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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1093/3/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16th December 2008

Before:
VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED

Appellant

supported by

TELEFÓNICA O2 UK LIMITED

Intervener

- v -

THE OFFICE OF COMMUNICATIONS

Respondent

supported by

HUTCHISON 3G (UK) LIMITED

Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Meredith Pickford instructed by and appearing on behalf of the Appellant.

Ms. Helen Davies QC and Mr. Ben Lask instructed by and appearing on behalf of the Respondent.

Mr. James Segan (instructed by Baker & McKenzie LLP) appeared on behalf of the Intervener Hutchison 3G UK Limited.

Mr. Robert O'Donoghue instructed by and appearing on behalf of the Intervener, Telefónica O2 UK Limited.

1 THE CHAIRMAN: Good morning everybody. Thank you very much for your written
2 submissions. Unfortunately, owing to the pressure of other obligations, I have not been able to
3 give them the attention that they deserve, but I have a fair idea as to what the matters to be
4 discussed today are. As I am sitting alone without my colleague wing members I cannot really
5 decide anything substantive today, but I hope it will be useful to have a discussion about where
6 we are with this case, and explore the extent to which there is agreement about what should
7 happen and, if there is not agreement what the process should be for taking the case to its
8 conclusion.

9 Who is going to speak first? Mr. Pickford?

10 MR. PICKFORD: I do not know whether it would be helpful for me to begin, madam. I am afraid I
11 was not able to prepare a skeleton argument for today, I had a case yesterday outside London
12 and I only realised I had skeleton arguments to respond to, for which I am very grateful, about
13 9 o'clock last night, so perhaps it would be helpful if I set out T-Mobile's position so that
14 Ofcom and others can respond to it. You should have received, I believe, skeleton arguments
15 from Ofcom and also from O2?

16 THE CHAIRMAN: Yes, so who is here for O2.

17 MR. O'DONOGHUE: I am.

18 THE CHAIRMAN: You are Mr. O'Donoghue, and you are Mr. Segan for H3G, thank you.

19 MR. PICKFORD: And Miss Davies appears for Ofcom.

20 THE CHAIRMAN: Yes.

21 MR. PICKFORD: The first point to make, madam, is that we do not wish to litigate for litigation's
22 sake. It seems quite possible, given the indications that have emanated from Ofcom so far, that
23 ultimately this matter will be resolved in a manner which is satisfactory to T-Mobile, and
24 therefore if we can we would like to avoid unnecessary substantive proceedings. However,
25 there remains a risk currently that Ofcom's decision will not be acceptable to T-Mobile
26 because Ofcom has not taken a final binding decision – it has given various indications in
27 letters of its position and the way it wishes to proceed, but it has not actually taken a decision
28 yet, so there remains that risk.

29 Secondly, we are somewhat concerned about the amount of time that it has taken Ofcom to
30 deal with this matter. You will recall that Ofcom accepted the essence of our appeal back in
31 January of this year but we are now in December – nearly a year later – and very little, if
32 anything, has really happened in the meantime.

33 We say our position in relation to our appeal is very straight forward. We are entitled to relief,
34 which is essentially twofold. First, we ask the Tribunal to set aside all elements of Ofcom's

1 currently extant DCC decision, by which we mean including those elements relating to the
2 other MNOs, that is O2 and Orange. Secondly, we ask the Tribunal to require Ofcom to
3 impose an industry wide donor conveyance charge (DCC) from a common date. I do not need
4 to turn it up at the moment, but that relief is contained in para.59 of T-Mobile's Notice of
5 Appeal, and we say it flows entirely properly and naturally from T-Mobile's grounds of
6 appeal, and I will come on to that in a moment because there is an issue which is taken by
7 Ofcom in relation to that.

8 THE CHAIRMAN: And do you have a date in mind from which the charge should be set at the
9 level ----

10 MR. PICKFORD: Madam, we do not currently advance a positive date in relation to the figure of
11 0.2 ppm. Our concerns are twofold. First, that it should be applied across the industry on a
12 common basis; and secondly, when Ofcom has taken a decision on the common date we
13 would obviously want to satisfy ourselves that the date that it went back to was still consistent
14 with 0.2 ppm being cost-based. So if it went back a very long way we might begin to wonder
15 whether that was, in fact, the case, but we do not know how far they are planning to go back
16 and we do not advance a positive case on that. We are essentially content as long as it is
17 applied equally and on a non-discriminatory basis.

18 THE CHAIRMAN: Presumably the investigation that was carried out by Ofcom to determine the
19 costs was the costs as at the time of the dispute that was referred to it?

20 MR. PICKFORD: Yes, as we understand it, madam.

21 THE CHAIRMAN: Now, Ofcom is saying that as at July 2003, when the Universal Services
22 Directive came into force, the MNOs were under a duty to reduce their charge to cost, however
23 they agreed to do that, so at some point ----

24 MR. PICKFORD: We have not yet formed a view on whether that is appropriate in 2003, we are not
25 saying it is not, but it does take some degree of analysis.

26 THE CHAIRMAN: Well presumably the 1.6 pence per minute level that Oftel set in 1999, was that
27 a cost based rate then?

28 MR. PICKFORD: Madam, I believe it was, and those are my instructions as well, but Ofcom may
29 be able to give its view in due course.

30 THE CHAIRMAN: Yes.

31 MR. PICKFORD: We say in relation to the relief that I have just explained to the Tribunal we have
32 not had that relief because whilst Ofcom has set a common rate going forward from 8th
33 February the position prior to 8th February remains up in the air, and so what we currently have
34 is a rate of 0.2 ppm having been set for different dates for different operators, and one sees ----

1 THE CHAIRMAN: Remind me what the date was?

2 MR. PICKFORD: One sees that if one turns to the decision at para. 6.1, the decision was annexed to
3 T-Mobile's Notice of Appeal – if you have the Notice of Appeal bundle it should be at tab 1.

4 THE CHAIRMAN: Yes.

5 MR. PICKFORD: On sees there at bullet point 4 on page 21 that:

6 "The Determinations shall apply from 26 June 2006 in the case of O2, 28 September
7 2006 in the case of Orange, and 12 October 2006 in the case of T-Mobile."

8 So we see there three different dates for three different operators and, of course, Vodafone is
9 not there at all because Vodafone was not the subject of this particular dispute.

