IN THE COMPETITION APPEAL TRIBUNAL

Case Nos 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st December, 2004

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

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(**in administration**) Appellant

and

OFFICE OF COMMUNICATIONS Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMTED Interveners

And

VIP COMMUNICATIONS LIMITED Appellant

and

OFFICE OF COMMUNICATIONS Respondent

Supported by

T-MOBILE (UK) LIMITED Intervener

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PROCEEDINGS

APPEARANCES

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

Mr. Mark Hoskins (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent

Mr. Stephen Wisking (of Herbert Smith) appeared for the First Intervener, Vodafone Limited.

Mr. Meredith Pickford (instructed by Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Second Intervener, T-Mobile (UK) Limited

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THE CHAIRMAN: Good morning. Can I just begin by thanking you for your skeletons, and the sensible approach that everybody is taking to this hearing. Can I just take Floe first? I think I have just four points to make. First, on page 2 of the written submissions of Ofcom, the proposed steps in the investigation. The Tribunal wonders whether (c) should come after (a) – so it is (a)(c)(b)?

The second matter on which we would like to hear submissions is the timing of the investigation, and the third matter is, of course, costs – and we would particularly like to hear the submissions from Ofcom because, quite understandably, there has been no skeleton, whereas as to the others we know what is being submitted. The fourth matter will be the terms of the order, which is of course dependent on what we decide in the other matters.

In relation to VIP the draft order is not quite in the form of the ABI order, and we are presently minded, and subject to submissions, to follow the ABI order. The timing and costs in VIP we will hear submissions on.

What we hope we will achieve today is a final order. So it may be that once the principles have been decided that we adjourn for a short while while everybody agrees a final order which we can then make so that we can conclude the matter today.

MR. HOSKINS: Can I add two other points to the Floe agenda?

THE CHAIRMAN: Yes.

MR. HOSKINS: It just struck me that there were two other matters that came out of the parties' skeletons. First of all, it comes out of Floe's written submissions on the consequential orders because at para.3 they refer to the "discrimination argument".

THE CHAIRMAN: Yes.

MR. HOSKINS: I certainly need to make submissions to you as to whether the discrimination argument can and should form part of the remittal.

THE CHAIRMAN: Yes.

MR. HOSKINS: The second point, and it may well be covered by your fourth point about the terms of the order, but just to flag it up as a specific point. T-Mobile have suggested that our undertaking should include commitments as to the role that should be played by T-Mobile, Vodafone, Floe and VIP and I need to address you on that as well, and the other matters I had identified are ones that the Tribunal has listed.

Would you like me to start?

THE CHAIRMAN: Probably.

MR. HOSKINS: I think the first one logically is the discrimination point because it actually affects the scope of the order, and I'll explain that as I get to it. But you will have seen from Floe's

written submissions – it is probably best to look at it – it is in their submissions concerning consequential orders on Floe.

THE CHAIRMAN: Yes.

MR. HOSKINS: Paragraph 3 - the Appellant also wishes to clarify that the question of discrimination, although not the subject of the amended Notice of Appeal will be considered again on reconsideration of the original complaint where it was referred to. Our submission is that it is no longer possible for that question to arise. Let me explain why.

In the Decision challenged (vol.5 tab 85) the Director General at paras. 62 to 69 found that Vodafone had not discriminated as between Floe and other GSM Gateway operators. So that was part of Floe's complaint to the Director. It was considered and it was ruled upon in the Decision.

Floe did not appeal that finding in the Decision in its original Notice of Appeal. When it applied for permission to amend its Notice of Appeal the proposed amendment included a challenge to that finding that there had not been discrimination. But the President, Sir Christopher Bellamy, ruled that that proposed amendment was not permissible, so the discrimination argument therefore did not form part of the substantial appeal that the Tribunal heard. It seems to us that two consequences must flow from that. First, it appears that the Tribunal should not in fact therefore set side the whole of the Decision challenged because, as I have said paras. 62 to 69 of the Decision, which deal with the discrimination point were not in issue in the Appeal, and therefore it seems that they must stand. What that would mean, I think, is that the order setting aside the Decision should only set aside paras. 39 to 61, the first two bullet points of paras.71 and para 72.

Madam, I apologise for the fact that we did not pick up on this fact when we put forward our draft order. It was only when we saw Floe refer to the discrimination point that we looked through and realised that in fact that part of the Decision had not been challenged and therefore it seems to us the appropriate thing is quashing the Decision insofar as the Judgment makes findings against Ofcom. Insofar as no findings were made it seems to us that that part of the Decision must stand. Regardless of the mechanics of that part of the Decision it seems to us that because the President decided that Floe was not entitled to raise the discrimination point in its appeal that that submission cannot and should not form part of the committal because it is not before the Tribunal.

THE CHAIRMAN: So what you are saying is that because that part of the Decision was not before the Tribunal, the Tribunal cannot remit the whole of the Decision?

MR. HOSKINS: Precisely. It cannot quash the part of the Decision that was not part of the Appeal before it.

THE CHAIRMAN: And therefore that part stands.

MR. HOSKINS: That part stands. As I say, I apologise that we had not picked up on that in our draft orders. It is all buried in the five volumes, in the history. It does seem to us that that must be the logical and correct outcome.

THE CHAIRMAN: Shall we just deal with that point to start with?

MR. HOSKINS: I think it is best to take these points as they come.

MR. MERCER: I must be prescient. It is entirely because I suspected that Ofcom would indulge in this kind of salami slicing that I put the point in the submission, ma'am. My points are the reverse of Mr. Hoskins' – nothing new in that. First, you quash the Decision – you quash the Decision and you quash the whole Decision. Salami slicing and saying "Well, actually that bit of the Decision is all right but that bit is not"… the whole thing went down. There were certain Grounds of Appeal where Sir Christopher Bellamy (the President) did not think that we should, or needed to pursue. If you read the transcript his reasoning was actually this was not in the original Notice of Appeal – that is a point relating to discrimination, and he used words to the effect: "Well, Mr. Mercer, if you had been allowed to present the Primary Argument, the two alternative arguments, do you really need **this** as an adjunct to the second alternative argument?" The answer was "Indeed not". It absolved the Tribunal from dealing with a number of other points and at that time, in that context we were not unhappy for that to occur.

However, one of the things that the Judgment does is to re-examine a number of interlinked areas, and one of the things that your Judgment does is to look at the interpretation of the exemption regulations. It decides on an interpretation of the regulations in relation to multi or unilateral users, which was not the one we would contend was in Vodafone's mind at the time that it took the action to switch off my client's SIM cards. Therefore as the matter was contained in the original complaint, and as that matter has now been affected by the Tribunal's Judgment in related matters like the interpretation of the relevant regulations, it is only fair that that matter should be looked at again. Fair, ma'am, because the marginal cost of adding that item, if you like, to the cost of the exercise is marginal and the extra work is not that bright. It is a matter originally raised, it is affected by the Judgment and, in all fairness, if we are actually going to get the right result at the end of this process it needs to be examined again.

I think that is all I can say to assist you on that point at the moment, ma'am.

THE CHAIRMAN: Thank you.

MR. HOSKINS: I think all I can do is repeat the point.

THE CHAIRMAN: Yes. I can see both ways of looking at it at the moment. I think Mr. Mercer's point is that what we have decided might reflect on the way the discrimination point was decided. If that is right then the discrimination point ought to be reconsidered, and we may have to go back and look and see what the President said, what Mr. Mercer is suggesting is that you only needed points 1, 2 and 3 to quash the Decision and then you do not need to argue point 4, but you get the whole Decision quashed.

MR. HOSKINS: Madam, I think the way it was put is that there is an application for permission to amend a Notice of Appeal to insert new points, and it does not matter what the reasoning was. The reasoning was, as Mr. Mercer correctly said, twofold. It was "You did not pursue this in the original Appeal", and "You probably do not need it anyway". But the punch line is: "I am not going to give you permission to run the discrimination argument".

THE CHAIRMAN: Yes, but if, at the end of the day, what we have said affects the way that Ofcom or its predecessors, considered the discrimination argument then I can see Mr. Mercer's point in saying "The whole decision should be quashed."

MR. HOSKINS: The difficulty is that question because Mr. Mercer says "Oh, there are Rulings on the interpretation of regulations in the Judgment" – correct, but Mr. Mercer has not shown with which it interacts. Hand on heart I cannot tell you whether or not it interacts. But there is a problem, and it is something we have raised throughout these proceedings, and the Tribunal has made the point, for example in the *Freeserve* Judgment. One has to always remember that one is dealing with a complaint, and the Tribunal has to be careful, according to the *Freeserve* Judgment, not to transform itself into a First Instance Court. This is just an aspect of that because a complaint was made, it was ruled on, the second part was not challenged. The danger is, of course, that these things just keep running exponentially if one ignores the "niceties" – I use that in inverted commas – of the procedure.

I have made the point, it seems to us that logically, because that point is not pursued it is difficult to see how the Decision can be quashed and I will leave it at that. That is the way we put it.

MR. MERCER: Ma'am, would it help if I explained the interaction?

THE CHAIRMAN: Yes.

MR. MERCER: Vodafone is taking certain action in respect of what it says were, by its definition at the time, public gateways. At the same time Floe contends that it has evidence that there were agents providing the intermediary type services that Floe was to single-user Gateways. Of course, that action also would bring those intermediaries, in respect of that equipment, under

the ambit of the regulation. If that is true then clearly Vodafone was discriminating between operators whose apparatus was not exempted by the regulations. I think that is the up and down of the issue, ma'am.

MR. HOSKINS: Madam, can I return to the Decision, because this proves my point and it has been my case throughout that this case keeps changing – new point after new point after new point. So be it, that is where we are, but query whether we want to carry on in this vein.

THE CHAIRMAN: Where is the best place to find it?

MR. HOSKINS: It is in volume 5 – I am not sure what the internal reference is. It is behind tab 85, and the section on discrimination begins at p.1626, para.62 where one sees the nature of the complaint. The starting point, of course, is that all of this starts with the complaint and that sets the limits for the proceedings.

> "62. Floe's complaints to the Director also alleged that Vodafone's actions were discriminatory in that Vodafone had suspended service provision for certain GSM Gateway operators but not others. Floe named three other companies allegedly providing public GSM Gateway services."

