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IN THE COMPETITION

Case No. 1053/3/3/05

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

23 November 2005

Before:
MARION SIMMONS QC
(Chairman)

ANN KELLY
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

MEDIA MARKETING & PROMOTIONS

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

Andrew Millard (of Media Marketing Promotions) appeared for the Appellant.

Tim Ward (instructed by the Office of Communications) appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good afternoon. (After introductions) Of course we all know about the
2 procedure here but I just thought I would try and bring you up to date so you know what goes
3 on here. Would that be helpful?

4 MR. MILLARD: Thank you very much.

5 THE CHAIRMAN: After receiving an appeal we fix a case management conference (which is
6 today) so that the Tribunal can set a timetable for the hearing and so that we can discuss what
7 evidence is going to be needed both written and, if necessary, oral, and when and how that is
8 going to be provided. Part of the written evidence may, of course, be contemporaneous
9 documents. I do not know if there is anything relevant here but there may be. If there is any
10 written evidence then of course we need to make directions for disclosure and exchange
11 between the parties.

12 We also have a procedure which allows interested parties to intervene in the
13 proceedings to support either the appellant or Ofcom in this case. That happens where
14 a third party has an interest in the outcome of the proceedings and/or is affected by the
15 Decision, and where that third party may be able to give a different perspective to the issues
16 from the parties that the application is between. There is a fixed time for intervention and in
17 this case an application for permission to intervene has to be made by Friday, 25th November,
18 so the time period has not yet expired and so far we have not received any interventions.

19 Ofcom have very helpfully set out in their written skeleton argument a list of the
20 possible directions which we should consider today and I think they followed the agenda
21 which the Tribunal sent out, so I suggest that it might be convenient to proceed by looking at
22 the agenda which we sent out and that document. But if you have prepared it differently then
23 we are happy to proceed in whatever way you would like us to proceed. At the end of the
24 hearing we will make some directions which will effectively be a shopping list which gets us
25 to the hearing and we will also be fixing the date for the hearing.

26 The usual procedure at a case management conference, and effectively at the main
27 hearing, is for the appellant to start and in a case management conference to indicate what
28 directions you require and I have indicated how we are going to proceed in relation to that. So
29 in a minute I am going to ask you to address me, but before doing so I would just like to
30 mention two points that are troubling us – in fact, I think it may be more than two points now.
31 It may be that you can assist, or it may be that Ofcom can assist. We do not expect answers
32 today but they may be matters which could go into the Defence or some other document.

33 The first matter is in connection with portability. It might be helpful if we actually
34 understood:

- 35 (i) how and by whom numbers are initially allocated

- 1 (ii) the basis upon which they are allocated
- 2 (iii) the chain from the initial allocation to the ultimate user; and
- 3 (iv) the basis upon which each party in that chain obtains the number.

4 Hopefully I have been very careful not to use certain words, and I am going to mention those
5 words: “possess” or “possession”, “acquire”, “own”, and you will see I have done that for
6 obvious reasons because that is effectively part of what we are going to have to decide.

7 Secondly, it may be that we only need to know that information in relation to
8 non-geographic numbers if there is any difference, but I do not know if we need to know it in
9 relation to both. That is a matter that probably needs to be discussed.

10 Having looked at the question from the initial allocation down, can I turn the
11 hourglass the other way round? If the ultimate user no longer wants a number then to whom
12 does it revert? We ask this question because if there is number portability if, say B has
13 acquired a number from A and then transfers to C, and then B decides he wants to give up that
14 number, does it go back, does it revert to A or to C, or does something else happen?

15 Another question which might be relevant, but is something that we would like to
16 know because it is in our minds, is whether there is a time break between different users of the
17 same number. In other words, if the same number is “transferred”, “acquired” (or whatever the
18 word is) by one user and then he does not want it any more and it goes to a different user, is
19 there a time break between that? Is there a period of three months or six months? That might
20 or might not be relevant to non-geographic, I do not know. It might be a question that relates
21 to geographic only.

22 Also, I think there were published non-confidential papers of Ofcom which might
23 assist us in understanding the background to number portability. We think that that is probably
24 what you have referred to in para. 9 of your skeleton – that you are going to give us a file of
25 those – and that would be very helpful.

26 MR. WARD: Would it be helpful for me to explain what Ofcom did have in mind, because it very
27 much anticipated the questions the Tribunal has just asked, but if you prefer I will come back
28 to that?

29 THE CHAIRMAN: Shall we take it in proper order and see what happens? Thank you. I am afraid
30 that that is all that I was going to say, so Mr. Millard, do you want to address us? Or would
31 you prefer Mr. Ward to go first? It is up to you how you want to do it?

32 MR. MILLARD: I think, ma'am, it would be useful if I addressed the Panel first, and maybe if
33 I could take the liberty of trying to answer the three key questions that you have raised subject
34 to the defendant agreeing to that.

1 A little bit of background, if I may, ma'am. My name is Andrew Millard, and the
2 business is Media Marketing & Promotions. It is wholly funded by myself, I am the senior
3 partner. I have in excess of 20 years' experience in the telecommunications industry both in
4 the UK and within Europe. I am a former director and committee member of ICSTIS (the
5 premium rate regulatory body) and a former director of ATIEP, which was the industry
6 association which merged with the DMA (Direct Marketing Association), and I have been
7 a main board director of numerous telecommunications' companies both listed and privately
8 owned. So hopefully I speak with an amount of experience both at the sharp commercial end
9 as well as at the regulatory end.

10 If I may I will digress and try to answer those three key points because I think it
11 would be useful fairly early on to try and understand. I will, if I may, talk first of all about
12 portability and the background behind it, and I hope the defendant will agree with my
13 summation.

14 In essence, portability was brought in to allow a subscriber to a telephone number to
15 be able to move that number to a different company should that subscriber wish to do so
16 primarily for commercial reasons, and a very good example of that would be if I am a
17 domestic subscriber with a telephone number terminating at my home address and the provider
18 of that was British Telecommunications plc and I decided to move that service to another
19 provider, then that number would go with me and it would be ported by British
20 Telecommunications plc to the new provider. So that was the background behind it. It is
21 exactly the same rationale behind a subscriber to a mobile phone service. You have your
22 mobile phone with an operator, you decide that you wish to move to a different operator but
23 you wish to keep the same handset and that number is ported by the original operator to the
24 secondary operator. It is my understanding – certainly this is what happened in the early days
25 and I will stand corrected if it is not the case any longer – that if you had operator A and that
26 number was ported to operator B and then for whatever reason the subscriber decided actually
27 they preferred operator A that number would be ported back but the two links in the chain
28 would remain. In other words, the original porting would not be taken off, it was ported once
29 and then it was ported back again. That is how it used to operate. I will stand corrected if that
30 is not the case any more, but I think it is useful to understand the chain of events and how
31 numbers move around.

32 It is also my understanding that it is absolutely no different for non-geographic
33 numbers as it is for PSTN (Public Switch Telephone Network) numbers, or any other number,
34 it is exactly the same principle behind it. The only difference is that a non-geographic number
35 is not specific to any location, hence the terminology “non-geographic”.

1 THE CHAIRMAN: We understand that you cannot port from one area to another?

2 MR. MILLARD: That is correct. As an example, if I may, a PSTN (Public Switch Telephone
3 Network) number, for example, the Competition Appeals Tribunal number, which is 020 7979
4 7979 – a very good, memorable telephone number. If you relocated the Competition Appeals
5 Tribunal to an area within the 0207 ability then it could be ported. If you were moving to
6 Leeds, where I am, then there would be no way to port that because that would be 0113.

