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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1024/2/4/04

Victoria House
Bloomsbury Square
London WC1A 2EB

Friday, 25th June 2004

Before:

Marion Simmons QC (Chairman)
Mr Michael Davey
Ms 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

and

T-MOBILE (UK) Limited

Interveners

MR EDWARD MERCER (of Messrs Taylor Wessing) appeared for the Appellant.

MR COLIN WEST appeared for the Respondent.

MR STEPHEN WISKING (of Messrs Herbert Smith) appeared for the First Intervener.

MR MEREDITH PICKFORD appeared for the Second Intervener.

CASE MANAGEMENT CONFERENCE

Transcript of the Stenographic Notes of
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1
2 THE CHAIRMAN: Good afternoon. Mr Mercer.

3 MR MERCER: Yes, ma'am.

4 THE CHAIRMAN: It might be helpful if I outlined very, very
5 provisionally where we had thought that everyone probably got to,
6 and where we were going today; would that be helpful?

7 MR MERCER: I think that would, ma'am.

8 THE CHAIRMAN: First of all, can I say that we found the statements of
9 fact very helpful, and where the outline, of course, has been
10 agreed and what has not been agreed. So can we thank you all for
11 co-operating in doing that. We are, as you may be, a little
12 concerned as to whether or not it is necessary to have any oral
13 evidence. Having oral evidence means, effectively,
14 cross-examination, and, first of all, whether that actually is
15 necessary, and, secondly, if it is necessary how it fits into the
16 timetable. So we have been thinking a little about whether or not
17 it is necessary, and I assume probably you all have as well.

18 If I can take the primary argument first. There appears to be
19 quite significant agreement as to the facts that are necessary in
20 order to decide the issues. We wondered whether, in fact, what is
21 contained in paragraphs 25 and 26 of the first of the agreed
22 statements was actually probably sufficient, and embodied the
23 facts which are relevant for the purposes of deciding the issue,
24 and whether it was actually necessary to go any further, and we
25 wondered whether it was. So that is, I think, the outstanding
26 point on the primary argument for today's CMC.

27 Shall I turn to the next point, which is the first alternative
28 argument, if I can call it the "contractual point".

29 MR MERCER: Yes, ma'am.

30 THE CHAIRMAN: Now there appears to be an issue about what business
31 plan was provided, and we have the business plan which Floe says
32 they provided. Vodafone says there was a different business plan.

33 What we do not know was whether Vodafone have a copy of the
34 business plan that they say was provided because that would

1 possibly sort that bit of the issue out. So that is a question
2 that we are -- would like to raise.

3 Then Floe are indicating that they may want to call some oral
4 evidence i.e. disputed evidence which would need cross-examination
5 in relation to, I suppose one can call it the background or matrix
6 of the agreement, in other words what was known.

7 MR MERCER: Yes, ma'am.

8 THE CHAIRMAN: Now we are wondering whether the starting point is not
9 to be thinking about oral evidence, but whether the starting point
10 is whether there is any documentation, i.e. correspondence or
11 notes of meetings which would indicate what that background
12 information is, and whether from that there can be some agreement,
13 -- that would mean the information which was both on Vodafone's
14 side and on the Floe side. Unless one knows that, for my part, I
15 find it difficult to know whether any oral evidence is helpful.

16 There is also the question in relation to Ofcom as to whether
17 -- as to what documents they -- or what information they relied on
18 to decide what the contract was and what the background was.

19 I think on page 11 of the decision there is some reference to
20 some documents. I am not sure that we have those documents and
21 that might be something we need to explore. If there is oral
22 evidence which is needed then we are going to have to consider
23 that very carefully. But at the moment I think the Tribunal would
24 need to be satisfied that it was important to have that oral
25 evidence before they made an order for it to be provided.

26 There is another issue in relation to the first alternative
27 argument, the contractual point, which is probably an issue of
28 law, not an issue of fact, and that is that if the contract
29 contemplated public gateways then the decision might have been
30 taken on the false basis, and that probably is something which we
31 just thought we ought to indicate may have to be dealt with in the
32 skeleton arguments.

33 MR MERCER: It was actually a point I intended to raise in the skeleton
34 argument, and in fact it goes to one of the facts, the disputed

1 facts, in the longer of the two statements which has not been
2 agreed, which includes my facts as well as everybody else's,
3 relating to the equipment directive.

4 THE CHAIRMAN: Absolutely. But we just thought we ought to mention it,
5 that that possibly needs to be dealt with.

6 Can I just go on to the final matter, and that is the second
7 alternative argument, -- the factual issue there is whether
8 Vodafone disconnected both private and public. Now, one question
9 we have is whether as a matter of deciding this case it is
10 necessary to know how many or which or when were private and which
11 were public. But if it is necessary, then that ought to be
12 something that can be dealt with by documentary evidence. So I
13 think those are the points we were going to raise in relation to
14 the issues on fact and evidence.

15 I think that leaves us with the question of whether T-Mobile
16 is now going to be present at the hearing, or whether what they
17 are now saying is that they, having given their original
18 intervention which we would consider, they are not making any more
19 submissions, and we need then to consider in relation to the -- if
20 there is going to be oral evidence, how that is going to fit in. I
21 hope that helps.

22 MR MERCER: Shall I try to do these points one by one where I hope I
23 can assist. On the first point in the primary argument I have
24 been considering over the last 24 hours and reading the comments
25 kindly provided on behalf of the interveners and Ofcom and
26 wondering if, in fact, because my attempt to put in appendices 1
27 and 2 to the not yet agreed full version was to try and set out
28 what we thought was the function, how things actually fitted
29 together when you looked at SIM cards and IMEI. I think it would
30 be fair to say that our doing that seemed to excite Ofcom and the
31 interveners slightly. They seemed to consider that we were
32 raising new issues by doing that. In fact what I was trying to do
33 was to lay down what had happened and where we actually come to
34 blows.

1 THE CHAIRMAN: Absolutely.

2 MR MERCER: Where we come to blows, essentially, is over the crucial
3 issue in the primary argument, the one I think I first mentioned
4 at the very first CMC some months ago, which is control and who
5 actually has control of the gateway device or the handset. The
6 issues we are now beginning to arrive at are issues that go to
7 that exact point. I have been considering whether or not it would
8 be helpful to the Tribunal and might save us on providing oral
9 evidence if we produced in tabular form functions and the views of
10 the parties, one against the other, going out, so that we looked
11 at how first connections to the network arises, who controls the
12 frequency at which the gateway transmits, who controls the power
13 level. That is all implicit in the kinds of things we have been
14 saying, and what that will bring out even more is the precise
15 parts of the mechanisms that we disagree about in terms of who
16 exerts control. I wonder if that might be useful to the Tribunal.

17 THE CHAIRMAN: I wonder if there is a stage before the Tribunal, if you
18 see what I mean, whether having worked all that out, there is the
19 essence between you, which is all we need to know.

20 MR MERCER: I hesitate to encapsulate it tritely in a Sun-type headline
21 comment, but it is basically -- at one level it is between what we
22 say is a control loop, essentially, if you read between the lines,
23 between the SIM card and the network. So that there is very
24 little in that gateway itself that controls frequency, power,
25 connection et cetera, and I hesitate to put words in the mouth of
26 the interveners and Ofcom, but they would categorise is being --
27 the handset as being an independent item, the SIM card merely an
28 authentication device. And it connects as the user of the
29 services wishes with the network.

30 THE CHAIRMAN: Well, it may be you have to look at it from both ends.

31 MR MERCER: Well, the difference between us, I suspect, in essence, is
32 that we see the gateway or the handset as being something by which
33 services are provided by, in this case, Vodafone, and they see the
34 handset as being something which is in the control, care and being

1 looked after by the user. We say, well, the user may have it, but
2 he is not actually in control or charge of it.

3 THE CHAIRMAN: What about a television? That is exempted.

4 MR MERCER: Well, there is a certificate of exemption for televisions
5 actually.

6 THE CHAIRMAN: It looks as if televisions would have been within it if
7 there had not been the exemption. We should not get into the
8 legal argument.

9 MR MERCER: It is points that go to that issue and related issues that
10 I think we will be spending some time on in submission and
11 identifying exactly where we think we disagree I think might be
12 useful.

13 THE CHAIRMAN: Have you discussed that with...

14 MR MERCER: No, I have to admit, ma'am, I only thought of it two days
15 ago, and I first referred to it in a letter to Mr Wisking, which
16 was copied to the other parties about 48 hours ago.

