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IN THE COMPETITION

Case No. 1047/3/3/04

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

13th September, 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)

MR. MICHAEL BLAIR QC
PROFESSOR PAUL STONEMAN

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer) appeared for the Applicant

Mr Richard Fowler QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener.

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good afternoon ladies and gentlemen. I suggest we take the agenda for this
2 hearing and deal with it in order. In case it ever appears to be relevant there does not seem
3 to be any dispute that the proper forum for these proceedings is England and Wales. So
4 unless there is any dispute about that we will treat that as decided.

5 Item 2 on the agenda is the request for permission to intervene submitted by BT. I
6 think it may be useful if we just begin by indicating our own provisional thinking on this
7 issue before we hear the parties. Our provisional thinking is that BT probably does have a
8 sufficient interest to intervene in this matter, particularly since it is suggested that BT may
9 have had countervailing power in relation to the appellant, Hutchison 3G. However, exactly
10 how the BT intervention should be handled may require some further thought from two
11 points of view. First, the issue of confidentiality and, secondly, the precise scope of the BT
12 intervention and in particular to what issues BT's intervention may most usefully be
13 directed.

14 What we would provisionally suggest, subject to hearing the parties, is that BT
15 should be given permission to intervene, but that no further direction should be given at this
16 stage in relation to the conduct of that intervention. There should then be a process
17 whereby the existing pleadings served by 3G and by OFCOM are rendered in to a non-
18 confidential state, it being particularly important that OFCOM verifies with 3G that there is
19 nothing in the OFCOM defence that is confidential that should not go to BT, that when
20 those documents are ready they should be served on BT in the non-confidential versions
21 and, at that stage, BT can first of all see whether it has the material that it needs to intervene
22 and make any representations to us that it may need to make on that point. Secondly, we
23 may then at that stage decide on the scope and utility of BT's intervention so that that
24 intervention is directed to the issues that can most usefully be addressed. That is how we
25 are seeing it at the moment. In the light of that provisional indication perhaps I should just
26 ask the parties for their comments on that approach.

27 I think, Mr. Green, it is you first for Hutchison?

28 MR. GREEN: You have received our submissions by way of Freshfield's letter of 3rd September.
29 I do not wish to add anything to that. I wish to address you simply on how the matter should
30 be dealt with from here on in. We have pretty much between ourselves on this side of the
31 court contemplated that you may wish us to put in redacted versions of the application and,
32 indeed, a redacted version of the defence will need to be prepared.

33 THE PRESIDENT: Yes.

1 MR. GREEN: We are happy to discuss informally with OFCOM what in the defence and
2 supporting statements is confidential and ensure that if your provisional view remains
3 definitive that is provided to BT and we would then suggest that at a later stage there is a
4 further CMC at which we could take matters further forward to see what BT's intervention
5 is relevant to and how they can usefully participate.

6 THE PRESIDENT: Yes. Have you any provisional feel for the timetable for producing redacted
7 versions. I think you have already done it for the Notice of Appeal, have you not?

8 MR. GREEN: That is right, and I do not think that OFCOM had any problems with the matters
9 we have identified as confidential, they will clarify if they do.

10 THE PRESIDENT: Yes.

11 MR. GREEN: There are a number of matters in the defence which plainly are confidential and
12 we would need to discuss those with OFCOM, but I would not have thought that it would
13 take ----

14 THE PRESIDENT: Perhaps in the witness statements as well.

15 MR. GREEN: Indeed, absolutely, and the annexures to the witness statements, but we should be
16 able to do that within a couple of weeks.

17 THE PRESIDENT: Yes, thank you. Yes, Mr. Fowler, how does that sound to you?

18 MR. FOWLER: It sounds an entirely appropriate course to us and we have indicated in our
19 written submissions that we are entirely happy to redact the defence witness statements as
20 necessary to meet any confidential information.

21 THE PRESIDENT: Yes. What would be a reasonable time frame for that to happen?

22 MR. FOWLER: I think two weeks would probably be appropriate.

23 THE PRESIDENT: Yes, thank you. On that basis, unless there is anything from BT, we will
24 grant BT permission to intervene. We will direct that non-confidential versions of the
25 Notice of Appeal and of the defence should be served on BT let us say by Tuesday, 28th
26 September – two weeks from tomorrow. Further directions as to the conduct of BT's
27 intervention should be reserved, that is the appropriate order.

