

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. 1053/3/3/05

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

26 January 2006

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

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

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

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 CHAIRMAN: Good afternoon. Can I begin by thanking you both for the written materials that
2 have been submitted in this case, and also the list of issues which arrived recently? You may
3 or may not have had an opportunity to look at the list of issues, but hopefully there will be
4 some discussion today – I thought it would be useful that we have something, I hope you do
5 too.

6 I have one comment or point to make out of the materials. If one looks at Article 2C
7 of the Universal Services Directive (divider 13) there is a definition of “publicly available
8 telephone service”. If one then goes to divider 16, to the general conditions and to Part 1,
9 which is where the general definitions are, about four pages in there is a definition of “publicly
10 available telephone service” and, for the purposes of this case, I do not think there is any
11 material difference between that definition and the definition in the Directive; certainly I think
12 in the very helpful summary of the regulation, you say there is no difference.

13 Now, what the definition says is that it means “... a service available to the public for
14 originating and receiving calls”, but then when one turns to General Condition 18 itself, the
15 way that the general condition has been drafted is that there is the original definition and then
16 there are specific definitions of the various General Conditions contained in the document, and
17 there is another definition for the purposes of General Condition 18 of “publicly available
18 telephone services”. That definition says “... available to the public for originating and
19 receiving or only receiving.”

20 What we are wondering – and you have probably realised what we are wondering – is
21 what is the justification for inserting the words “only receiving”, and does the insertion of
22 those words comply with s.47 of the Communications Act – the: objective justification,
23 non-discriminatory, proportionate and transparent, requirements? It may or may not be
24 relevant, and that depends on whether the MMP service which they provide is one that only
25 receives calls or one that originates and receives. Our understanding at the moment is that it
26 may be that it only receives, but again that is a matter that might need to be explored. I do not
27 expect that to be addressed today, but I wondered if that might be something that could be
28 addressed in the skeleton argument?

29 MR. WARD: Ma’am, it most certainly will be addressed in the skeleton argument, but if it is
30 helpful, just to anticipate where it will be put in the skeleton argument, I can tell you now if
31 I may what it is that is currently intended to be said on the subject. Very, very briefly, of
32 course you are quite right in the points that you have made thus far. Ofcom’s view on this
33 really operates at two levels. One is that to make sense of the Directive in respect of number
34 portability it is necessary to extend the definition of public available telephone services to
35 encompass incoming services only, and I will show you why in a moment. Secondly, it is

1 perfectly permissible under the Community regime for the domestic definition used in the
2 context of general number portability to be actually slightly more extensive than that which is
3 provided by the Directive, because of course the vires for this is not the European
4 Communities Act. So the Article operates at both levels; I can give you a little more detail
5 now if you prefer but rest assured we will most certainly be dealing with that point.

6 THE CHAIRMAN: We thought we ought to raise it; I am pleased you are going to deal with it.
7 I think it is probably better to deal with it in full in the skeleton rather than try and do it today
8 – are you happy with that?

9 MR. WARD: Yes, ma'am.

10 THE CHAIRMAN: So that really leaves the matters for the CMC today, and that is the oral
11 evidence of Mr. Millard and whether there should be cross-examination. At the moment we
12 are unsure as to the reasons why there should be any cross-examination. We have another
13 point about the bundles; it seems that they have been prepared in a very useful way. The
14 Defence and the way it has been set out is very useful; (to Mr. Millard) the way you have done
15 yours is very useful too. It is probably not economical now to put them together because they
16 can be used independently. However, the pages in the bundles are not numbered and, having
17 worked on them today, that became obviously a disadvantage because we did not know which
18 pages we were talking to each other about, so we need to number them. I do not know what is
19 the most economical way of numbering them, especially as for our part some of these bundles
20 have now been marked.

21 MR. WARD: Might we think about this, ma'am?

22 THE CHAIRMAN: Yes, because normally if it is put through the photocopier the photocopier now
23 numbers it. I assume that Ofcom have those sort of photocopiers?

24 MR. WARD: No.

25 THE CHAIRMAN: You do not, so you have to hand number anyway. But then, normally, you
26 would hand number one copy and then put it through the photocopier so everybody gets the
27 same numbers. If you have to do it on each page it is a bit of a problem.

28 MR. WARD: There may be no realistic alternative, ma'am.

29 THE CHAIRMAN: It may be cheaper just to do it again. I do not want to cause you an
30 uneconomical way of doing it. On the other hand, I think it is going to be very difficult for you
31 to say for example, "Well, it is the 15th page on divider 4."

32 MR. WARD: How many numbered bundles would the Tribunal require?

33 THE CHAIRMAN: 5 plus yours.

34 MR. WARD: It is obviously sensible and necessary, so ...

35 THE CHAIRMAN: Yes, it is unfortunate that they were not numbered. (To Mr. Millard) Your set

1 – I numbered a set this morning. I do not think this is a difficult job because we could all
2 number it the same as I numbered it, and I called **this** sheet “1”, and if I called **this** sheet
3 “1” I then went through.

4 MR. WARD: Can we take one other point of reference in your bundle?

5 THE CHAIRMAN: Yes, just to make sure.

6 MR. WARD: For example, the first page of the supplemental material after David Redmiles’
7 statement, I actually have a blank page and then I have something headed “Section 2 Ofcom’s
8 Investigation and Reasoning”.