So that was the nature of the complaint, and at para.68 one finds the way in which the Director dealt with the problem. Floe says "Discrimination, look at these three other companies".

> "During the course of the investigation the Director required Vodafone to provide details of any action it had taken against the companies named by Floe, Companies A, B and C. In response Vodafone stated that it had no dealings with Companies B and C at all, and that SIMs used by company A had been disconnected."

So you cannot have discrimination because Floe is disconnected, and the other company was disconnected. Now that is the evidence that Floe produced. They say three companies treated differently, two of them Vodafone did not deal with at all, and the other one was disconnected. So that is the basis for the finding of no discrimination. There is just nothing in it. Then it goes on ----

THE CHAIRMAN: Yes, I am just reading on.

MR. HOSKINS: Yes, exactly, the Director actually went further than the complaint and looked into correspondence between Vodafone and 15 other companies, but if the point ----

THE CHAIRMAN: Can I just read this?

MR. HOSKINS: I am sorry, Ma'am.

THE CHAIRMAN: I am just wondering about those 15 other companies, because that would depend, would it not, on matters which had been considered in the Judgment as to how you look at those letters?

MR. HOSKINS: It may do.

THE CHAIRMAN: So that that part of it would be material in the sense that the Decision on that part may have been taken wrongly?

MR. HOSKINS: It may have been.

THE CHAIRMAN: Yes, I said "may" have been.

MR. HOSKINS: It depends how the Tribunal wishes to approach it. Although if it takes the view that although this was not a specific ground of appeal, and indeed permission to raise this ground had been specifically rejected, there may be matters in the Judgment which reflect on the decision. It may decide to set aside the Decision, but that is the choice that is facing the Tribunal. I do say that would be – I must choose my words carefully – odd procedurally in a circumstances where permission to raise this argument had been rejected. That is the oddity.

But I do not want to push this, I have pointed out the procedural issue.

THE CHAIRMAN: No, thank you very much. I mean I think it is an interesting point. If it had only been companies A, B and C, then it looks as if that may have closed the door, but the Director went further than that, and in relation to where he went further it does look as if the Decision might impinge on what he did.

MR. HOSKINS: Certainly, but that point was not appealed. We are going around in circles again.

THE CHAIRMAN: Whether that matters we will have to consider.

MR. HOSKINS: Indeed. The only point I would make is that it will feed into one of our other points, but of course if the scope of the remittal is to be widened from the specific points in the Judgment to also include discrimination I will also be making submissions when it comes to timing, because that will obviously add to the burden that Ofcom has to deal with in the investigating. It is all very well for Mr. Mercer to say there will not be very much more work, but I am afraid that is not necessarily the case.

THE CHAIRMAN: If your first submission is right then it should not be too much more work.

MR. HOSKINS: No, but the point is if you were against me on that and say "Well, actually there may be something in the Judgment" ----

THE CHAIRMAN: But we do not know. We do not know how that would reflect because we do not know what investigations were done in relation to these 15 companies.

MR. HOSKINS: The first thing Ofcom will have to do is to go away and read through the Judgment carefully. If you remit the discrimination part of the Judgment to Ofcom, we will have to go

through and read the Judgment very carefully in that context and then see whether further steps are required in relation to the discrimination. Absolutely right, I cannot say "Oh, that means an extra three months", but nor can one say "Oh, that is no extra work", there is a degree of uncertainty when it comes to timing again, that is its highest, but we will come on to timing separately.

(The Tribunal confer)

THE CHAIRMAN: What we will do is hear the other submissions and then retire for a moment and consider it.

MR. HOSKINS: Obviously I am in your hands as to which order you wish to take them.

THE CHAIRMAN: I do not think it matters, really.

MR. HOSKINS: The next point is perhaps the suggested T-Mobile amendment to our undertaking, or the proposal that we should enter undertakings – I do not know if it is appropriate to take that one next?

THE CHAIRMAN: Yes.

MR. PICKFORD: I am sorry, ma'am, if I may shorten this. I have just taken instructions on that point and, subject to a little bit more whispering, I think the position is that we would actually withdraw our proposed amendments.

THE CHAIRMAN: Well do you want a moment to whisper a little longer?

MR. PICKFORD: Yes, if I might.

THE CHAIRMAN: Why do we not leave that over and assume that you are going to withdraw it. If you are not we can deal with that at the end.

MR. PICKFORD: Certainly.

MR. HOSKINS: The next item I had on my list was the timetable for the new investigation. You will have seen from our written submissions that the undertaking we are offering to the Tribunal is to use our best endeavours to complete the new investigation, within six months if we consider that there are no grounds for an infringement Decision, and within 12 months if we decide to issue an infringement Decision. You will have seen from our written submissions that that reflects, admittedly the maximum, but it reflects the Ofcom guidelines for investigations. Also, I must say it reflects the reality of the situation which is that whether one likes it or not, Ofcom has limited resources which must be managed in light of all its obligations and commitments. I do not want to make the point too strongly but it is important that the Tribunal should be careful because obviously it does not have an overview of all Ofcom's commitments and again, I cannot put it any higher than to say that there should be a degree of deference (with a very small "d") in dictating to Ofcom exactly how it should pursue

its work streams, but obviously there is a margin of appreciation of both sides. The Tribunal has to be content that we are behaving appropriately and we would ask for a certain amount of appreciation of our practical position.

That is the undertaking that Ofcom has offered, and on the other side of the table, if you like, there is Floe's submission which is that any investigation and decisions by Ofcom should be completed by 28th February next year, which is effectively three calendar months. It appears that that suggestion should apply both to a non-infringement position and also to an infringement position, so there is no distinction made.

THE CHAIRMAN: I suspect that is because that point had not been considered, because there must be a distinction between the two.

MR. HOSKINS: Then Floe might say a month and a half for non-infringement, I do not know. There is a distinction to be drawn.

THE CHAIRMAN: I will hear what Mr. Mercer says on that.

MR. HOSKINS: Precisely. In our submission the Floe suggestion is inappropriate and you will not be surprised to hear that our suggestion is appropriate for two main types of reason. The first reason concerns the scope of the matters remitted and the second reason concerns the previous practice of the Tribunal when it has indicated time limits on remittance. If I can deal with the next point, the scope of the remittal. We submit that we should be allowed six months to establish that there are no grounds for action, so the negative, for the following reasons. First, the Tribunal has identified a large number of specific issues for us to consider. These are set out at particular paragraphs, 287, 338 and 339 of the Judgment. I make again the obvious observation that many of those issues are far from straightforward. There is, in our submission, no merit in requiring Ofcom to rush through the process because if nothing else, I am sure everyone has learned is that this subject matter in this area is not easy to deal with and rushing it would not be of benefit to any of the parties involved.

The second point is that the Tribunal has suggested that Ofcom may feel it is appropriate to invite comments more widely than usual, given the subject matter of this case. Again, I make the obvious point that any effect of a meaningful consultation takes time.

The third point, and this is an important point, is that it is important to remember that the Decision actually only focused on one particular element of Chapter II prohibition, which was the question of abuse. It did not reach definitive findings on the other ingredients of Chapter II infringement, in particular what is the relevant market definition, and is Vodafone, and obviously T-Mobile and the VIP case dominant in that market? It may well be – depending on the view taken – if Ofcom approaches this by saying let us look the question of

abuse again first of all, the view may be taken this time round – this is not on instructions, it is just me hypothesising – they might say actually there was not objective justification for refusing to supply, but it does not necessarily then follow that there has been a breach of the Chapter II prohibition. Before reaching a decision of whether a "no infringement" or an "infringement" decision is appropriate Ofcom would, in those circumstances, have to consider the relevant market and consider the question of dominance. That is just to reach the stage of whether there should be a "no infringement decision", because of course if Vodafone is not dominant around the market that is the end of the matter. So it is not simply going back to the already many issues which are in the Decision and the Judgment, it is perfectly possible it would be far more broad in scope for reconsidering and I do not need to remind the Tribunal that any issues of market definition in particular, but also dominance, are not easy. They tend to require quite a large amount of work in terms of information gathering, and one can imagine that in this context it may well be very hotly disputed, certainly by the mobile operators what the market definition is and whether they are dominant in it. That is a very important factor to take into account when one comes to timetable.

The final point, and probably the least important of the four, is that Ofcom will have to deal with Floe and VIP cases at the same time, and whilst they have many common features they are not identical. So that is why we say that six months for a decision of no infringement is actually an appropriate timescale. I should say that still looking at this question of scope, let us assume that Ofcom decides to go to the next stage which is it decides that an infringement decision may be appropriate because there are then other factors which have to be taken into account, and again I am looking there for the 12 months. As well as the six month factors already identified if Ofcom decided that an infringement decision was going to be appropriate it would, of course, have to follow the procedural requirements which are set down in particular in s.31 of the Competition Act as amended, and also Rule 5 of the Office of Fair Trading Rules (2004 version). In particular that requires a Statement of Objections to be issued and an opportunity to be given to make representations to the persons affected or likely to be affected by the decision. So that is another factor which has to be taken into account. So we say that given all those factors, that is why six months and twelve months is appropriate, it is not simply revisiting old grounds.

THE CHAIRMAN: Do we need for the time being to think about what would happen if an infringement decision is taken because at that point one could then consider how long that is going to take. We really only need to consider the period up to the time that a decision as to

either a no infringement or infringement decision is taken, and then one can look in the context of what happens in the next period of time. Do you think that would be a sensible approach?

MR. HOSKINS: It is essentially a question for the Tribunal. Obviously my clients would like as much freedom as possible to organise their affairs. It depends to what extent the Tribunal wants to try - my primary submission is micro-management is not appropriate, but the extent to which the Tribunal wants to – "control" is the wrong word – survey what is going on, obviously if any parties are concerned about the scope of the investigation then they can raise their concerns but as a first instance perhaps with the Tribunal but my primary submission is that the Tribunal should basically trust Ofcom. We have given our undertaking we will use our best endeavours and that really is an appropriate relationship between the Tribunal and a responsible public body.

THE CHAIRMAN: But at the present stage it is very difficult to know if an infringement decision is taken how long would be necessary because one does not know what the decision is and therefore how appropriate and how difficult it is for the regulator etc., and who is going to be involved, etc. and so to set that timetable up now is looking very much in the dark.

MR. HOSKINS: If I could take some instructions?

THE CHAIRMAN: Yes.

