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**IN THE COMPETITION**

Case No. 1026/2/3/04

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

9<sup>th</sup> December 2004

Before:

SIR CHRISTOPHER BELLAMY  
(The President)  
PROFESSOR JOHN PICKERING  
MS PATRICIA QUIGLEY

Sitting as a Tribunal in England and Wales

BETWEEN:

WANADOO UK PLC  
(formerly FREESERVE.COM PLC)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC (instructed by Messrs Baker & McKenzie) appeared for the appellant

Mr Richard Fowler QC and Mr Meredith Pickford (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the respondent.

Mr Gerald Barling QC and Miss Sarah Lee (instructed by the Head of Competition and Public Law, BT Retail) appeared for the intervener.

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**CASE MANAGEMENT CONFERENCE**

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1 THE PRESIDENT: Good morning, ladies and gentlemen. Mr. Fowler, we have had a recent  
2 submission from Ofcom for which we are very grateful indeed, and we understand from that  
3 that it has kindly been arranged that Mr. Meek and Mr. Williams were able to come along  
4 today to help the proceedings. Is that right?

5 MR. FOWLER: Yes, Sir, they are here.

6 THE PRESIDENT: Good morning, Mr. Meek, and Mr. Williams, good morning. Thank you very  
7 much indeed for coming down. It seemed to us useful, albeit in this somewhat formal setting to  
8 have a certain dialogue today about the sorts of problems that may or may not be arising so  
9 that we can very fully understand how you see the situation, what your point of view is,  
10 because that helps us to manage our caseload and our workload, and generally to do our job  
11 too, so thank you very much for being here, we appreciate it.

12 What is the best way to proceed, Mr. Fowler? We have had the advantage of quickly  
13 reading these submissions. We have, I think, two points we would like to explore, and there  
14 may be other points that you would like to elaborate for us. The two points are: first, in this  
15 very helpful document you refer from time to time to the working up of a new document by  
16 Ofcom in the course of the present proceedings, and we are not quite clear whether that is  
17 another Statement of Objections, or whether we are now moving towards a Decision. If it is the  
18 latter what is the realistic timetable for the Decision? That is the first question. The second  
19 question, which we are somewhat puzzled by at this stage, is how the problems of Broadband  
20 Basic have, as it were, crept into this case, and how that is affecting the timetable for the  
21 proceedings which were, as we originally understood it, directed to the investigation which  
22 was originally started in 2003 and then parked for a while, and then recommenced in February  
23 of this year. So those are the two matters upon which we would like a bit of help to start with,  
24 if we may?

25 MR. FOWLER: As to the first, at the moment it looks more likely to be a second SO than a non-  
26 infringement Decision. If it were a Decision at all it would be a non-infringement Decision. If  
27 it went the other way it would be, and this seems likely at the moment, a second SO. That is  
28 what we are working to in June at the moment.

29 THE PRESIDENT: Second SO in June, so that is effectively another five to six months for a second  
30 SO, which means how long after that for a Decision? Are we talking about this time next year,  
31 or something of that sort?

32 MR. FOWLER: We would hope clearly that the further SO would be a very robust position for  
33 Ofcom, and in the response we would plainly have to take into account whatever BT said, but  
34 we would hope ----

1 THE PRESIDENT: Something very close to your final position?

2 MR. FOWLER: A sound basis for a final Decision, yes, but obviously it is very difficult.

3 THE PRESIDENT: Quite, that is one of the problems with the whole case, it is very difficult for  
4 everyone to work out quite where the next twist and turn will come.

5 MR. FOWLER: One of the problems, and we recognise of course, this is to some extent a rather  
6 novel case in a changing market, in a new market. That is one of the reasons why it has been  
7 taking so long, and has taken so long. The other cases that have been dealt with by Ofcom have  
8 been dealt with within their guidelines. This case, we recognise, is a difficult case.

9 THE PRESIDENT: That is one of the things that troubles us to some extent. This is such a fast  
10 moving market that is the regulatory system, as it were, geared up in a way that enables it to  
11 catch up with what is happening, because if things keep evolving and one keeps changing the  
12 investigation as new things happen, one will never get out of it, as it were.

13 MR. FOWLER: We of course recognise it is a difficulty, the more so at the early stage when the  
14 original Decision was taken that there was no infringement. But now that the market has  
15 developed, we do believe that it is possible to take a Decision one way or the other. But that  
16 does involve a full and proper investigation. The fact is that we have been challenged on  
17 almost every aspect of the SO by BT and there are a number of lines that we wish to pursue  
18 further, and that is what gives rise to the projected amount of resource that is being devoted to  
19 this case, which we said in the written submission amounts to something like seven people  
20 full-time until the next document comes out. That is not, in any sense, we believe a fanciful  
21 projection nor is it in any sense based upon any sort of boiler plating. It is simply what we  
22 believe needs to be done to get to a robust position in this difficult case.

23 As to your second question about Basic Broadband, whilst that is an additional matter  
24 it is not, as it were on the critical path in relation to our work streams.

25 THE PRESIDENT: It was not in the original SO.

26 MR. FOWLER: It is not in the original SO and it does involve additional material, investigation of  
27 additional facts, but it falls alongside other work that is -----

28 THE PRESIDENT: So it is not in the main investigation effectively?

29 MR. FOWLER: It is in the main investigation. When I say "it is not in the critical path", it is not the  
30 cause of the projected end date for our next document. The work on that can take place  
31 alongside other matters.

32 THE PRESIDENT: Without going into detail, are you able to help at all on the fact that when we  
33 last met, which I think was on 10<sup>th</sup> September, you were very robustly telling us that you  
34 would be able to stick to the original timetable.

1 MR. FOWLER: We hoped to do so, yes.

2 THE PRESIDENT: It was a very strongly expressed hope, although always hedged around the  
3 appropriate qualifications. If it is not Broadband Basic that has caused the delay, what has  
4 happened to push you off your projected path, as it were?

5 MR. FOWLER: It is addressing as best we can and as robustly as we can, challenges that have been  
6 made by BT to the positions that we have adopted in the original SO. We do not really believe  
7 it is appropriate for us to identify what we actually regard as the work projects ----

8 THE PRESIDENT: Absolutely, no.

9 MR. FOWLER: Nevertheless, it arises out of that. In particular they have raised challenges to the  
10 market definition, indeed, whether narrowband and broadband should be included together in  
11 the market definition, and that does raise very serious issues.