28 Just thinking about that, what we have in mind – just so we can signal to the parties
29 what we do have in mind – is that a further CMC in this case will be necessary in any event
30 and for that we actually had in mind a date about two months from now, that is to say 19th
31 November. It would be desirable if we were in a position to have a Statement of
32 Intervention from BT before that so we would need to devise some procedural mechanism
33 for dealing with the preparation and service of BT's Statement of Intervention and the
34 issues that it needs to address between 28th September and 19th November. I would think

1 the best course is that we should deal with any necessary directions in that regard in writing
2 between those two dates. I do not see any immediate problem in dealing with that – I do not
3 think we need to meet again to debate that unless there is some major problem. So we will
4 give directions as to the further conduct of BT's intervention once the non-confidential
5 pleadings have been exchanged in the way that I have indicated.

6 That, I think, takes us on to a number of issues that perhaps go together. The main
7 issues likely to arise: the question of further evidence including expert evidence, and
8 whether any witnesses are sought to be called by any of the parties. In relation to that, we
9 have one question that we would like to pose, particularly to the appellants, Hutchison 3G,
10 and a number of provisional observations as to how we see the case, as it were, developing
11 from now. The question, Mr. Green, and not necessarily for immediate answer if you feel
12 you are being put on the spot, but for answer in writing if necessary, is that OFCOM argues
13 in its defence that it would be open to your clients to serve a charge change notice under
14 clause 13.1 of their agreement with BT. That would, according to OFCOM, greatly
15 facilitate your client's position. I am putting it rather in the abstract because I am not quite
16 sure what is confidential and what is not, but I think you know the point that is being made.
17 As a matter of curiosity we have asked ourselves at this stage whether that does represent
18 any route by which some of the difficulties in this case might be resolved without it being
19 necessary to decide all of those points that you raise.

20 MR. GREEN: We are obviously very alive to this point. So far as we are concerned it does not
21 come close to providing an answer to the case. There are a number, we will in due course
22 submit, of quite profound and insuperable legal difficulties in the way of OFCOM's
23 proposed solution. There are an equal number of very difficult, practical, logistical
24 problems which they plainly just have not thought through. We will be addressing these in
25 submissions and possibly in evidence. I do not think I can realistically say more at this stage
26 without possibly dealing with confidential matters.

27 THE PRESIDENT: No. Thank you for that, let us leave that there. The way that we are seeing
28 this at the moment is that there may very well be scope for sorting out at least some of the
29 issues in this case before we get to a full scale hearing. There are some economic issues
30 that turn, among other things, on the way one should approach long run incremental cost in
31 this particular situation. In particular in that regard, how one should treat the licence fee
32 itself – not only how one should treat the licence fee itself but over what product should one
33 spread it, and perhaps as a matter of principle to what extent the licence fee is to be
34 regarded as a charge properly made in relation to a long run incremental cost calculation.

1 We would see provisionally some advantage in the Tribunal perhaps identifying a
2 number of possible issues that arise at the moment on the economic evidence, possibly
3 inviting the parties to clarify their positions in writing, and then possibly at that stage having
4 a meeting with the relevant experts and the Tribunal in order to have a discussion about
5 some of these matters (of which a transcript would be kept) so that we can identify
6 everybody's point of view in that way rather than seeking to do so through more formal
7 processes of cross-examination, so that we have at least narrowed the scope for this
8 agreement and identified at least some of the issues which we can then address in more
9 detail in the context before hearing when we get to it. That is, I think, the way we are
10 looking at it at the moment, but the parties themselves may have views as to what the main
11 issues are likely to be, what evidence is likely to be necessary to address those issues, and
12 whether they feel that this is a case where they would wish to call witnesses in person
13 and/or to cross-examine. So again, it is for the appellants I think, Mr. Green, to give any
14 views you have on those points.

15 MR. GREEN: Our provisional position is as follows. We see the Appeal largely turning upon
16 some points of law. There are some points of fact and economics that come into the
17 equation possibly depending upon the view you take of certain legal points.

18 THE PRESIDENT: What are the points of law you have in mind?

19 MR. GREEN: There are points of law and I would describe them also as sort of Judicial Review
20 challenges to the adequacy of a decision, the logic of the reasoning, the adequacy of the
21 reasoning, and quite a lot of those, if we were right could well obviate the need to consider
22 some of the economic issues. There are circumstances in which the economic issues might
23 become relevant but we view them as somewhat secondary to the legal points that we
24 anticipate we will be arguing. One illustration of this concerns the question of OFCOM's
25 powers both under the contract and in relation to the framework directive to determine
26 disputes, that I think on the basis of the defence is an important issue, and it could be
27 determinative of the whole Appeal - certainly if our legal arguments are right. You will
28 have seen that we are only applying for this matter to be remitted, the relief we are seeking
29 is for it to be quashed and sent back, we are not asking for the Tribunal to make its own
30 determinations on some of the more complex factual issues. So there may come a point in
31 time in which there would be scope for defining and refining the economic issues. I think
32 we would suggest that that is something to be considered at the next CMC once we have
33 seen BT's Statement of Intervention.