MR. HOSKINS: (After a pause) I do not think we have any further submissions to add, save that because of the concerns about being able to manage our resources, if you like, the undertaking that we have offered is the one that we are offering and that is why we think it is appropriate, for the reasons I have described, that if we offer an undertaking in accordance with our guidelines, I accept it is at the maximum level but I have explained why we think it should be at the maximum level, that is the position.

I am sorry, I still have not developed the previous Tribunal Decisions which I wanted to show what the practice has been in relation to setting timetables. I preface this by saying that obviously each case has to be considered on its own merits, which is what I have just done. However, it may be useful to look at what the Tribunal has done, certainly in the two other cases I am aware of where this has arisen, and I should hand up copies of the relevant Judgments. (Documents handed to the Tribunal)

The first Judgment I have handed up is one of the Rulings in *Freeserve* and Floe refers to this Ruling in its written submissions. I think the best thing is if I ask the Tribunal to read paras. 16 and 17 and then I can make submissions on them.

THE CHAIRMAN: Yes. (After a pause) Yes.

MR. HOSKINS: The position in *Freeserve* was that there was a non-infringement decision that was challenged, and what the Tribunal said was that normally in that circumstance a period of three months would be appropriate in normal circumstances to allow the Regulator to decide that there was no infringement. I am drawing that distinction between no-infringement and infringement – three months normal. However, in the circumstances of that case a period of six months was allowed.

THE CHAIRMAN: The history of this case…this is an extension of time?

MR. HOSKINS: It is. Initially Ofcom had itself offered to deal with the matter within three months, and when it realised that three months was not going to be sufficient, it came back and asked for an extension of time which would have taken up to seven and a half months, and the Tribunal in the end said "We will give you six months".

THE CHAIRMAN: In fact it gave an additional three months to the original three months?

MR. HOSKINS: Exactly. There are three important facts, normal three months in the circumstances of this case, six months, for a non-infringement decision. However, what para.17 shows is that if the Regulator then considers that it is appropriate to move on to an infringement decision then more time is needed over the six months.

THE CHAIRMAN: That is what I said, maybe at this stage, we do not know where we are for the second, and in *Freeserve* was it a dual order, or was it a single order?

MR. HOSKINS: I must take instructions on that. (After a pause) I will need to take instructions on that. Certainly, from reading the Judgment it appears that it was a timetable that was set for no infringement. There is no discussion here of whether there was a timetable for infringement. I suppose that is not surprising, because they were coming back for extra time.

THE CHAIRMAN: It may be putting the cart before the horse to set what we could call "dual" timetables, but in *Freeserve* the Tribunal was faced with having given three months, and at the end of the three months the work had not yet been done and therefore they had to give more time, and the question was "how long?" and another three months was given.

MR. HOSKINS: That is correct.

THE CHAIRMAN: So as regards this Decision I can see you might say that shows that these things take about six months – July.

MR. HOSKINS: Yes. What this case shows I say is that one should be very careful inserting time limits. In my submission the Tribunal should be very slow to take up a situation where it is micro-managing an investigation. I have to put it strongly because Ofcom feels very strongly and we actually submit it is not appropriate for the Tribunal, which does not have an overview

of Ofcom's workload, to try to micro-manage. That is why we have offered the undertaking in accordance with our guidelines.

THE CHAIRMAN: Well it is not in accordance with the guidelines, because the guidelines show a maximum of six months.

MR. HOSKINS: Well, with respect, it is in accordance with the guidelines, because we say this is a case which is at the maximum. So we do say it is in accordance with the guidelines. We accept it is at the maximum, but for the reasons I have explained, which I am not going to go over again, our submission is it is very clear that this is not a run of the mill case – that leaps out from the Judgment itself.

THE CHAIRMAN: What has happened in *Freeserve*, was the decision taken by July?

MR. HOSKINS: I am instructed that there was a dual order in *Freeserve* of three months extended to six, and then six months. What has happened in *Freeserve* is that a non-infringement decision was issued within six months, and that non-infringement decision has now been appealed before the Tribunal.

THE CHAIRMAN: Thank you.

MR. HOSKINS: The other example is the *Association of British Insurers'* case.

THE CHAIRMAN: Which has not …

MR. HOSKINS: Well there is no Judgment, the *Associated British Insurers'* was a very odd case, because the Appeal Notice was put in and the normal time ran for the OFT to put in a defence, and rather than put in a defence the OFT indicated that it did not wish to defend its decision, so there was simply then a short hearing followed by directions for remittal, so there was no substantive hearing. Again, it is important to note that the approach taken by the Tribunal in terms of the remittal was actually a very cautious one. If I could ask you to look at the terms of the order. It is appendix 2 to our written submissions, the undertaking is on the second page – you see about half way down:

> "Now therefore, the OFT hereby gives the Tribunal the following undertaking. The OFT will consider for the purpose of sections 2 and 25(2) and (6) of the Competition Act (as Amended) whether there are reasonable grounds for suspecting that the GTA may affect trade from the United Kingdom and has, or has had, as its object to affect prevention, restriction or distortion of competition within the United Kingdom having regard to the following factors…"

Now it is very important to understand that sections 25(2) and (6) of the Competition Act, they are the ones that were inserted in the amendments which took place in the last year, are the sections which deal with the decision of the Office whether to open an investigation or not. So

what the Tribunal was saying is that the OFT has six months in which to use its best endeavours in order to decide whether to open an investigation or not, not six months to decide whether to adopt a non-infringement decision – simply six months to decide whether to investigate or not. So the timetable in ABI was (we say correctly) a very cautious one.

THE CHAIRMAN: Is that correct? If you look at the end of para. 1: "And accordingly decide whether they should propose to make a decision and take the action they consider appropriate", because it says s.2 and s.25 and s.31.

MR. HOSKINS: I am sorry, if you give me a second. (After a pause) Madam, I agree the order is ambiguous.

THE CHAIRMAN: I can probably clarify it within the Tribunal. I think my understanding is that it is not the limited way you put it.

MR. HOSKINS: I have to confess I was actually counsel for the OFT in that case. It is with full disclosure I say that I think that that order is ambiguous, because as I have said the heading relates only to s.25(2) and (6), but the tail refers to s.31.

THE CHAIRMAN: I am looking at s.31, it does not seem to have anything to do with it.

MR. HOSKINS: I think the Purple Book is now out of date. The Competition Act was amended within the last year, so s.25 and s.26 deal with whether the OFT has reasonable grounds for suspecting that there is an infringement, so as to cause it to open an investigation; and s.31 relates to decisions following an investigation, i.e. the issuing of a Statement of Objections and the ability to give representations. Madam, we do not have to worry too much, it is probably more for the OFT to worry about what that particular Order means. But what it does show is, again, at least a cautious approach because six months are given for a non-infringement decision on one reading of the Order, and I think that is as far as we need to take it for our purposes this morning.

Madam, unless I can help you further those are our submissions, but again I apologise for repeating myself, but I do have to say that Ofcom's position is that the proper relationship between the Tribunal and Ofcom is that Ofcom should have a sufficient margin of appreciation to organise its own affairs, and we submit that six months and 12 months in the context of this case is clearly appropriate.

THE CHAIRMAN: You handed up the permission to amend judgment in this case – did you intend to hand that up? Is it in relation to another point?

MR. HOSKINS: I think that is an error on my part. It may be useful to have it, but I have already referred to that in the context of the discrimination argument, but it may be useful for the Tribunal to have that when it deliberates the discrimination point.

THE CHAIRMAN: We will hear Mr. Mercer.

MR. MERCER: As Mr. Hoskins said, ma'am, each case must be looked at on its own merits, and what may be applicable in a competition dispute between two monoliths in the industry is one thing, and where poor old Floe comes in is another point altogether. I ask you to look at the dates when the original complaint was made back in 2003 and look how long it has taken us to get here. We were not given any interim measures although we applied for them. When the company started with its complaint it was not in administration – it now is – and Mr. Hoskins asks for more time. He reiterates a point I have heard given before by Ofcom that how we deal with these things is our affair. The next point, the relationship between the CAT and Ofcom is that it is remitted and then "we will look after it". I do not think the interests of justice would be served by that.

I think in this case if Mr. Hoskins really thinks that there is a difficulty with market definition in a case where Vodafone controls network termination on its own network – I will not go back to the part SIMs play in that, ma'am – but I think the question is much easier than he imagines, and there has been lots of work in that area in relation to other matters that have been before the courts.

We are at an interesting point in terms of the regulation of electronic communications services in this country, because we have, along with the rest of Europe, to decide whether or not competition law is really a route for regulation, or whether we should have sectoral, direct regulation. I do think it does the argument that it should be left to competition law no good whatsoever to have a prolonged fight. We need, in the case of small companies developing in new markets, speed. That has been said in public for some years. I remember back in 1994/95 when Mr. Cruickshank (the then Director General of Telecommunications) was having hearings about whether or not to insert a fair competition provision in people's licences, people standing up then and saying that it is all very well putting conditions in licences, etc. but unless we get speed of regulatory action there is no point, and in this case as time goes on, ma'am, the Appellant will just not be there any longer, and will not be in a position to come out of administration and take advantage of any decision it gets. I apologise if Mr. Hoskins was uncertain as to what I meant by "decision". In fact, I clarified that in a set of supplementary submissions, in fact headed "VIP" because it was in response to something in that matter yesterday, what I meant was the decision as to whether or not there has been an infringement.

THE CHAIRMAN: I thought that is what you meant.

MR. MERCER: I, like you, ma'am, then think that that, like any subsequent issues, may have to come back to the Tribunal, and we may have to look at the timetable then going forward, but

we need to know what is happening. I think it is a matter of the interests of justice that this is dealt with quickly. I have to say that the view was put to me, when I was secretary of a statutory corporation which was a Regulator, that pleading poverty was never a defence to not doing something, or not doing something quickly enough. If Ofcom does not have the resources, then it should go back to its sponsoring departments and sort that out, and maybe it should look at its priorities.

