

IN THE COMPETITION

APPEAL TRIBUNAL

Case No: 1027/2/3/04

Victoria House
Bloomsbury Square
London WC1

Friday, 2nd April 2004

Sir Christopher Bellamy (President)
Mr Michael Davey
Ms Shelia Hewitt

BETWEEN

VIP COMMUNICATIONS LIMITED

Appellant

-and-

OFFICE OF COMMUNICATIONS

Respondent

supported by

T-MOBILE

Intervener

Mr Edward Mercer and Mr Patrick Clark appeared for the Appellant

Mr Mark Hoskins and Mr John McInnes appeared for the Respondent

Mr Meredith Pickford appeared for the Intervener

Miss Elizabeth McKnight and Mr Stephen Wiskin appeared for Vodafone (Intervener in Case No. 1024/2/3/04)

CASE MANAGEMENT CONFERENCE

Transcription of the stenographic notes of
Harry Counsell & Co
(incorporating Cliffords Inn Conference Centre)
Cliffords Inn, Fetter Lane, London EC4A 1LD
Telephone: 020 7269 0370

(At 12.15 p.m.)

1
2 THE PRESIDENT: In relation to VIP, Mr Mercer you represent
3 them also, is that right?
4 MR MERCER: I am instructed.
5 THE PRESIDENT: As of today?
6 MR MERCER: Merely in respect of today.
7 THE PRESIDENT: Yes.
8 MR MERCER: The happy coincidence of me having to be here for
9 something else, sir.
10 THE PRESIDENT: Do we have any actual representative of that
11 company present?
12 MR MERCER: Mr Happy, sir, has been assisting them and we are
13 able to take telephone instructions on points.
14 THE PRESIDENT: So Mr Happy is on the end of the telephone
15 somewhere, is he?
16 MR MERCER: Mr Happy is here.
17 THE PRESIDENT: This is Mr Happy. Good morning, Mr Happy. I am
18 sorry.
19 MR MERCER: And the Director of the company is on the end of
20 the telephone.
21 THE PRESIDENT: Yes.
22 MR MERCER: You asked the telling question, sir, which is the
23 relationship between the two matters.
24 THE PRESIDENT: Yes.
25 MR MERCER: The point at which the two VEN diagrams intercept
26 of the two cases is really the primary argument because
27 that ----
28 THE PRESIDENT: Is that pleaded in VIP or not?
29 MR MERCER: We would say yes, sir.
30 THE PRESIDENT: Yes.
31 MR MERCER: And ----
32 THE PRESIDENT: A not unexpected position, Mr Mercer.
33 MR MERCER: No. It was not a surprise to me either. I am just
34 looking for ----
35 THE PRESIDENT: It is a pretty sketchy document, this Notice of
36 Appeal in the VIP case. I suppose the questions that we
37 are thinking about ourselves are, what is the most
38 economical way and the most efficient way of dealing with
39 these cases?

1 MR MERCER: I had given some thought to that, sir.

2 THE PRESIDENT: Yes.

3 MR MERCER: My view kind of goes like this: as I said, the
4 point at which the cases intercept is the primary argument
5 and I am sure those appearing for T-Mobile and Ofcom may
6 have other views but that is where I see it; in which case
7 might I make the following suggestion: that VIP be
8 adjourned but that the Intervener in VIP become an
9 Intervener in respect of the primary argument for Floe.

10 THE PRESIDENT: Yes.

11 MR MERCER: Therefore we can air the issue of the primary
12 argument with all of the relevant parties present and
13 then, as it were, go our separate ways. As Miss McKnight
14 said, there are issues that go on from the primary
15 argument, were it successful/were it not, and there are
16 issues which I think may be slightly different in the case
17 of T-Mobile, Floe, if the primary argument were right in
18 their case, and things go on.

19 So the economical way to despatch of this, is to get
20 that argument out of the way and then see in which
21 directions we go, sir.

22 THE PRESIDENT: Yes. I suppose our own thinking had got this
23 far: that we could simply allow the Floe case to go on,
24 either adjourning as you suggest, or staying the VIP case.
25 That would probably, as you submit, involve us devising
26 some method of allowing T-Mobile to be heard on matters
27 that affected its interests, although it is not yet in the
28 Floe case. That is one possibility.