10 THE CHAIRMAN: And that was agreed to be a reciprocal rate, was it not?

11 MR. PICKFORD: Yes.

12 THE CHAIRMAN: So that that rate applied from 12th October in both directions as between ----

13 MR. PICKFORD: As between H3G and each of the counterparties listed there. Currently, because
14 it has not been set aside, this decision is, as I said, still extant. So we say that we clearly have
15 not had the relief that we sought in relation to this appeal. We say that is a pretty obvious point
16 but Ofcom seek now to argue against that.

17 Before going on to address those specific points we do suggest it is slightly ironic that Ofcom
18 takes the particular points that it does, because it takes a number of pleading points against us
19 and, of course, the Tribunal will be aware that Ofcom itself has not advanced any pleadings so
20 it puts us in a slightly difficult position. It is a little bit like engaging in, if I might term it
21 "guerrilla warfare" because we have laid our cards on the table and we have a pleading, and
22 Ofcom currently slightly sits in the bushes and takes pot shots at us but has not actually taken
23 the step of advancing its own positive formal case. But for what they are worth I am very
24 happy to address the particular points that Ofcom raises against us, and they can broadly be
25 divided into four categories.

26 The first question is whether T-Mobile is entitled to relief in respect of the entirety of the DCC
27 decision or whether it is simply entitled to relief in respect of the T-Mobile/H3G element.
28 Secondly, which is in fact really a related point, whether Ofcom has power to withdraw a
29 decision which it knows to be flawed, thirdly, and this is the point we have just been
30 canvassing, how Ofcom should determine the position historically, that is prior to 8th February
31 2008 and, as part of that, whether enforcement proceedings are necessary in this case; and
32 fourthly, there is an issue relating to the powers of the Tribunal for setting timetables, and there
33 is a point I need to clarify in relation to that.

34 THE CHAIRMAN: Sorry, the fourth point was?

1 MR. PICKFORD: The fourth point was in relation to the powers of the Tribunal in relation to the
2 setting of timetable, and there is a point that I need to clarify in relation to ----

3 THE CHAIRMAN: That is the *Floe* point?

4 MR. PICKFORD: That is the *Floe* point, yes.

5 THE CHAIRMAN: The third point ----

6 MR. PICKFORD: There is a nuance in relation to that which is not quite brought out in T-Mobile's
7 letter.

8 THE CHAIRMAN: The third point: how Ofcom should determine the position historically, how
9 does that arise in this appeal? Is that a question in fact of what directions this Tribunal should
10 give, if any, when disposing of the appeal? How were we seised with the question of how
11 Ofcom should determine the position historically?

12 MR. PICKFORD: Madam, certainly one of the elements with which we would submit the Tribunal
13 is seised is in relation to the fact that Ofcom should do whatever it does on a non-
14 discriminatory basis, because one of the aspects of our appeal is that Ofcom have failed to act
15 on a non-discriminatory basis, it imposed, as I said, the same rate but over different time
16 periods, and so certainly one of the aspects of the relief that we would be seeking from the
17 Tribunal would be a direction that in relation to any future decision taken by Ofcom it should
18 be on a non-discriminatory basis, that is applying equally to all MNOs.

19 THE CHAIRMAN: What do you mean by "future decision" there? You mean they are expected to
20 re-determine this dispute?

21 MR. PICKFORD: Well there are potentially a number of different avenues by which this matter
22 might be settled and we are not currently urging upon Ofcom any particular means of dealing
23 with it. We would suggest that one method might be to withdraw these determinations that
24 settled this dispute and take a new decision in relation to the disputes. It may be that Ofcom
25 feels it needs to take a further decision in relation to that to bring Vodafone into the fold,
26 although there is a question mark about whether it could, even in determining the disputes that
27 arose before it, have made some order which would have had the effect of binding Vodafone as
28 well.

29 THE CHAIRMAN: I am just thinking, Mr. Pickford, about the powers that we have in determining
30 this dispute which are, as we know, powers which are limited to doing what Ofcom would
31 otherwise have power to do.

32 MR. PICKFORD: Indeed.

33 THE CHAIRMAN: The directions we give must be for the purpose of giving effect to the decision
34 that we take on the appeal. Now, the decision that it is not contested that we take in relation to

1 this appeal is that Ofcom erred in its legal analysis in two respects, and so the matter must be
2 remitted to them either with no directions or with some kind of directions which give effect to
3 that decision, but I am not sure how far we can range in the directions that we give as to how
4 they ought to exercise their powers more generally in the future – I am just thinking of what
5 the order would look like.

6 MR. PICKFORD: If one of the flaws is that Ofcom did not act on a non-discriminatory basis, and it
7 should have done, then we would urge upon the Tribunal that it is appropriate for the Tribunal
8 to direct Ofcom in the future to ensure that it does act on a non-discriminatory basis. It might
9 also be helpful, madam, if I took you to the opening paragraph of our Notice of Appeal,
10 because there are two broad elements to our challenge.

11 The first of those, madam, you will see is a direct attack on the decision of 17th August 2007
12 and that is at 1.1. But then we also challenge in addition the failure of Ofcom, irrespective of
13 what we term the “DCC Decision” to impose an industry wide donor conveyance charge
14 treating all network operators equally on a non-discriminatory basis, and we develop that
15 ground of appeal in particular at para.55 of the grounds of appeal. I do not intend to read out
16 para. 55 ----

17 THE CHAIRMAN: No, thank you, I will read it. (After a pause) Yes.

18 MR. PICKFORD: So there are two elements to this appeal, one focused on the DCC Decision itself,
19 another, which stands independently of that (which is challenging a failure to act) and that is a
20 legitimate challenge under s.192(7) of the Act because, of course, madam, you will be aware
21 that you can challenge both a positive decision and also a failure to act, and that is what we
22 challenge here. There cannot be any dispute about whether we are entitled to bring that
23 challenge, because we actually brought that particular aspect by way of amendment and Ofcom
24 did not contest the amendment at the time it was brought.

25 THE CHAIRMAN: But there may be a question as to whether Ofcom’s concessions, in relation to
26 which parts of your appeal are well founded, cover that part of your appeal, because there is a
27 difference between saying “Yes, they realised they erred in acting on the basis that they did not
28 have the power to do that, and therefore did not consider whether they ought to have done
29 that”, and agreeing that they were under the duty and have failed to comply with that duty as
30 you allege.

