do not know that yet. I do not think Ofcom has decided whether it
19 plunges straight into an investigation of the market and dominance at the same time. Again, it
20 is Catch 22 because either you go into the abuse points first, which is again a perfectly
21 acceptable way for a regulatory body to act, it is absolutely standard practice for regulatory
22 bodies and, indeed, for certain courts and tribunals to say that there is one issue which is
23 potentially determinative of the case, rather than pour resources into a full investigation we will
24 focus on that first, and it is only if we come to a certain conclusion we then widen it. That is an
25 appropriate way of doing things, and we submit that if that is what Ofcom decides to do it
26 should be allowed that leeway in this case. It would be very, very unfortunate if Ofcom had to
27 approach every complaint, and indeed, every remittal by launching a full investigation into all
28 factors. That cannot be right.

29 THE CHAIRMAN: I do not think that is being suggested, Mr. Hoskins. The point I was trying to
30 make was that because there were hypotheticals it is only, as I understand your submission, if
31 those hypotheticals become real, and Ofcom take the wider course, which is a matter for
32 Ofcom, that you need six months.

33 MR. HOSKINS: The other point is the consultation ----

34 THE CHAIRMAN: Again a hypothetical ----

1 MR. HOSKINS: Well no ----

2 THE CHAIRMAN: -- because it is a matter that we said you might, it is a matter for Ofcom whether
3 they do or not.

4 MR. HOSKINS: It is, ma'am. The consultation point goes in the first instance to the investigation of
5 abuse, and again unless one is going to get into a situation where the Tribunal requires Ofcom
6 to attend, and give chapter and verse on each stage of the investigation then, in our submission,
7 that is simply not appropriate. If a direction is going to be given it should be at a general level,
8 for example, you have six months to come to a non-infringement decision. We would not be
9 prepared to give an undertaking which said, for example, "You have three months to look at
10 the question of abuse, and then you must come back and report."

11 THE CHAIRMAN: I am not suggesting that.

12 MR. HOSKINS: So, ma'am, there are hypotheticals, but that goes to the point that Ofcom must be
13 allowed a reasonable amount of leeway to organise its own affairs. In terms of what priorities
14 Ofcom has as to re-investigations as opposed to initial investigations I need to take instructions
15 on that particular point. I do say that where the difference between the parties is five months
16 and six months, then really that should be the focus of the decision.

17 THE CHAIRMAN: Shall we hear Mr. Mercer on that point – I think he wants to say something?

18 MR. MERCER: Yes. Amazing how things are twisted by lawyers, is it not? What I had in mind
19 actually was a decision by All Fools' Day, which is 1st April – I think the phrase I used was
20 "by April". I did not have the intention to suggest that Ofcom should have the whole of the
21 month to do it, which would be one extra month.

22 THE CHAIRMAN: To be fair, I wrote down "...could take place by April", and then you said
23 "Three months for decision, and six to eight weeks for looking more generally" ----

24 MR. MERCER: That was my mistake, I meant four to six weeks.

25 (The Tribunal confer)

26 THE CHAIRMAN: Mr. Hoskins, would you like to take instructions without us here?

27 MR. HOSKINS: I just have!

28 THE CHAIRMAN: Right.

29 MR. HOSKINS: I can give you the answer. In terms of priorities, first of all Ofcom has to prioritise
30 those matters it has a statutory duty to deal with in accordance with the statutory timetable.
31 Once it has prioritised those matters then there is no magic in the difference between an
32 investigation and a re-investigation. The question of whether to prioritise any type of
33 investigation will depend on the subject matter that is at stake, and in particular, for example,
34 where there is a potential for serious consumer detriment, that matter will be prioritised. So it is

1 perfectly possible that one will have an initial investigation with serious consumer detriment
2 that would be prioritised over a new investigation if that was felt to be appropriate. There is no
3 magic in a new investigation; it depends on the subject matter.

4 THE CHAIRMAN: Can I refer you to para.11 of the *Freeserve* case? We should have your
5 submissions on that.

6 MR. HOSKINS: Madam, yes, that is one of the factors to be taken into account, and in *Freeserve*
7 what was at issue was the provision of broadband, which you will see at para.12 is where it is
8 developed:

9 “These considerations apply particularly in a case where the allegation is one of
10 predatory pricing or margin squeeze in a fast developing market of national
11 importance such as broadband.”

12 Clearly, nationwide broadband market, I would submit is of greater importance than the
13 particular commercial activities that are at dispute in the present case. So yes, that is one of the
14 factors, but if we are talking about the wider public interest, *Freeserve* was up **there** on the
15 scale, but, with respect, *Floe* is approaching the bottom of the scale.

16 THE CHAIRMAN: But if one looks at para.11 I do not read that to say it is only in cases of
17 broadband that there should be speedy resolution, what it is saying is:

18 “The Tribunal attaches importance to the speedy resolution of matters remitted by it
19 to the relevant competition authority, or where, as in this case, the competition
20 authority concerned has undertaken to take a new decision to replace an earlier
21 decision....The public interest in matters being disposed of quickly and efficiently is
22 self-evident, from the point of view of both the complainant and the undertaking
23 complained against. In addition, the matter is not confined to the interests of the
24 immediate parties, nor those of the competition authority; the wider public interest in
25 the existence of a fair competitive market for the benefit of consumers and users is of
26 paramount importance.”

27 That is a general paragraph, and then para.12 it says that these considerations apply
28 particularly in the case of *Freeserve*, which was a broadband case.

29 MR. HOSKINS: Madam, I absolutely accept that there is interest in the quick and efficient disposal
30 of disputes. That is why Ofcom has its guidelines, there is no denying that. But there is no
31 standard which says “must be quick”. It must be quick. It must be as thorough as necessary,
32 hopefully we reach the correct answer, but simply saying it must be speedy, with all due
33 respect does not take us very much further. We submit that is precisely why we have
34 guidelines of six months and 12 months. It is because we recognise that is the policy.

1 MR. MERCER: Ma'am, I am afraid there is something I really cannot let go that Mr. Hoskins has
2 just said. First, I will point out that Mr. Hoskins' attitude, which I think reflects that of his
3 clients, we are down **here** in importance and the big broadband issues are up **here**, is so
4 typical of what we have discovered during this matter; and yet, as I said to the Tribunal
5 (differently constituted) at one of the early hearings, there are a great many companies who
6 are interested in the outcome of this matter, not all of them as large as Vodafone, but a great
7 many, and to say there is no serious consumer detriment at stake here is actually, ma'am,
8 verging on the laughable, because you can start to work out on the information already
9 provided as to the difference in rates that the public might pay using GSM Gateways or not
10 for getting on-net access. There is a considerable amount of money, consumers' money, and
11 public interest in this matter. But it is typical, I am afraid, ma'am, of Ofcom not to have
12 recognised that.