29 The second possibility is that they should in some
30 way go on together, but that might lead to some
31 duplication of pleadings and resources and so forth, which
32 Mr Hoskins and Ofcom are anxious to save. Or we should
33 simply treat them as two cases and they should have an
34 independent life of their own and proceed and perhaps be
35 heard one after the other or on the same occasion or
36 something, but in terms of pleadings and interlocutory
37 issues and so forth, they have a separate life, which is
38 possibly the least efficient of the three possibilities.

39 But we had reached no real view on which is desirable

1 and obviously various parties here may have their own
2 views.

3 MR MERCER: Whilst they are not, in every respect, Siamese
4 twins, they are best friends and they have -----

5 THE PRESIDENT: Is there any point that arises in VIP that does
6 not arise in Floe? There seems to be more confusion in VIP
7 as there was a written contract or -----

8 MR MERCER: There are matters concerning whether there is a
9 contract.

10 THE PRESIDENT: What the arrangements were.

11 MR MERCER: And what the arrangements were. There is the
12 question of maximum minuteage per SIM card, maximum usage
13 regulations. There are other questions that do not appear
14 in Floe. As I say, where they overlap is in the legal
15 argument and then I think they go separate ways.

16 THE PRESIDENT: Yes. Very well. Let us see what other parties
17 think about this. Mr Hoskins, have you had a chance to
18 reflect on this aspect?

19 MR HOSKINS: Not particularly, sir. I am just wondering
20 whether it might be better for the Tribunal to break for
21 five minutes because rather than have me speak off the top
22 of my head, it is probably better for me to take
23 instructions.

24 THE PRESIDENT: Yes, I am sure.

25 MR HOSKINS: We did not know what the application to amend was
26 going to -- obviously there is a primary impact on the
27 case of Floe.

28 THE PRESIDENT: Yes.

29 MR HOSKINS: Can I say one point in relation to VIP though,
30 and there are no surprises, but the primary argument is
31 not pleaded in VIP. We have made that point in our
32 submissions and we are not going to stand here boring
33 everyone with that point indefinitely.

34 In a sense it depends on what view the Tribunal takes
35 of Floe's application, why the Tribunal has decided to
36 allow the application to amend Floe, to what extent that
37 might impact on VIP or not. If the Tribunal has decided to
38 take the point of its own motion, for example, then
39 obviously that goes across to VIP. Ofcom would not waste

1 the Tribunal's time in trying to suggest otherwise.
2 If, however, the reason why Floe has been allowed to
3 amend its appeal relates to the particular circumstances
4 of Floe, then clearly how that leads across to VIP -- I do
5 not particularly want to make this a big issue because we
6 have had our morning in court on the point.
7 THE PRESIDENT: Yes.
8 MR HOSKINS: But it is a formality that has to be tidied up
9 and it is difficult to tidy up until we have seen the
10 reasons for this morning's decisions in relation to Floe.
11 I just wanted to flag that up.
12 THE PRESIDENT: Yes. I think in broad terms, if it helps you in
13 relation to Floe, it seems to us that the question of
14 whether Floe was acting illegally is raised directly in
15 the Floe appeal and that there are arguments as to whether
16 the new primary argument is a new ground.
17 It seems to us, secondly, that the point of law is
18 potentially of fairly central importance and it ought to
19 be ventilated one way or another. From the point of view
20 of what is just and economical in saving costs and to
21 avoid another round with Ofcom, it seems to us appropriate
22 to introduce it into the Floe case, either under the
23 rubric of exceptional circumstances or by way of the
24 Tribunal simply inviting the parties, under our powers
25 under Rule 19(2) I think it is, to address us on it.
26 I think it is a combination of all those
27 considerations and we are operating on the assumption that
28 you submitted, that it is a short and self-contained point
29 and is either right or wrong and, if it is wrong, well it
30 is wrong and that is the end of it.
31 MR HOSKINS: That is very helpful.
32 THE PRESIDENT: I think that is how we are looking at it.
33 MR HOSKINS: Might I suggest, if you are amenable, if I could
34 take until half past.
35 THE PRESIDENT: Yes. I would just like to signal, we have got
36 T-Mobile here, have we not?
37 MR PICKFORD: Yes, sir.
38 THE PRESIDENT: I just wanted to say good morning and to
39 recognise that we know you are here, as it were. In a

