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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No 1074/2/3/06 [IR]

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

16<sup>th</sup> January 2007

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

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**VIP COMMUNICATIONS LIMITED**  
(in administration)

Applicant

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

Supported by

**T-MOBILE (UK) LIMITED**

Intervener

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

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

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

Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

—————  
**HEARING**

1 THE CHAIRMAN: Good morning. I understand there is an application to be made, and the  
2 application is in private, is that right?

3 MR. BEARD: Madam, I appear on behalf of the Secretary of State. I do not know of any  
4 applications at the moment, madam.

5 THE CHAIRMAN: Do you wish to be heard?

6 MR. BEARD: Madam, it may be useful briefly to review matters.

7 THE CHAIRMAN: All I am asking is if there is something to be heard in private is the public in the  
8 court or should people withdraw?

9 MR. BEARD: I believe there are people in court who are not part of the parties.

10 THE CHAIRMAN: So would it be possible, please, for them to withdraw.

11 (For In Private hearing see separate transcript)

12 THE CHAIRMAN: I am sorry that everybody had to be outside. Thank you very much for your  
13 patience.

14 Mr. Mercer, this is your application. Can I make some remarks first? Can I thank all the  
15 parties for their written submissions and other evidence? It might be helpful if we indicated at  
16 the outset on what matters we think we need particular assistance from VIP. The first matter is  
17 urgency. We note that there could have been application for interim relief back in 2003, and  
18 that might have met the criteria of urgency. But, it does seem to us on what we have seen at  
19 the moment that an application now has difficulties in that respect. At present it seems to us  
20 that a stay of the proceedings was the choice of VIP, and the lift of the stay giving rise to legal  
21 costs follows naturally. So, we find some difficulty in seeing how VIP can meet the urgency  
22 test.

23 The second matter is preventing serious irreparable damage to VIP. We find some difficulty at  
24 the moment in understanding how an interim order now could prevent damage since the  
25 damage took place in January 2003. It seems to us that what is being sought is a form of  
26 restitutionary relief which, on our reading of the provision, is probably not what was  
27 contemplated. It seems to us, on what we have read at the moment, that monetary  
28 compensation would, in all the circumstances of this case, compensate VIP in an appropriate  
29 way, and that any irreparable damage therefore occurred in 2003 and not now, and that  
30 damages would be the appropriate relief, and not a restitutionary remedy at this present  
31 juncture.

32 Third, protecting the public interest. I am not going to say any more about that.

33 Fourth, the effect on VIP. Essentially, what is being asked is not to maintain a status quo, but  
34 to put VIP back in the position it might have been four years ago. Now, we note that the  
35 contract has not been made, and is not, available. We also note that T-Mobile provided

1 OFCOM with some standard terms and conditions which we have not seen. Now, VIP appear  
2 to be suggesting that they are entitled contractually to SIMS and services from T-Mobile on  
3 terms agreed four years ago. But, we have got no evidence before us to substantiate that  
4 submission. We note the large number of SIMS referred to in the business plan, which do not  
5 appear on our reading of the witness statements to be consistent with the number of SIMS  
6 which were the subject of the original arrangements between VIP and T-Mobile. We have not  
7 evidence to suggest that the price at which it would have been supplied in 2003 would have  
8 been maintained for the whole of the four year period and would be relevant today, or that the  
9 agreement would have lasted that long.

10 Fifth, the effect on competition. It seems to us that the delay of four years is relevant when one  
11 is considering the effect on competition. We are also concerned that there may be significant  
12 uncertainty that VIP will be successful in the final appeal. In that regard we refer to the matters  
13 which we said in the Floe Judgment were inadequately reasoned, and the matters which were  
14 put to one side are not considered at all so far in the Floe Judgment.

15 So, we thought it was important to outline that to you so that you can address those points in  
16 particular, because we have significant concerns at the moment, on what we have read, that this  
17 is an appropriate case for an interim order.

18 MR. MERCER: Madam, one of those areas is one on which I would like to take specific  
19 instructions. I wonder if we might adjourn for ten minutes in order that I can do so, Madam?

20 THE CHAIRMAN: Yes.

21  
22 (Short break)  
23

24 MR. MERCER: Madam, I will try and interleave what the Tribunal particularly wants to hear  
25 about with the structure of what I was going to say. What I will do, Madam, is skip over some  
26 bits, but tell you where I am going to skip over some sections. If you are particularly  
27 interested, you can stop me and buy a few extra paragraphs as we go through.

28 I do not think any of us here really have any difficulty working out what the issues are. The  
29 issues are set out, for example in the *Genzyme* interim relief case, as partly outlined by the  
30 Tribunal this morning as, for example, set out at para. 4 on p.2 of OFCOM's submissions. Do  
31 we have a *prima facie*? Is urgency established? Is the applicant likely to suffer serious and  
32 irreparable damage? What is the likely effect on competition of relevant third party interests?  
33 What is the balance of interests between the last two points?

34 There are few places where Mr. Pickford and I agree. But, one of them is what we are asking  
35 for, and what we are asking for is to be given SIMS on the terms of our original agreement. I

1 will come back later, Madam, to the questions you have asked about, 'What are the terms of  
2 that agreement?'

3 I want to get over one point straightaway which is that we are not asking for something new or  
4 something different. We are asking for what we always thought we would get - which is the  
5 development of business which was stopped when it was operating 400 SIMS and which had  
6 given notice to T-Mobile that it was going to operate up to 4,000. We are saying that as with,  
7 we had always intended, the installation of those SIMS, we would be subject to a degree of  
8 consultation with T-Mobile to give it comfort about network planning, etc., and other technical  
9 issues. We are not asking for a sudden entry into the Wild West of mobile telephony. We are  
10 asking for what T-Mobile once thought was perfectly acceptable. I want to stress that, Madam.  
11 Our position is that T-Mobile has agreed, on one occasion ---- agreed in the past to give us  
12 what we are asking for now.

13 THE CHAIRMAN: Where did they agree it?

14 MR. MERCER: They agreed it as demonstrated in Mr. McCabe's first witness statement, p.413,  
15 from para. 14. I was just going to draw your attention to one or two matters as we went  
16 through the following paragraphs. What he describes is a course of events dealing with an  
17 authorised accredited employee of T-Mobile, in which he enters into a written contract -  
18 though that is no longer available in T-Mobile's records - where some estimate of the amount  
19 of credibility given to what could be spent under the contract is shown by the credit control  
20 requirements exhibited by T-Mobile ----

21 THE CHAIRMAN: If you look at para. 21 we are there talking about 200 SIMS - not 4,000 SIMS.

22 MR. MERCER: Yes, Madam, but if you go on to para. 26 you will see a reference to 4,000 SIMS  
23 being built up as the business builds up over a period of twelve to eighteen months.

24 THE CHAIRMAN: But there is no contract to provide 4,000. That was just a discussion, as I  
25 understand it. (After a pause): There was no right to get 4,000.

26 MR. MERCER: The contract that I believe is described, Madam, is a contract allowing for variable  
27 call-off of numbers - otherwise, why would Mr. Power's directors be asking him to ask Mr.  
28 McCabe for a forecast of future use?

29 THE CHAIRMAN: It would be an unusual contract not to have some sort of termination clause, or  
30 increase in price, or duration, or ---- I mean, what happened to all of that? (After a pause): I  
31 mean, it says here 'on an eighteen month contract'.

32 MR. MERCER: Yes, Madam. But, firstly, you asked, when outlining the points that the Tribunal  
33 had, 'How would we know that the terms now would be the same as they were then?' In fact,  
34 we do not, because if you look at the comparable tariff levels between then and now, in fact,  
35 they are less. That is what I am instructed.

1 THE CHAIRMAN: That is not what is being said by T-Mobile.

2 MR. MERCER: Termination clauses, Madam, usually require something to trigger them, like, 'We  
3 didn't pay' ---

4 THE CHAIRMAN: It says here 'on an eighteen month contract' in para. 21. (After a pause): In  
5 para. 25 it says 'with the contracted 200 SIMS'.

6 MR. MERCER: That would be the first contracted SIMS, Madam. These contracts are call-off  
7 contracts, Madam. You do not have a separate contract for each batch of 200 SIMS. You have  
8 one contract and you call down more SIMS under it.

9 THE CHAIRMAN: But there was a maximum here. If you look at para. 21, "About a week later  
10 David Powers rang me and said that VIP could have a contract at the rate we had asked - that  
11 is, 2p per minute but a maximum of three cells a minute per SIM on 200 SIMS". So, that does  
12 not look like that was a call-down contract on your evidence.

13 MR. MERCER: That is what I am instructed it was.

14 THE CHAIRMAN: This is your evidence, is it? This is Mr. McCabe's evidence? (After a  
15 pause): You are giving evidence different from---

16 MR. MERCER: I am not trying to give evidence, Madam. (After a pause): That is a reference to  
17 the particular maximum minutes on 200 SIMS provided under the contract. That does not  
18 indicate - that wording - that more or less SIMS could be provided under that contract.

19 THE CHAIRMAN: But you have not provided any evidence ---- I mean, we are dealing with an  
20 interim application for an interim order, and you have not provided any evidence to show that  
21 there was more than 200 SIMS contracted for. So, when you say that you ought to go back to  
22 the position you were in in 2003, how do you substantiate that in 2003 you would have been  
23 entitled, had they not cut you off, to 4,000 SIMS?

24 MR. MERCER: Because that is the forecast they had got and they were working to, Madam.  
25 Besides that, at the time we were cut off, there were at least 400 - not 200. (After a pause):  
26 That is right, Madam. (After a pause): The relationship between T-Mobile and VIP started  
27 with T-Mobile not knowing a great deal about VIP and what it wanted to do. It developed that  
28 relationship. T-Mobile provided it with SIMS - 400 - and was asking ---- not telling, Madam,  
29 but it was asking VIP for its future forecast for the numbers it wanted provided under that  
30 contract.

31 THE CHAIRMAN: Do we get any assistance from the exhibit to Miss Allimadi's witness  
32 statement? I assume these are e-mails sent in July 2002?

33 MR. MERCER: They are, Madam. What is sometimes confusing is that they have been re-sent.  
34 (After a pause): There are the details of new SIMS being ordered; the terms being  
35 confirmed ----

1 THE CHAIRMAN: But it is talking about 3,000 minutes ----

2 MR. MERCER: -- which was the extent to T-Mobile's usage policy per SIM at that time in relation  
3 to that tariff.

4 THE CHAIRMAN: If you look at what is p.4 of that exhibit - in the 'fair use policy' - about half-  
5 way down at the third star, "-- explained that if the customer continues to exceed the limit they  
6 will be moved to a version of their price plan which charges for calls made over 3,000 minutes.  
7 Despite this, however, call charges will be highly competitive ----" It does suggest that the  
8 price was not a fixed price.

9 MR. MERCER: It is, Madam, provided you do not exceed 3,000 minutes.

10 THE CHAIRMAN: But if you have 4,000 SIMS how many minutes?

11 MR. MERCER: 4,000 times 3,000 per month. Forgive me if I do not give you quite at this  
12 moment the reference, I think that in either the Floe or VIP investigation ---- in the Floe  
13 documents relating to the second Flow investigation, there is a description, I think by Mr.  
14 Stonehouse of the devices to make sure that a particular number of minutes are not exceeded  
15 on a particular gateway.

16 So, it is our contention that there is a contract; SIMS are being provided; they are discussing  
17 what the future forecasts are. There can be no doubt from the evidence before the Tribunal at  
18 the moment - and this is an application, as I am constantly reminded by the Tribunal and the  
19 other parties for interim relief - that T-Mobile knew full well what was going; they knew what  
20 these SIMS were for. There can be no question on the evidence before the Tribunal - and,  
21 indeed, on the evidence before OFCOM - of what they were to be used for.

22 THE CHAIRMAN: That is in the first decision.

23 MR. MERCER: In the second decision, Madam. I am sure I do not need to take the Tribunal to it.  
24 It has been discussed by the Tribunal before.

25 On the evidence before the Tribunal - the only evidence before the Tribunal - T-Mobile knew  
26 what they were being used for; they were quite prepared to let them have them. We will say  
27 that either there is enough evidence to show that a written authorisation form of contract did  
28 exist, or some appropriate form of authority was given. We would point out that though  
29 OFCOM - strangely, some might say - did not come to a formal decision about market  
30 definition and dominance to their second investigation report appended what their views  
31 appeared to be in full, in a way which accords nearly exactly with the view of VIP.

32 So, we would says, Madam, that when it comes to the first of the hurdles - which is, 'Is there a  
33 *prima facie* case?' - we have an extremely strong *prima facie* case.

34 THE CHAIRMAN: That is on your facts.

35 MR. MERCER: Yes.

1 THE CHAIRMAN: But what about the other matters that have not been dealt with in the Floe  
2 decision which might mean that if they were re-looked at - and I was referring to them  
3 paragraphs earlier - that even if the facts were in favour of VIP, the outcome would not be  
4 successful? (After a pause): It seems to me that there are two matters: (1) do you succeed on  
5 the facts, whereas Floe did not? But, also, (2) will you succeed ultimately in the appeal?

6 MR. MERCER: If we park the facts for a moment, the other two questions must be market  
7 dominance and undue discrimination.

8 THE CHAIRMAN: No. There are matters as to whether the regulation was valid, which we said  
9 on the material that was in the decision had not been adequately reasoned.

10 MR. MERCER: The regulation itself is ---- I am sorry, Madam. I wonder if you could just give  
11 me ----

12 THE CHAIRMAN: Paragraphs 236 to 247, for example.

13 MR. MERCER: (After a pause) Yes, madam, as I understand the position of the Tribunal is that it  
14 still has no material before it, does it not, that the restrictions could be justified.

15 THE CHAIRMAN: There may not be, we do not know.

16 MR. MERCER: But there is no such evidence to say that they are justified, madam. We have not  
17 produced any evidence – certainly not; I have not seen any from anybody else that justifies  
18 them. We know now because of *Floe 2* or we have an indication of what needs to be shown.

19 THE CHAIRMAN: But in *Floe* it was unnecessary to remit it because the facts were not  
20 substantiated. In VIP it may well be that they will have to be investigated.

21 MR. MERCER: Well, as we are looking here at a prima facie case I am not sure that I have to rebut  
22 the point, do I?

23 THE CHAIRMAN: Well your submission was that you had a strong prima facie case on the basis of  
24 the factual aspects?

25 MR. MERCER: Yes, madam.

26 THE CHAIRMAN: And I was putting to you that there was another aspect to the position as to  
27 whether you will be successful at the end of the day, which are the other matters that we dealt  
28 with, which we did not have to determine in *Floe*, and it is not just the points that were left  
29 over, but the points where we said that they were inadequately reasoned.

30 MR. MERCER: I am sorry, madam, I did not catch the last two words?

31 THE CHAIRMAN: Where we said it was inadequately reasoned; and the most significant one, I  
32 think, is the one that I have referred you to – there are others.

33 MR. MERCER: VIP's submission on that point, madam, is that it would argue – as *Floe* did relating  
34 to the meaning of Article 7.2 – it believes as time goes on the European Commission comes

1 'round to the same opinion over time, and that congestion is not interference and nobody has  
2 yet suggested that congestion by itself ----

3 THE CHAIRMAN: The question is whether it is appropriate and effective.

4 MR. MERCER: I beg your pardon, madam?

5 THE CHAIRMAN: The question is whether it is an effective and appropriate use of radio spectrum,  
6 not harmful interference.

7 MR. MERCER: I have to say, madam, I fail dismally to see how one could ever make out an  
8 argument that it was not appropriate use of the spectrum, and effective use of the spectrum,  
9 because that would be the same as saying that all GSM services are not an effective use of the  
10 spectrum. In terms of the use of the spectrum, and the use to which it is put, you do not  
11 determine ----

12 THE CHAIRMAN: Mr. Mercer, we do not have to decide that. The issue is that you said you have  
13 a strong prima facie case and you relied on the factual evidence. I was pointing out that the  
14 *Floe* Judgment, which is what you are relying on, does have other matters in it which might  
15 affect whether or not you have a strong case. Whether the *Floe* Judgment is right or wrong and  
16 whether, at the end of the day, if it was considered again by Ofcom they would come to the  
17 same conclusion or a different conclusion is neither here nor there for that purpose. The issue  
18 is on the basis of the *Floe* Judgment you have a strong prima facie case, and it seems to me that  
19 you cannot just address the factual issues because there are other issues. You may submit that  
20 you do have a strong prima facie case irrespective of those other issues.