12 THE PRESIDENT: But that would always have been something that you must have thought about at  
13 some earlier point.

14 MR. FOWLER: That is indeed true, Sir. We had not, in time for the original SO, had time to address  
15 that, and we now believe it needs to be addressed.

16 THE PRESIDENT: Just help me again on Broadband Basic. It is not a factor in the delay in the  
17 investigation. Is that right?

18 MR. FOWLER: It is a factor in the resources, but not in the delay, no. It is not on the critical path.

19 THE PRESIDENT: Is it part of the alleged infringement?

20 MR. FOWLER: It is to bring it within the alleged infringement, yes.

21 THE PRESIDENT: So it is being added in as an infringement.

22 MR. FOWLER: It is being added in, but when I say it is not in the critical path I mean in time terms,  
23 in the duration of the period until the next document.

24 THE PRESIDENT: So added in as an infringement, but not causing any consequential delay as  
25 a result?

26 MR. FOWLER: Indeed, yes.

27 THE PRESIDENT: Is that the idea? Have I got the point?

28 MR. FOWLER: Yes.

29 THE PRESIDENT: What should we do with the existing Appeal, in your submission?

30 MR. FOWLER: We recognise that it is plainly something that you have the jurisdiction to require to  
31 be brought on. We do not think that that would be a sensible use of resources. It would delay  
32 our ongoing investigation. We believe it would be largely academic. We do not believe it  
33 would shed much light on the ongoing investigation even if a decision were capable of coming  
34 out before the ongoing investigation reached conclusion. So we do not see any great point in

1 that, particularly since even if Wanadoo were successful in it, it would be on their case largely  
2 a matter for remitting to us to do what we are currently doing, and therefore in circumstances  
3 where it would actually divert resources away from the current investigation that would not  
4 seem a very fruitful line to be pursuing.

5 THE PRESIDENT: I suppose part of our concerns are that under the present regulatory regime the  
6 enforcement of the Competition Rules is regarded as a central part of the regime and, indeed, it  
7 is hoped, and we have seen expressed, the idea that over time some of the other regulatory  
8 structures will fall away and we will be relying very heavily on competition law to ensure  
9 a level playing field. That approach is no doubt an extremely sensible and desirable approach.  
10 It does involve the premise that the relevant competition law principles can be enforced within  
11 a reasonable timescale. Our concern is that the timescale in this case, and it may be for very  
12 good reasons I do not know, but the timescale in this case does seem to be quite a long  
13 timescale – as still envisaged quite a long timescale. Although you rightly point out that it is  
14 a fast changing market, and in some ways a novel case, a number of the basic principles about  
15 dominance and abuse, and predatory pricing and so forth are relatively well known. We are  
16 still struggling to see quite why all this is necessary to come to a view. It may be you cannot  
17 help us because you cannot elaborate on the underlying issues, and I am not inviting you to.  
18 But that is our concern as to how the competition regime can be effectively enforced on these  
19 kinds of envisaged timetables. I am sure it is a concern you share as much as we do.

20 MR. FOWLER: Indeed it is, Sir.

21 THE PRESIDENT: I do not know how we can jointly solve the problem, or help the problem.

22 MR. FOWLER: In our other investigations we have dealt with them within our guidelines to date,  
23 but plainly the guidelines cannot apply in every case, and are not intended to apply in every  
24 case. It is a difficult case, and it is difficult case in a fast changing position, we recognise that.  
25 The work plan that we have has been gone through thoroughly, it has been analysed at the  
26 highest level in Ofcom.

27 THE PRESIDENT: I am sure it has.

28 MR. FOWLER: And this case is being given priority, the highest priority, the greatest amount of  
29 resource devoted to it, and serious resources are being devoted to it. They are not being  
30 devoted to it unnecessarily we believe, or wasted on it, it is what is required. That is not going  
31 to be, we believe, capable of being improved upon. It may be that some of the lines of inquiry  
32 are inter-dependent, and it may be that some of them prove in the event to enable one to  
33 foreclose or shorten down other lines of inquiry, and arrive at a position quicker, but at the

1 moment we do not see that as a likely possibility. It is a possibility but we believe that it is  
2 more sensible for us to indicate a realistic end date, and that is June.

3 THE PRESIDENT: I think Professor Pickering has a question.

4 PROFESSOR PICKERING: Mr. Fowler, I wonder whether I could just explore perhaps on an  
5 unduly simplistic basis, but you will no doubt tell me if it is, this whole question of what the  
6 purpose of the regulatory investigation is in this particular case. It seems to me – and you may  
7 wish to comment on this – that there are two purposes of handling a complaint through Ofcom.  
8 One might be to say definitively – or as definitively as one can – whether a dominant firm has,  
9 within the terminology abused the position.

10 The second purpose, it seems to me, especially with a developing market and, as we  
11 recognise, new products, is actually perhaps to offer some ground rules, probably building  
12 upon other people's thinking and applying them in this particular context. But to offer ground  
13 rules both to a dominant firm and also to other players in the market, as to what conduct is  
14 likely to be appropriate and what conduct is not, and on what basis we assess this. If I am right  
15 that both of these would be useful outcomes from a process then there is, following on from  
16 that, the question as to whether we necessarily are looking at ex-post analysis, to see an  
17 outcome or, whether in fact, it is not only appropriate, but perhaps also necessary to try to lay  
18 down some guidelines on an ex-ante basis, so that there is the guidance in the market place for  
19 the future. Can you see what I am asking?

20 MR. FOWLER: Yes.

21 PROFESSOR PICKERING: I wonder whether you have a view as to whether the proposition that  
22 I put is appropriate, in which case it maybe has some implications for the exercise Ofcom is  
23 undertaking?