31 MR. PICKFORD: Indeed, madam, we entirely endorse that. Our position is that the concessions
32 that Ofcom have made do not cover the whole breadth of the appeal that we have brought. We
33 do not necessarily have to pursue all of the points that we brought in our appeal depending on
34 what Ofcom ultimately does, because it may be that it is entirely otiose and, as I said at the

1 outset, we do not want to pursue litigation merely for its own sake, but that is indeed one of our
2 key points that Ofcom, by its concession, has not simply done away with everything that we
3 originally raised in our Notice of Appeal.

4 THE CHAIRMAN: No, but it is important for us to identify what the decision of this Tribunal is in
5 relation to this appeal, and hence what directions we can give to give effect to that decision.

6 MR. PICKFORD: Madam, I hesitate to suggest a course of action which may entail costs being
7 unnecessarily incurred, but of course one way potentially of clarifying precisely what is in
8 issue and not in issue is for Ofcom to put in a defence, because that is one way of formalising
9 and bringing out the particular issues, because it is not really for me to speculate on precisely
10 which aspects of my appeal Ofcom does and does not concede.

11 THE CHAIRMAN: Anyway, those are the four points which you say arise?

12 MR. PICKFORD: Yes, so if I could deal with the first of those.

13 THE CHAIRMAN: Well, as I said at the outset, I cannot really decide these points today; today is
14 just a hearing for working out what are the issues that need to be decided and how we are
15 going to go about deciding them, so I am not sure it is going to be helpful to hear submissions
16 as to T-Mobile's case on those four points.

17 MR. PICKFORD: I am very content with that, the only reason I was going to advance any
18 submissions is because, as I understood it, Ofcom's position was essentially that they were
19 advancing a type of strike-out application against me, saying that these issues could not
20 possibly still be issues because by virtue of the concessions they had made there was nothing
21 left, and my intention was probably to demonstrate that that is not true, but I am happy to
22 accept that those issues are for another day.

23 THE CHAIRMAN: So what is the outcome that T-Mobile is looking for? Your case is that the
24 totality of the determination in relation to all the MNOs should be set aside?

25 MR. PICKFORD: That is correct.

26 THE CHAIRMAN: That is if Ofcom does not want to withdraw them?

27 MR. PICKFORD: Yes.

28 THE CHAIRMAN: That there should be directions then, which set a date of 8th February, or is it
29 your case that we should direct Ofcom to do anything in relation to this dispute, or simply to
30 direct them to consider whether they do have power to apply an industry wide solution given
31 that one of the errors that has been conceded is that they thought they did not have that power?

32 MR. PICKFORD: Madam, I think the simplest approach is, having set aside what we say are the
33 fatally flawed decisions, that Ofcom then really puts aside dispute determinations and goes on
34 to take a common decision in relation to all operators, and imposes a rate from a common date.

1 THE CHAIRMAN: So you do not want us to direct them to re-take the decision in this dispute, that
2 is just left, set aside?

3 MR. PICKFORD: They do not have to as long as ultimately they take a decision which effectively
4 embraces and goes wider than the particular decision that they took that is under challenge.

5 THE CHAIRMAN: Does that mean then that they have not effectively determined this dispute
6 because are they not under an obligation to determine disputes?

7 MR. PICKFORD: Madam, there are provisions in relation to the determination of disputes that do
8 permit Ofcom to decline to determine the dispute in certain circumstances. I have not analysed
9 them precisely to see whether they are applicable in this particular case. My recollection is
10 that they may well be, but if they are not we would say it is not really a particular problem
11 because Ofcom can, having approached the matter on a global basis, which we say it should
12 have done, then as a mere formality if it needs to go back and re-determine the disputes in line
13 with its global decision, and that would be a formality rather than any serious further
14 substantive step.

15 THE CHAIRMAN: So just to be clear, Mr. Pickford, T-Mobile's desired outcome is that the flawed
16 decisions amongst everybody are set aside and we make no direction as to the re-determination
17 of those disputes but direct Ofcom to consider whether to exercise its powers to arrive at an
18 industry wide result.

19 MR. PICKFORD: Save, madam, that we would say that the Tribunal does have the power and
20 should direct Ofcom to take that new decision on an industry wide basis, non-discriminatory
21 basis.

22 THE CHAIRMAN: Take what new decision?

23 MR. PICKFORD: To take a decision in relation to the DCC rates that should be applicable.

24 THE CHAIRMAN: So rather than simply tell them to consider whether they should do that we
25 should tell them to exercise the powers that they have?

26 MR. PICKFORD: Yes, and moreover, there is a particular constraint on them that is binding in the
27 exercise of those powers, which is that it should be non-discriminatory. That really has been
28 the essence of our appeal all along, we are to some degree, albeit obviously reserving our
29 position in case the decision is particularly eccentric – which we do not expect it will be –
30 ambivalent about the particular rate and the particular date. What we care about is fairness.

31 THE CHAIRMAN: Wait one moment, Mr. Pickford. (After a pause) Yes.

32 MR. PICKFORD: There is one further point which I should draw to the Tribunal's attention, which
33 is a procedural matter, and it arises out of a point that T-Mobile made in a letter in connection
34 with the Tribunal's powers to set any form of timetable. As expressed in that letter, the point

1 was insufficiently nuanced, it failed to properly reflect what we understand to be the position
2 in law, and so it might just be helpful if I explained what T-Mobile's understanding of the
3 correct position is. I have handed up a copy of the *Floe* case which Ofcom itself refers to, and
4 it is well established that this is authority for the proposition that once an appeal has been
5 determined and the Tribunal is *functus* the Tribunal has no role in setting a particular timetable
6 for Ofcom, that is a matter for Ofcom's own discretion.

7 The nuance in relation to that, however, is of course if an appeal has not been determined and
8 is still on foot, then the Tribunal does have powers in relation to setting timetables for Ofcom,
9 and it may just be helpful to look in particular at para. 25, which is in the judgment of Lord
10 Justice Lloyd. What is said there is:

11 "If the appellant challenges a decision by a regulator, and establishes, on grounds
12 taken in the notice of appeal, that the decision was wrong, whether as a matter of
13 procedure or because of some misdirection of law or because the CAT takes a
14 different view of the facts on the evidence before it, the Tribunal has a choice of a
15 number of courses open to it. It may set aside the decision and remit the case to the
16 regulator. It may feel able to decide itself what the correct result should have been, so
17 that no remission or reference back is necessary."