21 MR. MERCER: Well in going through what I was going through a moment ago I am trying to  
22 demonstrate that there are some substantial points that might still be argued, but you have to  
23 draw a line somewhere in terms of looking at all of the things that could go wrong and, having  
24 looked at all of those and taken an assessment, VIP does not think there is. The most  
25 important aspect really, we contend, when looking at a prima facie case in this area at this  
26 moment in time, are the four questions the Tribunal articulated on 12<sup>th</sup> September.  
27 That brings me, conveniently, madam, to another point, if I can just go off at a slight tangent  
28 for a moment. It is the question you raised, madam, about why did we do this in 2006 and  
29 why did we not do it before, and relating that into the question of urgency. I want to take you  
30 to Mr. McCabe's thought processes; I am not a therapist but most solicitors feel that they  
31 sometimes have an understanding with the mind. Mr. McCabe, when he started this process  
32 looking at *Floe*, rightly or wrongly might have had the supposition that it would not be too  
33 long before an answer came forth one way or the other, about what was essentially, when this  
34 thing first started, madam, a legal argument. If you look at those first two decision letters it  
35 was an argument about whether or not gateways were lawful. The expectation that Mr.

1 McCabe had in that first instance was that it was not going to take from 2004 to 2007 (May)  
2 and Judgment there following, to get an answer to the substantial points. He thought that this  
3 was a blip in the business development process, not a yawning chasm and, if you read the  
4 textbooks on competition law enforcement, you might well believe that. The reality has  
5 turned out to be somewhat different.

6 When Mr. McCabe, and the administrator by that time, were faced with the situation the  
7 company was in by September 2006, and looked at the resources available to it, its hand to  
8 mouth *ad hoc* funding arrangement, what did it do? It straight away put an interim relief  
9 application in to return it to the position immediately before it made the first complaint.

10 Now, the Tribunal articulated the view that because of the delay we were now looking at  
11 restitution, but madam in a circumstance like this we could only ever have been looking at  
12 some form of restitution – it is a case of whether you are restored to where you were one day  
13 ago, one year ago. The urgency that pertains is the urgency at the time you make the  
14 application.

15 One of the areas I do not intend to spend a lot of time on is in relation to the identity of the  
16 Appellant, champerty and maintenance, unless the Tribunal particularly wishes me to go  
17 through those areas. My view, madam, is the Appellant is the person it has always been, that  
18 has never changed. The Appellant in this public law matter is not On-line it is VIP  
19 Communications Ltd (In Administration) and the person who is in charge of that company [in  
20 inverted commas] is Mr. Frost must, like all administrators, every day he wakes up reconsider  
21 the view as to whether or not that administration should continue in the interests of the  
22 purposes for which it was set up. A number of practitioners might add: “And by the way, Mr.  
23 Frost, you might well consider your own position vis-à-vis the expenses of the administration  
24 and what you incur along the way”. Mr. Frost has been told by On-Line, and Mr. McCabe as  
25 well, so I am instructed, that there is little prospect of this matter continuing unless the  
26 business of VIP can start to be resurrected. Mr. Frost has examined all other means of funding  
27 this matter going forward, and come to the conclusion that the business’ business plan still has  
28 merit, as updated and filed, and the business of VIP, which has never been assigned, could be  
29 continued if it could get its hands on the SIM cards that are the lifeblood of that business. It  
30 could trade its own way out. That would fulfil the purposes of the administration and several  
31 other purposes.

32 THE CHAIRMAN: Can you just explain what you meant by, ‘There is little prospect of this matter  
33 continuing?’

34 MR. MERCER: Beyond this stage, Madam.

1 MR. PICKFORD: Madam, I hesitate to interject, but my difficulty with this is that I do not actually  
2 know what evidence Mr. Mercer is referring to. This seems to be new evidence that Mr.  
3 Mercer is giving to the Tribunal, and it is not the evidence that we have so far received from  
4 Mr. Frost.

5 MR. MERCER: We thought the matter had been made perfectly clear, Madam.

6 THE CHAIRMAN: I do not want to put words in your mouth - and we have got various versions of  
7 what the thought process has been ---- As to whether the company is going into liquidation;  
8 whether the company is not going into liquidation; whether you can trade out, or you may trade  
9 out ----

10 MR. MERCER: In one of Mr. Frost's witness statement I think he deals with some of the  
11 questions. Let us try and deal with some of those questions. Mr. Frost, as you may remember,  
12 Madam, was also an administrator of Floe. He is now a liquidator of Floe. One of the things  
13 that Mr. Frost discovered in the course of the application for Floe to be put into liquidation was  
14 the grave difficulty that caused because the Chancery Division Judge, before whom that  
15 application went, expressed considerable doubts that in fact the purpose of the liquidation  
16 would be fulfilled because there was going to be no dividend whatsoever - so, what was the  
17 purpose in liquidating the company in the first place? Therefore, what is likely to happen to  
18 this company, VIP, is not that it will go from administration into liquidation, but that it will be  
19 struck off.

20 THE CHAIRMAN: In Floe it was put into liquidation. So, somebody satisfied the Judge that there  
21 was a purpose for liquidation. This case is no different. If there is a damages action, and if the  
22 liquidator is there to pursue that damages action, there must be a purpose of the liquidation,  
23 and it would be inappropriate, if that was the case, to strike it off because once it is struck off it  
24 cannot bring the claim. That seems to be what I assume happened in Floe, and that is why it  
25 was put into liquidation.

26 MR. MERCER: In Floe, Madam, it was put into liquidation with a return date for a limited period  
27 to further investigate ----

28 THE CHAIRMAN: I can understand that, but if there is a damages action, then there is a purpose  
29 for the liquidation. Therefore, it is not a submission that says, "Well, this company is going to  
30 be wound up". It suggests that there is no financial outcome that can be achieved, and that  
31 what is going to happen is that any claim which VIP may have is intended to be abandoned.

32 MR. MERCER: That might have to be the case, Madam.

33 THE CHAIRMAN: If that is the case then what is the purpose of funding these proceedings.

34 MR. MERCER: The purpose of funding these proceedings is that if you can actually get the  
35 business going again it can become self-funding.

1 THE CHAIRMAN: Then there is a purpose in the administration.

2 MR. MERCER: That is the purpose of the administration, yes.

3 THE CHAIRMAN: But if you decided you are not going to continue the administration ----

4 MR. MERCER: If it is unsuccessful in these proceedings for interim relief. (After a pause):

5 How else is it going to fund any claim for damages going forward? It is difficult to see a Judge

6 accepting the application for the company going into liquidation, even if it has a claim, if there

7 is no means of actually finding a way of that claim being prosecuted. One cannot think of a

8 liquidator ----

9 THE CHAIRMAN: One knows how liquidators fund actions.

10 MR. MERCER: In some instances. But, of course, they are personally liable for the costs incurred,

11 which dramatically lessens the scope of their ability to find somebody to take the matter on.

12 THE CHAIRMAN: That is not our problem here. (After a pause): What I understand from what

13 you say, 'There is little prospect of this matter continuing' is that those who are prepared to

14 fund this are no longer prepared to fund it, and they will withdraw any support.

15 MR. MERCER: Yes. That is what I am instructed, Madam.

16 THE CHAIRMAN: I am not sure that that is actually the latest evidence of Mr. Foster in his

17 witness statements.

18 MR. MERCER: I do not want to get back to where we were on assignment in the last hearing,

19 Madam, but I am instructed that that is what he meant by what he said, and that is where he

20 thinks he is.

21 MR. DAVEY: Mr. Mercer, are you saying that your instructions are that if interim relief is not

22 granted, that all funding will cease and that the substantive proceedings will die the death?

23 MR. MERCER: That is a quite likely outcome, Madam.

24 MR. DAVEY: That is not what you said at the last hearing to my recollection. My recollection is

25 that you said that the substantive hearing would be proceeding regardless of whether interim

26 relief was granted. Now, I hasten to say, Mr. Mercer, that that is my recollection, and I have

27 not got the transcript in front of me.

28 MR. MERCER: I have not got a transcript in front of me either.

29 MR. PICKFORD: If it is of assistance, I believe the passage you may be referring to is at p.38 and

30 following - the transcript of the last hearing. There was quite an involved discussion with Mr.

31 Mercer about the nature of the indemnity.

32 MR. ANDERSON: (After a pause): The passage may be Mr. Mercer's comments at the top of

33 p.40 where he indicates what would happen if the administrator took the view that he did not

34 wish to continue with the action - the indemnity would then kick in and he would have to

35 continue with the action.

1 MR. PICKFORD: Madam, members of the Tribunal, of it would also help ---- There is the  
2 subsequent statement by Mr. Mercer on p.40, lines 6 to 13, and then over the page at p.41,  
3 lines 1 to 16, and then also on p.42, lines 22 to 23.

4 THE CHAIRMAN: Our recollection is that it was when we were discussing the timetable.

5 MR. PICKFORD: Madam, I am not sure that is the case. I have just lent my copy of the transcript  
6 to Mr. Mercer, and so I cannot unfortunately deal with your query.

7 MR. MERCER: I think the reference you might be thinking of, Madam, is p.59, line 30 – it starts at  
8 line 26.

9 THE CHAIRMAN: Yes, exactly. Then my “...it is not the be all and end all ...”

10 MR. MERCER: But it is pretty important.

11 THE CHAIRMAN: And then you said “It is pretty important ...”, so you were not saying at that  
12 stage that the interim relief application was going to close the door.

13 MR. MERCER: Those were my instructions at the time, madam, yes.

14 THE CHAIRMAN: Has there been any evidence from Mr. Frost since then?

15 MR. MERCER: We have submitted a further witness statement from Mr. Frost since then.

16 MR. ANDERSON: There have been two further witness statements from Mr. Frost since that time,  
17 neither of which make the point that Mr. Mercer is now making.

18 THE CHAIRMAN: No, that is why I was asking. It clearly says in lines 30 to 33 that your purpose  
19 is to get the end result, i.e. the final decision not the interim relief, and that is what your client  
20 would like to do, and one took it from that those were your instructions.

21 MR. MERCER: That is what my client ----

22 THE CHAIRMAN: What is now being said is that your instructions are different.

23 MR. MERCER: What my client is saying is my client would still very much like to get to a  
24 substantive hearing, wishes it had got there already, but its chances of funding are going to be  
25 taken away from it. I cannot say it is 100 per cent. certain if we do not get interim relief then  
26 this will not proceed to a substantive hearing because there are at that time other matters which  
27 one would want to discuss properly with one’s client about how it might be taken forward. But  
28 on the basis of the funding being available, that funding is – I am instructed – not going to be  
29 available on the *ad hoc* indemnity basis it has been available so far and that is going to cause  
30 Mr. Frost considerable difficulties.

31 THE CHAIRMAN: But (a) that is to do with the funders, that they are withdrawing any funding; but  
32 (b) I, at the moment, am not sure how that is a matter which one should take into consideration  
33 in relation to whether or not interim relief ought to be granted in the circumstances of this case,  
34 because that is something which could have been overcome if, four years ago, interim relief  
35 had been applied for. If the reason that interim relief was not applied for then was funding,

1 and if the reason that interim relief had not been applied for over the four years was because  
2 there was no funding then what is there to say that the position is any different?

3 MR. MERCER: Well clearly, madam, I have not managed to articulate the reason why interim relief  
4 was not applied for in 2004, which is that at that time those in charge of the company (my  
5 client) had a reasonable expectation that matters would not take quite as long as they have.

6 THE CHAIRMAN: I understand that, but at some point that expectation was no longer reality, and  
7 therefore the urgency became urgent at an earlier date than 2006.

8 MR. MERCER: Well, madam, you have to remember that through much of the time in which this  
9 matter has been stayed, we have not actually known the correct analysis to know what the  
10 factual situation we needed to show was.

11 THE CHAIRMAN: Well you say that you have a good prima facie case because of what was in the  
12 Decision and that you are different from Floe, and you could have come along and said “Look,  
13 this is absolutely terrible, it is spoiling the business, they must reinstate”, and had this  
14 application much earlier.

15 MR. MERCER: Well we could have done, madam, but where would that have got us

16 THE CHAIRMAN: It would have got over the urgency problem.

17 MR. MERCER: It might have got us over urgency, madam, from what you are suggesting, but it  
18 certainly would not have got us over knowing what the prima facie case was because at that  
19 time we would not have known what prima facie case we were trying to make in the first place  
20 – and we have not known that since last September, because – I repeat, madam – when this  
21 matter started it was about the interpretation of the regulations as to whether or not GSM  
22 gateways were lawful, which was the principal reason given, of course ----

23 THE CHAIRMAN: Which we still do not know.

24 MR. MERCER: Yes, it has to be correct, madam, to that extent, but at least now we know what the  
25 four questions are and what the other questions that need to be answered are identified to be,  
26 and what the inadequate reasoning is said to be by the Tribunal, and what other points need to  
27 be dealt with. You must remember that VIP did not just pack up its caravan in 2004, it got  
28 back into the game at the end of *Floe 1* and took part in the investigations of the new complaint  
29 going through, so that its complaint was dealt with side by side with Floe’s during that period;  
30 only then was its proceedings stayed again when Floe went back into Appeal, as it were,  
31 following the second Decision letter. So it did not throw its hands up in 2004 and abandon  
32 things, it has got on with matters, thinking always that it would, quite rightly, be able to follow  
33 in on its own facts behind those of Floe.

34 THE CHAIRMAN: Anyway, the way you want us to proceed now is that if you do not get the  
35 interim relief this company is either going to be wound-up or struck off ?

1 MR. MERCER: That is much more likely than not, madam, is what I am instructed. I will not let  
2 my client on this occasion say “100 per cent. it will wither away” because they have not yet  
3 had all the advice they need to take that decision.

4 THE CHAIRMAN: That is because the funders are not prepared to fund any more?

5 MR. MERCER: Without seeing some light at the end of the tunnel, madam. I think it is true to say  
6 that Mr. Frost is reasonably certain that funds necessary to recommence the business would be  
7 forthcoming as in accordance with the business plan that has been filed.

8 THE CHAIRMAN: Are you going on to the next point, Mr. Mercer?

9 MR. MERCER: I was about to go on to the next point.

10 THE CHAIRMAN: Is that a convenient point then?

11 MR. MERCER: Yes, it is, madam.

12 THE CHAIRMAN: 2 o'clock.

13 (Adjourned for a short time)

14 \*\*\*\*\*

15 MR. MERCER: I think we were dealing with other points this morning on the effect on VIP if the  
16 request is not given. I will move on to the effect on the party against whom the request is  
17 made, and the evidence put in by T-Mobile. If the evidence by T-Mobile is to be believed then  
18 ten or fewer VIPs would knock out its entire profit for one year on the estimate of £150 million  
19 per year, which is the estimate that is given in the evidence.

20 MR. PICKFORD: T-Mobile does not make any profit.

21 THE CHAIRMAN: I noticed that in one of your witness statements.

22 MR. MERCER: We will get you by the end of the afternoon the figures I was looking at. We may  
23 be looking at growth profit and actual. But, if you believe, Madam, that that is going to be the  
24 total effect, that would be remarkable. The evidence of Mr. Spence takes, in every case, worst  
25 case assumptions, and based on tariffs that were not available certainly to VIP when it last was  
26 able to use SIMs back in 2003.

27 My submission is simply that it is more far fetched and the actual effect is nowhere near as  
28 serious as they would try and make out.

29 The effects on third parties. One of the things that seems to (I was going to say) flow through  
30 this band of cases is the belief that the gateway operators themselves have no interest in  
31 maintaining call quality within cell sites and pick up when clearly they do because if they  
32 affect call pick-up and drop, and congestion within cell sites then it is not just third party  
33 customers but their own customers who suffer. It is in their interests therefore to consult, plan,  
34 direct antennae, etc. to ensure that any problems relating to congestion can be dealt with. Mr.  
35 Springall's evidence deals not with hypotheticals but with matters that have been done, were

1 employed, to be able to do that. It is not guesswork. It is not extrapolation. It is the  
2 experience of VIP when it was actually allowed to operate some SIMs. It is an experience, etc.  
3 that is backed up by the experience of Floe and the evidence in the Floe matter was, I think,  
4 formally adopted in this matter.

5 I will not - unless you ask me to - Madam, deal with questions relating to, for example,  
6 OFCOM's point relating to VIP being afforded the opportunity to provide COMAG services  
7 while in their view the legality is still in doubt.