24 MR. FOWLER: I can readily see the utility of having guidelines as to conduct and that is something  
25 potentially that Ofcom could consult on. But that is not the position we find ourselves in. The  
26 position we find ourselves in is being asked by the complainant to decide an allegation of  
27 abuse which is, essentially ex ante. We carry out market reviews on a forward looking basis for  
28 the purposes of the new directives, but that is a different consideration from the consideration  
29 that we are addressing here, and the very specific question of whether or not BT is dominant in  
30 a relevant market, and whether or not they have committed an abuse, and that requires  
31 a detailed examination of the relevant facts, and it is that that we are conducting. Were we to  
32 use that merely as an opportunity to issue guidelines without making a finding, we would be  
33 plainly challenged by Wanadoo and that is one of the problems we find ourselves in. Either  
34 way we are likely to be challenged.

1 THE PRESIDENT: I think Professor Pickering was highlighting the possible pedagogic effect that  
2 the Decision itself will produce and the principles that can be applied in other cases.

3 MR. FOWLER: It will indeed, but it will do so on the basis of facts.

4 THE PRESIDENT: On those facts, yes.

5 MR. FOWLER: And it has to be on the relevant facts of the relevant case, and that is really where we  
6 are.

7 PROFESSOR PICKERING: Could I just come back? You did actually link investigation of abuse  
8 with the term “ex ante”, I think am I right, that you actually meant to say “ex post”.

9 MR. FOWLER: Indeed, yes, I am sorry.

10 PROFESSOR PICKERING: Then one is, I suppose, forced to ask how long, oh Lord, how long do  
11 we actually have to wait before we can have the results of an investigation of abuse, if there are  
12 no guidelines available that would at least guide not only, as I say, the dominant firm but also  
13 the potential complainants as to what is or is not appropriate? And I do wonder, especially  
14 now you have added Broadband Basic and so on, whether there is not a danger that this will  
15 just roll on into the sunset.

16 MR. FOWLER: We do not believe so. Obviously that is a risk of which we are fully conscious, but  
17 that is not the intention and certainly not the consequence of adding in Broadband Basic. That  
18 is not what is causing the expected end date of the current stage of the investigation, so it is not  
19 as a result of that. It is a result of wishing to investigate properly the facts that are relevant to  
20 the allegations of abuse that have been made.

21 THE PRESIDENT: That may be highlighting that is almost, in a way, a sort of philosophical  
22 problem, is it not? Obviously, from the narrow perspective of these proceedings and the  
23 existing Appeal, we are concerned with the time that that is taking. We are also, from the  
24 Tribunal’s point of view, concerned with the resources that this case is taking, because it is  
25 very hard on other litigants who have to wait while we progress this matter. What is somewhat  
26 worrying from the philosophical point of view is to know whether you are really submitting  
27 that these sorts of cases are so difficult and so complex, and so heavy, that it is very difficult to  
28 do them in any way that would enable this particular law to be enforced in a relatively clear  
29 cut, simple fashion over a reasonably short time frame.

30 MR. FOWLER: Well I think it is the particular circumstances and the particular allegations here that  
31 do require ----

32 THE PRESIDENT: Yes, they have just got very complicated.

33 MR. FOWLER: They are very complicated, and it requires a detailed examination of revenue against  
34 costs and projections as to expected profitability and so on, it requires that being carried out in

1 a considerable amount of detail, and that is a very time consuming process – quite apart from  
2 the analysis of the relevant market and the extent to which BT is right or wrong in its claim  
3 that we should have included narrowband.

4 PROFESSOR PICKERING: Could I ask why then did you choose to include Broadband Basic,  
5 which you notified, I notice to Wanadoo on 30<sup>th</sup> November, within the framework of the  
6 existing investigation? If there was a new product introduced next week that Wanadoo also felt  
7 they needed to complain about, Broadband Intermediate or whatever, would you then add that  
8 to the investigation?

9 MR. FOWLER: Both BT and Wanadoo think it would be sensible that the present investigation  
10 should include Broadband Basic. We believe it can be included without extending the  
11 timetable for the present investigation and therefore it seems sensible to do so.

12 THE PRESIDENT: Yes, thank you. Mr. Meek, or Mr. Williams, if you want to add anything or  
13 contribute in anyway, you are very free to do so either through your counsel or directly to us if  
14 you feel it helpful.

15 MR. MEEK: Perhaps I can contribute. Just to say that the concern that the Tribunal is expressing is  
16 obviously one that we share. We do not like the timescale that we have indicated, and we do  
17 not like that because it clearly creates practical problems for both the parties concerned here  
18 and therefore consequently for consumers who should benefit from this process. So we did  
19 look at this very much through those spectacles.

20 I think you can see from the document that we have submitted that we are putting  
21 significant resource into this, so it is not a question of us, as it were, undercooking what is  
22 needed to produce a timely result. I think the concern you might have is that we are  
23 overcooking it – in other words we are putting large amounts of resources and taking a lot of  
24 time to do it when perhaps we could be more expeditious in some way.

25 THE PRESIDENT: We would not want you to be too frightened of the Tribunal, for example – that  
26 in some way you are going to get it wrong and it will all go pear shaped, because sometimes  
27 the best can be the enemy of the good.

28 MR. MEEK: It is certainly something that, I do not know the Tribunal, I have not come across the  
29 Tribunal to date, but that concern is one that my colleagues have indicated to me that you  
30 might have, and all I can say is that we have looked very hard at all the components of the  
31 work programme, and we want to produce something that is robust, but not overcooked in the  
32 way I have described.

33 THE PRESIDENT: Yes.



1 MR. MEEK: I suppose, if I were to be honest what I would say is I think there is a risk that if we do  
2 something quicker and dirtier – if I may use that term – then actually the result of that might  
3 not be that this thing gets resolved faster, it might get resolved slower, and that is because  
4 obviously this is an extremely important case to the two parties concerned, and any  
5 deficiencies in our argument they will quickly identify.

6 I just want to reassure you as best I can without getting into detail on the work  
7 programme that we have looked at this, we have examined it very, very hard. Obviously, we  
8 took the letter that requested my presence here very seriously ----

9 THE PRESIDENT: Yes, thank you.

10 MR. MEEK: -- and prior to that this timetable was, in any case, getting scrutiny, but it has had  
11 particular scrutiny in the last few days. So just to add my assurances to those of counsel ----

12 THE PRESIDENT: We are very pleased to have it, as it were, from the horse's mouth, and get a feel  
13 for the situation. Thank you very much indeed. I think we had better see now what the  
14 Appellants and the Intervener think about the situation we are in. Mr. Green, what should we  
15 do in your view?

