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IN THE COMPETITION

Case Nos 1024/2/3/04

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5th May, 2005

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

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

and

OFFICE OF COMMUNICATIONS
supported by

Respondent

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

Miss Anneli Howard (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.

Miss Robyn Durie, Regulatory Counsel, T-Mobile appeared on behalf of the Second Intervener, T-Mobile (UK) Limited

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: This morning we are handing down the decision on Ofcom's application to set
2 aside paras. 2 and 3 of the Tribunal's Order dated 1st December 2004. For the reasons set out
3 in the Judgment now being handed down the Tribunal unanimously dismisses Ofcom's
4 application. On that application we assume that the same Order will be drawn up in the Floe
5 and in the VIP Appeals.

6 There is an application before us today by Ofcom to extend the period of time in
7 which they are to take a fresh decision or to issue a Statement of Objections. The application
8 is for a further eight weeks. This is opposed by Floe and VIP. Floe and VIP submit that an
9 extension of four weeks should be given and that thereafter if further time is required by
10 Ofcom it should be required to report on its progress monthly at a case management
11 conference. Our present view is that this would not be an appropriate order in the
12 circumstances of the case.

13 Subject to further submissions, it seems to us that the question is how long does
14 Ofcom reasonably now require to complete this stage. Floe and VIP submit that Ofcom have
15 not been proceeding expeditiously. We do not see that it is today of assistance to analyse what
16 has happened since the beginning of December. Ofcom has provided us with the details of the
17 information requests made on Floe and VIP but have not given us any details of the other
18 investigations which they have been conducting. The evidence provided gives us some cause
19 for concern, for example, as to why the s.26 notices issued to Floe and VIP were not issued
20 until the end of March, and whether the delay in issuing the consultation statement was
21 unavoidable. However, we do not have the material which it would be necessary to consider if
22 we were to make any analysis of the progress to date.

23 We accept, subject to any submission from Floe, that Ofcom have prioritised and are
24 prioritising the investigation. Our view is that we need to address today when this stage of the
25 investigation can reasonably be completed having regard to it being given priority. We are not
26 at the moment persuaded that it is appropriate to have a review case management conference
27 each month since such a course may not necessarily lead to expedition in this case. However,
28 from the point of view of the Appellants, and potentially the industry, the time it is taking to
29 complete this stage is unfortunate but, depending on the reasons, may be unavoidable. It is
30 particularly unfortunate because the time period now sought exceeds Ofcom's own guidelines
31 as to the maximum time in which an entirely new investigation should be completed, and this
32 time period must be compared and contrasted with the present circumstances which relate to
33 a reinvestigation which is being prioritised. However, at the hearing on 5th April that it was
34 submitted by Ofcom that they may require an extension of four to six weeks, whereas today the
35 application is for eight weeks.

1 We note that, subject perhaps to clarification of a number of points of information
2 supplied by Floe, Ofcom has all the information it considers it needs (including from VIP,
3 Vodafone and T-Mobile) but are still waiting for external legal advice. We also appreciate that
4 there are internal procedures to complete during the decision making process as outlined in
5 Mr. Louth's evidence.

6 In the light of the matters to which we have just referred, we would like to hear from
7 Ofcom as to why it submits that it does require eight weeks to complete this stage. In this
8 regard we would also note that, subject to any submissions we hear today, we do not see at
9 present why a Statement of Objections should take any longer to write than a non-infringement
10 decision.

11 Before we hear submissions there is just one further aspect referred to in the materials
12 which have been provided to us on which we would like to comment and that is the exchange
13 between Floe and Ofcom about bias. We very much hope that that exchange in writing is not
14 going to be reopened before us today.

15 Miss Howard? I hope that was helpful.

16 MISS HOWARD: Thank you very much for your indications. Before I move to the application for
17 the extension of time I just wanted to raise one outstanding matter which is any possible appeal
18 from your Judgment handed down today. OFCOM is considering the grounds for any appeal
19 and I currently do not have any instructions to make an application orally and OFCOM will be
20 submitting an application in writing in due course, and we will keep you updated accordingly,
21 but that is all I am instructed to say at the moment.