1 sense, our sort of first feeling was that since these kind
2 of issues do seem to affect both VIP and Floe and maybe,
3 as it were, sort of around a number of other companies in
4 the same position, that there may be some argument for
5 treating Floe as some kind of sort of test case and trying
6 to deal with it as quickly as we can without getting
7 perhaps sidetracked into the details of other cases if
8 Floe can be dealt with as a matter of principle.

9 That is how we are seeing it and that might be the
10 most efficient route to take from everyone's point of
11 view.

12 MR HOSKINS: Yes, sir.

13 THE PRESIDENT: We will rise. We have got plenty to do anyway.
14 Shall we give you sort of ten or fifteen minutes?

15 MR HOSKINS: Wherever we are ready, I will come back.

16 THE PRESIDENT: You signal to us when you are ready and if you
17 would all like to have a little discussion between the
18 four of you, as it were, because your interests are
19 affected as well, Miss McKnight. You may not be too happy
20 to -- I do not know. I will leave it to you to have a
21 view.

22 MISS MCKNIGHT: I did want to raise a related point. I do not
23 know whether it would help you to do so first. We can
24 discuss it amongst ourselves but it may very well be a
25 short subject.

26 THE PRESIDENT: By all means raise it.

27 MISS MCKNIGHT: Thank you. We of course have not seen the VIP
28 papers yet, but we understand the gist of them. I think
29 you made the point earlier that if the primary argument
30 were to be introduced, it would not require any new
31 evidence. I think we would simply wish to reserve on that
32 because we do contemplate that it may be necessary to
33 introduce a short witness statement explaining precisely
34 what control a mobile network operator has over a SIM card
35 and how it -----

36 THE PRESIDENT: How it all works, yes.

37 MISS MCKNIGHT: Because that would go to who is using it. I
38 simply wish to mention that.

39 THE PRESIDENT: No. Thank you for that.

1 MISS MCKNIGHT: Possibly, as to the options you described, we
2 would favour the option put forward by Mr Mercer, that is
3 that our case go forward and T-Mobile be permitted to
4 intervene. We would not favour having the cases heard
5 sequentially for fear that the argument, if we went first,
6 in the T-Mobile case might raise a new facet to the
7 primary argument and we would not be present to address
8 that new facet.

9 THE PRESIDENT: No, quite.

10 MISS MCKNIGHT: That is all I wish to say.

11 THE PRESIDENT: Thank you very much for that. I think just on
12 the question of the witness statement that you mentioned,
13 by some route or other, whether the primary argument is in
14 the case or not, it would help us to have some fairly
15 basic explanation of how it all worked.

16 MISS MCKNIGHT: Yes. It had occurred to me that would be helpful
17 anyway.

18 THE PRESIDENT: I think that is a given anyway and we would
19 have expected, I think, either Ofcom's in its defence, or
20 you in your intervention to give us -- I mean, it is
21 partly there of course already in the Amended Notice of
22 Appeal, but a direct explanation of the basics of the set
23 up, as it were, is very helpful to us.

24 MISS MCKNIGHT: Certainly. We will note that more generally.

25 THE PRESIDENT: Yes. I am sure that can all be agreed. I mean,
26 it must be fairly common ground. We will rise, certainly
27 until about twenty to one and you just let us know when
28 you are ready and we will see how we get on. Thank you
29 very much.

30 (Adjourned at 12.27 p.m. and resumed at 12.55 p.m.)

31 THE PRESIDENT: Yes, Mr Hoskins.

32 MR HOSKINS: I am very sorry that took longer than
33 anticipated.

34 THE PRESIDENT: No, I am sure it was time well spent.

35 MR HOSKINS: Our first point is we are not keen on using Floe
36 as a test case and adjourning VIP.

37 THE PRESIDENT: Yes.

38 MR HOSKINS: If I can explain why and then tell you what we
39 propose instead?

1 THE PRESIDENT: Yes.

2 MR HOSKINS: I think the starting point is this: we cannot
3 deal with the primary argument separately, by which I mean
4 separately Floe as from VIP, because in an ideal world we
5 would want, of course, VIP to be bound by whatever was
6 found in Floe. If Floe was to be heard first and in taking
7 the primary argument, then at least formally speaking VIP
8 could say, "Well, we are not bound by that decision and
9 here are some extra arguments."