18 Of course that only applies in relation to a Competition Act ----

19 THE CHAIRMAN: Yes, this was not an exercise of the power to direct under s.195, was it?

20 MR. PICKFORD: No, it was not, it was a Competition Act case, so clearly there is an important
21 distinction there, but nonetheless it is relevant because the rules that apply in relation to
22 Competition Act cases obviously also apply in relation to telecoms' cases. By the rules, I
23 mean the Competition Appeal Tribunal Rules 2003. It goes on to say that:

24 "It may wish to retain for itself the task of deciding the eventual outcome but require
25 further findings from the regulator, in which case it will not remit but may refer all or
26 part of the decision back under Rule 19(2)(j) with a view to deciding the appeal with
27 the benefit of the result of that referral."

28 Of course, the particular context here, madam, as you rightly noted, is the Competition Act,
29 and so it might not be that the Rule 19(2)(j) route is the appropriate one on the facts of this
30 case, but we say that it is nonetheless important to recognise that the Tribunal does have
31 powers to require Ofcom to act under a particular timetable whilst there is an appeal still afoot.
32 So, for example, if the means of proceeding with this appeal were to allow Ofcom some time
33 to form a view on what it is going to do which, as I understand it, seems to be Ofcom's
34 favoured approach judging by recent correspondence, then it would be permissible for the

1 Tribunal to set a timetable in relation to that because the appeal has not been determined and so
2 the Tribunal is not *functus*.

3
4 THE CHAIRMAN: Yes, thank you very much, Mr. Pickford. Miss Davies?

5
6 MISS DAVIES: Madam, Mr. Pickford indicated at the beginning of his submissions that T-Mobile's
7 position was essentially twofold. The first was that they did not wish to litigate for litigation's
8 sake, and they would like to avoid a substantive dispute in these proceedings if at all possible.
9 With respect, we agree on that point and I will elaborate that a bit further, if I may, in a
10 moment.

11 The second point, and really the main point that he seemed to be making through his
12 submissions, is that they were concerned about time, and there was a suggestion that very little
13 has been done since January. In fact, madam, we submit that that is not the position at all.
14 There are two strands to what has been happening since January.

15 The first strand is that on 8th February Ofcom took a decision, which it communicated to all
16 MNOs in relation to the DCC going forward from that date and that was clarified by a
17 subsequent letter in March. As a result all MNOs from 8th February have been applying 0.1
18 ppm on a reciprocal basis, and so on. That, we say in fact was the relief that T-Mobile were
19 seeking in this Notice of Appeal, and I will come back to that in a moment as well if I may. I
20 appreciate the comments about what can be decided today, but I think it is important bearing in
21 mind the scope of the dispute just to have a look at what they were saying. So that is the first
22 strand, that is the future, forward looking.

23 The second strand is the historic position which we say is not subject to these proceedings at
24 all, and there has been progress in relation to that. What Ofcom has been doing since its
25 acceptance that this appeal should be allowed, at least in the terms which we accepted in our
26 letter of January, is consulting with the MNOs. Madam will appreciate that only three of the
27 relevant MNOs are represented here, there are also Orange and Vodafone to be consulted, and
28 this is obviously an issue of industry wide concern. Ofcom has been consulting. A large
29 amount of the correspondence I think has been copied to the Tribunal, but we have put a
30 bundle before the Tribunal this morning containing it all. In a nutshell the result of that is that
31 in the last week Ofcom received substantive responses from Orange and Vodafone, they are in
32 tab 7 of this bundle, in which they both indicated giving some lengthy reasons, essentially that
33 they were opposed to the idea of Ofcom taking any action in relation to the historic position
34 and, in fact, suggesting for a variety of different reasons that Ofcom had no legal power to do

1 so, that it was not at all clear what was the basis of the cost oriented charge was, and so on and
2 so forth. I make no criticism of either Orange or Vodafone but it is important to note that the
3 points that they are now making are points that are new, they have not been made before even
4 though there has been some ongoing correspondence for some time. Ofcom is obviously going
5 to have to consider those; we have said we will. Ofcom have also indicated that their present
6 intention is to give a view on the legal analysis by 12th January. One has to bear in mind the
7 Christmas period, these letters came in on 10th and 11th December. So there is, with respect,
8 progress being made into the historic position.

9 Mr. Pickford accepted in terms, during the course of his submissions, that the historic position
10 takes some degree of analysis. With respect, again, we agree it does, and that is what Ofcom
11 has been engaged in doing, but that is a second strand, and a separate strand from these
12 proceedings, because these proceedings as I indicated at the outset we say are not concerned
13 with the historic position, and that is an issue we addressed in our skeleton argument at para.
14 15 and following, in particular at para. 17 we quote from the amended Notice of Appeal.

15 THE CHAIRMAN: When you refer to the “historic period” do you include in that all the time
16 before 8th February, or all the time before 12th October 2006 as far as T-Mobile is concerned?

17 MISS DAVIES: I include all the time before 8th February, because T-Mobile’s position in its Notice
18 of Appeal was that the only decision that Ofcom could take, consistently with Community law
19 and non-retroactivity principles etc, was a decision, and I quote from para.34 of the Notice of
20 Appeal:

21 “Given that the DCC Decision is flawed and falls to be set aside, in practice this
22 would now need to be the date of any new decision.”

23 And that new decision was the decision that was taken on 8th February. In para.18 we go on to
24 refer to other paragraphs of the Notice of Appeal and in particular make the point that in para.
25 48 of the Notice of Appeal T-Mobile submitted that:

26 “Ofcom could only lawfully require the payment of new rates prospectively with
27 effect from the date of a new (legally robust) DCC decision.”

28 THE CHAIRMAN: So what is it that Ofcom is then asking this Tribunal to do on the disposal of the
29 appeal?

30 MISS DAVIES: Our position in relation to the disposal of appeal is simply as set out, in fact, in our
31 letter back in January, which is at tab 3 of this bundle, that the Tribunal remits the T-Mobile
32 DCC determination pursuant to s. 195 of the Act but should not include any directions in the
33 remittal.