8 When looking at the overall balance of convenience, and indeed the effects on competition,  
9 there are two points I want to make. The first is that T-Mobile makes the point that it would  
10 somehow be wrong, unusual, or worse, for VIP alone now to be able to provide COMAGs.  
11 My answer to that is that in my view there may be lots of people who ought to be lawfully able  
12 to provide COMAGs, but at this moment in time VIP is the only one that has made an  
13 application for interim relief in these sorts of proceedings. The fact that it would be the only  
14 person who might be able to do so because all of the MNOs have stopped other people  
15 providing COMAGs is neither here, nor there.

16 The second point in relation to competition is that we would contend that, of course, the  
17 consumer in all of this would benefit because the way in which T-Mobile would find its  
18 lifeblood would be in selling services more cheaply than were available elsewhere. We have  
19 read what T-Mobile have said about the fact they are going to change their tariff structure, and  
20 the "unfairness" of VIP taking advantage of any arbitrage - those are questions relating to the  
21 structure of those tariffs. You might say the interesting questions themselves are raised by T-  
22 Mobile's admissions that in fact in a sense it cross-subsidises some services with others within  
23 the tariff package, and that it wants to sell you something that enables you to use 3000 minutes,  
24 say, and the last thing you are expected to do is to actually use them, because if you use what  
25 you are offered that is somehow unfair.

26 Before I come to my concluding remarks, I am just looking through my list from this morning,  
27 madam, of the points which you specifically wanted covered, and I return to the point again  
28 that what VIP thinks was the status quo, that you could not have interim relief which ordered  
29 somebody to resume the provision of services without there being some element of restitution,  
30 whether you did that at minute 1 after it finished, or day 1000, there is always going to be an  
31 element of restitution ----

32 THE CHAIRMAN: Mr. Mercer, the point is that if you do it at day 1 you have not wound down the  
33 business, you do not have to reinstate it in that sense. You go to the court and you say to the  
34 court "My business has been stopped, I can start it up immediately." Your case is not that,  
35 your case is that there are now either one or no employees that you have to get new investment,

1 that there are other matters physically that need to be dealt with and that what you have to do is  
2 effectively to set up a business. You may have the GSM gateway sitting around but apart from  
3 that you have to set up a business and that is very different; and that is what I was referring to  
4 when I was talking about restitutionary rather than prevention. Of course, for the moment it  
5 may have all stopped, but you just flick the switch and it all starts again – that is not the case  
6 which you are talking about.

7 MR. MERCER: As simple as flicking a switch and it all comes back on, but neither is it some long  
8 term re-initialisation of the venture because the equipment exists.

9 THE CHAIRMAN: Well it is only the equipment that exists, the venture has been not been  
10 proceeded with for four years and is no longer there.

11 MR. MERCER: But in terms of going back on to the wholesale commercial multi-use gateway  
12 market we could sell minutes simply by advertising them on an exchange like Band-X  
13 tomorrow, because we have SIMs, we have equipment, we have connectivity and we could sell  
14 the minutes on an exchange tomorrow, on a wholesale basis. In fact, we have given no  
15 evidence on the point, but some might contend that there are one or two people still doing that  
16 at the moment.

17 THE CHAIRMAN: I do not think I can take that into account.

18 MR. MERCER: No, you cannot, madam, but the infrastructure exists to be able to sell those  
19 minutes, and is available, and obvious to all. As I said earlier today, Mr. Pickford may believe  
20 that any technical questions relating to the introduction of these systems may take forever, we  
21 do not, and we believe there is a strong prima facie case. We believe there is an urgency now  
22 to do so, and to get this company back and working and that will prevent serious and  
23 irreparable damage, it is even consistent with protecting the public interest.

24 THE CHAIRMAN: Are you relying on protecting the public interest in 61(2)(b), or are you only  
25 relying on 61(2)(a)?

26 MR. MERCER: We have made out the argument so far in terms of 61(2)(a), I think we could ----

27 THE CHAIRMAN: But are you? Are you relying on 61(2)(b), which is a different point to the point  
28 that you might have addressed earlier?

29 MR. MERCER: It is, madam. My view would be that what I have argued and VIP's case is  
30 consistent with that, it is protecting the public interest.

31 THE CHAIRMAN: What is the public interest that is being protected?

32 MR. MERCER: The public interest that it is consistent with is providing competitive  
33 telecommunications' services.

1 THE CHAIRMAN: (After a pause) And why is it necessary as a matter of urgency for the purpose  
2 of protecting that public interest – does it not have the same problem that the public interest  
3 has not been protected for four years so why suddenly do we do it?

4 MR. MERCER: I do not want to go over ground we went over this morning, and ----

5 THE CHAIRMAN: But this is the public interest, this is not your client not being able to fund or  
6 whatever, this is a much more general aspect, this is the public interest.

7 MR. MERCER: The public interest in obtaining alternative telecoms is ever present and urgent in  
8 the sense of being of use and assistance to it, because if it never arises, if there is no advantage  
9 because VIP may, more likely than not, not continue in some form that will provide a business,  
10 but if something happens now then that makes it urgent. At the risk of giving Mr. Pickford  
11 more amusement, as the point seems to give him considerable amusement, I would return to  
12 where exactly VIP is in its present state, and I do not think we are trying to perform mental  
13 gymnastics, or be tricky in what we say about its position. As I said at the previous hearing,  
14 madam, whether or not it gets interim relief is pretty important to it and over time that  
15 importance crystallises. As I said this morning, madam, I cannot stand here and say with 100  
16 per cent. certainty, if VIP does not receive interim relief that at the substantive hearing it will  
17 not be represented, or will not be represented in the same way, or adequately or at all – I  
18 cannot say that with certainty because there is advice, and matters that still need to be gone  
19 into. However, I am instructed and believe that as time goes on indeed it would seem a fair  
20 submission to say that it would begin to seem more likely than not that VIP will not be able to  
21 continue if it does not get interim relief.

22 Damages are not, VIP would contend, always the only appropriate relief when you are dealing  
23 with a developing business because you are taking into account ----

24 THE CHAIRMAN: Mr. Mercer, that as a general submission is correct, because competition law  
25 provides the interim relief in order that the status quo should be preserved. The question here  
26 is whether this case has gone past that. It was always available to your clients to use the  
27 measures under competition law to seek to preserve the status quo. They chose not to do that.  
28 They have now chosen to do it for the reasons which you have indicated. We understand what  
29 you have said. That is really as far as it goes, is it not?

30 MR. MERCER: Except that there is in this matter, from what I have submitted so far, still time to  
31 pull us back from the brink, at which time damages would be the only possible remedy.

32 THE CHAIRMAN: It is not clear that you can be pulled back from the brink. It is just that you  
33 may be able to be pulled back from the brink. I think the phrase that is used is that you may be  
34 able to trade out of your problems - not that you will be able to trade out of your problems.

1 MR. MERCER: No. Apart form the fairly obvious point that no business can ever guarantee to full  
2 its business plan ----

3 THE CHAIRMAN: But your evidence is that you will attempt to trade out of your problems, and  
4 that you may enable VIP to trade out of administration. That is what the witness statements  
5 say.

6 MR. MERCER: Actually, Madam, I wonder if we could look at the fourth witness statement of  
7 Jeremy Frost? It is dated 10 January, and filed on 11<sup>th</sup>.

8 THE CHAIRMAN: TP39 in the interim relief.

9 MR. MERCER: At para. 5, Madam, “As administrator I have also worked with Mr. McCabe as to  
10 how the interim relief, if granted, will practically allow the appellant to trade itself out of  
11 administration and be able to afford the legal fees ----“ for continuing with this case. A draft  
12 business plan is attached. I do not think Mr. Frost is using the word ‘may’.

13 THE CHAIRMAN: I will show you where he does. (After a pause): ‘Attempt to’ is in para. 15  
14 of his witness statement of 8 December.

15 MR. ANDERSON: Whilst Mr. Mercer is trying to find that, it is worth recording that the Tribunal  
16 may well be aware that that first witness statement when originally served in draft used the  
17 word ‘may’ and Mr. Frost deliberately changed away from that. He used the word ‘will’ and  
18 changed it to ‘may’ before signing.

19 THE CHAIRMAN: That is the first witness statement. So, ‘may’ is in the first witness statement.

20 MR. ANDERSON: It is not only in the first witness statement, but Mr. Frost deliberately changed  
21 it from ‘will’ to ‘may’.

22 THE CHAIRMAN: The draft was ‘will’. That was changed by Mr. Frost to ‘may’. Then, in the  
23 second witness statement he used ‘to attempt to’. (After a pause): Are you now saying that  
24 he is definite about this, or it is ‘may’?

25 MR. MERCER: The first point I would like to make, Madam, is that wearing a non-contentious  
26 hat, one would never advise anybody to give a warranty that any business plan will work  
27 except in qualified circumstances. That may sound a trite point, Madam, but it is perfectly true.

28 THE CHAIRMAN: That is why I was picking you up on the point.

29 MR. MERCER: But my instructions are - and certainly I think it is quite obvious - that as Mr. Frost  
30 and Mr. McCabe have been focused on, for example, the preparation of a business plan, so  
31 they can become more certain that the parameters they need to worry about can be dealt with,  
32 so that by the time we get to Mr. Frost’s fourth witness statement, the ‘may’ begins to be  
33 removed because he feels more confident that he can say the business plan will succeed  
34 because he has a detailed road map of how to do it. Indeed, it is my understanding that the

1 degree of likelihood of success of the business plan was discussed with Mr. Frost before that  
2 statement was concluded and signed by him.

3 THE CHAIRMAN: It does not say that he is saying that it would trade itself out of administration.  
4 He says, "As administrator I have worked with Mr. McCabe as to how the interim relief, if  
5 granted, will practically allow the appellant to trade itself out of administration and be able to  
6 afford the legal fees. A draft business plan has now been developed. The draft management  
7 agreement will be provided". It does not say that Mr. Frost has looked at the business plan and  
8 he now considers, contrary to what he had said in the other witness statements, that it will trade  
9 itself out of administration on that business plan. All it is saying is that he has discussed it  
10 with Mr. McCabe and this is a business plan which Mr. McCabe has provided for that purpose.

11 MR. MERCER: He has worked with Mr. McCabe to provide a plan ----

12 THE CHAIRMAN: I am just concerned that you are putting words in Mr. Frost's mouth which in  
13 fact he did not intend to have placed there because of the very careful wording of para. 5 of the  
14 witness statement, and his very careful wording of the first and second witness statements.

15 MR. MERCER: I think the difference, Madam, is the fact that the business plan ----- I do not  
16 believe I am putting words in Mr. Frost's mouth.

17 THE CHAIRMAN: I think if you want to make that submission it would need more evidence than  
18 we have before us because you are giving evidence.

19 MR. MERCER: I think the statement would allow me to submit, Madam, that the business has a  
20 business plan which Mr. Frost and Mr. McCabe consider will practically allow it to trade itself  
21 through.

22 THE CHAIRMAN: It says '-- how the interim relief, if granted, will allow the appellant to trade'.

23 MR. MERCER: Through the mechanism of the business plan.

24 THE CHAIRMAN: And on the basis of a draft management agreement.

25 MR. MERCER: Yes.

26 THE CHAIRMAN: (After a pause): Which I think provides for ---- I am not sure about this, but  
27 I think it provides for Mr. McCabe to receive some funds under this ----

28 MR. MERCER: Management fees is what is provided for. In fact, profit and money would not  
29 otherwise come out of VIP until ----

30 THE CHAIRMAN: -- until the end, but at some point Mr. McCabe might benefit from it.

31 MR. MERCER: Yes. (After a pause): I have already taken thirteen minutes more than I had  
32 intended. I will wrap up pretty quickly and just go back to the nub of it. We say we are not  
33 asking for more than we originally did. We are saying that in some ways it could not be more  
34 urgently required. We are saying that we would look at implementation of the numbers of  
35 SIM cards in a plan as a consultative matter with T-Mobile. We are saying on the facts that we

1 have a strong *prima facie* case. There is no other reason that we can see that has been put  
2 forward by the other parties that should mean that we are denied interim relief at this stage.  
3 Unless there is anything else that I can help the Tribunal with ----?

4 THE CHAIRMAN: Actually there is one point: the question of 107 Clifton Street. It may be that I  
5 have just mislaid these documents, but if you look at the bundle which has been provided by T-  
6 Mobile, at Divider 4, which is Ms. Durie's witness statement, and if you then look at the  
7 exhibit RMD 1, the first page, and it is the first main paragraph which deals with VIP Com  
8 PLC, and a legal charge over 107 Clifton Street. If you go a bit further into the bundle there is  
9 another document which says that there is no charge now – I think – well that is in relation to  
10 80 Clifton Street, this is 107 Clifton Street.

11 MR. PICKFORD: Madam, I do not know if it will be of assistance, there is a document towards the  
12 end of the exhibit which has on the top right hand side in very large letters "395", it is  
13 "Companies' Form 395 – Particulars of a Mortgage or Charge".

14 THE CHAIRMAN: This is why it is useful to have pages numbered, but anyway, yes, I have a  
15 number of 395.

16 MR. PICKFORD: This is the one, the second page of it relates to the mortgage or charge for 107  
17 Clifton Street and lower ground floor of 22-24 Strutton Street.

18 THE CHAIRMAN: Yes, I have that.

19 MR. PICKFORD: Is that the document that the Tribunal is trying to find?

20 THE CHAIRMAN: Yes. You indicated earlier that this property was not owned by any of the  
21 companies and I thought, just for completeness, we ought to deal with that.

22 MR. MERCER: My instructions are that the property was sold around a year ago.

23 THE CHAIRMAN: Ah, so it had been?

24 MR. MERCER: It had been, and the present switch room is leased.

25 THE CHAIRMAN: And that is 107 Clifton Street, is it?

26 MR. MERCER: That is no.80 Clifton Street.

27 THE CHAIRMAN: And that is where the room was all the time, or was it in 107 before?

28 MR. MERCER: The room all the time has been 80 Clifton Street, madam, that is what I am  
29 instructed.

30 THE CHAIRMAN: So was 80 Clifton Street – because this is 107 Clifton Street, the document that  
31 we just referred you to – was 80 Clifton Street owned by you or one of these companies?

32 MR. MERCER: I am instructed "no", madam.

33 THE CHAIRMAN: Never – it had not been sold?

34 MR. MERCER: They have never owned it, madam.

35 THE CHAIRMAN: It is only 107 Clifton Street, and that has now been sold?

1 MR. MERCER: That was sold a year ago.

2 THE CHAIRMAN: Thank you, I just thought we ought to clear that up.

3 MR. PICKFORD: I am grateful madam. There are essentially three main headings into which I can  
4 put the points that I intend to make. The first is as a matter of general principle, that the type  
5 of relief sought by VIP should not be ordered by the Tribunal. The second point falls into two  
6 parts. The overall point is on the facts of the present case, even if one puts to ones side the  
7 assignment agreement, VIP's claim cannot succeed and the two sub-parts to that are firstly the  
8 premise for the application that there is some urgent need for the relief to prevent serious and  
9 irreparable harm has not been made out on the evidence, and secondly, even if it were, all the  
10 other factors militate against the grant of relief in this particular case.

11 THE CHAIRMAN: Sorry, when you said VIP's claim cannot succeed, you meant this application  
12 cannot succeed?

13 MR. PICKFORD: This application – I beg your pardon. This application cannot succeed on the  
14 facts. The first point is one of principle that really the kind of relief that they are seeking is  
15 inappropriate for the Tribunal to grant.

16 THE CHAIRMAN: We have the point.

17 MR. PICKFORD: Thirdly, only if the Tribunal requires me to I intend to address the implications of  
18 the assignment agreement. It may be that once I have got that far the Tribunal is sufficiently  
19 convinced it does not need to hear me further on on those points.

20 THE CHAIRMAN: I am not saying whether you need to address us or not, but at the moment  
21 certainly my thought process is that the question for us is whether a party is interested, whether  
22 they have a sufficient interest.

23 MR. PICKFORD: Yes.

24 THE CHAIRMAN: VIP, whatever the construction of those documents, if – giving the most  
25 beneficial construction to you – the Appellant has some interest, because it has a 5 per cent.  
26 interest, in those circumstances there is support for the proposition that they have a sufficient  
27 interest. The question that I think might be addressed, but I do not think it is relevant at the  
28 moment – I cannot see its relevance – is whether, if the other companies made an application  
29 they have a sufficient interest; and that may depend on trying to unravel, or fathom out what  
30 the documents actually mean. But it does not seem to me at the moment that we need to go  
31 down that road, because that is nothing to do with this application.

