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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1027/2/3/04
1074/2/3/06(IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th December 2006

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

Sitting as a Tribunal in England and Wales

BETWEEN:

VIP COMMUNICATIONS LIMITED
(in administration)

Appellant/Applicant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Supported by

T-MOBILE (UK) LIMITED

Intervener

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—————

Mr. Edward P.O. Mercer (of Taylor Wessing) appeared for the Applicant.

Mr. Rupert Anderson QC, Miss Anneli Howard and Ben Lask (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Meredith Pickford and Miss Robyn Durie, Regulatory Counsel, T-Mobile appeared on behalf of the Intervener.

—————
HEARING

1 THE CHAIRMAN: Good morning. Can I thank you all for your various submissions in
2 correspondence and in skeleton arguments for today's hearing. Perhaps I can begin by making
3 some general comments on how the Tribunal presently is thinking, subject of course to any
4 submissions that are dealt with today, so if I do not keep repeating that it is, of course, subject
5 to submissions.

6 First, the application for a stay of the proceedings pending an Appeal in the *Floe* case; that we
7 think we dealt with on 13th September in the CMC, and if one looks at p.29 of the transcript,
8 (lines 21 and following) whether, after the facts have been determined there should be any stay
9 can be considered at that time; we think at the moment that a stay today would be
10 inappropriate.

11 Secondly, VIP have put in some submissions about the facts being dealt with today. We
12 assume that was caused by the confusion which has resulted from the change of legal
13 representatives and not being here on 1st November and so we are not going to say any more
14 about that.

15 T-Mobile have raised an issue on jurisdiction in relation to the facts saying that the facts were
16 not part of the original Decision. That does not seem to us to be properly founded because in
17 the 28th June 2005 Decision at para. 224 it says that T-Mobile has confirmed that when it
18 provided SIMS to VIP it understood that these SIMS would be used by VIP in commercial
19 multi-user GSM Gateways. In any event at the moment, even if that had not been in the
20 Decision we are not persuaded by T-Mobile's argument on the facts point.

21 Thirdly, the references in the proposed Notice of Appeal, which I think are not new references
22 they were in the original, relating to base transceiver stations and legitimate expectation, it
23 seems to us that T-Mobile may have a point in relation to those parts of the pleading. We
24 would like to hear why VIP submit that those matters fall outside the *Floe* Judgment.

25 MR. MERCER: If I can assist the Tribunal for a moment on that point by saying that in my
26 submissions I was actually going to concede that point.

27 THE CHAIRMAN: Thank you very much. Fourthly, the plea in relation to implied terms; since the
28 facts on which reliance is being placed were previously pleaded it seems to us, subject of
29 course to submissions, that this is not a new ground of Appeal, it is merely legal packaging of
30 what was there originally.

31 Fifthly, market definition and dominance – our present feeling is that we do not intend to make
32 any rulings today on those matters. It seems to us that it would be premature to do so, and it
33 should be left until those matters become an issue in the proceedings. Then it can be decided
34 how they ought to be dealt with. That was really the way it was dealt with in *Floe* and
35 probably should be dealt with in the same way.

1 Sixthly – this relates to Vodafone and I understand that there are representatives from Herbert
2 Smith at the back of the court; we hope this deals with the point. We have the letter from
3 Herbert Smith of 16 November (which I think everybody has seen) in which Vodafone would
4 like to intervene on market definition and dominance only. It seems to us that the suggestion
5 made in that letter of extending time for the application to be made for permission to intervene
6 until those matters become relevant is a sensible way forward. They also, in that letter, ask for
7 an order relating to documents in relation to dominance and market definition. The Tribunal
8 presently considers that notification to Vodafone when the point becomes live would deal with
9 the point, and that that would be an appropriate way forward. So, if there are no submissions
10 on that point, contrary to that, that is the order we propose to make. If Vodafone want to say
11 anything about that today, we are very happy to hear you.

12 That leaves, I think, the assignment point which I am not going to make any comment on.
13 That is a matter for submissions today. We are not sure where that is going, and so I think we
14 had better not say anything.

15 Finally, there would be a date for the interim relief application. Unfortunately, the Tribunal's
16 diary is very full for January and February next year. So, it is very difficult to find two days
17 together. In order that we can hear it as early as possible what we are going to suggest is that
18 we hear it on Tuesday, 16 January, and if we need a second day then we would keep Monday,
19 22 January in reserve. Unfortunately at the moment there is not another day in the week of
20 16th, and we do not get two days in the week of 22nd.

21 MR. PICKFORD: Madam, would it be appropriate if I addressed you first after that very helpful
22 introduction because I think many of the outstanding matters are probably mine to deal with in
23 the first instance?

24 Just to deal with one point that the Tribunal raised before I forget it - I think it was (5) on the
25 Tribunal's list - that market definition and dominance should be parked for the time being ----
26 We entirely endorse that approach. We would also say that there was a further issue that was
27 also parked in the *Floe* appeal, which was the question of alternative objective justifications.
28 We would suggest that it would be appropriate to also park that issue, which means that the
29 only issue that we need to debate today is the Tribunal's jurisdiction in respect of
30 authorisation.

31 THE CHAIRMAN: The facts.

32 MR. PICKFORD: Well, the facts as pleaded by VIP. There may be other factual issues that arise in
33 relation to the three issues that are parked.

34 In terms of the issues that otherwise need to be addressed, as I understand it we have firstly the
35 question of whether VIP is the correct appellant, and I would propose to deal with that in fact

1 first because I think there are ramifications of that for other issues that arise in the case.

2 Secondly, I would seek to persuade the Tribunal that the jurisdictional point is not quite as
3 clear-cut as it might at present appear to the Tribunal ----

4 THE CHAIRMAN: On fact.

5 MR. PICKFORD: On fact, yes. Thirdly, there is the issue of amendment. I bear in mind the
6 Tribunal's preliminary observations on that before I come to it. Fourthly, there is the question
7 of whether or not there should be a stay. That was an application that was made by Ofcom and
8 insofar as Ofcom want to say anything further, given your preliminary observations; I leave it
9 to Mr. Anderson to do so.

10 THE CHAIRMAN: Right. So you are not making any submissions about whether this ought to be
11 stayed at the moment?

12 MR. PICKFORD: I am not, no.

13 MR. ANDERSON: If it assists the Tribunal, in view of the Tribunal's indication as to how it
14 proposes to deal with market definition and dominance, we are not pushing for a stay either
15 now.

16 THE CHAIRMAN: The stay has gone.

17 MR. PICKFORD: Fifthly, I think it would be appropriate to address briefly the conduct of the
18 hearing between now and the application for interim measures, I think there is a number of
19 small issues that need to be dealt with in relation to that.

20 THE CHAIRMAN: One of the things I think we need to deal with is the defence, etc.

21 MR. ANDERSON: In terms of timing of the defence, yes, of course.

22 MR. PICKFORD: Finally, there is a preliminary point in relation to the admissibility of a very short
23 witness statement that T-Mobile had proposed to rely upon and it may be appropriate if I deal
24 with this point first. In my submission it is actually very, very small.

25 THE CHAIRMAN: I do not think we know anything about this. I assume this is what was going on
26 yesterday.

27 MR. PICKFORD: It is indeed.

28 THE CHAIRMAN: That is all we know.

29 MR. PICKFORD: What I can tell the Tribunal is there is a very short (eight and a half lines long)
30 witness statement from Robyn Durie at T-Mobile. It deals with one very discrete and
31 relatively minor point but it was a point that we considered was material to the Tribunal's
32 consideration. Because we considered there might be some sensitivity in this issue, we raised
33 the point first with VIP, VIP contend that the facts themselves in the statement are without
34 prejudice and therefore we cannot reveal them to the Tribunal they say. That is only my
35 understanding of the position. We say that the facts are not without prejudice and even if they

1 were we would still be allowed to reveal them because the without prejudice rule is an absolute
2 one and where the interest of justice demanded it is quite feasible to have regard to evidence of
3 a without prejudice nature.

4 In order for the Tribunal to be able to determine whether it even feels that it can have regard to
5 the material, it needs to look at it and determine whether or not it is admissible. As I said, it is
6 a relatively small point but because there is a dispute between me and my learned friend about
7 whether the Tribunal should even see it, it blows it to some degree into a larger one.

8 THE CHAIRMAN: So is Mr. Mercer saying we should not look at it *de bene esse*?

9 MR. MERCER: What I said, ma'am, is we are asserting privilege. I do not think we said any more
10 than that actually, just that we are asserting privilege.

11 THE CHAIRMAN: Is it information that you provided to T-Mobile, is that the problem?

12 MR. MERCER: No, it is to do with an event in relation to an approach to T-Mobile.

13 THE CHAIRMAN: What is the basis of privilege?

14 MR. MERCER: The basis of privilege is that the event was made in the furtherance of the
15 settlement of litigation.

16 THE CHAIRMAN: So was it disclosed by VIP to T-Mobile in circumstances where there is
17 confidentiality?

18 MR. MERCER: We would say "yes", ma'am.

19 THE CHAIRMAN: Is there dispute now as to whether or not there was confidentiality – putting it
20 on the table, in mediation everything that is said in mediation is not then supposed to be used
21 in proceedings if the mediation does not settle the proceedings. I am trying to keep it more
22 general, but ----

23 MR. MERCER: We would say it fell within that category, ma'am.

24 MR. PICKFORD: And we would say it does not.

25 THE CHAIRMAN: The first question one has to decide is whether or not there was an event in
26 which there was confidentiality without knowing what was disclosed.

27 MR. PICKFORD: Indeed, and we do not seek to rely on any admissions made by VIP, nor do we
28 seek to disclose any documents provided to us by VIP. We simply wish to draw the Tribunal's
29 attention to one, as I said, relatively small fact which we say is not privileged, and even if it
30 were we would still be entitled to draw the Tribunal's attention to it.

31 THE CHAIRMAN: It is not that it is without prejudice, it is that you learned of this information in
32 circumstances where VIP say there was an agreement in relation to confidentiality, that it
33 would not be disclosed in proceedings?

34 MR. PICKFORD: Well we would dispute that.

35 THE CHAIRMAN: Is that what Mr. Mercer is saying? Is that what you are saying, Mr. Mercer?

1 MR. MERCER: What I am saying is that there had in the circumstances been an understanding that
2 it was confidential.

3 THE CHAIRMAN: And would not be used in proceedings?

4 MR. MERCER: And would not be used in proceedings, yes.

5 THE CHAIRMAN: And so you are objecting to us looking at it *de bene esse*?

6 MR. MERCER: Yes, ma'am.

7 THE CHAIRMAN: The way that that could be resolved is if it had been considered yesterday for
8 another Judge here to have a look at it.

9 MR. PICKFORD: Indeed. T-Mobile did write to the Tribunal, I believe on ----

10 THE CHAIRMAN: I have not seen the letter.

11 MR. PICKFORD: No, prior to the letter that was erroneously sent to the Tribunal containing the
12 witness statement, which I phoned the Tribunal about to ask them not to put it in front of the
13 Tribunal.

14 THE CHAIRMAN: It did not go in front of the Tribunal, it is the first time we have heard about it.

15 MR. PICKFORD: There was a letter prior to that which there was no request to withdraw from the
16 Tribunal, which I believe was sent by T-Mobile on Friday, which explained that there was an
17 issue here, and invited guidance on the best way of proceeding.

18 THE CHAIRMAN: Right. If the issue is whether there was an event – I will call it “an event” – in
19 which it had been agreed that information might be passed but that information might not be
20 used in these proceedings. If there is a dispute about that then either we can decide it because
21 that is not going to tell us the information, or another Judge can decide it. We do not need to
22 see the information to decide that issue.

23 MR. PICKFORD: We say there is no information that we wish to disclose save for the event itself,
24 which we say cannot be privileged. As I have emphasised, it is not a point which we consider
25 is a very substantial one, it is only effectively blown out of proportion by the fact that VIP will
26 not consent to us telling you what we are talking about.

27 We would suggest that the appropriate way forward would be for the Tribunal to have regard
28 to the very short statement simply to ascertain for itself whether it considers it is admissible or
29 not. If it considers it is inadmissible then the Tribunal should disregard it and that can be the
30 end of the matter. If it considers that it is admissible then so be it. We would suggest that in
31 the circumstances that is the practical way forward. We certainly would not suggest that it was
32 of such a nature that it merited a new Judge hearing it. Indeed, if it were to we might even
33 have to consider whether we would want to rely on that information because we think that
34 would probably be disproportionate.

35 THE CHAIRMAN: Thank you. Mr. Mercer?

1 MR. MERCER: Mountains and molehills, ma'am. I believe that my client is quite properly
2 asserting privilege in the circumstances. It is an established and traditional situation where
3 privilege exists.

4 THE CHAIRMAN: Did you have an agreement that whatever this is should not be disclosed in
5 these proceedings?

6 MR. MERCER: There is no express agreement, ma'am, no.

7 THE CHAIRMAN: Well what circumstances do you say makes it clear that there was an
8 understanding that it should not be disclosed? I am trying to put this very generally.

9 MR. MERCER: If I tell you the circumstance, madam, it kind of gives the game away.

10 THE CHAIRMAN: I know.

11 MR. MERCER: I am not trying to be obdurate or unhelpful.

12 THE CHAIRMAN: I am sure you are not. I am sure your clients think there is something they do
13 not want us to know which has happened.

14 MR. MERCER: Neither, madam, do I want to give the impression that we are being tricky in any
15 way.

16 THE CHAIRMAN: No. No. No. I was not suggesting that. That is why I put it in the mediation
17 sense - that it is a quite proper thing to do, if it is appropriate. The question is: is it
18 appropriate?

19 MR. MERCER: My view, as Mr. Pickford himself said, is that it is ---- or it seems to us to be an
20 extremely minor point. We cannot imagine that his entire argument depends upon it. If it is that
21 important, perhaps we should go away and another Judge should look at it.

22 MR. PICKFORD: As I have said, my argument certainly does not depend on it. It is a relatively
23 minor point. It is a material point. There is one possible way through, which is that if VIP is
24 willing to provide the clarification that we sought in our submissions for today in relation to
25 certain aspects of its conduct prior to this hearing, it may not be necessary for the Tribunal to
26 have regard to it at all. The only reason why it has come to light now at this relatively late
27 stage is because we did not get the answers that we were hoping for. But, perhaps one way of
28 dealing with it would be to allow VIP the opportunity to explain the position to T-Mobile in
29 greater detail. If T-Mobile is content with that, then that really is an end to the matter and we
30 do not need to raise it with the Tribunal again. If it is not, then we will have to deal with the
31 matter prior to the hearing of interim measures early next year. That really is, I think, the only
32 pragmatic course that we can offer if the Tribunal is not willing to ----

33 THE CHAIRMAN: This all goes to the assignment point, does it?

34 MR. PICKFORD: It is relevant to the assignment point. It is also relevant ultimately to the interim
35 relief point.

1 THE CHAIRMAN: As to who is entitled to interim relief.

2 MR. PICKFORD: Yes.

3 MALE SPEAKER: I am always quite happy to talk, madam.

4 THE CHAIRMAN: Shall we rise for a few moments and see whether you can resolve this.

5 MR. MERCER: I would be obliged.

6 (Short break)

7 MR. MERCER: Mr. Pickford and I have discussed matters and the *quid pro quo* for getting on with
8 this is for me to give him some other information which I also do not want to give him -
9 because I do not have to, and I do not think it is necessary or in the interests of my client.
10 Therefore, madam, as it is a simple question of law, we suggest it is put to another Judge on
11 the papers.

12 THE CHAIRMAN: The President can deal with it today.

13 MR. PICKFORD: I am grateful, madam.

14 THE CHAIRMAN: I do not know how you want to do that. Do you have to make submissions to
15 him, or can he just look at the document?

16 MR. PICKFORD: He can look at the document. I would need to make submissions to him if he
17 thought that it was privileged because I would argue that there was still scope for him ----

18 THE CHAIRMAN: Does he need to know anything about it?

19 MR. PICKFORD: In terms of its relevance he would need to know some context, simply in order
20 to determine whether there is likely to be any privileged information in it. I am not sure he
21 needs a great deal of background. In order to determine whether it is at all relevant, and in
22 order to determine whether if there is any privilege in it it should nonetheless be made
23 available to the Tribunal, he would need some background. So, he can deal with the first
24 question without background, I would suggest.

25 THE CHAIRMAN: I am just wondering whether he needs to do it in his room, or whether he needs
26 to come on here ----

27 MR. PICKFORD: I think he could deal with the first question, which is simply, "Is there anything
28 in this that could be privileged without any background?"