13 Thank you, ma'am.

14 MR. HOSKINS: Madam, I do not think I need to respond to those comments. I have nothing else to
15 add.

16 THE CHAIRMAN: Does that conclude the argument on time?

17 MR. HOSKINS: It does, madam, yes, that is all I have to say.

18 THE CHAIRMAN: So the next matter is costs?

19 MR. HOSKINS: It is costs, yes. Madam, just to set out the nature of the dispute, Floe seeks costs
20 against Ofcom and Vodafone on an indemnity basis. I will deal with exactly how we say the
21 award of costs should be dealt with, and it will not surprise you to know that we oppose the
22 application for any costs on an indemnity basis.

23 THE CHAIRMAN: Do you oppose an application for costs at all?

24 MR. HOSKINS: I am going to make submissions as to how the costs should be dealt with, but yes, I
25 oppose an order that Ofcom should pay all of Floe's costs in the Appeal.

26 By way of preliminary observation, because this is a factor that Floe makes great play
27 of in its written submissions on costs, the fact that Floe is in administration is completely
28 irrelevant to the question of costs. It is either entitled to costs, or it is not, but it cannot be
29 awarded more costs than it would otherwise be entitled to simply because it is in
30 administration. It is a false point.

31 In relation to the costs award we submit the appropriate order is this – I will say what
32 it is and then I will explain why I say what it is – we say that Ofcom should pay two-thirds of
33 Floe's costs in respect of the Appeal, save those costs occasioned by Vodafone. Secondly, we
34 say that Floe should pay Ofcom one-third of its costs in respect of the Appeal. Thirdly, we

1 say that the parties should seek to reach agreement as to the amount of costs recoverable
2 failing which the amount of costs should be assessed pursuant to Rule 55(3) of the Tribunal's
3 Rules, following an application by either party. We say that is the appropriate order for the
4 following reasons.

5 First of all, I am not going to step into the debate between Vodafone and Floe, but
6 simply to say that depending on what view the Tribunal reaches, then Ofcom should not be
7 liable for costs which were incurred by Floe in dealing with specific arguments and evidence
8 raised by Vodafone.

9 THE CHAIRMAN: Are you going to tell us what those are?

10 MR. HOSKINS: I am going to leave that simply to Vodafone and Floe to make submissions on that.

11 THE CHAIRMAN: Well you are saying that you do not want to pay those costs, I think we need to
12 know what the particular items are that you are saying that you should not pay.

13 MR. HOSKINS: I propose the order on the basis that the Tribunal finds for Floe in its application
14 against Vodafone, and the Tribunal will hear detailed submissions from Floe as to why
15 Vodafone should pay its share of its costs, and from Vodafone as to why it should not pay
16 Floe's costs. We are quite content to take whatever comes out of that debate.

17 THE CHAIRMAN: But the question is what is this Tribunal going to order, and just assume for the
18 moment that the Tribunal decides – I have no idea what it is going to decide, but just assume
19 for the moment that it decides that Vodafone should not have to pay any costs, then are you
20 saying that we take some costs out of yours in any event?

21 MR. HOSKINS: No, madam, if that is the order that Vodafone is not to pay any of Floe's costs then
22 you can simply strike out the first limb of my proposed order the words "...save those costs
23 occasioned by Vodafone". That is what I say we will leave it to ----

24 THE CHAIRMAN: No, then I understand. I thought you were saying that there were certain costs
25 that you were not going to pay in any event.

26 MR. HOSKINS: I am sorry, madam, I over complicated it. We are in the Tribunal's hands having
27 had submissions from those parties.

28 THE CHAIRMAN: Right.

29 MR. HOSKINS: The second point is this: what we want to focus on, which is the costs as between
30 Floe and Ofcom, but you are well aware that the CPR introduced an issues based approach to
31 costs. One sees that in CPR Rule 44.3(4)(b), and one sees it in the commentary at 44.3/10 of
32 the White Book. I do not think I need to take you to those paragraphs, you are well aware of
33 the issues based approach. We submit that the Tribunal should adopt a similar approach to
34 costs here, that is the modern way, if I can put it like that, of dealing with costs. If one

1 accepts an issues based approach then we submit that the matter becomes pretty straight
2 forward, because Floe relies on three principal heads of argument. There was the Primary
3 Argument, the first alternative argument and the second alternative argument and on the
4 Primary Argument Floe effectively lost and Ofcom won. The order that I proposed simply
5 recognises that Floe succeeded on two out of its three arguments, and that Ofcom succeeded
6 on one of the three arguments.

7 There is one point I should pick up from Floe's written submissions on the award of
8 costs, because it does make a reference to the Primary Argument. It is at para.3(c) of Floe's
9 application for an award of costs.

10 THE CHAIRMAN: Yes.

11 MR. HOSKINS: I trust the Tribunal have read these? I must confess I found it quite difficult to
12 follow where the point led. However, it seems from the first sentence that the point is based
13 on a premise because para.(c) says:

14 "In passing the attention of the Tribunal is drawn to the fact that Ofcom submitted
15 that the true construction of the licence was a matter introduced by Ofcom in
16 response to Floe's Primary Argument. This in turn means...." etc.

17 And the logic of the point being made flows from that assumption:

18 "Ofcom submitted that the true construction of the licence was a matter introduced by
19 Ofcom in response to the Primary Argument."

20 That premise is a false one because it was rejected at para.276 of the Judgment.

21 "Ofcom submitted that the true construction of the licence was a matter introduced by
22 Ofcom in response to Floe's Primary Argument".

23 The tribunal goes on to reject that.

24 So whatever the argument being made at para.3(c) of Floe's written submissions is, it
25 is based on a false premise.

26 Madam, that is all I want to say in relation to the award of costs as between the
27 parties. The final point on costs is whether they should be awarded on a standard or an
28 indemnity basis. Floe has asked for costs on an indemnity basis, but it has not put forward
29 any reasoning whatsoever as to why that would be appropriate in this case. We submit that
30 there is nothing in Ofcom's conduct in this case that would lead a Tribunal to award costs on
31 anything than the standard basis.

32 Unless there is anything else on costs, madam, those are our submissions.

33 THE CHAIRMAN: Are we going to deal with VIP separately afterwards?

1 MR. HOSKINS: I thought it was probably best to come to VIP separately. The position is actually
2 different for us in relation to VIP so there will be a different debate and I thought it sensible
3 to leave that.