7 THE CHAIRMAN: You will be pleased to know I think the number has already been ported.

8 MR. MILLARD: Right. You would need to be in the same area. Non-geographic numbers are very
9 different, they are not regionally based and therefore it would make no difference as to whether
10 you were in Aberystwyth, Aberdeen or London.

11 The next question was if the ultimate user did not want the number, for example, it
12 had been with A, B had that number and they moved it to C, and then B decided to give up that
13 number for whatever reason. It is my understanding that it would remain with C. Again,
14 I stand corrected if that is not the case but it is my understanding.

15 In terms of a time break between different users of the same number, there is an
16 industry practice, should we say, that is normally about six months. Some telephone
17 companies, some network operators may have a different principle under which they operate.
18 It depends upon the commercial viability of keeping that number dormant for six months or
19 even longer, but the general rule is about six months. I am aware that British
20 Telecommunications plc has that as a basic principle which, on occasions they do alter, but in
21 the main they keep a number dormant for six months so that hopefully there is no cross traffic
22 that would come across. Further, if I may, certainly under the premium rate guidelines, and
23 I appreciate we are not here to talk about premium rate but that is non-geographic and so that
24 may be useful, within the ICSTIS guidelines and code of practice there is a section which
25 suggests that a number should not be used within a certain period of time for a completely
26 different type of service, to try and separate the traffic or the type of service off it.

27 So that is very briefly going through and I hope trying to answer from my point of
28 view and perspective, and my experience of what I have been through. If you are happy,
29 ma'am and members of the Panel I will move on to the specific points within the agenda.

30 Point 1 is to consider a request for permission to intervene, obviously that relates to
31 the third party in this case. Point 2 ----

32 THE CHAIRMAN: Can I just say there is one point which is not on the agenda, which is
33 jurisdiction, and this is England – there is no interest outside England? I will explain that to
34 you. We have a UK jurisdiction and we have to specify whether we are England and Wales,

1 Scotland or Northern Ireland because the Appeal system is different, and we are acting under
2 whichever Appeal system we are, so we need to say that this is in England and Wales.

3 MR. MILLARD: Thank you. The second part of the agenda is “With the parties to undertake
4 a preliminary discussion of the issues likely to arise in the Appeal”. Whilst I appreciate,
5 ma'am and members of the Panel, that you have papers in front of you that outline a statement
6 of facts from Media Marketing & Promotions (“MMP”) it may be useful just to run through
7 with you the key points of that and the key stages which I think put the whole of this particular
8 case into context and perspective.

9 The non-geographic telephony industry, for want of a better way of putting it, has
10 been in existence for a considerable number of years in the UK – in its infancy still in relative
11 terms to some other countries but, as I mentioned, I have been involved in it for a good part of
12 (if not over) 20 years. In this case there is a third party, prime time radio, of which their
13 representative, Mr. David Atkey, also has equal experience. I say “equal experience”, he has
14 the experience from the user end as opposed to actually the telephony and providing end. I
15 think he actually has even more experience than myself in terms of longevity – more than 20
16 years – because certainly he was using telephone numbers such as this years before that in his
17 former life with a national broadcasting radio station.

18 It has been common practice for as long as I can remember that broadcasting and
19 media organisations have been using non-geographic telephone numbers for a variety of
20 reasons – maybe competitions, brochure request lines, horoscopes – they are used in a wide
21 variety of ways. One of the most prominent and in your face uses at the moment is on national
22 television for vote lines, for example, “I’m a Celebrity Get Me Out of Here”, or the “X
23 Factor”. So they have been well used by the media. Historically, those media organisations
24 have not wanted to set themselves up as what is commonly called an “ISP” (Independent
25 Service Provider), they have not wished to do that, because if they had done that they would
26 have been subject to all sorts of other regulations. They purely have wanted to use those
27 numbers for a purpose and that purpose may have been for interaction with the audience, it
28 might have been to take credit card details as a payment, or revenue generation, or whatever.

29 The range of media organisations I have provided services to in the past have included
30 national newspapers, regional newspapers, national and regional television stations and
31 national and regional radio stations, FMCG, magazines – a huge array – and the same principle
32 has followed all along. A media group has had the option of going to what I would describe as
33 a “network operator” to become an independent service provider themselves, or they have had
34 the option to go to an organisation or company such as MMP who would then run all those

1 services and facilities for them. There are advantages and disadvantages. It is up to that media
2 organisation to weigh those up.

3 One of the advantages of going direct is that you effectively take those numbers from
4 that network operator and you use them in the way you wish, and you have the right, because
5 you are the subscriber, to use those numbers whilst those numbers are approved by the various
6 regulatory bodies as being suitable for such use. Also, if there were revenue generation, the
7 revenue would come direct to you, you would be the subscriber.

8 The disadvantages are that you would be covered by various other
9 telecommunications' regulations and, in addition, you would have potentially very high
10 running costs because you might have to have a team of technical experts organising the
11 routing of those numbers, where calls terminated, what services you were running, maybe you
12 had some what is called "IVR" call handling equipment, whatever it may be – so advantages
13 and disadvantages.

14 You could go to a company like MMP – advantages and disadvantages. The number
15 one disadvantage widely accepted throughout the industry, and in the papers referred to as "the
16 industry norm", is that you would not be the subscriber to those numbers or blocks of numbers.
17 The ISP (MMP in this case) would be the subscriber. You would simply rent those numbers
18 from the subscriber. If you terminated your contract with that subscriber those numbers would
19 be retained by the subscriber, they would not go with you. If you decided that you wanted to
20 run a different type of service and the particular number or numbers were not suitable for that
21 other type of service you could not take them with you, they would be retained by the
22 subscriber and some very good examples of that are certain number pre-fixes particularly on
23 the premium rate non-geographic side that can only be used for certain types of services, for
24 example, adult services, or services costing more than a certain amount of money per minute to
25 telephone. Therefore, it is without question that Mr. Atkey, who was acting on behalf of Prime
26 Time Radio – a brand new digital radio station – when he came to MMP and looked to rent
27 those numbers from MMP fully accepted and recognised that MMP was the subscriber, and he
28 would not have rights to those numbers indefinitely, he was renting them, he was paying a sum
29 of money for the short term use. I can give countless examples, and maybe later when we go
30 through the agenda we might list witnesses who may or may not be called and other
31 documentation that may or may not be provided ahead of the hearing. But, if I could give just
32 two examples of where Mr. Atkey has had situations in the past where he had not been able to
33 retain the use of the numbers.

34 The first was when he worked for an organisation called "Long Wave Radio Atlantic
35 252", the particular radio station is no longer in existence – it used to transmit on 252m long

1 wave from Southern Ireland just outside Dublin. Mr. Atkey was working with an organisation
2 of which I was deputy managing director, TIM (Telephone International Media), we were his
3 service provider. At that time he was renting from us some telephone numbers that were
4 suitable for broadcast on Atlantic 252. One of them was the telephone number
5 (a non-geographic number) 0891 252 252. We (TIM) had that number within blocks of
6 numbers that we had obtained from a network operator. Of course, it was suitable for us to
7 rent that to Atlantic 252, and it was suitable for them to use it because of the last six digits
8 within the number. Mr. Atkey's bosses decided to consolidate their non-geographic telephone
9 business with another provider, and they were unable to take that number with them. That
10 number was retained by TIM. With their new provider they obtained some new telephone
11 numbers which they then used in the future – number 1 example.