34 THE PRESIDENT: Yes.

1 MR. GREEN: We have had a greater opportunity to work our way through the defence – we
2 obviously only received it on Friday. But at the moment I think we do feel that there are
3 quite a large number of legal issues. It may be that over the next week or so we could frame
4 those more precisely – it is a series of propositions of law or issues – which certainly before
5 the next CMC you will have sight of.

6 THE PRESIDENT: In relation to the legal issues at the moment I am on p.52 of the Notice of
7 Appeal where at para. 1.1 is the summary of what appear to be five grounds of appeal. Are
8 you able to help us at this stage as to which ones can deal with as purely legal issues
9 without getting into any economic issues?

10 MR. GREEN: The economic issues arise largely out of OFCOM's defence and in particular the
11 manner in which they have addressed I think it is issue "D" there. Certainly our reading of
12 the defence I think fortifies us in the proposition that issues A, B and C we will largely be
13 dealing with as questions of law. We have identified a small number of issues of fact which
14 we may wish to supplement by a witness statement, but I do not think those issues of fact
15 will raise economic issues. Indeed, it is only part of issue D that we would view as an
16 economic issue, and part of our challenge to D is also a legal issue. So out of the five issues
17 identified there we would suggest it is only part of D which squarely raises an economic
18 issue of some complexity and that really focuses on the points which you raised earlier on
19 about the use of the LRIC model, what goes into it, and how you apportion components of
20 that model between various activities.

21 THE PRESIDENT: I am still a little in the dark as to what the points of law are going to be.

22 MR. GREEN: If you take subparagraph (a), that focuses upon the period prior to the entering into
23 force of the agreement with BT, and we have various submissions both in relation to the
24 evidence and as to the logical consistency of the Decision in the way that it treats that. That
25 would also give rise to the legal implications that one draws from a proper construction of
26 the agreement, which is not an economic issue it is a construction issue, and how that will
27 operate during the two year period, 2004 to 2006.

28 THE PRESIDENT: If I may make one remark as you go along, (a) may or may not raise the
29 question of what is the relevant period, i.e. at what date are we looking?

30 MR. GREEN: I do not think there is any dispute about that.

31 THE PRESIDENT: Are we looking at 2004, or are we looking at the period 2002 to 2004?

32 MR. GREEN: Possibly. I think that is a question of construction of the Decision. We understand
33 the Decision to cover the period until the next review by OFCOM. It seems to us clear from

1 OFCOM's own defence that they are looking at it as a two year period. There are various
2 paragraphs of the defence we have identified.

3 THE PRESIDENT: That is 2004 to 2006.

4 MR. GREEN: That is right.

5 THE PRESIDENT: But your agreement was entered into in 2002.

6 MR. GREEN: That is right. The relevance of that is that the position in 2002, as reflected in the
7 agreement, will continue at the very least for a two year period, which is the period of time
8 which is required for service of a Notice. So no contract provision can change for two years
9 following service of a Notice, save for any intervention by OFCOM pursuant to the dispute
10 resolution procedure.

11 THE PRESIDENT: Yes.

12 MR. GREEN: But the scope of that does raise a point of law, pure and simple, which is the
13 construction of the Act and the Directive. So we do not believe there is any issue of
14 economics lurking there, it is an issue of fact, construction of the agreement and how it
15 interrelates with the framework Directive, and the dispute resolution procedures in that
16 measure. Very much the same analysis, but variants of it, then govern sub-issue (b) which
17 concerns the actual terms of the agreement and again, as you will have seen, we make
18 certain submissions about the implications of the fact that we have entered an agreement
19 which has a certain period of notice, a two year period of notice, and one puts it this way
20 that if OFCOM is correct in some of the assertions of fact that it sets out in the Decision that
21 has implications for the way in which it should have analysed the period of 2004 to 2006
22 and it has not followed those conclusions that it itself has arrived at through certain parts of
23 the Decision, and indeed parts of the defence, plainly constitute admissions as to what it did
24 or did not do, and the position it took. We say that having taken those positions and made
25 those admissions it simply failed to follow them through in any sensible way. But then
26 putting it in those terms demonstrates it is not a question of economics, it is a question of
27 looking at the Decision, seeing what OFCOM actually said and ruled upon, and seeing
28 whether or not the logic of their position is correct or consistent.

29 THE PRESIDENT: I am sorry to take things out of order, but if we just jog back to (a) which
30 says:

31 "1.1 (a) the Decision failed to analyse properly or give due consideration to the
32 imbalance of the bargaining position between the Appellant and BT prior to the
33 completion of the BT Agreement."