4 THE CHAIRMAN: Mr. Mercer, shall we hear from Vodafone first, do you think? Then you can
5 reply to both?

6 MR. MERCER: I think that probably would be a good use of time, ma'am.

7 MR. WISKING: Madam, before I get to the question of costs I would just like to raise very briefly
8 three matters in relation to the form of the order which we have heard about this morning.
9 First, in relation to this question of the discrimination argument, all we say there is that I
10 think Mr. Hoskins has said all there is to be said on that point, and we support his
11 submission. We are obviously concerned that the scope of the investigation does not go
12 spiralling out of control.

13 The second point is in relation to T-Mobile's proposal (which we supported) to amend
14 the form of the order proposed by Ofcom. We have discussed that and taken instructions and,
15 in the light of T-Mobile's proposal to withdraw that proposed amendment we would do the
16 same, so that would deal with that point.

17 THE CHAIRMAN: We did not get from T-Mobile whether it was – oh, it is now.

18 MR. PICKFORD: It is. I can confirm for the Tribunal that T-Mobile will be withdrawing that
19 proposal.

20 MR. WISKING: The third point is the question of timing. For us there are two issues, one is that we
21 are obviously concerned that we should have proper opportunity to make submissions,
22 respond to any s.26 notices that Ofcom should choose to send to us, and that Ofcom should
23 have proper opportunity to consider those. Having seen what Ofcom is proposing in terms of
24 its work programme, their submission that they would seek their best endeavours to reach
25 either a non-infringement decision or issue a statement of objections within six months seems
26 reasonable to us, and we would not oppose that at all.

27 The second point, which I think is very important, is our concern that the decision not
28 be rushed. We do not want to be back before the Tribunal with another appeal, and so we are
29 very concerned that it is done properly and thoroughly, and that we can be content with the
30 outcome of the investigation so we would say that that also weighs in favour of the timetable
31 proposed by Ofcom.

32 The other matter then relates to costs. We have set out our submission fairly fully on
33 that point in the submissions we filed with the Tribunal yesterday morning and those
34 provided on Monday night. I do not propose to go into those in the same level of detail,

1 unless the Tribunal wishes to ask about any particular points raised. Just to set out our
2 position on costs. First of all, we oppose an order that costs be awarded against Vodafone at
3 all. We think that it is appropriate that no order be made, and that is consistent with the
4 general position of the Tribunal as regards Interveners, that they should be costs neutral, that
5 they should not be discouraged in intervening in cases before the Tribunal at the risk of costs'
6 awards.

7 The second point is that in the event the Tribunal is against me on that I would say
8 that the amount claimed by Floe towards its costs in all the circumstances is excessive at 25
9 per cent.

10 Thirdly, the claim for costs on an indemnity basis is also opposed. If I could just
11 briefly deal with those three points. In relation to the costs' order generally, there are two
12 issues, first of all whether Vodafone has materially added to Floe's costs in these
13 proceedings; and secondly, whether there are special circumstances which would warrant the
14 Tribunal making an order for costs against Vodafone. It is our submission that neither of
15 those is satisfied. As regards to additional costs Floe points to two things. One is Vodafone's
16 Statement of Intervention and the second is the process of agreeing facts in these
17 proceedings.

18 As regards the Statement of Intervention, the complaint appears to be its length. Now,
19 having looked at it again, the submissions in the Statement of Intervention were 15 pages of
20 which 10 were occupied dealing with the Primary Argument in which, as we heard, Floe was
21 unsuccessful. Vodafone set out submission at length – if that is considered lengthy – because
22 it was conscious of its role as an Intervener and that it would have limited opportunity to
23 make submissions at the hearing and therefore it was important that its position be set out
24 fully in writing. Furthermore, Floe accepts there were no new points raised, and simply put
25 the arguments in a slightly different way from Ofcom. In my submission that is a perfectly
26 proper role for an Intervener in these proceedings.

27 As regards the Statement of Agreed Facts, the process that the parties took on that
28 matter were, as far as possible, to try and deal with it as efficiently as possible, so Ofcom
29 dealt with Vodafone and tried to reach a common position. It then went to Floe, so as far as
30 Floe was concerned it was dealing principally with Ofcom. Vodafone only got involved in
31 those discussions where it was necessary because the Tribunal had asked the parties to deal
32 with specific topics, some of which were in the direct knowledge of Vodafone – in particular
33 matters relating to the connection and disconnection of Floe. So, in a sense, having Vodafone
34 directly involved in those discussion was, in fact, the most efficient way of dealing with them

1 and, as the Tribunal will remember from the last Case Management Conference in these
2 proceedings, the problem with the agreed facts was that Floe was seeking to introduce quite
3 complicated and, in our submission, irrelevant material on the question of the Primary
4 Argument, and the Tribunal was very concerned that it not turn into another major dispute,
5 and ultimately Floe did not pursue that. It did not seek to prove those matters at the hearing
6 and, if anything caused costs in relation to the agreed facts, it was that diversion introduced
7 by Floe. So those are the only two matters that Floe relies upon as adding to the costs of
8 these proceedings as a result of Vodafone's intervention and, in our submission, they do not
9 and they are certainly not material additional costs.

10 The second point is there are no special circumstances in this case which would
11 warrant an order for costs against Vodafone. The Tribunal has to look at the case in the
12 round, and this case is very similar to the *Freeserve* case where costs were not awarded
13 against BT which was effectively an unsuccessful Intervener. *Freeserve* was, as you have
14 heard, successful at least in part in its Appeal, and this is very similar. Floe was unsuccessful
15 on Primary Argument, it did not pursue its second alternative argument, so it won some and
16 it lost some, and taking the case in the round – bearing in mind policy considerations – this is
17 not an appropriate case for an award of costs against Vodafone as an Intervener.

18 In terms of the amount I say that, given what I have said about the Statement of
19 Intervention, and the agreed facts, seeking a contribution of 25 per cent. is frankly excessive.
20 If one looks at the two cases where costs were awarded against Interveners such as GISC and
21 the IBA case, the Tribunal ordered the Interveners pay 15 per cent. of the Appellant's costs in
22 GISC and in IBA it was 17.5 per cent. and there were two Interveners in that case.

23 It is also clear from the Judgment that those Interveners took a much more active role
24 in the case. In GISC the Intervener ran an argument which the OFT did not run and was
25 unsuccessful. In IBA the Interveners introduced 1200 pages of documents, so it is quite
26 different from this case.