12 Number 2 example: Mr. Atkey had effectively been a service provider himself,
13 a subscriber, and you may remember there is someone called Simon Bates, a broadcaster, who
14 I believe is now on Classic FM but at the time was on Radio 1, and Mr. Atkey was acting as
15 his agent. He had a premium rate non-geographic telephone number – it is my understanding,
16 as a subscriber himself – and therefore when Mr. Bates left Radio 1 that number went with
17 him. So Mr. Atkey had experience on both sides of the table, of having to give up numbers,
18 which he freely accepted, and also the ability to retain numbers. So this was a real choice for
19 Prime Time Radio in July 2000, I think it was, when they came to MMP. They could have
20 gone direct to a network operator. They could have got a series of numbers direct themselves,
21 but they chose to come to MMP.

22 Another matter I should mention, which I think might be useful, is that 20 years ago it
23 was relatively easy to obtain from network operators some fairly good what are called
24 “golden” or “memorable” telephone numbers. Nowadays it is pretty difficult. Most of those
25 numbers have been allocated somewhere. Quite a lot of them are not being used, and
26 historically what happens is you have a block of numbers, maybe 100 that are allocated and
27 within every block of numbers there are going to be some pretty good memorable numbers and
28 there are going to be some that are less memorable. Therefore, he was having difficulty
29 obtaining some memorable numbers. MMP had, amongst others, the telephone number 08700
30 50 50 50. Prime Time Radio was a part of the Saga Radio Group aimed at the 50 year olds and
31 over. Therefore, that seemed an ideal number. Mr. Atkey could not obtain that number
32 through any other service provider or go to any other network operator because MMP had
33 subscribed to that number. There are two other numbers mentioned as well, they are all part of
34 the same group but if I may I will just refer to that particular number at the moment because
35 everything carries for all three of the numbers.

1 Therefore, effectively, what Mr. Atkey was doing, he knew (and Prime Time Radio
2 knew) that they had an ability to go to a network operator, but because they were small they
3 had no broadcast track record or history, no one knew how many listeners they had and they
4 were unable to guarantee core volumes to a network operator. They did not want to set
5 themselves up as an independent service provider, and it was convenient because MMP had
6 this and other good memorable numbers that they could rent. That is the background before
7 service started and commenced. I think the rest will probably become clear over time rather
8 than holding up proceedings at the moment, but I think that background is very useful and
9 certainly, as I say, it is the industry norm, and I could roll off a whole list of other examples
10 where major broadcasting organisations, including the BBC, print organisations such as
11 Express Newspapers, Mirror Group Newspapers plc, the National Magazine Company
12 Limited, other radio stations including Scottish Radio Holdings recently sold to EMAP Radio
13 Group plc, and other television stations have had to give up their numbers. So I hope that
14 background is useful.

15 I note that within the papers filed by the defendant – I think it is really quite important
16 to determine whether the appellant provides call conveyance, and therefore whether we are
17 providing an electronic communications’ service, and also to determine who is the subscriber,
18 and hopefully what I have described beforehand has made that fairly clear.

19 I think it should be determined whether the defendant has reasonable grounds to
20 suppose there was a breach of Condition 18 of the Telecommunications Act 2003, whether the
21 appellant’s client, Prime Time Radio was aware at the time that it originally rented the
22 numbers that it would not be able to port them – I think we do need to determine that, and from
23 what I have said I do believe that to be the case. Also, whether the appellant’s client, Prime
24 Time Radio, had previously been able to port the numbers in the past, either in conjunction
25 with the appellant or competitors of the appellant with whom Prime Time Radio or David
26 Atkey had previously dealt with, and the industry norm. The definition of “rental” should also
27 be determined because I think it is very clear, particularly in this case, that Prime Time Radio
28 was renting those numbers from MMP; and the implied and legal rights accruing (or not, as the
29 case may be) to the definition of rental.

30 MMP does not dispute a number of the points made in the notification which is dated
31 26th August 2005 from Ofcom, but would request that some that have been omitted are
32 considered. We need to determine, I think, whether Prime Time Radio had a choice as to
33 whether or not it used MMP’s numbers, and why it chose the former. The potential
34 ramifications of the outcome of the hearing need to be considered, and the determination,
35 because this could have a massive impact on the traditional service provider industry

1 determining who is the subscriber, not only for traditional ISPs such as MMP, but as to those
2 who bundle group traffic, such as the BBC, serviced office locations – this has wide
3 ramifications. Ultimately I think natural law and justice hopefully must be seen to prevail.

4 Those, I think, are the key points that will need to be considered in this matter. I hope
5 that is useful.

6 THE CHAIRMAN: That is very helpful. Mr. Ward.

7 MR. WARD: That was very helpful indeed ma'am, and of course we do not in any way seek to
8 prevent Mr. Millard putting forward whatever case he wishes. On hearing him this afternoon
9 we would submit that the essential case Ofcom is going to run is the same in any event as in
10 our Decision Letter. But as we rather foreshadowed in the skeleton argument there is some
11 new material there which goes beyond what was originally said in his response to us. It may
12 be best, if I may respectfully suggest, if Mr. Millard puts in a witness statement whatever
13 supporting materials we can expect and then, of course, Ofcom could have a chance to
14 consider whether it wanted to put in evidence of its own in respect of that material. That
15 evidence is very unlikely I conjecture to consist of empirical evidence about what this provider
16 does, or that provider, but would be a kind of regulatory perspective on the kind of commercial
17 activities that Mr. Millard has been describing.

18 THE CHAIRMAN: What has been going through my mind when I have been reading it and when
19 I was listening to Mr. Millard is that there are two separate things here, there is regulation and
20 there is contract.

21 MR. WARD: Yes.

22 THE CHAIRMAN: It may be that one needs to look at what happens in the industry, i.e. the
23 contractual position in order to understand the regulatory position. It is a bit of an odd way
24 round – as I say, it “may be”. It may be that one has to start with the Directive, go to the
25 Conditions and then look at what is underneath the Conditions.

26 MR. WARD: Yes.

27 THE CHAIRMAN: But the real issue here is who is a subscriber, and who is ----

28 MR. WARD: A communications provider.

29 THE CHAIRMAN: -- a provider, and that really is the issue.

30 MR. WARD: That is the centre of the whole case. In a sense everything else is peripheral.

31 THE CHAIRMAN: Absolutely, and it may be that Mr. Millard will want to support who is
32 a subscriber by showing what the custom in the industry is and therefore assisting in the
33 background in order to read the Directive.

34 MR. WARD: Yes.

1 THE CHAIRMAN: That is why I said it is rather odd that one may look at the contract to read
2 Directive – well, you would not quite do that, but it is the background.

3 MR. WARD: The Tribunal may find itself with two opposite approaches, in the sense that
4 Mr. Millard may want to go from the contract up in the direction of the Directive and
5 I anticipate Ofcom's Defence will be something like the reverse. It will say that the
6 obligations flow from the Directive and they shape the ability of the contracting partners to
7 contract. To put it another way you cannot contract out of regulatory obligation.

8 THE CHAIRMAN: That is why I have gone down that route is that there is a difficulty in working
9 that out. The conditions are quite recent, are they not?

10 MR. WARD: 2003.

11 THE CHAIRMAN: And what Mr. Millard is telling us about is circumstances which occurred
12 before as well as after, and I am not sure how many of the examples he was giving were
13 examples which were before the conditions as compared with after the conditions. Nor do
14 I know, but I suspect that you are going to tell us, how much of the general background and the
15 working papers and the material that you are going to provide us considered this particular
16 problem, that there were providers doing this, and how that was going to be affected
17 afterwards.