22 Turning now to the application for an extension of time, I am very grateful for your
23 indications and I will endeavour to deal with them as quickly as possible. I would like to start
24 by referring to the para.123 of your judgment that you have handed down today, where you
25 state that:

26 "Any time period provided in a direction by the Tribunal can be abridged or extended
27 and is therefore not set in stone. Accordingly if the time period provided for in the
28 order thereafter appeared to OFCOM to be too short and therefore unreasonable, it
29 could apply to the Tribunal for an extension of the time period. If cause was shown
30 the period would be extended by the Tribunal."

31 The Tribunal in *Freeserve* has made similar comments where it said it was likely to be
32 sympathetic to any such application.

33 I do not want to go into, as you have highlighted, the past conduct to date
34 unless ----

35 THE CHAIRMAN: We have indicated we do not.

1 MISS HOWARD: Exactly. But I would like to mark OFCOM's surprise that professional advisers
2 such as Taylor Wessing and Mr. Happy, should make vilifying statements and allegations of
3 bias about a public body. I would just like to make that comment for the record, and I will
4 leave it there and not go any further.

5 I am not going to go into the past again, I really want to address your queries about
6 why the consultation statement was issued when it was and why we need eight weeks rather
7 than four to six weeks previously. Ofcom has been working expeditiously during the five
8 month period and has accomplished a large volume of work. We submit that this is not
9 a straightforward reinvestigation of a case which has already been re-examined where all the
10 issues have been subject to administrative investigation and have been fully argued before the
11 Tribunal. In your Judgment of 19th November you raised specific issues that you would like to
12 be addressed and that has engaged OFCOM in a very large wide public consultation and it has
13 had to liaise with its European counterparts, not just the European Commission, not just the
14 DTI but also the representatives in all 25 Member States, and it was that co-ordination process
15 that led to the consultation statement being issued later than was originally envisaged.

16 THE CHAIRMAN: Can I just ask one question about that that is on our minds?

17 MISS HOWARD: Yes.

18 THE CHAIRMAN: In the evidence that has been produced it says that that goes wider than the
19 issues in this case and therefore using the phrases *ex post* and *ex ante* there seems to be some
20 intermingling – I will not say “confusion” – between what is *ex post* and what is *ex ante*. It
21 may be that it is that intermingling that has caused delay which did not need to be caused in
22 relation to the particular investigation here.

23 MISS HOWARD: Can I just take instructions?

24 THE CHAIRMAN: Yes.

25 MISS HOWARD: (After a pause) The reason why we had to consult more widely and open it up
26 into a wider issue is that in your Judgment you raised concerns about the interpretation of the
27 licences.

28 THE CHAIRMAN: But it is the interpretation of the licences at the relevant time, not in accordance
29 with new state of the art or what was going on now, it was what was going on then.

30 MISS HOWARD: That is correct, but I think OFCOM felt it had to assess its current legal position,
31 the legal position at the time of the judgment at the time of European developments to address
32 your concern as to whether it was compatible with the European legislation and so that is why
33 it took forward with that consultation.

34 THE CHAIRMAN: That is what I am saying, there is an intermingling and one has to be careful
35 about that, and we do not want to go into the past – the last five months – but we have to be

1 careful that the eight weeks, six weeks, or whatever period of time you need to do it, is
2 addressing this case and not a much wider issue.

3 MISS HOWARD: I think it was specifically concerned with this case and making sure that testing
4 the approach that had been taken in this case, and as to whether that was compatible with the
5 European legislation as you had raised, that process has now been concluded. What is still
6 ongoing in is obtaining the information and the evidence that is necessary, and if I can just flag
7 you a timeline of what we expect to be doing in the next six to eight weeks and why our
8 original estimate when we applied of four to six weeks has changed.

9 THE CHAIRMAN: Yes.

10 MISS HOWARD: At that stage we had not got all the information that OFCOM needed from Floe
11 and VIP, and it is only as more information has come in and more questions have been raised
12 that we have had to extend that period. To give you an update, yesterday OFCOM held
13 meetings with both Vodafone and T-Mobile and those meetings have raised additional
14 questions.