16 MR. GREEN: We are in a somewhat schizophrenic position which is perhaps predictable. On the  
17 one hand we want speed and on the other hand we want Ofcom to do the job properly. We  
18 need speed because in the interim it is my clients' position that they are suffering in the market  
19 place as a result of BT's pricing, and we also need regulatory certainty for precisely the  
20 reasons that BT has identified in its correspondence. We need to know what the score is and  
21 how we conduct our business in the future. You may recollect that the European Commission,  
22 in its Decision in Wanadoo in July last year, addressed the question of the Commission's own  
23 responsibility in a fast moving market and made it quite clear – as I think Ofcom now accepts  
24 – that it had to act, notwithstanding that the market was moving and was immature because  
25 (a) Article 82 is prophylactic, it is there to prevent further harm in the market; and (b) in  
26 a market of the importance of internet, "particular vigilance" – to use the Commission's phrase  
27 – was required. So the points I think are well taken, but we do have this schizophrenic  
28 position. We recognise that Ofcom needs to do the job properly but in the quickest reasonable  
29 timeframe. But we did ask Ofcom to introduce the Broadband Basic, because we see it as a  
30 new price point, it is a variation on the same theme. But in Baker & McKenzie's letter of  
31 1<sup>st</sup> December we have made the point that Ofcom's investigation needs to be proportionate in  
32 relation to the question of time, and so it is a question of balance and all I think we can do  
33 today is just to ask the Tribunal to lay down a specific timetable. You have heard Ofcom's  
34 submissions. We are not in a position to judge the correctness of Ofcom's submission about

1 timing, we simply do not have enough information to do that, but we would invite you at the  
2 end of the day to lay down as firm a timetable as you are able to do.

3 THE PRESIDENT: On that last point what we are seized at the moment of is your existing Appeal.  
4 It is in that case that this Case Management Conference is taking place. We do not have  
5 a general jurisdiction to boss Ofcom around – if I can put it like that.

6 MR. GREEN: Well the existing Decision was remitted. You have it within your power to govern the  
7 conditions on which the new Decision ----

8 THE PRESIDENT: You mean it flows from the old liberty to apply under the original Decision?

9 MR. GREEN: Yes, we are historically still in the same context of a remitted Decision.

10 THE PRESIDENT: Yes, I am sorry, I had forgotten. I had overlooked that original order.

11 MR. GREEN: So we do think the Tribunal has the power. We are neutral as to whether Ofcom ----

12 THE PRESIDENT: No, wait a minute. We remitted it originally and they have taken a new  
13 Decision on what we remitted and you have appealed from that, so I am not sure that the old  
14 proceedings are still live. They may just be, but it is a bit difficult.

15 MR. GREEN: The second Decision is the outcome of the first Appeal, and there is not yet a Ruling  
16 on the second Decision. We are sort of in the realms of *Aberdeen Journals* whereby ----

17 THE PRESIDENT: What was the matter that was remitted in the first place?

18 MR. GREEN: The matter remitted was for Ofcom to take a Decision which it then did, which has  
19 not yet been ruled upon. We are now talking about a Decision which is either substitutional or  
20 supplementary. But from a pragmatic perspective ----

21 THE PRESIDENT: Well let us not worry too much about the legal technicalities for the moment.  
22 Yes, from a pragmatic point of view?

23 MR. GREEN: From a pragmatic perspective it seems to be in the interest of all parties that there is  
24 a timetable laid down, and we find it very difficult to know whether we should ask for a date  
25 for a Decision next February, or next July, or next October, and we have little information on  
26 which to assess Ofcom’s position.

27 THE PRESIDENT: Yes.

28 MR. GREEN: The principle seems to be – and I doubt it is disputed by anyone – which is that it is  
29 the fastest possible Decision.

30 THE PRESIDENT: Well, consistent with getting it right, as Mr. Meek would say.

31 MR. GREEN: We accept that.

32 THE PRESIDENT: And what about the existing Appeal?

33 MR. GREEN: We do not see much benefit in that being progressed. It would certainly distract  
34 Ofcom, and the Tribunal. If it is as we understand, Ofcom’s skeleton to be effectively now an

1 issue or a Decision which has been overtaken by events, because as is put in para.18 of the  
2 skeleton, and Mr. Fowler put it this morning, effectively if my client succeeded on that Appeal,  
3 it would be remitted for Ofcom to do what it is now doing, and for my client there is no great  
4 benefit to be had from pursuing that Appeal when the real gain is now somewhere else.

5 THE PRESIDENT: Yes.

6 MR. GREEN: When the Tribunal considers the detail of timetable, there is only one other point we  
7 would like to make which is that we do wish to ensure that my client is properly involved in  
8 the progress of the case going forward to a Decision. The Tribunal has made it clear that  
9 complainants need to be closely associated with the proceedings, as is set out in Article 27 of  
10 the Modernisation Regulation. We would wish to have sight of the relevant documents,  
11 properly redacted of course, but including BT's submissions, again properly redacted and  
12 participate in hearings.

13 THE PRESIDENT: That will take even more time.

14 MR. GREEN: Well that is why I put the marker down now, but there is no point in our views being  
15 ignored, and them having to be raised before the Appeal Tribunal for the first time. Both  
16 parties will be better served by having our views made known to them, so that the Decision  
17 takes account of them, good or bad. We would wish to slip stream into the procedure. We  
18 would not wish to unduly delay it at all, and we would obviously ensure that that did not  
19 happen, but that is really a question of the procedure being devised to cater for Ofcom's  
20 relationship with BT, and us streaming in to that as best we were able. We recognise that that  
21 may mean curtailments of time, and so on but we would still wish to participate even if it is on  
22 an abbreviated basis.

23 I think that is really all I have to say at this stage.

24 THE PRESIDENT: Thank you. Yes, Mr. Barling?

25 MR. BARLING: Sir, on that last point that Mr. Green made, in our submission it is really up to  
26 Ofcom to decide to what extent a complainant needs to know particular material put in by the  
27 person who is being investigated, and to what extent that will help them (Ofcom) to take the  
28 decision that they need to take.