10 THE PRESIDENT: Yes.

11 MR HOSKINS: So our reasoning is that it would be desirable to
12 deal with it on a common basis.

13 THE PRESIDENT: Yes.

14 MR HOSKINS: The other point which leads us to say that we
15 prefer them to be dealt with together, because that is
16 where I am going to come to, is certainly from Ofcom's
17 perspective it is felt we need to draw a line under this
18 issue.

19 THE PRESIDENT: Yes, I agree.

20 MR HOSKINS: Whichever way it goes, we need to know where we
21 stand.

22 THE PRESIDENT: Absolutely.

23 MR HOSKINS: And also the industry needs to know where it
24 stands.

25 THE PRESIDENT: Absolutely, yes.

26 MR HOSKINS: The problem with having Floe as a test case and
27 VIP separately is because there is not a perfect symmetry
28 between them, it will just delay the final words in the
29 matter until VIP has actually been resolved.

30 So how should we deal with this? There are, as I have
31 said, different legal and factual issues in each case. I
32 have made my point about the primary argument.

33 THE PRESIDENT: Yes.

34 MR HOSKINS: Let us assume, for present purposes, primary
35 argument is going to be common to both.

36 THE PRESIDENT: Yes.

37 MR HOSKINS: Then there will be the Floe bits, legal and
38 factual, and the VIP bits, legal and factual.

39 THE PRESIDENT: Yes.

1 MR HOSKINS: So there are then three bits that we have to
2 manage: primary argument, Floe issues, VIP issues.

3 THE PRESIDENT: Yes.

4 MR HOSKINS: What we suggest is that they should be heard
5 together, everyone is present with probably, say, two
6 days' worth of hearing, and there will be three sections
7 to the appeal: primary argument, Floe, VIP.

8 I think at this stage it is probably not wise to try
9 and set down in stone exactly how those three bits will be
10 dealt with because I am thinking that if confidentiality
11 issues arise as between Vodafone and T-Mobile, for
12 example, then that may well affect the structure of how we
13 do the hearing.

14 THE PRESIDENT: Yes.

15 MR HOSKINS: What we suggest is that in principle at the
16 moment a direction that the cases be heard together, set
17 aside two days and how we deal with the three bits will be
18 revisited, certainly after documents and confidentiality
19 issues have been dealt with, or at least we have become
20 alert to whatever issues there may be.

21 THE PRESIDENT: Yes.

22 MR HOSKINS: That is what we suggest. It brings certainty and
23 it means that the primary argument and any other common
24 arguments that there are will be dealt with once and once
25 only.

26 THE PRESIDENT: So would you envisage, for example, a separate
27 defence in VIP?

28 MR HOSKINS: We would have to, sir. There is no choice. The
29 primary argument one, if it is to be run in VIP, of course
30 is easier; that will be cut-and-paste, but the other one,
31 we cannot avoid it. It will either have to be now or, if
32 it were to be adjourned, we would have to do it later
33 anyway. It is not going to go away.

34 THE PRESIDENT: Yes, I see. Let us see how far that is thought
35 to be a sensible idea. What do you say, Mr Mercer, insofar
36 as you have instructions from VIP?

37 MR MERCER: So far as I have instructions, sir, I thought
38 there was much more merit in the original idea. If we
39 dispose of the primary argument first, and admittedly we

1 will have to take Mr Hoskins's three sections, we then go
2 straight on to Floe and the factual. We could save
3 somebody quite a lot of money, basically, one way or
4 another. I have not got instructions on this, but I think
5 my client, in the case of VIP, would say that if the
6 primary argument goes down, they would not see much point
7 in continuing with the factual parts of their appeal.

8 In that case, there is no point in just having the
9 three bits heard together apart from the fact that we will
10 be here slightly longer.