9 THE CHAIRMAN: Section 2 I numbered as “19”. All the blank pages have been numbered
10 because I was quite lazy and I only numbered the odd pages.

11 MR. WARD: What is your last page number?

12 THE CHAIRMAN: 55. I hope that works. Is that right?

13 MR. MILLARD: Yes, good afternoon, ma’am, members of the Panel. First of all, may I say it
14 makes perfect sense; and secondly, can I apologise for not numbering my bundle, but I am
15 slightly inexperienced in these matters as all in this room I am sure will appreciate.

16 THE CHAIRMAN: Well Ofcom did not number their bundle either.

17 MR. MILLARD: And I simply followed Ofcom’s pattern here, so I do apologise for that.

18 THE CHAIRMAN: Do not apologise. It is 55 pages, is it?

19 MR. MILLARD: I will need to count, ma’am, but certainly pages 1 to 19 your numbering tallies
20 with mine.

21 THE CHAIRMAN: So it is probably right. So if we just do that we all have the same, and it does
22 not take very long for each of us to do that.

23 The matters we now need to discuss are: Mr. Millard’s cross-examination, the new
24 dates for the various things that need to be done before the hearing, and the hearing date will
25 be 22nd/23rd February. It seems to us that in relation to skeleton arguments Mr. Millard’s
26 documents can stand as his skeleton, and all we need is the response. Are you happy with that,
27 Mr. Millard?

28 MR. MILLARD: I am, ma'am. Just before we do move on, if I may seek leave to clarify a couple of
29 issues that arose in the last case management conference, because I think that would actually
30 be very useful. May I do that?

31 THE CHAIRMAN: Yes.

32 MR. MILLARD: There was an issue raised at the last case management conference regarding the
33 porting of numbers and operators A, B and C were referred to. At that time, my response on
34 p.4 of the transcript of 23rd November (lines 11-14) I made it clear that I was not 100 per cent.
35 sure of what I was saying and I would stand corrected if that was not the case. I have to say

1 I have subsequently been corrected – and I would like to bring that to the Panel’s attention – by
2 Ofcom within their bundle. I am not quite sure how to refer to that because obviously you do
3 not have a numbered Ofcom bundle at the present time.

4 THE CHAIRMAN: Are you saying you accept what Ofcom are now saying?

5 MR. MILLARD: Yes, that if you have operator A and a subscriber B, and subscriber B ports the
6 number from operator A to operator C, and B then ceases to provide service, the number does
7 not remain with operator C it reverts back to operator A. As I mentioned, ma'am I did
8 potentially stand corrected because it was my understanding and I have been corrected in that.
9 But if I may move it on a little bit further to introduce another element which might help
10 clarify for the panel’s sake when they are looking through the bundles, and that is that if we
11 have operator A and operator C, and subscriber B, and then we have another organisation (such
12 as PTR in this case) as being D, and D is lent the numbers by B, if B has ported from A to C
13 and D decides to cease service then the numbers do remain with C, it is at the discretion of B.
14 So B being the immediate subscriber has that discretion on how those numbers are ported.

15 THE CHAIRMAN: Is that accepted or not? You do not know?

16 MR. WARD: I do not know actually – I am not even sure I recorded it correctly. Perhaps when we
17 get the transcript we will look at it and ----

18 THE CHAIRMAN: Make sure it is in the skeleton.

19 MR. MILLARD: Thank you, ma'am, for that. There is a second point about whether there was
20 a dormant period? I think in Ofcom’s bundle they refer to this as being “sterilisation”. At the
21 time I gave an example by saying that certainly as far as I was aware British
22 Telecommunications PLC had a general corporate policy to lie dormant, or sterilise a number
23 for potentially around a six month period. Of course, in that situation I was referring to where
24 an operator was allocating a number to a direct subscriber. If I may elaborate on that? If
25 company B (in this instance MMP) was loaning their number to D (PTR) and PTR ceased
26 service then it would be the subscriber’s choice as to whether they kept that number dormant
27 or not and for how long. Of course, the reality is that that number is used virtually straight
28 away for pure commercial reasons, so I hope that clarifies the matter.

29 THE CHAIRMAN: Thank you very much. You can deal with both those points when you have
30 seen them in the transcript and they can go into the skeleton.

31 MR. WARD: Can I just ask Mr. Millard, when he said “subscriber’s choice” who did he mean by
32 “subscriber” in that context? Just so that we understand the point being made.

33 MR. MILLARD: B, which is MMP, so it is the subscriber choice, MMP choice as to whether that
34 number is re-used or not immediately, because B is the subscriber to the operator.