It is a standing point amongst people in both the broadcast and telecommunications' industries that every day another consultation document comes from Ofcom, and whether all of these it has to produce, ma'am I do not know, I have not done the analysis, but I suspect that it is doing some work voluntarily according to work programmes where resources could be diverted, and it must make those choices. You only have to look at its website to see the number of consultations and, when it decides it is right it can foreshorten consultations, even on very, very important matters like digital replacement licences very recently. It foreshortened its normal consultation periods in respect of those licences when it thought it had good need. It can do all these things, ma'am, it should do all these things, and it should do it very quickly. The only question on which I would show some leeway is if Ofcom were to decide that this whole matter needs a thorough shaking out before they begin considering the matter again. I think there is an argument, ma'am, that Ofcom might be allowed a period of time – put in the vernacular – to get its act together. That is perhaps giving a period of general thought, and discussion before they look at the precise decision. Even so, ma'am, I would imagine that the first stage of the decision making process as to infringement or not could take place by April.

THE CHAIRMAN: That is five months.

MR. MERCER: Three months for a decision and a period of six to eight weeks for perhaps looking at the matter more generally. There is also an argument that actually those two things could go hand in hand. I am not going to go back across the authorities, ma'am, because as I started by saying this is a matter of what is right in each individual circumstance, and what is right here – where you have a very small company – up against a very large company is that speed is of the essence, and that is to be followed through, and enforced or it diminishes and demeans the use of competition powers as a means of settling these disputes. As, ma'am you are undoubtedly aware, in the original complaint there was reference to Ofcom by Floe. There was reference to both sectoral regulation and competition regulation and Ofcom made the decision to go down the competition route, and the only appeal against that decision ma'am is by way of judicial review. So we did not have a great deal of choice, Hobson's choice indeed, as to what route was taken, and we should not have to suffer because they have gone this particular way.

Thank you, ma'am.

THE CHAIRMAN: Mr. Hoskins, you have put forward a number of hypotheticals which you rely on for saying that it is going to take or may take a long time. First of all, whether consultation happens or does not happen is a matter for Ofcom; whether it is decided that it is necessary at the outset to deal with the relevant market and dominance - those matters have not, from your submissions, yet been considered, so one does not know whether or not one should timetable them in, or timetable them out. That is the first thought that was going through my head.

The second thought that is going through my head is this. This is not a case where Ofcom are starting from scratch, they have done a huge amount of work (a) originally in the Decision; and (b) for the purposes of these hearings in this Appeal, so one is not starting from the guideline point with a clean sheet and having to build, one is starting from the position where a lot of the information has been obtained.

Also, this is a case where the matter has been dealt with once. Floe, the complainant, has had to come here, a decision has been taken and on the basis of the Judgment the matter is remitted and Ofcom are asked to consider the matter again. Now, those circumstances it seems to me at the moment are very different from the circumstances of a first initial investigation. Mr. Mercer refers to priorities, and I think it would be helpful to know how Ofcom consider the priorities of a re-investigation as against an initial investigation.

MR. HOSKINS: There are six points there. First, if we are looking at what is necessary to be fair to all involved, and I include Ofcom in this, Mr. Mercer said that five months is appropriate. Now, if Ofcom is asking for six months, and Floe says that five months is appropriate then, with respect, we should only be arguing about the difference between five months and six months because that should be the primary interest here, in fairness, as between the parties.

There is a classic "Catch 22" for the Regulators here. Mr. Mercer referred to the initial complaint having been made in 2003. Now, what happened, in fact, was that Ofcom did deal with this matter very quickly initially. It reached its non-infringement decision within four months. It tried to act speedily. So what happens, the Regulator gets a complaint, it deals with it on a practical basis as quickly as possible, it reaches a non-infringement decision which the complainant does not like, and then we have an Appeal which takes as long as an Appeal takes – there is no criticism there, that is what an Appeal takes – but you cannot have your cake and eat it. You cannot say to a Regulator "We want you to investigate this to the nth degree and we want you to do this immediately." Now, what has happened is that Ofcom reached what it considered to be an appropriate decision. It said it was going to issue a decision in a period of four months. We have had proceedings before the Tribunal, we have had a Judgment but, with

respect, the Judgment does not actually decide many of the matters. It decides the contractual dispute, but what the Judgment does – and again no criticism intended – is to say that if this is going to be resolved you need to go back and look at a long list of things.

Yes, there has been an initial investigation but there are a large number of new matters, difficult matters, that have been raised, so one can say "yes", it has already been started, but that does not really help us. The question is "How do we go forward from here?" and the bottom line is that there is a substantial amount of work to be done, and there is no point in that work being rushed, because what one might say, and certainly Ofcom does not say it, but the initial decision of four months did not consider everything because the Tribunal has told us it did not. So what is the point in now saying to Ofcom "you must do this very, very quickly". The interest should be in saying "You, Ofcom, must do as thorough job as possible to take account of the matters that we have raised".

In terms of the hypotheticals, if you like, consultation in the relevant markets, I start from the position that there are already a large number of points that have to be considered, because they come out of the Tribunal's Judgment, they said "You must consider these things". My point is that depending on the view taken in relation to those points, which only go to the question of abuse it may, in order to reach a non-infringement decision, be necessary to go into the market definitions. We do not know that yet. I do not think Ofcom has decided whether it plunges straight into an investigation of the market and dominance at the same time. Again, it is Catch 22 because either you go into the abuse points first, which is again a perfectly acceptable way for a regulatory body to act, it is absolutely standard practice for regulatory bodies and, indeed, for certain courts and tribunals to say that there is one issue which is potentially determinative of the case, rather than pour resources into a full investigation we will focus on that first, and it is only if we come to a certain conclusion we then widen it. That is an appropriate way of doing things, and we submit that if that is what Ofcom decides to do it should be allowed that leeway in this case. It would be very, very unfortunate if Ofcom had to approach every complaint, and indeed, every remittal by launching a full investigation into all factors. That cannot be right.

THE CHAIRMAN: I do not think that is being suggested, Mr. Hoskins. The point I was trying to make was that because there were hypotheticals it is only, as I understand your submission, if those hypotheticals become real, and Ofcom take the wider course, which is a matter for Ofcom, that you need six months.

MR. HOSKINS: The other point is the consultation ----

THE CHAIRMAN: Again a hypothetical ----

MR. HOSKINS: Well no ----

THE CHAIRMAN: -- because it is a matter that we said you might, it is a matter for Ofcom whether they do or not.

MR. HOSKINS: It is, ma'am. The consultation point goes in the first instance to the investigation of abuse, and again unless one is going to get into a situation where the Tribunal requires Ofcom to attend, and give chapter and verse on each stage of the investigation then, in our submission, that is simply not appropriate. If a direction is going to be given it should be at a general level, for example, you have six months to come to a non-infringement decision. We would not be prepared to give an undertaking which said, for example, "You have three months to look at the question of abuse, and then you must come back and report."

THE CHAIRMAN: I am not suggesting that.

MR. HOSKINS: So, ma'am, there are hypotheticals, but that goes to the point that Ofcom must be allowed a reasonable amount of leeway to organise its own affairs. In terms of what priorities Ofcom has as to re-investigations as opposed to initial investigations I need to take instructions on that particular point. I do say that where the difference between the parties is five months and six months, then really that should be the focus of the decision.

THE CHAIRMAN: Shall we hear Mr. Mercer on that point – I think he wants to say something?

MR. MERCER: Yes. Amazing how things are twisted by lawyers, is it not? What I had in mind actually was a decision by All Fools' Day, which is 1st April – I think the phrase I used was "by April". I did not have the intention to suggest that Ofcom should have the whole of the month to do it, which would be one extra month.

THE CHAIRMAN: To be fair, I wrote down "…could take place by April", and then you said "Three months for decision, and six to eight weeks for looking more generally" ----

MR. MERCER: That was my mistake, I meant four to six weeks.

(The Tribunal confer)

THE CHAIRMAN: Mr. Hoskins, would you like to take instructions without us here?

MR. HOSKINS: I just have!

THE CHAIRMAN: Right.

MR. HOSKINS: I can give you the answer. In terms of priorities, first of all Ofcom has to prioritise those matters it has a statutory duty to deal with in accordance with the statutory timetable. Once it has prioritised those matters then there is no magic in the difference between an investigation and a re-investigation. The question of whether to prioritise any type of investigation will depend on the subject matter that is at stake, and in particular, for example, where there is a potential for serious consumer detriment, that matter will be prioritised. So it is

perfectly possible that one will have an initial investigation with serious consumer detriment that would be prioritised over a new investigation if that was felt to be appropriate. There is no magic in a new investigation; it depends on the subject matter.

THE CHAIRMAN: Can I refer you to para.11 of the *Freeserve* case? We should have your submissions on that.

MR. HOSKINS: Madam, yes, that is one of the factors to be taken into account, and in Freeserve what was at issue was the provision of broadband, which you will see at para.12 is where it is developed:

> "These considerations apply particularly in a case where the allegation is one of predatory pricing or margin squeeze in a fast developing market of national importance such as broadband."

Clearly, nationwide broadband market, I would submit is of greater importance than the particular commercial activities that are at dispute in the present case. So yes, that is one of the factors, but if we are talking about the wider public interest, *Freeserve* was up **there** on the scale, but, with respect, Floe is approaching the bottom of the scale.

THE CHAIRMAN: But if one looks at para.11 I do not read that to say it is only in cases of broadband that there should be speedy resolution, what it is saying is:

> "The Tribunal attaches importance to the speedy resolution of matters remitted by it to the relevant competition authority, or where, as in this case, the competition authority concerned has undertaken to take a new decision to replace an earlier decision….The public interest in matters being disposed of quickly and efficiently is self-evident, from the point of view of both the complainant and the undertaking complained against. In addition, the matter is not confined to the interests of the immediate parties, nor those of the competition authority; the wider public interest in the existence of a fair competitive market for the benefit of consumers and users is of paramount importance."

That is a general paragraph, and then para.12 it says that these considerations apply particularly in the case of *Freeserve*, which was a broadband case.

MR. HOSKINS: Madam, I absolutely accept that there is interest in the quick and efficient disposal of disputes. That is why Ofcom has its guidelines, there is no denying that. But there is no standard which says "must be quick". It must be quick. It must be as thorough as necessary, hopefully we reach the correct answer, but simply saying it must be speedy, with all due respect does not take us very much further. We submit that is precisely why we have guidelines of six months and 12 months. It is because we recognise that is the policy.