29 THE PRESIDENT: Well there is quite a lot of European Practice on this.

30 MR. BARLING: There is, and there is a discretion obviously on the part of the Regulator, and it  
31 may well be that it is appropriate for them to see some things, but equally it may be sufficient  
32 for them to be told and asked to make submissions on certain points. But that is perhaps not the  
33 primary point at the moment.

1 THE PRESIDENT: You are closer to the administrative procedure, you are very much affected by  
2 it, so we are obviously keen to know what BT's position is – it may be a bit schizophrenic too,  
3 I do not know.

4 MR. BARLING: I am sure the complainant is keen to know and it is right that they should know  
5 what it is right they should know.

6 THE PRESIDENT: I meant on the timetable of the matter.

7 MR. BARLING: On the delay points?

8 THE PRESIDENT: Well are you pressing for Ofcom to reach a Decision as soon as possible?

9 MR. BARLING: Yes, well Sir, you have seen our letter of 1<sup>st</sup> December. We do actually,  
10 surprisingly, very much associate ourselves with what Mr. Green has said just now about the  
11 time that this is taking.

12 THE PRESIDENT: I am just turning it up.

13 MR. BARLING: Sir, if I could just highlight one or two points rather than just repeat what is in that.  
14 The bare facts are that they have been investigating actively for 14 months now. BT has been  
15 subject to investigation in this matter for 20 months. In other words, the uncertainty that BT is  
16 under has lasted from April 2003 to the present time. We are now faced with another six  
17 months or so before we get another document which may be another Statement of Objections  
18 or it may be a non-infringement Decision, but either way we are looking at a period of well  
19 over two years of commercial uncertainty, and we are very concerned about the way Ofcom is  
20 proceeding, and I will explain why.

21 It relates really to the point Professor Pickering made when he said “Is this going to  
22 roll on into the sunset?” First of all the sheer cost of undergoing this is enormous to BT. We  
23 have had something like 14 s.26 Notices requiring detailed answers, which has taken  
24 approaching 6000 hours of BT employee time to complete to date, and that is hugely  
25 expensive. But even more significant than that, as I have already said, is the commercial  
26 uncertainty that we are under in this admittedly dynamic market. We need obviously a clear  
27 test to follow. Our business people need that. The idea that one is put in doubt as to the  
28 lawfulness of one's pricing policy for that length of time in this kind of market is really not  
29 acceptable, as I know the Tribunal have already indicated to some extent. I am afraid the way  
30 it is going at the moment this uncertainty is obviously going to continue for a considerable  
31 period.

32 The reasons – and I am afraid I am baffled now – Mr. Fowler has said it is not the  
33 addition of BT Basic into the Decision making process that has caused the additional  
34 requirement for time, and that it is something else. What they need to do are two things in our

1 submission and I say this to the Tribunal, recognising that the Tribunal probably cannot require  
2 it, but can nevertheless indicate a view. First, we need a cut-off point. Originally they had said  
3 they were investigating us up to this last August – so be it. But the problem is that they are now  
4 seeking ---

5 THE PRESIDENT: That was August 2004.

6 MR. BARLING: Yes, that is what the investigation was designed to do. They are now, however,  
7 seeking, data going forward from that time. This very much throws into highlight what  
8 Professor Pickering was saying. First of all, they have asked for historical data for September  
9 2004. There were price changes in October 2004 – everybody had a pricing round. BT had  
10 a pricing round at any rate. They have now sent us a s.26 requirement asking details supporting  
11 the plans for that pricing round – that is going forward from October 2004. So there is a real  
12 concern that what Professor Pickering says might happen, will happen, because if every three  
13 months or so in this market people change prices and products, and it takes Ofcom on current  
14 record approximately that time, if not longer, to analyse each new chunk of figures, and each  
15 new plan that comes out, and that is what they have asked for now, so it will never end if they  
16 do not give themselves a cut-off point for this particular investigation. Our fear is that they are  
17 not doing that. For example, there is going to be another price round, three or four very big  
18 companies, AOL and others – I am not sure, it might include Wanadoo – have announced just  
19 recently that they are going to change their products, their speed, their prices, structures, tariffs,  
20 in the near future.

21 THE PRESIDENT: You have different tariffs for different speeds and things now, have you not?

22 MR. BARLING: Yes, capacity based charging has come in of course which, as it were, permits that.  
23 So is all that going to form part of this ongoing investigation? That is one point – we need  
24 a cut-off point.

25 So far as Basic is concerned, Mr. Fowler says that is not going to be part of the critical  
26 path, and we are surprised to hear that bearing in mind that they have threatened us with a new  
27 s.26 Notice in respect of their introduction of BT Basic into the Decision making process.

28 THE PRESIDENT: Ofcom's letter to the Tribunal of 29<sup>th</sup> November did suggest to us that BT Basic  
29 was part of the reason for the further work.

30 MR. BARLING: We had rather assumed that it was because if they were going to pursue the same  
31 approach for BT Basic, i.e. they were going to take all historical data going back nine months  
32 for BT Basic, and put it back into the models they had developed ----

33 THE PRESIDENT: Just remind us when BT Basic came in?

1 MR. BARLING: 1<sup>st</sup> March 2004. Immediately they were supplied with the business plans for BT  
2 Basic, they requested them and I think in our letter of 1<sup>st</sup> December that we sent the other day  
3 you can see what the request was back at that time in respect of the BT Basic business plans.  
4 So they have had all the information for BT Basic since BT Basic ----

5 THE PRESIDENT: That was March, yes.

6 MR. BARLING: They have had all the information for BT Basic since BT Basic came into  
7 existence. Also they had the information on the new business plan in June 2004, because the  
8 business plans were not disaggregated. The business plans were consolidated across the whole  
9 portfolio of BT's broadband products including BT Basic. So it was actually Ofcom that  
10 decided to disaggregate and take Basic out of their original calculations.

11 THE PRESIDENT: I see your business plan included the range.

12 MR. BARLING: It does, yes. And now they are saying we have to put it back in again and, as we  
13 understood it, it will take a long time now to process it in the way that we processed the  
14 balance of the business plans.