11 I think in the interest of saving anybody's time and
12 money on this, if it were that way round it would be far
13 better.

14 THE PRESIDENT: Would you be able to get instructions to the
15 effect that VIP would regard itself as bound by the
16 decision in the Floe case on the primary argument?

17 MR MERCER: I was going to come to that, sir. I think probably
18 that is something I could seek instructions on because I
19 certainly did not envisage, and would not think that it
20 were right, for VIP to have two bites of the cherry in
21 those circumstances.

22 THE PRESIDENT: Yes.

23 MR MERCER: I cannot give the undertaking at this moment,
24 sir, but I am sure that VIP would seriously consider
25 undertaking that it would not make further representations
26 on the point and would consider it as closed one way or
27 the other.

28 THE PRESIDENT: Yes. I am not reminded, myself, of what they
29 are but there are procedures in the High Court for dealing
30 with this. There are procedures in the High Court for
31 having a case and everybody else agreeing to abide by the
32 decision in the "test case".

33 MR MERCER: Yes.

34 THE PRESIDENT: Those are fairly well established.

35 MR MERCER: I think that is what we should do here. I cannot
36 say for sure, sir, and you will appreciate my position,
37 but I am very confident that VIP would give that
38 undertaking.

39 THE PRESIDENT: Yes. The ideal world would be -- and I do not

1 know whether this is feasible or not and I am certainly
2 not putting any pressure on anybody -- that if the
3 situation was that VIP regarded their main argument as the
4 primary argument, and if they were to lose on the primary
5 argument, if the Floe case was to decide the primary
6 argument against them, that would effectively determine
7 their appeal as well.

8 MR MERCER: It would, sir.

9 THE PRESIDENT: That is to say, there would not be any other
10 points that they would want to raise after primary
11 argument.

12 MR MERCER: I would not want to be held exactly -----

13 THE PRESIDENT: But you should not go any further than your
14 instructions.

15 MR MERCER: I was just going to draw a differentiation between
16 VIP and Floe on my analysis so far, which is, for example,
17 the first alternative argument would not apply in the VIP
18 case.

19 THE PRESIDENT: Yes.

20 MR HOSKINS: Sir, there are two elements we have to be aware
21 of here. There is the primary argument, does it bind VIP,
22 the VIP bits and -----

23 THE PRESIDENT: Mr Mercer is hinting, and I do not think we can
24 decide it now because he has not got express instructions
25 and we need to be satisfied he had actually got express
26 and informed instructions.

27 MR HOSKINS: I understand that, sir.

28 THE PRESIDENT: But the suggestion possibly is that there would
29 not be an effective Floe appeal, bar the primary argument,
30 so that would be decided in the Floe case.

31 MR HOSKINS: Absolutely, I understand that. I am trying to
32 -----

33 THE PRESIDENT: So we sort of park VIP.

34 MR HOSKINS: You see, that is the problem, because parking is
35 not sufficient for us unless we know the other bits are
36 going to go.

37 THE PRESIDENT: Yes. You need reassurance on that point.

38 MR HOSKINS: Exactly.

39 THE PRESIDENT: And that is a perfectly reasonable and

1 legitimate position.

2 MR HOSKINS: What I was going to suggest, I think the formal
3 way to achieve it would be for VIP, of course, to replace
4 its existing Notice of Appeal with a new Notice of Appeal
5 which only has the primary argument in it. That can be
6 achieved in a number of ways but that is what we need to
7 get to, so that the only extant issue in the VIP appeal is
8 the primary argument. It does not appear on the face of
9 the current Notice of Appeal and the arguments that do
10 appear in the current Notice of Appeal, if they are to be
11 abandoned, have to be abandoned because otherwise the
12 practical aspect I have indicated does not work.

13 THE PRESIDENT: Yes. What you want to achieve, and speaking for
14 myself without having discussed it with the members of the
15 Tribunal, it sounds a reasonable objective, is that you
16 want VIP bound into the result of the primary argument on
17 the Floe appeal and you want, if possible, no further
18 points to arise in the VIP case other than the primary
19 argument.

20 MR HOSKINS: It is entirely a matter for them.

21 THE PRESIDENT: It is indeed.

22 MR HOSKINS: If they want to raise the other issues,
23 absolutely fine, but then we have to deal with the two
24 cases together.

