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IN THE COMPETITION

Case No. 1047/3/304

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 November, 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)

MR. ADAM SCOTT T.D.
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr. Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer.) appeared for the Appellant.

Mr. Richard Fowler QC and Miss Kassie Smith (instructed by the Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good afternoon ladies and gentlemen. May I open this Case Management
2 Conference by dealing with a matter that is not, I think, on our agenda at the moment, which is
3 the question of the composition of the Tribunal. You will be aware that there has been
4 a change in the composition of the Tribunal since this Tribunal was originally constituted for
5 reasons that have been I think explained in correspondence, with the result that Mr. Adam
6 Scott (on my left) has been appointed a member of the Tribunal. There has been a certain
7 amount of correspondence in which we have, with the help of the parties, set out as far as we
8 know all matters that might be relevant as to whether there is any conflict of interest arising in
9 this case. I think for good order's sake I need to clarify at the outset as unequivocally as
10 possible, whether there is any objection to be taken, or likely to be taken, to the composition of
11 the Tribunal and if there is we would need to know what the basis of the objection was and rule
12 upon it as necessary.

13 What I would like to do at the outset, if I may, is just to invite the parties in turn,
14 starting with the appellant, to say whether there is any objection to the composition of the
15 Tribunal or not.

16 MR. GREEN: None whatsoever.

17 THE PRESIDENT: Thank you very much, Mr. Green. I think from Ofcom's point of view,
18 Mr. Fowler?

19 MR. FOWLER: Well if the appellant has no problem we have no problem, Sir.

20 THE PRESIDENT: So, if I may just be absolutely clear, that is an unequivocal statement of
21 Ofcom's position that no objection is taken.

22 MR. FOWLER: Yes.

23 THE PRESIDENT: Mr. Barling, I think you have been copied in on all the relevant correspondence?

24 MR. BARLING: We have and BT has no objection at all.

25 THE PRESIDENT: Good, thank you very much, that has that out of the way. If we could then turn
26 to the agenda for this Case Management Conference? We are grateful for the various
27 submissions that have been submitted by the various parties. The first general heads really are:
28 the state of the proceedings and the issues that are likely to arise. I think if I may say so, we
29 are still somewhat concerned as to the scope of the present Appeal and whether we have
30 sufficient clarity in the present pleadings to be able to know what issues are likely to need to be
31 addressed in the course of argument and in our Judgment.

32 Where we have got to, as it were, so far is that our impression is that the market
33 definition as such is not in issue, but beyond that we are somewhat unclear on at least two
34 points which go to the question of the countervailing market power issue. The first point is
35 how far either in dealing with the Appellant's case, or as a matter of fairness to the respondent

1 or the intervener, we need to go into what actually happened in the course of the negotiations
2 that led up to the agreement between Hutchison and BT. Two sub-issues relevant to that are,
3 first of all, whether those negotiations do have relevance at all to the respondent's subsequent
4 determination of market power for the period of 2004 to 2006, given the negotiations took
5 place before that time.

6 Secondly, assuming that the negotiations are (or could be) relevant, how far do we
7 have to make findings about what actually occurred in those proceedings? As things stand at
8 the moment we have the negotiations, or the existence of countervailing power in the
9 negotiations was relied on in the original Notice of Appeal. We now, among other things have
10 some other evidence from BT as to what happened, according to BT in the course of those
11 negotiations, and I think in those circumstances it would be useful for us to try to get a better
12 feel for how far we need to go into what happened, and to make findings about it.

13 Mr. Green, to start the discussion can you perhaps help us a little bit as to how you see
14 that aspect? If I can quickly turn up your submissions for today.

15 MR. GREEN: Paragraph 2.2 I think it is.

16 THE PRESIDENT: Yes. You have three alternatives basically which you set out there.

17 MR. GREEN: Yes.

18 THE PRESIDENT: But under item 5 (over the page) you also say that you want to reply to the
19 evidence of Mr. Locker, which is principally about negotiations.

20 MR. GREEN: Yes.

21 THE PRESIDENT: So what approach should we adopt to this, bearing in mind among other things
22 in relation to your three alternatives set out under item 2.2 the dangers which a court
23 sometimes faces when it tries to decide things on assumptions about what may or may not have
24 happened, or what view might or might not have been taken, without actually going into the
25 underlying facts as to what did or did not happen?

26 MR. GREEN: It seems to us that the principal position is, when you construe properly Ofcom's
27 decision that they operated upon a hypothetical assumption that BT had, or might have had,
28 countervailing buyer power – and without having to prove that proposition they concluded that
29 it did not matter, because even if they had buyer power on a forward looking analysis there
30 was plenty of possibility for Hutchison to raise prices in an unconstrained manner. That is why
31 they said what they said in the Decision and that is what they have said, in effect, in paras. 22
32 and 23 of their Defence, that they contemplated the possibility that there might have been
33 buyer power, but when you paraphrase what was said in the Decision and the Defence it does
34 not matter because, even assuming there was buyer power, on a forward looking analysis it

1 does not prevent Hutchison having SMP. Therefore they did not go on and make a definitive
2 finding one way or the other that BT had buyer power, though they contemplated that it was
3 a real possibility. I cannot say they made a finding of buyer power, but they at least made
4 a prima facie conclusion that it was a possibility. They did not discount it, but they felt they
5 did not have to go any further because it was not relevant.