29 THE CHAIRMAN: Does he need to see your skeleton on assignment?

30 MR. PICKFORD: In order to determine that first question, probably not. I have not thought it
31 through.

32 THE CHAIRMAN: Should we pass behind a copy of whatever this document is?

33 MR. PICKFORD: Certainly. (After a pause): It has already been provided to VIP. So, they
34 know what it is.

35 THE CHAIRMAN: Mr. Mercer, are you happy for that document to go to the President?

1 MR. MERCER: I am quite happy, madam.

2 THE CHAIRMAN: Is there anything else that you think he needs to see?

3 MR. MERCER: The circumstantial nature of what the point is comes out of the document.

4 MR. PICKFORD: Madam, having had a moment to reflect on your question, I think it would be
5 helpful if the President were able to read merely paras. 2 to 6 of my written submissions for
6 today.

7 THE CHAIRMAN: He probably ought to read para. 1 as well, should he not?

8 MR. PICKFORD: Yes.

9 THE CHAIRMAN: He should paras. 1 to 6. (After a pause): Paragraph 7 then goes on to the
10 law, which is something else. Of course, he knows a bit about this case because he was the
11 Chairman who started it.

12 MR. PICKFORD: He was indeed, in pre-history.

13 THE CHAIRMAN: Are you happy with that, Mr. Mercer?

14 MR. MERCER: Yes, madam. I wonder if the President might also be directed to our submissions
15 of 7 December at paras. 26 to 28?

16 THE CHAIRMAN: So, the idea is that he would look at it on paper in the first instance and make a
17 preliminary ruling, and then decide what we do at that stage.

18 MR. PICKFORD: I am very grateful, madam. I am certainly very happy to continue my
19 submissions whilst that is done.

20 THE CHAIRMAN: We can leave assignment until the end and deal with all the others.

21 MR. PICKFORD: I am very grateful, madam. Turning in that case to the matter of jurisdiction, I
22 am grateful for the Tribunal's preliminary indication of its view on this question, and having
23 been directed to para. 224 of the decision of 28 June, 2005. We would, however, maintain
24 that the matters that the Tribunal would be required to investigate in order to determine VIP's
25 appeal in relation to authorisation go well beyond what was ever considered or investigated by
26 Ofcom in its Decision and the reason for that is in the Decision which is the subject of this
27 Appeal, Ofcom decided at para.121 that:

28 "GSM Gateways do not constitute radio equipment for the purposes of 2G cellular
29 licences, because GSM Gateways are not base transceiver stations or repeater stations,
30 and it follows therefore that the 2G cellular licences do not cover the use of GSM
31 gateways whether by the mobile network operators themselves or by anyone else."

32 So in the light of that conclusion it was not necessary for them to investigate in any detail
33 whatsoever whether, as a matter of fact, there had been any authorisation because Ofcom's
34 view was there could not possibly be any authorisation because the licence itself did not permit
35 GSM gateways to be used for the purposes for which they were being used.

1 If one turns to para.191 one finds the point at 121 echoed again in Ofcom's legal and economic
2 assessment:

3 "VIP has never been issued with a licence under s.11 of the WTA to use GSM gateway
4 equipment, nor for the reasons explained in s.3 above could T-Mobile have authorised
5 VIP to use GSM gateways under its licence as T-Mobile's licence does not cover GSM
6 gateways."

7 So that was the basis on which Ofcom proceeded. It is true that it made some comments,
8 largely in passing, at paras. 224 and 225 of its Decision about its view on authorisation but it
9 was not necessary for it to go into any detail or to consider that point.

10 THE CHAIRMAN: Is it not a matter of law consequent upon 224 as to whether that would amount
11 - because construction of the licence and/or construction of the contract is a matter of law, and
12 on that basis as a matter of law the question is if the licence is to be construed in accordance
13 with the way it was construed in *Floe a fortiori* in law there is a consequence.

14 MR. PICKFORD: Well we are certainly entitled to debate, and the Tribunal is certainly in my
15 submission permitted to make whatever conclusions it wants in relation to matters of law and if
16 all is being put is that the answer is already contained in para.224, and we simply need legal
17 submissions on that then we do not need any of VIP's evidence. But VIP has adduced a lot of
18 evidence and if T-Mobile is to engage properly at trial with that evidence it will itself have to
19 adduce evidence in reply, and there will be considerable debate ----

20 THE CHAIRMAN: Well what evidence are you going to adduce which is going to be different from
21 224?

22 MR. PICKFORD: There are, we would say, a host of factual questions which would need to be
23 investigated in order to ----

24 THE CHAIRMAN: What are those host of factual questions?

25 MR. PICKFORD: They are, for example, what precisely was communicated by VIP to T-Mobile, to
26 whom it was communicated in T-Mobile.

27 THE CHAIRMAN: Well why does it matter if you have confirmed that you understood that the
28 SIMS would be used by VIP in commercial licence user GSM gateways?

29 MR. PICKFORD: Well that is a very simple statement but it hides – in my submission there is a
30 considerable complexity.

31 THE CHAIRMAN: That shows that it is within here, it is part of the Decision and you are saying
32 that what is in here is not quite accurate, and you want to clarify – I will put it that way – the
33 statement that Ofcom made as to what you confirmed. So it is within the Decision.

34 MR. PICKFORD: What we say is not within the Decision is any detailed factual investigation.

35 Moreover, we say – and this is a point that I will come to in due course having dealt with the

1 jurisprudence in this area – that there can be no finding of infringement made against a
2 company in T-Mobile’s position unless the basis of the allegations against it have been set out
3 in a statement of objections, and put to it in an administrative investigation. What VIP is
4 inviting this Tribunal to do is to bypass those procedural safeguards which are an essential part
5 of our rights of defence.

6 THE CHAIRMAN: Well was this not in the statement of objections, para.224?

7 MR. PICKFORD: There has not been a statement of objections.

8 THE CHAIRMAN: Oh, because it was a non-infringement, case, I am sorry.

9 MR. PICKFORD: Because it was a non-infringement Decision. That is our point.

10 THE CHAIRMAN: Can I just interrupt – what the President has said is that he would like some oral
11 submissions and therefore we can either interpose at an appropriate time or you can go to
12 courtroom 2, which will probably be easier, well I am not sure, it would probably be easier for
13 us to go out, but I do not know if you want to do it now, or if you want to do it at 2 o’clock?

14 MR. PICKFORD: I would prefer to continue with my submissions on jurisdiction.

15 THE CHAIRMAN: Yes, I am sorry to have interrupted you – there has not been a statement of
16 objections, yes?

17 MR. PICKFORD: And that is a very important missing factor in this case for reasons that I intend to
18 expand upon, but just to come back to the point about precisely what would need to be
19 investigated by Ofcom if it was to consider the point about authorisation properly. We say that
20 it would need to understand precisely what was communicated by VIP to T-Mobile, to whom it
21 was communicated within T-Mobile, and when, what would have been required to provide
22 authorisation under the licence, e.g. did T-Mobile itself have procedures in place, or means of
23 dealing with authorisations under its licence, and were those steps that were taken in this
24 particular case? Did the T-Mobile Board, or did its legal department have any knowledge of
25 the agreement?

26 THE CHAIRMAN: Why does that matter?

27 MR. PICKFORD: We would contend that the state of knowledge within T-Mobile is a relevant
28 consideration as to whether something can be said to have been authorised under its licence. If
29 a mere salesman sells you a contract to use SIMS we would argue that that is not necessarily
30 sufficient to have been authorised under T-Mobile’s WTA licence. We would say that that
31 requires something substantially different. The Tribunal may be with me or against me on that
32 but there is a factual matrix to be decided in order to be able to understand that question and to
33 deal with it properly.

34 It would also be necessary to determine precisely what the nature of the agreement was
35 between VIP and T-Mobile. It is contended now by VIP that various terms ought to be implied

1 into that contract and in order to understand what terms should properly be implied one needs
2 to understand the factual matrix pursuant to which the contractual negotiations took place. So
3 there are a number of potentially quite complex factual issues that were not considered by
4 Ofcom in its investigation, there is no evidence that they were considered by Ofcom in that sort
5 of detail, precisely because they did not need to consider them because on their view it was all
6 irrelevant because there was no way that T-Mobile could have authorised. That is our first
7 point, that those issues would need to be considered. Secondly, no statement of objections has
8 ever been put to T-Mobile in respect of those allegations.

9 I can then bring this together with the relevant statutory provisions. In my skeleton argument
10 at paras. 12 through to 15 I have set out some of the relevant statutory background in terms of
11 the Tribunal's powers to hear appeals. The key provision which is plainly in dispute between
12 me and my learned friend is para. 3(2)(e) of Schedule 8 to the Competition Act 1998, in
13 particular it is the provision that "... the Tribunal may make any other decision which the OFT
14 (in this case Ofcom) could itself have made." The question of law that the Tribunal is to
15 determine is what do those words mean? What we say they mean is that the Tribunal can only
16 take a decision which Ofcom could have taken at the time it took its decision.

17 THE CHAIRMAN: Surely at the time it took its decision it could have taken that if it had gone into
18 the matters that you say it ought to have gone into – or, it might not have gone into them and it
19 could have taken a decision, that may be why it has appealed?

20 MR. PICKFORD: Madam, you are being asked by VIP to effectively put in place one of these
21 stepping stones to a finding of infringement; one of those stepping stones is the issue of
22 authorisation. Now, in order to have come to a finding of infringement at the time that it took
23 its decision, Ofcom would have needed to do two things in relation to authorisation. It would
24 need to have investigated the issue in some detail, and it would have needed to put its case to
25 T-Mobile in a statement of objections. It did neither of those things, so at that time Ofcom
26 certainly would not have been in a position to take an infringement finding against T-Mobile
27 on the basis of allegations of authorisation. We say for the same reasons, therefore, the
28 Tribunal should not be permitted to now, because if it were it would entirely obviate the need
29 for a proper administrative procedure pursuant to which points are put in the statement of
30 objections and, if I may, I would like to support that by reference to ---

31 MR. DAVEY: Mr. Pickford, are you saying that if the Regulator conducts an investigation and
32 makes a non-infringement decision and that non-infringement decision is appealed, that it can
33 only go back to Ofcom; that there is no way that this Tribunal can make an infringement
34 decision? The appeal is merely that the best that anybody who is appealing to this Tribunal
35 can hope for is to have it remitted – is that what you are saying?

1 MR. PICKFORD: If, in the case of the party against whom the infringement decision is to be made
2 objects to the Tribunal being invited to make that decision then “yes”, that is my answer. It is
3 conceivable that a party might come before the Tribunal and say “We don’t mind, we don’t
4 care who decides it, the Tribunal can decide it, Ofcom can decide it”, in that case I would be
5 silent about whether the Tribunal would be permitted to decide it in those circumstances. But
6 in this circumstance where T-Mobile says “No, we assert our rights of defence ...”

7 MR. DAVEY: So in fact all you have to do to ensure that there will not be a decision, that there will
8 be a further investigation is just to raise an objection? You would not actually have to put any
9 arguments in at all if what you are saying is true, because all you can do is say, “We object to
10 the idea of any actual decision being made”, and then sit down and let them go on, and if the
11 Tribunal says, “No, we’re satisfied it should be remitted”, that is the best they can hope for. I
12 mean, is that what the whole appeal structure is about?

13 MR. PICKFORD: Yes.

14 MR. DAVEY: This is what you are saying.

15 MR. PICKFORD: It is, and the reason for that is because ----

16 MR. DAVEY: I am not saying you are wrong, Mr. Pickford. I am just trying to tease out the
17 necessary corollary to your argument.

18 MR. PICKFORD: It is very helpful, sir.

19 MR. DAVEY: I am a simple man, Mr. Pickford, and I like things presented to me in a simple way.
20 If that is what you are saying, at least I can understand it. Whether it is right or wrong is
21 another matter, but ---- In this case you are saying that they did not carry out any investigation.

22 MR. PICKFORD: They did not carry out investigations ---

23 MR. DAVEY: They do seem to have reached a conclusion.

24 MR. PICKFORD: They reached a conclusion, but they did not have to carry out any detailed
25 investigation because of the other conclusions that they had reached. Therefore, their
26 conclusion was ----

27 MR. DAVEY: Whether it was legitimate ... whether it was a sensible or justifiable conclusion is
28 completely beside the point. They did reach a conclusion. So, are you saying that they could
29 have reached a decision - an infringement decision - on the basis of the conclusion that they
30 reached?

31 MR. PICKFORD: Well, we, of course, say ----

32 MR. DAVEY: No. Let us assume for the moment that they had reached that conclusion. Let us say
33 that you knew what you were doing when you supplied this. They say that loud and clear in
34 para. 224. On that basis they could, could they not, have made a decision?

1 MR. PICKFORD: Well, we would say that that in itself is certainly not sufficient to support an
2 infringement finding. There is a whole host of other issues about which we would argue.

3 MR. DAVEY: Yes, but at the moment we are only arguing about one. Let us assume for the moment
4 that all other things were equal. On the basis of the conclusion they reach, they could have
5 made a decision, and they could have said, "You authorised this".

6 MR. PICKFORD: Well, we would say they could not have done because they did not actually
7 carry out sufficient investigation, and the reason why they did not is because ----

8 MR. DAVEY: That would have been a ground of appeal, and possibly a ground of objection. But it
9 would have been a decision nonetheless.

10 MR. PICKFORD: Sir, you are entirely correct that the essence of my point is that one cannot
11 convert, as it were, a non-infringement decision into an infringement decision before the
12 Tribunal if the party about whom the decision is to be taken asserts its rights of defence and
13 says that it is entitled to have a full administrative procedure. I can certainly develop on that
14 point and explain why I say that in the light of both Community and domestic jurisprudence.

15 THE CHAIRMAN: I am very interested in the rights of defence because under Article 6 you would
16 have your protection here. As I understand the jurisprudence, if you have your hearing within a
17 court setting then it does not matter that the administrative procedure does not comply with
18 Article 6 - that you did not have your rights under Article 6. Therefore I am just wondering
19 where you hang your rights of defence.

20 MR. PICKFORD: It is not an Article 6 point. It is a point based on Community law and domestic
21 law jurisprudence in relation to administrative investigations concerning competition law.

22 THE CHAIRMAN: You will need to explain that.

23 MR. PICKFORD: I shall. The short answer, just before I go on to do so, madam, in relation to
24 your point about Article 6 rights, is that competition investigations in this jurisdiction, we say,
25 are subject to a very clear two-tier institutional structure. Those two tiers are that there is an
26 administrative investigation first, always prior to any finding of infringement; secondly, there
27 were rights of appeal to this Tribunal in respect of that decision. One of the key things that T-
28 Mobile loses out on if the Tribunal is to decide this matter now for the first time without there
29 being any administrative procedure, and without there being any statement of objections that
30 has been put to T-Mobile is that had there been an administrative stage, and the primary
31 decision-maker on fact - in that case Ofcom - came to factual conclusions that T-Mobile
32 disagreed with, T-Mobile would have an opportunity to appeal those, and it would be able to
33 do so to this Tribunal.

34 So, if the first decision-maker makes a mistake, we get a right of appeal on fact, and we can
35 ask this Tribunal to rectify that mistake.

1 THE CHAIRMAN: You do not get a right of appeal from us to somebody else. I understand that.

2 MR. PICKFORD: We do not get a right of appeal from you on fact.

3 THE CHAIRMAN: You do not get a right of appeal - apart from the fact that there is the
4 administrative investigation, etc. Do you have anything else that you found your right of
5 appeal on?

6 MR. PICKFORD: Sorry. I am not sure I totally follow your question, madam?

7 THE CHAIRMAN: Apart from your two-tier structure ----?

8 MR. PICKFORD: Yes, I do. I have the jurisprudence to which I think it is probably appropriate
9 that I now turn. If I deal firstly with the Community case law, the first relevant case is at Tab
10 16 of the authorities bundle, Volume 2. It is the Cement cases. If one turns to para. 66 of that
11 case, one sees that the court says there in the context of respecting the rights of defence,
12 “Equally, respect for the rights of defence requires the undertaking concerned must have been
13 afforded the opportunity during the administrative procedure to make known its views on the
14 truth and relevance of the facts and circumstances alleged and on the documents used by the
15 Commission to support its claim that there has been an infringement of the treaty”.

16 THE CHAIRMAN: The court does not have our power of looking at all the facts in the way that
17 we do. They are only a review body, are they not? So, in the set-up in Europe it is a very
18 different set-up because you have the investigation procedure before the Commission but it is
19 not, effectively, a complete re-hearing before the court.