34 THE CHAIRMAN: So when you say “remit it” do you mean just the T-Mobile bit of it?

1 MISS DAVIES: Just the T-Mobile bit of it for the reason, and I will come to that in a moment, that
2 we say that that is the only bit that could formally be the subject of an appeal by T-Mobile
3 because there were separate determinations. Madam, if you have the Notice of Appeal ----

4 THE CHAIRMAN: Well, as I say, I cannot decide that today.

5 MISS DAVIES: I appreciate that you cannot decide that but just to explain the ambit of the point,
6 there were separate determinations. T-Mobile have only actually in their Notice of Appeal
7 suggested they are affected by the determination against them, and the separate decision that
8 they also challenge – the one not to adopt an industry wide determination – but they have not
9 given any ground for being affected by the determinations between H3G and each of O2 and
10 Orange, and we say that therefore within the Act, whatever their Notice of Appeal says the
11 only appeal can be against the T-Mobile determination.

12 THE CHAIRMAN: So you would not be in favour of us directing you to exercise your power to set
13 a non-discriminatory industry wide charge?

14 MISS DAVIES: We have done that for the future looking period. I was just about to say there is no
15 need to give any direction to require us to take a new decision because in fact the decision has
16 already been taken – that was the one on 8th February, which does exactly what T-Mobile
17 asked in their Notice of Appeal, which is to set a new DCC prospectively from its date on an
18 industry wide basis, so that has been done. Our position is that there is no need for a direction
19 from the Tribunal in relation to replacing the T-Mobile determination because in effect Ofcom
20 has already done so. I recognise that there is a separate question raised by T-Mobile now as to
21 whether the Orange and O2 determinations should also be set aside which, in light of the
22 indication, cannot be decided today. If T-Mobile insist on pursuing that point, notwithstanding
23 our position on it and our understanding that there is also the position of Orange against whom
24 the determination was, of course, issued, and also Hutchison who is party to both of them.
25 Notwithstanding that, T-Mobile persists on pursuing that and I should also say Orange – it is
26 also clear from the Orange correspondence that Orange does not consider their determination
27 to be subject to this appeal. So all the parties to the determination do not think it is subject to
28 this appeal, but nonetheless, if T-Mobile insist on pursuing that the Tribunal will have to make
29 some directions in due course in order to resolve that issue because it is suggested it is an issue
30 as to the scope of relief that T-Mobile seek.

31 We would say, however, coming back to Mr. Pickford's first point, that it would be premature
32 to do that at this stage, the reason is (as has been raised by Hutchison in its correspondence) if
33 we proceed down the second strand that I was describing, and take a decision that is
34 satisfactory to T-Mobile in relation to the historic position, effectively Ofcom will have to

1 come to a means of resolving the issue of the other determinations as part of that process, and
2 the correspondence with the MNOs has made it clear that Ofcom is aware of that and has
3 invited the views from the MNOs as to how that is done. So, in our respectful submission,
4 wasting the Tribunal's time and costs dealing with what may become an academic dispute in
5 circumstances where it is clear from the correspondence it is an issue that is being grappled
6 with, would not in our respectful submission be appropriate.

7 THE CHAIRMAN: If we set aside the determinations, all of them, and made no directions then the
8 upshot of that would be that everybody would be paying the 0.1 ppm as from 8th February, and
9 Hutchison would then lose the benefit of the determination insofar as it relates to the period
10 before 8th February.

11 MISS DAVIES: And indeed, O2 and Orange because it is reciprocal, as the Tribunal pointed out.

12 THE CHAIRMAN: Yes.

13 MISS DAVIES: We do not know today quite how the maths work, but it is a reciprocal
14 arrangement.

15 THE CHAIRMAN: But T-Mobile having brought this appeal, and having had its determination set
16 aside, would then be in the same position as Vodafone, effectively, that they pay the 0.1p as
17 from 8th February, on the basis that that is what they have agreed to do. Is that right?

18 MISS DAVIES: Everyone is paying the 0.1ppm from 8th February ----

19 THE CHAIRMAN: Yes, but the effect of the appeal is that T-Mobile are brought into the 8th
20 February onwards instead of 12th October 2006 onwards.

21 MISS DAVIES: Yes, of course it may be that commercially speaking, bearing in mind that Ofcom
22 have indicated it is considering the historic position, it may be the parties will not do anything
23 about the historic position until Ofcom has reached its determination, because what Ofcom
24 have indicated most recently in the 24th November letter is that the present view is that going
25 back to 25th July 2003, so some time back, the date of implementation of the relevant
26 Directive, the charges have been in excess of a cost-orientated basis.

27 THE CHAIRMAN: But apart from the question of whether the O2 and Orange dispute
28 determinations are also set aside, there does not seem to be that much difference in the
29 outcome between your position and T-Mobile's position given, as you say, you have in fact
30 brought about the application of an industry wide rate as from 8th February.

31 MISS DAVIES: Well insofar as I understand the difference, it is a formal one, essentially in relation
32 to the historic position and whether the historic position is formally the subject of these
33 proceedings such that this Tribunal has some control over it at this stage or not. Practically we
34 say, and that is why we join with my learned friend's initial submission: let us not waste time if

1 time need not be wasted. Practically, we say in fact it is clear from the correspondence that
2 Ofcom is intending to consider the historic position and to take a decision. I should say in
3 relation to that, that with respect we agree with a point made by O2 in its skeleton that,
4 regardless of the position in the Notice of Appeal, these proceedings do not provide the
5 appropriate forum for determining the historic position because it is quite clear from the
6 correspondence that the two main protagonists about the historical position, namely, Orange
7 and Vodafone, are not party to these proceedings. So what in fact is going to have to happen –
8 these could be substantive ----

9 THE CHAIRMAN: Well they could have intervened if they wanted to?

10 MISS DAVIES: Well they could have done. Vodafone say in terms that they strenuously object to
11 the legal analysis that has been put forward by Ofcom, so it looks from that as if this is
12 something they intend to take seriously going forward. These obviously could be reasonably
13 large sums if one is going back to July 2003, and what Ofcom has also indicated in the
14 correspondence is that it has invited the views of the MNOs as to the appropriate legal means
15 for sorting out on an industry wide basis the historic position.