17 THE CHAIRMAN: Shall we hear what everyone says about that.

18 MR MERCER: Yes. Do you want to go on with background or shall I deal
19 with the second -- the other point.

20 THE CHAIRMAN: Which do you think is the most useful?

21 MR MERCER: I think we can knock them off one at a time, ma'am.

22 THE CHAIRMAN: Yes. Well, is it Mr Wisking who knows more about this,
23 or is it Mr West?

24 MR WISKING: I think Mr West should start.

25 MR WEST: Ma'am, can I say that we entirely endorse your suggestion
26 that the crux of the issue is really set out in the body of the
27 agreed statements of facts, and can be resolved by reference to
28 what are essentially agreed facts of which there is no real
29 contention. Where we get into difficulties is when we start
30 looking at the appendices which have been submitted by Mr Mercer
31 and which introduce a whole load of contentious, technical,
32 factual material, which at least as far as we are concerned do not
33 really seem to take the matter very much further. And one
34 possible way of proceeding perhaps would be, if there is an issue

1 about how material this is, asking Mr Mercer to explain precisely
2 where any of this goes to, and how relevant it is, for example,
3 when the mobile phone is switched on whether the phone first
4 contacts the network or the network first contacts the phone and,
5 so what, one might think. The parties are not in agreement about
6 which way round it is. But it does not seem to us to matter very
7 much.

8 Mr Mercer suggested that what we should do is set out in
9 tabular form where we disagree about these functions. But the real
10 difficulty about that is what we are here today to do is not to
11 identify what we are disagreeing about, hopefully that has already
12 been done, but to try and proceed and identify a way of resolving
13 those disagreements. The difficulty is again that in order to
14 resolve them the appeal hearing is going to have to be very much
15 elongated. It is going to involve cross-examination as to very
16 technical matters, service of other witness statements and so on.

17 THE CHAIRMAN: What I am trying to indicate, I think, is that unless we
18 were satisfied that it was necessary to do that and that we do not
19 want to be in a situation where we hear all the evidence and then
20 say to ourselves, well, why have we listened to it.

21 MR WEST: Well, if you propose to let in this material in the
22 appendices I would certainly have some further submissions to
23 make. But perhaps logically the first issue to resolve is whether
24 any of this should come in and whether it is relevant at all.

25 THE CHAIRMAN: Why do you say it is irrelevant? Maybe that would be a
26 helpful start.

27 MR WEST: Mr Mercer said that the key issue here is the issue of
28 control and who is controlling these devices but that simply is
29 not right. The key issue is who is using the devices, because it
30 is use of the devices which requires to be licensed. We say that
31 could be resolved on the basis of what is agreed between the
32 parties. Does it really matter whether the handset first
33 contacted the network or the other way round as far as the issue
34 of use is concerned. Mr Mercer himself referred to the person who

1 uses the handset as the handset user, which perhaps indicates at a
2 preliminary stage the sort of level of merits which his argument
3 involves.

4 Ma'am, as I said, I will have some more submissions to make if
5 it is determined that this material should come in as to how it
6 should be dealt with, but perhaps we should hear the others and
7 resolve the issue as to whether it should come in at all.

8 THE CHAIRMAN: Yes. Mr Wisking.

9 MR WISKING: Thank you, ma'am. Our position is much the same, that we
10 consider that there is sufficient material in the main body of the
11 draft statements of agreed facts to deal with the primary
12 argument, and we have the same difficulties with the appendices,
13 that they go beyond what is necessary for the resolution of these
14 proceedings. The Tribunal asks the parties to identify the main
15 features of the GSM gateway and the SIM card and that has been
16 done in the main body of the documents. The difficulty with the
17 appendices is that in dealing with what are very technical matters
18 which are, we would submit, on the periphery of the issues in this
19 case disagreement has arisen and we for one, and I think the other
20 intervener, do not accept the accuracy of some of this material.
21 We do not necessarily think it is necessary, and also it does
22 contain in some parts elements of submission which we would never
23 agree.

24 I think paragraph 10 of appendix 1, which makes the submission
25 that Mr Mercer has just made about control. As Ofcom have just
26 submitted if we proceed on the basis of that material being
27 relevant and necessary to be resolved then that would open up the
28 whole question of whether further new matters of evidence would
29 need to be brought before the Tribunal to resolve the
30 disagreements which have been identified.

31 THE CHAIRMAN: Thank you. Mr Mercer.

32 MR MERCER: Ma'am, we have endorsed the position. Nothing we need to
33 repeat.

34 THE CHAIRMAN: I am wondering whether one needs to get into the

1 technical detail, or whether it is possible to deal with it on a
2 more superficial basis, because once we start getting into
3 technical detail, first of all, one has to understand the
4 technical detail, and, secondly, there are all the problems that
5 there are disputes about the technical issues. Your point is that
6 the person who has control is the person who uses it. Do you need
7 to go any further than that, because is it ...

8 MR MERCER: Well, ma'am, Mr West threw down a slight gauntlet by
9 saying, well, if he took appendix 1 or appendix 2 just how
10 relevant is this et cetera. So just let us take a point and look
11 at it. Let us try paragraph 7.

12 THE CHAIRMAN: Of appendix?

13 MR MERCER: Of appendix 1, ma'am.

14 THE CHAIRMAN: "Where the cellular device".

15 MR MERCER: Mine actually says "the authentication process".

16 THE CHAIRMAN: That is 6.

17 MR MERCER: It may be, because I am using the very latest version with
18 Mr Wisking's comments.

19 THE CHAIRMAN: As long as it is the same.

20 MR MERCER: "The authentication process used by the mobile networks to
21 identify the subscriber or holder of the SIM to the network
22 operator formed automatically between the network and the SIM is
23 independent to any interaction by the subscriber once the phone is
24 switched on. The technique used can be best described as a
25 challenge and response to process by the mobile network and based
26 on encryption which is pre-programmed into the SIM by the mobile
27 network operator."

28 This point and the others go to the question of who actually
29 is using this to do what, and why it does that is that it
30 indicates that things happen between the gateway or handset device
31 and the network that you, the person Mr West would categorise as
32 the user, with the phone in your pocket just do not know about.
33 There are things going on and control of that signal that you just
34 have no idea is going on, because really the person, we say, is

1 the network. The network in this case, we say, is using challenge
2 and response to see what is happening; whether the phone is on,
3 whether it is in a state of repair. It is independent of any
4 interaction between you, the subscriber, and that handset.

5 Have you ever have been in the back of a cab, ma'am, when
6 suddenly the loudspeaker next to you on the shelf has chirruped.
7 Well, it has chirruped because your mobile phone was being
8 interrogated by its network. And there were a set of signals
9 coming through. It is that kind of point that I think, ma'am, is
10 quite pertinent to who actually is in control and charge, is using
11 that phone for what purpose.

12 THE CHAIRMAN: Well, would it not be possible if that is relevant and
13 we do not say whether it is or it is not, but if it is relevant
14 then would it not be possible for Ofcom and Vodafone to agree
15 certain things which would be sufficient for your purpose?

16 MR MERCER: I would have hoped so, ma'am.

17 THE CHAIRMAN: If you get into very great detail then it might become
18 more difficult, but are there some matters of generality in
19 relation to what you are saying which could be agreed which would
20 be sufficient for your purpose?

21 MR MERCER: It is really a matter for the others, ma'am, rather than
22 me.

23 THE CHAIRMAN: Yes.

24 MR WEST: May I suggest...

25 THE CHAIRMAN: Yes.

26 MR WEST: In my submission the key point, really, for Mr Mercer is that
27 Vodafone can switch off its SIM because that is where this
28 argument comes from.

29 THE CHAIRMAN: I am not sure that is where he is now saying it comes
30 from.

31 MR WEST: That is certainly where it originally came from and that is
32 the genesis, if you like, of the argument that Vodafone were in
33 control of the devices. That sort of level of generality I believe
34 --

1 THE CHAIRMAN: Is that --

2 MR WEST: And has been dealt with in the body of the statement.

3 THE CHAIRMAN: Yes.

4 MR WEST: I would suggest that is the sort of level of generality which

5 we should seek to restrict ourselves to.

6 (The Tribunal conferred)

7 THE CHAIRMAN: It does appear that in your amended Notice of Appeal you

8 are dealing with switching off rather than these other matters of

9 what happens on the on-going -- in an on-going situation.

10 MR MERCER: As an the ultimate example, yes, they have the power to

11 switch on and off and they control the phone.

12 THE CHAIRMAN: So do you need -- I do not want to stop you doing

13 something which you need, do you need more than that?

14 MR MERCER: May I answer, ma'am, by saying this, if the other parties

15 would agree -- let us just take two crucial facts that go

16 alongside switching off, if they would say it is the network that

17 determines the frequency of the reverse path from the handset or

18 gateway and the network that determines the power radiation used

19 by the handset or gateway on the reversed path I would make do

20 with that, ma'am.

21 THE CHAIRMAN: You probably cannot tell us at the moment.

22 MR WISKING: I am not sure that is something we would agree today.

23 THE CHAIRMAN: No, no. Is the answer that now that we have explored

24 this that everybody goes away and sees if there is something which

25 can be agreed which can be done in one or two sentences, in the

26 same sort of way as paragraphs 25 and 26, so that Mr Mercer can

27 put whatever point he needs to put, but which is not too

28 complicated and does not require oral evidence and disputed

29 evidence.

30 MR WISKING: I think that is the essence. I think that if there are

31 matters which can be put in a very simple formulation that

32 Vodafone can agree, then that is something we would consider. The

33 difficulty with this document is it goes well beyond that.