1 THE CHAIRMAN: Shall we deal with Mr. Millard's cross-examination? We probably need to open
2 his witness statement.

3 MR. WARD: Yes. I should say, ma'am, in drafting the skeleton we were conscious that the
4 directions did not provide for a decision to be made about this today. We were more raising
5 a possibility here. I should also say that if there were to be any cross-examination I anticipate
6 it would be very short indeed. Really, it only arises, if at all, in relation to what Mr. Millard
7 said in para.5 about facts on the ground. What we tried to make clear in the skeleton argument
8 is that there is quite a lot of material in the witness statements that we do not accept. We
9 would not want to be taken to accept it, but we do not see the need to establish ----

10 THE CHAIRMAN: It is a question of what its relevance is?

11 MR. WARD: Absolutely, and it is really para.5 where Mr. Millard talks about the kind of market
12 value of these numbers, and we will be making assertions about how the market works, and
13 you may wish them to be put to Mr. Millard. It may be that there is no dispute about them by
14 the time we have served our skeleton argument and explained our position.

15 THE CHAIRMAN: So you think it is premature to ----

16 MR. WARD: I think it is premature, but I do not think there is any cause for concern in the sense
17 that it is not going to be like "replica kit", if we are cross-examining on this it will be short. To
18 step back from the issue, if I can just remind the Tribunal, we said all along in a sense that the
19 broader commercial arguments are not really at the heart of this case, but nevertheless they are
20 raised in the Appeal, and we are going to seek to deal with them. As we said in the skeleton
21 argument the way we propose to deal with them in a sense is a kind of argument based on
22 regulatory logic which says that there are perfectly coherent ways for resellers and
23 intermediaries to make a profit or charge fees at least in respect of golden numbers. It may be
24 that the model Mr. Millard is explaining that he has operated is not one of them, although that
25 is not really primarily for us to say. We have also said that we found some examples of how
26 other people do indeed charge for this kind of product by just looking on the internet, and we
27 can put those in if that would be helpful. Otherwise we will simply be arguing as a matter of
28 logic how it can be done.

29 To give you the flavour one of the things we will be saying is if numbers can be
30 ported away from an intermediary then one way that revenue can be extracted from them is by
31 charging a fixed fee rather than what Mr. Millard has characterised as a "rental" from the
32 number. I do not want to open any of those arguments before you today. I am more indicating
33 the kind of issue which may arise – given the way the appeal has been presented – it has never
34 been Ofcom's case that these things really are at the centre of the issue here. Ofcom's case is
35 that this case really is about applying a series of regulatory definitions which interlock to the

1 facts; and in fairness to Mr. Millard that is part of his case too. But the issue which has always
2 been in the background of the appeal is that he has put forward a case which just says what
3 Ofcom is doing destroys this perfectly legitimate industry. Our answer is to say that it may not
4 destroy it, it may just have to adjust to operate within the regulatory framework which applies.

5 THE CHAIRMAN: So what you are really saying is that in order for us to really understand the
6 regulatory framework in the background and matrix of a contractual sense ----

7 MR. WARD: Yes.

8 THE CHAIRMAN: -- it would be useful that we understood a little bit more about how this part of
9 the industry works, and what is being sold?

10 MR. WARD: If I may, I would not actually put it quite as high as that. I would put it **this** way, it is
11 being asserted by the Appellant that you must interpret these provisions in a certain way. In
12 part, although exclusively because he says to do otherwise is effectively to ruin the business of
13 people in a similar position to himself. Our first answer to that is ----

14 THE CHAIRMAN: The regulation is there.

15 MR. WARD: -- it is vertical and that is the end of it. But then our other answer to that is to say "No,
16 there are perfectly sensible ways for people to operate within this regulatory framework". It is
17 not a commercial nonsense, it is a competition necessity and a perfectly sensible proposition
18 from the point of view of commercial logic. So we will be advancing a case on commercial
19 logic.

20 We have not sought to call a witness to say "In my experience of the industry ..." so
21 on and so forth. What we were going to do is to make submissions about it and, if it would
22 assist the CAT, also hand in some examples of what we have found by no more than just
23 browsing on the internet, and looking what other providers do.

24 THE CHAIRMAN: This may go to s.47 may it not?

25 MR. WARD: It may do.

26 THE CHAIRMAN: Whether it is thought of at the time you made the regulations – there may be
27 a question that it is something that was after the event. Mr. Millard would like us to have seen
28 that material, as I understand it.

29 MR. MILLARD: Yes, ma'am, I think that would be useful, but I think this now opens up a much
30 wider issue, because up until this point the Defendant has maintained that this is a very clear
31 cut case on the general conditions 18.1 and 18.2; now they are actually starting to look at the
32 commercial reality of this, and whether ----

33 THE CHAIRMAN: Well I think they are saying that we could do it just on the regulations but since
34 you have opened up the commercial reality they are prepared to meet that argument as well.

1 MR. MILLARD: And I accept and understand that, ma'am, in which case I would like to explore
2 that further.

3 THE CHAIRMAN: I think the way forward on this is that there needs to be some agreement
4 between you as to the material that is presented to us. I do not think that it is appropriate that
5 you present the material and Mr. Millard says "Actually that is not correct", etc. So I think we
6 will need some way that you present the material and see if we can get an agreed document
7 which we can look at, which is the background of the commercial use of numbers – or
8 however one puts it.