25 THE PRESIDENT: Yes.

26 MR HOSKINS: If they do not want to pursue them and only do
27 primary appeal, absolutely fine. But I want it to be tidy.
28 I want certainty.

29 THE PRESIDENT: Absolutely. You want tidiness and certainty
30 which are entirely desirable objectives.

31 MR HOSKINS: Exactly.

32 THE PRESIDENT: Let us quickly see what Miss McKnight says, and
33 Mr Pickford in a moment.

34 MISS MCKNIGHT: I think we would go along with Ofcom's position,
35 subject to clarifying whether VIP wishes to pursue other
36 elements of its case.

37 THE PRESIDENT: Yes, quite.

38 MISS MCKNIGHT: If it were helpful, we have no objection, I
39 think, to your inviting VIP to intervene in our case for

1 the purposes of participating in the primary argument,
2 which would be one way of binding them.

3 THE PRESIDENT: That would be one way of binding them, yes.

4 MISS MCKNIGHT: But we would obviously be concerned about
5 additional costs.

6 THE PRESIDENT: Of course. Yes absolutely.

7 MISS MCKNIGHT: And that will obviously come at the end of the
8 day.

9 THE PRESIDENT: Yes.

10 MISS MCKNIGHT: We do not at present envisage that the principal
11 documents that we would be seeking to rely on would be
12 confidential, but we would obviously have to consider
13 further what evidence we are going to adduce and whether
14 any of it would be confidential as against T-Mobile and/or
15 VIP if they intervene. That is all we can say, I think.

16 THE PRESIDENT: Yes. Thank you very much. Yes, Mr Pickford,
17 what is your position?

18 MR PICKFORD: Sir, we very much support the position of Ofcom,
19 for the reasons given, certainty and to ensure that there
20 is no opportunity for VIP effectively to have a second
21 bite of the cherry.

22 THE PRESIDENT: Yes, I see. I am not sure we are really in a
23 position to make any directions or orders now because you
24 lack, understandably, enough instructions, Mr Mercer.

25 MR MERCER: Yes. I am just giving some thought, sir, to the
26 practical means of despatching this matter.

27 THE PRESIDENT: Yes.

28 MR MERCER: We can always give directions in writing. We do
29 not have to reconvene necessarily.

30 THE PRESIDENT: Yes.

31 MR MERCER: I think perhaps the thing to do is to give me
32 seven days to confirm my instructions in writing to the
33 Tribunal.

34 THE PRESIDENT: Yes.

35 MR MERCER: And if we took it from there, sir, in writing.

36 THE PRESIDENT: Yes. I think we would need to make some sort of
37 order which did make it clear that VIP was accepting the
38 result as to the primary argument in the Floe case and/or
39 was not pursuing any other point in its appeal.

1 MR MERCER: That is exactly the point on which I wish to take
2 instructions.

3 THE PRESIDENT: Yes, you need to do that.

4 MR MERCER: We need to be absolutely explicit on it.

5 THE PRESIDENT: I do not want VIP to think that VIP is under
6 any pressure from the Tribunal to take any course it
7 wishes. It is entirely a matter for VIP.

8 MR MERCER: I assure you, VIP's management is not of the
9 nature to be pressured by anybody, sir.

10 THE PRESIDENT: I am sure that is so, but there is no pressure
11 from this end. It is entirely up to them. They may feel
12 that commercially their interests would be appropriately
13 looked after by that route; they may not.

14 MR MERCER: I can only say I will take instructions.

15 THE PRESIDENT: Yes. What I suggest is that we simply stand
16 over the Case Management Conference generally. We invite
17 VIP to write to the Tribunal with its position. We will
18 then consider the situation and if we think further
19 directions are appropriate, which they may well be, we
20 will write to everybody saying what directions we think
21 are appropriate and deal with any outstanding matters in
22 writing as far as we can and/or reconvene the Case
23 Management Conference if anybody wants to reconvene it, or
24 if we feel we should reconvene it. Does that sound
25 appropriate?