15 THE CHAIRMAN: I thought in the evidence it said that you had all the evidence you needed from
16 Vodafone and T-Mobile?

17 MISS HOWARD: Yes, I think we have all the information that we need formally. It was just minor
18 clarifications that have been raised informally at those meetings, but those questions are
19 relatively simple and we would not expect a lot of delay in getting responses from them.

20 Tomorrow (as OFCOM has notified Floe) it will be sending them a further
21 information request. I am instructed that these questions are checking the information that has
22 been provided in previous meetings and they will have a one week deadline in which to reply,
23 which will take us to 12th May. This week and next week OFCOM will be preparing what it
24 calls a “skeleton analysis” of the factual basis of the legal analysis and of proposals for its
25 decision. Obviously, it cannot make a decision until it has gathered in all the information and
26 it has assessed it, but it will be evaluating its position on an ongoing basis during this and next
27 week with the aim to submit it to the two stage process that Mr. Louth explained in his witness
28 statement, and during weeks three and four ----

29 THE CHAIRMAN: Which is 19th May.

30 MISS HOWARD: That would be between 16th and 25th May. If I can go into some detail of how
31 that two stage policy decision making process works. There are actually two internal bodies
32 that OFCOM has to put its decision to.

33 THE CHAIRMAN: Yes.

34 MISS HOWARD: This will be just the skeleton analysis. First it goes to the Policy Executive – I do
35 not know if you need to know the exact composition?

1 THE CHAIRMAN: No.

2 MISS HOWARD: But they meet weekly, that is the first stage, and we would anticipate putting it to
3 the Policy Executive in approximately mid-May at the first available meeting that they have.
4 After that stage it then goes to the Board and the Board meets fortnightly. The first available
5 meeting that they have is the week after the Policy Executive meeting.

6 THE CHAIRMAN: Which is?

7 MISS HOWARD: At the moment we have it at 24th May. The Board will sign off on the approach
8 to be taken at that stage. What OFCOM hopes to be able to do is to try and draft the Decision
9 at the same time as it is putting forward the analysis to the Policy Executive and the Board, so
10 that by the time the Board gives its comments it hopes to be in a position where it can really
11 push forward with the first draft of the Decision and push that through to finalisation. So it
12 expects that during weeks five and six it will be finalising that draft, submitting it to internal
13 review through the investigations group and submitting it to external counsel for comments.

14 During week six it anticipates there will be a confidentiality exercise with the parties
15 which can be quite a drawn out affair. Then at the end of weeks six and going into week seven
16 it aims to submit the final draft, which has been approved by counsel, to the Board again. We
17 would hope that to be at some time in mid-June, but if there was any hold up or any slippage
18 either in obtaining the information that we require, or in taking comments on from the Board,
19 or in the confidentiality exercise we may miss that slot with the Board and then have to wait
20 until the next Board meeting where they meet fortnightly. So that explains why we are
21 applying for eight weeks to be on the safe side. We really do not see the point of applying for
22 this six week extension when there is this potential risk of slippage which is not due to
23 OFCOM's process of the investigation but may be due to circumstances beyond its control.
24 OFCOM does not see that it is worth anybody's interests, whether the parties or the wider
25 public interest that we have to come back again for a further case management conference
26 which only takes resources away from the investigation.

27 THE CHAIRMAN: I think that is what we said in the opening.

28 MISS HOWARD: Yes, and creates costs.

29 I want to conclude by saying that OFCOM is treating this as a matter of priority and
30 we are very keen to ensure that we complete a sound investigation rather than one that is
31 rushed and, although it will do its best to complete the investigation as speedily as possible it
32 wants to apply for an extension that is realistic, and realistically OFCOM will need six to eight
33 weeks to conduct a proper analysis and reach a considered and well reasoned decision and it
34 really believes that it is in everyone's interest that it be given sufficient time to do so.