20 MR. PICKFORD: The court has the power to make factual findings, and it has the power to
21 determine the factual findings of the Commission were wrong.

22 THE CHAIRMAN: But it is not the same as here, where it is an appeal on the merits.

23 MR. PICKFORD: We say it is actually very close because judicial review in the context of
24 community law does enable the court of first instance to substitute its own view on the facts.

25 THE CHAIRMAN: Do you have witnesses in the court of first instance?

26 MR. PICKFORD: You do. You can.

27 THE CHAIRMAN: You can.

28 MR. PICKFORD: Yes. You have witness evidence. Indeed, if it is of assistance, I have the Rules
29 of Procedure of the Court of First Instance, which I can hand up.

30 THE CHAIRMAN: I thought that was a significant difference between the procedure there and the
31 procedure here, and that therefore one has to read this in the light of that difference.

32 MR. PICKFORD: It is true that the European Court of Justice can only consider points of law, but
33 the court of first instance can hear evidence, and can have witness statements. I mean,
34 typically, the procedure is not an oral one - it is a written one.

35 THE CHAIRMAN: Do they have cross-examination?

1 MR. PICKFORD: I believe that there is provision for cross-examination, but I would have to check
2 the Rules of Procedure. Certainly there is provision for evidence and dealing with disputed
3 issues of fact.

4 THE CHAIRMAN: But I do not think it is as wide as ours.

5 MR. PICKFORD: In my submission it is sufficiently close for it to be of relevance when the
6 Tribunal is considering its powers. I will make good that point when I come to the domestic
7 case law, if I may.

8 THE CHAIRMAN: Paragraph 66?

9 MR. PICKFORD: Yes. Paragraph 66 I have read. At para. 67 it goes on,

10 "In that sense, Regulation 17 provides that the parties are to be sent a statement of
11 objections which must set forth clearly all the essential facts upon which the
12 Commission is relying at that stage of the procedure".

13 So, it is clear that in Community law rights of defence, in the context of competition law, is not
14 merely met by Article 6 in terms of there being a right of appeal ----

15 THE CHAIRMAN: But, in the CFI, if a case goes to the CFI on a non-infringement, they have no
16 jurisdiction, I think, to hear that appeal on the merits. So, they have to send it back to the
17 Commission, do they not?

18 MR. PICKFORD: They have no power to turn a non-infringement decision into an infringement
19 decision. That is true. There has never been, certainly to my knowledge, any case in which ----

20 THE CHAIRMAN: No, because they cannot hear the evidence.

21 MR. PICKFORD: Well, they can hear evidence, but what they cannot do is re-make the decision
22 and take their own decision.

23 THE CHAIRMAN: Yes. They cannot, whereas we can. So, there is a significant difference.

24 MR. PICKFORD: Well, we say that the Tribunal's powers in this jurisdiction have to be read
25 subject to Community law. As I have said, I will come on to make good that point in just a
26 moment, if I may, having dealt with the Community jurisprudence first.

27 So, that is what we see from the Cement cases. If one turns to the *Atlantic Container Line*
28 case, at Tab 15, para. 162, one sees there,

29 "According to the case law, regard for the rights of the defence requires that the
30 undertaking concerned shall have been able to make known effectively its point of
31 view on the documents relied upon by the Commission in making the findings on
32 which its decision is based. Consequently in principle only the documents cited or
33 mentioned in the statement of objections are admissible evidence as against the
34 addressee of the statement of objections. Moreover, as far as the documents appended
35 to the statement of objections, but not mentioned therein are concerned, they may,

1 according to the case law, be used in the decision as against the addressee of the
2 statement of objections only if that person could reasonably infer from the statement
3 of objections that the conclusions which the Commission intended to draw from them
4 ----“

5 So, again, that is reinforcing the importance in Community law of statements of objection.
6 If one turns briefly to the *Italian Flat Glass* case at Tab 13 one finds at para. 319 the very
7 point, madam, that we were just dealing with concerning the court’s powers:

8 “Accordingly, the court considers that although the Community court may, as part of
9 the judicial review of the acts of the Community administration partially annul a
10 Commission decision in the field of competition, that does not mean that it has
11 jurisdiction to re-make the contested decision. The assumption of such jurisdiction
12 could disturb the institutional balance established by the Treaty, and would risk
13 prejudicing the rights of defence”.

14 So, that is very much the point that we were just discussing.

15 Now, if one goes to the case of *Pernod -v- OFT*, at Tab 6 of the bundle, one finds at para. 229
16 a discussion by the Tribunal of the approach that it should take to Section 60, which is the
17 requirement of consistency in the Competition Act. It is a longer paragraph. I will just allow
18 the Tribunal to read it.

19 THE CHAIRMAN: (After a pause) What was the actual point in this case that they were concerned
20 with?

21 MR. PICKFORD: The point here was that there was a matter of procedure in relation to, as I recall,
22 to what extent third parties had to be notified in relation to decisions to potentially close a file,
23 in relation to commitments, decisions. So where the OFT were intending potentially to close a
24 file on the basis of commitments, it concerned the procedures to be followed by the OFT in
25 that context.

26 The point that the Tribunal were making at 229 is that the duty of consistency under s.60
27 extends to procedural matters as well as substantive questions of competition law, and they
28 emphasised at the end of that paragraph: “But it follows that so far as possible they should
29 decide this case consistently with the corresponding provisions of Community Law”. It is
30 helpful at this juncture to turn briefly to s.60 itself just to see what the words of that section
31 are. Section 60(1) provides:

32 “The purpose of this section is to ensure that, so far as is possible, having regard to
33 any relevant differences between the provisions concerned, questions arising under
34 this Part in relation to competition within the United Kingdom are dealt with in a

1 manner which is consistent with the treatment of corresponding questions arising in
2 Community Law in relation to competition within the Community.”

3 Then 60(2):

4 “At any time when the court determines a question arising under this Part it must act,
5 so far as is compatible with the provisions of this Part and whether or not it would
6 otherwise be required to do so, with a view to securing that there is no inconsistency
7 between”

8 And it deals with the principles to be applied and the decision reached by the court in
9 determining that question and the principles laid down by the Treaty and the European Court
10 and any relevant decision of that court as applicable at that time in determining any
11 corresponding question arising under Community Law.

12 So the duty there is one of consistency as far as possible. Now, it is quite plain that if the
13 provisions in domestic law prevent this Tribunal from following Community Law then that is a
14 relevant difference which bites in terms of s.60. But in my submission there is nothing in the
15 Rules governing the procedures to be adopted by this Court and in the rules concerning its
16 jurisdiction which prevent an approach which is on all fours with Community law. Therefore,
17 because there is nothing to prevent it, s.60 in my submission obliges this Tribunal to adopt the
18 same approach as would be adopted in Community Law. That is not a novel submission so far
19 as these issues are concerned before the Tribunal.

20 If I may now turn to the relevant domestic jurisprudence on this issue. The first relevant case
21 is that of *Napp*, that is the 2002 Judgment of the CAT. It is at tab 2, para.133. There was a
22 dispute in this case about whether the Director should be permitted to adduce new evidence in
23 support of his decision. The Tribunal stated at para.133:

24 “On this point, for the same reasons that we consider that our discretion to allow the
25 Director to submit further evidence should be exercised only sparingly, we accept
26 Napp’s basic submission that in principle the Director should not be permitted to
27 advance a wholly new case at the judicial stage nor rely on new reasons. To decide
28 otherwise would make the administrative procedure and the safeguards it provides
29 largely devoid of purpose. The function of this Tribunal is not to try a wholly new
30 case. If the Director wishes to make a new case the proper course is for the Director
31 to withdraw the Decision, adopt a new Decision or for this Tribunal to remit.”

32 We say it follows equally that if the Director cannot make a new case in the context of having
33 itself taken an infringement decision and obviously if it had taken an infringement decision
34 there would have had to have been some sort of statement of objections prior to that decision,
35 if it would be wrong for the OFT or Ofcom to advance a new case and require the Tribunal to

1 go into new factual areas, then it is equally impermissible for VIP to be able to do so in the
2 context of these Tribunal proceedings.

3 If the Tribunal could turn to tab 3, this is the case of *Aberdeen Journals* and again the Tribunal
4 dealt with the issue of rights of defence at paras. 175 to 177, and give that that is a longer
5 section, if I could just ask the Tribunal to read those paragraphs? (After a pause) At para.177
6 the Tribunal will have seen that the Tribunal previously expressed itself in trenchant terms
7 explaining that if one was to effectively ignore the rights of defence and the procedural stage,
8 that would transform the Tribunal from essentially an appellate Tribunal to a court of trial
9 where matters of fact, or the meaning to be attributed to particular documents are canvassed
10 for the first time at the level of the Tribunal, where they could (and should) have been raised in
11 the administrative procedure and dealt with in the Decision. We say that is the danger of the
12 approach that you are being invited to adopt by VIP.

13 If I could turn to the case of *Argos* finally, which is at tab 5 of the bundle. Here the passage is
14 even longer it is para.64 through to the end of 66. There are a few points that I would like to
15 highlight, but it is probably appropriate if I allow the Tribunal an opportunity to read those
16 passages.

17 THE CHAIRMAN: (After a pause) Is that the end of the cases you are going to refer us to?

18 MR. PICKFORD: It is in relation to this particular issue, there is a further paragraph ----

19 THE CHAIRMAN: What about the cases which deal with the Appellant putting in evidence,
20 because this is not a case where Ofcom want to put in something different from their decision,
21 it is where the Appellants are saying that something different happened.

22 MR. PICKFORD: My understanding is there has never been a restriction on Appellants ----

23 THE CHAIRMAN: But is that not what this case is about?

24 MR. PICKFORD: I beg your pardon, madam?

25 THE CHAIRMAN: Is that not what this case is about? It is the Appellants who want to put in the
26 evidence, Ofcom does not want to put in more evidence.

27 MR. PICKFORD: Madam, our objection is not to the Appellants putting in evidence. They are quite
28 permitted to put in whatever evidence they feel is appropriate in order to establish that the
29 factual basis supporting the disputed decision is wrong.

30 THE CHAIRMAN: Yes, or different.

31 MR. PICKFORD: Indeed, and they are entitled to do that; and the Tribunal is clearly entitled to set
32 aside the original decision if it is ultimately satisfied by the Appellant that ----

33 THE CHAIRMAN: Or substitute its own decision?

34 MR. PICKFORD: It depends on what decision it is being invited to substitute. It could substitute its
35 own non-infringement decision for another non-infringement decision if all of the relevant

1 factual material was available to it either in the original decision or on the basis of evidence
2 that was provided in relation to that decision. What it cannot do, as I have said, is move from a
3 non-infringement decision to an infringement decision, because if there is ever going to be an
4 infringement decision that is when rights of defence are engaged.

5 THE CHAIRMAN: So you are saying that this has an effect on cases, I think, like *Burgess*?

6 MR. PICKFORD: It does.

7 THE CHAIRMAN: That is why I was saying are you going to – because I would have thought those
8 are relevant.

9 MR. PICKFORD: I am certainly very happy to take the Tribunal to *Burgess*, but the point in that
10 case is the Tribunal did go on to make its own finding of infringement, but the points that I
11 have made, as I understand it, were never canvassed before the Tribunal. With respect to the
12 advocate who appeared for Harwood Crematorium, I do not understand that he was a specialist
13 competition counsel and I do not understand that any of these particular points were ever
14 raised.

15 THE CHAIRMAN: You are saying that, in fact, if they had been raised they would have been just
16 as relevant there.

17 MR. PICKFORD: They would be likely to have been as relevant there. As the Tribunal has raised
18 this, then it may be helpful if we turn to it briefly at Tab 9. If one turns to para. 129 one sees
19 that the Tribunal are articulating its thoughts about whether it is appropriate, or not, to take its
20 own decision. (After a pause): If I could draw the Tribunal’s attention to para. 136, the
21 Tribunal went on to say,

22 “As to the issue of abuse, the principle facts are largely common ground, and it seems
23 to us to be mainly a question of applying the law to those facts as the Tribunal did in
24 *Jisk*”.

25 One can see that there there is a possible point of distinction, because here we say that the facts
26 are not common ground.

27 THE CHAIRMAN: Then you go to para. 138 - procedural fairness, which is really what you are
28 talking about. “--- participated fully and has been ably represented”.

29 MR. PICKFORD: Yes - by counsel who did not raise these particular points. It also says at the end,
30 “In addition, as already pointed out, there is no question of a penalty being imposed upon
31 Austin’s”. Now, that is not the case here. We do not know whether a penalty would, or would
32 not, be imposed. So, the Tribunal obviously felt that it was in a safer position here. It is also
33 relevant to go to the end of para. 139 where the Tribunal said,

34 “In addition, as already stated, the Tribunal understands from a letter from the
35 solicitors acting for Harwood Park Austins, of 13 May, 2005, that the issue of

1 unrestricted access to Holwell Park has now been resolved as between the parties. In
2 those circumstances it is highly desirable that these proceedings concluded as soon as
3 possible”.

4 So, in that situation there was no longer even any live dispute. One can well see that in those
5 circumstances where the parties no longer had a dispute; there was no question of any fine; and
6 no point had been taken, it would appear, by Austins itself, that the Tribunal might have been
7 tempted, in essence, to take a little bit of a short cut and just tie up the loose ends.

8 THE CHAIRMAN: Are you sure the point was not taken, because there are, as you have shown us,
9 nearly ten paragraphs in relation to this?

10 MR. PICKFORD: I am basing now on having spoken to one of the counsel in the case who told me
11 that ----

12 THE CHAIRMAN: They did not take the point.

13 MR. PICKFORD: -- they did not think it had. But, if that turns out to be wrong, I do not hang
14 my ----

15 THE CHAIRMAN: It may have been taken in a different way.

16 MR. PICKFORD: Possibly.

17 THE CHAIRMAN: As procedural fairness rather than the way you are putting it, which is no
18 jurisdiction.

19 MR. PICKFORD: I do not hang my submissions on that point. What I do say is that we are putting
20 the point in the way we put it now before the Tribunal.

21 THE CHAIRMAN: We can probably check because it is normally set out ----

22 MR. PICKFORD: At para. 124 Austins adopted the position of the OFT.

23 THE CHAIRMAN: The parties' submissions covered principally the standard of proof; how far the
24 Tribunal should take its own decision ----

25 MR. PICKFORD: In relation to the Tribunal's powers, as I read the Judgment ----

26 THE CHAIRMAN: But they have not set out in detail the submissions and so we cannot tell.

27 MR. PICKFORD: No. (After a pause): As I say, madam, I do not hang my submissions on that
28 point. Insofar as this point was put in the times that I am putting it squarely to the Tribunal ----

29 THE CHAIRMAN: It was not quite put in that way.

30 MR. PICKFORD: It does not appear to have been put in that way. I would say that if it was, then
31 the Tribunal got it wrong. But, it is not at all clear that it was. As I emphasised, in relation to
32 that case, it does seem to be very special circumstances where there was not even dispute
33 between the parties any more. One can well see that the temptation in that sense to simply
34 effectively cross the Ts and dot the Is ----

1 THE CHAIRMAN: So, what you are asking us to do is to remit that question under Rule 19 so that
2 you can have that point decided.

3 MR. PICKFORD: Madam, I think there are two potential approaches - one would be that: to remit
4 under Rule 19(2)(j); the other, which is actually the course that I would urge upon the
5 Tribunal, is to allow the appeal to the extent that the Tribunal sets aside the aspects of the
6 reasoning of Ofcom which are inconsistent with the Tribunal's judgment in *Floe* - because
7 clearly there is considerable symmetry between the two cases - and at that point that leaves
8 Ofcom with an incomplete investigation that it will need to pursue, subject to its view on its
9 administrative priorities. We say that that is an entirely usual result - indeed, it is the result,
10 effectively, of what happened the first time round in the *Floe* case: the Tribunal took the view
11 that in substantial part the reasoning of Ofcom was inadequate. It did not go on - and, in my
12 submission, rightly - to make its own factual findings. It sent it back. Obviously there was an
13 issue about timetabling, but otherwise that was an entirely proper course.

14 THE CHAIRMAN: You say when we decided the facts in *Floe*, Vodafone could have run the same
15 argument, but did not, and everybody agreed that we should do it.