9 MR. WARD: That is fine, ma'am. In a sense what we present will have two or possibly three
10 elements. There will be the submissions, which we will make in the skeleton argument. There
11 will be examples that Ofcom has been able to find of how other organisations are marketing
12 golden numbers. Then there is a third element, which I have not yet mentioned but rate now as
13 a possibility, namely in considering the regulatory summary that we have put in, and
14 considering the complexity of the regime, we did think that it might be of assistance to the
15 Tribunal if, during the hearing, we have available an official from Ofcom who could
16 conceivably give some evidence if, for example, there were questions the Tribunal wanted to
17 ask about the regime, which I would not be perhaps best equipped to answer if they are broader
18 or deeper, or more practical and less legal. We were not proposing to serve it as a witness
19 statement; we were not proposing to rely on anything that was said, but rather just to have
20 someone available if it would be helpful.

21 THE CHAIRMAN: There is no reason why you should not have somebody sitting behind you who
22 could assist you and, of course, that would possibly – depending on what happens – be a very
23 useful matter. For my part, I am always very flexible about who, at the end of the day,
24 addresses me if it is a technical matter. I am not saying "yes" or "no", but ----

25 MR. WARD: No, no, I thought it best to mention it now – if it is helpful we will have it available
26 rather than a witness who we want to rely on.

27 THE CHAIRMAN: I can see it is useful for you to have somebody sitting behind you and if it turns
28 out we go down a particular line of interpretation then at least you have an expert behind you
29 who can assist you – I am not sure he can give evidence on the law ----

30 MR. WARD: No, no, certainly not, but there may be explanation that he can provide.

31 THE CHAIRMAN: We will have to take it as it is; it is for you who sits behind you, but I can see
32 that that is a useful thing to do.

33 MR. WARD: I thought it best at least to mention it now as it was in our thoughts.

1 MR. MILLARD: Ma'am, if I may? As the Defendant has been seeking leave to file further evidence
2 effectively MMP would like to seek leave to file further evidence at a later date if possible, and
3 also to ----

4 THE CHAIRMAN: On what?

5 MR. MILLARD: Well here, ma'am, there is a paper that has been submitted for consideration today
6 where Ofcom is seeking leave to file further short regulatory statements and therefore
7 evidence.

8 THE CHAIRMAN: Well as I understand it, what they are going to put in is purely statutory
9 material ----

10 MR. WARD: Exactly.

11 THE CHAIRMAN: -- so it is not evidence in that sense, it is statutory material.

12 MR. WARD: Although they have requested to submit further evidence which is available on the
13 internet.

14 THE CHAIRMAN: No, that is why I said there has to be an agreed ----

15 MR. MILLARD: Right.

16 THE CHAIRMAN: In relation to the statutory material, is there any other statutory material that you
17 would want to put in that is not before us?

18 MR. MILLARD: In terms of statutory, ma'am, I do not think there is.

19 THE CHAIRMAN: So in relation to what they say in para.2 there is nothing that you would want to
20 add?

21 MR. MILLARD: With respect, ma'am, I will need to consider this very carefully because this was
22 actually submitted yesterday – late in the day.

23 THE CHAIRMAN: If there is statutory material that you want to put in then I am sure there will be
24 no problem that you can provide it and then you can address us on it. In relation to this
25 evidence from the internet or wherever it is from, it may be you will want to discuss this, but
26 should I say what my view is at the moment? (The Tribunal agree) It seems to me the right
27 thing to do is that we do not wait until you put in your skeleton – you know what that material
28 is now – but you show it to Mr. Millard ----

29 MR. WARD: Certainly.

30 THE CHAIRMAN: -- and that Mr. Millard has then an opportunity to agree whatever that material
31 is. If he feels that there is some other material that ought to go in then he can show it to you
32 and since this is all apparently public material there should be no problem about agreeing that
33 as well, then you will have an agreed bundle of this type, or categorisation of material which
34 can then be provided to us.

1 MR. MILLARD: Ma'am, may I therefore request leave possibly to call upon a witness, or further
2 witnesses to answer any issues that may arise as a result of that additional material?

3 THE CHAIRMAN: Well since we do not know what is in this material at the moment I do not think
4 we would be prepared to do that at the moment. It should all be able to be done by showing us
5 some written material.

6 MR. WARD: Ma'am, of course I am quite content with all of that, but I would like at least to
7 re-emphasise that the primary case is all in the legislation ----

8 THE CHAIRMAN: I appreciate that.

9 MR. WARD: -- but then the secondary case is that the commercial logic can be inferred from the
10 legislation in any event. This empirical case, if you like, is very much a tertiary case and it is
11 very much in response to what has been put to us.

12 THE CHAIRMAN: I do not think we want to spend too much time or effort on this part, because the
13 main part is the regulatory part.

14 (The Tribunal confer)

15 THE CHAIRMAN: So does that leave us with the timetable? Is there anything else in your written
16 submissions for today that we have not dealt with?

17 MR. WARD: I do not think so, ma'am, no.

18 MR. MILLARD: Ma'am, the written submission that was made by the Defendant was made
19 yesterday and I received it late because I was out of the office all of yesterday and, to travel
20 here in time for today, I was catching a train early this morning, and therefore I was literally
21 looking through it whilst on the train. I do believe there are a considerable number of other
22 issues and questions that need to be considered, and I would like to seek leave to supply
23 a detailed list of those in good time, if I may?

24 THE CHAIRMAN: The only thing that was being addressed in the submissions from Ofcom for
25 today was what needed to be dealt with today – right? Are there any other matters which are
26 preparatory and need to be dealt with before the hearing?