27 In relation to costs on an indemnity basis, I agree with Mr. Hoskins. No basis has
28 been advanced for costs to be awarded on that basis. It is clear from the procedure rules that
29 there has to be something else other than the ordinary run of litigation to move the Tribunal
30 to make an award of costs on that basis, and furthermore it would be inconsistent with the
31 practice of the Tribunal to date, which has been very concerned with controlling costs,
32 ensuring costs are proportionate to make effectively a penal award of costs against an
33 Intervener in this case.

1 That is all I wanted to say about costs unless there was a particular matter the Tribunal
2 wanted to ask about. As I say, it is fully set out in our written submissions.

3 THE CHAIRMAN: Mr. Mercer?

4 MR. MERCER: What we are looking for, ma'am, is what is just in the circumstances, and can I say
5 that the only rule about costs in this Tribunal, so I understand it, is that there is no rule. We
6 have to look at exactly who we are and where we are, taking into account some of the
7 guidelines that have been given in previous cases. You may have another idea, ma'am and
8 put me right on it, but I do not think this is a case where there is a draw - what was applied
9 for has been given by the Tribunal. I totally agree with Mr. Hoskins in his comment earlier
10 this morning that this is one of those cases where things do seem to change over time, and
11 one of the things that changed very, very dramatically, ma'am was Ofcom disowning a large
12 part of its original Decision. A large part of its original Decision suddenly became very
13 inconvenient, and they changed it. I do not intend, ma'am, to quote back to you the
14 Tribunal's own words in the Judgment in respect of what might have occurred at that time.
15 But if, as the Tribunal suggests, ma'am the matter should then have been halted, and looked
16 at anew, you can appreciate from the date of the receipt of the Defence to today how much in
17 terms of the proportion of costs my clients would have saved – it is a very substantial
18 proportion. Their decision would have been looked at again, and they would not have to be
19 here now.

20 In addition, Vodafone and Ofcom spent quite a lot of effort in opposing the
21 application to amend the Notice of Appeal, and yet it must have been apparent to them,
22 having read the application to amend, that what was being inserted was essentially a variation
23 of a legal argument and, as far as Vodafone is concerned, we would – without it becoming
24 too granular a process – merely ask that the Tribunal weigh in one hand the Defence and in
25 the other the Statement of Intervention from Vodafone. Unfortunately, I only have PDF'd
26 and copied versions, I cannot do a word count between the two, but the Tribunal might ask
27 itself whether it is unusual in the circumstances to have what amounts, in effect, to a second
28 defence.

29 As far as Vodafone are concerned, I would point out that they were happy to pick up
30 and run with the parts of the Decision letter that were disowned by Ofcom, and that is
31 apparent from their skeleton, and from their Statement of Intervention.

32 Dealing with Vodafone's points in its submission, I really do find it doubtful that
33 Vodafone would have been deterred from intervening in this matter, simply by having costs
34 awarded against it. There may be some Interveners, ma'am, who would be in that position

1 but I do not think that Vodafone Ltd. falls into that category. Mr. Wisking, at para.12.3 of
2 his submissions refers to the *Freeserve* case and draws your attention to what it says which is
3 that costs for an intervention will very often in justice be allowed to lie where they fall.
4 “Very often” does not mean on every occasion. The provision which is referenced is to
5 justice.

6 Mr. Wisking referred in his submissions to BT Plc and Ofcom, which is a matter
7 before the Tribunal, I think perhaps with the suggestion that the two matters should follow
8 each other, or be considered together in some way because, ma’am, I think every case has to
9 be considered on its merits – I cannot see that there is any question of that.

10 In conclusion I just want to deal with two matters. Mr. Hoskins, in what I think I have
11 described as his “tactical” application for costs against Floe, makes play, as I thought he
12 would, of the Primary Argument. My submissions on that go like this: First, Mr. Hoskins
13 drew your attention, ma’am, to what he described as my puzzling para.3(c) in the application.
14 I am not sure I really understand Mr. Hoskins’ point, but the point I was trying to make was
15 this. If we had not actually looked at the Primary Argument we would not actually have seen
16 a position where Ofcom got to the position it now thinks is the correct one, concerning the
17 interpretation of Vodafone’s GSM WT Act licence. There are a number of other things
18 actually that we have not looked at the Primary Argument; we would still have to have
19 looked at, in my submission, in relation to the first and second alternative arguments. We
20 would still have had to look at the interpretation of the Regulations. We would still have had
21 to have looked at the impact of the Authorisation Directive, and the RTTE directive. We
22 would still have had to have look at the framework and matrix of regulation relating to the
23 regulation of GSM Gateways. This is not a case, in the sense of looking at issues and Rule
24 44 you can say that what the Tribunal did was to grant the Appeal in respect of paras. 45 to
25 52, but it did not grant the Appeal in respect of another set of issues, for unless Mr. Hoskins’
26 submissions this morning are successful, it is the whole Decision that will be quashed.

27 The second point is in relation to indemnity costs. I have already made the point, and
28 it is quite simple, which is that if Ofcom had considered the position and withdrawn its
29 Decision letter when it realised that it could no longer in its mind sustain the arguments made
30 concerning the interpretation of Vodafone’s GSM licence, from that moment onwards there
31 was no reason why we should suffer financially in respect of this matter. Mr. Hoskins says it
32 does not matter whether you are in admin. or you are the richest company in the world.
33 Well, I can tell you, ma’am, it does make a substantial difference, because what we are
34 talking about here is the ability of Floe to continue with this matter generally, and be

1 properly advised. I have no doubt that Mr. Hoskins' clients and Vodafone would like to see
2 the matter disappear because if Floe went out of administration into liquidation the whole
3 issue could conveniently have evaporated. I do not think that is served by the interests of
4 justice.

5 For all of those reasons, ma'am, I made the application that we did in respect of costs.

6 THE CHAIRMAN: Mr. Mercer, can I just ask you something? What you have asked for is that
7 your costs be met 75 per cent. by Ofcom, and 25 per cent. by Vodafone. Why do you say that
8 this case is one that Ofcom should not pay 100 per cent., if that is what we ordered, and why
9 is this case something special that an Intervener ought, in this case, to contribute to the costs?