34 THE CHAIRMAN: And requires tremendous understanding.

1 MR WISKING: So it is really then a matter for Mr Mercer to formulate
2 something. He knows the position of ourselves on the technical
3 matters, so he is in a good position to know what can be and what
4 cannot be agreed.

5 THE CHAIRMAN: Mr Mercer, do you think that is the way forward, that if
6 you went away and formulated in a very simple and summary form the
7 essence of the point that you are trying to make, or the facts
8 which support the point you are trying to make, in the same sort
9 of way as it is done in paragraphs 25 and 26.

10 MR MERCER: Yes, ma'am.

11 THE CHAIRMAN: Provided to the other parties and see whether that can
12 be agreed.

13 MR MERCER: I will certainly have a go, ma'am. Agreement I cannot,
14 unfortunately, answer for.

15 THE CHAIRMAN: Well, if one tries to keep it simple and if -- I am sure
16 that Ofcom and Vodafone will assist in trying to -- so that there
17 is agreement in words which they can accept and which gets over
18 your point.

19 MR MERCER: We will certainly try, ma'am.

20 THE CHAIRMAN: It is very difficult because it is very technical. One
21 wants to see whether there is something we can cut through that.

22 MR MERCER: I am afraid the technicality is to some extent slightly
23 unavoidable. But we will certainly try and cut through the knot.

24 THE CHAIRMAN: We are going to have to have a timetable for that. Let
25 us just see where we get to on the other points.
26 The next point, which is the business plan, is it not.

27 MR MERCER: Yes. We have already put in our bundle the one we think is
28 right. We have not seen anything yet from Mr Wisking. I suppose
29 the first thing, ma'am, is to ask Mr Wisking if he can produce the
30 one they think it was and that might solve the problem.

31 MR WISKING: Well, again, I cannot do that today. I have to say, ma'am,
32 both myself and those instructing me are new to this case. We are
33 not completely au fait with every single document, so I cannot
34 immediately answer this question or the next question. All we can

1 do is address this point and find what relevant documents we have
2 on the provision. However, one point to make is that there is no
3 evidence, aside from the document that is being adduced by Floe,
4 from Floe itself, as to what business plan was made available to
5 Vodafone. There is no witness statement from anyone at the time
6 saying this was the document. By contrast you have the witness
7 statements of the Vodafone executives.

8 THE CHAIRMAN: So it was not a witness statement, but not producing the
9 -- not the business plan, but not producing the documents they say
10 it was.

11 MR WISKING: I think the point is the contract that we have does not
12 have any business plan with it. The people who have seen the
13 documents which is being asserted as the one that was provided to
14 them they say they have not seen this document before, but...

15 THE CHAIRMAN: I do not think it is disputed that you did get a
16 business plan.

17 MR WISKING: No.

18 THE CHAIRMAN: So there must be something.

19 MR WISKING: So I think what we have to do is produce such documents as
20 we have. What I cannot say is precisely what there is because I
21 am not familiar with the documents.

22 THE CHAIRMAN: No.

23 (The Tribunal conferred)

24 Well, Mr Mercer, Vodafone are going to have a look in their
25 files.

26 The next question is whether the -- are you only relying --
27 you want to go further than the business plan and rely on other
28 matters which may have been told?

29 MR MERCER: There is generally the question of the description of the
30 background at the time. I doubt somehow we are going to agree, and
31 I had always imagined that we would have to adduce in oral
32 evidence.

33 THE CHAIRMAN: But is not the first stage to see if there are any
34 documents that say those meetings et cetera?

1 MR MERCER: We can provide those.

2 THE CHAIRMAN: I do not know its relevance though, and whether there
3 was anything in these documents which is relevant to that before
4 one gets to see what can be agreed and what cannot be agreed.

5 MR MERCER: Well, our reading of them has been so far, ma'am, that it
6 does not really help us.

7 THE CHAIRMAN: Help you, meaning that there is nothing in them, or that
8 they are not supportive of your case?

9 MR MERCER: I meant help us in the sense of everybody here rather than
10 just Floe, because we would argue it was so obvious what we were
11 going to use them for that it hardly would have caused comment.

12 THE CHAIRMAN: But do you need oral evidence in relation to that, or is
13 that just submissions, because the oral evidence would only be in
14 relation to facts which occurred at the time. In other words, if
15 it is said we had a meeting with Mr So and so of Vodafone and at
16 that meeting they were told that our customers and the following
17 and so on.

18 MR MERCER: Yes.

19 THE CHAIRMAN: Is that the sort of oral evidence --

20 MR MERCER: That is the kind of oral evidence we are looking for being
21 to able to say, for example, that -- and using industry knowledge
22 that somebody who is anticipating using this kind of minuteage,
23 the minuteage that was discussed in the business plan could only
24 have been intending to use those SIM cards for one purpose.

25 THE CHAIRMAN: That submission -- that is saying that on the basis of
26 what was in the business plan the only assumption that Vodafone
27 could have come to was, that is not really oral factual evidence.

28 MR MERCER: It is evidence to -- to understand a submission of that
29 nature you would have to know what the average minuteage per SIM
30 card was at the time. You cannot just look at it and go, ah. Of
31 course it is our contention that is exactly what Vodafone did do
32 later. You would have to know what it was.

33 THE CHAIRMAN: So some technical information that we need to know.

34 MR MERCER: It may well be that we could just turn to Vodafone's own

1 evidence in respect of its switch off, purported switch off
2 criteria levels and relate that back to the business plan, because
3 when you are looking at this type of high minute usage per SIM the
4 revenue is -- it is called ARPU in the industry, average revenue
5 per unit. When you look at that proposed in this plan you could
6 only really have had one use in mind.

7 THE CHAIRMAN: Well, it does not sound as if there is very much -- the
8 evidence is not factual evidence that you want to adduce. Factual
9 evidence, i.e. in relation to what happened at the time, it is
10 technical information which will... is that right?

11 MR MERCER: That is right.

12 THE CHAIRMAN: Now I would have thought the technical information if it
13 is factual could be agreed.

14 MR MERCER: We, again, could attempt to say that -- to agree with the
15 other parties that if this was -- that any business plan which
16 showed -- leaving aside the question of which business plan is
17 there, but if the business plan showed X revenues and X purported
18 minutes then that would be outside the range one would normally
19 expect for domestic use.

20 THE CHAIRMAN: You could put it even more blandly than that, could you
21 not, saying that the range for domestic use is X.

22 MR MERCER: Yes.

23 THE CHAIRMAN: Therefore, that makes it even more objective as evidence
24 which we can then consider when we consider what -- when we decide
25 what they knew.

26 MR MERCER: I am sure Vodafone must have the accurate figure for ARPU.

27 THE CHAIRMAN: Well, they must know when they start thinking that this
28 is not domestic use, private use or whatever one calls it.

29 MR WISKING: Well, I suppose the point is that Mr Mercer has to
30 formulate certain propositions which he would submit to us as to
31 whether we would agree or not, which he says are essentially
32 building blocks for his case that the document which he says was
33 put to Vodafone was one that would necessarily disclose public
34 gateways would be used. It is our case (and it is set out in the

1 witness statements) that the business plan which Floe says -- in
2 fact produced to us at the time of the agreement was not one that
3 disclosed the use of public gateways. So if what he is proposing
4 to do is to take passages out of that documents and say, well,
5 that itself is self-evident I am not sure that that is going to
6 be something that is capable of agreement.

7 THE CHAIRMAN: I think what he is saying is that there is certain
8 information in the business plan, and somebody with technical
9 knowledge in the industry would appreciate from that information
10 that this was not private use.

11 MR WISKING: Private gateway use.

12 THE CHAIRMAN: Private gateway use; is that what you are saying, Mr
13 Mercer?

14 MR MERCER: It is, ma'am.

15 THE CHAIRMAN: Yes. So if he identifies the technical information which
16 you need which -- and he says would be known by everybody if you
17 have that technical background, not you or I.

18 MR WISKING: Certainly not me.

19 THE CHAIRMAN: Then that -- if it is common in the industry then that
20 ought to be able to be agreed. If it cannot be agreed then we
21 have found out what the issue is.

22 MR WISKING: Well, it is obviously for Mr Mercer to formulate --

23 THE CHAIRMAN: I think, Mr Mercer, you need to put it as blandly as
24 possible, as objectively as possible, because otherwise I think
25 there is difficulty in agreeing it, if you put it subjectively,
26 you must have known because.

27 MR MERCER: Yes, I appreciate that.

28 THE CHAIRMAN: But if it is put in the bland, neutral way then it is
29 easier to agree it, and then easier to use the material in your
30 submissions.

31 MR MERCER: Yes. I appreciate that, ma'am.

32 THE CHAIRMAN: So that is really the next thing on my list then before
33 we come to ... that should avoid any oral evidence or identifying
34 what oral evidence is needed.