18 MR. WARD: I do not know the answer to that, but one thing I can say that is very much part of
19 what you were just saying, is that the regime has changed a lot over the last 15 years, and
20 number portability has come in in various ways and in various stages to reach the point at
21 which we are now. Indeed, this is what you were saying, it does anticipate something that
22 Ofcom will say, which is that what may have made sense once may not make sense today but,
23 of course, you as a Tribunal are in truth focused on a much narrower question which is as of
24 August 2005 is Ofcom's analysis of the portability requirement correct? But we had
25 anticipated in the regulatory statement setting out a little bit more history as well just so the
26 Tribunal can get the full picture.

27 THE CHAIRMAN: The other matter that was crossing my mind, and I think other people's minds,
28 was the competition aspects of the Conditions – if I can put it that way.

29 MR. WARD: Yes.

30 THE CHAIRMAN: The idea of portability was to encourage competition.

31 MR. WARD: Yes.

32 THE CHAIRMAN: If one looks at it from Mr. Millard's point of view what has happened, I think, is
33 that he will say it is preventing competition but I am not sure, and we will need some help
34 about how you read the Directives and the Conditions in the light of that problem and whether
35 one tries to read them in a way which does not discourage or preclude competition in

1 a particular market.

2 MR. WARD: Yes.

3 THE CHAIRMAN: Alternatively, it might be that it was all considered and it was decided it was
4 necessary.

5 MR. WARD: Again, if I may, I anticipate that what Ofcom are going to say is that in truth
6 Mr. Millard's argument is anti-competitive because of course its effect, if it is right, is to stifle
7 the ability of somebody like PTR to change communications' provider as he wishes to do. So
8 of course from his point of view it is bad for competition because it stops people operating in
9 the way that he wishes to operate, he would say; but from Ofcom's point of view – and again
10 I am only anticipating what may be said – we would say in truth its overall effect is strongly
11 pro-competitive.

12 THE CHAIRMAN: Yes, and but for today's purposes we need to know what material needs to come
13 before the Tribunal in order that we can consider that point. That is an issue I suspect.

14 MR. WARD: Yes, if I may respectfully agree. If I can deal with that, today thus far has been very
15 interesting from that point of view, and has suggested all manner of new inquiries, but the
16 original idea was, really, to provide the regulatory structure and answer the questions about
17 how numbers are allocated, how they may move through the system, and that would be in
18 a sense not really evidence but just regulatory detail. It may be, in the light of the way
19 Mr. Millard is putting his case, something a bit more akin to evidence will be needed. In other
20 words, something more in the nature of Ofcom's position and Ofcom's, if you like, policy
21 perspective on some of the issues that Mr. Millard is raising. It may be that what was
22 originally described as a regulatory summary would be better done as a form of witness
23 statement. Then indeed you would have an official from Ofcom the Tribunal could actually
24 ask questions of, and of course Mr. Millard as well – if there were particular points on which
25 clarity was needed.

26 THE CHAIRMAN: Mr. Millard is very experienced in the industry.

27 MR. WARD: Clearly.

28 THE CHAIRMAN: And it therefore maybe that we can have an agreed statement and define – and
29 refine – the matters which are actually in issue rather than something which is difficult to
30 identify what is in issue and what is not in issue. I suspect from listening to Mr. Millard that it
31 would be capable of doing that.

32 MR. WARD: That may be right, indeed, the core of what Ofcom would put in would be of course
33 the Directive, the Act and the general Conditions, how they all relate. That ought to be totally
34 non-contentious, but anyone can see that there may be further matters that Ofcom wants to say
35 that would be contentious.

1 THE CHAIRMAN: Well there must be something contentious, must there not? Otherwise we
2 would not be here.

3 MR. WARD: As you said, ma'am, in a sense it is a very narrow issue which is to say "Is
4 Mr. Millard's business a communications' provider and was PTR a subscriber?" In a very
5 narrow sense the whole appeal turns on that.

6 THE CHAIRMAN: Yes.

7 MR. WARD: But, as you said, in order to grapple with those issues, and given the way Mr. Millard
8 is developing his Appeal, one is going to have to look wider, think about the economics of it,
9 think about the competition aspects of what we are talking about and, from that purpose, it
10 seems that the Tribunal would, in my respectful submission, be greatly assisted by having
11 Ofcom's view on that.

12 THE CHAIRMAN: Yes.

13 MR. WARD: Really, to agree or rebut the way Mr. Millard is presenting what is essentially
14 a commercial case rather than a regulatory case. So that part may well be highly contentious.

15 The only further thing I would say, if I may – perhaps jumping ahead and apologies if
16 I am – for that purpose it is obviously Mr. Millard has a lot that he would like to advance
17 before the Tribunal, we would, of course, be greatly helped by seeing it in a witness statement,
18 not necessarily in the most formal manner that a solicitor would do ----

19 THE CHAIRMAN: No.

20 MR. WARD: -- but also with whatever documents he wants to rely on in advance and then we can
21 respond to that in an orderly manner.

22 THE CHAIRMAN: Are you saying that you want that before the Defence?

23 MR. WARD: Well preferably. I can say to you today that we are quite prepared to serve the
24 Defence, as indeed we are, but of necessity it will be quite narrow. The Defence will deal with
25 the kind of regulatory framework, rather as it is dealt with in the Decision, and then give rather
26 short answers, I anticipate to the kind of points that Mr. Millard is making.

27 THE CHAIRMAN: We will have to discuss it, but I am talking aloud so that everybody here knows
28 what is going through my mind, it might be better for you to put in your Defence so that you
29 have defined your issues, and then Mr. Millard can come along and say "Actually, you have
30 misunderstood it", whereas otherwise he does not know what you have misunderstood, if you
31 see what I mean. I think that would be better.

32 MR. WARD: I would be very happy with that, if I may say so, subject to one proviso, which is that
33 these kind of wider issues will undoubtedly be dealt with very narrowly in the Defence relative
34 to the way Mr. Millard is going to develop and I would not wish to be back in front of the
35 Tribunal in, say, three months, being told "Well this is much broader than what you said in the

1 Defence”, because while we have a good flavour of Mr. Millard’s position today, it has not
2 been exhaustively set out, he has not purported to, and I simply put a marker down.

3 THE CHAIRMAN: I cannot remember when you need to put in your Defence?

4 MR. WARD: 6th December.

5 THE CHAIRMAN: If, before Christmas – 20th December – Mr. Millard was to put in an answer to
6 that ----

7 MR. WARD: Yes.

8 THE CHAIRMAN: -- then you would know where you were.

9 MR. WARD: We would, although I would again, if I may, reiterate that witness statements and
10 documents in time for us to respond to them would be a huge asset in both answering the
11 Appeal and potentially narrowing the issues. So I am quite happy to accept the suggestion that
12 we put in our defence. I just raise a concern that things may move on and the Defence ----

13 THE CHAIRMAN: Well then we will sort that out so that it can be dealt with.

14 MR. WARD: Of course.

15 THE CHAIRMAN: I think we must not be too technical about the name of documents.

16 MR. WARD: Indeed, nor do we wish to be, if you like, taken by surprise when things go in one
17 direction rather than another.

18 THE CHAIRMAN: We will not let you be taken by surprise. I suppose one of the issues is if the
19 ultimate user in this case is not a subscriber then what is he?