MR. MERCER: Ma'am, I am afraid there is something I really cannot let go that Mr. Hoskins has just said. First, I will point out that Mr. Hoskins' attitude, which I think reflects that of his clients, we are down **here** in importance and the big broadband issues are up **here**, is so typical of what we have discovered during this matter; and yet, as I said to the Tribunal (differently constituted) at one of the early hearings, there are a great many companies who are interested in the outcome of this matter, not all of them as large as Vodafone, but a great many, and to say there is no serious consumer detriment at stake here is actually, ma'am, verging on the laughable, because you can start to work out on the information already provided as to the difference in rates that the public might pay using GSM Gateways or not for getting on-net access. There is a considerable amount of money, consumers' money, and public interest in this matter. But it is typical, I am afraid, ma'am, of Ofcom not to have recognised that.

Thank you, ma'am.

MR. HOSKINS: Madam, I do not think I need to respond to those comments. I have nothing else to add.

THE CHAIRMAN: Does that conclude the argument on time?

MR. HOSKINS: It does, madam, yes, that is all I have to say.

THE CHAIRMAN: So the next matter is costs?

MR. HOSKINS: It is costs, yes. Madam, just to set out the nature of the dispute, Floe seeks costs against Ofcom and Vodafone on an indemnity basis. I will deal with exactly how we say the award of costs should be dealt with, and it will not surprise you to know that we oppose the application for any costs on an indemnity basis.

THE CHAIRMAN: Do you oppose an application for costs at all?

MR. HOSKINS: I am going to make submissions as to how the costs should be dealt with, but yes, I oppose an order that Ofcom should pay all of Floe's costs in the Appeal.

By way of preliminary observation, because this is a factor that Floe makes great play of in its written submissions on costs, the fact that Floe is in administration is completely irrelevant to the question of costs. It is either entitled to costs, or it is not, but it cannot be awarded more costs than it would otherwise be entitled to simply because it is in administration. It is a false point.

In relation to the costs award we submit the appropriate order is this – I will say what it is and then I will explain why I say what it is – we say that Ofcom should pay two-thirds of Floe's costs in respect of the Appeal, save those costs occasioned by Vodafone. Secondly, we say that Floe should pay Ofcom one-third of its costs in respect of the Appeal. Thirdly, we

say that the parties should seek to reach agreement as to the amount of costs recoverable failing which the amount of costs should be assessed pursuant to Rule 55(3) of the Tribunal's Rules, following an application by either party. We say that is the appropriate order for the following reasons.

First of all, I am not going to step into the debate between Vodafone and Floe, but simply to say that depending on what view the Tribunal reaches, then Ofcom should not be liable for costs which were incurred by Floe in dealing with specific arguments and evidence raised by Vodafone.

THE CHAIRMAN: Are you going to tell us what those are?

MR. HOSKINS: I am going to leave that simply to Vodafone and Floe to make submissions on that.

THE CHAIRMAN: Well you are saying that you do not want to pay those costs, I think we need to know what the particular items are that you are saying that you should not pay.

MR. HOSKINS: I propose the order on the basis that the Tribunal finds for Floe in its application against Vodafone, and the Tribunal will hear detailed submissions from Floe as to why Vodafone should pay its share of its costs, and from Vodafone as to why it should not pay Floe's costs. We are quite content to take whatever comes out of that debate.

THE CHAIRMAN: But the question is what is this Tribunal going to order, and just assume for the moment that the Tribunal decides – I have no idea what it is going to decide, but just assume for the moment that it decides that Vodafone should not have to pay any costs, then are you saying that we take some costs out of yours in any event?

MR. HOSKINS: No, madam, if that is the order that Vodafone is not to pay any of Floe's costs then you can simply strike out the first limb of my proposed order the words "…save those costs occasioned by Vodafone". That is what I say we will leave it to ----

THE CHAIRMAN: No, then I understand. I thought you were saying that there were certain costs that you were not going to pay in any event.

MR. HOSKINS: I am sorry, madam, I over complicated it. We are in the Tribunal's hands having had submissions from those parties.

THE CHAIRMAN: Right.

MR. HOSKINS: The second point is this: what we want to focus on, which is the costs as between Floe and Ofcom, but you are well aware that the CPR introduced an issues based approach to costs. One sees that in CPR Rule 44.3(4)(b), and one sees it in the commentary at 44.3/10 of the White Book. I do not think I need to take you to those paragraphs, you are well aware of the issues based approach. We submit that the Tribunal should adopt a similar approach to costs here, that is the modern way, if I can put it like that, of dealing with costs. If one

accepts an issues based approach then we submit that the matter becomes pretty straight forward, because Floe relies on three principal heads of argument. There was the Primary Argument, the first alternative argument and the second alternative argument and on the Primary Argument Floe effectively lost and Ofcom won. The order that I proposed simply recognises that Floe succeeded on two out of its three arguments, and that Ofcom succeeded on one of the three arguments.

There is one point I should pick up from Floe's written submissions on the award of costs, because it does make a reference to the Primary Argument. It is at para.3(c) of Floe's application for an award of costs.

THE CHAIRMAN: Yes.

MR. HOSKINS: I trust the Tribunal have read these? I must confess I found it quite difficult to follow where the point led. However, it seems from the first sentence that the point is based on a premise because para.(c) says:

> "In passing the attention of the Tribunal is drawn to the fact that Ofcom submitted that the true construction of the licence was a matter introduced by Ofcom in response to Floe's Primary Argument. This in turn means…." etc.

And the logic of the point being made flows from that assumption:

> "Ofcom submitted that the true construction of the licence was a matter introduced by Ofcom in response to the Primary Argument."

That premise is a false one because it was rejected at para.276 of the Judgment.

> "Ofcom submitted that the true construction of the licence was a matter introduced by Ofcom in response to Floe's Primary Argument".

The tribunal goes on to reject that.

So whatever the argument being made at para.3(c) of Floe's written submissions is, it is based on a false premise.

Madam, that is all I want to say in relation to the award of costs as between the parties. The final point on costs is whether they should be awarded on a standard or an indemnity basis. Floe has asked for costs on an indemnity basis, but it has not put forward any reasoning whatsoever as to why that would be appropriate in this case. We submit that there is nothing in Ofcom's conduct in this case that would lead a Tribunal to award costs on anything than the standard basis.

Unless there is anything else on costs, madam, those are our submissions.

THE CHAIRMAN: Are we going to deal with VIP separately afterwards?

MR. HOSKINS: I thought it was probably best to come to VIP separately. The position is actually different for us in relation to VIP so there will be a different debate and I thought it sensible to leave that.

THE CHAIRMAN: Mr. Mercer, shall we hear from Vodafone first, do you think? Then you can reply to both?

MR. MERCER: I think that probably would be a good use of time, ma'am.

MR.WISKING: Madam, before I get to the question of costs I would just like to raise very briefly three matters in relation to the form of the order which we have heard about this morning. First, in relation to this question of the discrimination argument, all we say there is that I think Mr. Hoskins has said all there is to be said on that point, and we support his submission. We are obviously concerned that the scope of the investigation does not go spiralling out of control.

The second point is in relation to T-Mobile's proposal (which we supported) to amend the form of the order proposed by Ofcom. We have discussed that and taken instructions and, in the light of T-Mobile's proposal to withdraw that proposed amendment we would do the same, so that would deal with that point.

THE CHAIRMAN: We did not get from T-Mobile whether it was – oh, it is now.

MR. PICKFORD: It is. I can confirm for the Tribunal that T-Mobile will be withdrawing that proposal.

MR. WISKING: The third point is the question of timing. For us there are two issues, one is that we are obviously concerned that we should have proper opportunity to make submissions, respond to any s.26 notices that Ofcom should choose to send to us, and that Ofcom should have proper opportunity to consider those. Having seen what Ofcom is proposing in terms of its work programme, their submission that they would seek their best endeavours to reach either a non-infringement decision or issue a statement of objections within six months seems reasonable to us, and we would not oppose that at all.

The second point, which I think is very important, is our concern that the decision not be rushed. We do not want to be back before the Tribunal with another appeal, and so we are very concerned that it is done properly and thoroughly, and that we can be content with the outcome of the investigation so we would say that that also weighs in favour of the timetable proposed by Ofcom.

The other matter then relates to costs. We have set out our submission fairly fully on that point in the submissions we filed with the Tribunal yesterday morning and those provided on Monday night. I do not propose to go into those in the same level of detail,

unless the Tribunal wishes to ask about any particular points raised. Just to set out our position on costs. First of all, we oppose an order that costs be awarded against Vodafone at all. We think that it is appropriate that no order be made, and that is consistent with the general position of the Tribunal as regards Interveners, that they should be costs neutral, that they should not be discouraged in intervening in cases before the Tribunal at the risk of costs' awards.

The second point is that in the event the Tribunal is against me on that I would say that the amount claimed by Floe towards its costs in all the circumstances is excessive at 25 per cent.

Thirdly, the claim for costs on an indemnity basis is also opposed. If I could just briefly deal with those three points. In relation to the costs' order generally, there are two issues, first of all whether Vodafone has materially added to Floe's costs in these proceedings; and secondly, whether there are special circumstances which would warrant the Tribunal making an order for costs against Vodafone. It is our submission that neither of those is satisfied. As regards to additional costs Floe points to two things. One is Vodafone's Statement of Intervention and the second is the process of agreeing facts in these proceedings.

As regards the Statement of Intervention, the complaint appears to be its length. Now, having looked at it again, the submissions in the Statement of Intervention were 15 pages of which 10 were occupied dealing with the Primary Argument in which, as we heard, Floe was unsuccessful. Vodafone set out submission at length – if that is considered lengthy – because it was conscious of its role as an Intervener and that it would have limited opportunity to make submissions at the hearing and therefore it was important that its position be set out fully in writing. Furthermore, Floe accepts there were no new points raised, and simply put the arguments in a slightly different way from Ofcom. In my submission that is a perfectly proper role for an Intervener in these proceedings.