1 On the last point – an extension of two months – it is longer than our guidelines but
2 we feel that the circumstances and the wider issues that have been raised by the Tribunal’s
3 Judgment take this beyond a simple case of reinvestigation and although there is a six month
4 limit in our guidelines OFCOM feels that there have been added complications through the
5 consultation process with this. We have been pursuing the information requests as
6 expeditiously as possible, and there are the complications of dealing with a company that is in
7 administration. We are not trying to allocate any blame for that, it is just the fact of the matter
8 that Floe has limited resources.

9 THE CHAIRMAN: Yes, well we do not want to go into that, but you did not actually put your
10 requests in until the end of March.

11 MISS HOWARD: That was because of the allocation of resources. As Mr. Louth explained in his
12 witness statement, because the consultation process was complicated and involved so many
13 parties it was thought best to proceed with that first and then turn to the information request.
14 He very candidly says that with hindsight perhaps things could have been done differently, but
15 when you start an investigation you are drawing up a timetable in the abstract and it is very
16 difficult to be absolutely precise as to how it is going to proceed when you are dealing with
17 something in advance.

18 THE CHAIRMAN: But at that stage it is a little bit hard for any criticism to be made of Floe or VIP
19 that they had difficulty in responding in time, and that criticism has been made of them.

20 MISS HOWARD: No, we have not ----

21 THE CHAIRMAN: No, you may not have but the criticism has been made of them.

22 MISS HOWARD: We have not intended to make any criticism by that, we have been trying to deal
23 with them as co-operatively as possible. We have sent out the information requests in advance
24 so that we could have comments from them if they felt the deadline was unachievable, if they
25 felt the questions were unfair and they did not submit any comments about the substance of
26 those questions at the time and we have been trying to deal proactively with the concerns that
27 they have had at a series of meetings with them.

28 THE CHAIRMAN: Well we will not go into that, but I think it may be T-Mobile has made some
29 criticisms of them which they have picked up from what you had told them.

30 MISS HOWARD: I am instructed, I do not think that T-Mobile’s criticisms were based on anything
31 that we told T-Mobile.

32 THE CHAIRMAN: Where else would they get them from?

33 MISS HOWARD: I really do not think it would be productive to go into that.

34 THE CHAIRMAN: We will not go into that. You have made it absolutely clear that you are not
35 making any criticism of them at all ----

1 MISS HOWARD: We are not making any criticism at all.

2 THE CHAIRMAN: -- about any of their conduct.

3 MISS HOWARD: That is correct. We cannot see that an extension of four weeks over the original
4 six month deadline will adversely prejudice their position to any material extent. It is far better
5 that we proceed to a sound reasoned judgment. I have one issue left, but perhaps it is better to
6 leave that to the end once you have heard submissions from the other parties.

7 Unless I can help you further, that is the end of my submissions.

8 THE CHAIRMAN: Thank you. Mr. Mercer?

9 MR. MERCER: We are still waiting, ma'am, and we continue to wait, and we have been waiting for
10 a very long time. As the Tribunal is well aware, because you said so before, you know our
11 predicament and our difficulties, and they do not get any easier. I heard exactly what you said,
12 but given what counsel for OFCOM has said I think I should perhaps just add two lines about
13 the "B" word we are not to mention, and that is that having read the letter from T-Mobile we
14 felt we had to explain exactly where we were and exactly what we have done, because we were
15 being put to notice on that and put to proof on that, and you could not tell the story of what had
16 gone on in respect of us and providing information without telling the whole story and nothing
17 but the story. We did not make any application to the Tribunal about what went on, we just
18 wanted to tell it as we saw it and that is why it is in. I hope, ma'am, you will not regard telling
19 the full story as being unprofessional.

20 Given what you said, ma'am, I have not that much to say. However, there is a few
21 points I would like to make about the general situation. One is that counsel for OFCOM made
22 the comment about needing to go and consult in Europe, etc. Well, we certainly know that
23 OFCOM have had to go to Europe because they have been asked to go to the Commission
24 about a matter related to this. But before the main hearings last year it is our understanding
25 that there was a meeting of national regulatory authorities in Europe, attended by the European
26 Commission, which made the general view of that Body and of the Commission, quite clear.
27 I understand that the EU Commissioner, Fabio Collasante, said – and this is a public
28 matter – that a general negative presumption on the use of GSM Gateway should not be taken.
29 Europe had already considered this issue and we are at a bit of a loss as to why it took quite so
30 long to go and ask them again for what OFCOM (who were part of the national regulators'
31 group) must have known.