26 MR MERCER: That sounds reasonable to me, sir.

27 THE PRESIDENT: Does that sound appropriate, Mr Hoskins?

28 MR HOSKINS: Sir, absolutely. I think if that is to be the
29 position, the same issue arises in each case. In relation
30 to VIP, the time for service of our defence is currently
31 stayed. I presume that -----

32 THE PRESIDENT: Yes, we continue the general stay of the time
33 for service of defence.

34 MR HOSKINS: And then Floe would need to deal in reply. I do
35 not know if there is time to deal with our defence. Maybe
36 there is time to do that.

37 THE PRESIDENT: What sort of time do you -----

38 MR HOSKINS: I was going to ask for six weeks, sir, the reason
39 being twofold.

1 THE PRESIDENT: Really to restart the clock.
2 MR HOSKINS: Restart the clock because we have got the new
3 legal argument to deal with, we have got to remould any
4 ground we have got over, we have got to pick up the way it
5 has been remoulded and there is the Easter holiday, to be
6 absolutely frank.
7 THE PRESIDENT: Yes, quite.
8 MR HOSKINS: Six weeks, by my calculation, takes us to Friday
9 , 14th May.
10 THE PRESIDENT: Yes. We have not really got as far, amongst
11 ourselves, as to planning when we would actually get to a
12 hearing in this case. One day is somewhat more easier to
13 accommodate than two days, but we would at least try to
14 have the main argument before the summer break at some
15 point in July.
16 MR HOSKINS: Exactly, yes.
17 THE PRESIDENT: I would have thought, off the top of my head,
18 did you say 14th May?
19 MR HOSKINS: 14th May would be six weeks from today.
20 (The Tribunal conferred)
21 THE PRESIDENT: That sounds to us a satisfactory time for the
22 defence, I think, Mr Hoskins. What I would suggest is that
23 when we have got a little more clarity on the position
24 with VIP, we sort out, through channels, an appropriate
25 date for a possible hearing.
26 MR HOSKINS: Yes.
27 THE PRESIDENT: With the aim to try to get it on at least for
28 hearing before July.
29 MR HOSKINS: Precisely.
30 THE PRESIDENT: It may be, if the case is, in one way or
31 another, telescoping a little or concentrating a bit more
32 on some points more than others, we may be able to get
33 through it in the day, I do not know. You may say with an
34 Intervener, or two Intervenors effectively ----
35 MR HOSKINS: I think two days was my guess for both cases.
36 Just standing here, best guess for one case but with two
37 Intervenors, a day and a half I would have thought is
38 probably safe.
39 THE PRESIDENT: Yes. We will reflect on that a little later on.

1 We would also need to reflect, I think, depending on how
2 VIP reacts, on exactly who intervenes in which case, as it
3 were, so that we simply tie up the formalities and make
4 sure everybody has their chance to be heard on whatever
5 point they want to be heard on.

6 Yes. Mr Pickford, did you want to add something?

7 MR PICKFORD: Yes sir. Might I ask for the Statement of Case
8 in the Floe case to be provided to T-Mobile? Currently we
9 are at the slight disadvantage in that we are working
10 slightly in the dark.

11 THE PRESIDENT: Yes, absolutely. We will make sure that is done
12 anyway. We will make sure that is done anyway and it may
13 be that technically we ought to admit you as an
14 Intervener, if you want to be an Intervener, in the Floe
15 case, but whatever the technical position is, we will ask
16 the Registry to supply you with the pleadings in that case
17 and give you an opportunity to be heard.

18 MR PICKFORD: I am sure Miss McKnight would also appreciate
19 the same in relation to the VIP case.

20 THE PRESIDENT: Yes.

21 MISS MCKNIGHT: I wonder, sir, whether you would also wish to
22 fix a date for us to serve our Statement in Intervention.
23 We have merely done our request for permission to date.
24 Would 28th May be satisfactory? That would be two weeks
25 beyond the date for defence.

26 THE PRESIDENT: Yes. I do not know whether you have had a
27 chance to consider how extensive your Statement in
28 Intervention is likely to be or whether it is more likely
29 to be a more formal development that rose in behind the
30 Ofcom document or whether you have a specific angle you
31 particularly want to address us on.

32 MISS MCKNIGHT: Certainly as regards the primary argument, what
33 we do not know precisely is how Ofcom will put their
34 defence in that that is entirely new.