As regards the Statement of Agreed Facts, the process that the parties took on that matter were, as far as possible, to try and deal with it as efficiently as possible, so Ofcom dealt with Vodafone and tried to reach a common position. It then went to Floe, so as far as Floe was concerned it was dealing principally with Ofcom. Vodafone only got involved in those discussions where it was necessary because the Tribunal had asked the parties to deal with specific topics, some of which were in the direct knowledge of Vodafone – in particular matters relating to the connection and disconnection of Floe. So, in a sense, having Vodafone directly involved in those discussion was, in fact, the most efficient way of dealing with them

and, as the Tribunal will remember from the last Case Management Conference in these proceedings, the problem with the agreed facts was that Floe was seeking to introduce quite complicated and, in our submission, irrelevant material on the question of the Primary Argument, and the Tribunal was very concerned that it not turn into another major dispute, and ultimately Floe did not pursue that. It did not seek to prove those matters at the hearing and, if anything caused costs in relation to the agreed facts, it was that diversion introduced by Floe. So those are the only two matters that Floe relies upon as adding to the costs of these proceedings as a result of Vodafone's intervention and, in our submission, they do not and they are certainly not material additional costs.

The second point is there are no special circumstances in this case which would warrant an order for costs against Vodafone. The Tribunal has to look at the case in the round, and this case is very similar to the *Freeserve* case where costs were not awarded against BT which was effectively an unsuccessful Intervener. *Freeserve* was, as you have heard, successful at least in part in its Appeal, and this is very similar. Floe was unsuccessful on Primary Argument, it did not pursue its second alternative argument, so it won some and it lost some, and taking the case in the round – bearing in mind policy considerations – this is not an appropriate case for an award of costs against Vodafone as an Intervener.

In terms of the amount I say that, given what I have said about the Statement of Intervention, and the agreed facts, seeking a contribution of 25 per cent. is frankly excessive. If one looks at the two cases where costs were awarded against Interveners such as GISC and the IBA case, the Tribunal ordered the Interveners pay 15 per cent. of the Appellant's costs in GISC and in IBA it was 17.5 per cent. and there were two Interveners in that case.

It is also clear from the Judgment that those Interveners took a much more active role in the case. In GISC the Intervener ran an argument which the OFT did not run and was unsuccessful. In IBA the Interveners introduced 1200 pages of documents, so it is quite different from this case.

In relation to costs on an indemnity basis, I agree with Mr. Hoskins. No basis has been advanced for costs to be awarded on that basis. It is clear from the procedure rules that there has to be something else other than the ordinary run of litigation to move the Tribunal to make an award of costs on that basis, and furthermore it would be inconsistent with the practice of the Tribunal to date, which has been very concerned with controlling costs, ensuring costs are proportionate to make effectively a penal award of costs against an Intervener in this case.

That is all I wanted to say abut costs unless there was a particular matter the Tribunal wanted to ask about. As I say, it is fully set out in our written submissions.

THE CHAIRMAN: Mr. Mercer?

MR. MERCER: What we are looking for, ma'am, is what is just in the circumstances, and can I say that the only rule about costs in this Tribunal, so I understand it, is that there is no rule. We have to look at exactly who we are and where we are, taking into account some of the guidelines that have been given in previous cases. You may have another idea, ma'am and put me right on it, but I do not think this is a case where there is a draw - what was applied for has been given by the Tribunal. I totally agree with Mr. Hoskins in his comment earlier this morning that this is one of those cases where things do seem to change over time, and one of the things that changed very, very dramatically, ma'am was Ofcom disowning a large part of its original Decision. A large part of its original Decision suddenly became very inconvenient, and they changed it. I do not intend, ma'am, to quote back to you the Tribunal's own words in the Judgment in respect of what might have occurred at that time. But if, as the Tribunal suggests, ma'am the matter should then have been halted, and looked at anew, you can appreciate from the date of the receipt of the Defence to today how much in terms of the proportion of costs my clients would have saved – it is a very substantial proportion. Their decision would have been looked at again, and they would not have to be here now.

In addition, Vodafone and Ofcom spent quite a lot of effort in opposing the application to amend the Notice of Appeal, and yet it must have been apparent to them, having read the application to amend, that what was being inserted was essentially a variation of a legal argument and, as far as Vodafone is concerned, we would – without it becoming too granular a process – merely ask that the Tribunal weigh in one hand the Defence and in the other the Statement of Intervention from Vodafone. Unfortunately, I only have PDF'd and copied versions, I cannot do a word count between the two, but the Tribunal might ask itself whether it is unusual in the circumstances to have what amounts, in effect, to a second defence.

As far as Vodafone are concerned, I would point out that they were happy to pick up and run with the parts of the Decision letter that were disowned by Ofcom, and that is apparent from their skeleton, and from their Statement of Intervention.

Dealing with Vodafone's points in its submission, I really do find it doubtful that Vodafone would have been deterred from intervening in this matter, simply by having costs awarded against it. There may be some Interveners, ma'am, who would be in that position

but I do not think that Vodafone Ltd. falls into that category. Mr. Wisking, at para.12.3 of his submissions refers to the *Freeserve* case and draws your attention to what it says which is that costs for an intervention will very often in justice be allowed to lie where they fall. "Very often" does not mean on every occasion. The provision which is referenced is to justice.

Mr. Wisking referred in his submissions to BT Plc and Ofcom, which is a matter before the Tribunal, I think perhaps with the suggestion that the two matters should follow each other, or be considered together in some way because, ma'am, I think every case has to be considered on its merits – I cannot see that there is any question of that.

In conclusion I just want to deal with two matters. Mr. Hoskins, in what I think I have described as his "tactical" application for costs against Floe, makes play, as I thought he would, of the Primary Argument. My submissions on that go like this: First, Mr. Hoskins drew your attention, ma'am, to what he described as my puzzling para.3(c) in the application. I am not sure I really understand Mr. Hoskins' point, but the point I was trying to make was this. If we had not actually looked at the Primary Argument we would not actually have seen a position where Ofcom got to the position it now thinks is the correct one, concerning the interpretation of Vodafone's GSM WT Act licence. There are a number of other things actually that we have not looked at the Primary Argument; we would still have to have looked at, in my submission, in relation to the first and second alternative arguments. We would still have had to look at the interpretation of the Regulations. We would still have had to have looked at the impact of the Authorisation Directive, and the RTTE directive. We would still have had to have look at the framework and matrix of regulation relating to the regulation of GSM Gateways. This is not a case, in the sense of looking at issues and Rule 44 you can say that what the Tribunal did was to grant the Appeal in respect of paras. 45 to 52, but it did not grant the Appeal in respect of another set of issues, for unless Mr. Hoskins' submissions this morning are successful, it is the whole Decision that will be quashed.

The second point is in relation to indemnity costs. I have already made the point, and it is quite simple, which is that if Ofcom had considered the position and withdrawn its Decision letter when it realised that it could no longer in its mind sustain the arguments made concerning the interpretation of Vodafone's GSM licence, from that moment onwards there was no reason why we should suffer financially in respect of this matter. Mr. Hoskins says it does not matter whether you are in admin. or you are the richest company in the world. Well, I can tell you, ma'am, it does make a substantial difference, because what we are talking about here is the ability of Floe to continue with this matter generally, and be

properly advised. I have no doubt that Mr. Hoskins' clients and Vodafone would like to see the matter disappear because if Floe went out of administration into liquidation the whole issue could conveniently have evaporated. I do not think that is served by the interests of justice.

For all of those reasons, ma'am, I made the application that we did in respect of costs.

THE CHAIRMAN: Mr. Mercer, can I just ask you something? What you have asked for is that your costs be met 75 per cent. by Ofcom, and 25 per cent. by Vodafone. Why do you say that this case is one that Ofcom should not pay 100 per cent., if that is what we ordered, and why is this case something special that an Intervener ought, in this case, to contribute to the costs?

MR. MERCER: My application was on the supposition that it might be possible to gain a division. My application is for my costs on an indemnity basis, and I have suggested a breakdown. It is for the Tribunal to decide. I chose that figure, ma'am, because both parties, despite the change of heart on the interpretation of the WT Act licence, proceeded with matters and I have well in mind, ma'am, when it comes to the amount of work involved just exactly where, to take one example of one day, ma'am, the day on which I drafted our skeleton argument, and going from not one document, and then dealing with the interveners, but having constantly to juggle what were, in effect, two defences in preparing the skeleton, because every argument made had a brother or sister in the alternative document, put in a slightly different way sometimes it had to be dealt with, and that takes time and money.

I hesitate before giving evidence in the matter in that way, but that is how I saw it and how I came to that figure in my mind.

Is there anything else I can help you with, ma'am?

THE CHAIRMAN: No, thank you very much.

MR. DAVEY: Mr. Mercer, you are asking for costs on an indemnity basis, but you have not advanced any particular reason why it should be on an indemnity basis. Would you like to address that?

MR. MERCER: Yes. Indemnity because what should have happened in all fairness and justice is that we should not be here today, and we should not have had the hearing in July, because Ofcom should have withdrawn its Decision, and reconsidered the matter again. That, in a nutshell, is the argument.

MR. HOSKINS: Six points again. First of all, Mr. Mercer made the point that the reason why we should not have this split issues based approach that I have suggested, two-thirds/one third, is because Ofcom disowned a large part of its original decision – for the large part they were putting it too high, but we did take a different stance from that in the Decision. He says that

is why they should have all their costs. But one has to be very careful about that, because there is a mirror image to it. We did take a different stance on certain aspects of the Decision and that is why Floe won on the first and second alternative arguments, because the Tribunal took the view that therefore those matters should be reinvestigated. My suggestion on costs reflects that fact. But just as Ofcom bears responsibility in the way it conducts its case, and if it takes arguments and loses it has to pay the costs, it is the same for Floe, because given that Ofcom did not withdraw its Decision, Floe nonetheless decided to run the Primary Argument, and again Floe could have decided not to run that argument because it thought it would lose, or could have withdrawn it or abandoned it at some stage, because it thought it could lose.

If one chooses to litigate one bears responsibility, so just as Ofcom had decisions to make about how to conduct the case, Floe had similar decisions, they decided to run the Primary Argument, they lost. As I have said the normal costs' approach in the High Court would dictate that they pay costs in relation to that.

The second point Mr. Mercer referred to was that both Ofcom and Vodafone opposed the amendment of the Notice of Appeal, and the main amendment that was proposed was indeed the Primary Argument, and it is fair to say that the principal reason why we opposed it was an interpretation of the rules. We said that it was not open – the Tribunal did not have jurisdiction on the Rules to make the amendment. However, the question was raised by the President; I was asked as to the merits of the argument. I have to be very careful, because I have not looked at the transcript and my memory is not necessarily that accurate. We were asked as to the merits of the argument, and my recollection is that we said it was bound to fail. So the position we took at that stage was that the argument was bound to fail and again, here we are, we have been proved correct. Nothing really turns on the fact that we opposed the amendment of the Notice of Appeal. Again, it is a matter of responsibility, Floe chose to seek that amendment having obtained permission, sought to run it, it lost, we are back into the issues based approach.