32 MR. PICKFORD: Madam, what I would say is we do not need to go down that road because there  
33 are at least 10 other reasons why this application should not be granted, but if the Tribunal was  
34 against me on all of those others, there is a further point that one pragmatic solution to the

1           apparent problems of VIP is that On-Line does take over this appeal and the case that is made -  
2           ---

3 THE CHAIRMAN: That does not seem to me – I do not want to spend a lot of time on this because  
4           it really is way down the line.

5 MR. PICKFORD: Yes.

6 THE CHAIRMAN: But it does not seem to me that that is a matter for the Tribunal or for you. If  
7           the Appellant has a sufficient interest then they are entitled to be the Appellant. If somebody  
8           else wants to be an Appellant then they would have to make an application and that has all  
9           sorts of implications. But it is not either for the Tribunal or for you to be saying “Well it  
10          should be somebody else”. You might be able to say “It should not be them”, but you cannot  
11          say “It should be somebody else”, because they have not made the application.

12 MR. PICKFORD: We are not saying it should not be them. What we are saying – and I will deal  
13          with it very briefly, because as you rightly pointed out, madam, it is somewhat down the  
14          batting order of relevant points – is that when one comes to address the question of ----

15 THE CHAIRMAN: Can I just say what I think you are saying? I think what you are going to say is  
16          that because their interest is very small and there are others who may have a greater interest in  
17          this then it is one of the considerations one ought to take into account in granting interim  
18          relief?

19 MR. PICKFORD: That would be one way of putting it potentially. Just to expand on that, the  
20          reasoning that T-Mobile adopts, and as I said I will be very brief now in dealing with it, is  
21          simply that the very worst case scenario that is posited by Mr. Mercer is that apparently VIP  
22          will go into liquidation. We say of itself what happens, what changes it if that actually  
23          happens? They are not currently trading and, as far as this Appeal is concerned, somebody  
24          else can continue the Appeal, so we say it is somewhat academic.

25 THE CHAIRMAN: I am not sure you are right about someone else can continue this Appeal, you  
26          see.

27 MR. PICKFORD: That is the question ----

28 THE CHAIRMAN: You cannot just suddenly change the name unless they have a sufficient interest  
29          – we dealt with this last time.

30 MR. PICKFORD: We did and our submission is that they do have a sufficient interest, anyway I do  
31          not intend to take any more ----

32 THE CHAIRMAN: We would have to give permission and it is out of time, and all sorts of things.

33 MR. PICKFORD: You would and I have made written submissions as to why that would be  
34          appropriate in this case, but I really do not need to take any longer now.

1 So dealing first with the matter of general principle as to why the relief sought should not be  
2 ordered by the Tribunal, it is certainly true that the Tribunal's powers are apparently wide, but  
3 the instances in which it is appropriate to grant relief are described in the Tribunal's own  
4 guidance at para.20.4 to 20.5. The Tribunal describes in 24 at the end how the making of an  
5 appeal does not suspend the effect of the decision to which the appeal relates. Then it goes on  
6 ----

7 THE CHAIRMAN: If you look at the Rule, is that not dealing with 61(1) rather than 61(2)?

8 MR. PICKFORD: Madam, in my submission certainly in the context of para .20 that is a general  
9 application and whether or not that is a general application what certainly is the case is that  
10 every case so far where the Tribunal has ever granted interim relief the application has been in  
11 respect of directions either made by, or refused to be made by, a competition authority. Given  
12 the constraint of time I can be brief here, and I do not intend to take the Tribunal to each  
13 relevant authority, but the cases are: *Napp*, and that is in the bundle at tab 1. In that case Napp  
14 sought an order suspending certain directions given to Napp by the Director General of Fair  
15 Trading, so that conforms with that proposition. *Genzyme* was the next case, and in *Genzyme*  
16 Genzyme similarly sought an order suspending certain directions against Genzyme made by  
17 the Director General of Fair Trading.

18 THE CHAIRMAN: That is why I said it was in relation to 61(1) and not 61(2). Those are all cases  
19 which fall within 61(1).

20 MR. PICKFORD: But these are all the cases in which the Tribunal has ever exercised its ----

21 THE CHAIRMAN: We have not had to deal with this sort of case before, a 61(2) case.

22 MR. ANDERSON: Apart from *Albion* that is.

23 MR. PICKFORD: And in *Albion* it was again the same point that the application was made because  
24 the Director General of Water Services refused to grant interim relief and the application was  
25 made against that refusal.

26 THE CHAIRMAN: Yes.

27 MR. PICKFORD: So what is certainly the case is that this application is without precedent, and we  
28 say all of the circumstances in which the Tribunal's power has been exercised thus far involved  
29 the setting aside of directions or a request that the Tribunal should make a direction where the  
30 relevant competition authority refused to do so, and that is not the basis of the application here.

31 THE CHAIRMAN: That is what I have been saying. Sorry, I was cutting it short, but that is what I  
32 was trying to cut short, because this is a different sort of application. This falls within 61(2)  
33 without prejudice to the generality of 61(1) – “If the Tribunal considers that it is necessary as a  
34 matter of urgency for the purpose of ... “ (a) or (b) “... the Tribunal may give directions”, so it  
35 gives a wider jurisdiction.

1 MR. PICKFORD: As Mr. Anderson pointed out, *Albion Water* was ....

2 THE CHAIRMAN: That was a refusal to grant interim relief.

3 MR. PICKFORD: As I understand it from what Mr. Anderson said - and I would have to check the  
4 case to confirm the point ---

5 THE CHAIRMAN: Do not worry ----

6 MR. MERCER: Can I just very briefly clarify? The Tribunal in fact granted interim relief on the  
7 basis of what it called three jurisdictional routes, one of which was the Authority's refusal to  
8 grant interim relief; another was 61(2) and the need to ----

9 THE CHAIRMAN: That is what I understood, yes.

10 MR. PICKFORD: So, it is a short point. The first point is that this is without precedent, and  
11 therefore the Tribunal should certainly tread very carefully when considering whether it is  
12 appropriate ----

13 THE CHAIRMAN: I am not sure you can say it is without precedent, having regard to what Mr.  
14 Anderson just ----

15 MR. PICKFORD: No. What is without precedent is granting relief ----

16 THE CHAIRMAN: -- alone.

17 MR. PICKFORD: -- in circumstances where it is alone; where there is no challenge to the decision  
18 that has been taken by either the Director-General of Fair Trading or some other regulator or  
19 competition authority. That is what makes it without precedent.

20 The second point is that we are told that the reason why this is so urgent is because funds are  
21 needed in order to fund the legal costs of this appeal. That, as I understand it, is what this case  
22 boils down to.

23 THE CHAIRMAN: I am not sure that it is now being put that way. It was put that way originally,  
24 but it is really being put on the basis that it needs to go back into business, because if it goes  
25 back into business then the administrator ---- the people funding it, or the administrator is  
26 prepared to continue. If it does not go back into business ---- I am not sure how to put it now.  
27 It may not be funded. I am not sure it is being suggested that there is a direct line between the  
28 money coming into the business and the legal costs. I think they may be two separate lines.

29 MR. PICKFORD: As I understand what Mr. Mercer has said this afternoon, he expressed grave  
30 doubt about whether this appeal would be funded in the absence of interim relief.

31 THE CHAIRMAN: Yes. But, it may be a separate line. It is not that the money coming into the  
32 business is going to fund it.

33 MR. PICKFORD: That certainly was not my understanding of the witness evidence of Mr. Frost  
34 most recently.

35 THE CHAIRMAN: I do not think it matters.

1 MR. PICKFORD: Mr. Frost's most recent witness evidence - and I can take the Tribunal to it if  
2 you would like - certainly on my reading - says that the funds for this appeal will come out of  
3 the net profits from re-commencing the business. Now, Mr. Mercer can correct me if I am  
4 wrong, but I believe that is the case. Mr. Mercer is nodding.  
5 So, it is the case that *inter alia* one of the things that is being requested is funds in order to  
6 fund this particular appeal, and those fund are to come, in effect, from a third party/intervener,  
7 T-Mobile. We say there is no precedent whatsoever - whether it be in the Tribunal's case law;  
8 in European jurisprudence; or in private litigation - which supports the proposition that a third  
9 party intervener in proceedings should be compelled to act in such a way as it provides funds  
10 to enable a claimant to bring a claim in whatever forum. It is a point which was touched upon  
11 - albeit not concluded upon - by the President of this Tribunal in Albion Water. I have given  
12 the reference in my skeleton, and I do not need, again, to take the Tribunal to it now. In  
13 summary, the President indicated his provisional view that it would not be appropriate to grant  
14 interim relief for those purpose.

15 We say that that position is further supported firmly by the jurisprudence of the High Court. If  
16 the Tribunal can turn to Tab 25 ----

17 THE CHAIRMAN: Do you just want to give us the references?

18 MR. PICKFORD: It is the Crown on the application of *Cornerhouse Research -v- Secretary of*  
19 *State for Trade & Industry* [2005] CA 192, Tab 25. It is the Judgment of the Court of Appeal.  
20 Paragraph 74 - although I can guide the Tribunal because there are a number of bits that can  
21 simply be selected for sake of speed. At para. 74 the Court of Appeal was setting out the  
22 principles that apply to the grant of protective costs orders. Protective costs orders are *ex ante*  
23 orders which are intended to promote access to the court by impecunious claimants by  
24 protecting them against the possibility of heavy costs orders being made against them if they  
25 are unsuccessful in their application. The context is judicial review.

26 It is just worth pausing there to note that a central part of the justification for such orders is that  
27 the challenge is being brought by someone who does not have a personal interest in the matter.  
28 It is a public interest issue.

29 Having set out the principles that apply to protective costs orders the Tribunal went on to note  
30 at para. 77 -- and this is the key one from my perspective ----

31 THE CHAIRMAN: They do not think there is any jurisprudence whereby the Defendants were  
32 obliged to finance the Claimant's costs of first instance as the litigation proceeded. "This  
33 would be to trespass into judicial legislation in a way which was proscribed by the House of  
34 Lords." So, you say that that shows you do not have to do something to finance the litigation.

1 MR. PICKFORD: Indeed. We say *a fortiori* it must apply to us because we are not even the  
2 Respondents or the Defendants. We are the interveners. That, in essence, is my first point -  
3 that as a matter of principle we cannot be compelled to act in a way to provide fund for VIP's  
4 litigation.

5 Secondly, if we turn to the facts of this particular case ----

6 THE CHAIRMAN: That is slightly different from trading with somebody. In IP cases if there is  
7 an order for specific performance, which is an interlocutory matter ... an interim order, the  
8 Defendant may have to continue to trade, and that may produce finance which might, directly  
9 or indirectly, finance the action. That is what is being said here. It is not saying to you, "Can  
10 we have money from you directly to finance this action?"

11 MR. PICKFORD: It is not being said, "Can we have money directly?" but it is saying, "Can we  
12 have the money, and the way we will get the money is by you offering the services, and we  
13 will re-sell them".

14 THE CHAIRMAN: But that does happen in litigation because if you have an interim order for  
15 specific performance - for example, in an IP situation ----

16 MR. PICKFORD: Absolutely, Madam. What we are saying is that that cannot be the purpose of  
17 granting the relief.

18 THE CHAIRMAN: No.

19 MR. PICKFORD: Certainly it might be possible that a company would be granted interim relief,  
20 and that would give them funds, and it might be possible that one thing they would do with  
21 those funds is to use them to conduct litigation. That is very different from what was certainly  
22 the way that it was originally put by VIP. Now, they may be trying to change the basis on  
23 which they put it now, but the case as originally put was quite clear: "We need this particular  
24 relief. Why do we need it? We need it because we need the funds to pursue this litigation,  
25 and if we don't get it then there is a risk that this litigation might not get funded". That was the  
26 way it was put . I say that that is an illegitimate reason for the grant of relief.

27 So, turning to the facts, the first point that it is necessary to consider is the principles that one  
28 applies to those facts. Now, Mr. Mercer has said there is nothing between any of us about the  
29 principles being those articulated in the *Genzyme* case. That is not quite correct, because in the  
30 *Genzyme* case, as the Tribunal has pointed out, that was concerned with the suspension of  
31 directions. It is just worth turning up that case at Tab 4 of the authorities bundle. One sees at  
32 para. 78 in the Tribunal's analysis that the Tribunal says ---- It is referring to its previous  
33 decision *Napp*, and the President says, "I came to the view that applications for interim relief to  
34 suspend directions should be dealt with by analogy to the principles applied by the Court of  
35 First Instance of the European Communities".

1           So, the first point to note is that *Genzyme* was a case in that context.

2 THE CHAIRMAN: We have got that point.

3 MR. PICKFORD: Therefore, one also has to have regard in this context, where effectively the

4 relief is sought as if this were in some way party and party litigation ... there are principles to

5 be applied from the High Court ----

6 THE CHAIRMAN: I do not think, for my part, that there is a distinction between party and party

7 litigation and this litigation.

8 MR. PICKFORD: You say there is or there is not?

9 THE CHAIRMAN: There is a distinction because this type of litigation has the specific provision

10 which is in our rules. What one considers is not on all fours with what one considers in a

11 private litigation scenario. The undertaking as to damages does not apply here. So, it is a very

12 different scenario. One of the differences is the public part of these proceedings - the public

13 interest part of these proceedings.

14 MR. PICKFORD: Madam, I would submit that the undertaking in damages could quite equally

15 apply here. It is certainly true that ----

16 THE CHAIRMAN: On what basis could we make an order for an undertaking as to damages?

17 MR. PICKFORD: The Tribunal would not make the order. In the High Court, the High Court

18 does not make an order. The undertaking as to damages is an undertaking given by the party

19 seeking relief, and it is the price that they pay ----

20 THE CHAIRMAN: In the High Court that is a normal requirement of going. There is no

21 requirement here of going ---- of coming here that there should be an undertaking as to

22 damages.

23 MR. PICKFORD: Well, that comes back to my first point, that this case is moving into new

24 territory because we are not dealing with the kind of purely public law cases that the Tribunal

25 has dealt with previously where it was all an issue about setting aside a decision of the

26 Director. We are being invited to move into a new realm, which is effectively where the

27 Tribunal is being asked to exercise its jurisdiction in a manner which is if not precisely on all

28 fours, extremely close to the manner in which the High Court would exercise its jurisdiction.

29 The undertaking as to damages is a point I will come to. My submission is certainly that the

30 undertaking could be given here, just as other undertakings were given this morning, in this

31 particular context.

32 What I say the implication of that is that one does not simply apply the *Genzyme* test, but one

33 also has to have regard to the relevant principles that would apply in the High Court were there

34 an application for interim relief there of the sort that is being made here. Of course, this type

1 of application could equally be made in the Chancery Division. Plainly we are all here in the  
2 Tribunal in any event. So, to that extent it is appropriate to make it here.

3 THE CHAIRMAN: Does the Chancery Division have a similar provision about interim relief,  
4 which is in the competition context rather than in the private litigation context?

5 MR. PICKFORD: The Chancery Division is able to make all of the same interlocutory orders as  
6 this Tribunal would be able to in a competition context, indeed I am acting in a case currently  
7 where someone is seeking ----

8 THE CHAIRMAN: But that is a private litigation, is it not?

9 MR. PICKFORD: Private litigation.

10 THE CHAIRMAN: No, but the public litigation does not get before the Chancery Division.

11 MR. PICKFORD: That is correct, but what I am saying is this particular application ----

12 THE CHAIRMAN: I understand your submission; your submission is – I am just trying to cut it  
13 short, it may take longer by cutting it short – that this is equivalent to private litigation.

14 MR. PICKFORD: Yes.

15 THE CHAIRMAN: I understand that submission, I think we all understand that submission – I am  
16 not saying whether it is right or wrong, I am just saying we understand it.

17 MR. PICKFORD: I am grateful, and therefore I say the corollary of that is that one should ----

18 THE CHAIRMAN: One should use the principles that are used in private litigation?

19 MR. PICKFORD: Yes, where they are appropriate. I am happy to adopt the *Genzyme* framework  
20 overall, but one should not ignore that there are principles in private litigation and that they are  
21 relevant and helpful, indeed, even in the *Genzyme* case the President of the Tribunal at para  
22 .79 – I do not want to take the Tribunal back to that passage – but the President of the Tribunal  
23 indicated that there may well be useful analogies to be drawn from the jurisprudence relating to  
24 interim applications in private law - so even in that more purely public law context. So I say  
25 in this context that really must be the case.