10 MR. MERCER: My application was on the supposition that it might be possible to gain a division.
11 My application is for my costs on an indemnity basis, and I have suggested a breakdown. It is
12 for the Tribunal to decide. I chose that figure, ma'am, because both parties, despite the
13 change of heart on the interpretation of the WT Act licence, proceeded with matters and I
14 have well in mind, ma'am, when it comes to the amount of work involved just exactly where,
15 to take one example of one day, ma'am, the day on which I drafted our skeleton argument,
16 and going from not one document, and then dealing with the interveners, but having
17 constantly to juggle what were, in effect, two defences in preparing the skeleton, because
18 every argument made had a brother or sister in the alternative document, put in a slightly
19 different way sometimes it had to be dealt with, and that takes time and money.

20 I hesitate before giving evidence in the matter in that way, but that is how I saw it and
21 how I came to that figure in my mind.

22 Is there anything else I can help you with, ma'am?

23 THE CHAIRMAN: No, thank you very much.

24 MR. DAVEY: Mr. Mercer, you are asking for costs on an indemnity basis, but you have not
25 advanced any particular reason why it should be on an indemnity basis. Would you like to
26 address that?

27 MR. MERCER: Yes. Indemnity because what should have happened in all fairness and justice is
28 that we should not be here today, and we should not have had the hearing in July, because
29 Ofcom should have withdrawn its Decision, and reconsidered the matter again. That, in a
30 nutshell, is the argument.

31 MR. HOSKINS: Six points again. First of all, Mr. Mercer made the point that the reason why we
32 should not have this split issues based approach that I have suggested, two-thirds/one third, is
33 because Ofcom disowned a large part of its original decision – for the large part they were
34 putting it too high, but we did take a different stance from that in the Decision. He says that

1 is why they should have all their costs. But one has to be very careful about that, because
2 there is a mirror image to it. We did take a different stance on certain aspects of the Decision
3 and that is why Floe won on the first and second alternative arguments, because the Tribunal
4 took the view that therefore those matters should be reinvestigated. My suggestion on costs
5 reflects that fact. But just as Ofcom bears responsibility in the way it conducts its case, and if
6 it takes arguments and loses it has to pay the costs, it is the same for Floe, because given that
7 Ofcom did not withdraw its Decision, Floe nonetheless decided to run the Primary
8 Argument, and again Floe could have decided not to run that argument because it thought it
9 would lose, or could have withdrawn it or abandoned it at some stage, because it thought it
10 could lose.

11 If one chooses to litigate one bears responsibility, so just as Ofcom had decisions to
12 make about how to conduct the case, Floe had similar decisions, they decided to run the
13 Primary Argument, they lost. As I have said the normal costs' approach in the High Court
14 would dictate that they pay costs in relation to that.

15 The second point Mr. Mercer referred to was that both Ofcom and Vodafone opposed
16 the amendment of the Notice of Appeal, and the main amendment that was proposed was
17 indeed the Primary Argument, and it is fair to say that the principal reason why we opposed it
18 was an interpretation of the rules. We said that it was not open – the Tribunal did not have
19 jurisdiction on the Rules to make the amendment. However, the question was raised by the
20 President; I was asked as to the merits of the argument. I have to be very careful, because I
21 have not looked at the transcript and my memory is not necessarily that accurate. We were
22 asked as to the merits of the argument, and my recollection is that we said it was bound to
23 fail. So the position we took at that stage was that the argument was bound to fail and again,
24 here we are, we have been proved correct. Nothing really turns on the fact that we opposed
25 the amendment of the Notice of Appeal. Again, it is a matter of responsibility, Floe chose to
26 seek that amendment having obtained permission, sought to run it, it lost, we are back into
27 the issues based approach.

28 The third point related to para.3(c) of Floe's written submissions where both of us
29 seem to be passing in the night, because I cannot understand Mr. Mercer and he cannot
30 understand me. I have already made the point that 3(c) is based on a particular premise. If
31 one looks at para. 276 of the Judgment the premise is not borne out. I do not intend to say
32 anything else on that unless the Tribunal wants further help, although I may not be the person
33 to give that help.

1 The fourth point is Mr. Mercer said “Well even without the primary argument we
2 would have had to have looked at the question of compatibility with the Directives, the
3 regulations, the framework” – correct; but the point was that the Primary Argument raised
4 distinct issues, distinct arguments about the proper construction of the relevant legislation. It
5 was not some general discussion about the regulations, there were particular points made
6 about who was a user, what installation meant etc., all set down in the Judgment, and it was
7 for Floe the Primary Argument – the Primary Argument, first alternative argument, second
8 alternative argument. This was a matter that took up a lot of time and, in a sense, it is
9 unfortunate, when one looks back and reads the Judgment, it would actually probably have
10 been better if we had not had the Primary Argument there would have been a lot more time to
11 focus on first and second alternative arguments. But there we are, that was Floe’s Primary
12 Argument. It raised distinct points about the regulations, they lost on them – you know what
13 my mantra is by now, it is an issues based approach.

14 The other point is, of course, on the second alternative argument, as Mr. Wisking
15 pointed out, it was in the Amended Notice of Appeal that no overall submissions were made
16 on it at the hearing. The hearing was about Primary Argument and first alternative argument,
17 as far as Floe made submissions about. That shows the importance of the Primary Argument
18 it cannot simply be brushed to one side.

19 In relation to the question of indemnity costs, it is said that if Ofcom had withdrawn
20 its decision at some stage in the Appeal because, of course, it is not suggested that none of
21 this would have happened, so if one were of the mind to issue indemnity costs it could not be
22 for the whole Appeal, it could only be from a stage when it was considered that Ofcom
23 should reasonably have withdrawn its decision. But if we had withdrawn our decision we
24 would not have had the hearing in July, and that is said to justify indemnity costs. With
25 respect, when Ofcom realised that internally it could not stand by the basis of the decision
26 and did what was appropriate, it raised that issue, it brought it out into the open, obviously it
27 had to.

28 The question then is what was the most efficient way forward? We have heard the
29 complaints about the need for speed, etc. The position Ofcom took was that, given that we
30 considered it was primarily a matter of construction, as the Tribunal found, we needed to put
31 in some factual material, we had hoped that it was a matter which, if we raised it and if all
32 parties had the chance to make submissions on it, could be dealt with by the Tribunal. In the
33 event that did not prove possible, obviously, for the reasons set out in the Judgment. When
34 you are considering whether that merits indemnity costs, can it really be said that Ofcom

1 acted unreasonably in choosing to adopt an approach which it thought would lead to a proper
2 consideration of the issue, and a resolution of the issue as quickly as possible.

3 One can imagine that if we had said we intend to withdraw a decision there may well
4 have been wails from either side of me saying “Hang on a minute, either you have reached
5 that decision you are stuck with it”, or “Hang on a minute, we have been waiting four
6 months, we want an answer.” I do not ask you to form a judgment as such on what the right
7 course of action was. The only submission is that Ofcom acted reasonably in the way it did,
8 and therefore there was certainly no question of indemnity costs being imposed in a case
9 such as this.