The third point related to para.3(c) of Floe's written submissions where both of us seem to be passing in the night, because I cannot understand Mr. Mercer and he cannot understand me. I have already made the point that 3(c) is based on a particular premise. If one looks at para. 276 of the Judgment the premise is not borne out. I do not intend to say anything else on that unless the Tribunal wants further help, although I may not be the person to give that help.

The fourth point is Mr. Mercer said "Well even without the primary argument we would have had to have looked at the question of compatibility with the Directives, the regulations, the framework" – correct; but the point was that the Primary Argument raised distinct issues, distinct arguments about the proper construction of the relevant legislation. It was not some general discussion about the regulations, there were particular points made about who was a user, what installation meant etc., all set down in the Judgment, and it was for Floe the Primary Argument – the Primary Argument, first alternative argument, second alternative argument. This was a matter that took up a lot of time and, in a sense, it is unfortunate, when one looks back and reads the Judgment, it would actually probably have been better if we had not had the Primary Argument there would have been a lot more time to focus on first and second alternative arguments. But there we are, that was Floe's Primary Argument. It raised distinct points about the regulations, they lost on them – you know what my mantra is by now, it is an issues based approach.

The other point is, of course, on the second alternative argument, as Mr. Wisking pointed out, it was in the Amended Notice of Appeal that no overall submissions were made on it at the hearing. The hearing was about Primary Argument and first alternative argument, as far as Floe made submissions about. That shows the importance of the Primary Argument it cannot simply be brushed to one side.

In relation to the question of indemnity costs, it is said that if Ofcom had withdrawn its decision at some stage in the Appeal because, of course, it is not suggested that none of this would have happened, so if one were of the mind to issue indemnity costs it could not be for the whole Appeal, it could only be from a stage when it was considered that Ofcom should reasonably have withdrawn its decision. But if we had withdrawn our decision we would not have had the hearing in July, and that is said to justify indemnity costs. With respect, when Ofcom realised that internally it could not stand by the basis of the decision and did what was appropriate, it raised that issue, it brought it out into the open, obviously it had to.

The question then is what was the most efficient way forward? We have heard the complaints about the need for speed, etc. The position Ofcom took was that, given that we considered it was primarily a matter of construction, as the Tribunal found, we needed to put in some factual material, we had hoped that it was a matter which, if we raised it and if all parties had the chance to make submissions on it, could be dealt with by the Tribunal. In the event that did not prove possible, obviously, for the reasons set out in the Judgment. When you are considering whether that merits indemnity costs, can it really be said that Ofcom

acted unreasonably in choosing to adopt an approach which it thought would lead to a proper consideration of the issue, and a resolution of the issue as quickly as possible.

One can imagine that if we had said we intend to withdraw a decision there may well have been wails from either side of me saying "Hang on a minute, either you have reached that decision you are stuck with it", or "Hang on a minute, we have been waiting four months, we want an answer." I do not ask you to form a judgment as such on what the right course of action was. The only submission is that Ofcom acted reasonably in the way it did, and therefore there was certainly no question of indemnity costs being imposed in a case such as this.

THE CHAIRMAN: I think we should look in the Judgment at that paragraph to see what exactly it said.

MR. HOSKINS: It is para.275 of the Judgment. "…it will normally be appropriate…". Madam, I would say this, obviously it is a question of what is normally appropriate, by not acting that way does not mean that Ofcom acted unreasonably. The issue does not flip in that way.

This is the first instance in which the Tribunal has indicated that that is the normal procedure that should be followed. It has not arisen before. ABI – I do not have the date of the order – took place at around the same time, I think it slightly pre-dated this, but not by much. So there was no precedent for this course of action being taken. As I say, Ofcom made a judgment call, it is one that the Tribunal has disagreed with. That is very different from saying that Ofcom acted unreasonably, first of all making that judgment call; and secondly, given the state of indications from the Tribunal as to what the appropriate course was at that stage. So we will suffer in costs, as my suggestion is that we pay two-thirds of the costs. But that is where it should lie; it should not be an indemnity costs issue.

The final point is again returning to Floe in administration. I have made my submission on that, it is irrelevant, but I do have to say that the suggestion, if it is being made – it was not made in these terms, but if it is being suggested that the purpose in Ofcom suggesting that the costs' order it does is to somehow make this go away, is one we very strongly reject. Indeed, one can see there is no substance in it, because whatever Floe chooses to do about its Appeal, the VIP complaint is still there, so I do have to put on the record that we strongly reject that that is the purpose of seeking our costs.

Unless there is anything else I can help you with those are my submissions.

MR. WISKING: I have four short points. I support what Mr. Hoskins says about an issues' based approach, with just one addendum to that, and that is that Vodafone, as part of its opposition

to the amendment to include the Primary Argument did oppose it on merits as well as procedural grounds, on the basis it had no prospects of success.

The second point, in relation to indemnity costs, the distinction between indemnity costs, and costs on the standard basis is that costs on the standard basis have to be proportionate to the case. That is not true of indemnity costs. I just want to give the Tribunal a reference – I do not have copies of the case – to the GISC case at para.60 where the Tribunal makes the statement that it is effectively concerned to ensure that costs are proportionate in proceedings before the Tribunal to the matters at stake. In my submission that is consistent with the normal, usual practice of making costs on the standard costs' basis to the extent that those principles are applicable to the Tribunal.

Mr. Mercer also referred to our reference to the BT case. I am not making a submission that the question of costs should be reserved pending the outcome of that case, simply that we thought it was appropriate to draw the Tribunal's attention to the fact that there is another costs' case pending before the Tribunal, and it is a matter for the Tribunal how it chooses to deal with that.

Lastly, Mr. Mercer raised again the fact that Vodafone appears to have increased its costs because he had to look at two different ways of putting the same argument. In my submission that does not really increase the costs at all. In preparing for the hearing he had to think about the case in the round. He had to be prepared to deal with various different ways of putting the case and, frankly, our articulation of the case in a different way assisted him.

That is all I have to say.

THE CHAIRMAN: The practice which has been stated in cases about Interveners is normally costs are not ordered against them, the practice also is that Interveners are present for added value. If they are not going to add value they should not be there, and therefore there must be additional costs of some sort built into the system.

MR. WISKING: I think that is right, but I do not think it follows that simply because there are nominally or some additional costs which just flow from the existence of an additional party in the hearing, it follows that therefore it is automatically ordered ----

THE CHAIRMAN: No, that is what I am saying, that in fact those two things may be linked (a) that the Intervener is there because of added value, therefore there must be some added work, but (b) the practice is in the normal case Interveners should not have a costs' order against them?

MR. WISKING: Those are my submissions, and the question is really whether the Intervener steps beyond the proper bounds of the intervention and, in my submission, Vodafone did not do that in these proceedings.

THE CHAIRMAN: Mr. Mercer, it is your application for costs, so I suppose you ought to go last if you want to. Do you have any other submissions?

MR. MERCER: I think we have been around the houses on this one long enough.

THE CHAIRMAN: Are there any other outstanding points that need to be decided?

MR. HOSKINS: I think there is just one, which is one that the Tribunal itself raised at the start, which is the (a),(c),(b) point, which is the timetable, the proposed steps in the investigation suggested in para. 5 of the Ofcom written submissions, you suggested ----

THE CHAIRMAN: (a),(b),(c) and (a), (c), (b) – yes.

MR. HOSKINS: Exactly. We are perfectly happy with (a), (c), (b).

THE CHAIRMAN: That can be dealt with in ----

MR. HOSKINS: It does not appear in the order, simply we have made that decision and the Tribunal has indicated that is the logical way, and we are saying "yes", that is the logical way.

THE CHAIRMAN: Right, so there are no other outstanding points to decide, just the terms of the order.

MR. HOSKINS: Nothing, touch wood, in Floe.

THE CHAIRMAN: Should we now hear VIP, or ----

MR. HOSKINS: I think VIP is going to be very quick – I may be hung by that.

THE CHAIRMAN: Yes.

MR. HOSKINS: In relation to VIP there are actually three points, because the Tribunal has indicated what it would look for is a draft consent order which has been agreed, effectively, between VIP and Ofcom subject to two points, but that is all subject to the Tribunal's overriding comment. It would prefer to see an order closer to ABI. I am not quite sure – is the point that the Tribunal would prefer to see the Decision quashed, rather than it being done by consent?

THE CHAIRMAN: Yes, well it will be done by consent, it is by consent that happens, but it is not both sides withdrawing, because it is not withdrawing the Appeal – withdrawing the decision and withdrawing the Appeal – it is the application or the Appeal is being determined by your undertaking that the Decision is quashed.

MR. HOSKINS: The reason why we suggested and we thought it was appropriate to have that consent provision was, of course nothing really ever happened in the end. All that has ever happened was that there was a Notice of Appeal put in ----

THE CHAIRMAN: But nothing happened in ABI either.

MR. HOSKINS: -- and then it was stayed. In ABI the OFT said it did not want to defend its Decision and as a result the Decision was quashed. There was a difficulty in ABI, I am not quite clear and I do not want to stray into territory that I cannot stray into obviously, but ABI

was a different context, because ABI concerned the conditions attached to a grant of exemption in relation to an agreement which had been notified. The problem was because of the modernisation regime, there was no longer any power to grant an exemption and again, I obviously I cannot go into the details, but the OFT's approach in that case was conditioned by consideration of the scope of its ability to withdraw its Decision, whereas here what we have done, and the reason why we have done it – I am sorry to be so cryptic on ABI, but you will understand why I have to be relatively cryptic.

THE CHAIRMAN: Yes.

MR. HOSKINS: What we have done here, what we thought we were doing was responding to para.275 of the Judgment, which was the Tribunal's indication that when Ofcom, or when a Regulator decides it cannot defend part of its original Decision it should seek permission to withdraw the Decision. So we were intending to reflect what we had understood to be what the Tribunal said should happen, because it is the same sort of situation in Floe. The Appeal went in and it was only after the Appeal Notice went in that Ofcom changed its position on its Decision. So what happened in VIP was the Appeal Notice went in, it was then stayed. Ofcom, by definition, has decided it cannot defend part of the Decision, so what we are doing is what we thought the Tribunal was saying should happen in para. 275 of the Judgment. That is the thinking behind the VIP argument.