26 So the first question that has been addressed: is there a prima facie case? According to Mr.  
27 Mercer he has a prima facie case, but I say (borrowing from the private law jurisprudence) that  
28 it is not sufficient simply for there to be a prima facie case, the Tribunal needs to be satisfied to  
29 a high degree of assurance that injunction would be granted at trial and for that proposition I  
30 rely on two cases, namely, *Hounslow London Borough Council v Twickenham Garden*  
31 *Developments Ltd* and *Shepherd Homes v Sandham*, and they are at the bundle of authorities  
32 submitted for this hearing, that is the third volume, at tabs 11 and 12.

33 THE CHAIRMAN: They are new volumes, are they? Thank you.

34 MR. PICKFORD: Mr. Mercer has had my submissions on that. He has not sought in his  
35 submissions this morning and this afternoon to take issue with that particular point, so I can be

1 relatively brief. But if, for example, we turn to the case of *Hounslow London Borough Council*

2 ----

3 THE CHAIRMAN: Yes.

4 MR. PICKFORD: And it is page reference 268. I believe there was a typographical error in my  
5 skeleton which was “258”, but the correct reference is 268 at E to H. The important point is at  
6 the bottom of that page where Mr. Justice Megarry says:

7 “It so happens that a few days ago I gave judgment on a motion (*Shepherd Homes v*  
8 *Sandham* [1970 3 W.L.R. 348) in which I had to consider the principles applicable to  
9 applications for mandatory injunctions. For the reasons stated in that judgment, I think  
10 that before granting a mandatory injunction on motion the court must feel a high degree  
11 of assurance that at trial it will appear that injunction was rightly granted.”

12 So we say that in relation to mandatory injunctions, certainly in private law, it is not simply a  
13 case of establishing a prima facie case, there needs to be a high degree of assurance that the  
14 injunction would be granted at trial, and we say that that is the approach the Tribunal should  
15 take in the present case. Indeed, it is notable that the Court of Appeal, when considering the  
16 issue of mandatory injunctions some 15 years later in the more recent case of *Parker v Camden*  
17 *London Borough Council* and that is at tab 22 of the authorities that were prepared for the  
18 hearing in December, the Court of Appeal expressed the matter in quite trenchant terms. If one  
19 turns to p.177 of the report, and these are the words of Lord Justice Browne-Wilkinson (as the  
20 then was), he said: “I accept that it is only in the most exceptional circumstances that a  
21 mandatory order can be made on an interlocutory application before the trial of action.” He  
22 then goes on to say that in that particular case there were exceptional circumstances. In that  
23 particular case, for the benefit of the Tribunal, the circumstances were that there were old  
24 people who were living in accommodation, and their heating had broken down and as I  
25 understand it, it was approaching winter and the nature of the application was one to compel  
26 the person who was responsible for servicing those boilers to come and do so because there  
27 was grave risk to the health, and indeed lives, of those people.

28 THE CHAIRMAN: You would say that *a fortiori* in competition law where some of the cases which  
29 were decided in this Tribunal those are equivalent, that there are grave concerns to keep the  
30 businesses running, and the likelihood is at the end they will succeed?

31 MR. PICKFORD: Yes, there are two points. First, that the Tribunal has to believe not simply that  
32 there is a prima facie case – well it is the test that there is a high degree of assurance that they  
33 are going to be right; and secondly, that it really needs to be an exceptional case to grant relief  
34 on an interim basis ahead of a full hearing of the substantive matters.

1 THE CHAIRMAN: Well I suppose the exceptional case is within what is set out in the Rules as to  
2 what you should take into consideration.

3 MR. PICKFORD: Well one might approach it in that manner, but it is certainly not the case that  
4 every case that comes before the Tribunal will be ----

5 THE CHAIRMAN: No, clearly not.

6 MR. PICKFORD: -- will be exceptional. Of course ,there will be other cases which come before the  
7 Tribunal where the relief that is being sought is not mandatory, it is not saying: “You must  
8 reconnect not having provided services for four years”. It might be saying “Do not disconnect  
9 us” and that would be very different, that is not a mandatory injunction, and therefore the test  
10 would be the ordinary *American Cyanamid* one.

11 THE CHAIRMAN: Well “Do not disconnect” is different from “You must reconnect”. “Do not  
12 disconnect”, the next stage is “Reconnect”, or “Disconnect” and therefore you have a  
13 “Reconnect” case.

14 MR. PICKFORD: I say “Do not disconnect” is different because had VIP come – and this is a point  
15 that blends in with the issues of *status quo*.

16 THE CHAIRMAN: It is requiring whoever it is not to disconnect, i.e. to provide a service so it is a  
17 mandatory order.

18 MR. PICKFORD: It is possible that that might be correctly construed as a mandatory order as well,  
19 maybe I have not chosen my example very well. There are other examples where clearly the  
20 relief being sought is not mandatory in nature, and in those cases one applies the ordinary  
21 *American Cyanamid* approach in private law and, depending on the exact context, that blends  
22 in with the *Genzyme* approach in the Tribunal. But this case is most certainly mandatory, and  
23 therefore one must apply the principles that I have just articulated.

24 Turning to the question of whether or not there is a prima facie case the Tribunal has already  
25 identified, when hearing Mr. Mercer’s submissions, some of the considerations that would  
26 need to be taken into account, and I say those considerations of themselves mean that the  
27 Tribunal cannot, or should not, be satisfied with the requisite degree of assurance that the relief  
28 would be granted at trial if it was sought. But it is also worth just stepping back and  
29 remembering that the issue that prompted VIP to come to the Tribunal was a disconnection  
30 some four to five years ago, and irrespective of the historic position, what happened then may  
31 or may not have been a breach of competition law, the contract – and we see this from Mr.  
32 McCabe’s witness statement at para.21 when the Tribunal took Mr. Mercer to it earlier on  
33 today, the contract that VIP had was an 18 month contract.

34 THE CHAIRMAN: Well that is what he says anyway.

35 MR. PICKFORD: That is what he says, that is his case.

1 THE CHAIRMAN: And you have not said anything.

2 MR. PICKFORD: We have not said anything yet because we are still preparing our evidence. Let  
3 us just take his case at its highest, and let us suppose that that is correct. If it was an 18 month  
4 contract then potentially there was some sort of obligation, or in his case some sort of  
5 authorisation by T-Mobile which allowed or even on his case required the provision of GSM  
6 gateway services.

7 The Tribunal will recall that in the *Floe* second Judgment, (tab 11, authorities' bundle) in that  
8 case the Tribunal concluded that Vodafone would have been objectively justified in refusing to  
9 supply having regard to Vodafone being the sole licensee authorised to provide services and  
10 having regard to Article 10 of the Licensing Directive. What is said in this case to distinguish  
11 Floe from VIP is that Mr. Mercer says that in this case they were authorised and Floe was not  
12 in the Vodafone case, but at best that could only be for the 18 months of the contract. What  
13 Mr. Mercer needs to establish in order to make good his application for interim relief is not  
14 some historical breach. What he needs to establish is that at substantive trial he would be  
15 entitled in 2007 to a final injunction of the sort that he now seeks on an interim basis and we  
16 say that whatever the case might have been historically that surely cannot be an easy thing for  
17 him to do. If one just stands back and looks at the matter with some commonsense, to suggest  
18 that because there may have been some authorisation many years ago that that somehow  
19 creates an ongoing obligation on an allegedly dominant undertaking to supply, for ever after,  
20 whatever the circumstances – even if there is no contractual obligation any more – when the  
21 Tribunal has already held that Vodafone (who never supplied at all) would have been quite  
22 entitled not to supply, would have been objectively justified. I am not asking the Tribunal to  
23 decide the point, all I am saying is it must raise, at the very least, considerable doubt.

24 THE CHAIRMAN: Would a dominant undertaking, who has a year's contract with somebody, and  
25 at the end of the year refuses to renew the contract, could that be an abuse of a dominant  
26 position?

27 MR. PICKFORD: Well I would submit in these circumstances, if there were an objective  
28 justification for it, no.

29 THE CHAIRMAN: But what is the objective justification?

30 MR. PICKFORD: The objective justification, which is the evidence which I will come on to, when  
31 dealing with the effects on T-Mobile is what we say, and Mr. Mercer expressed doubts about  
32 it, but there was no evidence to contradict what we say are the effects of the grant of this relief,  
33 that it has very, very serious financial implications for T-Mobile, and it has a very seriously  
34 deleterious effect ----

1 THE CHAIRMAN: In other words, you are not abusing your dominant position because you have  
2 other reasons why you have decided – if that is the case – or a person, a company has decided  
3 not to do it?

4 MR. PICKFORD: Absolutely. It is quite clear, as a matter of competition law that there is no  
5 requirement on even a dominant undertaking to supply a customer at a loss. For the sake of  
6 completeness, the reference is the *Industrie des Poudres Sphériques*’ case, which is at tab 14.  
7 Again, it is not a point that Mr. Mercer has taken issue with, so I am not proposing to take the  
8 Tribunal there – it is para.179 of that case. That is our case before the Tribunal on this interim  
9 application, that we would be loss making if we made this supply and there really cannot be an  
10 obligation on us to do that. So that is dealing with the first point, which is prima facie case.

11 THE CHAIRMAN: What about Mr. Anderson’s point, which he alerted us to before, about the  
12 resources and 3G, and that sort of thing, that he would want diverted from putting your efforts  
13 in other areas. Would that come into that as well?

14 MR. PICKFORD: It does, Madam. The reason why I am hesitating is because in order to deal with  
15 the point properly, it might be appropriate if we went ---

16 THE CHAIRMAN: Which we do not want to do. So, we should leave that aside.

17 MR. PICKFORD: We certainly should not leave it. It is an extremely relevant consideration. It is  
18 relevant to the matters that we discussed in private this morning ----

19 THE CHAIRMAN: No. I was looking at it in a much wider area. You have got a business, and  
20 you are directing it in one way. They are asking you to direct it in a different way.

21 MR. PICKFORD: Absolutely.

22 THE CHAIRMAN: That is all I was saying. I was not dealing with other matters. I was just saying  
23 that you have got a business going one way. Can you be forced, effectively, to change your  
24 business direction?

25 MR. PICKFORD: We say, ‘No’.

26 THE CHAIRMAN: That is the way they are saying they want you to go.

27 MR. PICKFORD: We entirely agree with, and endorse, that point.

28 Clearly, there are two manifestations of that. One is as regards T-Mobile and whether it is  
29 appropriate or fair as regards T-Mobile’s business, but there is also the wider public interest, as  
30 the Tribunal cited. Miss Durie deals, for example, with the roll-out of 3G. There is a public  
31 interest in 3G being rolled out properly. If T-Mobile is diverted and distracted----

32 THE CHAIRMAN: That is the point I am trying to make.

33 MR. PICKFORD: It is a very good point, and I adopt it.

34 If one turns now to the question of urgency, which I will also deal with in conjunction with  
35 serious and irreparable harm, we have some degree of difficulty in responding to this particular

1 case because it seems to change almost at every turn. In my submission that is indicative of  
2 the inherent weakness and difficulties in Mr. Mercer's case - the fact that we never seem to  
3 hear the same case from one submission to another.

4 As a general point, my submission is that the Tribunal can only sensibly deal with this  
5 application on the basis of the written, sworn witness evidence that has been provided to it.  
6 We have a total of five different witness statements from Mr. Frost - we have two versions of  
7 his first witness statement and then three further witness statements. VIP has had more than  
8 ample opportunity, and more than ample second chances in order to get its case straight on the  
9 written evidence. In my submission, with the greatest respect, it is quite unacceptable to  
10 engage in a constant process of trying to manoeuvre that evidence into some different position  
11 by means of saying what the evidence allegedly says; being confronted with the fact that it  
12 does not say that; and then saying, "Well, my instructions are that that is what they ,meant". It  
13 is not good enough, and it is not how litigation should proceed. So, I intend to deal with this  
14 application on the basis of the written witness evidence.

15 If one turns to the first witness statement of Mr. Frost at para. 7, he explains what he says the  
16 reasons are for there suddenly being urgency - and it is that there is now an increasing cash  
17 burden as legal fees are incurred. So, certainly the reason that he gave was the cash burden  
18 from legal fees.

19 Now, I have obviously dealt with the principle of funding legal fees. So, these submissions are  
20 on the assumption that the Tribunal rejects my point on that. Even if it were the case that it  
21 was, in principle, correct for T-Mobile to act in a way that gave funds for the purposes of legal  
22 fees ----

23 THE CHAIRMAN: That is a slightly different point, because your submission is that you should  
24 not finance it. There is a difference between financing it and being required to trade, which  
25 will provide finance, which might be used for this purpose. I am not sure that it is necessarily if  
26 we reject your first point because there is a second layer to it.

27 MR. PICKFORD: In my submission there is no material distinction between the two in this  
28 particular case because that is being advanced as the purpose of the application. It is objective,  
29 and it would be a formalistic approach to differentiate between simply being asked to give the  
30 cash and being asked to act in such a way as they get the cash. It is appropriate for the  
31 Tribunal to look at this as a matter of substance, and not of form.

32 So, we see from the case that was certainly presented originally by VIP that the alleged  
33 urgency was the cash burden, and the fact that these proceedings were going to require a lot of  
34 investment, and they could not apparently meet it. Well, at this point there was no explanation  
35 of the fact that it was VIP On-Line that was funding this appeal. They were silent about it then.

1 This witness statement does not, as I recall ---- I beg your pardon. It does. That was a bad  
2 point. It does say that they were financed by VIP On-Line.

3 But, if that is the case then there really is nothing in the point that the funds are needed  
4 desperately in order to finance this litigation unless we have evidence of VIP On-Line's  
5 financial position, and we do not. We have no information whatsoever about VIP On-Line. So,  
6 we do not know whether it is feasible or practicable for that financing to continue.

7 We hear a slightly different story about that each time the point is put to Mr. Mercer. At the  
8 last hearing we heard - as the Tribunal correctly pointed out - that the financing was to  
9 continue in any event. Now we are hearing, as he first put it earlier on today, that it would not  
10 continue. Then again, that was nuanced further to, "Well, can't say for definite. It might. It  
11 might not".

12 Well, we say that the only way that one can really get to the bottom of all that is if one saw the  
13 full financial picture, and they have not chosen to give us that. That is a factor which should  
14 count against the grant of interim relief.

15 If one considers the other costs that are referred to by Mr. McCabe that he says that he has to  
16 continue to meet, he referred in his second witness statement to increasing financial pressures.  
17 This was at para. 24. I will just read from that - I do not think the Tribunal needs to turn up the  
18 witness statement. "I have had no salary over this time from VIP. I have borrowed heavily. I  
19 have had to re-mortgage my house just to keep everything going. I have gradually laid off five  
20 out of six staff members". It is a bit of a sob story.

21 But, we then challenged in our original submissions much of this evidence, and said, "Well,  
22 hold on a minute! You're painting a rather bleak picture, but actually really you haven't given  
23 us the complete story" and we still have not been given a complete story. There is no  
24 evidence as to how the costs - and they must be fairly minimal - of continuing to run VIP as a  
25 non-trading company, have increased very significantly in recent weeks. Indeed, on Mr.  
26 McCabe's evidence, he has laid off five out of six staff members. So, the costs must have come  
27 down, and the pressure on him must surely be easing rather than increasing. We certainly do  
28 not have any evidence to support the idea that these costs are somehow giving rise to urgency.  
29 Indeed, Mr. Mercer today did not press that point. So, it does not appear that that is the basis  
30 upon which they now say that the application is made out.

31 I have also, in my skeleton argument, drawn attention to the fact that what little evidence we  
32 do have of Mr. McCabe's financial position does not suggest that it is exceptionally perilous.  
33 He makes reference in his first witness statement to having sold a company which was the fifth  
34 largest telecom company in the world at the time when he sold it. It apparently had an annual  
35 turnover of some £27 million. Now, admittedly that was in 1998. But, certainly I think I

1 would probably quite like to be in the position of having sold a company with a turnover of  
2 £27 million in 1998, and I imagine most people would too.