1 Can we address that without first deciding whether there was an imbalance of bargaining
2 position between the Appellant and BT?

3 MR. GREEN: Well you will have seen from the Decision that OFCOM accepts at least the
4 possibility that there was. It accepts that there may have been imbalance of bargaining
5 position flowing out that 3G was in a position of urgency – it had to sign up its contract.
6 OFCOM itself distinguishes between the point in time at which it entered this agreement
7 and what the position might be in the future, and it is largely in the future that OFCOM says
8 there is no inequality of bargaining power . It concedes expressly the possibility that there
9 was an inequality when the agreement was entered into. One of the points we will make is,
10 assuming that to be the case that there was at least that possibility, certain inferences should
11 have been drawn from that. OFCOM should have investigated the implications of that
12 finding, and as it goes on to acknowledge in the Decision it did not do that. It confused the
13 period as of the date of entry into the Agreement with a period some years later, and one of
14 the criticisms we shall make of the Decision is that many of the points OFCOM makes are
15 simply misdirected because they do not govern the period of the Decision, or the period of
16 contract notice.

17 THE PRESIDENT: We have to apologise to you, I think, Miss Stevens, because you do not have
18 the Notice of Appeal yet so you will not be able to follow this in detail.

19 MISS STEVENS: No, Sir.

20 MR. GREEN: I am afraid I am making it intentionally obtuse.

21 THE PRESIDENT: You are being very helpful, Mr. Green. What I am picking up from this is
22 that as far as your clients are concerned you are inviting us to deal with this on the face of
23 the documents, largely.

24 MR. GREEN: We are indeed, having thought it through ----

25 THE PRESIDENT: For example in the witness evidence there is a dispute about whether
26 particular figures do or do not show particular things.

27 MR. GREEN: That is right.

28 THE PRESIDENT: Are you saying we do not actually need to go into that, or resolve that?

29 MR. GREEN: On one scenario you will have to, but only on one scenario, and even in relation to
30 D it would be a secondary argument that you have to grapple with the underlying maths or
31 the correct apportionments and so on, such as we have seen arise as a disputed issue in the
32 witness statements. We have other arguments which are largely arguments of law.

33 THE PRESIDENT: Professor Stoneman has a question, I think.

1 PROFESSOR STONEMAN: I am looking at the main grounds of appeal not on p.52 but on p.6,
2 which are rather different. At (a) on p.6, the last part of that is the important part I believe,
3 and that brings the economic issues way back to the front again, it is not just a legal point.
4 That is one of the reasons I think why we considered that there was an economic point here
5 and not just a legal point. So it depends which part of your Appeal we are looking at.

6 MR. GREEN: Let me see if I can clarify that point. The argument could run at a number of
7 levels. It would largely run at the level of OFCOM has accepted at least as a possibility that
8 there is inequality of bargaining power. If that was the case, then as a matter of proper
9 administration OFCOM should have investigated the implication of that, because it raised
10 an important matter which they failed to grapple with, they did not do that although they
11 accepted there was a real possibility that such a situation arose. Now, if we were inviting
12 you to decide the point, and come to your own conclusion effectively *de novo* then we
13 would need to put evidence to you. If we are saying to you that they committed a procedural
14 error or an administrative error and we are asking you to remit it back to OFCOM for the
15 homework to be done properly, we need only satisfy of the procedural error, that it was a
16 relevant matter, they failed to investigate it, it was potentially highly significant and that
17 justifies quashing the decision. That is the way in which we are framing our argument. We
18 are not asking you to make primary findings of fact about the quality or inequality of
19 bargaining power which did or did not exist at the time. That I think differentiates between
20 the two types of arguments which we could advance but we have deliberately framed this as
21 an application to remit for the exercise to be conducted properly s we see it.

22 PROFESSOR STONEMAN: I take that point, but when you state that:

23 “The Applicant was compelled to agree to termination charges at a level which fell
24 short of any estimate of the Applicant’s costs of termination.”

25 We do not have to determine that in any exact sense. If that was the supposed outcome we
26 surely have some evidence that that is the out come and therefore some idea of an estimate
27 of the Applicant’s costs of termination, that is where the economics issue arises, it is not
28 just a legal issue.