35 THE PRESIDENT: No.

36 MISS MCKNIGHT: I would hope that as regards the arguments which
37 were raised in the complaint and in the initial decision,
38 we would merely support Ofcom, but I think it is quite
39 possible we would want to supplement what Ofcom say.

1 THE PRESIDENT: Yes.

2 MISS MCKNIGHT: The two weeks was intended to give us plenty of
3 time to be sure that we were not merely replicating what
4 Ofcom did.

5 THE PRESIDENT: Yes. You say 28th May for your Statement in
6 intervention?

7 MISS MCKNIGHT: Thank you.

8 THE PRESIDENT: Now we are leaving a bit in the air what we are
9 going do with you, Mr Pickford.

10 MR PICKFORD: Yes.

11 THE PRESIDENT: Do you have a suggestion, or what were you
12 going to ask for?

13 MR PICKFORD: I was going to ask for slightly longer, but I
14 mean potentially we could also fit in with that so that we
15 were to provide our Statement in Intervention in VIP by
16 the same date.

17 THE PRESIDENT: I think if you put in any observations you have
18 got, I am not sure whether it is technically going to be a
19 Statement in Intervention because I am not quite sure yet
20 whether the VIP case is going to be a case or not, but
21 there is no reason why you should not put any observations
22 in on whatever case it is by 28th May, if you follow me.
23 We have just got a slight technicality as to which party
24 is in which case at the moment which we need to sort out
25 for good order's sake.

26 MR PICKFORD: In the light of that, I suppose it might be
27 helpful if we can potentially delay putting in that
28 document so that we can see what Vodafone have to say, but
29 that might be giving us an advantage.

30 THE PRESIDENT: I do not know quite how this could work, but it
31 is desirable to avoid duplication so far as possible and I
32 do not know whether there is any scope at all for the two
33 potential Interveners, at least at a legal level, doing
34 their best to see that unnecessary duplication does not
35 account.

36 MR PICKFORD: Sir, I am sure we could deal with that, but it
37 might be advisable, in the light of that, if we were to
38 allow perhaps three weeks rather than two.

39 THE PRESIDENT: The trouble is we are then sort of slipping and

1 slipping and slipping basically.

2 MR PICKFORD: I am in the Tribunal's hands.

3 THE PRESIDENT: Yes. I think we will say 28th May for both
4 third parties, T-Mobile and Vodafone, and invite them to
5 liaise, so far as they can, at a legal level and with
6 Ofcom to avoid any unnecessary duplication.

7 MR HOSKINS: Sir, there is another follow on from that. I have
8 been instructed in previous cases and Ofcom has been given
9 an opportunity to comment, if it wishes, on the Statements
10 in Intervention. Sir, I was just looking at the calendar.
11 Wednesday, 9th June which would be ten days thereafter. I
12 am not saying we will do it.

13 THE PRESIDENT: I think -----

14 MR HOSKINS: The other way of doing it of course, sir, is we
15 do not make an order just now, but if we have anything to
16 say, we produce it.

17 THE PRESIDENT: If you want to make an application or you want
18 to do something additional, there are both the -- we are
19 not making orders at this stage about the exact timing of
20 the exchange of any skeleton arguments.

21 MR HOSKINS: Exactly.

22 THE PRESIDENT: I think we will just see how it unfolds a
23 little bit before we do that. I think you have got both
24 the skeleton argument and the hearing itself where you
25 could, as it were, reply to the replies and I think that
26 will do for the moment.

27 MR HOSKINS: I understand.

28 THE PRESIDENT: No, thank you for raising it.

29 MR HOSKINS: I flag it up.

30 THE PRESIDENT: Quite. Absolutely.

31 MR HOSKINS: I imagine it is something that we probably would
32 not need to take advantage of but, if we do, I would make
33 the point.

34 THE PRESIDENT: Similarly, if there are things in the defence
35 or the Statements in Intervention on which Floe wants to
36 come back on, as it were, then I think we will leave that
37 over to a later stage and you can make applications in due
38 course if you want to, Mr Mercer.

39 MR MERCER: I envisaged that being the case rather than there