3 He also, some two years after T-Mobile stopped providing services to VIP, purchased a house  
4 for £1.7 million. That is evidenced in the witness evidence of Robyn Durie. So, again, this  
5 does not seem to quite accord, when one burrows down a little bit, with the apparent sob story  
6 we were initially being given.

7 THE CHAIRMAN: The difficulty with all this is that you are piercing the corporate veil, are you  
8 not? I am not sure that any of this is really relevant to our consideration of it. The question is:  
9 should interim relief be given to this company? It is being said by the administrator or  
10 liquidator, "Well, maybe I can't get any funding", or, "Maybe I haven't got any funding", or,  
11 "I don't have any funding and I can't go on". But, you have addressed that point, and I am not  
12 sure that Mr. McCabe's personal finances have anything to do with it.

13 MR. PICKFORD: In my submission, Madam, they do. In a sense they put them in issue  
14 themselves. They have said, "We can't do it, and the reason why it's all problematic is  
15 because this is having an increasingly deleterious effect on Mr. McCabe's finances".

16 THE CHAIRMAN: Yes, but I do not understand quite why you are making such an important  
17 point about answering it, rather than saying, "Well, actually it doesn't matter".

18 MR. PICKFORD: If the Tribunal considers that it does not matter ----

19 THE CHAIRMAN: That is my thought at the moment. I am not saying that if I think about it again  
20 ---- But, that is my thought - that it does not really matter.

21 MR. PICKFORD: I am happy to approach it on the basis that it does not matter. If the Tribunal  
22 were to change its mind and decided it does matter ----

23 THE CHAIRMAN: We have got your submissions.

24 MR. PICKFORD: -- then you have submissions on that.

25 THE CHAIRMAN: You have your submissions all written down.

26 MR. PICKFORD: I refer to my written submissions in particular on that point, and so I will not  
27 take up the Tribunal's time any further on that - nor on the point about Mr. Browning, which  
28 is again dealt with in detail in our written submissions. Mr. Browning is dealt with, I believe,  
29 in particular, at para. 16 of the submissions for the first hearing.

30 The only point I would make, which is something which has arisen out of the most recent  
31 evidence that we have been provided with by Mr. Frost, is that that evidence is actually quite  
32 revealing as to the true motivation for this particular application. If one looks at the business  
33 plan which is attached to Mr. Frost's fourth witness statement ---- Firstly if one goes to the  
34 notes to that business plan at para. 5 ---- That is dated 10 January. At para. 5 one sees there  
35 the consideration that Mr. McCabe is to receive under this business plan. It says that the price

1 of the agreement is 50 percent of net profits payable one month in arrears subject to a  
2 minimum monthly payment of £40,000 commencing in February 2006 – I think that must be a  
3 typographical error, it must mean February 2007.

4 THE CHAIRMAN: That is what I was referring to earlier.

5 MR. PICKFORD: Indeed, madam, my point, and it may simply be to echo the point that has been  
6 already made, is that at a very minimum one of the purposes of this agreement seems to be to  
7 channel £40,000 a month, or the best part of £ ½ million a year to, as I understand it, Mr.  
8 McCabe, and we say that that is not really an appropriate basis for the grant of interim relief.  
9 Indeed, that is just the minimum, if one turns to the actual business plan itself, and the figures  
10 that are set out and estimated there, as I understand it Mr. McCabe is ultimately to receive  
11 £85,000 a month once the project is up and running after about seven or eight months – that is  
12 on the second page of the exhibit, top line: “MD T. McCabe”. We have a print-out from a  
13 spreadsheet, and it is exhibit JF 12.

14 THE CHAIRMAN: Yes, we have that.

15 MR. PICKFORD: The first page deals with revenues, and then the second page goes on to wages  
16 and salaries, and then at the top “MD” ----

17 THE CHAIRMAN: “Not T. McCabe”.

18 MR. PICKFORD: That is not “T. McCabe”. I am sorry, the copy that I have is so unclear it looks  
19 like “Mr. T. McCabe” on mine.

20 THE CHAIRMAN: Mine says “Not T. McCabe”.

21 MR. PICKFORD: I withdraw the point, on my copy it is entirely unclear whether that is “not” – I  
22 withdraw the point insofar as it is Mr. McCabe, whoever the MD of this company is apparently  
23 they are going to earn £85,000 a month, because if one looks across the top we are dealing  
24 with months: “August, September, October, November, December”, £85,000 a month, equates  
25 to roughly £1 million a year – that is a fairly generous salary by most people’s estimation.

26 THE CHAIRMAN: Do you think that is right because all the other figures are also very high on that  
27 basis, per month? The secretary would be £25,000 a month.

28 MR. PICKFORD: Well, certainly on the face of it, because we have months along the top, that is  
29 correct. It may in fact be that this budget is somewhat misleading, there is no explanation that  
30 has been given as to the fact that these sums may be annual sums rather than monthly sums – it  
31 appears that they are monthly sums. In any event the point I do not think is particularly key, it  
32 does not need to detain the Tribunal if, as the Tribunal says, it is right on the primary point,  
33 which is that the particular source of funding is, in fact, somewhat ... (After a pause) Sorry, I  
34 was just taking instructions. Whether or not the spreadsheet is correct – it is only the case  
35 that he gets £40,000 a month, in para.5.

1 THE CHAIRMAN: Well the relevance of the point you are making on the spreadsheet is that if this  
2 is relied on as the business plan whether this is a reliable spreadsheet?

3 MR. PICKFORD: Well it certainly calls it into question, yes.

4 MR. MERCER: I think, madam, at the appropriate time I may have to spend a few minutes going  
5 through what this means. I have not interrupted my learned friend before, but I think we are  
6 getting into the realms of misunderstanding and for example, £40,000 does not go to Mr.  
7 McCabe, and nobody is getting £75,000 a month salary.

8 THE CHAIRMAN: Well can you explain what those figures are?

9 MR. MERCER: The £40,000 ----

10 THE CHAIRMAN: No, the £75,000 or the £85,000 on p.2 of the spreadsheet?

11 MR. MERCER: (After a pause) If you take those columns ----

12 THE CHAIRMAN: I know it says “Annualised Wage Bill” underneath.

13 MR. MERCER: Yes, it does, and that is the annualised wage bill for the people employed in that  
14 particular month.

15 MR. ANDERSON: I hesitate to get up and explain Mr. Mercer’s own table, but my understanding of  
16 this was that the figures down to “Annualised Wage Bill” were the figures for those people, but  
17 then divided by 12 ----

18 THE CHAIRMAN: Which is where you get the 15.

19 MR. ANDERSON: Which is where you get the 15.

20 THE CHAIRMAN: That is what I understood.

21 MR. ANDERSON: So the monthly figures are the bold figures, which are calculated by dividing the  
22 annualised figure by 12 and splitting it across the 12 months.

23 MR. MERCER: Therefore allowing you to put a cost per month in to the scale.

24 THE CHAIRMAN: I think, Mr. Pickford, the point you have been making is probably a  
25 misunderstanding of the schedule – it is slightly confusing, but I think it is a misunderstanding.

26 MR. PICKFORD: It may be, it is certainly not the point on which my submissions resisting this  
27 application hang.

28 So concluding in relation to urgency, the Tribunal was quite right this morning to point out that  
29 this application suffers from quite exceptional delay. The application could have been brought  
30 at any time in the last four years and in those circumstances there would need to be something  
31 very, very compelling to explain why it is appropriate to grant the relief now, and we really  
32 have not been given that compelling evidence by VIP. One does have to ask the question what  
33 would happen even if VIP were wound up? VIP is not currently trading so in terms of  
34 competition there would be no effect whatsoever. VIP also claims to have sold its right of  
35 action, in return for 5 per cent. of it back again if it is ultimately successful, to On-Line. So

1 insofar as there is any claim for damages in respect of the historical position that can be  
2 pursued on their case. I am silent as to whether they are correct or not because obviously I  
3 reserve my position in relation to that assignment, but certainly that is their case that they have  
4 assigned the private law action, and so one really has to ask the question: even in this very,  
5 very worse case scenario, which we say on the evidence the Tribunal has before it, is not  
6 plausible – we say on the evidence before the Tribunal what appears to be likely is that VIP  
7 On-Line will continue to fund this litigation and/or Mr. McCabe will continue to do so. But  
8 even if that is wrong it is far from clear that in practical terms the consequences of VIP going  
9 into liquidation are as dramatic or as adverse as they have been painted.

10 Turning to the question of the effect of the relief if granted on competition and third parties, as  
11 I have already said in relation to competition, the current *status quo* is that there is no lawfully  
12 operating GSM gateway operator as far as I understand it. It has been suggested by Mr.  
13 Mercer that it may be people who are doing it covertly.

14 THE CHAIRMAN: Well we cannot take that into account, the fact is that as far as we know ----

15 MR. PICKFORD: You cannot take the latter point, you cannot take the covert point.

16 THE CHAIRMAN: No.

17 MR. PICKFORD: Quite, yes, so the position currently is that no one is running these kind of  
18 businesses, and that has been the case for the best part of four years, and what VIP seeks to do  
19 is to put itself in a very, very nice position indeed. It says “We would like this interim relief  
20 ...”

21 THE CHAIRMAN: .... would be the only ones, you have made that clear.

22 MR. PICKFORD: “-- but we would be the only ones”. So all the GSM gateway business that there  
23 used to be throughout the manifold GSM gateway companies that can all come to us. One can  
24 see why they are making application, it would be particularly desirable to get a massive head  
25 start. If they are ultimately right in their application, if they are ultimately right in their claim,  
26 then it may well be the case that the GSM gateway services can be lawfully provided, and it  
27 may be the case if they are right – obviously our case is that they are not – that mobile phone  
28 operators have to offer them these services. If that matter were decided at final trial there  
29 would be an equal playing field, but what VIP seeks to do is to completely distort the  
30 conditions of competition and get a leg up now to get ahead of the game.

31 Supposing it were otherwise and in fact T-Mobile were obliged to reconnect every gateway  
32 operator that then came along to it, that would also have extremely ----

33 THE CHAIRMAN: We have read this.

34 MR. PICKFORD: -- adverse effect on T-Mobile, so clearly that counts against very strongly the  
35 grant of interim relief.

1 I am conscious, madam, that you have read my submissions and you have also had the  
2 opportunity to review T-Mobile's evidence. It is the case, we say, that the financial  
3 consequences will be very grave. I am very happy to take you through the witness evidence of  
4 Mr. Spence, who deals with that. I can only emphasise that even if I do not take the Tribunal  
5 to it, those are points that very much concern T-Mobile ----

6 THE CHAIRMAN: We understand.

7 MR. PICKFORD: -- and we will therefore submit that they should not be overlooked. Likewise, the  
8 impact of congestion and again the evidence on that – I will give the Tribunal the references –  
9 the witness statement of Mr. Hartley, paras. 10 to 20, and in particular para.6 where he deals  
10 with the impact of reconnecting VIP. It is the witness statement of Mr. Wiener at paras. 5 to  
11 12, it is the witness evidence of Mr. Louth, at paras 8 to 19, and it is the witness statement of  
12 Miss Durie at para.14. This is just to pick up on the new point that was raised by Mr. Mercer  
13 this morning. He says: “Well hold on a minute, we care too, as GSM gateway operators, we  
14 care about whether there is going to be disruption to the network, because we do not want it  
15 either, and therefore the mobile operators are making a fuss about nothing”, and the point that  
16 Miss Durie explains, having spoken to Mr. Hartley, is that the way in which GSM gateways  
17 work is they effectively latch on and hog the spectrum. So if you are coming through the GSM  
18 gateway you are fine, because the GSM gateway always has a link into the cell. It is everyone  
19 else on the outside who is trying to get in, who is just a mere random customer on their own,  
20 that experiences the difficulty. The problem with gateways is they impact disproportionately  
21 on the legitimate customers, T-Mobile's customers, at the expense of VIP's customers. So that  
22 is why Mr. Mercer's point is a bad one.

23 We also have explained, and this is dealt with in the witness statement of Mr. Weiner at paras.  
24 5 to 7, and the attachments to that, not simply the impact on T-Mobile, but the impact on T-  
25 Mobile's customers, because they will suffer a worse service as a result of what we say will be  
26 the congestion caused by allowing GSM gateways to be operated on T-Mobile's network.  
27 Then, of course, there is a further factor, which was the factor that we heard this morning.  
28 If one turns to the balance of interests, it is at this point where I would suggest it is again  
29 helpful for the Tribunal not merely to have regard to the test in *Genzyme* but also the classic  
30 exposition of the balance of interest tests in the *American Cyanamid* Case.

31 THE CHAIRMAN: I think we are familiar with it.

32 MR. PICKFORD: I am grateful, madam. I therefore do not need to detain the Tribunal by taking it  
33 through the extensive passage of Lord Diplock, but it is in essence a three stage test. Firstly,  
34 are damages an adequate remedy for the claimant ---- the person seeking the injunction, and if  
35 they are then that really should be the end of the matter? If they are not, then one goes on to

1 look at whether damages would be adequate to protect the person against whom the relief is  
2 sought. In this case that is T-Mobile. If those factors are equal, because in both cases damages  
3 would be inadequate, then one goes on to consider the many factors that come within the  
4 balance of convenience or the balance of interests.

5 In addition to the exposition of that test by Lord Diplock it is also, of course, important to have  
6 regard in this particular context to the remarks that I drew the Tribunal's attention to earlier of  
7 Lord Justice Brown Wilkinson in the *Parker -v- Camden* case. Of course, where you are  
8 considering a mandatory injunction the balance of inconvenience has to be set against the  
9 context that is only the most exceptional circumstances that merit the grant of interim relief.  
10 So, the burden is always on VIP to establish its case and to establish that it is correct to grant  
11 interim relief. The presumption must always be against them, we say, in this particular context.  
12 I have dealt with much of what would happen if the relief were not granted already, because I  
13 say, "So what? It really does not matter". Everything they care about can ultimately happen -  
14 not necessarily through VIP, but it will happen. Insofar as the issue is legal costs that, say, Mr.  
15 McCabe, or the administrator, or someone wrongly had to pay because the Tribunal wrongly  
16 decided not to grant interim relief, well, those can be claimed as a matter of damages. I would  
17 adopt and support the point made by the Tribunal this morning that what we are dealing with  
18 here is all remediable in damages, and therefore that really should be an end of the matter. One  
19 does not even need to go on to consider T-Mobile's position.

20 But, if one does go on to consider T-Mobile's position, we say that the loss that would be  
21 suffered by T-Mobile would not be remediable in damages. That is for two reasons: one is  
22 because the loss ----

23 THE CHAIRMAN: You would not have any damages. It does not work that way.

24 MR. PICKFORD: Sorry?

25 THE CHAIRMAN: It does not work that way, does it? You would not have any claim to damages.

26 MR. PICKFORD: Well, we say, as I mentioned at the outset, that there is no obstacle to VIP, in  
27 theory, providing a cross-undertaking.

28 THE CHAIRMAN: They have not provided an undertaking.

29 MR. PICKFORD: They have not provided an undertaking. Quite.

30 THE CHAIRMAN: Therefore you have got no protection.

31 MR. PICKFORD: Exactly. We would suffer loss, but it would not be remedied. Therefore, that  
32 again counts against the grant of interim relief. We say, in fact, it really pretty well counts ----  
33 It is almost determinative of this application - as indeed, are about eight or nine other points.  
34 The Tribunal has seen the passage that I cited to **Zuckerman on Civil Procedure** in my  
35 skeleton. I will just very briefly quote the passage (at Tab 29 for the Tribunal's reference). It is

1 probably not necessary to turn it up. Zuckerman says at para. 9.95, “The practice of requiring  
2 an undertaking in damages as a condition to the grant of an interim injunction was well-  
3 established by the mid nineteenth century. The undertaking is considered to be a matter of  
4 elementary fairness ----“

5 THE CHAIRMAN: That is to do with civil litigation.

6 MR. PICKFORD: It is, and we say that really does apply here.

7 THE CHAIRMAN: I understand your submission. If this was civil litigation, or if the principles of  
8 civil litigation applied here, then undertakings as to damages are important. The question is -  
9 which we may, or may not, need to go into - is what the relationship is between an interim  
10 direction under our rules and the civil litigation rules.

11 MR. PICKFORD: Indeed, Madam. In my submission, they are not merely important. It is really  
12 the price of the injunction.