1 MR MERCER: Yes, ma'am.

2 (The Tribunal conferred)

3 THE CHAIRMAN: It may be that the sort of facts which are technical
4 facts which you are relying on are things which it is not any
5 individual that can give it, it is an expert in the field who has
6 that technical knowledge, and therefore it might be that you could
7 agree a person who would then give that information so that you
8 would have an agreed statement by an expert who you both were
9 prepared to rely on, or you were all prepared to rely on. I do not
10 know if that is a possibility if we are in that realm.

11 MR WISKING: All I can say is it is a little -- as a proposition it may
12 be a bit abstract at this stage.

13 THE CHAIRMAN: Yes.

14 MR WISKING: We do not know what is going to be put to us and what is
15 going to be in dispute.

16 THE CHAIRMAN: It may be that if you put it in the neutral way there
17 will not be a problem. If there is a problem, if the information
18 is such that somebody in this business would understand what was
19 in this business plan in a particular way then one is looking at
20 anybody with that technical knowledge who would be able to make
21 those deductions, therefore, it is something which somebody with
22 expertise in the area should be able to do. If they cannot do it,
23 if they do not say that, then one has to start wondering whether
24 the proposition is right to start with.

25 MR MERCER: Yes, ma'am. There are at least, thank goodness, two mobile
26 operators not yet involved in this matter, which might give us
27 some scope for finding somebody independent from the case if it
28 were necessary.

29 THE CHAIRMAN: If it were necessary. But the starting point is seeing
30 whether you can set it out in a neutral way.

31 MR MERCER: Given the differences and that -- which are somewhere in
32 the region of 100 times we should be able to arrive at something,
33 I would have thought, ma'am.

34 THE CHAIRMAN: Let us see whether we can get there. So that deals with

1 the business plan. Does it also deal with any other -- you are
2 not relying actually on discussions between you, you are really
3 relying on the material in the business plan and what you can
4 imply from that material?

5 MR MERCER: Yes, essentially. There were some discussions, but I think,
6 essentially, our case is that somebody looking at the business
7 plan would have known exactly what was going on, particularly
8 given the circumstances.

9 There is one matter which I hesitate to mention but would take
10 the view of the Tribunal. We had always imagined that in terms of
11 the contractual circumstances surrounding the formation of the
12 contract, and that we were alone, but it is possible that somebody
13 has come forward who has a very similar circumstance in terms of
14 actually -- and this is total allegation -- told the operator,
15 Vodafone, exactly what they were going to do, entered into a
16 contract and then found the rug pulled somewhat later. We had
17 been contemplating, if it were possible, putting that in as
18 further evidence, ma'am, because it would show a track record in
19 terms of (if it were true) an initial failure to understand the
20 contract that has been entered into. If we were to consider that,
21 ma'am, we would have to produce a new witness statement, of
22 course.

23 THE CHAIRMAN: The first thing is you have to decide whether that is
24 available to you. If it is available to you then you will have to
25 consider what you do with it and make an application. You are
26 probably premature, are you not?

27 MR MERCER: Slightly, but as we are here, ma'am.

28 THE CHAIRMAN: I do not think we can --

29 (The Tribunal conferred)

30 If anybody has something to say about that, our view is it is
31 premature.

32 MR WEST: Can I first simply ask Mr Mercer to clarify something which I
33 think he said; I think he said that Floe is not in a position to
34 adduce any evidence from anyone that the personnel of Floe

1 actually told Vodafone what they were going to do. I think that is
2 what he said but I wonder if he could just confirm that is what he
3 meant to say.

4 MR MERCER: I wish I was in an American court now, they can play it
5 back on a screen in front of you and with Live Note, but what I
6 hoped I have said, ma'am, was that we were not proposing to adduce
7 any evidence, oral evidence, relating to the circumstances. We
8 could if we had to.

9 THE CHAIRMAN: You are not proposing to produce any evidence?

10 MR MERCER: Any oral evidence on that point, ma'am.

11 THE CHAIRMAN: On what point?

12 MR MERCER: On the point of the circumstances surrounding the entry
13 into the contract.

14 THE CHAIRMAN: But I do not think that is the...

15 MR MERCER: Well, I think Mr West was actually suggesting that I could
16 not produce any evidence on that.

17 MR WEST: Well, I was --

18 THE CHAIRMAN: There must be some. I do not think that is what you were
19 saying.

20 MR WEST: Well, it appears to be a factual issue in the case for what
21 the circumstances were when this contract was entered into. Mr
22 Mercer appeared to be saying we will be relying on the business
23 plan and nothing else. I was simply seeking to clarify whether
24 that was because he was not in a position to adduce any evidence
25 of any witness which goes to this fact. If he is he cannot come to
26 the trial and say, well, I could have produced all this evidence,
27 but in fact we chose not to, perhaps because we understood that
28 there was a direction from the Tribunal to that effect.

29 But can I also simply register the concern we have at Ofcom
30 about what appeared to be ballooning factual issues at this stage
31 as the Competition Appeals Tribunal said in the Freeserve
32 decision, which I can take the Tribunal to if you would like me
33 to, this is not the occasion for, essentially, what is a new
34 complaint. This should be a review of the matters which were put

1 before the director in order to determine whether the director's
2 decision was the correct one. As the Tribunal says:

3 "In principle the original complaint sets the framework
4 within which the correctness of the director's decision is to be
5 judged."

6 The documents which were put before the director on this point
7 are referred to in paragraph 46 of the decision and footnote 29.
8 We can produce those.

9 THE CHAIRMAN: They were the ones that I mentioned earlier.

10 MR WEST: Exactly. We would submit that those should form the starting
11 point of the examination of this issue, and not the extensive new
12 technical evidence which Mr Mercer seems to want to introduce to
13 be agreed if possible, but who knows. So I would sound that word
14 of caution about this proposed way of proceeding.

15 (The Tribunal conferred)

16 THE CHAIRMAN: Can we just clarify what this issue goes to; is this to
17 do with this other evidence about another operator? Is that what
18 you are dealing with, because if it is then we are not --

19 MR WEST: No.

20 THE CHAIRMAN: I did not think it was. This is as to whether -- do you
21 want to articulate it?

22 MR WEST: Yes. This goes to the -- I am not sure whether it is the
23 first or second alternative argument, that there was a contract in
24 place between the parties which permitted Floe to operate public
25 GSM gateways. My point is that the starting point at least should
26 be the material put before the director.

27 THE CHAIRMAN: Who put the material before the director.

28 MR WEST: Well, the director asked for it. He issued a notice under s26
29 of the Competition Act to Floe. I can read it for the relevant
30 part.

31 THE CHAIRMAN: Have we got that?

32 MR WEST: It is in our bundle at tab 21, defence bundle, it is on the
33 third page under "provision of specified information", the very
34 first request:

1 "We confirm Vodafone has or had contractual arrangements in
2 place with Floe relating to Floe's GSM gateway service... provide
3 Oftel with its contract and any other contract that Floe
4 considered it has or had with Vodafone. (However, if you are
5 unable to provide Oftel with any such written contract please
6 explain on what basis Floe considers that it has or had
7 contractual arrangements in place with Vodafone.) Please provide
8 any available evidence to support such a view, e.g. letters,
9 e-mails et cetera."

10 THE CHAIRMAN: Did they not provide the agreement?

11 MR WEST: They provided the agreement.

12 THE CHAIRMAN: What they are now saying is that Oftel wrongly construed
13 that agreement.

14 MR WEST: Yes.

15 THE CHAIRMAN: Because they did not have the right background to
16 construe it and therefore came to the wrong conclusion.

17 MR WEST: Well, we did not have the right background to construe it,
18 but that is because there was no other background information
19 provided at the time.

20 THE CHAIRMAN: But you did not ask for the background information.

21 MR WEST: Well, there was also another request on the same page at
22 request number 3: irrespective of information provided in
23 response to 1 and 2 like any other evidence that Floe considers
24 demonstrates that it is entitled to legally provide its service.

25 THE CHAIRMAN: Did they provide the business plan?

26 MR WEST: The business plan and nothing else.

27 THE CHAIRMAN: They say that on the business plan they provided you
28 should have come to conclusion A, and they say you came to
29 conclusion B, and what has now happened is that Vodafone are
30 saying, no, that is not the business plan, because they are
31 challenging the documents that were before you. So are you saying
32 that Vodafone are not entitled now to challenge that document?

33 MR WEST: I am not, no. If we say that Vodafone fails on that
34 challenge. We are not saying that they will. If we assume that

1 that business plan was the business plan provided we are perfectly
2 happy for submissions to be made on the basis of that business
3 plan.

4 THE CHAIRMAN: Yes.

5 MR WEST: What they are not happy to happen is for another large
6 technical inquiry to be mounted in order to determine how a
7 reasonable person would have understood that business plan --

8 THE CHAIRMAN: A reasonable technical person. I think one has to
9 assume that business plan will be construed by Ofcom as a
10 technical person would construe it, not as I would construe it, or
11 possibly you, and therefore one has to have the technical
12 knowledge to be able to construe it. Ofcom ought to have
13 concluded in that way. So that evidence must be something that we
14 should look at or not.