20 MR. WARD: Yes, that is an issue.

21 THE CHAIRMAN: Is he an agent, I suppose, of who ever is the subscriber?

22 MR. WARD: Yes. Of course, ma'am, you appreciate that our case is that the subscriber has
23 a definition in the general conditions and if they are satisfied common law questions of agency
24 would just be irrelevant.

25 THE CHAIRMAN: I appreciate that.

26 MR. WARD: That is Ofcom’s case.

27 THE CHAIRMAN: Yes, or are there two subscribers in this case?

28 MR. WARD: There may well be, and it may well be that ----

29 THE CHAIRMAN: A joint subscriber.

30 MR. WARD: Or rather it may well be the case that Mr. Millard’s organisation is both a subscriber
31 and a communications’ provider; the two are not mutually exclusive.

32 THE CHAIRMAN: Mr. Millard, I am having this conversation so that you can see how one’s mind
33 works. I hope it is helpful to you.

34 MR. MILLARD: It is very useful, ma'am, thank you.

1 MR. WARD: We had intended to say “We will serve our Defence and with it what we call the
2 regulatory summary”. As I said a moment ago the regulatory summary may now in truth have
3 to be evidence. I am quite happy, ma'am, should you wish to so direct that we serve with the
4 Defence what I hope to be at least the non-contentious parts of the regulatory summary,
5 namely if you like the legal clockwork that takes you from the Directive down to number
6 allocation, but then reserving the question whether something further ought to be put in when
7 you have reflected further on what Mr. Millard is saying. I am a little uneasy that Ofcom
8 should simply, if you like, deal with all factual matters on the basis of what is in the rather
9 short Notice of Appeal and the further flavour that we have had today.

10 THE CHAIRMAN: Well I think Mr. Millard did not have very much time to put in his Notice of
11 Appeal, if I remember I think he did it overnight, or something.

12 MR. WARD: It is anything but a criticism.

13 THE CHAIRMAN: No, I appreciate that.

14 MR. WARD: We want to proceed in the most helpful way possible but without cornering my clients
15 and having to anticipate what he is going to say or being put in a position where they have lost
16 the opportunity to respond to some of these wider issues.

17 THE CHAIRMAN: Are the issues wider though, in truth, or is it just the way that it appears or one
18 perceives it, because the question really is “Who is the subscriber?”

19 MR. WARD: That is undoubtedly the narrow question, but if Mr. Millard wishes to present his case
20 on what I call rather loosely the “commercial” footing, then that is something which we would
21 like to respond to.

22 THE CHAIRMAN: I suppose you would say that the normal practice here is that the witness
23 statements etc. should have gone in with the application? Of course he had no time to do that.

24 MR. WARD: I am not taking that point, but of course it is right.

25 THE CHAIRMAN: No, no, and so Mr. Millard must have the opportunity to be able to do that now.
26 Is that what you are saying?

27 MR. WARD: Absolutely, and ordinarily one would expect that to be before they reply to the
28 Defence. How the Tribunal manages that, of course, is a matter for the Tribunal.

29 THE CHAIRMAN: We will have to think about that on our side. What is going through my mind,
30 as I said, is that it might be easier for Mr. Millard if you put in your defence so that he saw
31 where you were coming from, and then he can answer it rather than having an open door which
32 he does not quite know where it is going to go.

33 MR. WARD: I am very happy to do that although what I would say is that it is not completely
34 impossible to see where we are coming from because the reasoning in the Decision Letter is
35 quite full and we do not propose to depart from it, and it represents what will be on any view

1 the core of our case. But I am very, very happy to put in Defence and to give what will be of
2 necessity rather short answers to his points rather, as I have already flagged up, we will be
3 saying one has to look the vertical regulatory relationship rather than the horizontal contractual
4 relationship. But to deal with the factual case we are do need a proper opportunity to put in
5 whatever submissions that are going to assist.

6 THE CHAIRMAN: I can see from the commercial point of view the idea that the business could run
7 on this basis before 2003, and then if you are right that it cannot one needs to justify that jump.

8 MR. WARD: Yes, I do not mean to say that that is our case – it may be. Obviously, our position is
9 whatever you can do commercially is defined by the regulatory framework. You cannot do
10 things that regulations do not allow.

11 THE CHAIRMAN: Was there no regulatory framework at all?

12 MR. WARD: There was, oh yes. Number portability first came in in some instances in respect of
13 certain numbers as long ago as 1991, and it has developed considerably over that period.

14 THE CHAIRMAN: But you are going to explain all this in ----

15 MR. WARD: That is the plan.

16 THE CHAIRMAN: That is the plan, excellent. Right, so what you are really suggesting is either
17 Mr. Millard should have an opportunity to put something else in or you should put your
18 Defence in and then Mr. Millard should have an opportunity to effectively answer your
19 Defence by some witness statements or something of that sort.

20 MR. WARD: Whatever he wishes.

21 THE CHAIRMAN: I think we have to help in the way we do it because it is easier for us if it is done
22 in a way that we are used to.

23 MR. WARD: Of course.

24 THE CHAIRMAN: Then possibly to have another CMC in which we make sure that everything is
25 there.

26 MR. WARD: And anticipating that Ofcom will put in some form of witness statement dealing with
27 the issues raised by Mr. Millard in his pleadings in the loosest sense, whatever form you think
28 fit to invite him to advance his case.

29 THE CHAIRMAN: Apart from your published materials, the historic published materials, is there
30 any documentation that is relevant? Possibly on Mr. Millard's side there may be because of
31 the contracts?

32 MR. WARD: I think the answer is "no". Published materials, including for example Commission
33 Green Papers and the like?

34 THE CHAIRMAN: Yes, that is what I mean.

35 MR. WARD: Not just Ofcom published material?

1 THE CHAIRMAN: No.

2 MR. WARD: What I anticipate ----

3 THE CHAIRMAN: And may be EU.

4 MR. WARD: Yes, absolutely. The other matter that I anticipate, as I have already said, Ofcom may
5 wish to do is to put forward a kind of Regulator's perspective of the commercial arrangements
6 and that would, of course, be a witness statement.

7 THE CHAIRMAN: Yes. But on your side there is no internal documentation that is relevant, apart
8 from that? It is all published stuff?

9 MR. WARD: I will check, but I believe that is right, there are various consultation papers,
10 notices ----

11 THE CHAIRMAN: That sort of thing, yes, it is all in the public domain?

12 MR. WARD: Yes.

13 THE CHAIRMAN: So that it would be useful to have it altogether.

14 MR. WARD: That is what we had anticipated.

15 THE CHAIRMAN: Yes. But on Mr. Millard's side, if he is going to rely on the relationship
16 between ISP or communications' provider or whoever and the subscriber, and/or the end user
17 – if I can call this neutral person the “end user” – then possibly we need to see those
18 documents.

19 MR. WARD: We do.

20 MR. MILLARD: Ma'am, may I intervene? I think it would be very useful, and maybe the Freedom
21 of Information Acts may have to be invoked here, to see the working papers that might have
22 considered this particular type of scenario when it arose within the change from Oftel to
23 Ofcom and the drawing up of the Telecommunications Act because I think the whole thing is
24 going to hang on who is deemed to be the subscriber and whether or not such a situation was
25 considered.

26 THE CHAIRMAN: It is in the published papers, is it?

27 MR. WARD: yes, I must say I would resist that approach; it is a kind of super Pepper v Hart
28 approach.

29 THE CHAIRMAN: Well in Judicial Review it depends on what one is judicially reviewing does it
30 not?

31 MR. WARD: Of course it does. Really the question is what do the general Conditions say? Are
32 they fulfilled? If there are questions of interpretation then one of course may look at the
33 background material (but again the published material) insofar as that may assist. But looking
34 at what may or may not have been thought by an official at such and such a stage whilst
35 formulating a public position is not really going to assist the Tribunal at all.