29 MR. GREEN: Again, although in a different factual context I repeat the point I just made that
30 even in relation to that issue, there is certain evidence that we have referred to in the
31 application identifying other aspects of OFCOM’s own findings as to what levels of costs
32 might be, or what levels of monopoly profits might be. We are saying, for example, if we
33 take it out of context and make it entirely hypothetical, assume for the sake of argument that
34 OFCOM have concluded that the monopolistic price was 100 and that in the contract the

1 price was 30. We would be saying “look at the disparity”, at that least that creates a very,
2 very strong presumption that the difference between price A and price B is so great that it
3 could never, ever, in a million years be said to be charging anything which covered its costs
4 or was close to a monopolistic price. You only have to look at the size of the disparity to
5 see that that was an issue which cried out for proper investigation, and there was no
6 investigation. So we are saying, on the basis of the evidence that you will have before you
7 found elsewhere in the Decision, there is sufficient for you to say they have not done their
8 homework. I could go on and say not only have they not only done their homework, but we
9 invite you to decide what the proper level of costs are and come to a ruling on that. That
10 would require primary evidence, but we are not asking you to go that far.

11 PROFESSOR STONEMAN: Thank you.

12 MR. GREEN: Can I suggest that we do not need to decide that issue at this stage, that we could
13 leave it over until the next CMC when we will have BT’s Statement of Intervention.

14 THE PRESIDENT: Well it affects a little the scope of BT’s Statement of Intervention. If BT is
15 going to spend a lot of time rebutting some of the detailed argument about averages and
16 costs and so forth, that is one thing. If what you are basically saying is “look at the face of
17 the Decision, you can draw an inference from the face of the Decision of X, and you can
18 draw the further inference that X was not properly addressed in the Decision, that is another
19 thing. That is a different kettle of fish.

20 MR. GREEN: It is largely that which we will be saying to you. We are conscious of the fact that,
21 as both we have stated in our application, and indeed OFCOM have stated, there are some
22 not insignificant problems in conducting some of the calculations about the way 3G’s
23 business is going to develop because it is such a new entity, and realistically speaking we
24 find it difficult to envisage how the Tribunal could get a handle on some of the economic
25 issues without having to grapple with an absolute mountain of evidence which it may be
26 hard to put together. OFCOM could do that over a period of time in conjunction with 3G,
27 providing information, it is more of an evolutionary process which would occur. So we
28 have sought to fashion the Notice of Appeal to identify what one could loosely describe as
29 more Judicial Review types of challenge.

30 THE PRESIDENT: From the Tribunal’s point of view, first, it is very much up to the Appellants
31 to frame their case as they wish to frame it, obviously. Secondly, I think you will perhaps
32 encounter a certain degree of hesitation in inviting us to deal with matters on some assumed
33 basis, unless we are absolutely satisfied that the assumed basis is in fact an agreed basis or
34 an established basis, or whatever, because if there are residual, factual disputes it is not

1 always satisfactory to try to treat it as if it were a Judicial Review. That is just a difficulty
2 that one faces.

3 MR. GREEN: I use the phrase "Judicial Review" lightly, obviously this is ----

4 THE PRESIDENT: No, this is an appeal on the merits.

5 MR. GREEN: -- an appeal on the merits, absolutely. The criticisms we are making will be on
6 the basis of facts as stated by OFCOM, in the main. We obviously will put forward our
7 own evidence and we know where they agree or disagree with us. This is in the context of a
8 debate we are having about whether we identify more pure economic issues. I was
9 differentiating that in my mind between the factual or evidential issues which might or
10 might not arise.

11 THE PRESIDENT: So if we look back to the agenda and look at items 3, 4, and 5 how do you
12 see it unfolding, Mr. Green? Do you see us getting as far as witnesses or evidence, or not?

13 MR. GREEN: As matters presently stand, unless the economic issues have to be thrashed out, we
14 were not contemplating there would be witnesses. Again, that is somewhat tentative because
15 we have not seen BT's Statement of Intervention, we do not know what other issues they
16 are going to raise, but provisionally speaking we did not contemplate there would be
17 witnesses called. At the moment we are not certain there is any further disclosure we would
18 want from OFCOM, and we do not think there is anything they want from us.

19 So far as further evidence is concerned, we have provisionally identified a few factual
20 matters, not necessarily economic matters, but factual matters, which we would need to
21 address, probably by way of the service of a supplementary witness statement, but they are
22 fairly small in compass and we are still investigating it because obviously we have not had
23 much time to review the defence. So we do not contemplate there is a great deal more to do
24 -- certainly at this stage.

25 THE PRESIDENT: I am sorry, I am probably being very slow. When we look at the witness
26 statement served by OFCOM, for example the witness statement of Mr. Myers, who
27 criticises among other things the approach of Mr. Michael Mickel -- just to take an example
28 -- what are we expected to do with all that? Are we expected just to note that it is disputed,
29 or are we being invited to resolve it, or what?