15 Our first point about that is that they should not be doing that now. This is a new  
16 product, and they can just look at the business plans and decide whether they were plausible at  
17 the time those business plans were inaugurated. They do not need to do the full analysis of just  
18 nine months, or whatever it is, worth of figures on that, to see how it turns out. Perhaps one can  
19 quote back at them what they said in November at paras 5.21 and 5.22.

20 THE PRESIDENT: Do you want us to go to it?

21 MR. BARLING: Well, Sir, can I read it into the record?

22 THE PRESIDENT: Yes, do.

23 MR. BARLING: What they said at para.5.21 was:

24 "... the decision to enter a particular market or to introduce a new pricing strategy is  
25 itself based on ex-ante forecasts and takes place in a world of uncertainty. The  
26 Director [OFTEL] does not believe that it would be appropriate to take action if  
27 a strategy would have been profitable on the basis of reasonable ex-ante forecasts,  
28 but in the event turns out to be over-optimistic and loss making ...

29  
30 "5.22 For the purpose of the new Freeserve investigation the Director's assessment of  
31 margin squeeze is conducted on the basis of information which could have been  
32 reasonably available to BTOW at the time the relevant pricing decisions were made,  
33 announced and implemented."

1 So that was the view that they very sensibly took in November 2003 in that Decision, and we  
2 say they should do that in this investigation generally, but of course they could do that with  
3 Basic and that would save all the months of number crunching which we have understood is  
4 the reason – at least part of the reason – for the inordinate length of time ----

5 THE PRESIDENT: When you say “number crunching” what do you mean?

6 MR. BARLING: Because what they have done, and I put this very simply because my  
7 understanding is only limited, is they have constructed models on various bases, several  
8 models, and having taken all the Basic figures out because they did not want to include Basic,  
9 they then ran these models with all the data on the other products on various different  
10 scenarios, and all the historical cost, that is the data that they fed into these models, and that is  
11 what apparently took a certain number of months to perform. Now, as I understand it, their  
12 intention would be to perform that exercise also with the basic data included. One can  
13 understand, on their track record, that that would take them some months to do. Our  
14 submission is that that is the wrong way to go about it, and certainly the wrong way to go about  
15 it at this stage in the investigation, given the extra time.

16 Sir, we do invite the Tribunal, if it feels able, to suggest at least a cut-off point and  
17 possibly to encourage them to adopt the approach in relation to Basic at any rate that the  
18 Director suggested was the sensible way to go about things with a newish product, which this  
19 still is.

20 THE PRESIDENT: Without pressing you too much on the details of the actual case, can you help us  
21 at least to this extent. I have understood that so far there is an issue about the market – there  
22 always is an issue about the market and the issue in this case is whether narrowband or  
23 broadband are relevant markets, part of one market.

24 MR. BARLING: Yes.

25 THE PRESIDENT: In relation to the abuse issue is it the case that there is a dispute about the test to  
26 be adopted, or is it the case that there is a dispute about whether whatever test it is was  
27 complied with or not? There may be other disputes too, but just stopping there for a minute?

28 MR. BARLING: There is certainly a dispute about the test to be adopted, the approach to be adopted  
29 to this kind of case.

30 THE PRESIDENT: I suppose, and I am looking across to Mr. Fowler at this point, so we can come  
31 back to Ofcom in a moment, the conceptual idea that whether or not there is an abuse depends  
32 on running large numbers of different models in circumstances where the conduct in question  
33 is illegal and may expose the company to financial penalties, is an idea that would need a great  
34 deal of thinking about from the point of view of the effectiveness of this sort of law.

1 MR. BARLING: With respect, we entirely agree. It is not appropriate in our submission. It is not  
2 how businessmen go about things, and it would lead to huge problems of legal certainty. We  
3 would take issue with the way they have gone about it in a very root and branch way, as well as  
4 saying that they have also carried out their own analysis in the wrong way – not even done it in  
5 the right way, but I do not want to get into this now.

6 THE PRESIDENT: No, I do not want you to either.

7 MR. BARLING: But there is a raft of points taken of that kind, and there is a very real issue on  
8 dominance. We are admittedly not dominant in the retail market – no one suggests we are  
9 dominant in the retail market – and there is a real issue of dominance in the wholesale market,  
10 given that for a large part of the time under which we are supposed to have abused we were not  
11 even the largest player.

12 THE PRESIDENT: In the wholesale market?

13 MR. BARLING: Yes, and that is leaving aside the narrowband point. But they have investigated the  
14 narrowband issue. They have separately, not in respect of this investigation, but they have  
15 already done a great deal of work on the market issues in relation to narrowband, and so one  
16 wonders how much time that will actually take, why they simply cannot pray in aid – they are  
17 not starting from a standing position in relation to narrow band. So if you feel able, and I am  
18 not sure that it is a question of directing anything, but we do invite the Tribunal (as did  
19 Wanadoo) to encourage them to curtail the investigation in a way that they do not appear to  
20 have indicated they intend to at the moment, and to bring their Decision forward.

21 THE PRESIDENT: Yes, the specific point you have made is the question of the cut-off date.

22 MR. BARLING: Yes.

23 THE PRESIDENT: And your attitude to Broadband Basic is what?

24 MR. BARLING: That they should be able to do that simply by looking at the business plan.

25 THE PRESIDENT: You do not need to run the models?

26 MR. BARLING: No. They should adopt the approach that the Director of Telecommunications  
27 adopted in the second Decision in para.521, and simply determine whether, at the time the  
28 business plan pricing was done that was a plausibly reasonable view to take rather than doing  
29 an ex-post facto exercise on the historical data that has been produced in the nine months or so  
30 that the product has been sold.

31 Before sitting down, may I also make one other point in relation to Baker &  
32 McKenzie's letters? I will not trespass on your time for long. Whilst we share their concerns,  
33 and to some extent we share their views on how the matter should proceed, we do not consider



1 that some of the comments in their correspondence, particularly the correspondence to the  
2 Tribunal has been appropriate.

3 THE PRESIDENT: Yes.

4 MR. BARLING: Secondly, they have made assertions in that correspondence to the Tribunal which  
5 are not accurate.

6 THE PRESIDENT: Would you like to draw our attention to ----

7 MR. BARLING: If I may. The first point, it is not helpful for them to make assertions in a letter to  
8 you, who are not currently seized of this investigation ----

9 THE PRESIDENT: No, not at all. We have to keep that firmly in the forefront of our minds.

10 MR. BARLING: And I quote: "BT has been abusing its dominant position for over two years..."  
11 etc. That is gratuitously prejudicial commentary. We all know that that is the issue in the  
12 investigation but in our submission it is not helpful or appropriate to send that to you expressed  
13 in that way.