16 THE CHAIRMAN: Yes.

17 MISS DAVIES: So in essence there is a formal issue but we say, given paras 34 and 48 of the
18 Notice of Appeal it is actually quite clear what relief T-Mobile were seeking.
19 The second of the points raised by my learned friend, Mr. Pickford – I dealt with first, which is
20 relief in respect of the entirety of the DCC decision: we say “no”, it can only be the T-Mobile
21 determination – the second was a question as to Ofcom’s power to withdraw a decision which
22 it knows to be flawed. With respect to Mr. Pickford, we say that simply cannot be part of these
23 proceedings. Either the O2 and Orange determinations are subject to its Notice of Appeal in
24 which case the Tribunal can take action in relation to them, or they are not. What it cannot do,
25 with respect to Mr. Pickford, is to engage into no doubt an interesting legal debate but a legal
26 debate which is entirely outwith these proceedings as to whether Ofcom has power to
27 withdraw decisions which are not the subject of an appeal. That is all I need to say about the
28 second.

29 The third, how Ofcom should determine the position historically, I have already explained
30 Ofcom’s position on that, and it has indicated, as I said, in a letter of yesterday, its current
31 timetable, 12th January for dealing with the legal analysis. That leads me to the fourth point,
32 which is the powers of the Tribunal in relation to the setting of timetables in relation to which
33 my learned friend, Mr. Pickford, took the Tribunal to *Floe* with which the Tribunal is no doubt
34 very familiar in any event. We accept, of course, the Tribunal has power to issue directions in

1 relation to the conduct of these proceedings and the disposal of that. What we say the Tribunal
2 does not have power to do, and this feeds into a point that is made by O2 in its skeleton, is to
3 issue a direction to Ofcom to take a decision by any particular date in relation to the historic
4 position – or indeed as to the form of that decision.

5 Madam, I am not sure at the moment whether I need to go through the paragraphs of *Floe* ----

6 THE CHAIRMAN: No.

7 MISS DAVIES: -- but it is very clearly set out there why that is. With respect to my learned friend,
8 Mr. O'Donoghue, he refers in his skeleton to Article 10 and the obligations on the Tribunal in
9 relation to the enforcement of Community law, and seems to be suggesting that that gives rise
10 to some sort of supervisory jurisdiction on the part of the Tribunal over Ofcom. With respect,
11 that simply does not fit with *Floe*. Yes, of course, in determining any dispute, any appeal
12 raised properly under s.192, Article 10 applies, and the Tribunal has to reach a result consistent
13 with Community law, but what it cannot do is assume to itself some sort of supervisory
14 jurisdiction to try and ensure that Ofcom complies with Community law. So that is what we
15 say about timetable.

16 In fact, where that leads one, with respect because of the understandable concern, both on
17 Ofcom's part and, as we understand it now, T-Mobile's part, to avoid further cost is that this
18 case management conference effectively should simply be adjourned. What we say should
19 happen is that Ofcom should proceed down the timetable that we have indicated, the parties
20 can then see in light of that where Ofcom is on the historic position and then give mature
21 reflection to the need to resurrect these proceedings to decide the points that it is now
22 suggested remain live.

23 THE CHAIRMAN: Well suppose on 12th January that you decide: "Well, we are not going to take
24 any enforcement action and we will just be happy with the fact that it has been reduced to
25 0.1ppm from 8th February onwards", that is one of the possible things that you might decide on
26 12th January. Would you then propose to do anything about the fact that as far as two of the
27 MNOs are concerned, they are still bound by the determinations setting the 0.1 figure for
28 earlier periods than that?

29 MISS DAVIES: With respect, we would say that is a matter partly for them, because they have not
30 sought to appeal those determinations and they are not subject to these proceedings, although I
31 could see in that situation, should T-Mobile persist in its position that they are subject to
32 appeal, that would then be an issue that this Tribunal would need to grapple with to decide
33 whether it ought to be setting aside those determinations. I can see that, but I would have also
34 thought that Orange and O2 may have something to say at that stage.

1 THE CHAIRMAN: Thank you.

2 MISS DAVIES: Unless I can assist you further?

3
4 THE CHAIRMAN: No, thank you very much, Miss Davies. Mr. Segan, can we hear from you
5 next?

6
7 MR. SEGAN: Yes. Madam, H3G's position is very simple and it is that evidently from what has
8 been said, insofar as Mr. Pickford has anything left in his appeal, it relates to the period prior to
9 8th February 2008, even on the widest construction of his Notice of Appeal. Given the
10 indication from Ofcom that it intends to take a decision as to the historic position by 12th
11 January 2009 it seems to us to be premature to do anything other than, as it were, stay this case
12 management conference pending the outcome of Ofcom's consideration. It seems to be the
13 only sensible course to us. As you have correctly observed, were this Tribunal to take any
14 other course of action H3G would lose the benefit of the DCC determinations insofar as they
15 relate to the period prior to 8th February without knowing what Ofcom's decision actually is on
16 what the correct DCC for that period was. There is no logical reason why that course of action
17 ought to be taken by this Tribunal.

18 So we say, for the purposes of today, the decision is relatively simple for you, it must be
19 simply to stay this case management conference, pending whatever Ofcom decide. There
20 could be a direction for the parties to put in written submissions on Ofcom's decision in due
21 course, that is something to consider, or to reschedule an oral hearing. One way or the other
22 we are not going to be able to work out what our position is on whatever remains in this
23 appeal, if there is anything left, until we know what Ofcom's decision is, and we say it is really
24 as simple as that.

25 THE CHAIRMAN: Thank you. Mr. O'Donoghue, anything you want to add?

26 MR. O'DONAGHUE: Again, I can be brief. First, we would say very clearly that it is certainly
27 within the Tribunal's power, we say almost certainly an obligation, to direct that Ofcom can
28 take the decision, whatever that decision may be, on the non-discriminatory application of an
29 industry wide DCC for the period before 8th February 2008, and we would suggest the Tribunal
30 also direct, because again it is obvious, that the long stop on that retrospective should be the
31 date of implementation of the Directive, 25th July 2003.

32 We say on the basis of the relief sought in the appeal, and on the basis of the concessions made
33 by Ofcom as to the unlawful fettering of its discretion as to the past, specifically on the point
34 whether it was open to operators to agree an alternative basis, we say that the corollary of that

1 is that the Tribunal can and should direct the application of an industry wide DCC for the
2 period before 8th February 2008.