1 THE CHAIRMAN: I would have thought in any event the first stage is to see the published
2 material?

3 MR. WARD: Absolutely.

4 THE CHAIRMAN: Because if the published material assisted you, you would not need to go behind
5 it, and if it does not assist you the fact that, as you say, people were talking about it I am not
6 sure that would get you home.

7 MR. MILLARD: I think, ma'am, if I may, certainly, yes, first of all the published material should be
8 considered but it may well, and I reiterate this, help the Panel if any working papers that were
9 used to eventually arrive at those Conditions and published papers were supported, because at
10 the end of the day if such a scenario had not been considered at that time, and the conditions in
11 fact do not take account of such a situation, then one has to question the ability of those
12 conditions to be applied throughout the industry, particularly as it has such ramifications.

13 THE CHAIRMAN: But, Mr. Millard, if it is not mentioned in the published materials then you will
14 be able to make that point and you will not need to go behind it and, in fact, it might be to your
15 advantage not to go behind it because it might have been discussed and not got into the
16 published materials.

17 MR. MILLARD: It may or may not, ma'am but what I am here to do is to see fair play for the future
18 of the industry.

19 THE CHAIRMAN: So are we. I will discuss it in a minute but my immediate impression is that one
20 should start with published materials and then if it is not mentioned at all you can make your
21 point. If it is mentioned you can make your point and if it turns out that it is mentioned in
22 a way which looks as if one needs to see the background materials to it then we would have to
23 consider an application.

24 MR. MILLARD: Agreed, thank you, ma'am.

25 (The Tribunal confer)

26 THE CHAIRMAN: I think that is how we would seek to go forward on that. So we cannot really go
27 very much further with the issues.

28 The first question then is whether or not Ofcom should put a Defence in first.

29 Mr. Millard, what do you think about that? You have heard my off-the-cuff thoughts?

30 MR. MILLARD: I think that would be advisable, ma'am, if they submitted their Defence first.

31 I think it has to be filed by 6th December if I am correct, and from recollection a few minutes
32 ago you mentioned a suggested date of 20th December that maybe MMP could then answer
33 some of those points by, so that then it is a level playing field; we all know where we are
34 going.

35 THE CHAIRMAN: Yes.

1 MR. MILLARD: Certainly we would be very happy with that.

2 THE CHAIRMAN: By 6th December are you going to put in this witness statement that you are
3 considering?

4 MR. WARD: Perhaps, ma'am. I say "perhaps", I will just explain why. As I said already Ofcom is
5 completely content to put in a Defence by 6th December, there is not problem on that at all.
6 What it will not do is really address the kind of issues that Mr. Millard has raised this morning,
7 the broader commercial issues, save that it will say that the regulatory determines the
8 commercial, not the commercial determining the regulatory. Mr. Millard's Reply, if you like,
9 may or may not deal with what we say in our Defence, but I am anticipating on the basis of
10 what he said this morning that he is going to want to put in more material.

11 THE CHAIRMAN: Mr. Ward, I understand that point. The question is whether or not there is
12 a basic line which you want to put in at this stage?

13 MR. WARD: What I was going to offer was effectively part 1 of the Ofcom material, which is the
14 hard law, the regulatory stuff which comes down from the Directive down to the general
15 Conditions both dealing with number portability and dealing with number allocation more
16 generally – the really black letter law material – of course only published materials that we can
17 exhibit to that as well, but there may well be a part 2 dealing with Mr. Millard's commercial
18 arguments.

19 THE CHAIRMAN: Are you not intending to address any argument or any defence on the issue of
20 the industry having this particular market at the moment? You are going to wait until
21 Mr. Millard tells you what that that market is?

22 MR. WARD: Well I can only anticipate because, of course, we will have to consider the position.
23 But I think the position at present would be something like this. If the industry operates in
24 a way that Mr. Millard explains, the industry has not taken account of the regulatory reality
25 which is that numbers are portable in the hands of subscribers. Now, I am not in a position to
26 test the factual propositions one way or the other today, nor am I in a position to advance what
27 Ofcom may say about what a regulatory viable trade in gold numbers may look like – or may
28 indeed already be taking place in some sectors of the industry. So we may address that in short
29 form in the Defence, but the detail, in my submission, will have to wait.

30 THE CHAIRMAN: Because I can see that it might be helpful to address it, at least in short form, so
31 that one gets the issue there.

32 MR. WARD: Whilst recognising at the same time that we may have to make that good later.

33 THE CHAIRMAN: Absolutely, but just so that we have the issue there, because we know what the
34 issue is.

35 MR. WARD: Yes.

1 THE CHAIRMAN: And your immediate answer in summary form might be of assistance in the way
2 that Mr. Millard then puts his point.

3 MR. WARD: Absolutely.

4 THE CHAIRMAN: All right, so the Defence is 6th December. Then MMP is going to provide
5 something (we will discuss in a minute what you are going to provide) by 20th December
6 which is a Tuesday – I do not know if you want a bit more time to the end of that week? We
7 certainly do not want after that because it becomes Christmas and New Year.

8 MR. MILLARD: I am happy with the 20th December, ma'am.

9 THE CHAIRMAN: All right. What are you going to put in by 20th December? What were you
10 considering?

11 MR. MILLARD: There are likely to be a number of witness statements of what I would loosely
12 describe as “industry experts” both ----

13 THE CHAIRMAN: Now do we need a number if they are industry experts? Are they going to give
14 expert evidence or are they going to give their own factual evidence?

15 MR. MILLARD: They would give a combination of both, some factual evidence of previous cases
16 and also their experience both from a commercial and a regulatory side.

17 THE CHAIRMAN: I think we will have to see it before we decide what it is. If you have a number
18 of witnesses all saying the same thing then it is not terribly helpful to have five people saying
19 that there is a black telephone, or a rare telephone or whatever it is.

20 MR. MILLARD: I think, ma'am, there will be a number of different statements in which there may
21 be a commonality running through all of them, but they will each elaborate on a specific point.

22 THE CHAIRMAN: Insofar as they agree with other people then that can be dealt with rather than
23 repeated?

24 MR. MILLARD: Yes.

25 THE CHAIRMAN: So you want to put in witness statements, you will want to put in what we
26 would call a “Reply” to the Defence?

27 MR. MILLARD: Yes, correct.

28 THE CHAIRMAN: So we will call it a “Reply” – you are happy with the terminology, are you?

29 MR. MILLARD: Yes.

30 THE CHAIRMAN: Because we are not tied to terminology in this Tribunal.

31 MR. WARD: May I suggest if Mr. Millard wants to give his account of the commercial reality that
32 he too should put in a witness statement?

33 THE CHAIRMAN: Yes. So witness statements including from Mr. Millard, and a Reply to the
34 Defence. You would like to put something in in answer to that?

35 MR. WARD: Yes.

1 THE CHAIRMAN: So we may as well make our directions now. When would you be able to do
2 that by having regard to Christmas?

3 MR. WARD: I am sure that those behind me would like as much time as possible ----

4 THE CHAIRMAN: Yes, apart from that?

5 MR. WARD: It is a question of what the Tribunal will stand for. It may be simple to deal with, it
6 may not. There may of course be difficult issues about just how broad to take Ofcom's
7 evidence. So if I were to at least open the bidding at some time towards the end of January and
8 perhaps then leave it to you, ma'am. Realistically a couple of weeks will be lost there.