14 Secondly, they returned to this kind of assertion in the later part of the letter – I am  
15 talking about their letter of 3<sup>rd</sup> December. They return to this and they make an assertion of  
16 a fact there. They say: "BT is increasing its market share". This is quite simply not true.  
17 Neither in the overall market of joining Cable and GSL together, the retail market, are we  
18 increasing market share – it is declining. It is declining if you just look at GSL connections  
19 alone, and it is declining in respect of the overall trend in net additions. So it is just wrong, and  
20 Ofcom I think would be able to confirm to some extent that it is wrong, but what are they doing  
21 making those assertions. We do strongly object to it and we would again invite the Tribunal to  
22 indicate that it is not appropriate, particularly in correspondence to the court. They may well  
23 send a steady stream of letters encouraging Ofcom to fine BT, and to find infringements of BT,  
24 which seem to come out on almost a weekly basis so far as one can see, but it is quite another  
25 matter to send that kind of correspondence to the court.

26 THE PRESIDENT: We do not take any notice of it, Mr. Barling.

27 MR. BARLING: I am very grateful, I know you do not, but it should not happen.

28 THE PRESIDENT: But nonetheless, I will ask Mr. Green about it in a moment.

29 MR. BARLING: Those are our submissions, Sir.

30 THE PRESIDENT: Thank you. Sorry, just to be clear, what do you think we should do about the  
31 existing Appeal, which is where we have the jurisdiction?

32 MR. BARLING: We accept, as the others do, that really it is probably not a useful exercise to bring  
33 it on.

1 THE PRESIDENT: Just while Mr. Fowler is taking instructions, Mr. Green, I do not know whether  
2 you want to comment on that last point raised by Mr. Barling? It is sometimes tempting to  
3 write to the Tribunal in terms that are critical of other parties in the case, but when we are  
4 dealing, as we are at this stage, with purely procedural issues it is not always helpful for us to  
5 have allegations flying around, as it were, as to what the underlying facts might or might not  
6 be.

7 MR. GREEN: I am sure my clients will take those comments on board, and of course they feel  
8 strongly that these are not inaccurate and incorrect, and if one went through every letter of  
9 every party in the course of ----

10 THE PRESIDENT: I think a properly Statesman like approach to letters to the Tribunal is always  
11 a good idea. Thank you. Yes, Mr. Fowler, I am not quite sure where we go from all that.

12 MR. FOWLER: Can I first address the point raised by Mr. Green about a request for a timetable for  
13 the current investigation?

14 THE PRESIDENT: Yes.

15 MR. FOWLER: So far as that is concerned, this CMC is not taking place in the original Appeal  
16 which was remitted. A Decision was taken as required by the Tribunal. We are now on  
17 a different Appeal relating to a different Decision. As you, yourself, said, Sir, you have no  
18 general power to “boss us about”.

19 THE PRESIDENT: I put that very loosely! [Laughter] We have to bear in mind that the jurisdiction  
20 today is that we are trying to case manage the existing Appeal.

21 MR. FOWLER: Indeed, yes, Sir. Everybody is agreed that there is not much point to be served by  
22 bringing it on.

23 THE PRESIDENT: No, but by the same token it may not be completely wise just to forget about its  
24 existence, and say nothing about when it should be brought on. In the event that various other  
25 parallel developments for some reason did not happen.

26 MR. FOWLER: Let me make it clear, we are not saying “It is none of your business what we do in  
27 the current investigation”, but the fact is there is no jurisdiction to set a timetable for the  
28 current investigation, and we would not accept, even if this were a remittal, there was any  
29 jurisdiction to set a timetable on a remittal, but this is not a remittal.

30 THE PRESIDENT: That may be a more difficult point, but we do not have to decide that at the  
31 moment.

32 MR. FOWLER: It is not a point that arises here.

33 THE PRESIDENT: No.

1 MR. FOWLER: So we will of course listen attentively to what the Tribunal says about the current  
2 investigation, but in terms of limiting it, it is simply not within the scope of the jurisdiction of  
3 the Tribunal to do so, or not appropriate either, to do so. That is a function for the Regulator to  
4 determine the subject matter, and the content, the timing and the priorities given to particular  
5 investigations. This investigation is being given the highest priority and you have seen the  
6 resources we are devoting to it. The resources are being devoted to it within the discretion of  
7 Ofcom, as it regards appropriate in addressing the matters that have been raised. Really, in  
8 relation to the Broadband Basic that is not affecting the duration of our timetable as it is  
9 envisaged now. It is part of the extra work that we are doing, as referred to in our letter to you,  
10 but it is not the cause of the end date and reducing it or removing it would not make any  
11 difference to the end date.

12 PROFESSOR PICKERING: Mr. Fowler, your letter of 29<sup>th</sup> November does not fully support what  
13 you have just said, does it?

14 MR. FOWLER: It raises an additional point and it is part of the extra work but on further  
15 examination of the timetable, which I have been through with my client, it is clear that if this  
16 work were removed it would not make any difference to the end date.

17 PROFESSOR PICKERING: Well forgive me, I am not a lawyer, and lawyers of course read words  
18 very carefully, but you do say “In addition Ofcom considers it necessary to include the  
19 broadband basic product within the investigation”, and then goes on immediately: “In view of  
20 this...” not only **that** point, but also the earlier problems in relation to the timetable,  
21 “... Ofcom will not be able to adhere to its guidelines.” So I put it to you that it is reasonable  
22 to assume that Broadband Basic is at least a material consideration?

23 MR. FOWLER: I would not for a moment dispute that that is a perfectly reasonable interpretation,  
24 but the fact is on further investigation, since the letter was written, and further discussion it is  
25 perfectly clear that it does not actually make any difference to the end date in the timetable.  
26 I would not for a moment dispute that that might be read in the way that you read it, and it may  
27 perhaps not have been worded as clearly as it might have been. But the fact is it does not make  
28 any difference to the end date.