6 Now, we think that is the proper construction of the Decision, that is what Ofcom
7 found, and if that is the starting place for the analysis we simply say on the hypothesis, as yet
8 unproven, that BT had countervailing buyer power, was Ofcom correct to say that when you
9 examine the BT Agreement in the context of the interconnection price dispute mechanisms
10 which existed at the time it would have been possible for Hutchison to raise prices in an
11 unconstrained manner. That is, we think, the proper analysis of both the Decision and the
12 Defence.

13 There is no finding by Ofcom that there was not buyer power, but it just simply is not
14 relevant and their decision is not therefore based upon that proposition. That is the starting
15 point and then one simply gets into an analysis of whether or not the BT Agreement did
16 contain mechanisms, or did not contain mechanisms which constrained Hutchison's prices.
17 That is what we think the Decision did and that is the target that we have in mind. That is why
18 we say in item 2.2 of our letter that we think that is the assumption which the parties should be
19 proceeding upon. We are not certain whether the other two parties demur from that
20 proposition. BT, for example, does not it seems to us deliberately deny that it had buyer
21 power. It simply says it does not wish to make submissions on that because it says it is not
22 relevant, and that is really the gist of paras. 22 and 23 of Ofcom's Defence.

23 THE PRESIDENT: Trying to take it in stages, if I go back to your Notice of Appeal at 1.3(a). I am
24 going a bit carefully because I am not quite sure who has what at the moment in terms of
25 confidentiality, I will have to come back to it, but you say there:

26 "The Decision failed to analyse properly or give due consideration to the imbalance of
27 the bargaining position between the Appellant and BT prior to completion of the
28 Interconnect Agreement."

29 Then you say subsection (e), subsection 2, explains that BT held and exercised countervailing
30 bargaining power in its negotiations, etc., which is an allegation of fact that is developed in
31 considerable detail in a later section of the Appeal.

32 MR. GREEN: Yes.

33 THE PRESIDENT: Now is that as an allegation of fact an issue in the case?

34 MR. GREEN: The reason it was put in those terms was because there is a difference between the
35 language used in the Decision and the language used in the Defence. The Defence is a fuller

1 explanation of Ofcom's position than one actually finds in the Decision itself, and it is quite
2 clear from paras. 22 and 23 of the Defence, which we say makes it clear that the Decision was
3 based upon this assumption – obviously an unproven one, but that was the hypothesis – that in
4 a sense it becomes unnecessary for the Tribunal to test that.

5 THE PRESIDENT: Can I just go to the Defence, just so that I can follow it? Paragraphs 22 and 23,
6 did you say?

7 MR. GREEN: Paragraphs 22 and 23 of the Defence – page 9. Ofcom says:

8 “In the Decision, Ofcom therefore recognised the possibility that BT *may* have had
9 countervailing buyer power *at the time of* the BT Agreement. As already indicated
10 above, the circumstances obtaining at the time of the negotiation of the BT Agreement
11 were relevant only insofar as they continued to affect the position at the time of the
12 Decision and in the future.”

13 So they are therefore saying if there was buyer power and the consequence of that was
14 embedded in the agreement and then the agreement continued for X years you would have had
15 that position perpetuated into the future. They say:

16 “Ofcom did not reach any firm conclusion on whether or not BT had countervailing
17 buyer power at the time of the negotiation of the BT Agreement because it was not
18 necessary to do so, or relevant to its forward looking analysis.”

19 So even though they say BT might have had countervailing buyer power, it is not relevant to
20 come to a definitive conclusion because, as they then go on to explain, of the position set out
21 further in the contract whereby they say Hutchison would have had the ability to raise prices
22 That is reiterated in para. 23:

23 “For the purposes of its determination of present and future market power, and in
24 particular its assessment of whether the Appellant had SMP, the more relevant
25 question for Ofcom concerning the future position of the Appellant and BT, is how
26 future negotiations between BT and the Appellant would proceed, and whether BT
27 would have had countervailing buyer power which would offset the applicant's
28 market power.”