16 MR. PICKFORD: It could potentially have run the same argument in relation to those ---- If there
17 were any issues which it felt could lead to factual findings being made that were adverse to it,
18 it would have been entitled to say, in relation to those, "We demand ----"

19 THE CHAIRMAN: You are entitled to a statement of objection.

20 MR. PICKFORD: We are entitled to a statement of objections. We are entitled to our
21 administrative procedure. It did not. Therefore, as we all went through that appeal on that
22 basis ---- Clearly it would have been inappropriate for Vodafone to say at the end of that ---- If
23 they had ... the facts it would have been appropriate for Vodafone at the very end to say, "Well,
24 actually the Tribunal could not have done that ----"

25 THE CHAIRMAN: In a way, it is circular. It means that the facts can never be ---- or, may never
26 be looked at by this Tribunal because if it goes back to Ofcom, or the OFT, or whoever it is,
27 and they decide on whatever facts they find that there is no infringement, then what does this
28 Tribunal do? It is in the same position again.

29 MR. PICKFORD: This Tribunal looks at those facts that it is necessary for it to look at in order to
30 decide whether to set aside the decision. In this case it is already investigated sufficiently to
31 decide that the decision is one that cannot stand ----

32 THE CHAIRMAN: Just assume it goes back and OFT or Ofcom look at it again, do not do a very
33 good job ---- I am sure they will do a good job, but just assume they will not do a good job ----
34 They do not investigate what turns out to be ---- or what somebody says is the relevant facts.
35 They make a finding of non-infringement again, and it comes back here, and we say, "Well,

1 you really ought to have investigated this area. That was not included in your decision. You
2 did not investigate that area. Therefore, T-Mobile say that we cannot look at those facts.
3 Therefore, it has got to go back again". The whole point, as is clear from para. 129 - the quote
4 in para. 129 from the debate and the minister's statement, is that that was not supposed to
5 happen. We, as a Tribunal, were supposed to have the full jurisdiction. It seems to me that
6 what you are saying can obviate us looking at it at all.

7 MR. PICKFORD: Madam, if I can address that point in stages? Firstly, the Tribunal is quite
8 permitted, if it does remit something back, to explain to Ofcom the basis on which it thinks it
9 should conduct a future investigation.

10 THE CHAIRMAN: Well, no, because you do not know when you look at something what, in fact,
11 the facts might turn out ---- might become relevant. We know that when you investigate
12 something it is in stages. You find something out, and because of what you found out, you
13 may need to find something else out. You cannot look into the crystal ball and give a
14 complete assessment of what needs to be found. It depends on how the evidence emerges as to
15 what the investigation ought to be.

16 MR. PICKFORD: It is true that the Tribunal cannot necessarily be entirely comprehensive, but it
17 certainly can offer guidance to steer the relevant decision-maker in the right direction

18 THE CHAIRMAN: But that does not mean that (a) the guidance is going to be followed, or (b) that
19 the guidance turns out to close the relevant doors.

20 MR. PICKFORD: It is certainly the case that there is always the possibility that the decision-maker
21 itself does not take a good decision because they do not investigate all the facts that should
22 have been investigated.

23 THE CHAIRMAN: That is what the appeal process is about. That happens, and it needs to be
24 reconsidered.

25 MR. PICKFORD: It needs to be reconsidered. The question is, "By whom?"

26 THE CHAIRMAN: But yours would just keep going back, and it would never be looked at again.
27 It is always looked at at the same level.

28 MR. PICKFORD: There is a short cut through all of this in that there are private rights that
29 anybody who believes that their position has been prejudiced by an infringement of
30 competition law can pursue. What we say is that if the decision of infringement is to be
31 arrived at pursuant to an administrative investigation, one has to go through the right steps of
32 an administrative investigation. Quite plainly, if VIP do not have confidence that Ofcom will
33 come to what they consider to be the right view, they are quite entitled to go to the Chancery
34 Division and ask a Judge in the Chancery Division to decide the question for them at first

1 instance. That way they can guarantee that there is no possibility of that question being
2 remitted back to Ofcom. That is their solution.

3 If, however, they choose the route of an administrative investigation ... they choose to make a
4 complaint to Ofcom, then we say that the decision-maker has to be Ofcom. The decision-
5 maker cannot be the Tribunal. Now, I entirely understand the point that the Tribunal has put
6 to me in that one could potentially get into the situation where if one does pursue an
7 administrative investigation it goes on, and it becomes somewhat circular. But, there is a
8 balancing act here between that possibility and also, on the other hand, rights of defence and
9 the rights for someone who is potentially going to be subject to an infringement finding to have
10 a proper administrative procedure.

11 Now, ultimately, Parliament has entrusted in the field of telecommunications Ofcom with the
12 role of investigating infringements of competition law in relation to telecommunications. It
13 must be presumed therefore that Ofcom can be expected to do that to a sufficiently high
14 standard. Of course, that does not mean that they will get the answer right, and that is why
15 there is this appeal body. But it is Ofcom which has been entrusted with investigating
16 competition matters in an administrative procedure at First Instance, and not this Tribunal, the
17 function of which is to hear appeals. Having said, madam, that I was not going to refer to any
18 further authority, it does occur to me that there is one authority that I can refer to very briefly
19 which helps a little bit on this particular issue, and it is indeed the *Floe* case in the Court of
20 Appeal. If one turns to it very briefly, it is at tab 28 of the authorities' bundle. It is a section at
21 para. 34 – it is relatively short so I will read it:

22 “The Tribunal, as a statutory body, has the task of deciding such appeals as are
23 brought to it in accordance with the provisions of the 1998 Act and the Rules, but it
24 does not have a more general statutory function supervising regulators. On that basis
25 it seems to me that the CAT’s reasoning is based on a misconception of the
26 relationship between the Tribunal and the regulators. When a Decision is set aside
27 and remitted to the relevant regulator that particular matter is then dealt with by that
28 regulator in accordance with its own statutory duties and functions. The regulator will
29 have received a complaint and even embarked on an investigation but will not have
30 concluded that investigation because the decision by which it purported to do so will
31 have been set aside. Accordingly, as part of its current tasks it will have the
32 incomplete investigation to consider and process. If it comes to another decision
33 further rights of appeal may arise under s.46 or s.47 but otherwise the CAT has no
34 role in relation to the regulator’s conduct.”

1 It is clearly contemplated by the Court of Appeal here that one does have a process where one
2 goes back to the regulator, and one expects the regulator to be able to do its job properly.

3 There must be a presumption that the regulator is able to do so, even if one has rights of appeal
4 in case it does not.

5 THE CHAIRMAN: My recollection of the decision is that it has approved the idea that you can use
6 Rule 19 as well.

7 MR. PICKFORD: It does indeed, madam, and I was going to come on to that when you asked me
8 about what the appropriate course was. As I submitted, what we would urge upon the Tribunal
9 is that the Decision should be set aside and the matter should be remitted generally to Ofcom,
10 but the Tribunal has quite rightly raised with me that there is the possibility of a more targeted
11 remission under Rule 19. What we would say in relation to that is that Rule 19 is appropriate
12 where there is a hole in the investigation but otherwise the Tribunal is effectively in a position
13 to come to a conclusion. So, for example, had there been a complete investigation and
14 decision in relation to market definition, dominance, other objective justifications, and
15 everything else, and let us suppose that Ofcom, for the sake of argument, had reached an
16 infringement decision, now let us also suppose that there was one aspect of its decision that
17 was inadequate because it never went into the facts adequately, e. g. in relation to
18 authorisation.

19 THE CHAIRMAN: That would have made it a non-infringement decision and it was T-Mobile
20 appealing, is that the idea?

21 MR. PICKFORD: Yes, assume it is an infringement decision, T-Mobile is appealing, we come
22 before the Tribunal and it is discovered that in fact there was a hole in the investigation, there
23 was one particular aspect that was not dealt with properly and it now needs to be decided. We
24 say that is precisely what Rule 19 is intended for. Because the Tribunal itself should not take
25 its own infringement decision, or rather it should not engage in its own investigation, it should
26 remit that particular issue, pursuant to Rule 19. There should be essentially a limited statement
27 of objections in relation to it – a merely administrative procedure, as it were – and then it can
28 come back to the Tribunal and it can be dealt with. So, in my submission, Rule 19 is a means
29 of curing effectively relatively limited defects in the Decision but in this case there is a large
30 extent of issues that were never considered, and therefore to send back merely authorisation
31 pursuant to Rule 19 would be an inappropriate use of that particular power. I am not saying
32 there is not jurisdiction to do it, but I am saying it is not what it was intended for, because there
33 really is so much that still needs to be considered the appropriate course is simply just to remit
34 at large.

1 If I could briefly recap on the two most important features that we say would be missing if the
2 Tribunal adopted VIP's approach. T-Mobile would not get a statement of objections or all of
3 the procedural protections that go along with that, and it would not get a right of appeal on fact
4 from the primary decision maker. However expert a primary decision maker may be, whether
5 it be Ofcom or the Tribunal there is always the possibility that they might make a mistake.

6 THE CHAIRMAN: Now, the first one, no statement of objections, you rely on European Law?

7 MR. PICKFORD: European Law and also the commentary in the domestic cases that I took you to.

8 THE CHAIRMAN: Yes, but no right of appeal, what do you rely on for that?

9 MR. PICKFORD: If one turns to s.49(1)(c) of the 1998 Act one sees the basis on which a party is
10 permitted to appeal from this court, and it provides that an appeal lies to the appropriate court
11 and 1(c) "... on a point of law arising ..."

12 THE CHAIRMAN: No, I understand that there is no appeal from here, but where do you get your
13 right?

14 MR. PICKFORD: Where I get my right is that there is a clear two-tier institutional structure, there is
15 reference to that partition between the respective roles of the Tribunal and of the administrative
16 investigator in the Community jurisprudence, and also in the domestic jurisprudence to which I
17 have referred.

18 THE CHAIRMAN: Is that not a circular argument as well because if you are right that you have a
19 right, then you have a right. But if the Tribunal has jurisdiction to do what it does then it does
20 not give you a right. I am just wondering whether one can feed that in because ----

21 MR. PICKFORD: In my submission it would be very odd if, ordinarily, one were to adopt the
22 ordinary course that, for instance, a regulator makes an infringement finding and one gets to a
23 appeal that on a factual basis and that is what is clearly provided for in the statutory
24 framework. It is because of the fact that one was in the Tribunal defending, or dealing with a
25 non-infringement decision if one suddenly lost that right, there is clearly a right in the ordinary
26 course to be able to appeal on a finding of fact, and we say that is a very important right,
27 because however skilled and whoever is making that first decision there is the possibility that
28 they get it wrong.

29 Now, Parliament has provided, in the case of the Tribunal's decisions, very properly if the
30 Tribunal gets it wrong that is too bad, you do not have an appeal on points of fact before the
31 Tribunal. We expect the Tribunal to get it right, not least because it has already had the
32 advantage of an administrative procedure where it can see the reasoning that the first decision
33 maker has gone into and as an Appellate body it has that decision before it.

34 THE CHAIRMAN: My understanding was – I may be wrong – that the reason that this Tribunal was
35 given an appeal on the merits jurisdiction was because there were questions about fact at the

1 administrative stage, and that if that had not been properly done, and because the Judicial
2 Review did not allow the merits to be gone into there would be no judicial stage of review of
3 the facts, and therefore the appeal on the merits jurisdiction was provided in order to fill that
4 gap, so that at some stage there was a proper judicial determination of the facts – or the
5 possibility of.

6 MR. PICKFORD: Madam, clearly the Tribunal does have power to determine facts. The question is
7 in what context and how far it should go? I would say in response ----

8 THE CHAIRMAN: You say only in an infringement decision?

9 MR. PICKFORD: Well it can also determine the facts that it needs to determine in order to decide
10 whether to set aside a non-infringement decision.

11 THE CHAIRMAN: But it could only set aside the non-infringement decision, it does not need to go
12 into the facts, it can just say that those facts were not investigated; it would never actually have
13 to hear the facts and say “These are the facts as they are” because it would always have to
14 remit it to another body for the facts to be decided.

15 MR. PICKFORD: That is correct, and in response to the point that you raised about what Parliament
16 intended -----

17 THE CHAIRMAN: That is set out in *Burgess*.

18 MR. PICKFORD: Indeed, but I would like to make some submissions in relation to that. The
19 Tribunal has rightly highlighted that clearly this Tribunal has a merits jurisdiction and it is
20 important that there should be judicial scrutiny of the facts as decided by regulators, but one
21 has to step back ----

22 THE CHAIRMAN: Well no, the point I made was that it was because they may not do it properly,
23 or may not do it that there had to be at one level a proper Article 6 scrutiny of the facts, and it
24 is not that there is a right of appeal, it is that there is a right to have an Article 6 hearing on the
25 facts at some stage, and the stage that it was given was on the appeal on the merits; that is your
26 right.

27 MR. PICKFORD: Indeed, madam, the question is whose right is it? That is the question, because
28 the reason why Article 6 is engaged is because an infringement decision is contemplated and
29 the Tribunal has held in *Napp* that for the purposes of proceedings before the Competition
30 Appeal Tribunal that is effectively a criminal sanction because potentially very heavy fines can
31 be imposed.

32 THE CHAIRMAN: Yes, but Article 6 can be civil as well, you see it is not engaged between Ofcom
33 and VIP, you say it is only engaged between you and VIP?

1 MR. PICKFORD: Yes, because this is an administrative procedure and the only party whose Article
2 6 rights are given effect via this process is a party who is potentially subject to an infringement
3 finding.

4 THE CHAIRMAN: I have forgotten what the words of Article 6 are, the words in brackets that deal
5 with this.

6 MR. PICKFORD: I am afraid I do not have it in front of me at the moment. But, madam, whatever
7 the precise words are the important point is that clearly there should be an opportunity if
8 someone is to be subject to potentially very heavy fines and a finding of infringement, that
9 person – in this case T-Mobile – is entitled to have those facts reviewed, we say, it is allowed a
10 second bite of the cherry.

11 THE CHAIRMAN: That is the question, whether it is a second bite of the cherry, or whether you
12 have to have it as one bite, and I am just wondering where your right to a second bite is, except
13 you say under s.49(1)(c).

14 MR. PICKFORD: There is that and there is also all of the case law which emphasises that this is a
15 two tier institutional framework. To deal with your point about the potential rights of VIP
16 they have the means of giving effect to their Article 6 rights, because they have the option of
17 the Chancery Division, and that is what gives effect to their rights. The primary reason, we
18 say, that the Tribunal has the jurisdiction that it does have is to enable someone who has been
19 the subject of an infringement finding, and the potentially heavy consequences that follow
20 from that, to appeal that decision to the Tribunal, and to require the Tribunal to set it aside. The
21 problem with what is being advocated by VIP is that the Tribunal may possibly,
22 hypothetically, make a mistake on the facts. If it does, we have no right of appeal from that,
23 whereas if the first decision had been taken by Ofcom would have right of appeal; we would be
24 able to bring that point to the Tribunal. That is a right that we maintain.

25 Just before coming on to deal with the points that are raised by VIP in its skeleton argument
26 against me, I should say that whilst we are very firm in our submissions on jurisdiction, what
27 we would say in the alternative - if the Tribunal is not with me on jurisdiction - is that in this
28 case it would not be appropriate for the Tribunal to embark upon the course that has been
29 urged by VIP because of the fact that we would lose procedural protection which we say
30 should get. So, a softer version, as it were ---- a weaker version of my argument is that even if
31 there is no absolute bar on the Tribunal doing it, in these circumstances, and in any event, it
32 would be wrong for the Tribunal to do it.

33 THE CHAIRMAN: That looks like the argument put in *Burgess* – procedural unfairness.

34 MR. PICKFORD: It may well have been, yes.

1 If I could briefly deal with the points that VIP raise against me - firstly, they make their
2 complaint about potential speed and control, and my answer to that is obviously, "Well, if that
3 is what you are concerned about, you go to the Chancery Division". They also say that any
4 limit on para. 3.2 would rob the Tribunal of any effective authority in respect of fact-finding.
5 But, we have already really dealt with that. I say there clearly is a power to find facts, but it is
6 in a particular context, the Tribunal being an appellate body. It is subject to the procedural
7 protections which are afforded by a two-tier investigative procedure.

8 They also say that they rely on para. 3(4) of Schedule 8. That provides: "If the Tribunal
9 confirms the decision which is the subject of the appeal, it may nevertheless set aside any
10 finding of fact on which the decision was based".

11 Now, the first point in relation to this is that VIP is not asking the Tribunal to confirm Ofcom's
12 decision. So, it is difficult to see quite how it applies in this context. But, one can go on, just
13 putting that aside ---- We say that those words in par. 3(4) of Schedule 8 do not support the
14 proposition that the Tribunal is entitled to make its own separate findings of fact in order to go
15 on to make an infringement finding when it is faced with a non-infringement finding. The very
16 fact that there are no words to that effect in 3(4), we say, goes against VIP's point rather than
17 in favour of it. We simply do not see how 3(4) adds anything to its case on that.