3 With respect to Ofcom, this date of 8th February 2008 is really plucked from thin air, and the
4 idea that this provides a benchmark against which everything else can be regarded as historic is
5 not correct. This was simply the date that happened to follow from its concessions. It is clear
6 from the Notice of Appeal that a substantial period, going back to 2006 was at issue in these
7 proceedings and in the ordinary course of events it would have been appropriate for the
8 Tribunal to issue directions as regards that period and perhaps further back. As regards the
9 basic point on which no one, it seems, disagrees today, the principle of there being a cost
10 oriented charge of 0.1 ppm it does bear emphasis that the date on which Ofcom relies starts as
11 far back as 2005. We say that the gap between that period and the commencement of the
12 obligations of the Directive is quite small. So we say it is certainly within the Tribunal's
13 power, and we say an obligation to direct a decision in that regard. Of course, we do not know
14 yet what that decision may say, there is a range of possibilities and as regards the impact of
15 that decision on the disputes before the Tribunal we would agree with Hutchison that it is
16 premature and, with respect, unfair to expect undertakings such as O2 who have benefits and
17 burdens in these decisions to nail their colours to the mast today without having any indication
18 whatsoever of what Ofcom intends to do for a substantial part of the period also covered by
19 this appeal.

20 In other words, madam, we agree that as regards the residual relevance for application of these
21 disputes that is a decision that can only be taken in all fairness in the light of a very clear
22 outcome as to what Ofcom intends to do for some, if not all, of the period also covered by the
23 appeal.

24 THE CHAIRMAN: My difficulty with that, Mr. O'Donoghue, is what is going to happen on 12th
25 January? I can see that if Ofcom announce on that day that they are not going to take any
26 action then we have clarity as to what is going to happen. If they decide that they are going to
27 bring enforcement proceedings against the MNOs in relation to the historic period then from
28 what I have been told this morning they may have a fight on their hands with some of the
29 MNOs as to whether they have power to do that or whether it is appropriate for them to do
30 that, and until that dispute is resolved we will not know what is going to happen in relation to
31 the historic period maybe for some considerable time. We might be talking years rather than
32 months. Now, is it your submission that in that event these appeals should just be stayed
33 indefinitely until that is finally resolved?

1 MR. O'DONOGHUE: No, madam, I think clearly as a matter of fairness to the beneficiaries of
2 those decisions, as and when it becomes clear what action Ofcom intends to take as a final
3 matter, at that stage it may be that a further case management conference would be necessary
4 to agree a set of directions in that regard, because it clearly is a practical matter, the effect of
5 any decision it seems may well be further litigation whatever that decision is. In that context
6 there will clearly be a complicated exercise of offsetting benefits and burdens in much the
7 same way as has occurred in call termination. We say that it would be entirely premature and
8 unfair to expect one party to commit to a position today without any indication as to what will
9 happen on an industry wide basis or, indeed, for what period. We certainly do not wish to
10 delay that aspect of this appeal for several months, if not years. We say that it should be
11 revisited on that specific issue as and when Ofcom's final position becomes clear, because
12 quite frankly even from the letter of yesterday, it says: "... will take a final view", that is with
13 respect utterly unclear. They have had a year now and we have had various excuses –
14 overwork and holidays etc. – but the substance of this appeal has been conceded, the substance
15 of the rate of 0.1 ppm is not challenged by anyone today and we say that it should be relatively
16 straight forward and quick to finalise this matter.

17 THE CHAIRMAN: Yes.

18 MR. O'DONOGHUE: Thank you, madam, unless I can assist further.

19
20 MISS DAVIES: Sorry, madam, there is just one point arising out of that, it was suggested that we
21 had conceded an unlawful fetter, there is no such concession been made. The Tribunal
22 considered at length in its ruling last week on the *Merger Action Group* what constitutes a
23 fetter, and we say that the explanatory memorandum certainly does not do that, but just to
24 make that clear on the transcript.

25 MR. O'DONOGHUE: Madam, if I may for ten seconds. The General Condition says that it is open
26 to parties to agree something other than incremental cost as a basis. That has been conceded as
27 an unlawful statement, conclusion, and to the extent that Ofcom held that view, which clearly
28 they did, they have misdirected, and therefore fettered, the exercise of their legal powers; that
29 is all we say.

30
31 THE CHAIRMAN: Mr. Pickford, you wanted to say something?

32 MR. PICKFORD: Madam, yes, if I might just briefly reply to some of the submissions that we have
33 just heard?

1 As you have correctly identified the letter of 15th December is somewhat ambiguous in terms
2 of precisely what Ofcom is going to do, and the practicality of Ofcom's suggestion as to the
3 adjournment of this hearing really does depend on the timetable within which Ofcom envisages
4 reaching a final binding view on these rates, which may then itself be challenged and so we
5 would suggest that it is incumbent on Ofcom to indicate a particular timetable that it intends to
6 adhere to in order to assess the practicality of its proposed approach. I am unclear from the
7 letter of 15th December whether the view that is going to be expressed there is merely in
8 relation to a legal position and then there will be further decisions thereafter, or whether it is
9 supposed to be a final determination in relation to these rates. If it is the latter then clearly that
10 is a timetable that certainly T-Mobile can live with, and it would be sensible to adjourn further
11 consideration of this appeal until afterwards. If it is merely a preliminary step and there is
12 some further step that is envisaged by Ofcom many months down the line, then their proposal
13 may not be appropriate and we may have to bring on the appeal.

14 THE CHAIRMAN: Well as I understood it – Miss Davies, you may be able to help us here - what
15 Ofcom was saying was that on 12th January they will indicate whether they are going to
16 abandon the idea of bringing any enforcement proceedings in relation to the period prior to 8th
17 February, or whether they are going to go on with those enforcement proceedings. Of course,
18 if they decide the latter then presumably there is a process that has to be gone through, they
19 cannot just do that on 12th January; that has to be the start of a process which, as I indicated,
20 might take a long time.

21 MR. PICKFORD: I understand that.

22
23 THE CHAIRMAN: Is that the nature of the decision that is going to be taken on 12th January?

24 MISS DAVIES: Yes, madam, and two points to add to that. We have in the correspondence to date
25 also indicated always “enforcement proceedings, if necessary”. Of course, in light of the
26 indications that Ofcom give as to the appropriate legal analysis and also separately the question
27 of what the right charge is, the parties may agree, and it may be that we will not need to take
28 any enforcement action, and that is why we have always said “if necessary”. But there are two
29 issues, there is the legal analysis whether it is appropriate to seek to enforce historically
30 General Condition 18 and the legal analysis is what we are intending to address by 12th
31 January. There are separate economic questions as to what is the right amount of the charge
32 throughout that period, and my understanding is that the relevant economists at Ofcom are
33 working away on that but we may not be able to do that by 12th January, but we are intending
34 to get on with it.