15 MR WEST: I am bound to say I find that slightly vague. I am not
16 entirely clear which technical information it is alleged that the
17 director should have had in mind because if I --

18 THE CHAIRMAN: Well, if, for example, the business plan says that -- I
19 cannot use the technical language -- but that they were going to
20 use 3,000 Xs of Y or whatever, and it is only if you were doing it
21 in the public sphere would you use 3,000 Xs of Y. Well, if 3,000
22 Xs of -- if that is right then somebody with technical knowledge
23 would have construed it in that way. That is what I understood
24 the technical information was going to. That is knowledge which
25 Ofcom or Oftel would have had, because they are in the industry
26 and therefore the background against which they should have
27 construed it. As I understood it that was the point and that was
28 why we were -- one of the suggestions we were proffering in a
29 tentative way was whether if there was somebody in the industry
30 that said that was the position on those things then everybody
31 would be able to agree because that is the way the industry works.
32 If the industry does not work that way, it is not something that
33 is accepted, then of course there is a difficulty, because it is
34 not how you would have, or how Ofcom or Oftel would have

1 understood it. Mr Mercer, is that right?

2 MR MERCER: Yes, ma'am. It is how they should have examined that
3 situation and analysed the contract on the basis of the matrix in
4 which it was formed, against which I will make submissions as to
5 how it should have been interpreted.

6 MR WEST: Ma'am, we should certainly be told as soon as possible what
7 precise technical propositions --

8 THE CHAIRMAN: I understood that is what was going to happen. That is
9 where we had got to, that is in a neutral way rather than in a
10 contentious way.

11 MR WEST: And hopefully without seeking to open up a whole range of
12 further areas.

13 THE CHAIRMAN: We will have to see what it is.

14 Can we move on then to the second alternative argument. That
15 is the question of the disconnection of private and public. That
16 is the only factual issue that arises, is it not.

17 MR MERCER: Yes. But let me say something by way of putting it in
18 context, which is that my client did not, until the 18th July last
19 year, classify gateways as public or private. It had gateways, and
20 this -- documents in the bundle in which other people in the
21 industry thought much the same way were not using that divide. So
22 what we had intended to say was, yes, they did cut off both,
23 because the way in which they cut things off was a way which did
24 not differentiate. They cut off simply on the basis of minutes'
25 usage. That I think would not be contested by Mr Wisking. They
26 chose a formula for an upper limit, and they said, right, unless
27 you tell us whether those are public or private and how they are
28 used we are going to cut them off, and they did.

29 THE CHAIRMAN: This arises because at some point when your client was
30 asked your client said that it was only private that he was using
31 it for.

32 MR MERCER: Well, it really was not making the distinction, is our
33 case, ma'am.

34 THE CHAIRMAN: Well, is there a distinction in the amount of use, or no

1 is there distinction all?

2 MR MERCER: Well, that is one of the things, again, we might usefully
3 perhaps engage in a dialogue with, particularly Vodafone, in the
4 near future. Because we would say that in fact you can, although
5 typically gateways have the characteristics set out in the agreed
6 statement of facts, you can, in fact, have private gateways that
7 have up to 30 SIM cards in them. You can have private gateways
8 that have revenue levels far in excess of the cut off points
9 chosen by Vodafone. If, for example, you were to find a very
10 large corporation and attach its PABX to a SIM that might, if the
11 apparatus had not been provided and was not being run by Vodafone,
12 be a private gateway. It might have a fairly massive usage.

13 THE CHAIRMAN: Can I just go back to the beginning?

14 MR MERCER: Yes.

15 THE CHAIRMAN: There was a contract.

16 MR MERCER: Yes.

17 THE CHAIRMAN: Pursuant to which you or Floe were provided, or were
18 going to be provided with a service from Vodafone. The question
19 is what service were you going to be provided; it does not matter
20 it if it is called private or public or whatever, what was it?

21 MR MERCER: That is exactly where we coming from, ma'am. Our view is
22 that the contract provided for us to resell Vodafone's services,
23 and as a means of doing that were given SIM cards that would
24 enable Vodafone to use certain apparatus.

25 THE CHAIRMAN: Does it matter what they cut off?

26 MR MERCER: Well, it does if it shows the -- and it goes to the regard
27 to which they had in respect of the argument relating to
28 illegality et cetera. They, under their own analysis, had no
29 right (in inverted commas) to cut off private gateways.

30 THE CHAIRMAN: But you say you did not distinguish between private and
31 public.

32 MR MERCER: We did not.

33 THE CHAIRMAN: No, so, what are you saying they were not allowed to cut
34 off?

1 MR MERCER: Private gateways. Under their own analysis. Under my
2 analysis they were not allowed to cut anything off.

3 THE CHAIRMAN: Therefore it does not matter whether it is distinguished
4 as private or public, your case is they should not have cut
5 anything off?

6 MR MERCER: Correct.

7 THE CHAIRMAN: So if that is your case then do we need any evidence
8 about what they did cut off, because your case is that they did
9 cut off and they should not have?

10 MR MERCER: Well, they seem to be contesting that they cut off any
11 private gateways, or am I wrong?

12 (The Tribunal conferred)

13 THE CHAIRMAN: I think your point is that Vodafone says that they were
14 not entitled to cut off private gateways, that you were entitled
15 to have private gateways, whether you distinguish or not and they
16 did cut off private gateways. If it is accepted that they cut off
17 private gateways, and if -- then the question is whether one needs
18 any more evidence than that for your point. It may be as to the
19 number of private gateways as against public gateways.

20 MR MERCER: I am not sure that that is relevant. What the point goes
21 to is the argument that had been made by Mr Wisking's predecessor
22 in the matter, which we could describe to give them all an
23 epithet, the Pyrrhic victory argument, which is that I may be
24 right, but even if I am right Vodafone believe they were acting
25 lawfully anyway and therefore could not have been abusing their
26 dominant position. And my argument on that, ma'am, is that the
27 legality point is a fig leaf and they were hell bent in cutting
28 off everything they could find and they did. Public, private,
29 whatever.

30 THE CHAIRMAN: Do we need to differentiate? Do we need to know how
31 much or from whom or whatever? They admit that they cut it all
32 off.

33 MR WISKING: Well, I think --

34 MR MERCER: They do not admit, ma'am, that any of them were private

1 owned.

2 THE CHAIRMAN: No.

3 MR WISKING: I think the position is that it is not disputed by Floe
4 that it was operating public gateways as they are characterised,
5 that Vodafone did cut off gateways on the 18th March when the
6 contract was terminated. I do not think there is a dispute that
7 those were public gateways. What is not entirely clear, and I do
8 not think the appellant has ever particularised it, is this vague
9 allegation that private gateways were cut off, which appears, I
10 think, in schedule 3 of the amended Notice of Appeal.

11 In Vodafone's statement of intervention we have set out, and
12 that is then further supported in the evidence of Mr Morrow, we
13 set out what Vodafone did. We do not know any more than this
14 vague allegation that private gateways were cut off. What we have
15 set out is what we did, and we have a test to assess whether it
16 was a public gateway or not. If it was not we believed that
17 public gateways...

18 We then wrote to the service provider giving them an
19 opportunity to explain what had happened and what was happening.
20 In some instance I think with Pay As You Talk SIM cards, where it
21 is not possible to identify who has the SIM card, a message was
22 sent to the SIM card saying that unless you contact us the SIM
23 card will be suspended. So that is what we did. We do not know
24 what the allegation against us is. We do not know whether it is
25 10 or whatever. We have just described as best we can in response
26 to the allegations set out in the Notice of Appeal how we address
27 this particular issue of public gateways.

28 It is for the appellant to give -- the appellant's case is we
29 were operating two private gateways and you cut them off. Well,
30 they need to tell us that. If their case is we heard round the
31 industry that this is what you were doing, well, they need to tell
32 us that. But I submit that that latter submission would not be
33 precisely relevant to these proceedings. We are faced with the
34 difficulty that we have a very vague allegation and we have tried

1 as best we can to deal with it in the Statement of Intervention
2 and the evidence. We struggle to see its relevance. But we have
3 tried to address it.

4 MR WEST: I am not wanting to labour the point about Freeserve, but I
5 point out again that we asked Floe to provide this evidence before
6 we took the decision. They did not come up with anything. That
7 is expressly recorded in the decision so there was no evidence
8 provided that it was operating private gateways.

9 Can I just make two other very brief points? One is that Floe
10 has always been decidedly coy about this. If the point is to
11 continue at all Floe should now be ordered to provide what it is
12 that it is relying upon.

13 The second one is that Floe's argument here seems to suffer
14 from a certain degree of incoherence because just a minute ago Mr
15 Mercer was saying it must have been obvious to Vodafone from our
16 business plan that we would be operating public gateways because
17 the usage levels were so high. Whereas under this heading, public
18 re private gateways, he is saying, well, you cannot tell from the
19 level of usage whether a gateway is public or private and
20 Vodafone by cutting off all gateways which were at a certain level
21 of usage must therefore have cut off some private gateways. I am
22 not sure how those two arguments could possibly stand together but
23 I suppose that is not my problem.