32 THE CHAIRMAN: What date is that document?

33 MR. MERCER: It is around July 04. We are "damned if we do and damned if we don't" in respect
34 of information requests. If we say "I am terribly sorry, it is going to take us three weeks
35 longer", then we are justifiably concerned that people are going to come back and point

1 a finger at us and say: “Ah, you have delayed things”.

2 THE CHAIRMAN: I do not think it is said that you have delayed things, it is just that they cannot
3 keep the timetable because in the timetable they have allowed one week and it takes you
4 longer. There is no criticism on that basis; there is no criticism of delay by you, as
5 I understand it. It is quite appreciated it might take you longer, but an eight week timetable
6 would require you to do this within a week, or within whatever period they give you.

7 MR. MERCER: Well the only point I am going to make is that, as far as we are concerned, we have
8 kept to every timetable concerned, and I think we would probably be a little
9 bit – understandably – concerned that we were being criticised, given the tone particularly of
10 the second information request (first page, second paragraph), where it uses languages that
11 says basically “you have not given us as much as we wanted, and some of it is inconsistent”.
12 Maybe I am particularly thick skinned, or thin skinned, but I regard that as being potentially
13 criticism.

14 As far as moving forward with this matter, I quite agree that it could be that it is
15 a waste of resources to come back – you said you are not going to have monthly CMCs, but
16 I urge you to try and find some method of making sure this does get through on this timetable,
17 or something happens. I am not particularly concerned, ma’am, about members of the OFCOM
18 Board being committed to prison or fines on OFCOM, the thought of sequestering OFCOM
19 has a certain amount of joy for my clients, being an insolvency practitioner in the case of Floe,
20 but I do not think it is very practical. I would urge you to formalistically do this as an Unless
21 Order – unless you do this something else is going to happen.

22 THE CHAIRMAN: What do you suggest ought to happen?

23 MR. MERCER: Ma’am, I was at a bit of a loss as to that until I read the Judgment of the Tribunal,
24 which now fills me with the thought that maybe the answer is that unless you do it by a certain
25 date we are going to call it back in and ask for all the information we need to take a decision.
26 I have not quite had the courage to ask for that when making the application and submissions
27 originally. In the light of the Judgment I think that is an application I would make.

28 Unless I can help you with anything else, I think you have the flavour of what our
29 feelings are and the reasons why we did things and made the statements we felt we had to
30 make. I too would like to reserve my position on costs until the end.

31 THE CHAIRMAN: Thank you very much.

32 MR. WISKING: We have nothing to add. We do not oppose the application.

33 THE CHAIRMAN: I assumed you were only here in relation to receiving the Judgment this
34 morning.

1 MR. WISKING: Indeed, and also to say that we will deal with any further information request from
2 OFCOM as expeditiously as possible.

3 MISS DURIE: If I could just echo that, but also make it clear that the statements which T-Mobile
4 made to the Tribunal were based on the information in Mr. Louth's first statement. It was not
5 anything that OFCOM said specifically to T-Mobile. It may or may not have been a fair
6 representation of what was said, but that was the source of it. Otherwise, if there is anything
7 I can do to help?

8 THE CHAIRMAN: Thank you.

9 MISS HOWARD: I am just going to take three very short points, I do not want to comment in depth.
10 First, the statement that Mr. Mercer referred to the view of the Commissioner, I am instructed
11 that that was an informal view, it has no official status, it was the view of the Commission
12 expressed at a meeting, and it was not the view of the European Regulators' Group, that is to
13 say the Regulatory authorities in all 25 Member States which OFCOM also had to take into
14 consideration.