27 MR. MILLARD: I do not think so, ma'am.

28 THE CHAIRMAN: So I do not think there is any problem in that. There is nothing in **here** which is
29 to do with the substance of the hearing, it is only to do with the preparation for the hearing, and
30 how we deal with that today. The only matter, as I understand it, evidentially, which arises is
31 these examples of how, in the commercial world, portability of numbers is being dealt with,
32 and that hopefully there will be an agreed bundle of examples. There is nothing else that you
33 thought up in the train?

34 MR. MILLARD: I do not think so, ma'am, I was just thinking of questions.

1 THE CHAIRMAN: I suspect what you thought up was all to do with the substance which you will
2 deal with at the hearing?

3 MR. MILLARD: Yes.

4 THE CHAIRMAN: So the next matter is the issues. You may or may not have received for looking
5 at on the train the draft list of issues – did you receive them?

6 MR. MILLARD: Yes.

7 THE CHAIRMAN: Have you looked at that on the train?

8 MR. MILLARD: I did, ma'am, and that was incorporated in the pack that I was reading on the train
9 and I do have some further issues which I think need to be added to that, if I may.

10 THE CHAIRMAN: Right, well in relation to that I suggest that there is some discussion, because
11 Ofcom have prepared a very full list – I am not saying that it is the final list – but they have
12 sought to encompass some of your points at least.

13 MR. WARD: We have actually sought to encompass all of them, even if in short form. If there are
14 further issues that Mr. Millard wants to raise of course we would at least like to know what
15 they are in good time draft them.

16 THE CHAIRMAN: What I was going to suggest, as Mr. Millard is here and he does have notes
17 from the train, that perhaps after this hearing and before everybody leaves, you could discuss
18 that and agree a list of issues, because that would give you an opportunity to do it.

19 MR. WARD: I am sure we would be happy to do that. If I may just register one concern, obviously
20 there will be a little anxiety on our side if the issues do not seem to be the ones in the
21 pleadings, because we rather thought we had – at least in summary form – extracted all the
22 issues.

23 THE CHAIRMAN: I suspect if you talk outside – we will still be here, so if there is a problem you
24 can come back.

25 MR. WARD: That is very kind of you.

26 MR. MILLARD: Thank you.

27 THE CHAIRMAN: I think that is the way to deal with it.

28 MR. MILLARD: Yes, I think that would be useful, ma'am, but as I say there may well be further
29 issues that I may wish to add to that because I have been given such a limited time frame to
30 consider these.

31 THE CHAIRMAN: Yes. On our looking at this it appeared to us to encompass the issues which had
32 been raised in your documents, but you may say “no”, so I suggest you discuss it and see
33 where you get to. I think that is better than airing it here, and we will adjourn for half an hour
34 so that you can do that.

35 In relation to timetable, if we work back from 22nd/23rd February we must give

1 Mr. Millard sufficient time to be able to consider your skeleton argument and to be able to
2 prepare his submissions.

3 MR. WARD: Yes.

4 THE CHAIRMAN: Shall we ask Mr. Millard how long he thinks he needs to do that?

5 MR. MILLARD: I find this a difficult question to answer because when we were last in this court
6 I was not anticipating, as perhaps some others were, I do not know, a bundle quite as big as
7 **this**. Therefore, at this stage I have no idea how comprehensive those skeleton arguments may
8 or may not be, so with all due respect I do find it, actually, from my own point of view, very
9 hard to agree a firm timetable unless it is of sufficient degree that I have that flexibility.

10 THE CHAIRMAN: Can I suggest to you, from my own experience, that one does not want two bites
11 at the cherry in preparation. Therefore one wants to prepare it as near to the hearing date as
12 possible, because otherwise you will have to start again. The question is how long will it take
13 you? I assume you are going to set aside so many days before the hearing in order to prepare
14 you submissions. The hearing is on 22nd/23rd February, which is a Wednesday and Thursday.
15 It is very difficult for you – I can tell you how long I think it would take to prepare this – how
16 long do you think you are going to take to prepare it? You are experienced in preparing public
17 speaking and that sort thing so you have a fair idea of what you normally do.

18 MR. MILLARD: To slightly complicate matters, I am actually going to be out of the country from
19 7th February through it looks like to the 17th February.

20 THE CHAIRMAN: So it looks as though you are going to prepare it over the weekend of 18th and
21 19th?

22 MR. MILLARD: It does look like that.

23 THE CHAIRMAN: That will give you four days.

24 MR. MILLARD: Well it is two working days but yes, I would be working all weekend.

25 THE CHAIRMAN: Yes, I am afraid lawyers have a seven day week – nobody bothers whether it is
26 a weekend or a weekday for us. Four days should be enough to prepare it, should it not?

27 MR. MILLARD: I would hope so, ma'am.

28 THE CHAIRMAN: When are you going away?

29 MR. MILLARD: 7th February. So I am overseas from 7th February until the 17th – 7th February
30 being a Tuesday, the 17th being a Friday.