10 THE CHAIRMAN: I think we should look in the Judgment at that paragraph to see what exactly it
11 said.

12 MR. HOSKINS: It is para.275 of the Judgment. “...it will normally be appropriate...”. Madam, I
13 would say this, obviously it is a question of what is normally appropriate, by not acting that
14 way does not mean that Ofcom acted unreasonably. The issue does not flip in that way.

15 This is the first instance in which the Tribunal has indicated that that is the normal
16 procedure that should be followed. It has not arisen before. ABI – I do not have the date of
17 the order – took place at around the same time, I think it slightly pre-dated this, but not by
18 much. So there was no precedent for this course of action being taken. As I say, Ofcom made
19 a judgment call, it is one that the Tribunal has disagreed with. That is very different from
20 saying that Ofcom acted unreasonably, first of all making that judgment call; and secondly,
21 given the state of indications from the Tribunal as to what the appropriate course was at that
22 stage. So we will suffer in costs, as my suggestion is that we pay two-thirds of the costs. But
23 that is where it should lie; it should not be an indemnity costs issue.

24 The final point is again returning to Floe in administration. I have made my
25 submission on that, it is irrelevant, but I do have to say that the suggestion, if it is being made
26 – it was not made in these terms, but if it is being suggested that the purpose in Ofcom
27 suggesting that the costs’ order it does is to somehow make this go away, is one we very
28 strongly reject. Indeed, one can see there is no substance in it, because whatever Floe chooses
29 to do about its Appeal, the VIP complaint is still there, so I do have to put on the record that
30 we strongly reject that that is the purpose of seeking our costs.

31 Unless there is anything else I can help you with those are my submissions.

32 MR. WISKING: I have four short points. I support what Mr. Hoskins says about an issues’ based
33 approach, with just one addendum to that, and that is that Vodafone, as part of its opposition

1 to the amendment to include the Primary Argument did oppose it on merits as well as
2 procedural grounds, on the basis it had no prospects of success.

3 The second point, in relation to indemnity costs, the distinction between indemnity
4 costs, and costs on the standard basis is that costs on the standard basis have to be
5 proportionate to the case. That is not true of indemnity costs. I just want to give the Tribunal
6 a reference – I do not have copies of the case – to the GISC case at para.60 where the
7 Tribunal makes the statement that it is effectively concerned to ensure that costs are
8 proportionate in proceedings before the Tribunal to the matters at stake. In my submission
9 that is consistent with the normal, usual practice of making costs on the standard costs' basis
10 to the extent that those principles are applicable to the Tribunal.

11 Mr. Mercer also referred to our reference to the BT case. I am not making a
12 submission that the question of costs should be reserved pending the outcome of that case,
13 simply that we thought it was appropriate to draw the Tribunal's attention to the fact that
14 there is another costs' case pending before the Tribunal, and it is a matter for the Tribunal
15 how it chooses to deal with that.

16 Lastly, Mr. Mercer raised again the fact that Vodafone appears to have increased its
17 costs because he had to look at two different ways of putting the same argument. In my
18 submission that does not really increase the costs at all. In preparing for the hearing he had to
19 think about the case in the round. He had to be prepared to deal with various different ways
20 of putting the case and, frankly, our articulation of the case in a different way assisted him.

21 That is all I have to say.

22 THE CHAIRMAN: The practice which has been stated in cases about Interveners is normally costs
23 are not ordered against them, the practice also is that Interveners are present for added value.
24 If they are not going to add value they should not be there, and therefore there must be
25 additional costs of some sort built into the system.

26 MR. WISKING: I think that is right, but I do not think it follows that simply because there are
27 nominally or some additional costs which just flow from the existence of an additional party
28 in the hearing, it follows that therefore it is automatically ordered ----

29 THE CHAIRMAN: No, that is what I am saying, that in fact those two things may be linked (a) that
30 the Intervener is there because of added value, therefore there must be some added work, but
31 (b) the practice is in the normal case Interveners should not have a costs' order against them?

32 MR. WISKING: Those are my submissions, and the question is really whether the Intervener steps
33 beyond the proper bounds of the intervention and, in my submission, Vodafone did not do
34 that in these proceedings.

1 THE CHAIRMAN: Mr. Mercer, it is your application for costs, so I suppose you ought to go last if
2 you want to. Do you have any other submissions?

3 MR. MERCER: I think we have been around the houses on this one long enough.

4 THE CHAIRMAN: Are there any other outstanding points that need to be decided?

5 MR. HOSKINS: I think there is just one, which is one that the Tribunal itself raised at the start,
6 which is the (a),(c),(b) point, which is the timetable, the proposed steps in the investigation
7 suggested in para. 5 of the Ofcom written submissions, you suggested ----

8 THE CHAIRMAN: (a),(b),(c) and (a), (c), (b) – yes.

9 MR. HOSKINS: Exactly. We are perfectly happy with (a), (c), (b).

10 THE CHAIRMAN: That can be dealt with in ----

11 MR. HOSKINS: It does not appear in the order, simply we have made that decision and the Tribunal
12 has indicated that is the logical way, and we are saying “yes”, that is the logical way.

13 THE CHAIRMAN: Right, so there are no other outstanding points to decide, just the terms of the
14 order.

15 MR. HOSKINS: Nothing, touch wood, in Floe.

16 THE CHAIRMAN: Should we now hear VIP, or ----

17 MR. HOSKINS: I think VIP is going to be very quick – I may be hung by that.

18 THE CHAIRMAN: Yes.

19 MR. HOSKINS: In relation to VIP there are actually three points, because the Tribunal has indicated
20 what it would look for is a draft consent order which has been agreed, effectively, between
21 VIP and Ofcom subject to two points, but that is all subject to the Tribunal’s overriding
22 comment. It would prefer to see an order closer to ABI. I am not quite sure – is the point that
23 the Tribunal would prefer to see the Decision quashed, rather than it being done by consent?

24 THE CHAIRMAN: Yes, well it will be done by consent, it is by consent that happens, but it is not
25 both sides withdrawing, because it is not withdrawing the Appeal – withdrawing the decision
26 and withdrawing the Appeal – it is the application or the Appeal is being determined by your
27 undertaking that the Decision is quashed.