24 MR MERCER: As a matter of logic I have no difficulty, but then I am
25 only half Scots so perhaps I have not got the full deck of cards.
26 But there is not any difficulty in reconciling those two
27 statements at all in my mind. But I may have been dealing with
28 telecoms law for just a couple of years too long. The fact is
29 that they should have guessed what we were taking you to -- those
30 kinds of ARPU levels would be dealing with public gateways. You
31 cannot look at something and go "that is a private gateway" just
32 by looking at the revenue level. You just cannot. Because it
33 could be attached to a large company with a fantastic throughput
34 going out into the Vodafone network because its handset provider

1 MR MERCER: I would have to accept that, ma'am. Thinking while you
2 were talking to your colleagues, perhaps, here the best thing we
3 could do is a short paragraph to Mr Wisking in an uncontentious
4 style and see if we can agree it, or he has any reason to gainsay
5 us.

6 THE CHAIRMAN: And then see where we get to.

7 MR MERCER: And see where we get to, ma'am.

8 MR WISKING: Well, like my friend, I am standing here concerned about
9 the number of short paragraphs that we are going to be receiving.
10 But if the Tribunal is minded to give Floe the opportunity then
11 they should be asked to do so.

12 THE CHAIRMAN: Well, we are not deciding those paragraphs go in, we are
13 only seeing what the issue is. Then if it turns out that the issue
14 is one which is not within the notice, or not appropriate because
15 of the reasons that Mr West has indicated then those are the
16 submissions that can be made. We need to know what the point is
17 before we can decide it.

18 MR WISKING: Yes, I have real difficulty with the relevance of either
19 proposition to these proceedings. Vodafone's position, as Floe
20 will know, is set out in the witness statements of Mr Morrow. The
21 position is that Vodafone did not knowingly cut off private
22 gateways. It is for Floe to allege otherwise.

23 THE CHAIRMAN: One would need to know who were private and why they say
24 they were before you can decide that.

25 MR WISKING: The other point to make is that it is not limited to these
26 usage criteria so there were criteria and in addition to that
27 people were given the opportunity to explain, well, actually this
28 was a private gateway.

29 THE CHAIRMAN: That is because you sent the message.

30 MR WISKING: Sent the message or we wrote to the service provider
31 where the card was issued by a service provider. But I have -- I
32 just cannot see the relevance of either --

33 THE CHAIRMAN: That is in paragraph 27?

34 MR WISKING: And paragraphs 21 and 22 of Mr Morrow's evidence. That is

1 also set out in the end of the Notice of Intervention.

2 THE CHAIRMAN: Well, I think this is a matter on which you need to set
3 out what you are -- the facts you are trying to rely on, and then
4 the parties can see whether or not they think that they are
5 relevant and whether they are put in a neutral way so that they
6 can accept them or not. If there is a problem then it will have
7 to come back here and we will have to decide whether or not it is
8 relevant.

9 MR MERCER: I had one fact we will have to put Mr Wisking which had not
10 been made to me before, which is that -- and never struck me
11 before, of course, SMSs may not be read by gateway machines. But
12 we will have to look at that as well when we prepare our short
13 statement. Very well, ma'am.

14 THE CHAIRMAN: Does that deal with all the points on which you were
15 thinking that you might call oral evidence?

16 MR MERCER: I think so, ma'am.

17 THE CHAIRMAN: Well, it seems therefore on those points that you need
18 to go away and think about what the facts are you are trying to
19 rely on and see whether you can get some agreement in a neutral
20 form, and then come back.

21 MR MERCER: We will, ma'am.

22 THE CHAIRMAN: It is very important that we do not stray out of
23 relevant matters.

24 MR MERCER: Yes, ma'am.

25 (The Tribunal conferred)

26 THE CHAIRMAN: It seems there are two points; one, can it be agreed,
27 and, second, is it relevant. Now, can it be agreed, that is a
28 matter which we will have to see. If it can be agreed, then is it
29 relevant. Well, if it is just a short paragraph we can deal with
30 relevance at the hearing probably. If it is more complicated then
31 of course you may have to come back.

32 MR WEST: It has been pointed out that even short paragraphs may
33 contain points of principle which may have to be addressed in the
34 skeleton argument.

1 THE CHAIRMAN: Yes.

2 MR WEST: So I suppose the point is even if it is a short paragraph we
3 may have to come back.

4 THE CHAIRMAN: I think the answer is we have to leave it to you,
5 because we do not know where we are going. So I am just
6 indicating that if it is an easy point on relevance it may be
7 something that can be dealt with shortly in the skeleton and we
8 can deal with it at the hearing. But if it turns out it is going
9 to take half a day then that is another matter.

10 MR PICKFORD: Ma'am, if I might just say for the avoidance of doubt if
11 these points are of general application T-Mobile will obviously
12 seek to be involved in that agreement. If they are purely between
13 Vodafone and Floe then obviously we need not involve ourselves. It
14 is not entirely clear to me from what Mr Mercer has said the
15 extent to which there will be a general application.

16 THE CHAIRMAN: I assume that Mr Mercer will be providing you as well,
17 and then you can see whether you want to intervene on a particular
18 matter.

19 MR PICKFORD: Indeed.

20 THE CHAIRMAN: Is that right?

21 MR MERCER: That is exactly right, ma'am.

22 THE CHAIRMAN: Does that leave anything else outstanding?

23 MR WEST: There is a small point about service of the reply which
24 should have taken place last Wednesday if it was to take place at
25 all. That has not happened and I would ask Mr Mercer to indicate
26 whether he will be intending to apply for an extension of that or
27 otherwise. Is the reply now a fait accompli?

28 THE CHAIRMAN: Are you intending to reply, Mr Mercer?

29 MR MERCER: It would be true to say that it is not entirely agreed that
30 we had to deliver it by the 23rd. If you would look at the
31 Tribunal's letter of 10th June, it is the second paragraph, and we
32 took that to refer to a reply to the Statement of Intervention
33 referred to immediately above.

34 THE CHAIRMAN: I see. Do you want a reply? Can we short-circuit this?

1 MR MERCER: I was going to make the suggestion that in fact, ma'am, if
2 I am obliged to disclose my skeleton argument in advance to the
3 other parties.

4 THE CHAIRMAN: Which you will be. That is the usual procedure.

5 MR MERCER: In the circumstances that could be a combined skeleton
6 argument and where necessary reply, because then it is not
7 exactly that one is planning to step outside the bounds of what we
8 have already argued, but I thought that technically might save us
9 some toing and froing. As this has, ma'am, turned into a position
10 where, frankly, we appear to have two major opponents and the one
11 very clever intervener still in the wings, and where we are facing
12 Statements of Intervention the same size as the defence in matters
13 where issues are not that great. We would not have thought that
14 might have caused an inconvenience given the amount of legal brain
15 power to be exercised on the other side.

16 THE CHAIRMAN: Paragraph 7 of the letter indicated that the skeleton
17 argument by you was to be filed by Monday, 5th July, and then the
18 other parties were to sequentially file afterwards, so they would
19 have had your skeleton argument when they did theirs. So is it
20 really any different to a reply?

21 MR MERCER: I do not think it is, ma'am. What I am beginning to become
22 fearful of is a touch of lawyeritis in the sense of -- I do not
23 want to use football analogies this afternoon after last night,
24 but if I stray towards the goal line I get two 800 pound gorillas
25 chasing after me, and I am fearful we will spend time in
26 procedural matters if it is not classified as both a skeleton
27 argument and a reply.

28 THE CHAIRMAN: Disproportionate.

29 MR MERCER: Ma'am, just for the record, I did write subsequent to the
30 letter of 10th June saying that I saw no reason why there should
31 not be a simultaneous exchange of skeleton arguments. But if what
32 is, I suppose, an application by me now, is successful I would
33 have no objection to going on the 5th and keeping to the timetable
34 knowing a week in advance.

1 THE CHAIRMAN: Mr West, do you have any submissions on that, or are you
2 happy it is dealt with in that way, because proportionately one
3 document is easier to read than two.

4 MR WEST: I am not entirely sure what the difference is between saying
5 the pleadings are now closed and having the skeleton argument in
6 due course, or calling the skeleton argument a combined skeleton
7 argument and reply --

8 THE CHAIRMAN: We are not calling it a skeleton argument in reply, we
9 are just saying that we do not need the reply now because anything
10 will go to the skeleton argument.

11 MR WEST: That seems to be sensible.

12 MR WISKING: I think, ma'am, as long as it is on the basis that we do
13 not see anything new.

14 THE CHAIRMAN: But you will know that before you put yours in, so you
15 will be able to deal with it if that happens.

16 MR WISKING: Well, if it is a matter of submission in the skeleton that
17 is correct. If by calling it a reply and skeleton that is somehow
18 an opportunity to advance some new allegation and new evidence.