9 (The Tribunal confer)

10 THE CHAIRMAN: My two lay members say 9th January. You are going to say that is too soon, are
11 you not?

12 MR. WARD: It will be, I am speaking only for myself, I am going to be away from 22nd to
13 6th January, so I would much prefer we had a chance to give a really considered response rather
14 than merely sticking something in because time is ----

15 THE CHAIRMAN: So you would like until something like 17th January?

16 MR. WARD: At least. I do anticipate this case could be disposed of fairly quickly, especially when
17 we get past this stage.

18 THE CHAIRMAN: Well I am going to fix a date for the hearing on this basis and we will work to
19 a date.

20 MR. WARD: We may well need a further CMC to consider ----

21 THE CHAIRMAN: I will put that in as well.

22 (The Tribunal confer)

23 THE CHAIRMAN: Mr. Millard, we are very conscious of time in this Tribunal, and we normally set
24 very short time limits for all the procedural matters, and we make sure that the hearing comes
25 on very quickly. Why we are having words here is that I am sitting in a case here which starts
26 on 30th January, it involves Ofcom but it is a different team from Ofcom, so it does not matter
27 to them. It starts on 30th January and at the moment it is listed for that whole week. If
28 I propose very short time limits in January we are going to come to a full stop because I cannot
29 sit hearing this case at the time that it would come about, do you see what I mean, on those
30 short time limits. So what is going through our minds is in those circumstances should one be
31 a bit more lenient on time because it is not actually going to make a difference? I do not know
32 what you say about that?

33 MR. MILLARD: I am happy, ma'am, time is not an issue here.

34 THE CHAIRMAN: Time is not an issue, right.

35 MR. MILLARD: It is the principle.

1 THE CHAIRMAN: We appreciate that there is the Christmas period and if by 20th December we
2 have got to the stage of the evidence and the Reply ----

3 MR. MILLARD: Ma'am, can I just interject, can we just clarify the Reply by 5 p.m. on 20th
4 December?

5 THE CHAIRMAN: That is right.

6 MR. MILLARD: Thank you.

7 THE CHAIRMAN: Then you are going away until when, Mr. Ward?

8 MR. WARD: If I recall correctly I am back something like 6th January.

9 THE CHAIRMAN: Which is a Friday.

10 MR. WARD: That cannot be quite right, maybe I am back on Wednesday, 4th in that case – certainly
11 not the following week.

12 THE CHAIRMAN: And you probably need two weeks to do this, do you not?

13 MR. WARD: Well I would certainly like it?

14 THE CHAIRMAN: So if we gave you until the 20th?

15 MR. WARD: I am very grateful.

16 THE CHAIRMAN: What are we going to call it – the Ofcom

17 MR. WARD: Submissions in Response?

18 THE CHAIRMAN: Submissions in Response, yes, including any witness statements.

19 MR. WARD: Yes.

20 THE CHAIRMAN: So that will be effectively your skeleton argument, will it not? We do not want
21 two documents?

22 MR. WARD: It can be. I had not actually anticipated that. I had anticipated that we would put in, if
23 you like, the supporting material that answers as best we can what Mr. Millard has put in, but if
24 it assists the Tribunal ----

25 THE CHAIRMAN: I would have thought you could do the whole job by then.

26 MR. WARD: I should think we can.

27 THE CHAIRMAN: So that it is all in one document, because we do not want lots of documents
28 repeating each other.

29 MR. WARD: No.

30 THE CHAIRMAN: So we have your written submissions in response, including skeleton argument.

31 MR. WARD: Yes.

32 THE CHAIRMAN: So that effectively by the 20th Ofcom's side will be ready, and I think in this
33 case it is probably useful that it is sequential.

34 MR. WARD: Yes.

1 THE CHAIRMAN: So if we then give Mr. Millard – how long do you need? What normally
2 happens at that stage is that before you come and address us you put your arguments down in
3 writing, and we call that a skeleton argument. We try and have short hearings and elaborate,
4 so the idea is to get the Tribunal up to speed, if you see what I mean. How long would you
5 need to do that? Often those are exchanged, but I think in this case it is useful that it is
6 sequential.

7 MR. MILLARD: Thank you, ma'am. I am just looking at my diary, following the
8 20th January ----

9 THE CHAIRMAN: I can tell you it is not good to have too long because if you have too long one
10 gets ----

11 MR. MILLARD: Okay.

12 THE CHAIRMAN: On the other hand I have this fixture in my diary.

13 MR. MILLARD: From the 30th?

14 THE CHAIRMAN: For the week, yes.

15 MR. MILLARD: Well, with respect, from 20th to 30th, although it is actually 10 days it is effectively
16 a working week and my diary does not encapsulate a couple of quite major strenuous mind
17 taxing issues that week, so if I may have the opportunity to reply with the skeleton argument
18 by Friday, 3rd February?

19 THE CHAIRMAN: That is what I was going to say. Is that all right? That will deal with both the
20 legal issues and the factual issues. I am going to put a CMC in at some point, but I am
21 debating when that should go in at the moment. I am looking at the end point and then I am
22 going to go back, because there are other things that need to go in here as well. I am thinking
23 of something around 20th February because one does not want ----

24 MR. WARD: For the CMC or the trial?

25 THE CHAIRMAN: For the trial, because one does not want to be too far off the 3rd February,
26 because being an advocate I know you do not want to do it and then forget all about it. On the
27 other hand, I do not know if there is going to be a little bit of work that you might want to do
28 after you have seen the submissions and therefore I want to leave enough of a gap for you to be
29 able to do that.

30 MR. WARD: As you have just suggested, ma'am, the week of 20th February would actually strike
31 the right balance, with respect. We would have a little bit of time to respond either internally
32 or indeed in writing to whatever Mr. Millard had said and then, as you say, it would still be
33 very fresh.

34 THE CHAIRMAN: Yes.

35 (The Tribunal confer)

1 THE CHAIRMAN: Could we do it on 21st February – it is only going to be a day, is it not?
2 MR. WARD: Well that in a sense is one of the issues that still remains. We certainly anticipated
3 a day.
4 THE CHAIRMAN: Shall we fix it for two days?
5 MR. WARD: I think it may be safe given that now there may be witnesses who need to be heard
6 – hopefully not.
7 THE CHAIRMAN: Hopefully we all get around that problem.
8 MR. WARD: But just in case.
9 THE CHAIRMAN: It is much easier in this Tribunal if we can do it.
10 MR. WARD: Of course.
11 MR. MILLARD: Ma'am, can I make a request that it actually does slip by one day to the 22nd, that
12 would be enormously helpful.
13 THE CHAIRMAN: That has a problem here.
14 (The Tribunal confer)
15 THE CHAIRMAN: The 22nd and 23rd. Now, working back from that, one of the things that I think
16 may be important is a list of issues and I suggest that what we do is to put something in after
17 3rd February, maybe 10th February – an agreed list of issues? I know that is a slightly abnormal
18 way of doing it, but I think it may be sensible. So agreed list of issues 10th February. Now,
19 I suggest that we have some sort of agreed bundles, because it looks as if there is going to be
20 some paper here. I suggest, Mr. Millard, that since there is a team on the other side that we ask
21 them to prepare them.
22 MR. WARD: That is fine.
23 MR. MILLARD: Thank you, ma'am.
24 THE CHAIRMAN: The question is how we do that, because it is awful if we have documents all
25 over the place and if there is evidence attached to witness statements and it becomes very
26 difficult to manage.
27 MR. WARD: We ought to have all the documents in the case, if everything goes according to plan,
28 by the 20th January save for the further skeleton and save for the list of issues.
29 THE CHAIRMAN: We should not have any evidence ----
30 MR. WARD: They should not contain any evidence, so if you want to perhaps make a direction that
31 bundles be prepared as soon as practicable after 20th January.
32 THE CHAIRMAN: And before 3rd February so that the skeleton argument can deal with documents
33 in the order. You will have done some sort of bundling process for the 20th January.
34 MR. WARD: I imagine we will have, yes.