30 MR. GREEN: If I could give you a flavour of what we would say about that, because this goes to
31 that sub-issue D.

32 THE PRESIDENT: I am just trying to get a feel ----

33 MR. GREEN: I understand, it is very difficult.

34 THE PRESIDENT: -- how to handle this case.

1 MR. GREEN: It is very difficult, I understand that. We will be saying to you that we put forward
2 Mr. Mickel's statement in order to demonstrate not that it was necessarily accurate, you can
3 see what he says about the model that he uses, but to demonstrate that there was a real issue
4 which OFCOM had not addressed. OFCOM's reply to that is to concede that they have not
5 themselves carried out a full investigation either of the underlying facts or of Mr. Mickel's
6 statement, but they believe they have two criticisms they can make of Mr. Mickel, which
7 they have made. Those are economic issues, clearly, but our principal argument will be that
8 what the exchange demonstrates is that there was a serious issue which OFCOM never
9 properly grappled with, and that it is not satisfactory to attempt at this stage to fire a few
10 exocets across the bow saying "We are not going to conduct a proper investigation
11 ourselves but we have one or two criticisms we wish to make of your exercise." They either
12 do the exercise properly or they do not do it at all, and they have not done it at all, which
13 they concede in their own witness statement – Mr. Myers makes that clear.

14 On that basis, you will be reviewing the argument as a quasi-Judicial Review type
15 argument. Here was an issue, which was one of importance, which on their own case, set
16 out in the defence and in the Decision, they did not investigate, and they should have done,
17 and it is not satisfactory to try and pull themselves up by their bootstraps after the event.
18 That, in a nutshell, is one way of looking at the exchange. We could also go on and say
19 "And moreover, Mr. Myer's analysis is defective for the following reasons. If I have to go
20 that far then you will have to grapple with Mr. Myers and Mr. Mickel, but it is only if we
21 get to that stage. That exchange between Myers and Mickel relates only to 1.1(d). It is
22 confined to that, and it is only one of the arguments we have on that subparagraph (d). It is
23 within that subparagraph (d) that economic exchanges occur.

24 THE PRESIDENT: So are BT expected to address their minds to this point or not?

25 MR. GREEN: I do not think they can because it does not concern BT at all. It concerns entirely
26 discrete costs.

27 THE PRESIDENT: But they will want to make observations on whether they had countervailing
28 buying power or not, which is presumably part of the factual matrix of the case.

29 MR. GREEN: They may do, I do not think it actually addresses the point which is being debated
30 in subparagraph (d), that particular issue, which is a matter which is internal to "3".

31 THE PRESIDENT: Yes.

32 MR. GREEN: So far as BT saying whether or not they have countervailing power our
33 proposition is OFCOM found that they could well have countervailing power in the
34 Decision and we do not have to go so far as to say that they did, it is enough for us to say

1 that OFCOM found that they could well have countervailing power. We say on that basis
2 there was a matter which warranted proper investigation and OFCOM simply did not do it.

3 THE PRESIDENT: Yes.

4 MR. GREEN: I think one of the reasons for our slightly schizophrenic approach when we
5 addressed BT's application for permission was that we could obviously see their part in the
6 factual matrix of this case, but many of the issues are peculiarly limited to position 3 and
7 OFCOM, although plainly BT is an important part of that context. But many of the issues
8 arising on the Notice of Application are legal issues which largely arise in the debate
9 between ourselves and OFCOM.

10 THE PRESIDENT: Yes.

11 MR. GREEN: Sorry, that does not make life easier.

12 THE PRESIDENT: No, well I am sure we can find solutions to these interesting problems. Very
13 well, I think we ought to hear from OFCOM for a moment, to see how they see these
14 matters. The submission seems to be that you are basically facing a Judicial Review type
15 case which does not involve us really getting deeply into the facts.

16 MR. FOWLER: To an extent I would agree with what my friend says, there plainly is a
17 substantial area of the dispute between us which is based upon legal issues and not least
18 upon the question of the powers that OFCOM would have under the new regime in relation
19 to any dispute involving pricing by Hutchison.

20 THE PRESIDENT: Just let me understand that point so far as I can at the moment. In other
21 words, you are submitting that insofar as it might be suggested that there was some
22 countervailing bargaining power on the part of BT, that is effectively neutralised now by the
23 regulatory regime in force at least since 2004?

24 MR. FOWLER: It is neutralised by the end to end connectivity obligation which came into place
25 before that. It is that which neutralises any bargaining power that BT might have had.

26 THE PRESIDENT: That was always in place was it, under the previous regime?

27 MR. FOWLER: It was, under the previous regime, although it was made explicit on their
28 statement last year, but that is not connected with the changeover to the new regime.