19 THE CHAIRMAN: You would not be entitled to do that in the reply
20 either. That is why a reply is a reply to whatever you put in.

21 MR WISKING: Well, on that basis we do not.

22 MR MERCER: We will second it.

23 THE CHAIRMAN: I think it was Mr West who raised the question of the
24 reply and that has now been dealt with. There is going to be a
25 skeleton argument. It is going to go in first. So you will have
26 a chance to answer it and you will not be taken by surprise
27 because you will have it first.

28 MR WEST: Indeed.

29 THE CHAIRMAN: Is there anything else before we get to timetable?

30 MR MERCER: If I can mention one other matter, T-Mobile, ma'am, when
31 you were going through your initial list.

32 THE CHAIRMAN: Yes. Are you intending to be represented at the
33 hearing?

34 MR PICKFORD: We are, yes, ma'am. We do make a number of discrete

1 points. We will obviously strive to avoid unnecessary
2 duplication, but to reserve our position and ensure that there are
3 not matters that go astray that affect our interests adversely we
4 intend to be represented.

5 THE CHAIRMAN: There is the question of the timetable.

6 MR WISKING: Ma'am, there is one minor matter I wanted to raise, with
7 some trepidation, we had intended and would still like to, if the
8 Tribunal allowed us to do so, submit a very, very short second
9 witness statement from Mr Morrow. It is literally two paragraphs.
10 It deals with a matter which is implicit already in his existing
11 witness statement, but we thought it was appropriate to make it
12 explicit. It is simply this, that he gives evidence about this
13 issue where these IMEI numbers when they were loaded on to the
14 equipment register got automatically loaded on to the central
15 register, and then Vodafone put in place a process to stop that
16 automatic uploading.

17 What he does not detail expressly, ma'am, was what happened in
18 that period between May and October. It is implicit from the
19 statement that in fact Vodafone in that period did not enter any
20 IMEI numbers on its own equipment register because of this issue
21 of uploading. It is implicit because in his statement he refers to
22 the fact that during that period Vodafone had identified SIM cards
23 which he believed were being used in public gateways. That would
24 not be possible in the case of Floe or anybody else if they were
25 tagging or uploading these IMEI numbers. The fact was they were
26 not. They were only suspending the SIM cards. So it is implicit
27 already, and we wanted to make it explicit into two paragraphs.

28 I understand from Ofcom there is no objection to putting in
29 that statement, but I would seek leave to do so.

30 THE CHAIRMAN: Do you have an objection to that?

31 MR MERCER: Absolutely none, ma'am. In fact I wonder if I might save Mr
32 Wisking the bother, because we have no argument that depends on
33 it. The evidence we were looking for is the facts of what they can
34 do in this instance, rather than what they did in this specific

1 instance.

2 MR WISKING: Ma'am, it is already done.

3 THE CHAIRMAN: Yes. So we need a timetable for what is going to now
4 happen. When were you going to put that in?

5 MR WISKING: Tuesday, ma'am, 29th June.

6 THE CHAIRMAN: By 5.00 pm. Now when can you set out these factual
7 matters so that the other parties can consider them?

8 MR MERCER: Wednesday at 5.00 pm, as long as the other parties do not
9 mind receiving them electronically, rather than by fax.

10 THE CHAIRMAN: How long is it going to take? Can I say the "other
11 parties", the group, to look at it?

12 MR WISKING: I do not think it will take long to look at, but what I am
13 slightly concerned about is how this impacts on the timetable.

14 THE CHAIRMAN: I agree. That is why I have asked that question before
15 I ...

16 (The Tribunal conferred)

17 The problem that we see is that in order to keep to the
18 timetable it is important that you put in your skeleton by the
19 5th. I assume, but tell me that I am wrong, that these factual
20 matters are going to be relevant to your skeleton.

21 MR MERCER: They are, ma'am. But I had anticipated that they would not
22 be such that they would cause the drafting of the major part of it
23 to be prevented, and that the iterative process between me and the
24 other parties could continue during the period from Wednesday
25 until almost midday on the 5th, and it would still be possible to
26 submit the skeleton.

27 THE CHAIRMAN: Yes, but if you cannot agree, if there is a problem, and
28 then you may have to come back here; would that not be before the
29 skeletons or not?

30 MR MERCER: Well, I am not sure that is crucial, because I think you
31 can asterisk the paragraphs and say, well, if there is a
32 disagreement and we have to go back these either stay or come out.

33 THE CHAIRMAN: I suppose it may (I am thinking aloud now) but it may
34 identify whether the facts which you are then seeking to rely on

1 wants. I suspect that there is no damage or disadvantage to
2 dealing with the matters in the way in which I suggested, to be
3 quite honest. It is not as neat as Mr West might wish, but it gets
4 the job done equally efficiently by the time you get to trial,
5 ma'am.

6 THE CHAIRMAN: 1 o'clock on Tuesday. That gives you an extra half day.

7 MR MERCER: I am obliged to you, ma'am.

8 THE CHAIRMAN: So provide draft statements of facts upon which the
9 applicant wishes to rely by 1.00 pm on Tuesday, 29th June to the
10 respondents and interveners. Now, what -- Thursday by 5 o'clock,
11 you should be able to deal with that. So response by respondents
12 and interveners by 5.00 pm on 1st July. Now assuming that you can
13 all agree then that would be the end of it and there will be no
14 problem. If you cannot agree what do you want to do?

15 MR MERCER: The corollary of Mr West's submission is we should be back
16 in here the next day, ma'am.

17 THE CHAIRMAN: The difficulty we have is that the Tribunal would have
18 to sit very early on Friday and be finished by 11.00 am. But on
19 that basis one of the members of the Tribunal, as you know, comes
20 from Northern Ireland so he would have to know to be able to come
21 in the night before because otherwise he could not get here by
22 9.00 am. That is to try and accommodate the position that this
23 skeleton has to be served by the 5th.

24 MR PICKFORD: Ma'am, for our part I am not sure how crucial it will be
25 that T-Mobile attend that, I will not be available on Friday, nor
26 those instructing me.

27 THE CHAIRMAN: Thank you for letting us know. That is not going to
28 make much difference.

29 MR WEST: May I suggest for the convenience of the Tribunal that we
30 make the date for responses first at 1.00 pm instead of 5.00 pm,
31 which would enable the parties to be in agreement.

32 MR WISKING: A slight reservation, we have no wish to inconvenience the
33 Tribunal, but we are not quite sure what we are going to be
34 confronted with, and there is just this question of the

1 availability of necessary technical people to review this
2 material.

3 THE CHAIRMAN: May I...

4 (The Tribunal conferred)

5 MR WISKING: I was going to suggest whether this could be addressed
6 electronically or we could do this hearing by telephone. We
7 certainly have no objection to that.

8 THE CHAIRMAN: I am not sure that it would be the best way to deal with
9 this particular hearing. Whether this might be a simpler way of
10 dealing with it, I can be authorised to sit by myself and the
11 other members do not object to that. Now on that basis we can
12 leave the date -- the time and date fluid, because I will be able
13 to accommodate it, I am probably here anyway and I will be able to
14 accommodate a time during the following week, so I can either do
15 it on the Friday, or during the following week. I cannot do it on
16 Monday afternoon.

17 MR WISKING: My preference is for Monday morning, if necessary, but
18 others may make submissions.

19 THE CHAIRMAN: Do you want me to pencil in Monday morning?

20 MR WEST: We have the same problem again with the skeleton being due on
21 Monday.

22 THE CHAIRMAN: Yes.

23 MR WEST: So directions will have to be given as to what the skeleton
24 contained on that basis.

25 THE CHAIRMAN: Well, it can be done on the basis and then we can have a
26 look and see where we go. I could hear it on Friday afternoon.

27 MR WEST: For our part we would prefer that.

28 THE CHAIRMAN: So 2nd July at 2.00 pm, if necessary. At least it is in
29 our diaries. Is that all right? (Agreed). So provisionally booked
30 CMC 2.00 pm 2nd July. But hopefully the matter will resolve itself
31 so we will not need that.

32 Is there anything else that needs to be dealt with?

33 MR WEST: We have a small request that will not be contentious; we have
34 sent to all the other parties the documents which were in our file

1 when we made the decision, we have not sent that to the Tribunal,
2 would the Tribunal like to have those documents?

3 THE CHAIRMAN: Are you going to be relying on them?

4 MR WEST: I do not understand that they will be in the trial bundles
5 anyway.

6 THE CHAIRMAN: Then you are not relying on them. The documents we
7 referred to before that you relied on in relation to the
8 construction of the contract, which were on page 11, are they
9 going to be in the paginated bundle? I would assume they must be.

10 MR WEST: Those may well be, but as to other documents they may only go
11 to the issue of whether or not they were put before the Tribunal
12 below and not to any more substantive issue.

13 THE CHAIRMAN: Do you think there will be a dispute about that? Well,
14 is the answer that -- well, Mr Mercer has seen one of those
15 bundles, you served it on Mr Mercer?