31 THE CHAIRMAN: Would you look at it while you were away or not?

32 MR. MILLARD: I would be able to look at it and consider it but I would be unable to do any
33 preparatory work.

34 THE CHAIRMAN: Do you want to look at it while you are away?

35 MR. MILLARD: It would be useful.

1 THE CHAIRMAN: It could be emailed or faxed to you?

2 MR. MILLARD: Yes. Mr. Ward, when do you want to do your skeleton having heard that?

3 MR. WARD: Well of course we would like as much time as you would give us. There are a number
4 of points to make about the timetable of course. It is true the regulatory summary was large, it
5 is also true that Mr. Millard has had it for seven weeks. It is also true that we know he has
6 considered it because of course that is why his reply was delayed. Originally his reply was
7 going to be with us on 20th December, and we were to have a month to reply to it. Well of
8 course that allowed for the holiday season, so I am not suggesting that that is any longer
9 necessary. The hearing is effectively four weeks off - today is Thursday and it is the
10 Wednesday and Thursday, 22nd and 23rd. You have effectively dispensed with the further
11 directions that were binding upon him in the sense we are hopefully going to deal with the list
12 of issues today. Mr. Millard is not going to be asked to put anything in in writing and until we
13 had heard about Mr. Millard's plans to be away on holiday ----

14 THE CHAIRMAN: Well we do not know if he is on holiday.

15 MR. WARD: No, no, sorry, I do not know if he is on holiday, forgive me. I had rather thought we
16 might split the time down the middle and have a couple of weeks each. Having said all of that,
17 the matter we were most concerned about, which was that the scope of the case would broaden
18 considerably, that has not happened in truth, and we probably would accept that. What we
19 would like – if I can put it this way without wishing to sound over hopeful – at least until the
20 end of next week, which would be Friday, 3rd February. If Mr. Millard is going to be
21 away ----

22 THE CHAIRMAN: Then he could have it beforehand. I think that is a very generous offer.

23 MR. WARD: Well I did say “at least”!

24 THE CHAIRMAN: Do you want effectively to push Mr. Ward into doing it next week so that you
25 have it before you go away, or could he do it by, for example, 10th February, which would give
26 you effectively the same time as he had had – the two weeks, and since you are not actually
27 going to really sit down and do it until that weekend?

28 MR. WARD: I should say this as well, ma'am, we are quite happy to get it to Mr. Millard wherever
29 he is, it will not be a problem – if he is not on a cruise liner or something.

30 THE CHAIRMAN: Well even on a cruise liner you could get it to him.

31 MR. MILLARD: I appreciate that I am being offered by the Defendant until the 3rd ma'am, and that
32 I do not go away until 7th, and on that basis I think the 3rd probably would be acceptable – I say
33 “probably” -----

34 THE CHAIRMAN: Why I am hesitating here is that you are pushing Mr. Ward to do it in a week,
35 and then if you are not going to be really looking at it, it is a little bit unfair to him to be

1 pushed to do it in a week and then it sits in your case. If it makes no difference, and you are
2 not going to look at it until ----

3 MR. MILLARD: With respect, ma'am, if it is supplied on the 3rd I will be looking at it, from
4 whenever it arrives on the 3rd up until when I go away on the 7th; therefore the 3rd would be
5 useful, and if that is being offered I think that would be ----

6 MR. WARD: Mr. Millard has still not really said that he is going to sit down and work hard on this
7 case until he gets back from his trip. I reiterate the offer, but if we could have until the 10th of
8 course that would be vastly preferable. We are quite happy to get it to him wherever he is.

9 MR. MILLARD: If it is offered on the 3rd I will start working on it on 3rd or whenever it arrives.

10 THE CHAIRMAN: If I ordered it on the 10th?

11 MR. MILLARD: Then I would have no option, ma'am, but to wait until 18th to start working on it.

12 THE CHAIRMAN: No, because you would get it wherever you are, and you said you would look at
13 it when you were away.

14 MR. MILLARD: I will look at it but to work on it is a slightly different matter, ma'am.

15 THE CHAIRMAN: You could work on it on the weekend of 4th/5th?

16 MR. MILLARD: I am able to work on it prior to going away on 7th, yes.

17 THE CHAIRMAN: But it is a long way from 22nd, so it is very early to be working on it.

18 MR. MILLARD: I am just trying to give myself enough time, ma'am, so that there are no further
19 delays.

20 THE CHAIRMAN: Let me see what my colleagues think.

21 (The Tribunal confer)

22 THE CHAIRMAN: We all think that Mr. Ward should have until 10th February, and Mr. Millard
23 can provide Ofcom, or Mr. Ward himself if that is how it is going to go, with email and/or fax
24 facilities and you can have it on the 10th; that gives you two weeks, including the four days at
25 the end, to consider it. If email or fax does not work there is always a courier, but I suspect
26 email or fax is a quicker method than a courier – I am not quite sure where you are going to be.

27 We have dealt with the bundles of documents.

28 MR. WARD: Do we need to revisit the timetable for the documents?

29 THE CHAIRMAN: Yes, I am looking at the order. We are not having a skeleton argument from the
30 Appellant now. What we are having is a skeleton argument from Ofcom by 10th, the list of
31 issues hopefully will be dealt with in a moment.