15 THE CHAIRMAN: Have they reached some view, because if this is July 4th, have the regulatory
16 people made ... there is nodding behind you?

17 MISS HOWARD: No, and that is why OFCOM had to go out and liaise with them. We would like
18 to reiterate there is no accusation of delay and we endorse your comments about the timetable.
19 The statement in the second information request was just setting out OFCOM's concerns and
20 how to move things forward, just expressing what OFCOM was looking for, it was not
21 intended to be any kind of criticism.

22 As to the suggestion of an Unless Order, that is rather a nuclear bomb option. It is
23 usually used as a penal measure when you are accusing somebody of not taking steps and
24 being dilatory, and we would strongly resist that. We also think it is inappropriate when
25 OFCOM is in a position at the moment of having a totally open mind. It does not know
26 whether it is going to issue a non-infringement decision or a Statement of Objections, and we
27 may have to come back to you for a further extension if OFCOM decides to go for a Statement
28 of Objections. I know you mentioned that you cannot see why we would need more time to
29 issue a Statement of Objections. That is true in terms of the analysis, but actually drafting the
30 Statement of Objections might need extra time.

31 THE CHAIRMAN: Why is that?

32 MISS HOWARD: Because a Statement of Objections would require detailed analysis of the market,
33 abuse and dominance, breaking down into all areas of the Decision, it is not simply addressing
34 the areas of concern that you have raised in your Judgment, so it would basically amount to
35 starting completely afresh on those issues.

1 THE CHAIRMAN: But you have been investigating those issues, have you not? That is the
2 information in relation to those issues as well.

3 MISS HOWARD: Yes, OFCOM does have the information and would need to analyse it, but they
4 would also need to draft it and make sure that the Statement of Objection set out the case
5 clearly and adequately, and for the protection of rights in setting out a very clear and reasoned
6 Statement of Objections, that would take a longer time to produce than a new non-infringement
7 Decision. We feel that an Unless Order would be a sledge hammer to crack a nut in this case,
8 when we do need some flexibility to be able to come to the right Decision that is appropriate in
9 the circumstances.

10 Unless I can assist you further I would like to move to costs.

11 THE CHAIRMAN: This is costs in relation to?

12 MISS HOWARD: To the application.

13 THE CHAIRMAN: To this application?

14 MISS HOWARD: That is right.

15 THE CHAIRMAN: Well should we not first decide the application before you deal with costs?

16 MISS HOWARD: That is fine, I can leave it until afterwards.

17 THE CHAIRMAN: The Tribunal will adjourn for a few moments.

18 (The hearing adjourned at 11.05 a.m. and resumed at 11.35 a.m.)

19 (For Ruling see separate transcript)

20 MISS HOWARD: Could I just have one minute to take instructions?

21 THE CHAIRMAN: Yes. Do you want us to leave for a moment?

22 MISS HOWARD: It will not take a moment. (After a pause) Thank you, madam. We welcome
23 your grant of the extension. I am instructed that OFCOM would be prepared to give a best
24 endeavours undertaking to issue any eventual decision within the eight weeks but this would
25 have to be without prejudice to their position in any appeal against your Judgment of today.

26 THE CHAIRMAN: But the permission to apply order is effectively the equivalent of the “best
27 endeavours”, if you see what I mean?

28 MISS HOWARD: Yes.

29 THE CHAIRMAN: In *Freerve* I understand it was not a best endeavours’ undertaking. I do not
30 think this Tribunal quite understands why the offer is “a best endeavours’ undertaking” rather
31 than just an undertaking to do it within eight weeks with the liberty to apply. What does “best
32 endeavours” mean?

33 MISS HOWARD: It is simply because OFCOM feels it cannot fetter its discretion.

34 THE CHAIRMAN: But it is not fettering its discretion.

35 MISS HOWARD: Because you are saying that they have liberty to apply afterwards?

1 THE CHAIRMAN: Yes, and we just do not understand what OFCOM is trying to seek by “best
2 endeavours”.

3 MISS HOWARD: If I can just take one moment. (After a pause) Could we have a moment just to
4 take instructions more widely?