1 At the moment we are being told by Vodafone and Orange that we cannot take any action
2 historically at all, which is the legal question.

3 THE CHAIRMAN: Well yes, but on the legal question you may well decide, without conceding that
4 you do not have power to take enforcement action, that actually given that is a matter within
5 your discretion presumably that you are not going to do it. What we need to know from you
6 on 12th January is whether you have decided to go ahead with enforcement action or not. It
7 may be that if the decision is not, it may be because you accept the points made to you on legal
8 powers, it may be that you do not accept those but for your own reasons, resources, whatever,
9 you are not going to pursue it, but that is what we need to know.

10 MISS DAVIES: That is what the letter will make clear, but what it will not do is be an initiation of
11 any enforcement action, just to make that clear, because as Ofcom has already made clear in
12 the correspondence, it intends to give the MNOs the ability to agree the position. It would be
13 quite wrong, in our submission, to simply proceed to enforcement action bearing in mind the
14 historical, so we are not intending to do that on 12th January; we are not intending to issue
15 s.194 notices, but we will make the position clear. Madam, I am not sure if you have had a
16 chance to have a look at our letter of 24th November, it is at tab 6 of the bundle.

17 THE CHAIRMAN: Yes.

18 MISS DAVIES: What Ofcom did in that letter was set out at some length its then view of the legal
19 analysis and at p.3 that it has enforcement powers, that they have been giving consideration as
20 to whether there was any legal or other reason why it would not be appropriate to take
21 enforcement action, and concluded that in light of that analysis, and if it proves necessary,
22 Ofcom is presently considering taking enforcement action and inviting further views.
23 We have then had substantive responses to that letter. The letter of 12th January will set out
24 Ofcom's final view on the legal issue and it will indicate whether if the MNOs are not able to
25 reach commercial agreement to give effect to that legal analysis, Ofcom is minded to take
26 enforcement action or not, and it may well set a timetable for responses from the MNOs in the
27 same way that the 8th February letter said: "Please tell us within 10 days whether you are
28 enforcing the 0.1 ppm from that date". What it will not do is be a formal s.194 notice, a
29 commencement of enforcement action, because it is quite clear certain parties have already
30 indicated to Ofcom that they do not think enforcement action is necessary because they will
31 give effect to what Ofcom is saying.

32 THE CHAIRMAN: Will you be in a position by 12th January to specify to the parties what it is that
33 you want them to agree to do in relation to the historical period?

1 MISS DAVIES: What we have from Orange and Vodafone last week are new points about the cost
2 orientated basis of the charging and in relation to the precise rate that should apply in relation
3 to any period I cannot say today that we will be in a position to do that by 12th January. If we
4 cannot do that by 12th January the intention is to do it within a short period thereafter - we have
5 got the Christmas period. If one looks at the Vodafone and Orange letters there are very
6 significant points being raised as to whether it is appropriate to do anything at all in relation to
7 the historic period, and those are quite substantive legal points which need to be addressed and
8 which we are intending to address, and that is what this letter will do. If we can do more than
9 that we will. But assuming Ofcom takes the view, having considered all the submissions, that
10 it intends to carry on in the way that it has suggested in its letter of 24th November, what I
11 cannot say here today is that it will go a stage further and say: "... and this is the exact rate that
12 is to be applicable for each period", it may not be the same through the period, we are talking
13 about quite a long period again, back to 25th July 2003. So that is the position in relation to
14 that. We will obviously do what we can.

15
16 MR. PICKFORD: Madam, it is clear from that helpful clarification from Miss Davies, that the date
17 of the 12th January is a somewhat illusory one in terms of any outcome in relation to these
18 issues, because plainly as commercial matters, the rate and the period for which it is going to
19 apply are going to be critical to the assessment of all the parties, in particular most likely
20 Vodafone and Orange who are the parties least willing to agree to anything at the moment, and
21 it is going to be critical to their assessments of whether they are content to live with those rates
22 or not, and therefore whether we can strike some commercial bargain with them or not. So we
23 say it is not really satisfactory to say: "We will decide one element but the key pieces from the
24 jigsaw are going to remain missing, and we are not going to tell you thereafter when we are
25 going to decide those". We say that there should be a firmer indication at least of Ofcom's
26 timetable in relation to the resolution of the real issues that need to be decided on this appeal.

27 THE CHAIRMAN: Yes, I hear what you say Mr. Pickford.

28 MR. PICKFORD: The second point, madam, just for the record, I strongly object to the
29 characterisation of T-Mobile's appeal that has been advanced by Ofcom. I heard, madam, your
30 comments at the outset that you could not resolve those issues today, but certainly T-Mobile
31 has a position that it would wish to advance in response to the points that Miss Davies made
32 early today. I am happy not to develop it now, but for the record it should be very clear we do
33 not accept for one moment her characterisation of our appeal.

1 THE CHAIRMAN: Thank you. I will now rise for a few minutes and consider what I am going to
2 do.

3 (Short break)
4

5 THE CHAIRMAN: It is clear from the submissions of the parties made to me this morning that the
6 parties are not at present agreed as to how this appeal should be disposed of and there are
7 potentially several substantive issues on which the Tribunal's ruling might be needed. The
8 question I have to decide is whether or not to set a timetable now for determining those issues.
9 Ofcom has indicated that they intend to write to the participants in the industry on 12th January
10 updating them as to their position in relation to potential enforcement action. We will know,
11 as at 12th January, at least whether Ofcom have ruled out enforcement action or whether it is
12 likely to be some considerable time before we know for certain what the industry wide charge
13 will be for the period prior to 8th February.

14 I am prepared therefore to adjourn this matter again until a date following 12th January, but the
15 Tribunal will then proceed to dispose of this appeal whichever route Ofcom decides to go
16 down. I recognise that Ofcom's decision is relevant to the parties in taking their own decision
17 as to what stance they wish to take on the issues raised by this appeal.

18 Ofcom will, I hope, inform the Tribunal of the decision that is given to the parties on 12th
19 January and I do not think I need to make a direction in that respect.

20 Once we have seen that letter we will then contact the parties as to the way forward from that
21 point on.

22 MISS DAVIES: Madam, I can confirm we will, of course, copy the Tribunal in on that letter and I
23 am very grateful.

24 THE CHAIRMAN: Thank you very much.
25