28 MR. HOSKINS: The reason why we suggested and we thought it was appropriate to have that
29 consent provision was, of course nothing really ever happened in the end. All that has ever
30 happened was that there was a Notice of Appeal put in ----

31 THE CHAIRMAN: But nothing happened in ABI either.

32 MR. HOSKINS: -- and then it was stayed. In ABI the OFT said it did not want to defend its
33 Decision and as a result the Decision was quashed. There was a difficulty in ABI, I am not
34 quite clear and I do not want to stray into territory that I cannot stray into obviously, but ABI

1 was a different context, because ABI concerned the conditions attached to a grant of
2 exemption in relation to an agreement which had been notified. The problem was because of
3 the modernisation regime, there was no longer any power to grant an exemption and again, I
4 obviously I cannot go into the details, but the OFT's approach in that case was conditioned
5 by consideration of the scope of its ability to withdraw its Decision, whereas here what we
6 have done, and the reason why we have done it – I am sorry to be so cryptic on ABI, but you
7 will understand why I have to be relatively cryptic.

8 THE CHAIRMAN: Yes.

9 MR. HOSKINS: What we have done here, what we thought we were doing was responding to
10 para.275 of the Judgment, which was the Tribunal's indication that when Ofcom, or when a
11 Regulator decides it cannot defend part of its original Decision it should seek permission to
12 withdraw the Decision. So we were intending to reflect what we had understood to be what
13 the Tribunal said should happen, because it is the same sort of situation in Floe. The Appeal
14 went in and it was only after the Appeal Notice went in that Ofcom changed its position on
15 its Decision. So what happened in VIP was the Appeal Notice went in, it was then stayed.
16 Ofcom, by definition, has decided it cannot defend part of the Decision, so what we are doing
17 is what we thought the Tribunal was saying should happen in para. 275 of the Judgment.
18 That is the thinking behind the VIP argument.

19 THE CHAIRMAN: But if you withdraw the Decision after the application has been made, then the
20 Tribunal has jurisdiction and has to consent to that withdrawal.

21 MR. HOSKINS: Yes.

22 THE CHAIRMAN: And on that basis it seems to me at the moment that the Appellant should not
23 have to withdraw his application because he has effectively succeeded, and if he withdraws
24 his application where do costs lie?

25 MR. HOSKINS: Madam, can I short circuit this? My instructions are it does not make any
26 difference to us whether the Decision is quashed or not, so that is the easy bit. In relation to
27 costs we do not oppose the application for costs.

28 THE CHAIRMAN: Right.

29 MR. HOSKINS: I am sorry, I thought it was important to explain why we are doing what we are
30 doing, and in the course of that explanation I was told it did not matter, so I am sorry to have
31 got there by such a roundabout route.

32 THE CHAIRMAN: It is all right. So it will follow the ABI.

33 MR. HOSKINS: Well Floe, in a sense, is modelled on ABI, so it will be a quashing of the Decision,
34 but without again for the reasons setting out all the individual points, but obviously in

1 that form. Then the only question that remains is the timing issue, which is exactly the same
2 between Floe and VIP and I have made the submissions as to the undertaking that we are
3 prepared to offer.

4 THE CHAIRMAN: And is the idea that they run in parallel?

5 MR. HOSKINS: Yes. There may be internal ways in which the process is streamlined, but yes, that
6 is the suggestion, it is the same - six months or 12 months.

7 THE CHAIRMAN: Yes, thank you. Mr. Mercer, do you have anything to say? They are not
8 opposing costs, and I doubt whether you mind which ever form the order is in?

9 MR. MERCER: It is of no great concern to me, ma'am.

10 THE CHAIRMAN: In relation to the timetable, do you have the same submissions in relation to
11 Floe.

12 MR. MERCER: Exactly the same, ma'am.

13 MR. PICKFORD: Madam, if I could add on behalf of T-Mobile that to the extent that the issue of
14 discrimination is not remitted back in the Floe case, it would also obviously be inappropriate
15 to remit that issue back in relation to VIP.

16 THE CHAIRMAN: Was it in the Decision in VIP, and was it part of the application?

17 MR. PICKFORD: I do not have the application to hand.

18 THE CHAIRMAN: I think it was in it.

19 MR. PICKFORD: Well to the extent it was not in it, it does not arise, but to the extent it was then it
20 should be treated equally.

21 MR. HOSKINS: It was in the Decision.

22 MR. PICKFORD: And I understand it was.

23 THE CHAIRMAN: What about the application? Was there an Appeal on the discrimination aspect?

24 MR. HOSKINS: I do not think the appeal does raise it.

25 (The Tribunal Confer)

26 THE CHAIRMAN: We think the appeal does raise it.

27 MR. HOSKINS: I am sorry?

28 THE CHAIRMAN: It is a document headed "Appeal to the Competition Appeal Tribunal by VIP".

29 MR. HOSKINS: That is the one I am looking at as well, yes.

30 THE CHAIRMAN: Paragraph 4 on the second page.

31 "VIP cited to OFCOM an example where VIP knew of a company using TM SIMs
32 where TM did not disconnect them for usage over 3000 minutes. VIP SIMs however
33 were disconnected. VIP has seen no evidence from TM to prove that they were even-
34 handed..."

1 MR. HOSKINS: The last time I looked at this I had written beside that paragraph “Discrimination
2 question mark”

3 THE CHAIRMAN: Yes.

4 MR. HOSKINS: The difficulty is it looks like just a narrative.

5 THE CHAIRMAN: But it was raised, whereas it was not raised at all in the Floe case.

6 MR. HOSKINS: It was not in the original Appeal, no.

7 THE CHAIRMAN: No, but it was raised in this Appeal.

8 MR. HOSKINS: In so far as that is a ground, of course if one looks at the grounds for the Appeal.
9 Paragraph 1. Interestingly, the CAT’s own summary of the Appeal does not refer to
10 discrimination being a ground.

11 THE CHAIRMAN: If you look at the “Grounds of Appeal” 1(B) and one of the reasons why they
12 had no objective reason for refusal to supply is “4”, which is they did not do it in relation to
13 someone else.

14 MR. HOSKINS: That is a reading one could take.

15 THE CHAIRMAN: So it appears to have been in, on that reading anyway.

16 MR. PICKFORD: Madam, notwithstanding whether it was in the original Appeal or not, we would
17 say it would be inappropriate in relation to the VIP re-investigation to open up an issue
18 which is not being opened up in relation to Floe, and the reason why it should not be opened
19 up in relation to Floe is because the Tribunal has not set aside Ofcom’s Decision on the basis
20 that the discrimination ground was made out.