13 THE CHAIRMAN: We understand that.

14 MR. PICKFORD: If you are not prepared to pay the price in civil litigation, you do not get the  
15 injunction.

16 THE CHAIRMAN: We understand that.

17 MR. PICKFORD: We say the same should apply here. (After a pause): A further point on the  
18 losses is even if, putting aside the fact that there is no undertaking that is being given, it would  
19 also be extremely difficult to measure from T-Mobile’s point of view because the damage to its  
20 business ---- If it is correct, and we say we are correct - that this would cause congestion to our  
21 customers - clearly that is going to put customers off. But, to quantify that would be extremely  
22 difficult. Again, that is another consideration that is traditionally taken into account in  
23 determining whether it is appropriate to grant relief.

24 THE CHAIRMAN: That goes back to the undertaking as to damages and whether an adequate  
25 undertaking as to damages can be given, and that goes back to the question that I referred to. I  
26 do not think it takes the matter any further.

27 MR. PICKFORD: It is related.

28 THE CHAIRMAN: We understand those points.

29 MR. PICKFORD: Thank you. Further issues that plainly have to be taken into account in terms of  
30 the balance of interest are the public interest ---- We have already adverted to those. That is the  
31 public interest matter that I dealt with this afternoon. It is also the public interest matter that  
32 was dealt with this morning.

33 Finally on this point, if one turns to the remarks of Lord Diplock in the *American Cyanamid*  
34 case where he said that insofar as all other factors are evenly balanced, it is inevitably a  
35 counsel of prudence to take such measures as are calculated to preserve the status quo. Now,

1 we say that in this case all other factors are not evenly balanced. They overwhelmingly favour  
2 T-Mobile. But, even supposing they were, and the only objective was to preserve the status  
3 quo, the status quo is that there is no provision of GSM gateways. It is a point that the  
4 Tribunal has well on board.

5 But, just to deal with a point that was raised by Mr. Mercer, he seemed to be suggesting that  
6 the relevant status quo was the status quo some four years ago. That is plainly contrary to  
7 authority. If I could just hand up the case of *Garden Cottage Foods -v- Milk Marketing Board*,  
8 a decision of the House of Lords ---- (Handed) The House of Lords addressed the question  
9 of when one ascertains the appropriate point in time at which to measure the status quo. At  
10 p.140 between B and D ---- In particular at C,  
11 “The status quo is the existing state of affairs, but since states of affairs do not remain static,  
12 this raises the query, ‘Existing when?’ In my opinion, the relevant status quo to which  
13 reference was made in *American Cyanamid* is the state of affairs existing during the period  
14 immediately preceding the issue of the writ claiming the permanent injunction, or if there were  
15 unreasonable delay between the issue of the writ and the motion for an interlocutory  
16 injunction, the period immediately preceding the motion”.

17 THE CHAIRMAN: That must be right because otherwise you would not take account of delay.

18 MR. PICKFORD: Indeed.

19 THE CHAIRMAN: It is the corollary, or the other side of the coin, of delay.

20 MR. PICKFORD: Indeed.

21 THE CHAIRMAN: And urgency.

22 MR. PICKFORD: In this case there has been no claim for a final injunction. The first time at which  
23 an injunction was sought was on an interim basis. So, one looks back to the time whence the  
24 injunction was first sought, and that application was made legitimately some time during  
25 November - because, of course, the Tribunal will recall that at the CMC on 1 November it  
26 rejected an application that was hidden away in the depths of the revised notice of appeal, and  
27 the application was made again. I forget the date, but some time in November of last year. So,  
28 one judges the status quo ----

29 THE CHAIRMAN: One was not clear at that time that the application was being made, and the  
30 question was, ‘Was it going to be made?’

31 MR. PICKFORD: Quite.

32 THE CHAIRMAN: And if it was going to be made, proper application had to be made.

33 MR. PICKFORD: Absolutely. It was then made pursuant to the directions of the Tribunal within a  
34 week or to, as I recall. It is immaterial exactly when after that CMC. So, that is the point in  
35 time at which one judges the status quo - or just before that point in time. The status quo then

1 is that there had not been any provision of GSM gateway services by VIP for the best part of  
2 four years.

3 The final point in relation to this is one which was touched upon by the Tribunal in Mr.  
4 Mercer's submissions. It is the question of what was actually contracted for, and how does that  
5 compare with the 4,000 SIMs that is now being required? Now, Mr. Mercer submitted to you,  
6 "Well, it was always a contract for 4,000 SIMs". That is inconsistent with the evidence of Mr.  
7 Springall, their own witness. If one looks at the first statement of Mr. Springall at para. 8, and  
8 also the exhibits to his statement, one can see the point. This is in the first statement ----

9 THE CHAIRMAN: That you will find in the re-amended Notice of Appeal and supporting  
10 evidence.

11 MR. PICKFORD: Half-way down the paragraph he says, "Nevertheless in a conversation I had  
12 with Sarah Madondo around early August 2002 to order sixty more SIMs, which David Powers  
13 had authorised, she offered free handsets to go with the SIMs". So, there they are referring to a  
14 specific tranche of sixty SIMs which appears to have been specifically authorised. If one goes  
15 to the exhibits to that statement that point becomes clearer. If one goes to Exhibit CS1, and  
16 p.6, it is an e-mail entitled at the top 'Bennett, Jan from Charlie Springall'. Actually there are  
17 a number of e-mails entitled 'Bennett, Jan from Charlie Springall. So, that does not help  
18 enormously.

19 THE CHAIRMAN: "Please can you process ----"

20 MR. PICKFORD: Yes, indeed. "Please can you process this PO as soon as possible? These extra  
21 units have already been approved by David Powers". So, again, that is a specific tranche of  
22 units that apparently has had specific approval.

23 THE CHAIRMAN: That is to do with handsets - not SIMs. The handsets are set out. "Could you  
24 please arrange to send the SIMs as soon as possible ----" So, the SIMs and the handsets.

25 MR. PICKFORD: As I understand it, the two are hand-in-hand, because, of course, VIP originally  
26 just sought SIMs, but then they were offered handsets and they took advantage of that. Then  
27 again it is confirmed later on by ---- This is Exhibit CS2 - the first letter exhibited to CS2. The  
28 third paragraph begins, "As you know, last week we attempted to purchase further SIMs and  
29 this request was declined". This was 6 November, 2002. So, this was prior to suspension.

30 THE CHAIRMAN: And that refers on the next page to the fair usage policy, which is what I was  
31 referring to earlier.

32 MR. PICKFORD: Indeed, it refers to fair usage, but notably what it does not refer to, it does not say  
33 "You declined our request, but you cannot possibly do that because we were entitled to 4000  
34 SIMs", so again that is consistent with its being on a tranche by tranche, step at a time basis.  
35 Then if one looks at the next letter, which is dated 19<sup>th</sup> November 2002, that is a request from

1 Mr. Springall, and the final paragraph: “Also we do need to continue the arrangement of this  
2 month, or purchase some more contracts, please can you advise me of your preference”, so  
3 again this is all consistent with the Tribunal’s – in my submission – correct view.

4 THE CHAIRMAN: I am not sure we had a view, we wonder what it is?

5 MR. PICKFORD: This is all consistent with a contract where specific authorisation was required for  
6 each tranche of SIMs, and/or handsets, not one where there was some sort of open-ended  
7 entitlement, or entitlement to 4000 SIMs.

8 THE CHAIRMAN: What does it mean “Or purchase some more contracts”?

9 MR. PICKFORD: As I understand it “... purchase some more contracts” is referring to purchasing  
10 more individual SIM contracts, which is authorised on each occasion by Mr. Power.

11 THE CHAIRMAN: That would suggest that there is not an overall contract. Where does the 18  
12 month come in?

13 MR. PICKFORD: That is a question we can only answer when we have got to the bottom of it,  
14 when we provide our evidence – if we can answer it at all, because of course we are at the  
15 interim stage and we are prior to the submission of our evidence. So what we are having to do  
16 is to take this case on the best evidence which is currently available, which is in respect of this  
17 particular issue, the evidence of Mr. Springall. I say on Mr. Springall’s evidence it does not  
18 support the case that Mr. Mercer was making earlier on today.  
19 Madam, we say that all of those points clearly indicate that this is not an appropriate case to  
20 grant interim relief, but we say further, if the Tribunal were not satisfied by that, there are  
21 further circumstances which should be taken into account, which are that the grant of an  
22 interim injunction lies in the discretion of, in this case, the Tribunal or a court if we were in  
23 another forum. It stems historically from the principles of equity, and it is well established that  
24 somebody appealing to equity must come to equity with clean hands, and we say a similar  
25 principle naturally applies wherever an injunction is being sought. I do not want to make more  
26 of this than I have made in my skeleton, but there are considerable issues that arise as to how  
27 full and frank VIP and the various relevant actors in VIP have been in revealing information in  
28 this particular case. I accept the submission as it points out in my skeleton, and we say that  
29 they are relevant factors to take into account when determining whether it is appropriate to  
30 exercise the Tribunal’s discretion.

31 I have already dealt with some of those points in my submissions earlier, so I do not need to  
32 dwell on those but I do refer to my skeleton in respect of them. I should make clear that is my  
33 first skeleton and also the additional points that were made in my further skeleton ----

34 THE CHAIRMAN: I think we have your points.

1 MR. PICKFORD: Madam, we had a brief discussion at the outset about my point on the  
2 rectification and the assignment agreement. There is a further point that arises in relation to  
3 the assignment agreement, even if you are not with me on the point in relation to rectification,  
4 and if I might deal with that first, because it is relatively short and I can take that very swiftly.  
5 It is the point that is mentioned in my skeleton and we say properly construed the assignment  
6 agreement at Clause 2 still provides an indemnity which requires VIP On-Line to fund this  
7 litigation, it is not simply a matter of it being in its discretion. We say the indemnity still does  
8 in fact require it if you construe that agreement properly.

9 The Tribunal will recall, and again for speed I will not take the Tribunal to it, the relevant part  
10 of Clause 2 states that the purchaser “shall indemnify the company and/or the administrator in  
11 respect of any and all costs, claims, liabilities, damages or expenses ...”

12 THE CHAIRMAN: We have read this point in your skeleton and we discussed it last time, I am not  
13 sure it takes the matter any further.

14 MR. PICKFORD: It is a different point to the point that was discussed last time. I do not believe  
15 that I made this particular point last time that ----

16 THE CHAIRMAN: It is all to do with the definition of the right of action.

17 MR. PICKFORD: It is.

18 THE CHAIRMAN: Yes, we did discuss it last time.

19 MR. PICKFORD: Well we discussed it in a slightly different context. We discussed it last time in  
20 the context of what was transferred. In this context it is in the context of what has been  
21 indemnified, or who is indemnifying what in respect of what.

22 THE CHAIRMAN: I thought we were discussing both last time, I think, but it is a question of  
23 indemnity in relation to this ----

24 MR. PICKFORD: Indeed, madam, as I recall the Tribunal and yourself, madam, particularly,  
25 discussed the latter question with Mr. Mercer but I did not make submissions on it.

26 THE CHAIRMAN: All right.

27 MR. PICKFORD: And these are my submissions on it. Now, if the Tribunal has my submissions  
28 and is fully cognisant of them in my skeleton then I do not need to elaborate on them.

29 THE CHAIRMAN: Well is it not a question of – I do not have it in front of me – whether the recital  
30 is wider than the words of the right of action, and therefore there is the indemnity is meant to  
31 be wider?

32 MR. PICKFORD: No, it is not.

33 THE CHAIRMAN: I am not sure where this gets to anyway, because it is exactly the same, for my  
34 part at the moment I do not see that any of this is relevant.

1 MR. PICKFORD: It is quite feasible that I do not need this point, madam, but the point in a nutshell  
2 is that the right of action is defined simply as the right of action ----  
3 THE CHAIRMAN: The damages' action.  
4 MR. PICKFORD: -- against T-Mobile and the other UK network operators, but the indemnity is  
5 defined in terms of the damages or expenses arising out of, or pursuant to the right of action  
6 from the date hereof, and I say ----  
7 THE CHAIRMAN: "Of the right of action", we did discuss this ----  
8 MR. PICKFORD: But it is "arising out of or pursuant to", and we say in order to ----  
9 THE CHAIRMAN: I think I have your point.  
10 MR. PICKFORD: -- in order to pursue this particular claim in the manner that they are currently  
11 pursuing it they need this Appeal ----  
12 THE CHAIRMAN: Your submission is that there is a right of indemnity under the agreement ----  
13 MR. PICKFORD: Yes.  
14 THE CHAIRMAN: -- for those reasons, which is what I was referring to.  
15 MR. PICKFORD: Yes.  
16 THE CHAIRMAN: We did discuss it last time. Whether that is right or wrong I am not going to  
17 comment at the moment, and whether it is necessary for this Tribunal to comment on it we will  
18 see.  
19 MR. PICKFORD: Well in my submission it is not necessary because there are a large number of  
20 other reasons why the Tribunal does not even get there. The same applies to my other point  
21 which is that I submit that the deed of rectification was entered into under a common mistake  
22 as to the law and therefore is void *ab initio*, but again I do not actually need that point, and the  
23 point is in my original submission so I will not dwell upon it any further given the constraints  
24 of time.  
25 THE CHAIRMAN: Thank you very much.  
26 MR. PICKFORD: Those are my submissions, thank you.  
27 THE CHAIRMAN: Mr. Anderson?  
28 MR. ANDERSON: I will be as quick as I can, given that it is 25 past 4. Our view has always been  
29 that this application for interim relief was misconceived and doomed to failure for the reasons  
30 that we set out in our original submissions, and we amplified in our subsequent submissions.  
31 We would endorse the reservations that you, madam, put to Mr. Mercer, at the outset of the  
32 public element of today's hearing, and in my submission Mr. Mercer has not adequately  
33 addressed any one of them.  
34 We would agree with a great number of the points that Mr. Pickford has put to you, and I do  
35 not intend to repeat them, if I could just highlight one or two points that we consider

1 particularly important. First is the question of the general approach, the jurisdiction of the  
2 Tribunal, that is Mr. Pickford's first general area. We would accept that in this particular case  
3 the application, request for interim relief is entering new territory. I did indicate, of course,  
4 that in the *Albion* case, one of the grounds on which interim relief was granted was a 61(2)  
5 basis, but I should point out there are significant differences between that case and this; the  
6 most significant difference being of course that the relevant undertaking in that case originally  
7 consented to the interim relief being granted, and it was of course interim relief that was  
8 therefore in place from the outset of the Appeal. It was not a case of coming along some four  
9 years' later and asking for interim relief. So this case is entering new territory and in our  
10 submission the Tribunal should only seriously consider granting interim relief in this kind of  
11 case if it believed there was a compelling case for granting interim relief, and this is not such a  
12 case, this is a very weak case for interim relief.

13 Secondly, in relation to how this litigation is being funded, a great deal of time was spent last  
14 time exploring this question, and VIP was ordered to provide evidence on the funding  
15 arrangements, including ----

16 THE CHAIRMAN: I think they agreed to provide it and it went into the order.

17 MR. ANDERSON: However it ended up in the order there was an order to provide but they did not.

18 THE CHAIRMAN: It was on the basis that they agreed to provide it, they said that they would  
19 provide it and therefore it went into the order. It was not that the whole thing was very  
20 carefully considered and they were saying they were not going to provide it and the Tribunal  
21 ordered it.

22 MR. ANDERSON: No, but there was a great deal of debate about its relevance and its importance,  
23 and I myself was making the point that it was important to get to the bottom of that in order to  
24 understand the basis for the application for interim relief, because it has all along been our  
25 understanding of the case that the basis for the interim relief was the need to fund this  
26 litigation. That is how we understood the case to be put in the original application and in the  
27 witness evidence that had been advanced. That is why, of course, there was so much debate  
28 last time about the funding arrangements, and we now know, or it has been confirmed although  
29 it had been indicated beforehand that at least to date the litigation has been funded not by the  
30 Appellant, but by another company in what is described as Mr. McCabe's stable of companies,  
31 that is VIP On-Line. That, of course, is very significant, because it is that source of funding  
32 that has been available for the conduct of this litigation and if that changes it changes at the  
33 election of Mr. McCabe and if there are any other moving forces behind VIP On-Line those  
34 entities. If they so elect, in our submission, they cannot come to this court – I say “they cannot  
35 come” VIP cannot come to this court – and say “We need the interim relief” because the

1 driving or moving force behind us has decided no longer to fund the litigation. I can say that  
2 point without having to pierce the corporate veil because VIP itself in its evidence has made  
3 clear the source of the funding for this litigation was Mr. McCabe and VIP On-Line.