18 If I turn to deal with Ofcom's submissions, and Ofcom's stance in relation to this issue, Ofcom
19 has had - I think it would be fair to characterise it as - a slightly ambivalent attitude towards
20 this point. Initially it seemed at the case management conference we had, it might be making it
21 itself, but now it is quite clear that it is not making the point itself - it is allowing T-Mobile to
22 make it.

23 THE CHAIRMAN: Is it allowing T-Mobile to make it, or that T-Mobile are making it.

24 MR. PICKFORD: I leave Mr. Anderson to answer that. Certainly T-Mobile are making it. But,
25 one can see why that is the case, and why that is entirely proper, in fact. The essence of my
26 point is that it is about T-Mobile protecting its own rights of defence. Therefore it is a point for
27 us to take. One can well see why it is not a point for Ofcom to take.

28 THE CHAIRMAN: If we have no jurisdiction, it is a point for Ofcom to take.

29 MR. PICKFORD: Given that T-Mobile are taking it, and clearly it is us that feels the point
30 most ----

31 THE CHAIRMAN: We will hear what is said.

32 MR. PICKFORD: We feel the point most keenly, and we say that is one reason for Ofcom not to
33 take the point, but for us to take it.

34 Secondly, one can also see that the points I have made in relation to the European
35 jurisprudence and the domestic jurisprudence are somewhat double-edged from Ofcom's point

1 of view because, of course, what they equally prevent this Tribunal from doing is mending a
2 potential infringement decision that Ofcom might take by reliance on new arguments or new
3 evidence or a new case - for example, what happened in the *Mastercard* case recently over the
4 summer where it was ultimately held ---- or, generally agreed to be the case that the OFT's
5 position had shifted so far from the decision itself in the defence, and it was not appropriate to
6 continue with the proceedings before the Tribunal.

7 THE CHAIRMAN: Well, the OFT decided that, did it not?

8 MR. PICKFORD: Yes - in the face of those criticisms having been made to it. One can well see
9 that it is not in Ofcom's interests to urge upon this Tribunal a very strict approach in relation to
10 protection of rights of defence because it may well come back to haunt them in future cases.
11 The domestic jurisprudence that I have taken you to have all been cases where the OFT has
12 been trying to add something to its case - either new evidence or adopt a different position, and
13 the Tribunal has said, "Well, there are strict limits to the extent to which you can do that". So,
14 again, that explains, in my submission, why Ofcom takes the rather more lukewarm position in
15 relation to this issue. It does not mean that it is a bad point in my submission.

16 Finally in relation to Ofcom's submissions, it is important to point out that in Ofcom's
17 written submissions at para. 12 - a point picked up in my skeleton, but I will just make it very
18 briefly now - it is suggested by Ofcom that one of the ways in which one might proceed is that
19 one has to put in place various procedural safeguards to make sure everything is fair before the
20 Tribunal, and one has to notify third parties. We say that that would not be good enough, and
21 certainly it would not be good enough in relation to issues, for instance, such as market
22 definition and dominance. Now, I know those have been parked, but the same principles apply
23 generally in relation to how the Tribunal is to approach these matters. The reason why it
24 would not be sufficient would be because Ofcom has power to compel parties to provide
25 information to it pursuant to Section 26, and the Tribunal does not have those powers. That is
26 why it is right that it should be Ofcom that carries out these kind of investigations at first
27 instance.

28 THE CHAIRMAN: I think we can issue summonses. So, we can get witnesses before us. I think
29 we do have those powers.

30 MR. PICKFORD: You have the powers to issue witness summonses. That is not the same, I would
31 submit, as powers under Section 26 to ----

32 THE CHAIRMAN: Well, if you can get a witness summons you can get documents, and you can
33 get witnesses, and if they come here they are under a duty to provide the information that they
34 have. So, is there any difference?

1 MR. PICKFORD: Well, in my submission the procedures, and the powers the Tribunal has
2 available to it, are not ----

3 THE CHAIRMAN: We cannot go and do a search of premises ----

4 MR. PICKFORD: No, that is one thing you cannot do. Also, there is a practical and substantive
5 difference, I would suggest, between a Section 26 notice which sets out a range of questions
6 which the Respondent is obliged to answer, and if they do not there are potential criminal
7 consequences which follow from that ----

8 THE CHAIRMAN: Well, he would be in contempt of court. If they failed to answer, and we had a
9 list of questions, and we asked them those and they failed to answer, then there are sanctions in
10 relation to contempt of court.

11 MR. PICKFORD: I would suggest as a practical matter it would be a very cumbersome and rather
12 different method of dealing with things to try and replicate an administrative investigation in
13 front of the Tribunal. One can see that there may be ways in which the Tribunal might try
14 creatively to do the best that it can, but one would always be in a second-best position, and it
15 would be a cumbersome and inappropriate way of doing what should be done properly via the
16 administrative procedure.

17 THE CHAIRMAN: That goes to whether it is fair to do it, or right to do it, rather than whether we
18 have jurisdiction to do it.

19 MR. PICKFORD: Arguably, that is correct, yes.
20 Finally, I will just very briefly touch upon the ----

21 THE CHAIRMAN: Are you suggesting in this case that other than calling witnesses there would
22 be other investigations that need to be done - calling for documents? I mean, this is not a case
23 where one wants to go and do a search of premises or anything of that sort, is it?

24 MR. PICKFORD: I have not thought about whether it is or it is not. It does not immediately occur
25 to me that there is a justification for that. I am not committing myself to say that there never
26 would be. But, this is certainly the kind of case, particularly when we are getting to issues
27 such as market definition and dominance, where there would be a requirement for a whole host
28 of other evidence and ... and parties.

29 THE CHAIRMAN: That is why we parked it.

30 MR. PICKFORD: Indeed. My final point in relation to that, just to reiterate a point that I have
31 already alluded to at the beginning of my submissions, is that there is, in addition to market
32 definition and dominance, also the other objective justifications head that never ----

33 THE CHAIRMAN: I thought we parked that as well.

34 MR. PICKFORD: Indeed, I am urging the Tribunal that it should be parked. I am just making it
35 completely clear that that is my position on that.

1 I am conscious of the time, and I believe that unless there is anything further that my
2 instructing solicitor would like me to say, those are my submissions on that point.

3 THE CHAIRMAN: I think we need to deal with that point separately. So, we will get the
4 President to come back at two o'clock. Mr. Anderson, are you going to make submissions on
5 this point?

6 MR. ANDERSON: The position of Ofcom is that there is no statutory bar, as a matter of
7 construction of 3(2)(e) on the Tribunal making an infringement decision. In our submission,
8 the phrase 'any decision that the OFT could have made' would include an infringement
9 decision. Ofcom could have made an infringement decision. It did not. Clearly, had it
10 intended to make an infringement decision it would have done more than it did. So, we say, as
11 a pure matter of statutory construction, there is no bar on the Tribunal investigating the
12 question of authorisation. As to whether the Tribunal should, or should not, do that in this
13 case we have come down on the side that is probably appropriate for you to do so. Of course,
14 it is for the Tribunal to have regard to my learned friend's submissions on procedural fairness
15 and safeguards, but we would say that is essentially a matter for the Tribunal to manage.
16 In this particular instance on the question of authorisation, the history in fact goes back beyond
17 our second decision. It goes back to our first decision where at that stage, in the belief that as a
18 matter of law they could authorise, we investigated the matter; came to the conclusion there
19 was no written authorisation, and that decision has been set aside, reinstating the investigation.
20 We then reached the view that we reached in the second decision - that we did not need to take
21 a view on authorisation - but the Tribunal should also have regard to what we said in, I think,
22 para. 267 on the question of authorisation, namely, that we concluded that if we had to look at
23 the question of authorisation we would have reached the view that there was no written
24 authorisation - it is a matter for legal argument as to whether that is a good or bad point.
25 So, in our submission the appropriate course in this particular case and on this particular issue -
26 and I emphasise it is only this issue, because we take a very different view in relation to market
27 definition and dominance ----

28 THE CHAIRMAN: We understand that.

29 MR. ANDERSON: On this question of authorisation - the factual matter - it is a fairly confined
30 factual area. It may well not, as a matter of fact involve a great deal of disputed fact - I do not
31 know - but in our submission the appropriate course would be for the Tribunal to consider that
32 issue rather than the rigmarole of sending it back to us and then back here. Of course, sending
33 it back to us under 19(2)(j) does not meet my learned friend's objections to procedural fairness
34 and right of appeal on the facts because essentially 19(2)(j) is just us reporting back to you.

1 In our submission, given the relatively narrow issue that is in dispute, and the history of the
2 proceedings, the better course is for you to simply go ahead and hear this matter.

3 THE CHAIRMAN: That is very helpful that you have outlined that.

4 MR. ANDERSON: That is all I was proposing to say on that issue.

5 THE CHAIRMAN: That is what you wanted to say.

6 MR. ANDERSON: That is what I wanted to say on the question of authorisation.

7 THE CHAIRMAN: Mr. Mercer, how long will you be after however long the intervention takes?

8 MR. MERCER: I should think I will be about fifteen minutes.

9 THE CHAIRMAN: I am wondering whether we are going to finish this afternoon. I hope we are
10 going to finish this afternoon. Do you think we might be able to?

11 MR. PICKFORD: I would have thought so, madam. I can imagine I can be extremely short in my
12 reply.

13 THE CHAIRMAN: This is the major point, apart from the assignment point.

14 MR. PICKFORD: This is the major point, apart from the assignment point. This, I would suggest,
15 is the longer of the two.

16 THE CHAIRMAN: Shall we say two o'clock? It will be the President at two o'clock.

17 MR. ANDERSON: Before the court rises, can I just clarify whether at two o'clock when the
18 President is addressing that issue, whether the parties are requesting Ofcom not to be present or
19 present?

20 MR. PICKFORD: Clearly from our point of view we are entirely happy for them to be here. So,
21 the issue is really one for VIP.

22 MR. MERCER: I am entirely prepared to give Mr. Anderson an extra ten minutes on his lunch

23 THE CHAIRMAN: You would prefer him not to be here in the same way as we should not be
24 here.

25 MR. MERCER: Yes.

26 THE CHAIRMAN: That was a very good point to raise, Mr. Anderson.

27 (Adjourned for a short time)

28 THE CHAIRMAN: We have now seen the document.

29 MR. MERCER: That takes us on to the next bit, but whilst we are dealing with Round 1 still, I
30 wholeheartedly endorse Mr. Pickford's submission, and I too would like the Tribunal to allow
31 the appeal. It is only after those words that he and I differed, as you might imagine. I cannot
32 remember the exact quote, madam, but it is something you said, which is that complainants
33 have rights as well as the complained-of. I think that is what, with respect, Mr. Pickford was
34 losing sight of in his submissions this morning.

1 This is an appeal on the merits. I wonder how many times I have said that in this Tribunal,
2 madam, and I wish I had a fiver for every time. We could all go out for a decent dinner on it!
3 This is the appeal. This is an appeal on two investigations. This is not some wholly new case.
4 This matter has been examined as to its factual matrix since 2003, and it points up exactly why
5 this Tribunal must have the powers that I say it does to make factual determinations and
6 investigations, because it must, on occasions make up the deficiencies in other investigations.
7 As it happens, in this case it would seem - and, indeed, the Tribunal itself, madam, pointed to
8 para. 224 - the matter has been gone over; the issues have been investigated. Now, it is my
9 understanding that there are repercussions if you do not answer a Section 26 notice accurately
10 and to the best of your ability - or, at least accurately. Whatever it was T-Mobile said led
11 Ofcom to put that paragraph in. Now T-mobile seem to want to go over the point again in this
12 appellate Tribunal. I say they are quite entitled to do that. But, clearly, something they have
13 already said gave the impression that Ofcom got. So, the fact that they are now saying, "Oh,
14 well, it's a whole new different set of questions is entirely wrong". It is the same factual matrix
15 that it has always been.

16 As for the issue of authority, the issue of authority in respect of the licence has been an issue
17 since the first case - certainly since the first investigation. It was only during the course of the
18 first *Floe* matter that Mr. Hoskins, of Ofcom, changed its line in respect of the interpretation of
19 the license. Until that point, in respect of both the *Floe* and VIP matters, the question of
20 authority had been live and extant, and was presumably investigated.

21 Mr. Pickford quoted from the *Floe* Court of Appeal decision, but what the Tribunal is asked to
22 do here is not crossing the line of Lord Justice Lloyd's Judgment. What he was talking about
23 was exerting general powers of supervision in terms of policy or other matters, in my
24 submission, madam - not looking here at how you manage to assemble the factual matrix to
25 deal with the decision in this case.

26 The fact is that the 'through the looking glass world' Mr. Pickford describes would not give my
27 clients an effective right of appeal to which we are entitled because his world is one where, if a
28 new set of facts becomes relevant, that automatically goes back to Ofcom for supervision. Let
29 us suppose they do not get it right again, and it comes back, and it goes back to them again.

30 An interminable process - of whom the only beneficiaries are the lawyers.

31 You will forgive me a slight feeling for when Mr. Pickford said, "Of course, it will be remitted
32 back to Ofcom for them to deal with according to their priorities" when we know that
33 broadband is up here and gateways are down here.

34 It must be for this Tribunal to be able to come to findings of fact and then decide under
35 Schedule 8, para. 3(2)(e), what to do next. It might be that the Tribunal considers it has

1 enough information not merely to allow the appeal, but to substitute its own decision - or, it
2 may consider that the correct path is to order that Ofcom issue a statement of objections.
3 There are ways of using 3(2)(e) to be able to achieve the fair and just result in the
4 circumstances according to the information before the Tribunal. That is not, in my
5 submission, madam, trying to take away from Ofcom its primary duties or functions; it is to
6 actually fulfil the functions of the two-tier structure Mr. Pickford talked about: there is an
7 appeal, and the appeal is on the merits. For Mr. Pickford to suggest that this Tribunal has not
8 got means adequate to be able to subpoena witnesses gain documents and make an
9 investigation seems to me to be quite strange. The reason that regulators were given Section
10 26 of the Competition Act was because they did not have such powers, and had to be given
11 them to be able to make questions in the circumstances in respect of their investigations.
12 In short, madam, Mr. Pickford's interpretation of this Tribunal's powers and, where it touches
13 on it, duties in the case where there is no statement of objections issued against which an
14 appeal is made, would simply remove the effectiveness of the Tribunal in contravention to the
15 statements that are repeated in – I am afraid I fondly know it as - 'the Hertfordshire
16 undertakers' case - *Burgess*.

17 I think, madam, short as that is, that is all I really want to say.

18 MR. PICKFORD: Equally shortly, the first point is just to make good, having had the benefit of the
19 short adjournment, a point that I made to the Tribunal earlier about the rules of the procedure
20 of the CFI. If I might hand up some copies, firstly of the statutes establishing the courts and
21 then the rules of procedure which are appended behind them.

22 THE CHAIRMAN: The difficulty is that they cannot substitute their decision for the Commission so
23 they would never go down this road.

24 MR. PICKFORD: What they cannot do is substitute an infringement decision for a non-
25 infringement decision.

26 THE CHAIRMAN: So there would be no purpose in going down this road?

27 MR. PICKFORD: I say that this Tribunal cannot do it either.

28 THE CHAIRMAN: Because they cannot go down this road they do not have to consider this point
29 and their jurisdiction is different to our jurisdiction, so I am not sure how much the European
30 stuff helps us, anyway you can make your point and we can have a look at it.

31 MR. PICKFORD: In my submission it is very close, and it is simply to make good the point that I
32 made earlier by reference to the specific provisions. I suggested to the Tribunal that I believe
33 that the Court of First Instance did have power to hear witnesses and to deal with disputed
34 issues of fact. If one turns to Article 68, which is towards the back of the document I have just
35 handed up, that is made very plain in the terms in which that provision is expressed. I do not

1 need to go over any of this morning's arguments again, it was simply to draw the Tribunal's
2 attention to the fact that the Court of First Instance did have those powers.

3 In response to the points made by Mr. Anderson, he says that this is a very confined factual
4 area and it was one that was already considered in the first Decision in VIP. Of course, that
5 Decision has been set aside, and it is not the Decision which is currently subject to appeal.
6 Insofar as Ofcom have considered these matters already, albeit not in the context of the appeal
7 decision at some level it should not be particularly difficult therefore for them to finish off that
8 investigation and report back to the Tribunal if that is ultimately what is required. What that
9 would enable, certainly if they came to the view that they might ultimately want to issue an
10 infringement decision, they could issue a very short statement of objections to us and we
11 would be able to satisfy our rights of defence.