16 MR WEST: So I am told.

17 MR MERCER: I presume it is the two red folders that originally arrived
18 and, yes, I have seen it.

19 THE CHAIRMAN: Is there any material in those bundles that you would
20 like before this Tribunal?

21 MR MERCER: There is nothing on which I intend to rely.

22 THE CHAIRMAN: Is there anything that you would like the Tribunal to
23 see? Do you want to have a look at it?

24 MR MERCER: There is nothing I do not want you to see, ma'am,.

25 THE CHAIRMAN: No, but the issue is whether what we have ordered in
26 paragraph 10A of our letter is a composite bundle of documents, so
27 it should contain all the documents that all the parties believes
28 the Tribunal ought to see. We have ordered that in a
29 chronological order, rather than bits and pieces, so we can read
30 from beginning to end. If there is anything in those two red
31 files that you want the Tribunal to see, or that you may be making
32 submissions on if you tell -- I do not know who is going to make
33 up the agreed bundle.

34 MR MERCER: Well, in fact we have already started, ma'am, as we have

1 everybody else's bundles and given that I had access to a
2 paralegal this week we have already started it because I will be
3 writing my skeleton first.

4 THE CHAIRMAN: To have the bundle.

5 MR MERCER: Yes.

6 THE CHAIRMAN: So if you can make sure that everything is in there. I
7 think the point is taken that those two bundles are available, but
8 we only need that which you are all relying on.

9 MR MERCER: I think it is also if any of the other parties have
10 something else or that nature I cannot think that there should be
11 anything other than the bundles which they delivered with their
12 statements or defence. We would be kind of going to press.

13 THE CHAIRMAN: Those two bundles have the documents on which their
14 decision was based and therefore they should not be relying on
15 anything else. So that is the boundaries of their decision. If
16 you would just make sure there is nothing in it that you wish to
17 rely on and if there is it should go into the composite bundle.

18 MR MERCER: Very good, ma'am.

19 MR PICKFORD: I believe Mr West indicated that those bundles have been
20 provided to the parties generally, certainly for my part I am not
21 aware of that bundle being provided to T-Mobile.

22 MR WEST: I am sure that can be dealt with between the parties.

23 THE CHAIRMAN: Is there any confidentiality...

24 MR WEST: Maybe this is not an issue which is usually addressed today.

25 THE CHAIRMAN: No, but one has to be aware and deal with the
26 confidentiality point. There may be Vodafone's confidentiality
27 and there may be Floe's confidentiality. I do not know.

28 MR PICKFORD: I am confident that we can deal with that between us. I
29 just wanted to raise it.

30 MR WEST: I wonder if I can ask leave for Mr Austin to say a word. He
31 is going to do our trial.

32 MR AUSTIN: It is simply that after the first CMC Sir Christopher
33 ordered that we provide copies to Vodafone and to the appellant,
34 but not to T-Mobile, so T-Mobile are not in the loop. I must

1 confess I am not sure why, T-Mobile need to see that bundle now.
2 There will be confidentiality issues but that is something we can
3 deal with. I wanted to make it clear we had not left T-Mobile out
4 of the loop for any sinister reasons.

5 THE CHAIRMAN: Why did the President order -- I am not sure if he
6 ordered or did not order; was there a reason?

7 MR AUSTIN: It is simply that T-Mobile's role at that stage in the
8 appeal was not sufficiently concrete.

9 THE CHAIRMAN: Do you need the bundle?

10 MR PICKFORD: Ma'am, without knowing what it contains it is difficult
11 to answer. I think probably not.

12 THE CHAIRMAN: Is not the answer that I do not make any order, do not
13 deal with it and you try and resolve it between you. I am sure
14 that can be resolved.

15 MR PICKFORD: Yes.

16 MR WEST: Finally, I just ask whether the Tribunal would like us to
17 draft the order today, or whether the Tribunal will do that
18 itself.

19 THE CHAIRMAN: I think we will probably draft it, will we? We will
20 draft it and we will let you see it. It is only going to have --
21 it is quite simple.

22 MR WISKING: I have noticed two small matters to raise. The first is
23 following on from the conversation about the trial bundle we may
24 want to possibly put the document from the Ofcom file in the trial
25 bundle but that is specifically referred to in the Statement of
26 Intervention.

27 THE CHAIRMAN: Yes. It would be useful -- would be paginated. It
28 probably does not matter if it is A and B afterwards.

29 MR WISKING: I imagine the Tribunal would prefer it in chronological
30 order. If Taylor Wessing could circulate an index as soon as
31 possible and we could review that.

32 THE CHAIRMAN: Would that be possible?

33 MR MERCER: Certainly during the course of the next three working days
34 I would have thought.

1 MR WISKING: The second matter was I do not know whether the Tribunal
2 wants to, given the matters that have been discussed it may be
3 premature to discuss the indicative timetable for the hearing. I
4 understood from the agenda perhaps that might be something that
5 ...

6 THE CHAIRMAN: Yes. The difficulty is we do not quite know. Did you
7 have particular submissions.

8 MR WISKING: The one issue I wanted to raise is 45 minutes has been
9 allocated to Vodafone at this stage, we would like slightly
10 longer, perhaps an hour or an hour and 15 minutes.

11 THE CHAIRMAN: The second interveners will be 2.00 until 2.30. It may
12 be that the second Interveners are not intervening orally because
13 it is only you.

14 MR WISKING: I realise it may be premature.

15 THE CHAIRMAN: There is a bit of time because we have to finish at
16 3.30.

17 MR WISKING: That is right. If there is flexibility in the timetable
18 and it is noted that we may need a little longer for our
19 submissions.

20 THE CHAIRMAN: That is very helpful.

21 MR PICKFORD: For our part, ma'am, we were content with the time set
22 aside for us in the indicative timetable.

23 THE CHAIRMAN: The question is whether we move this up and give you a
24 half hour and it then finishes at 4 o'clock. We will leave the
25 timetable as it is. But we have noted that you have said that you
26 would like another 15 minutes. There is time by extending the
27 timetable by 15 minutes all the way through in the afternoon, if
28 that happens.

29 There was some European aspect of this matter, there was some
30 discussion in Europe or in the Gateway Operators Association going
31 to bring an action which was on the same subject matter. Do you
32 know anything about that?

33 MR MERCER: May I take instructions (pause while counsel takes
34 instructions). I am instructed, ma'am, that the Mobile Gateway

1 Operators Association and Floe separately have made complaint to
2 the Enterprise Directorate General concerning the United Kingdom's
3 noncompliance with the Radio and Telecommunications Terminal
4 Equipment Directive.

5 THE CHAIRMAN: Is that relevant to what we are going to decide at all?

6 MR MERCER: The directive will be referred to because the equipment,
7 and you will have seen one of the disputed agreed facts, it refers
8 to it, but I do not think it is relevant to that. We did in fact
9 -- the President asked the question about European involvement at,
10 I think, the first case management conference. The answer remains
11 the same. That there is nothing, we think, that is happening in
12 Europe that directly impacts or causes to be stayed, ma'am.

13 There is, however - me saying that does raise one question
14 perhaps we ought to deal with, which is that at the moment we
15 have the respondent's agreed facts to be relied on, and we have
16 the comments. I have received comments now on the respondents and
17 appellants and interveners agreed statement of facts from Mr
18 Wisking and the others.

19 THE CHAIRMAN: What we should do is by 1.00 pm on 1st July there should
20 be an agreed statement of facts.

21 MR MERCER: We should knock that on the head at the same time so have
22 it, perhaps, in one document, which might be useful.

23 THE CHAIRMAN: Yes, agreed statement of facts finalised by 1.00 pm on
24 1st July.

25 MR WISKING: Just on that point, I assume that that is to the exclusion
26 of the appendices, that the appendices have --

27 THE CHAIRMAN: Yes, and any other points in there which deal with oral
28 evidence et cetera.

29 Mr West, I do not know if you have anything to say about this
30 European matter or whether...

31 MR WEST: Could I ask Mr Austin?

32 MR AUSTIN: It is probably easier than having me stage whisper from the
33 back. The nature of the complaint would lead to factual
34 proceedings if anything were to happen against the United Kingdom.

1 Factual proceedings can take six, eight, the legal proceedings
2 certainly take about two years. So in terms of any notion of this
3 Tribunal waiting to see what happens in Europe, there is in fact
4 no legal bar, which is the most important thing, on this Tribunal
5 dealing with the issue because an infraction has been made.

6 THE CHAIRMAN: Because I think one of the points I made initially is
7 somewhat in relation to this matter, is it not.

8 MR AUSTIN: That is correct. We have dealt with it.

9 THE CHAIRMAN: We can continue dealing with it.

10 MR AUSTIN: Precisely.

11 THE CHAIRMAN: I have pencilled in Friday afternoon at two o'clock. I
12 hope you will all come to some sort of arrangement, so we will not
13 need to have that hearing. Thank you all very much.

14 (The hearing concluded at 4.15)

15

16