4 THE CHAIRMAN: That is why my mind is working on the basis that it is irrelevant, because you  
5 just do not take it into account.

6 MR. ANDERSON: Well you say “you do not take it into account”, the basis of the application for  
7 interim relief was that we need the money to fund this litigation. We said “That cannot be right  
8 because somebody else is funding the litigation according to your own evidence,” and it is  
9 utterly immaterial then that those who are funding the litigation may decide no longer to fund  
10 it.

11 THE CHAIRMAN: That is why I say it is irrelevant and, if Mr. Pickford is right, then you cannot  
12 force somebody – another party – to fund the litigation. So the original submission is  
13 misconceived, that is Mr. Pickford’s point on that.

14 MR. ANDERSON: The original submission by?

15 THE CHAIRMAN: The submission, the reason that we need the interim relief application in order  
16 to fund the litigation is a misconceived submission.

17 MR. ANDERSON: Yes, yes.

18 THE CHAIRMAN: It does not matter who has been funding it up until now it is a  
19 misconceived ----

20 MR. ANDERSON: Yes, that is the basis upon which the application has been made, and that is the  
21 basis upon which this Tribunal should be considering the application, not ----

22 THE CHAIRMAN: No, we have that point.

23 MR. ANDERSON: -- on some other basis. In terms of what is now being suggested as the basis for  
24 the interim relief, namely in order to trade out of administration the relevant points in our  
25 submission have been made in the course of dialogue between the Tribunal and Mr. Mercer,  
26 and I do not need to repeat them. It is not at all clear either that it would succeed on the basis  
27 of the evidence before the Tribunal, but, more importantly, in our submission it simply is not,  
28 as a matter of principle, a basis for granting interim relief, and, in particular, not on the facts of  
29 this case where the company has been placed into - I think it is described in one of the witness  
30 statements as - a skeleton position: without trading; with only one employee who may, or may  
31 not, still be there (we do not know); occupying premises (we do not know alone or whether  
32 with other companies in Mr. McCabe’s stable of companies - we do not know). But, it is a  
33 company that has sat in that position, and in administration, for, I think, eighteen months or so.

34 THE CHAIRMAN: What is going through my mind is that the reason we have interim relief in this  
35 jurisdiction is in relation to competition and public interest. It is not to keep companies alive

1 if that is not the reason - the main reason. One has to be very careful to make sure that the  
2 principle that we are applying is in relation to competition and public interest. That is why this  
3 is very different from the jurisdiction in the High Court.

4 MR. ANDERSON: Absolutely right. If one confines to those considerations, again, it is perfectly  
5 clear that this application for interim relief must fail because it is based either on the mis-  
6 conceived notion that it is necessary to fund the litigation, or it is based on the mis-conceived  
7 notion that it is necessary to revive a company in order to start trading, in order to generate  
8 some profits for Mr. McCabe because Mr. McCabe has decided he no longer wishes to fund  
9 the litigation. It simply is a mis-conceived basis for an application for interim relief.

10 THE CHAIRMAN: Effectively, the application has to be directed to the preservation of  
11 competition.

12 MR. ANDERSON: Of course, there may be situations where the applicant for interim relief is so  
13 precarious that if some form of interim relief is not granted it will disappear from the market in  
14 circumstances where it may not be able to get back in. In that sense the preservation of the  
15 competitive process and the preservation of that entity may be one and the same thing. That  
16 was very broadly the sort of argument that was being advanced by Albion in the *Shotton* case.  
17 It was in the market. It was suffering. It needed interim relief to survive in the market. That is  
18 not the case here because VIP is not in the market and has not been for several years.  
19 The question of whether or not a *prima facie* case has been made out. We would accept that  
20 the relevant test in a case such as this is whether a *prima facie* case is made out in respect of  
21 the final relief that is being sought in the context of this interim relief. We have serious  
22 reservations as to whether VIP has made out the necessary *prima facie* case that it will  
23 ultimately secure by way of final relief re-connection. That is not simply on the basis,  
24 obviously, of the facts of authorisation, but on questions such as whether there may be some  
25 other justification for no re-connection, or, indeed, issues of dominance and market definition.  
26 Urgency and serious harm. We have made many of the points in our written submissions, and  
27 I do not propose to go through them in any great detail. One or two points I would like to just  
28 highlight. Firstly, in our submission, the original request for interim measures greatly  
29 overstated the urgency and the precariousness of VIP's position - misconceived (for the  
30 reasons I have just been describing), but also overstated, and not supported, as it turns out, by  
31 the witness evidence that Mr. Frost ultimately gave -----

32 THE CHAIRMAN: Are you referring to the draft witness statements that we received?

33 MR. ANDERSON: Yes. The original application was made on the basis of the draft witness  
34 statement, and therefore it was overstating the actual position in terms of the consequences of  
35 there being no grant of interim relief, and the possibility of VIP being able to trade in the future

1 if it is either put into liquidation or not. Mr. Frost drew back from what was said in the draft  
2 that had been prepared on his behalf as the basis of the application. So, we are not satisfied  
3 that Mr. Mercer, for VIP, has made out the proposition that there is an imminent risk of VIP  
4 being wound up. It would appear that the existing creditors have been content for some period  
5 of time with the current arrangements, and there is no reason to suppose they will not continue  
6 to be - the main creditors being, of course, Mr. McCabe himself and the Revenue & Customs  
7 who have agreed to the assignment agreement, presumably on the basis of the understanding  
8 the parties then had, which was that it was a mechanism for the funding in particular of this  
9 appeal ---- the continuation of this appeal.

10 THE CHAIRMAN: I assume because then the Revenue might, at the end of the day, get some  
11 money.

12 MR. ANDERSON: Yes, of course. That is still the position.

13 THE CHAIRMAN: Not if the company is struck off.

14 MR. ANDERSON: It requires the funding of this litigation which, it is quite clear from what Mr.  
15 Mercer said last time, and is now in the evidence, is that Mr. McCabe and On-Line will fund  
16 the litigation in order to ensure that position. It is clear from the exhibits to, I think, Mr.  
17 Green's witness statement that that was the understanding of the parties. That was what the  
18 arrangement was designed to achieve.

19 The only issue that has changed, in our submission, on the evidence from the position back  
20 when administration was first implemented is the lifting of the stay. As you rightly pointed  
21 out, that was an inevitable consequence of the stay having been put in place in the first place -  
22 that it would be lifted, and legal expenses would then be incurred. Therefore, the reality is that  
23 the mis-conceived basis upon which the application for interim relief was originally put  
24 probably is the real reason. It is to generate money to finance the litigation, which is not an  
25 appropriate basis for interim relief.

26 The rest are really points that have been made.

27 Turning to the effect on competition, third parties and the public interest, we have produced  
28 our evidence in support of why we say it is not in the public interest for the SIMs to be re-  
29 connected. I do not propose to add orally to what we have said in writing, and in particular in  
30 the witness evidence of Mr. Graham Louth, and the exhibits. It is true that in reply submissions  
31 VIP submitted that Mr. Louth's evidence was without foundation. But, we have really had  
32 virtually nothing before the Tribunal that would meet what he has set out in his witness  
33 evidence as to concerns about congestion and other matters.

34 The effects on competition. We would endorse what has been said in relation to the relevant  
35 considerations. There will be no effect on competition by refusing interim relief. There would,

1 of course, be distortions if VIP were granted effectively a special dispensation to enter the  
2 market through this back door route of interim relief.

3 Finally, on the question of the approach to the substantive application, we would submit that if  
4 one gets as far even as the balance of interest, and the balance of convenience - and the  
5 Tribunal, in our submission, does not get anywhere near having even to weigh those in - it is  
6 clear that what in fact is being claimed is a form of damages at a premature stage of the  
7 litigation.

8 The absence of a cross-undertaking of damages. It is true, of course, that the jurisdiction of the  
9 Tribunal to grant interim relief is not the same as in private litigation before the High Court.  
10 But, in our submission it is perfectly legitimate for the Tribunal to take into account the  
11 adverse effect on T-Mobile in circumstances where there is no cross-undertaking, because the  
12 whole purpose of a cross-undertaking is to seek to preserve the integrity of the status quo on an  
13 interim basis pending the final result - the final result, of course, the court not knowing what  
14 that will be at the time that it is granting interim relief. So, it is a consideration that the  
15 Tribunal is perfectly entitled to take into account, as Mr. Pickford has suggested. We certainly  
16 submit that the wider public interest issues that have been canvassed are, again, if one gets to  
17 that point, a complete knock-out blow to the granting of interim relief in this case.

18 The final point that I wish to make is that in our submission this application for interim relief  
19 was so mis-conceived that this is a case where the regulator will, in due course, though not  
20 today, seek its costs, and on that there is just one point of clarification I would like to make. It  
21 has been suggested in a submission I think VIP has put in in a different context - or maybe  
22 Floe put in in the context of some request for a pre-emptive costs order (I have not seen the  
23 detail of it) - that this litigation is funded effectively by license fee money from the mobile  
24 operators. That is not the case. It is funded as part of the DTI's central government budget. It  
25 is therefore the taxpayer that is funding this litigation from the point of view of OFCOM's  
26 costs.

27 In our submission, both because of the absence of any merit in the application, and indeed in  
28 the way it has been advanced as a sort of moving feast, this is a case where, we would submit,  
29 it would be appropriate to award costs in the Regulator's favour.

30 Thank you. That is all I was proposing to say.

31 MR. MERCER: I did not actually expect to have to start fighting costs point s in the Floe case, and  
32 I do not intend to. For the record I think I really just ought to say that I do not think this  
33 matter is anywhere near *Cornerhouse*, and VIP's submission is that this matter is not on all  
34 fours with *Cornerhouse*; it is nowhere near *Cornerhouse*, and because if it were successful VIP  
35 might spend some of its money on litigation against T-Mobile is no reason why it should not,

1 in our opinion, receive SIM cards from them. It is not asking for cash - merely the means to  
2 make its own way in the world.

3 Again as a matter of record, I do not particularly want to see any future VIPs come on to this.  
4 VIP would submit that the *Hounslow London Borough Council* case is not relevant, and that  
5 what we are dealing with here are the statutory powers given to the Tribunal pursuant to the  
6 Competition Act 1998, and the rules, and this is not on all fours with current litigation with  
7 which the court was dealing in *Hounslow*.

8 Again, as a matter of the position that VIP, I think has to adopt, whether or not T-Mobile  
9 decided to ... it was lucky enough and big enough to win the 3G auctions I cannot see is at all  
10 relevant to this matter, Madam.

11 THE CHAIRMAN: I think the way that it is put - and Mr. Anderson can correct me - is that there  
12 were policy decisions in OFCOM which T-Mobile and the other operators are required to  
13 follow, and that it is important that other parts of the business are not put out of proportion to  
14 those considerations. Is that a fair way of putting it?

15 MR. ANDERSON: Yes.

16 MR. MERCER: What VIP would say to that, Madam, is that it is very interesting but it is, in VIP's  
17 submission, not relevant because what if T-Mobile had not won an auction for 3G? Would  
18 then suddenly it be right to grant interim relief, but it is wrong because they did win the 3G  
19 auction and maybe bid more than they should have?

20 THE CHAIRMAN: I do not think it is anything to do with winning the 3G auction. It is to do with  
21 the fact that they have a business to run, and they have to do it in compliance with the various  
22 approaches which OFCOM set them.

23 MR. MERCER: With respect, Madam, nobody forced T-Mobile to go in and apply for 3G. What if  
24 they had not?

25 THE CHAIRMAN: It is part of their business now.

26 MR. MERCER: Yes, Madam, and they knew the rules in respect of what they had to do in terms of  
27 ----

28 THE CHAIRMAN: I do not think this is going to take us any further, Mr. Mercer.

29 MR. MERCER: Very good, Madam. I do not think I need say anything more about piercing the  
30 corporate veil - or tearing it asunder even.

31 I think perhaps I should say that when we are dealing with looking at VIP On-Line and VIP,  
32 the appellant - as I am sure the Tribunal is already aware - the administrator is in charge of  
33 VIP, the appellant, and no-one else. There is, from that point of view, no connection between  
34 the two in terms of who is controlling them.

1 I think we mentioned at the time the business plan came up about the £75k per annum. The  
2 £40k payment is to the administrator for the purposes of the administration.

3 THE CHAIRMAN: So, who is paying the £40,000?

4 MR. MERCER: It goes into the administrator's resources for the use of ----

5 THE CHAIRMAN: Yes, but who is paying it?

6 MR. MERCER: It is coming in from trading, Madam.

7 THE CHAIRMAN: It says: "The consideration for" - can we just have a look at it, not that it really  
8 makes much difference. "The consideration for the price of this agreement" is what it says.

9 MR. MERCER: It is £40,000 a month, madam, coming into the pot from which creditors can be  
10 paid.

11 THE CHAIRMAN: Well, sorry, where is it coming from, it is a consideration for the price of this  
12 agreement? "Subject to a minimum monthly payment of £40,000", so there is a minimum  
13 monthly payment by someone to someone of £40,000.

14 MR. MERCER: Madam, the management agreement gives 50 per cent. of the net profits to the  
15 management company, the people actually providing the services subject to a minimum  
16 monthly payment of £40,000 to the administrator.

17 THE CHAIRMAN: Who is the management company?

18 MR. MERCER: That would be Mr. McCabe, well a vehicle set up to provide that.

19 THE CHAIRMAN: So there is £50,000 going to the management company which is Mr. McCabe's  
20 vehicle.

21 MR. MERCER: 50 per cent. of the net profits, yes.

22 THE CHAIRMAN: Yes, so it is a payment to Mr. McCabe?

23 MR. MERCER: Or whomever provides the management services.

24 THE CHAIRMAN: Yes, but there is a payment of £40,000 not going to the administrator, which is  
25 what you I think just suggested ----

26 MR. MERCER: No.

27 THE CHAIRMAN: -- but going to the management company.

28 MR. MERCER: There is a minimum of £40,000 a month going to the administrator for the creditors.

29 THE CHAIRMAN: No, "The consideration for the price of this agreement will be 50%. of the net  
30 profits payable one month in arrears, subject to a minimum monthly payment of £40,000."

31 MR. MERCER: 50 per cent. of the net profits goes to the person managing the service.

32 THE CHAIRMAN: Who is managing the service?

33 MR. MERCER: It could be a McCabe company, it could be ----

34 THE CHAIRMAN: That is right, so it is a payment to the management company, who might be Mr.  
35 McCabe, or maybe one of Mr. McCabe's companies, or may be somebody else.

1 MR. MERCER: Of 50 per cent.

2 THE CHAIRMAN: Well, minimum of £40,000, but it is not a payment to the administrator.

3 MR. PICKFORD: It is useful to have regard to the words in the final sentence of para.5 as well.

4 THE CHAIRMAN: Thank you very much, it just shows that “In the event that the roll out of SIMs  
5 does not equate to the contracted amount then Mr. McCabe has agreed to reduce his return...”  
6 So that shows you that the intention was that it was Mr. McCabe.

7 MR. MERCER: Two payments, madam, one is 50 per cent. of the net profits which goes to the  
8 manager, which might be Mr. McCabe, and £40,000 minimum each month goes through to the  
9 administrator, that is what that is supposed to say, madam.

10 THE CHAIRMAN: No, that is not what it says. Does it matter? The point that was being made is  
11 that something was going to Mr. McCabe. I thought you were just getting up to correct that,  
12 but on the terms of para.5 it does appear that Mr. McCabe, having regard to, I think it is the  
13 third sentence, was intended to get something out of this.

14 MR. MERCER: Yes, they both get something out of it was the point I was trying to get to.

15 MR. ANDERSON: Of course, it is clear from para.1 of the notes that it is in fact Mr. McCabe, not  
16 “might be” Mr. McCabe.

17 THE CHAIRMAN: Yes. “Mr. McCabe will manage the business of VIP within the administration”,  
18 and it is an agreement – and VIP – anyway, we have not seen the agreement.

19 MR. MERCER: I do not think there is anything else I can help with or wish to say, madam.

20 THE CHAIRMAN: Thank you very much. Can I thank you all for managing to finish in a day and  
21 for the very succinct way that the submissions were made, particularly this afternoon. We  
22 therefore do not need next Monday, so everybody is released from next Monday, and we will  
23 in due course provide our decision.

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