29 PROFESSOR PICKERING: So it is the robust challenge from your SO to BT that is actually  
30 causing the further slippage?

31 MR. FOWLER: That coupled with the threat of a challenge by Wanadoo, yes, Sir, yes it is.

32 THE PRESIDENT: The impression I got from Mr. Barling was that a lot of the time consuming  
33 work is concerned with the running of various models. Is that broadly what is taking the time,  
34 or is it something else?

1 MR. FOWLER: The market definition is one of the major issues taking time.

2 THE PRESIDENT: But this regulatory system must mean that Ofcom, and its predecessor Oftel,  
3 have been thinking about narrowband and broadband, and whether they are in the same market,  
4 for several years now. Why is it so difficult?

5 MR. FOWLER: Well it depends in part on empirical evidence.

6 THE PRESIDENT: But is not the regulatory duty to keep all these things under review and to have  
7 the facts available?

8 MR. FOWLER: It is indeed to have certain facts available, but for the necessary facts for reaching  
9 a view on this we need further investigatory work, and that is the fact of the matter.

10 PROFESSOR PICKERING: Is this current investigatory work in relation to the current situation in  
11 the market, or are you still dealing with historic data about the market as it was when the  
12 original complaint was made?

13 MR. FOWLER: We have moved on from that, Sir. Our Decision in November last year was  
14 addressed to that.

15 THE PRESIDENT: That was addressed to the first two months, I think.

16 MR. FOWLER: To the time of the original complaint. We are now looking ex-post at the data since  
17 then.

18 PROFESSOR PICKERING: But there does not seem to be total justification in looking, shall we  
19 say, at the structure of the market today in dealing with a complaint that related to matters in  
20 the second complaint that go back to 2002, 2003?

21 MR. FOWLER: That is one of the complicating factors in this case. It is the tightening of dominance  
22 is included in the matters under challenge – when there was dominance, and what is the  
23 appropriate time at which to examine the market. That is one of the complicating factors.

24 PROFESSOR PICKERING: Well surely that is linked to the timing in relation to the point at which  
25 the abuse is alleged?

26 MR. FOWLER: Well the abuse is alleged to be ongoing. So it has to consider the position as it was  
27 when the abuse was originally made, at least subsequent to our November 2003 Decision, and  
28 ongoing since then. That is what the complaint relates to.

29 THE PRESIDENT: So just to help us to get a feel for the situation, it is not Broadband Basic, it is  
30 partly narrowband/broadband, and it is something else?

31 MR. FOWLER: There is a series of work streams which I do not think it is appropriate for us to go  
32 into, but there is a series of work streams that make up the work load at which we have  
33 directed, and plan to direct what amounts to seven persons full-time ----

34 THE PRESIDENT: In a very complicated, heavy investigation.

1 MR. FOWLER: Yes, that is the position, and of course we listen very seriously to what the Tribunal  
2 says, but I repeat that this is not a matter that is within the jurisdiction of the Tribunal.

3 THE PRESIDENT: What can we do collectively, in a spirit of general support for the regime as  
4 a regime, to help matters along?

5 MR. FOWLER: We believe that we have examined, and examined very thoroughly, the amount of  
6 work required. We do not want to devote 30 per cent. of resources to a single investigation.

7 THE PRESIDENT: Quite, there are other cases.

8 MR. FOWLER: It is a major resource allocation, if we could avoid doing so we would.

9 THE PRESIDENT: What about BT's point about a cut-off date?

10 MR. FOWLER: Again, that is a matter to which we are alive and it is a matter for us to determine,  
11 but we are certainly alive to the need and it is a part of our duty to reach a decision as soon as  
12 we can, and also to reach the right decision.

13 THE PRESIDENT: Yes. Are there any other points you wanted to come back on?

14 MR. FOWLER: No, Sir.

15 THE PRESIDENT: Thank you very much, Mr. Fowler. I am sorry, Mr. Green?

16 MR. GREEN: Just one point relating to jurisdiction. I do take issue with Mr. Fowler's analysis that  
17 you have no jurisdiction. We are technically concerned here with the terms upon which the  
18 present appeal is stayed. The CAT can impose conditions as to that stay or it could invite  
19 Ofcom to undertake to adhere to a timetable as a condition for that stay.

20 The true situation is that no one wants to continue with Appeal two given the  
21 existence of case three. But the legal framework under which we are undertaking this analysis  
22 is, as you pointed out a moment ago, the terms upon which we address Appeal two. So with  
23 respect we do think you have jurisdiction, because it is in that context. That is the lever for  
24 your jurisdiction.

25 THE PRESIDENT: Yes. That sounds to me as if that might technically be right, Mr. Fowler, that  
26 last point?

27 MR. FOWLER: Well the choice is between either staying or bringing on.

28 THE PRESIDENT: Yes, but we cannot let a stay go on indefinitely, we have to do something.

29 MR. FOWLER: That is certainly right. That is a choice between either staying it or bringing it on. It  
30 does not open up a jurisdiction to impose conditions or impose a timetable or terms on an  
31 investigation out side of that.

32 THE PRESIDENT: If, which is not at all the case, but just theoretically and hypothetically if it was  
33 the case that the Ofcom investigation for some reason is going to take another five years, then

1 we would bring the Appeal on and there comes a point where we shall have to do that whatever  
2 happens, we cannot just leave it there.

3 MR. FOWLER: That is the alternative. The alternative is not to impose a timetable on a matter  
4 which is not properly within the jurisdiction of the Tribunal, and it is not appropriate either, in  
5 my submission, for the Tribunal to do so even if it had the jurisdiction, in a matter where it  
6 really is for the Regulator to determine the allocation of its resources.

7 THE PRESIDENT: It would presumably be within our jurisdiction to say “We will bring the Appeal  
8 on by whatever date, unless by then something has happened.

9 MR. FOWLER: Certainly that. I would not for a moment dispute that, Sir, that will be entirely within  
10 your jurisdiction.

11 THE PRESIDENT: Yes, thank you. I think we had better rise for a minute and have a think. Thank  
12 you very much indeed for all your help.

13 (The hearing adjourned at 12.22 p.m. and resumed at 12.55 p.m.)

14 (For Judgment see separate transcript)