12 I have no further points to make on that issue.

13 (The Tribunal confer)

14 THE CHAIRMAN: We are reserving our decision on that point so shall we continue with the other
15 points.

16 MR. PICKFORD: I am very grateful, madam, would it be helpful if I now turn to my point about
17 assignment.

18 THE CHAIRMAN: Are there any other points on the notice or is that the only other point now?

19 MR. PICKFORD: The only other point I think is just dealing with some housekeeping matters in
20 terms of what will or will not happen between now and the next hearing.

21 THE CHAIRMAN: There are no other points on the notice of application?

22 MR. PICKFORD: I have taken on board the Tribunal's preliminary views and I do not intend to
23 pursue that further, if the Tribunal has not been persuaded by what is in my skeleton argument.

24 THE CHAIRMAN: Thank you. So we are on to the assignment point.

25 MR. PICKFORD: Indeed, and I can be relatively short on this. We say that in any proceedings
26 before the Tribunal it is important to be clear about who the Appellant is. It is a fairly
27 fundamental proposition really that one needs to determine who actually has the right to appear
28 before the Tribunal and, we say, that on the face of the agreement that has been presented by
29 VIP in this case, it does not appear to be VIP Communications Ltd in Administration any
30 more, it appears to be VIP On-Line.

31 THE CHAIRMAN: It seems to us that one starts with who is able to bring proceedings in this
32 Tribunal and that is a person interested. The person interested who brought proceedings was
33 VIP. The question is whether they remain a person interested.

34 MR. PICKFORD: Or whether someone else has assumed their interest.

1 THE CHAIRMAN: Hold on - whether they remain a person interested. If there is another person
2 interested then that other person would have to bring proceedings and they may be in or out of
3 time. Now, assignments are to do with the benefits of actions. You have to have effectively a
4 novation normally to change the name of the person who has the right to bring the proceedings.
5 The assignment is only the benefit of the proceedings. So I am a little confused at the moment
6 as to what is going on. But it may not be the same confusion as you have.

7 MR. PICKFORD: It may not be, but what I would suggest is, in order to try to get through the
8 confusion the appropriate thing to do would be to turn to the assignment agreement, which
9 purports to transfer the rights in this particular litigation. It is in the statement of Jeremy Frost,
10 it is in either his original unsigned version or his second amended signed version. Does the
11 Tribunal have a copy of the agreement?

12 THE CHAIRMAN: I think we do.

13 MR. PICKFORD: Members of the Tribunal if one directs one's attention to the recitals to the
14 agreement, and in particular recital B, one sees at the end of that it is said that the company has
15 a right of action against T-Mobile and other UK mobile network operators in respect of their
16 abuse of a dominant position under UK law, and that is defined as the right of action.

17 THE CHAIRMAN: But the "...right of action against T-Mobile and other UK ...", so that is not
18 this action, these proceedings, it is the damages' action.

19 MR. PICKFORD: It is appropriate to pause there because nowhere does it say "damages", it says
20 "...a right of action in respect of their abuse of a dominant position".

21 THE CHAIRMAN: But it is a right of action against T-Mobile and other UK ..." they have not
22 brought an action against T-Mobile or other UK mobile network operators. They have
23 brought an appeal against a decision of Ofcom.

24 MR. PICKFORD: Well they have, and this comes back to my point on jurisdiction, and I say that
25 all the Tribunal should be doing there, in relation to their appeal is simply determining whether
26 Ofcom's decision should be upheld, and indeed the Tribunal has the information to be able to
27 decide that it should not, and it should go back. But they are going further, they are not simply
28 saying this is just a mere public law appeal against decision. They also want a finding by this
29 Tribunal that T-Mobile has abused a dominant position.

30 THE CHAIRMAN: That is what an infringement decision would do.

31 MR. PICKFORD: Well, it is but it is also therefore part ----

32 THE CHAIRMAN: It is not a finding against T-Mobile. It is us substituting our decision for what
33 would have been a decision of Ofcom and therefore would have been Ofcom's Decision.

34 MR. PICKFORD: Indeed, but it is also in respect of an abuse of dominant position. They are asking
35 this Tribunal to find that. But actually, the point is made much more clearly if one turns to

1 clause 1 of the agreement because we see there that “In consideration of the sum of £15,000-
2 odd and further in consideration of the purchaser’s covenants, the company hereby transfers,
3 conveys, and assigns to the purchaser absolutely all those rights of the company to prosecute
4 and carry on the right of action... “and here is the important point, “...including the right to
5 continue with any appeal against the Decision of Ofcom now stayed in relation to the matter
6 known as VIP Communications in Administration, supported by T-Mobile presently before the
7 CAT and all amounts recovered and received from T-Mobile or Ofcom or any other person in
8 that action”, and “that action” must be referable back to the only action that has been brought,
9 which his **this** one.

10 THE CHAIRMAN: But you cannot recover and receive any money in this particular action, can
11 you?

12 MR. PICKFORD: They could receive costs and, pursuant to this assignment, they are entitled to
13 receive costs if they were correct – “ ... or any subsequent action in relation to the same acts
14 and omissions ...” so clearly subsequent actions envisaged there are as the Tribunal has
15 pointed out, for instance damages’ actions. But the primary action which has purportedly been
16 assigned absolutely to another includes the right to continue with any appeal against the
17 decision of Ofcom. So on the face of this agreement it could not really be clearer in terms that
18 they believe that that is what has been assigned.

19 Mr. Mercer may well argue that that is not has been assigned, but if he is going to do that, he is
20 going to have to effectively persuade you that this agreement is not worth the paper it is written
21 on because it cannot do what it purports to do. In my submission that is for him to satisfy you
22 on. My position is relatively simple, which is simply that on the face of this agreement there is
23 a clear assignment of all the right – as it says, the right to continue with any appeal against the
24 decision of Ofcom that has been assigned.

25 THE CHAIRMAN: But then it goes on to say that there is a percentage which the Administrator
26 keeps. So the Administrator still has an interest.

27 MR. PICKFORD: No, what it says is that all of the moneys are also assigned to the purchaser but
28 then there is a further clause, which is clause 3, by which the purchaser covenants to pay 5 per
29 cent. of any proceeds to the Administrator.

30 THE CHAIRMAN: So you say he has lost it and then he gets it back?

31 MR. PICKFORD: Under the assignment he loses it and then becomes someone else’s right, it is not
32 his right any more, it is VIP On-Line’s right. But part of the consideration for having been
33 granted that right is that VIP says that “Anything we get we will give you 5 per cent. of it
34 back”, but it is very important to be clear about the legal structure, and it is that it is someone
35 else’s right and then they are giving it back. It is not that they have primary entitlement to it.

1 That is really as far as I need to go in relation to this point. I have raised that there may well be
2 difficulties with such an assignment but on its face that is the assignment and it is therefore up
3 to Mr. Mercer to persuade you that effectively this assignment is void, because if he cannot do
4 that it is VIP On-Line who is the party that we should be considering. Of course, this is very
5 relevant to, for example, the issue of interim relief because if it is VIP On-Line that now has
6 the right to continue this litigation, it does not really matter, to be honest, what happens to VIP.
7 The litigation can continue. VIP can pursue it, and the only party that would therefore be
8 interested in terms of their financial viability is VIP On-Line. Indeed, I suggest it would be a
9 very sensible way of proceeding, to allow the transfer because that removes any need to deal
10 with any issues of interim remedies because the VIP stable finds its own solution to its
11 problem. So, those are my submissions on the assignment point, subject to anything that Mr.
12 Mercer may say.

13 MR. ANDERSON: We have nothing really to add to that. We share the concerns of T-Mobile in
14 terms of the construction of the agreement - although it is apparent from VIP's latest written
15 submissions they contend that the right to pursue the appeal before the Tribunal has not been
16 assigned, that seems to us to be inconsistent with the terms of the agreement which, of course,
17 raises the question of whether VIP On-Line, if it is the beneficiary of this assignment, can
18 demonstrate to the Tribunal a sufficient interest to justify it becoming the appellant.
19 So, in essence, Ofcom's position is that VIP has some explaining to do, and it needs to explain
20 precisely what the position is in good time for the interim relief hearing. That, in our
21 respectful submission is really what the Tribunal should be focusing on extracting from VIP.
22 That is all we were proposing to say.

23 MR. MERCER: I am probably more of an expert than Mr. Pickford on this agreement. It is very
24 simple and adds to the submissions made recently. I go further than either of the other two
25 parties. I do not believe ---- VIP does not believe that it is possible to assign a public law
26 matter.

27 THE CHAIRMAN: That is what they purported to do, is it?

28 MR. MERCER: As a matter of concept, madam, we do not see how that can occur.

29 THE CHAIRMAN: But that is what they purported to do in the words.

30 MR. MERCER: Well, not exactly, madam. You will notice that the draftsman separated the two
31 matters. He separated the right of action ----

32 THE CHAIRMAN: Including the right ----

33 MR. MERCER: Then he included a right to continue. That was a deliberate act because he knew
34 he could assign one, but also had to give ---- wanted to give On-Line the ability to be able to
35 allow Communications to continue with its appeal.

1 THE CHAIRMAN: Well, including the right to continue is giving the purchaser ----
2 MR. MERCER: -- the right for Communications ---- to make Communications continue ----
3 THE CHAIRMAN: Including On-Line to continue ---- the right of On-Line to continue with any
4 appeal against the decision surely.
5 MR. MERCER: The way in which that was taken by the parties at the time, madam, was that the
6 right to damages was assigned ----
7 THE CHAIRMAN: It should have said 'excluding the right'.
8 MR. MERCER: No. 'Including the right' so that it could then claim for it through the indemnity
9 provision ... provide funding to the administration to continue with the appeal. That was the
10 intention of both of the parties, because they had been advised that it was not possible to assign
11 the public law right.
12 THE CHAIRMAN: 'Conveys and assigns for the purchaser absolutely all of those rights of the
13 company to prosecute and carry on the right of action including ----' So, conveys and assigns
14 for the purchaser absolutely the right to continue with any appeal against the decision.
15 MR. MERCER: Yes. It does not say 'continue itself' otherwise one would ----
16 THE CHAIRMAN: No. The purchaser. '-- hereby conveys and assigns to the purchaser
17 absolutely the right to continue ----' So, it assigns to the purchaser the right to continue with
18 any appeal against the decision of Ofcom now stayed. It is not saying that the right to continue
19 with any appeal against the decision Ofcom now stayed should remain in Communications.
20 That is ----
21 MR. MERCER: That is what was intended by the parties because they had been advised that public
22 law right could not be transferred. That is why the draftsman separated the two matters. It was
23 always intended by the parties that it would be Communications that continued with these
24 proceedings.
25 THE CHAIRMAN: That is why you say in (b) in the recital that it was not included.
26 MR. MERCER: Exactly, madam.
27 THE CHAIRMAN: So, what was the wording? It was supposed to be 'excluding the right to
28 continue' ?
29 MR. MERCER: No. On-Line was meant to have the right to be able to say to Communications,
30 "You must continue wit the appeal" that being then subject to the indemnification provision
31 that follows in the agreement.
32 THE CHAIRMAN: In other words, they want a control of the action.
33 MR. MERCER: No - simply that it be continued.
34 THE CHAIRMAN: But if it was subject to indemnification ---- They did not have to continue if
35 they did not get indemnity.

1 MR. MERCER: Yes. If they wanted it to continue, then the indemnification provision would kick
2 in.

3 THE CHAIRMAN: Surely they then gain control of the action because if they say, "Look, I'm not
4 going to indemnify", or, "I'm only going to indemnify if you do X", then that would have to be
5 ----

6 MR. MERCER: No. It is this way round: I say, "I want you to continue with the action, and that
7 may interfere with you, as the administrator's ----" I mean, the administrators, in my view,
8 madam, should always wake up very morning and ask themselves whether or not to continue
9 with the administration. It may be that Mr. Frost would have woken up one morning and gone
10 really, "I don't see the purpose of the administration being fulfilled any more. We should give
11 this up. That's because I haven't got any money to do this any more". The indemnity,
12 however, would then kick in, and he would not have to discontinue the action because he
13 would be able to see no prejudice to any of the creditors.

14 THE CHAIRMAN: Where is the indemnity?

15 MR. MERCER: Clause 2, madam.

16 THE CHAIRMAN: Arising out of 'Pursuant to the right of action', and you have said that it does
17 not include the right of action. So, where is the indemnity?

18 MR. MERCER: It was ----

19 THE CHAIRMAN: Was it intended to be the right of action?

20 MR. MERCER: The intention of the parties, madam, that that should be so.

21 MR. DAVEY: Mr. Mercer, as it stands, could it not be construed ---- Supposing that Mr. Frost was
22 to say, "I'm just not going to continue this action". Let us say he just refuses. Does this
23 agreement not then put the purchaser in the position of saying, "Well, that's okay. If you
24 won't do it, I'll do it for you because I have got the right to continue it myself"? Is that not
25 what the agreement says? Now, it is all very well you coming to us and telling us that the
26 parties intended it to mean something else, but is that not what it actually means if you
27 construe it straight?

28 MR. MERCER: No, madam.

29 MR. DAVEY: Well, perhaps you could explain why not.

30 MR. MERCER: The simply 'No' is probably not sufficient.

31 MR. DAVEY: It is fair to say, Mr. Mercer, that so far from what you have said - and I do not know
32 about my colleagues - I do not understand how you extract the meaning you say is in it from
33 the actual words. So, perhaps you could explain it again in different terms, and perhaps I will
34 then understand it.

1 MR. MERCER: Certainly, the administrator, at the time that the wording for this agreement was
2 delivered, was advised that though one could assign a right to damages against T-Mobile, it
3 was not possible to assign a public law complaint because it is a public law complaint and not
4 a private right to damages. However, to enable both the possibility of private enforcement
5 through the Chancery Division and the possibility of damages in this Tribunal -- keep that open
6 -- and because also the matter would be pretty important to both as to what finding this
7 Tribunal made, the purchaser of the right to the damages wanted the right to be able to make
8 the administrator continue and not withdraw from these proceedings. The administrator
9 considered that matter and said, "Well, the reason that I would not continue with the
10 proceedings would be that it led to some costs or expense which I did not believe it was in the
11 interests of the administration to expose myself, as a cost of the administration, or the company
12 to. I have an interest in seeing all of this through to the end in terms of damages because I am
13 entitled to 5 per cent. at the end of the day which can be put to the creditors. So if I am
14 indemnified as to my costs' position, which is a personal point for the Administrator in terms
15 of the cost of the administration I, the Administrator, cannot see that I have a downside in
16 proceeding with the agreement.

17 MR. DAVEY: Well accepting that, Mr. Mercer, why does the agreement not say that "The
18 Administrator covenants to continue the action in return for an indemnity which is contained at
19 paragraph (whatever) of this agreement." Would that not have expressed the arrangement
20 rather than say that in return – you are saying that they wanted a right to compel the
21 Administrator to continue with the action but that is not what they have said. They have said
22 that they are transferring the right to continue – not the right to compel the Administrator to
23 continue. That is my difficulty, Mr. Mercer, and, as I say, you have not so far explained it to
24 me.

25 MR. MERCER: Well I will have one more go. They could not transfer these proceedings is what
26 they believed, the Administrator did not believe he could actually transfer these
27 proceedings ----

28 THE CHAIRMAN: But Mr. Mercer ----

29 MR. MERCER: -- or novate them.

30 THE CHAIRMAN: Mr. Mercer, the difficulty is that the agreement appears on its face to look as if
31 they did think they could transfer these proceedings. Now, it may well be that that is mis-
32 drafting and what Mrs. Hewitt has been saying is that maybe this agreement needs rectifying,
33 but on the face of the agreement at the moment it does not seem to say – subject to you
34 convincing us otherwise – what you are submitting.

1 MR. MERCER: It does, ma'am, if you accept the fact that On-Line did not believe that it, itself,
2 could continue with the proceedings.

3 THE CHAIRMAN: But it looks as if they did believe that they could continue because the
4 agreement on its face said it transferred to them the right to continue with any Appeal, and it is
5 not clear to me that para.2 gives them an indemnity in relation to these proceedings, because it
6 gives them an indemnity in relation to the right of action, and the right of action as defined in
7 "B" does not include these proceedings. So the fact that those words are in "1", including the
8 right to continue, does not necessarily mean that "2", the indemnity, covers those words.