21 THE CHAIRMAN: Of course, that depends on whether we have set aside the whole decision on the
22 basis that there was a withdrawal and therefore we set aside the Decision, and the whole
23 thing has to be looked at again.

24 MR. PICKFORD: It certainly depends on the nature of the approach that the Tribunal takes in the
25 Floe case. We believe the two should be treated equally.

26 MR. HOSKINS: Madam, it is just a suggestion, but we are struggling to understand what is in this
27 Notice of Appeal, but I imagine the people that drew up the Notice of Appeal may well say
28 what the Tribunal has just said, so it may be a sensible question to ask VIP whether it was
29 intended to be raised?

30 MR. MERCER: I thought eventually we would come round to this one. The answer is “yes” the
31 discrimination point is in there we contend in its present form, and why is it there? Because
32 maybe at the time it was drafted we knew difficulties about the discrimination point were
33 going to arise elsewhere.

1 My submission, ma'am is very simple, I have made my submissions on Floe, but
2 notwithstanding that, treat each case as it comes along with its paper work, and this has
3 discrimination in it, it stays in it. Sometimes there are variations between complaints and this
4 is one of those situations where you have to take account of that.

5 THE CHAIRMAN: I think we have the submissions on that, unless anybody has anything original
6 to say. What we were wondering, it is five to one and there are a number of points that we
7 need to decide, I do not know if you were going to stay in the building or if you are going
8 away, because if you are going away I do not want you to have go come back and wait,
9 whereas if you are staying in the building then it does not matter.

10 (Discussion as to timetable)

11 THE CHAIRMAN: Shall we say 2.15 and we will use our best endeavours. Thank you all very
12 much.

13 (For Ruling see separate transcript)

14
15 (The hearing adjourned at 3.05 p.m. and resumed at 3.20 p.m.)

16
17 MR. HOSKINS: Madam, thank you very much for the time. Obviously we note and take on board
18 the Tribunal's comments in relation to Ofcom's priorities in moving forward. However, before
19 we came here today we did conduct a thorough assessment of the work involved and of our
20 resources, and the six month figure that we offered by way of undertaking was a genuine and
21 carefully considered proposal and, in those circumstances, it does not seem to us that it is
22 appropriate for us to give an undertaking and therefore we do say it is necessary for the matter
23 to be dealt with by way of order. I think in all good conscience that is the only way in which
24 we can put things.

25 THE CHAIRMAN: On that basis the Tribunal will draw up the order.

26 MR. HOSKINS: Yes.

27 THE CHAIRMAN: Is there anything else in the undertakings to go in? Is there no other
28 undertaking? Does paragraph 1 not go into it?

29 MR. HOSKINS: The obligation to undertake a new investigation?

30 THE CHAIRMAN: Yes.

31 MR. HOSKINS: I was wondering whether that is necessary, but probably the safest way to avoid an
32 ambiguity is for that to be incorporated in the order.

33 THE CHAIRMAN: So if we draw it up on the basis that (1) remains.

1 MR. HOSKINS: The remittal back – Ofcom to open a new investigation. Then the order as to the
2 timing, and I think it would be wise to leave the general liberty to apply.

3 THE CHAIRMAN: Yes.

4 MR. HOSKINS: I think those are the four components.

5 THE CHAIRMAN: And there will be a CMC, etc.

6 MR. HOSKINS: Yes.

7 THE CHAIRMAN: So there will be an undertaking but it can only have (1) in it.

8 MR. HOSKINS: Oh, I see, I am sorry, I misunderstood. I was envisaging that would all be dealt
9 with by way of order.

10 THE CHAIRMAN: All right, so it will all be dealt with by way of order.

11 MR. HOSKINS: I think that is probably the most straightforward.

12 THE CHAIRMAN: And then in VIP?

13 MR. HOSKINS: I think that will be the same order, I think, in the circumstances, given that the
14 position is now that the Decision is to be set aside and the matter remitted, I think it is exactly
15 the same order in VIP.

16 THE CHAIRMAN: Yes. I am just wondering, looking at VIP, whether it would be more
17 appropriate to have it by way of undertaking, but not the time, and if we're doing it in that one
18 then we could do that in Floe as well, so that you give an undertaking, which is what has
19 happened, effectively.

20 MR. HOSKINS: I think there has to be an order in VIP setting aside the Decision. It has to be by
21 order.

22 THE CHAIRMAN: Absolutely.

23 MR. HOSKINS: There has to be an order in relation to remittal. There has to be an order in relation
24 to timing.

25 THE CHAIRMAN: But the reason that we are giving the order in VIP is because you have
26 undertaken to reconsider. It is by consent in effect.

27 MR. HOSKINS: Well it may be appropriate in that case if there is a consent order – well it is not a
28 consent order as such ----

29 THE CHAIRMAN: No, that is why if we did it by the undertaking, upon that undertaking, and then
30 you are not consenting to the five months.

31 MR. HOSKINS: Yes, it would go in the earlier recitals, there would be “Upon Ofcom undertaking”,
32 and then ----

33 THE CHAIRMAN: Absolutely.

34 MR. HOSKINS: Can I just take instructions?

1 THE CHAIRMAN: Yes.

2 MR. HOSKINS: (After a pause): I am instructed that Ofcom is prepared to give that undertaking in
3 VIP, so an undertaking in the terms of that set out at the current draft, appendix 4 to our written
4 submissions, and I am instructed on behalf of Ofcom that we are prepared to give an
5 undertaking in terms of the first undertaking in that draft – “Ofcom will offer a new
6 investigation ...” etc.

7 THE CHAIRMAN: Yes.

8 MR. HOSKINS: And that would appear in the recital to the order, and then the order would follow
9 in the manner we have described.

10 THE CHAIRMAN: But we should not do the same in Floe? Do it the same way?

11 MR. HOSKINS: I do not think anything turns on it, madam, so if that is easier for you ----

12 THE CHAIRMAN: I am just thinking then are both then the same.

13 MR. HOSKINS: We are quite happy to give that undertaking.

14 THE CHAIRMAN: Right, so we will draw it up on the basis that there is an undertaking that you
15 are re-opening?

16 MR. HOSKINS: Yes.

17 THE CHAIRMAN: And the five months goes in our order.

18 MR. HOSKINS: Yes.

19 THE CHAIRMAN: And we will do both the same way?

20 MR. HOSKINS: Yes.

21 THE CHAIRMAN: Good. Thank you all for your submissions today, and of course for the
22 submissions on the previous occasion.

23 MR. HOSKINS: Thank you very much.

24 (The hearing concluded at 3.25 p.m.)

25

26