THE CHAIRMAN: But if you withdraw the Decision after the application has been made, then the Tribunal has jurisdiction and has to consent to that withdrawal.

MR. HOSKINS: Yes.

THE CHAIRMAN: And on that basis it seems to me at the moment that the Appellant should not have to withdraw his application because he has effectively succeeded, and if he withdraws his application where do costs lie?

MR. HOSKINS: Madam, can I short circuit this? My instructions are it does not make any difference to us whether the Decision is quashed or not, so that is the easy bit. In relation to costs we do not oppose the application for costs.

THE CHAIRMAN: Right.

MR. HOSKINS: I am sorry, I thought it was important to explain why we are doing what we are doing, and in the course of that explanation I was told it did not matter, so I am sorry to have got there by such a roundabout route.

THE CHAIRMAN: It is all right. So it will follow the ABI.

MR. HOSKINS: Well Floe, in a sense, is modelled on ABI, so it will be a quashing of the Decision, but without again for the reasons …. setting out all the individual points, but obviously in

that form. Then the only question that remains is the timing issue, which is exactly the same between Floe and VIP and I have made the submissions as to the undertaking that we are prepared to offer.

THE CHAIRMAN: And is the idea that they run in parallel?

MR. HOSKINS: Yes. There may be internal ways in which the process is streamlined, but yes, that is the suggestion, it is the same - six months or 12 months.

THE CHAIRMAN: Yes, thank you. Mr. Mercer, do you have anything to say? They are not opposing costs, and I doubt whether you mind which ever form the order is in?

MR. MERCER: It is of no great concern to me, ma'am.

THE CHAIRMAN: In relation to the timetable, do you have the same submissions in relation to Floe.

MR. MERCER: Exactly the same, ma'am.

MR. PICKFORD: Madam, if I could add on behalf of T-Mobile that to the extent that the issue of discrimination is not remitted back in the Floe case, it would also obviously be inappropriate to remit that issue back in relation to VIP.

THE CHAIRMAN: Was it in the Decision in VIP, and was it part of the application?

MR. PICKFORD: I do not have the application to hand.

THE CHAIRMAN: I think it was in it.

MR. PICKFORD: Well to the extent it was not in it, it does not arise, but to the extent it was then it should be treated equally.

MR. HOSKINS: It was in the Decision.

MR. PICKFORD: And I understand it was.

THE CHAIRMAN: What about the application? Was there an Appeal on the discrimination aspect?

MR. HOSKINS: I do not think the appeal does raise it.

(The Tribunal Confer)

THE CHAIRMAN: We think the appeal does raise it.

MR. HOSKINS: I am sorry?

THE CHAIRMAN: It is a document headed "Appeal to the Competition Appeal Tribunal by VIP".

MR. HOSKINS: That is the one I am looking at as well, yes.

THE CHAIRMAN: Paragraph 4 on the second page.

> "VIP cited to OFCOM an example where VIP knew of a company using TM SIMs where TM did not disconnect them for usage over 3000 minutes. VIP SIMs however were disconnected. VIP has seen no evidence from TM to prove that they were even-handed…"

MR. HOSKINS: The last time I looked at this I had written beside that paragraph "Discrimination question mark"

THE CHAIRMAN: Yes.

MR. HOSKINS: The difficulty is it looks like just a narrative.

THE CHAIRMAN: But it was raised, whereas it was not raised at all in the Floe case.

MR. HOSKINS: It was not in the original Appeal, no.

THE CHAIRMAN: No, but it was raised in this Appeal.

MR. HOSKINS: In so far as that is a ground, of course if one looks at the grounds for the Appeal. Paragraph 1. Interestingly, the CAT's own summary of the Appeal does not refer to discrimination being a ground.

THE CHAIRMAN: If you look at the "Grounds of Appeal" 1(B) and one of the reasons why they had no objective reason for refusal to supply is "4", which is they did not do it in relation to someone else.

MR. HOSKINS: That is a reading one could take.

THE CHAIRMAN: So it appears to have been in, on that reading anyway.

MR. PICKFORD: Madam, notwithstanding whether it was in the original Appeal or not, we would say it would be inappropriate in relation to the VIP re-investigation to open up an issue which is not being opened up in relation to Floe, and the reason why it should not be opened up in relation to Floe is because the Tribunal has not set aside Ofcom's Decision on the basis that the discrimination ground was made out.

THE CHAIRMAN: Of course, that depends on whether we have set aside the whole decision on the basis that there was a withdrawal and therefore we set aside the Decision, and the whole thing has to be looked at again.

MR. PICKFORD: It certainly depends on the nature of the approach that the Tribunal takes in the Floe case. We believe the two should be treated equally.

MR. HOSKINS: Madam, it is just a suggestion, but we are struggling to understand what is in this Notice of Appeal, but I imagine the people that drew up the Notice of Appeal may well say what the Tribunal has just said, so it may be a sensible question to ask VIP whether it was intended to be raised?

MR. MERCER: I thought eventually we would come round to this one. The answer is "yes" the discrimination point is in there we contend in its present form, and why is it there? Because maybe at the time it was drafted we knew difficulties about the discrimination point were going to arise elsewhere.

My submission, ma'am is very simple, I have made my submissions on Floe, but notwithstanding that, treat each case as it comes along with its paper work, and this has discrimination in it, it stays in it. Sometimes there are variations between complaints and this is one of those situations where you have to take account of that.

THE CHAIRMAN: I think we have the submissions on that, unless anybody has anything original to say. What we were wondering, it is five to one and there are a number of points that we need to decide, I do not know if you were going to stay in the building or if you are going away, because if you are going away I do not want you to have go come back and wait, whereas if you are staying in the building then it does not matter.

(Discussion as to timetable)

THE CHAIRMAN: Shall we say 2.15 and we will use our best endeavours. Thank you all very much.

(For Ruling see separate transcript)

(The hearing adjourned at 3.05 p.m. and resumed at 3.20 p.m.)

MR. HOSKINS: Madam, thank you very much for the time. Obviously we note and take on board the Tribunal's comments in relation to Ofcom's priorities in moving forward. However, before we came here today we did conduct a thorough assessment of the work involved and of our resources, and the six month figure that we offered by way of undertaking was a genuine and carefully considered proposal and, in those circumstances, it does not seem to us that it is appropriate for us to give an undertaking and therefore we do say it is necessary for the matter to be dealt with by way of order. I think in all good conscience that is the only way in which we can put things.

THE CHAIRMAN: On that basis the Tribunal will draw up the order.

MR. HOSKINS: Yes.

THE CHAIRMAN: Is there anything else in the undertakings to go in? Is there no other undertaking? Does paragraph 1 not go into it?

MR. HOSKINS: The obligation to undertake a new investigation?

THE CHAIRMAN: Yes.

MR. HOSKINS: I was wondering whether that is necessary, but probably the safest way to avoid an ambiguity is for that to be incorporated in the order.

THE CHAIRMAN: So if we draw it up on the basis that (1) remains.

MR. HOSKINS: The remittal back – Ofcom to open a new investigation. Then the order as to the timing, and I think it would be wise to leave the general liberty to apply.

THE CHAIRMAN: Yes.

MR. HOSKINS: I think those are the four components.

THE CHAIRMAN: And there will be a CMC, etc.

MR. HOSKINS: Yes.

THE CHAIRMAN: So there will be an undertaking but it can only have (1) in it.

MR. HOSKINS: Oh, I see, I am sorry, I misunderstood. I was envisaging that would all be dealt with by way of order.

THE CHAIRMAN: All right, so it will all be dealt with by way of order.

MR. HOSKINS: I think that is probably the most straightforward.

THE CHAIRMAN: And then in VIP?

MR. HOSKINS: I think that will be the same order, I think, in the circumstances, given that the position is now that the Decision is to be set aside and the matter remitted, I think it is exactly the same order in VIP.

THE CHAIRMAN: Yes. I am just wondering, looking at VIP, whether it would be more appropriate to have it by way of undertaking, but not the time, and if we're doing it in that one then we could do that in Floe as well, so that you give an undertaking, which is what has happened, effectively.

MR. HOSKINS: I think there has to be an order in VIP setting aside the Decision. It has to be by order.

THE CHAIRMAN: Absolutely.

MR. HOSKINS: There has to be an order in relation to remittal. There has to be an order in relation to timing.

THE CHAIRMAN: But the reason that we are giving the order in VIP is because you have undertaken to reconsider. It is by consent in effect.

MR. HOSKINS: Well it may be appropriate in that case if there is a consent order – well it is not a consent order as such ----

THE CHAIRMAN: No, that is why if we did it by the undertaking, upon that undertaking, and then you are not consenting to the five months.

MR. HOSKINS: Yes, it would go in the earlier recitals, there would be "Upon Ofcom undertaking", and then ----

THE CHAIRMAN: Absolutely.

MR. HOSKINS: Can I just take instructions?

THE CHAIRMAN: Yes.

MR. HOSKINS: (After a pause): I am instructed that Ofcom is prepared to give that undertaking in VIP, so an undertaking in the terms of that set out at the current draft, appendix 4 to our written submissions, and I am instructed on behalf of Ofcom that we are prepared to give an undertaking in terms of the first undertaking in that draft – "Ofcom will offer a new investigation …" etc.

THE CHAIRMAN: Yes.

MR. HOSKINS: And that would appear in the recital to the order, and then the order would follow in the manner we have described.

THE CHAIRMAN: But we should not do the same in Floe? Do it the same way?

MR. HOSKINS: I do not think anything turns on it, madam, so if that is easier for you ----

THE CHAIRMAN: I am just thinking then are both then the same.

MR. HOSKINS: We are quite happy to give that undertaking.

THE CHAIRMAN: Right, so we will draw it up on the basis that there is an undertaking that you are re-opening?

MR. HOSKINS: Yes.

THE CHAIRMAN: And the five months goes in our order.

MR. HOSKINS: Yes.

THE CHAIRMAN: And we will do both the same way?

MR. HOSKINS: Yes.

THE CHAIRMAN: Good. Thank you all for your submissions today, and of course for the submissions on the previous occasion.

MR. HOSKINS: Thank you very much.

(The hearing concluded at 3.25 p.m.)