9 MR. MERCER: I hear the point, ma'am.

10 THE CHAIRMAN: And if that is right they have not transferred – if it is right that you cannot,
11 which for my part I think you are right, and I suspect everybody in the room thinks you are
12 right, that the advice that the Administrator got was correct, that a public law action of this sort
13 is not assignable then this agreement, those words mean nothing and we can strike them out
14 and we are left with the complaint as it is.

15 MR. MERCER: Yes. I had not got to my alternative points yet, but either it works, and it works in
16 the way I say it does, or it has no effect whatsoever because it could not be done, it is an
17 impossibility.

18 In any event, following the comments made by the Tribunal and as it seems to cause angst to
19 the other parties I am instructed that the parties will consider – I would not describe it, ma'am,
20 as "rectification" but amplification of the agreement to make it absolutely clear what was
21 intended.

22 THE CHAIRMAN: Now, if you do that, as you said what is intended is that the funding of this
23 action, of these proceedings will be done by On-Line?

24 MR. MERCER: Yes ma'am.

25 THE CHAIRMAN: Do we get into any other problems?

26 MR. MERCER: Undoubtedly Mr. Pickford will find some, and the ones he will probably first go for
27 are related to interim relief, but we see that as a divorced question, which is another question
28 the Administrator has to look for in terms of whether or not the business has a sustainable
29 future going forward and a workable business plan that will take it out of administration.

30 THE CHAIRMAN: I think there are other problems as well, are there not? Whether in law you can
31 be funded in that way? I am not saying whether you can or you cannot, but that

32 MR. MERCER: Well that means an examination of the law of Champerty ma'am, and that is a point
33 which the Administrator thought he had considered in terms of the relationship of the
34 companies involved.

1 THE CHAIRMAN: Yes, we do not know what that is, but a director of a company, or a shareholder
2 of a company might have an interest in funding a company. I do not know what the
3 relationship is with On-Line as to what interest On-Line has to fund the company in relation to
4 this action. I do not know that you can use a bootstrap argument that because they are going
5 to get the proceeds of any damages' action they therefore have an interest in funding this
6 action.

7 MR. MERCER: No, but there is a considerable inter-relation given that Mr. McCabe is the owner of
8 On-Line.

9 MR. McCABE: I have an interest.

10 MR. MERCER: He has an interest in On-Line, and is also the largest creditor and shareholder in ----

11 THE CHAIRMAN: Is that good enough that you have an interest in another company and therefore
12 that other company can fund? Is that good enough on the law? This is a very technical area
13 and a very difficult area.

14 MR. MERCER: Well the advice the Administrator had at the time was that the connection did fall
15 within that which was permitted.

16 THE CHAIRMAN: I have not looked at it in any proper detail to see what the circumstances are and
17 I do not know whether T-Mobile or Ofcom think that the circumstances are such that it is all
18 right as disclosed.

19 MR. MERCER: But it is, in a sense ...

20 THE CHAIRMAN: (After a pause) We find some difficulty on the face of it seeing on a
21 hypothetical basis that if there is a common director or common shareholder that means that
22 the other company has an interest. One would have to show that that is sufficient.

23 MR. MERCER: (After a pause) Ma'am, I do not think that the administrator would probably see
24 such an arrangement as being any different from a funding arrangement in respect of
25 administration.

26 THE CHAIRMAN: I am talking about maintenance and Champerty.

27 MR. MERCER: But maintenance and Champerty might apply to an action for damages, do they
28 apply to a public action? I am not entirely sure that they do.

29 THE CHAIRMAN: Possibly not.

30 (The Tribunal confer)

31 THE CHAIRMAN: We do not know whether it applies to public law action.

32 MR. MERCER: My submission is it does not, ma'am. All of the case law relating to Champerty
33 and maintenance does not relate to public law actions.

34 THE CHAIRMAN: So you say a third party can fund a public law action?

1 MR. MERCER: Let me put it this way, let us suppose that I took an objection to genetically
2 modified crops and decisions the Government were making and wanted to Judicially Review
3 the Government in that regard, in the decision it took over something like that. Then I found a
4 wealthy patron who was prepared to pay the costs of counsel – would that be Champerty,
5 ma’am? Because I, a poor individual, prepared to put the time in to take that Judicial Review,
6 assuming I had *locus* etc., ma’am, would that be Champerty? I do not see how it could be
7 under the rules of Champerty as developed throughout the ----

8 THE CHAIRMAN: But you are not going to get any benefit from the action, so that distinguishes it,
9 is that what you say?

10 MR. MERCER: Yes, ma’am.

11 THE CHAIRMAN: Well going back to the first point, your suggestion is that you make this
12 agreement clearer?

13 MR. MERCER: We amplify it, and make it clear that the amplification is that which was intended to
14 be in force from the date on which it was first entered into.

15 THE CHAIRMAN: Well we had better hear from Mr. Pickford and Mr. Anderson as to what they
16 think about that.

17 MR. PICKFORD: Thank you, madam. Simply in relation to the construction that has been
18 advanced by Mr. Mercer, the Tribunal does not need me to tell it that as a matter of English
19 law one construes contracts objectively and not on the basis of what the draftsman gives in
20 evidence as to what he intended by a contract.

21 THE CHAIRMAN: We do not know at the moment whether the draftsman is giving evidence.

22 MR. PICKFORD: We do not know, but if we turn to the front page of the agreement, what we do
23 see is assignment of right of action and the reference at the bottom is “EPM”.

24 THE CHAIRMAN: You believe “EPM” is EPM sitting next to you, do you? (Laughter)

25 MR. PICKFORD: I believe “EPM” may stand for the learned EPM on my right, but in any event
26 whoever is giving the evidence that is not the manner in which one attempts to construe
27 contracts.

28 THE CHAIRMAN: It is always very unfortunate when one’s own drafting is before a court and one
29 is having to stand there; I sympathise with Mr. Mercer, if “EPM” is Mr. Mercer.

30 MR. PICKFORD: One construes them objectively on the basis of the words as they are, and the
31 words really could not be clearer. It is “transfers, conveys and assigns absolutely the right to
32 continue with any action.” If I had been trying I could not have conveyed more clearly ----

33 THE CHAIRMAN: I think we are past that point now. What Mr. Mercer says is that whether or not
34 those were the words that were used, that was not the intention of this agreement, and
35 effectively. “I put it on the basis that this agreement needs to be rectified; he says it needs to be

1 amplified". But, whatever it is, he is saying that that was not the intention of the agreement.
2 Now, the only people who know what the intention of the agreement is is Communications,
3 On-Line, and Mr. Frost. We do not know the intention. Those are the only people who do
4 know. We assume for this purpose that Mr. Mercer is standing there on the instructions of
5 those three parties. Now, he says his instructions are that they should amplify the agreement to
6 set out actually what was intended. Now, what do you say about that?

7 MR. PICKFORD: Well, we cannot really take it very much further until we have seen what the
8 new agreement says because we will not be able to engage in the same exercise, which is to
9 construe it objectively on the precise terms that are ultimately set down for it. So, there is
10 relatively little I can say until they have done that.

11 THE CHAIRMAN: Mr. Mercer says that they were advised - and if Mr. Mercer is the author of
12 this document then he is actually telling us what advice he gave the parties ---- The advice he
13 gave the parties was, "You can't do this". So, if the agreement says something which he is
14 saying, "You cannot do", and which he advised them at the time they cannot do, then the next
15 question is, "Well, this agreement cannot represent ----" We are not interpreting it on an
16 objective basis to represent what actually the parties agreed to do". So, we need to see how he
17 puts it.

18 MR. PICKFORD: We do, but I would say in relation to the point about whether it is feasible or not
19 that clearly there is a serious question here which I, for one, have not attempted to find an
20 answer to. It is noticeable that Mr. Mercer has not advanced any authority for his proposition
21 that you cannot assign a public law right. If one just steps back a moment and considers what
22 might happen when a company is sold in its entirety into another company, is it really the case
23 ----

24 THE CHAIRMAN: Normally you sell the shares of a company. If you sell the shares of the
25 company, then the name of the company stays. If you sell the assets of the company then the
26 question is whether part of the assets you have sold include that right, and that would depend --
27 -- I think that is a problem that we have actually faced at this Tribunal. I am not sure decided,
28 but faced ----

29 MR. PICKFORD: Well, it seems that we are faced with it again. It may be something that does
30 need to be decided.

31 THE CHAIRMAN: But all they have done is they have assigned ---- This is an assignment ---- a
32 novation, is it?

33 MR. PICKFORD: If Mr. Mercer is right - that you simply cannot do it at all ---- you cannot assign
34 it, then it would tend to suggest that you cannot even do it if you are selling the assets of a
35 company and the particular claim is inextricably related to the particular business that is

1 associated with those assets. So, I would suggest that the corollary of what he is saying is
2 that the answer to the question that the Tribunal has also been faced with is, “No, you can’t do
3 it”. But, he does not advance any authority for that proposition.

4 THE CHAIRMAN: The case that I am thinking of is in connection with fines, where the assets
5 have been sold, and the question is which company should be fined.

6 MR. PICKFORD: Indeed. I am aware that there is a lot of jurisprudence, particularly at
7 Community level, in terms of fines by the Commission and long-running cartels.

8 THE CHAIRMAN: We have had it here. Now, it may be different to this because that may depend
9 on ---- It is a transfer of liability, yes, and not an asset effectively. So, that is different.

10 MR. PICKFORD: Well, it may be different. It may not be different. But, it is really Mr. Mercer’s
11 case to persuade you that it could not have been done, because if it could be done ----

12 THE CHAIRMAN: Well, no, because what he is saying is - and he has waived his privilege here, I
13 suppose - that this agreement was entered into on that basis. Whether that advice was right or
14 wrong, that was the advice they received and therefore they never intended to do this.

15 MR. PICKFORD: But, in fact what they entered into was this agreement which did ultimately
16 assign those rights ----

17 THE CHAIRMAN: No. If they had not intended to do that, then this agreement does not represent
18 what they intended to do, and therefore can be rectified to show what it did intend to do.

19 MR. PICKFORD: It raises a number of rather complex points, because if it was entered into on
20 mistake as to law, then that opens a can of worms of itself because, of course, it might be that
21 one of the parties says, “Well now I know the true position as to the law here, in fact I want to
22 enter into an agreement that looks like this, and not like that”. So, it is very difficult for us to
23 speculate.

24 THE CHAIRMAN: Are you suggesting that you can assign ----- I cannot see how in this Tribunal -
25 ---

26 MR. PICKFORD: What I am saying is that we have not made a case on it because we say it is for
27 Mr. Mercer to make that case.

28 THE CHAIRMAN: You have to have an interest. So, if you assign the assets of the company, then
29 you might have an interest because you would continue to have an interest because you have
30 got the assets of the company, and therefore you have got the reason why you continue to have
31 the complaint. But this is only the complaint without the assets which is your point about the
32 interim relief. I do not quite see how you have got any interest in that sense.

33 MR. PICKFORD: T-Mobile, has, as yet, not taken a position on this point because what we say is
34 the primary prior question is, “Has in fact there been an assignment?” If we are now told,
35 “They didn’t mean what they said on the face of this agreement” then the next step is that we

1 need to be presented with a new agreement, and then we can look at that, and then we need to
2 take it from there.

3 THE CHAIRMAN: Yes.

4 MR. PICKFORD: It may be that we have submissions to make on the new agreement, but we
5 cannot really pre-judge what they are.

6 THE CHAIRMAN: So, do you think we ought to adjourn this out and see where we get to?

7 MR. PICKFORD: Unfortunately I think that is likely to be the position. It is important that VIP
8 and/or VIP On-Line provide some clarification to the Tribunal of the relationship between
9 them - not least because it is highly relevant to their interim measures application. Currently
10 we are just in a sea of confusion, frankly, on this.

11 THE CHAIRMAN: On the interim measures application, as I understand it, what you would say is
12 that if it had been assigned ---- if it can be assigned to VIP On-Line, then VIP Communications
13 are not there, effectively, and therefore they cannot be asking for interim measures.

14 MR. PICKFORD: Yes. Therefore that is really an answer to that. So, it is very important that we
15 get clarity on this point as to whether it can be done or it cannot be done, and what the parties
16 really did intend. Certainly we read this agreement, on the face of this agreement they intended
17 something which we are now told they did not intend.

18 Madam, can I just take instructions to ensure there is nothing further? (After a pause) Madam,
19 there is one further point that those instructing me have drawn to my attention, which is that
20 Mr. Mercer has said, "What we'll do is we will go away and we will draw up a new agreement,
21 and it will be with ... (overspeaking) ...

22 THE CHAIRMAN: Amplify, I think he said.

23 MR. MERCER: Amplify.

24 MR. PICKFORD: Amplify the agreement. Well, whether amplification is sufficient I will not
25 argue.

26 THE CHAIRMAN: I wonder if it has to be rectified.

27 MR. PICKFORD: In any event, what he did say, whatever they do to the agreement, is that it
28 would be with retrospective effect, backdated to the date of this agreement. We do not actually
29 know what the date of this agreement is. It might be helpful ----

30 THE CHAIRMAN: It says, 'Made on [something] 2006' on my copy.

31 MR. PICKFORD: Yes, but we do not know 'what' 2006. We simply know it was made this year.

32 MR. MERCER: Madam, I am afraid I cannot help the Tribunal there because the exact date this
33 agreement came into force, I understand, will have to be a matter of construction from events.

34 THE CHAIRMAN: Because they never put the date on.

35 MR. MERCER: Because they never put the date on.

1 THE CHAIRMAN: The fax at the top was 29 September from Square Root Business Centre to
2 Jeremy Frost. Now, I do not know who Square Root Business Centre is.

3 MR. MERCER: I think you will find, madam, that is just a fax of a copy because it had been going
4 from one place to another.

5 THE CHAIRMAN: I just wondered if they were sending it to each other, to do with the signatures.

6 MR. MERCER: That, I think, was being sent to another firm of solicitors, or something, at that
7 time.

8 THE CHAIRMAN: Well, we need some evidence as to when the agreement was signed. We also
9 possibly need some evidence as to what was intended at the time. I do not know if there is any
10 contemporaneous evidence as to ----

11 MR. MERCER: We will have to look at what there is and consider some witness statements, if that
12 is appropriate.

13 THE CHAIRMAN: To show that this what was intended, and not something that has been thought
14 up now to solve the problem.

15 MR. MERCER: Yes, madam.

16 THE CHAIRMAN: You say 'amplify'. It seems to me the appropriate way is 'rectify'. (After a
17 pause): When I said 'rectify' you said 'amplify'. I do not know if there was something
18 between us, or not.

19 MR. MERCER: I do not think there probably is, madam. As Mr. Pickford has sat down, can I
20 make just one last point in this area? Let us suppose that a local authority makes a licensing
21 decision against me, which I do not like, and there is no form of appeal in the statute. I say
22 that they are Wednesbury unreasonable. I apply for judicial review. I wonder, madam,
23 whether anyone in this court could think that I could transfer my **locus** in that matter to a third
24 party, because I do not think you ever could because **locus** in that instance is looked on by a
25 person-by-person basis ---- what happened to you.

26 THE CHAIRMAN: I think it is the same point as I was making. You have to have an interest, and
27 the question is whether you have an interest. You cannot bring proceedings unless you have
28 an interest, and you cannot bring this appeal unless you have an interest. So, if it was possible
29 to technically assign, or novate, or whatever, the person who you are saying to the court
30 changed the name would have an interest and if they have not got an interest ----

31 MR. MERCER: Yes, we are making the same point, ma'am, I am sorry.

32 THE CHAIRMAN: That is where I started from that it all depends actually on our Rules as to
33 whether On-Line has an interest, and it is not sufficient that they have taken an assignment and
34 have an interest in the damages' action. That is where I said there was a bootstrap argument.

35 MR. MERCER: Yes.

1 THE CHAIRMAN: Who is going first.

2 MR. ANDERSON: I was just going to follow on from what Mr. Pickford had said in response to
3 Mr. Mercer's submissions. I do not want to add to the debate what the agreement means, and I
4 do not want to say anything about whether there are any circumstances in which a cause of
5 action in public law can or cannot be transferred; we will wait and see what Mr. Mercer comes
6 up with and what the evidence supporting an application for what, in my submission, can only
7 be rectification not amplification.