1 THE CHAIRMAN: So why do we not say bundles by 27th – that would give you a week, would it,
2 from 27th to the 3rd – so you will have a bundle to finalise your documents. Is that all right?
3 So agreed bundles of documents by 27th January. Can we have them in accordance with the
4 CPR Rules? You know what I mean?

5 MR. WARD: Perhaps you would just indicate what you mean?

6 THE CHAIRMAN: If there is evidence, documentary evidence attached to the witness statements,
7 then it is useful to put that in chronological order, and you are going to produce a bundle of the
8 underlying materials – you can use the same bundle, but that ought to be produced in some sort
9 of chronological order so that we can see the history of it. If there is not a better way then the
10 answer is chronological order, and earliest date first, not earliest date last – it is I think the CPR
11 Rule is the earliest date first. The witness statements can just be a bundle of your witness
12 statements, and a bundle of Mr. Millard’s witness statements.

13 MR. WARD: Hopefully they will not be so voluminous so as to need that many bundles?

14 THE CHAIRMAN: You see what I mean?

15 MR. WARD: Of course.

16 THE CHAIRMAN: And there is a practice developing where there is correspondence that every
17 letter is divided by a divider, please do not use that practice. I doubt whether there are going to
18 be letters here, but that practice is very annoying.

19 MR. WARD: I would not anticipate the need to put correspondence in the bundle at all, so we will
20 not burden you just for the sake of completeness.

21 THE CHAIRMAN: Right, would there be anything else that is needed for the hearing?

22 MR. WARD: No, the only issue will be whether there is cross-examination.

23 THE CHAIRMAN: We need to know that. I would suggest sometime after the 20th January when
24 your Submissions in Response go in is when it is going to become apparent what other further
25 directions we need.

26 MR. WARD: It occurs to me that it may be prudent to wait for Mr. Millard’s skeleton argument
27 because then the door will hopefully have closed on any further expansion or shifting of
28 grounds on either side.

29 THE CHAIRMAN: The problem with that is there are only three weeks to the hearing. If we did it
30 on 20th January there is some flexibility and also it might help Mr. Millard in doing his
31 skeleton argument, because it might define the issues a bit more.

32 MR. WARD: Fine.

33 THE CHAIRMAN: It would also mean that we could discuss rather than conclude the list of issues.

1 MR. WARD: The only difficulty that would create on our side, I suspect, is that my clerk has told
2 me I am not actually available in that last week in January, but of course someone else can
3 come in my place.

4 THE CHAIRMAN: Well I do not particularly want that to happen, which week is the last week in
5 January?

6 MR. WARD: Actually he has said "Avoid the 16 to 20th, and avoid 23rd to 30th, but if you like I can
7 press him, I can ring.

8 THE CHAIRMAN: Have you got a phone there?

9 MR. WARD: I have.

10 THE CHAIRMAN: Do it here, just do it in front of me. The date that would be useful to do it
11 would be 24th.

12 MR. WARD: (After telephone call) That was a good idea, ma'am. In fact, my clerk had mixed up
13 dates to avoid with dates available.

14 THE CHAIRMAN: Sorry about that, Mr. Ward.

15 MR. WARD: Well I was a bit surprised and flattered to think I was so in demand in January. Any
16 time that week would be fine.

17 THE CHAIRMAN: At the moment I would suggest the 24th or 25th, but I think 24th is better for you,
18 is it?

19 MR. MILLARD: Ma'am, I am sorry to be difficult again, 24th is not good for me, 23rd, 25th, 26th or
20 27th.

21 THE CHAIRMAN: I cannot do 23rd. I will say it aloud so everybody knows what I am trying to do.
22 Ofcom's submissions are coming in on the 20th, which is Friday. Your submissions are
23 coming in on the 3rd, which is also a Friday in two weeks' time, and what I was trying to
24 organise was something so that you at least had the weekend, plus the rest of next week, do
25 you see what I mean?

26 MR. MILLARD: I will arrange my diary, ma'am, and I am happy to go with the 24th.

27 THE CHAIRMAN: Are you sure?

28 MR. MILLARD: Yes.

29 THE CHAIRMAN: I was only trying to do it for your purpose – 24th.

30 MR. MILLARD: For the case management ----

31 THE CHAIRMAN: CMC, at 10 or 2 it does not matter.

32 MR. MILLARD: 2 o'clock.

33 THE CHAIRMAN: 24th January 06, CMC, and we would want is to discuss a list of issues,
34 directions in relation to oral evidence. Anything else? Those are really the two matters I can
35 think of now.

1 MR. WARD: No, thank you, ma'am.

2 THE CHAIRMAN: And whether one or two days for length of hearing? Mr. Millard, if you are
3 going to have witnesses, and because we will not know until the 24th January whether they are
4 going to be required to be cross-examined, do you think you could make sure that your
5 witnesses are available and keep in their diaries 22nd and 23rd February?

6 MR. MILLARD: I will do my best, ma'am, thank you.

7 THE CHAIRMAN: The same applies to you.

8 MR. WARD: Of course.

9 THE CHAIRMAN: Going back to the agenda. We have dealt with “3. Documents” – oh, issues
10 arising relating to confidentiality. You raised the question about the Decision, whether there is
11 a confidential and a non-confidential version.

12 MR. WARD: We have pointed out that there are two versions. The confidential version was put in
13 and Ofcom has no submission either way as to which is used.

14 MR. MILLARD: I would request, ma'am, that the non-confidential version is used. I did not receive
15 a hard copy of that, although of course that is actually posted on the worldwide web.

16 THE CHAIRMAN: You do not have any confidences within the Decision.

17 MR. MILLARD: Within the notification that was submitted it does refer to a sum of money and
18 I would prefer that that does remain confidential.

19 THE CHAIRMAN: So we want to use the non-confidential version.

20 MR. MILLARD: I have not received to date a non-confidential version of that notification, albeit it
21 is actually published on the worldwide web. But in submitting the papers the only hard copy
22 I had was the confidential version.

23 MR. WARD: Well we will of course include the non-confidential version in the bundle.

24 THE CHAIRMAN: Of course, this Tribunal sometimes has a difficulty, I do not know if it is
25 confidential or not, but I suppose if we use the non-confidential version for the time being.

26 MR. WARD: Mr. Millard has pointed out the respects in which it is. I am sure those behind me can
27 send you a non-confidential version immediately if that would be helpful.

28 THE CHAIRMAN: Are there any third party issues on the confidential version?

29 MR. WARD: No.

30 MR. MILLARD: No.

31 THE CHAIRMAN: Witnesses we are going to deal with next time. Agreed facts, that hopefully will
32 come out when one looks at the submissions.

33 MR. WARD: Yes.

34 THE CHAIRMAN: Timetable, we have dealt with that. No further issues? Do you want to raise
35 anything else?

1 | MR. MILLARD: I would just like to thank you, ma'am, and the Panel for this afternoon.

2 | THE CHAIRMAN: Thank you both.

3 | (The hearing concluded at 4 p.m.)