29 THE PRESIDENT: It has always been there.

30 MR. FOWLER: Yes, but it is in the context of the new regime that the limitation on OFCOM's
31 powers, to impose price controls of any form in the absence of significant market power has
32 arisen, and that is one of the principal issues which arises here to the extent that Hutchison
33 seek to rely upon OFCOM's ability, as it were, to regulate their price under the dispute

1 resolution procedure in the agreement under clause 13 in the event that they were to seek to
2 charge an excessive price. So that is all really a legal issue.

3 THE PRESIDENT: Forgive me, Mr. Fowler, we are feeling our way in this case, is that a slightly
4 circular argument because what they are challenging here is that they have got significant
5 market power. If they were to activate the mechanism that you say they could activate,
6 although if you are right OFCOM could not fix any prices under the dispute resolution
7 procedure on your argument, nonetheless you would say that Hutchison still had SMP and
8 you could presumably at least impose some sort of price control via the fact that they have
9 SMP.

10 MR. FOWLER: But only if they have SMP, yes.

11 THE PRESIDENT: Which you say they have?

12 MR. FOWLER: Yes, but our ability to impose any control of their prices is based upon the fact
13 that they have SMP. If they have not got SMP then we cannot control their prices.

14 THE PRESIDENT: That is why I think the argument seems to go round in circles slightly.

15 MR. FOWLER: It goes around in circles because of the way in which it is put by the Appellants,
16 who seek to suggest in the absence of SMP rather they don't have SMP precisely because
17 we can control their prices where they seek to charge an excessive rate, but we could only
18 do that if they did have SMP.

19 THE PRESIDENT: And you say they do have SMP?

20 MR. FOWLER: And we say they do, yes.

21 THE PRESIDENT: And you could control their pricing?

22 MR. FOWLER: Indeed yes.

23 THE PRESIDENT: Not through this route but through the other route?

24 MR. FOWLER: Yes, but that of itself cannot possibly deprive them of SMP, the fact that we can
25 control their prices because they have got SMP cannot mean therefore that they do not have
26 SMP.

27 THE PRESIDENT: No, quite.

28 MR. FOWLER: That really would be circular.

29 THE PRESIDENT: Quite, I am trying to follow the logic of these difficult things. So how do
30 you see it? Are we going to need to get into this, for example, the argument between Mr.
31 Myers and Mr. Mickel?

32 MR. FOWLER: To some extent, yes, and there I am not sure that I do fully agree with my friend.
33 because it does seem to be the case that the argument about their being at a restrained price
34 in the first place arises at first flood at their appeal, and that is based not upon any clear cost

1 breakdown or anything like that in the case they put forward, it is based upon the evidence
2 of Mr. Mickel and he saying essentially that while as calculation goes it is not an accurate
3 calculation, it gives a broad indication which shows it must be way below the real cost. We
4 say that you cannot make that assumption at all on that basis. It is perfectly true that we did
5 not look at the details of their costs, we did not need to, we did not need to for the purpose
6 of the Decision on the grounds on which we reached it. But insofar as they seek now that
7 prima facie, or at least almost necessarily the charge under the BT Agreement is below their
8 costs, they have to put forward – they have to put forward – the evidence on which they rely
9 to that proposition. We say that the evidence on which they currently rely, namely Mr.
10 Mickel, does not support that for the reasons Mr. Myers gives.

11 THE PRESIDENT: Do you concede, as Mr. Green suggests, that in the Decision you conceded
12 that there may be something in the argument that BT has countervailing bargaining power?

13 MR. FOWLER: We do say expressly in our defence that the Decision acknowledged the
14 possibility that they may have had it at the time when the agreement was negotiated, but we
15 say that that is simply not relevant for the purposes of the forward looking analysis which
16 we were called upon to do in leading up to the decision in June of this year.

17 THE PRESIDENT: For many other reasons the legal structure you referred to?

18 MR. FOWLER: That for one reason, and the other reason being the fact that any countervailing
19 bargaining power that they might have had – BT might have had – was dissipated by the
20 end to end connectivity obligation that was made explicit after the BT agreement was
21 entered into, and that that did away with any kind of editing by bargaining power that they
22 might have had, and looking forward therefore one has to assume that there was not any
23 bargaining power. It is in response to that concept that the Appellants say “we have been
24 locked into the terms of the agreement” and therefore, as it were, the effect of the
25 countervailing bargaining power which Hutchison say BT did have has been carried
26 forward through the agreement, in response to which we say “If that was true, you had a
27 way out under the dispute resolution procedure, under clause 13. What is more, now you
28 cannot rely upon our ability to intervene under clause 13 in order to control your prices and
29 stop you over charging, because we cannot do that under the new regime.”