8 The more substantive point though is that this Tribunal, in my respectful submission, requires
9 from VIP information on what the actual funding arrangements are, because what we have
10 heard today is that whatever the agreement actually says what was intended is that On-Line
11 would fund this Appeal in return for a right to the lion's share of any damages that may
12 ultimately be secured against ----

13 THE CHAIRMAN: Yes.

14 MR. ANDERSON: And that is highly relevant to the question of interim relief and therefore this
15 Tribunal needs to know the facts of the funding arrangements, it needs, in my respectful
16 submission also to know the precise nature of the relationship between On-Line, VIP and Mr
17 McCabe, and the Tribunal also needs to know the nature of any interest On-Line has in the
18 outcome of these proceedings before one can really take a view both on interim relief and
19 whether or not it is a funding arrangement that is permissible; that is on top of the evidence
20 supporting the rectification.

21 THE CHAIRMAN: Is whether it is a funding arrangement that is permissible, a matter that is
22 relevant to us or is that a matter which, at the end of the day, if it is impermissible, you have a
23 right to go against Mr. McCabe, On-Line and so on?

24 MR. ANDERSON: It may be relevant to the question of interim relief.

25 THE CHAIRMAN: I can understand that it may be relevant to the question of interim relief but is
26 the funding arrangement relevant otherwise to us at this stage, or is the funding arrangement
27 only relevant at the end because it may expose everybody to personal costs?

28 MR. ANDERSON: I cannot answer that, I would need to research whether if it is an impermissible
29 funding arrangement whether that would then form a basis for the Tribunal to strike out the
30 action or whether it is only a matter that resounds in costs at the end, I simply do not know, but
31 it is important in our submission for the Tribunal to extract from VIP what the actual position
32 is.

33 THE CHAIRMAN: I can understand it in relation to the interim relief application that it could be
34 relevant because if Communications had no interest in the action etc. and the only question is

1 damages, then it is damages for past and the interim relief application may not have any
2 substance.

3 MR. ANDERSON: Yes. That is really all that I wanted to add.

4 THE CHAIRMAN: That may be true whether or not this is rectified or not?

5 MR. ANDERSON: Absolutely. We say the rectification is not the critical point, the critical point
6 for interim relief is what are the actual funding arrangements?

7 MR. PICKFORD: Madam, if I may make one very short point in response to Mr. Anderson, and
8 also in response to a comment that the Tribunal itself made. It is very important that we have
9 this information and we would suggest that in addition to clarifying the position through
10 witness evidence it would be appropriate in these circumstances for VIP to disclose the
11 contemporaneous documents that concerned the parties' intentions at the time they entered into
12 this agreement.

13 THE CHAIRMAN: I think I suggested that a moment ago – I did, did I not?

14 MR. MERCER: Yes, you did, ma'am.

15 MR. PICKFORD: I am grateful, madam, but in my submission there should be effectively an order
16 for disclosure not merely an invitation to VIP to perhaps give some those documents that it
17 feels it might want to rely upon, there should actually be full disclosure, which means
18 documents which potentially are adverse to its interests as well as those that promote its
19 position.

20 Secondly, also disclosure in relation to the funding arrangements, because we can only get to
21 the bottom of that if we see the contemporaneous documentation. It is not really sufficient,
22 given the amount of uncertainty and given the opportunities that VIP has had already simply to
23 rely on what he said.

24 THE CHAIRMAN: At the moment what we have been told is that On-Line are funding, paying for,
25 this Appeal. If that is the position do we need to know any more, if that is what they say the
26 position is?

27 MR. PICKFORD: Well we would suggest that given the amount of uncertainty in relation to this
28 issue we should have disclosure.

29 THE CHAIRMAN: What uncertainty is there? They say, as I understand it – I may be wrong and
30 Mr. Mercer may correct me, but as I understand what he was saying – this Appeal is being paid
31 for by On-Line?

32 MR. PICKFORD: If one reads the witness statements of Mr. McCabe, there is a suggestion,
33 certainly a strong inference to be drawn from those witness statements that he is personally
34 responsible for funding, and so it is not necessarily sufficient, merely to say "It is VIP On-Line
35 Ltd."

1 THE CHAIRMAN: Very well.

2 MR. ANDERSON: What Mr. Pickford says is absolutely right. Mr. McCabe has produced evidence
3 in the context of the interim relief that he has had to re-mortgage his house, or whatever, to pay
4 for this litigation. If it is the position that if Mr. Mercer can confirm today that On-Line is the
5 sole funder of this litigation then that of course ----

6 THE CHAIRMAN: Well if Mr. McCabe is funding On-Line and On-Line is then funding this
7 action.

8 MR. ANDERSON: Well there are two “ifs” in that hypothesis which merely underline the point my
9 learned friend was making that we do really need to get to the bottom of the factual basis of the
10 funding of this litigation.

11 THE CHAIRMAN: Mr. Mercer, how are we going to sort this out? I think somebody wants to give
12 you instructions.

13 MR. MERCER: I am pleased somebody does! (Laughter) I just ask which hat they are wearing at
14 the time, ma’am. (After a pause) I think, ma’am, the only way to get rid of this smoke and
15 mirrors red herring issue altogether, for that is what I regard it as, ma’am, is for us to write a
16 note that seeks to explain ----

17 THE CHAIRMAN: A witness statement is the easiest way.

18 MR. MERCER: -- a witness statement which seeks to explain all of this, all of the points as much as
19 we think it is right and proper.

20 THE CHAIRMAN: And to produce any contemporaneous documents that are relevant.

21 MR. MERCER: And to produce contemporaneous documents, good or bad, together with a draft
22 deed of – “rectitude” I was about to say – rectification or amplification and deliver the lot, and
23 to do so pretty quickly, I think probably is the answer, ma’am, in fact, before Christmas we
24 will deliver that.

25 THE CHAIRMAN: Within seven days I would have thought?

26 MR. MERCER: Within seven days, ma’am.

27 THE CHAIRMAN: Which would be next Wednesday?

28 MR. MERCER: Yes, ma’am. We know what the answers are, it is not that difficult and there is no
29 point in beating about the bush, we might as well get it in to the Tribunal, ma’am.

30 THE CHAIRMAN: Then we will have to see where that takes us?

31 MR. MERCER: We will, ma’am, yes.

32 THE CHAIRMAN: Does that mean we may need a hearing before the interim relief hearing, or can
33 we do this at the beginning of the interim relief hearing?

34 MR. MERCER: I suggest that that is possible, ma’am, if necessary.

1 MR. PICKFORD: Indeed, I do not see why they should not be combined the way the two have been
2 combined today.

3 MR. ANDERSON: There is a logistical problem with that approach, if the day is to be 16th January,
4 and the problem is this: it is the day of a very significant Board meeting at Ofcom at which
5 Miss Weitzman and Miss Turnbull both have to be present for a substantial part. What we had
6 been looking at was the prospect of perhaps the Tribunal starting early, dealing with the issues
7 on which I believe those two would certainly need to be present, which is addressing the
8 Ofcom evidence, and the submissions of any other interested third party before getting on to
9 the nitty-gritty of the financial position of Mr. McCabe and On-Line and VIP which is of less
10 immediate from the policy point of view. So what we were going to propose was that if the
11 Tribunal would be so kind as to start early and deal with that part of interim relief first, then
12 my colleagues can go to the Board meeting, the Board having re-arranged their agenda to put
13 the matters on which they need to address to later in the day.

14 THE CHAIRMAN: Well I suppose it does not matter which way we do it, does it, because it is part
15 of the interim relief application as to the interest in interim relief, and therefore we can deal
16 with it at any point during the day; we do not have to decide that first and then go on – it is part
17 of the whole matter.

18 MR. ANDERSON: So if the Tribunal were willing to deal with the areas I have identified first that
19 would be of great assistance.

20 THE CHAIRMAN: Well there is no objection to that, is there?

21 MR. MERCER: No, ma'am.

22 (The Tribunal confer)

23 THE CHAIRMAN: We have not looked at the document that caused so much concern. How does
24 that relate to it, or is that related to the interim relief application.

25 MR. PICKFORD: Madam, the relevance of that document depends somewhat on the clarification
26 that is going to be provided in terms of what was intended to have been transferred to whom
27 and when, and it also has some bearing on potentially the interim relief application. It may
28 turn out to be largely irrelevant depending on the clarification we get, and we are now going to
29 get that clarification. Madam, if you remember at the outset today I said if we had only had the
30 clarification we may never need to rely on this evidence. At that point Mr. Mercer was not
31 prepared to give it; he is now giving it ----

32 THE CHAIRMAN: So it does not matter.

33 MR. PICKFORD: I can tell the Tribunal whether or not it is relevant once we have had it.

34 THE CHAIRMAN: Right. So the next issue is timetabling and preparation between now and 16th
35 January.

1 MR. PICKFORD: Indeed, madam.

2 THE CHAIRMAN: The Defence was stayed.

3 MR. ANDERSON: On the question of the Defence there were just a couple of points I would wish
4 to raise. You heard this morning from Mr. Pickford that there were a number of factual
5 matters material to the issue of authorisation – he listed them.

6 THE CHAIRMAN: Yes.

7 MR. ANDERSON: Those are not, of course, matters that are currently formulated in any document
8 before the court and what we were proposing was that in the circumstances of the issue, that
9 the Tribunal is now addressing in this Appeal, the sensible course would be for a statement of
10 intervention to be served before the Defence, otherwise all we will be doing – because we did
11 not have to decide the point – is saying what we said in the Decision and it will not be of great
12 assistance to the Tribunal. What might be of more assistance to the Tribunal is if our defence
13 responds to the two positions which were adopted.

14 The second point that I was going to make was that it may be sensible for that to await the
15 interim relief hearing.

16 THE CHAIRMAN: When are we going to decide the facts?

17 MR. ANDERSON: I have a view about that, it being the season of goodwill. It wondered, if we
18 have got to come back in January, whether we might not throw the facts in as well.

19 THE CHAIRMAN: The question is whether we could do the relevant procedural matters leading
20 up to that in time for 16 January. We have these two dates - 16th and 22nd. Whether that will
21 be sufficient time, or whether it needs a whole day or day and a half depends how many
22 witnesses. Having regard to the paragraph in the decision, what is it that you are challenging?

23 MR. MERCER: Well, I am not challenging a great deal because I think probably all that I need ----

24 THE CHAIRMAN: What facts do you want to establish in addition to what is in the decision?

25 MR. MERCER: Not a great deal more, madam, because there is that ... to identify back on 13
26 September some issues concerning authorisation will arise.

27 THE CHAIRMAN: If we are only establishing the facts in the way that they were established in
28 *Floe* ----

29 MR. MERCER: There is no submission concerning the effects of those, etc. We are leaving that
30 entirely aside. There is not very much I have to do really.

31 THE CHAIRMAN: Well, is there anything you have to do? I do not think when we were here in
32 September that we had appreciated that paragraph.

33 MR. MERCER: No, madam. I do not think there is very much for me to do. The only thing I
34 imagined was, having heard Mr. Pickford today, and picked up the general sense that he

1 wishes to put in some evidence concerning issues like authorisation, but I may be wrong,
2 ma'am. It is for him to say.

3 MR. PICKFORD: Madam, to address, first, the suggestion that we should have a hearing on the
4 merits on 16 January - that is utterly inconceivable from T-Mobile's point of view. I really
5 cannot state that strongly enough in terms of what we consider we would need to do to ----

6 THE CHAIRMAN: What do you say you need to do?

7 MR. PICKFORD: We have a situation ----- While Mr. Mercer is now apparently telling us that he
8 does not need to rely on the five or six witness statements that he has put in, currently we are
9 faced ----

10 THE CHAIRMAN: I am not sure that you can cross ---- Depending what evidence you put in, I am
11 not sure you can cross-examine because of whatever the paragraph was in the decision - if that
12 is right. So, you might be challenging Ofcom's paragraph.

13 MR. PICKFORD: In which case I would submit that we can cross-examine.

14 THE CHAIRMAN: If you are challenging you have to produce evidence to the contrary.

15 MR. PICKFORD: Indeed.

16 THE CHAIRMAN: I do not know if that is what you are doing, or not.

17 MR. PICKFORD: We say the position is far more complicated than it might appear from that one
18 short sentence. We would need to explain that position in some detail to the Tribunal, and we
19 would need to have evidence on that. If I could just take a step back ---- Currently, as I
20 understand it, the Tribunal has not given a ruling on my application in relation to jurisdiction.

21 THE CHAIRMAN: That is right. And we are not going to do that today.

22 MR. PICKFORD: Indeed. Therefore, the appropriate thing is firstly that we deal with jurisdiction
23 because there is no point in T-Mobile rushing off, desperately trying to prepare however many
24 witness statements it needs to prepare if the Tribunal is ultimately with me on jurisdiction.

25 THE CHAIRMAN: I think we want to make an order today on the basis that we are not with you
26 on jurisdiction, so that everybody knows where we are, and there is some sort of timetable. We
27 will try and get a decision out as quickly as possible.

28 MR. PICKFORD: In that case, there are a large number of steps to be gone through before we
29 actually get to a hearing. Currently, all we have is an amended notice of appeal. We have no
30 defence.

31 THE CHAIRMAN: But the amended notice of appeal is not in its final form at the moment; is that
32 right?

33 MR. MERCER: We thought it was, madam, now that it is marked up to show the changes.

34 THE CHAIRMAN: My understanding was that on the legitimate expectation points and on the
35 base transceiver station points you were saying that you were not ----

1 MR. MERCER: -- going to rely on those further.

2 THE CHAIRMAN: Therefore the notice of appeal is not in final form.

3 MR. MERCER: Yes, I see what you mean, madam. But, that can be turned round in a couple of
4 days.

5 THE CHAIRMAN: But it is not actually in final form now. We cannot give leave on the document
6 that there is at the moment. There is going to be leave on some other document.

7 MR. MERCER: There is, madam, yes.

8 MR. PICKFORD: Which in itself raises a further point of clarification because, as I understand that
9 document there is now no longer any express reference to the witness evidence of Paul Burn
10 and Steve Perram. Indeed, we have been told that apparently they may not be relying on any
11 of the evidence that has been attached to ----

12 THE CHAIRMAN: We do not know. I think that has been sprung on Mr. Mercer. I do not think
13 we ought to ---- I think he needs to consider that.

14 MR. PICKFORD: In which case he needs to consider it, and it needs to be made clear. That is
15 Stage One. There needs to be amendment. After that, once we have got through Stage One,
16 then we say the correct approach is the one that is laid down in the Competition Appeal
17 Tribunal's own rules - that Ofcom should put in its defence. Now, if Ofcom says, "Ah well, on
18 the facts of ---- Because we never went into these matters very much, and therefore we're not
19 really sure that that's a very good idea. Why don't you go first, T-Mobile", what we say to that
20 is that that simply highlights why I am right on jurisdiction.

21 THE CHAIRMAN: I think what Ofcom says is not that, "We didn't go into these matters. We
22 stand by our decision. The decision has the relevant paragraph in it. That is all we can say".
23 You are saying that T-Mobile are saying ----

24 MR. ANDERSON: With respect that is not precisely what we are saying. We recognise that we
25 did not have to take a decision on whether or not there had been authorisation. There is a
26 statement of fact in our decision, but whether that is right or wrong is a matter on which the
27 Tribunal will hear evidence.

28 THE CHAIRMAN: Yes - if T-Mobile want to challenge it.

29 MR. ANDERSON: We have not taken a decision on whether or not there was authorisation
30 because we did not have to. The point I was seeking to emphasise this morning was that if the
31 Tribunal wishes to go down the route of investigating those facts because hypothetically it is
32 against Mr. Pickford on the jurisdiction, then it is important that safeguards are built into the
33 procedure that the Tribunal approaches. That is why, in our submission, the more sensible
34 approach is for T-Mobile to have an opportunity to prepare and present its case, and then we
35 can respond to that. After all, I am instructed that in the *Mastercard* case the defence followed

1 MR. ANDERSON: 21st May – I am told all relevant counsel from Monckton Chambers can make
2 that date.

3 THE CHAIRMAN: How many days do you think we ought to keep free, and then we can revise it?

4 MR. PICKFORD: As Mr. Anderson says it is very difficult to tell at the moment, but my best guess
5 currently is three days, but that is subject to revision depending on what ultimately transpires.

6 THE CHAIRMAN: So the hearing of the factual issues, including any legal issues arising there from
7 to be heard on 21st, 22nd and 23rd May.

8 MR. PICKFORD: For avoidance of doubt, the factual issues there being referred to are in relation to
9 authorisation?

10 THE CHAIRMAN: Yes, statutory issues on the authorisation question.

11 MR. PICKFORD: I am grateful.

12 THE CHAIRMAN: Yes, 21st, 22nd and 23rd May. Anything else or do you think we are there? We
13 can revisit that date and the next time if we are anywhere nearer working out how much work
14 there is there. Thank you all very much.

15 (The hearing concluded at 5.15 p.m.)

16

17