5 THE CHAIRMAN: Yes.

6 MISS HOWARD: Thank you.

7 (The hearing adjourned at 11.40 a.m. and resumed at 11.55 a.m.)

8 MISS HOWARD: Thank you for allowing us some extra time. I think first I should explain what
9 we mean by a “best endeavours’ undertaking”.

10 THE CHAIRMAN: Yes.

11 MISS HOWARD: We take that to be a very high burden that we will do everything in our best
12 efforts to comply with. We have made this application for an extension of eight weeks in good
13 faith, and that is exactly what we intend to do and OFCOM would pull out all the stops to
14 achieve that. You raised the analogy of the *Freeserve* case but, with respect, we feel that that
15 was a completely different landscape. That case concerned OFTEL, which is OFCOM’s
16 predecessor. OFCOM now has a completely different corporate structure, and the solicitor for
17 OFCOM was not acting for OFTEL at the time. She is concerned that she has no authority
18 from her Board, or from the Chief Executive, to give this kind of undertaking, and she is not
19 sure – even as a matter of law, let alone having the actual authority – whether she is able to
20 give it.

21 She has grave concerns because, as you raised the point, if there was liberty to apply,
22 that would cover any unforeseen circumstances. With respect, we do not accept your position
23 that eight weeks would be a satisfactory amount of time to proceed with issuing a Statement of
24 Objections, and it is foreseeable that we would have to reapply if necessary for extra time to
25 issue that Statement of Objections. That is without prejudice to the point that I am saying
26 obviously OFCOM will do their utmost to reach their decision within the eight week limit. But,
27 as a matter of professional conduct, the solicitor for OFCOM feels that she cannot give an
28 undertaking that she foresees she may not be able to comply with. So there is a professional
29 conduct issue as to whether she can actually give it and also the ramifications both in terms of
30 giving an undertaking to the court and as a professional conduct matter should she not be able
31 to comply with that.

32 THE CHAIRMAN: It may be that the best way to do it is by an order so we do not get into this,
33 because I do not see the difference between an undertaking that you will do it within eight
34 weeks with a permission to apply and what you say a best endeavours’ undertaking is, because
35 the best endeavours’ undertaking would be best endeavours to do the Statement of Objections

1 within eight weeks and that has the same ramifications, so I am afraid I do not understand
2 where your submission is going to. The easiest way to deal with this is we will make an order.

3 MISS HOWARD: Yes, rather than wasting time of going back to the Board, I think we have spent
4 enough time dealing with this issue.

5 THE CHAIRMAN: But since this regularly comes up it might be something that one needs to
6 consider, because it is difficult to see, and I think you can probably appreciate why it is
7 difficult to see what “best endeavours” means – I quite accept it has a very high burden – and
8 therefore what is being taken out by the best endeavours?

9 MISS HOWARD: It is really the constraint circumstances of the liberty to apply and it being
10 restricted to unforeseen circumstances, where we can see at the moment that there might be
11 a problem.

12 THE CHAIRMAN: It is the same thing because it is “best endeavours” - “best endeavours” is a very
13 high burden. Anyway let us not discuss it, I think let us make the order. I think Mr. Mercer
14 wanted to say something?

15 MR. MERCER: As former secretary of a statutory corporation regulator myself I find it
16 extraordinary that OFCOM does not have an emergency corporate governance procedure in
17 place. We are not asking for an undertaking from an instructing solicitor herself, a solicitor’s
18 undertaking, we are asking for an undertaking from OFCOM as a body.

19 THE CHAIRMAN: Well, I do not think it matters, Mr. Mercer, does it, because we are going to
20 make the order?

21 MR. MERCER: Yes.

22 MISS HOWARD: The only outstanding matter was costs. Of course, the standard position is that
23 we would bear the costs of the application. We were minded and did feel that in view of the
24 accusations that have been raised by Taylor Wessing and Mr. Happy that we would be
25 perfectly entitled to apply for our legal costs in preparing the response, and particularly the
26 second witness statement of Mr. Louth, but having obtained the order we think it is much more
27 expedient to accept the costs of this application and not make an application for them to make
28 a contribution to our costs.