30 THE PRESIDENT: Yes, and where does all that leave us so far as all this evidence about who had
31 what power to do what and, for example, the Myers/Mickel dispute as to how you look at
32 these things? Do we have to resolve it or not?

33 MR. FOWLER: I think the Myers/Mickel dispute is a sort of discrete area as it were of dispute,
34 albeit that it goes to a part of the case which on our understanding at least is relevant not

1 merely to ground (d) of the grounds of appeal but also to the other grounds of appeal,
2 because underlying those grounds of appeal is the notion that they are at a heavily restrained
3 price, and that is based upon Mr. Mickel's evidence. So it depends really on how the
4 Appellants wish to approach that part of their argument how far the Tribunal needs to
5 examine that part of their argument. That is their argument.

6 THE PRESIDENT: Yes. Thank you. I do not think you will probably have a useful contribution
7 to make at this stage, Miss Stevens.

8 MISS STEVENS: No, Sir.

9 THE PRESIDENT: We will deal with BT in due course as these proceedings unfold.

10 (The Tribunal confer)

11 THE PRESIDENT: The Tribunal is going to rise for a short while.

12 (The hearing adjourned at 2.48 p.m. and resumed at 3 p.m.)

13 THE PRESIDENT: Mr. Green, we would like to invite your clients to serve a Reply to the
14 Defence not simply pleading in the normal way to the facts but trying, so far as possible to
15 identify point by point what the legal issues are that you have explained to us, with the
16 particular legal provisions or other matters which you rely on in relation to each one, so we
17 are fairly clear what the legal points are, and indicating so far as possible whether there are
18 residual factual issues that we do have to decide, or that we do not have to decide, or on
19 what hypothesis (if any) we would have to decide certain factual issues. I think that would
20 help us – I know all cases have a life of their own as it were, and they change as they go
21 along, and perhaps in the light of the defence is developed a bit, and so forth and so on, but
22 I think now it would be a good idea both to help us and to help the Intervener not waste
23 costs unduly on things that do not matter. If a document of that kind could be produced –
24 have I made myself clear as to what sort of document we are looking for?

25 MR. GREEN: Yes, very. We are happy to do that.

26 THE PRESIDENT: That is very kind. That, I think, would include – if I may suggest – dealing
27 with why you say the escape route suggested by Mr. Fowler in the OFCOM defence is not,
28 in fact, a workable escape route.

29 MR. GREEN: Absolutely, yes.

30 THE PRESIDENT: I simply do not know at this stage, but it may be that within a short period we
31 (the Tribunal) may wish to raise for our part certain questions that you may or may not wish
32 to deal with in your reply, but if we do raise them we will let you know as soon as we can.

33 MR. GREEN: That is fine.

1 THE PRESIDENT: What would you suggest would be a workable timetable for a document of
2 that sort?

3 MR. GREEN: We will need a little bit of time for this reason, that we have identified four or five
4 areas of fact we wish to investigate arising out of the defence. They may turn out to be
5 nothing at all in which case we would not want to raise them further. I think we would like
6 to follow those investigations before we finally reduce our structure to writing the form of
7 the reply. So if we could have a month, if that would be acceptable?

8 THE PRESIDENT: Yes. I have the impression that this case is not pressingly urgent – I am sure
9 you want to get on with it at a reasonable pace, but it is not as urgent as some cases may be?

10 MR. GREEN: No.

11 THE PRESIDENT: So four weeks today would take us to 11th October, shall we fix the timetable
12 for that? What I am inclined to suggest is that that document should probably be available
13 before we invite BT to finalise its intervention so that things are tied down as much as
14 possible. It may be that you can narrow the case a bit or not, it is entirely up to you, it is
15 your appeal.

16 Very well. Are there other matters then we can usefully discuss this afternoon, or
17 is that about as far as we can take it? For example, just reverting to an issue that we have
18 already raised, if the way your case, as reformulated or pleaded in reply, did not rely on
19 matters that had a particular kind of confidentiality then we would not need to spend a lot of
20 time resolving confidentiality issues vis à vis BT, for example?

21 MR. GREEN: Yes.

22 THE PRESIDENT: If there are no other submissions – I do not know if there is anything else you
23 want to raise at this stage, Mr. Fowler – I think we just adjourn to November 19th, which is
24 a Friday. We will fix the next CMC for then, we will await the Appellant's reply on
25 October 11th and we will give directions thereafter in relation to BT's Statement of
26 Intervention and we may or may not ourselves in the meantime ask some questions of the
27 parties.

28 Thank you all very much indeed.

29 (The hearing adjourned at 3.05 p.m.)