32 MR. WARD: Yes.

33 THE CHAIRMAN: And the bundles it is really a matter of the numbering and that should be at the
34 same time – would it help you at all if the bundles were provided before you left, because that
35 would not make a difference ----

1 MR. MILLARD: That would be useful, ma'am, although it is highly unlikely whilst I am away that
2 I will be able to work on it, at least I would be able to look and perhaps consider some points
3 and therefore to have bundles prior to that, yes, must be of some assistance.

4 THE CHAIRMAN: Why do we not have the bundles by the 3rd?

5 MR. WARD: Yes.

6 THE CHAIRMAN: Including the new material?

7 MR. WARD: Yes, because of course we want to either resolve or abandon that project before
8 Mr. Millard goes away.

9 THE CHAIRMAN: Yes, we are going to have to deal with that. The statutory material you are
10 going to give us.

11 MR. WARD: Oh yes, I am sure we can do that, certainly.

12 THE CHAIRMAN: That leaves the commercial material. I think we need to make some precise
13 directions about that. When can you provide the proposed material?

14 MR. WARD: Monday.

15 THE CHAIRMAN: So Monday is 30th.

16 MR. MILLARD: Ma'am, may I request that it is actually provided tomorrow? This material has
17 been referred to, apparently it is available on the worldwide web.

18 THE CHAIRMAN: It depends whether they have it together in a bundle. Can you do it by
19 tomorrow?

20 MR. MILLARD: I am sorry, I did not appreciate we were talking of bundles, I thought it was
21 just ----

22 THE CHAIRMAN: No, they will give you a printed document.

23 MR. WARD: We have some material that we have obtained from the internet, as I have explained,
24 and we can hand Mr. Millard what we have obtained immediately, in fact. We can organise it,
25 think about it and put it together in a way that would be fit for the Tribunal with a little more
26 reflection, by Monday. So we can do both those things if you prefer.

27 THE CHAIRMAN: Have you got it with you today?

28 MR. WARD: Yes.

29 THE CHAIRMAN: Right, so you could provide the documents today.

30 MR. WARD: I can give Mr. Millard today what we have today.

31 THE CHAIRMAN: So you will have what Ofcom wish to rely on, Mr. Millard, in a moment. You
32 can then have a look at it and see whether you want to provide anything else, and that can be
33 done by when – Wednesday of next week? You do not want to put anything together for us
34 until we have an agreed bundle. This is going to have to be dealt with before you go away and
35 you are going away on the 7th – is that right?

1 MR. MILLARD: Yes, ma'am, I agree. 2nd or 3rd – I was thinking probably 3rd, by Friday 3rd.

2 THE CHAIRMAN: But you are going away on 7th?

3 MR. MILLARD: On 7th, yes.

4 THE CHAIRMAN: If you are going away on the 7th, if you are going to provide more material they
5 are going to have to look at it and they may want to negotiate with you.

6 MR. MILLARD: Right.

7 THE CHAIRMAN: So you have to give them time to do that, which is why I think Wednesday of
8 next week.

9 MR. MILLARD: That is the 1st.

10 THE CHAIRMAN: The 1st, so you have the rest of the week to negotiate.

11 MR. MILLARD: Yes.

12 THE CHAIRMAN: So if you are going to give the material now, Mr. Millard will either say he
13 agrees with that material or provide anything in addition by Wednesday, 1st February, and then
14 hopefully we will have an agreed bundle of material which can be provided by the 3rd. If there
15 was material which was not agreed, if all the material went in by the 3rd then we can sort out
16 what we do about non-agreed stuff, so long as there is a little statement on the front that you
17 have agreed or not agreed. Is that all right, Mr. Millard?

18 MR. MILLARD: Yes, ma'am.

19 THE CHAIRMAN: So the evidence is there. I can see that this could lead to some question about
20 what evidence is before us on the 22nd if it is not agreed. I do not know in what form these
21 documents are. I do not think I want to look.

22 MR. WARD: No, I thought I could explain some characteristics of them, I was not going to hand
23 them out. For example, these are just pages from websites that are advertising phone numbers
24 of certain types, e.g. 0870 numbers, and easily memorable numbers, and setting out their
25 charging rates for the provision of those numbers and/or call forwarding services, that is what
26 they are, and they are a pretty much random effort from one of those instructing me having
27 a roam on the computer – no more or less than that.

28 THE CHAIRMAN: I suggest we adjourn for half an hour and you will show that as well.

29 MR. WARD: Yes.

30 THE CHAIRMAN: We will see what Mr. Millard thinks about what you are going to provide, and
31 whether it is going to be something which is likely to form some sort of agreed bundle.

32 MR. WARD: I anticipate one thing that I may well be instructed to say at a later stage is that if this
33 proves to be a huge can of worms ----

34 THE CHAIRMAN: You are going to withdraw it.

35 MR. WARD: -- we will obviously withdraw it.

1 THE CHAIRMAN: I am not sure how helpful this is.

2 MR. MILLARD: It would be useful, ma'am, I think to have a quick cursory glance over some of that
3 now, because of course call forwarding services are wholly different to what we are talking
4 about.

5 THE CHAIRMAN: That is why I wondered, and if it is wholly different then it may not be relevant
6 – that is why I thought it would be better to have a look now. Have we dealt with everything?