29 THE CHAIRMAN: I think that is very sensible. Thank you very much. You do not have anything
30 to say on that, do you?

31 MR. MERCER: No, ma’am, except I take it it is reasonable costs to be agreed or assessed on the
32 standard basis?

33 THE CHAIRMAN: The usual order?

34 MISS HOWARD: The usual order, yes.

1 THE CHAIRMAN: Thank you very much. The only other matter is that we probably need to make
2 a date for another case management conference.

3 MISS HOWARD: Assuming that the order would go until 1st July I am instructed that the solicitor
4 for OFCOM is tied up with *Freeserve* the following week, and also a Judicial Review for the
5 week commencing 4th July, and for her it would be more convenient to have a case
6 management conference during the week commencing 11th July.

7 THE CHAIRMAN: What I was concerned about was the concern that OFCOM had on this occasion
8 about the extension of time. We hope there is not going to be an extension of time required.

9 MISS HOWARD: An alternative option would be to have the case management conference before
10 the deadline in the order.

11 THE CHAIRMAN: Yes, we were looking at 29th or 30th, because you would know what your
12 position was then.

13 MISS HOWARD: In view of the impending trial the solicitor for OFCOM asks whether it could be
14 the 29th, which does give her more time to prepare.

15 THE CHAIRMAN: The difficulty about 29th is that it would have to be after 3.30 – that would be
16 good?

17 MISS HOWARD: That would be acceptable, assuming everybody else can make it.

18 THE CHAIRMAN: Yes, so it is 3.30 p.m. on 29th June. That may or may not be effective because
19 there may be a Decision or Statement of Objections and you would know that by then, even if
20 it had not been issued. So you would be able to let everybody know before that time and if it
21 was necessary then that would be in order to apply for more time. There is an additional
22 matter that might arise on that hearing which is further directions even if the intention was
23 a Statement of Objection or decision and, of course, that might be a little bit complicated if it
24 has not been issued before that date.

25 MISS HOWARD: Madam, obviously the issue of directions also impinges upon any appeal as to
26 whether you can give directions if there is a decision on whether you are still *functus* and it
27 forms part of the ongoing process, but without prejudice to that one offer we could make is to
28 informally notify the parties what the Decision will be on a confidential basis. Obviously there
29 may be complications if Vodafone or T-Mobile feel this is market sensitive, but we would
30 have to deal with that at that stage, but we could notify them, say, on the Monday before the
31 case management conference.

32 THE CHAIRMAN: That is not providing a copy that is just notifying what the result is.

33 MISS HOWARD: No, just notifying what the result is.

34 THE CHAIRMAN: I assumed that you would do that for the purposes of the 29th. What was going
35 through my mind was what we could possibly do is to put another date in the diary in the July,

1 so that if the Decision and/or the Statement of Objections was going to be issued by 1st July
2 and therefore the urgency of the application is taken out of the issue, but also that would give
3 the parties the opportunity to consider whatever you do – the document – and decide where
4 they were going and therefore what the appropriate directions are. Because everybody’s diary
5 is difficult it might be that if we made a provisional date now, if we had both dates, and then
6 we could decide that week which one we use. The date we suggest is 19th July at 2 o’clock – is
7 that all right? That is a provisional case management conference depending on which way
8 events transpire.

9 MISS HOWARD: We will inform you.

10 THE CHAIRMAN: Yes, you will notify us on Monday 27th which way it is going to go.

11 Mr. Mercer is that all right?

12 MR. MERCER: That seems convenient to us, ma’am.

13 THE CHAIRMAN: That will give you an opportunity to consider any document. Hopefully the
14 document is going to be issued by 1st July, and then you can apply for whatever directions you
15 would like at that stage.

16 MR. MERCER: That gives us sufficient time, ma’am.

17 THE CHAIRMAN: Sufficient time to look into it.

18 MR. MERCER: Thank you, ma’am.

19 THE CHAIRMAN: Thank you.

20 (The hearing concluded at 12.10 p.m.)