7 MR. WARD: We have dealt with everything.

8 THE CHAIRMAN: Let us see what this evidence is and whether it is actually relevant evidence.
9 We will adjourn for half an hour – I say “half an hour” you may be quicker, but we will
10 anticipate half an hour – when you are ready let us know.

11 MR. MILLARD: And we agree the list of issues as well during that time period?

12 THE CHAIRMAN: Absolutely.

13 MR. MILLARD: Yes.

14 (The hearing adjourned at 3.45 p.m. and resumed at 4.05 p.m)

15 THE CHAIRMAN: Mr. Millard?

16 MR. MILLARD: Ma'am, there were two issues we were considering during the adjournment; first,
17 the new material and the secondly, the list of issues. In terms of the new material I am nothing
18 short of flabbergasted that this is being produced because the general conditions which were
19 imposed, if they were imposed correctly through the notification on MMP, could equally be
20 imposed on any of these – there is absolutely no difference. So I am astounded that these have
21 been produced ----

22 THE CHAIRMAN: Well are you objecting to them going in?

23 MR. MILLARD: No, I am not.

24 THE CHAIRMAN: Do you want to put anything else in or is that enough?

25 MR. MILLARD: I may well, if I may ----

26 THE CHAIRMAN: We have got until next Wednesday.

27 MR. MILLARD: In terms of the list of questions, I am not quite sure how Mr. Ward would like to
28 deal with this but, as I mentioned, I simply drafted some whilst on the train and my list is
29 a little more extensive than Mr. Ward's. It is trying to structure it in a logical way and remove
30 some of Mr. Ward's, and I think if some of his latter questions were answered first it would
31 reduce his list, but I am adding to that and I think it was agreed the Panel should be here to
32 decide exactly those issues. But as I mentioned earlier I would seek to add after that because
33 I have only just considered them.

34 MR. WARD: Mr. Millard read us his list and I think most of (if not all) the issues that we have
35 identified are within the list. His list understandably reflects his perspective on the case and,

1 without in any way disrespectful, of course he is not a professional lawyer, and we actually
2 wondered if the best thing were that you had both lists? It sounds rather irregular but it may be
3 a futile exercise of negotiation to try and distil them down. We would not necessarily accept
4 the way he wants to put some of his points, but we would rather perhaps just leave that to him.

5 THE CHAIRMAN: I think the importance of having the list is that everybody knows what is being
6 argued, and what the issues as they perceive them are, and it may well be a matter of language.
7 When can you produce your list – by Wednesday?

8 MR. MILLARD: I think that is reasonable, ma'am, by Wednesday of next week.

9 THE CHAIRMAN: So that you have an opportunity to consider ----

10 MR. MILLARD: To consider them, draft them and ----

11 THE CHAIRMAN: Can I explain that the list should be written, insofar as it can be, in a neutral way
12 and not in a subjective way. I think Mr. Ward has indicated that that is what he sought to do.
13 But if there are points which you want to make, which are an addition or different way of
14 putting it then Mr. Ward's suggestion is probably the only suggestion. I know it is difficult, but
15 if you could seek to go down a neutral rather than a subjective way of putting the question?

16 MR. MILLARD: I will endeavour to do that, ma'am, and I will have them to the Defendant and also
17 to the Competition Appeals Tribunal by 5 p.m. on Wednesday of next week.

18 THE CHAIRMAN: Yes.

19 MR. MILLARD: Thank you.

20 THE CHAIRMAN: And we will see where that gets us. If there is a problem in that we do not
21 understand then we can deal with it in the first few minutes of the hearing. I think that is
22 probably the best thing. Is there anything else?

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

24 THE CHAIRMAN: Do you want that material in – the numbers' evidence?

25 MR. MILLARD: I think it would be useful, ma'am, as we originally agreed. I do not think it will
26 alter matters but whatever is going to be used I think should be supplied in time.

27 THE CHAIRMAN: So the hearing is on 22nd and 23rd, now having regard to what happened over
28 Christmas, and having regard to you going away, I think it is important for you to understand
29 that the date is a fixed date – it is not a moveable date. The date has been set and is our three
30 diaries, and in the diary of the Tribunal and therefore we have committed ourselves to those
31 dates, and to the preparation beforehand, and the consideration afterwards and so they are
32 really sacrosanct.

33 MR. MILLARD: Thank you for clarifying that, ma'am. I do understand, it is in my diary, the 22nd;
34 it is in my diary the 23rd. I think the problem that happened over the Christmas/New Year

1 period was that I was not quite expecting a bundle that big, and it was Christmas and New
2 Year.

3 THE CHAIRMAN: And we had counted in the period of Christmas when we were considering the
4 dates, and we had anticipated a bundle like that, so I think we were quite lenient on you.

5 MR. MILLARD: With respect, ma'am, I am not experienced in these matters.

6 THE CHAIRMAN: I appreciate that, and that is why I have told you this time that we expect you to
7 be prepared by the 22nd, and the fact that you have arranged to be away during the period is not
8 in fact something that we can take into account; that is your option. We are very hard on
9 lawyers about that and we do not run this Tribunal for the convenience of the lawyers, we run
10 this Tribunal so that we can make decisions as expeditiously as possible.

11 Thank you very much, we will see you on 22nd February.

12 (The hearing concluded at 4.15 p.m)