29 So as we have understood their elaboration, or explanation of what was in the Decision, they
30 say “We make no finding as to BT's countervailing buyer power but we did find at least the
31 possibility of it. That was not a stray finding because there had been a lot of evidence put to
32 them by my client as to their negotiations with BT, so they deliberately decided not to make
33 that finding of fact but they recognised the possibility. They identified that they did not have
34 to go any further because they decided it was not relevant. If that is the hypothesis of the
35 Decision then we can short circuit of whether, or whether there was not, countervailing buyer

1 power by operating on that hypothesis. We have noticed what appears to us to be an
2 elaboration in the Defence over the Decision, which is why we necessarily feel we have to
3 reserve our right to say to you that if that is not a commonly understood position, and if there is
4 a material dispute over that then we do reserve the right to ask you to decide countervailing
5 buyer power because we feel confident that that is an issue which is of
6 a relatively limited compass, unlike the question of progression of costs, to which we will no
7 doubt come later, but we have reserved the right to put that to you as a proposition.
8 Undoubtedly that will render more complex the hearing in time, effort, costs and so on, but we
9 have not shut the door on that possibility which is why we put it as our third possibility; and it
10 is why we have explained that we think we have set up what we believe the proper
11 construction of the Decision is. Ultimately it is a question for the Tribunal as to whether we
12 are right in our construction and whether that is the correct hypothesis of the Decision. But if
13 that is correct, and/or if it were common ground there would not necessarily be a need to
14 consider the logically *a priori* question of whether there was or was not countervailing buyer
15 power.

16 THE PRESIDENT: A consideration of that question from a factual point of view, and from
17 a witness point of view to work out exactly what happened when, and who was late, and who
18 did not return the telephone call and all the rest of it, is quite a bit exercise. Potentially it does
19 affect the shape of the case quite dramatically which is why I am trying to sort it out now, if we
20 can.

21 MR. GREEN: We understand that and it is why we hope we can operate upon an assumption which
22 does not prejudice BT because it is an unproven assumption, but we do believe it is the correct
23 one.

24 THE PRESIDENT: Well I do not know, we will see what they say.

25 MR. SCOTT: It seems to me that there are three phases in which you can consider the
26 countervailing buyer power. The first relates to the situation as it stood up to the making of the
27 Agreement, the second is considering what is reflected in the agreement, and the third is what
28 happens if that Agreement is re-opened by either party in the terms of the Agreement or by
29 reference to the Respondent.

30 MR. GREEN: Yes.

31 MR. SCOTT: If we are taking a forward looking approach, whatever power is represented in the
32 first two stages is backward looking. How far, in taking a forward looking approach do you
33 think we need to take account of those first two stages? That really goes to how far we have
34 got to go into those two areas.

1 MR. GREEN: We have to be very clear here about the relevant time frame for the Decision which
2 is, as Ofcom has it, 18 to 24 months from June 2004. So we are looking at a period from that
3 date until mid-2006 at the latest, in which case one is saying “What would happen under the
4 contract for that period?” because the contract will continue and span that entire period.
5 Ofcom have said they will undertake another review at the end of that 18 to 24 month period as
6 to which the outcome is, of course, uncertain and unknown at this stage. So when one says
7 “a forward looking review” it is forward looking as of June 2004, that is Ofcom’s conclusion,
8 that for the period of their review, their Decision, up until mid-2006, say, they say that
9 Hutchison has SMP. That is the only matter that we are debating. We are not concerned with
10 whether after that period they do or they do not because there is no Decision on that yet.

11 MR. SCOTT: Yes, that I understand but if you were in a situation where either party re-opened,
12 albeit for a period two years out from now, are you suggesting that that period – if you like the
13 period two years out from now – would be irrelevant from Ofcom’s deliberation?

14 MR. GREEN: We do not have an Ofcom determination which governs that point entirely. You have
15 to look at the contract. There are various options under the contract. We could serve notice to
16 terminate which is two years. We could exercise the contract notice system, which just leads us
17 into a negotiation which may or may not be a dead end, or you can go down the arbitration
18 route, referring the matter to Ofcom, which then gives rise to a dispute as to Ofcom’s powers.
19 Those are the mechanisms during which the price can be changed during the period of the
20 Decision. We say on none of those analyses would Hutchison realistically be able to increase
21 its prices in an unconstrained manner.

22 THE PRESIDENT: For the period of the Decision?

23 MR. GREEN: Yes.

24 MR. SCOTT: That is helpful.

25 MR. GREEN: Obviously we are limited by the Decision which itself is temporarily limited.

26 THE PRESIDENT: Let us see at this stage what Ofcom’s Decision on this is. Mr. Fowler how far
27 should we, must we, ought we to go into these negotiations?

28 MR. FOWLER: Our position in the Decision and in the Defence is that whether or not BT had buyer
29 power vis à vis Hutchison at the time of the negotiation of the Agreement is irrelevant because
30 they do not have buyer power now because of the clarification of their end to end connectivity
31 obligation.

32 THE PRESIDENT: When you say “now”, you mean at the time the decision was taken?

33 MR. FOWLER: At the time the decision was taken.

34 THE PRESIDENT: Yes.

1 MR. FOWLER: The only way any hypothetical buyer power, from the time of the negotiation might
2 somehow be irrelevant is if it was somehow locked in by the terms and provisions of the BT
3 Agreement, and we say that too is irrelevant, that in fact any restraint that the Agreement might
4 exercise goes simply to the exercise of SMP on Hutchison's part and not to its existence. In
5 other words, if there were some sort of constraint it is rather like an ex ante price control on
6 somebody who has SMP. The fact that there is an ex ante price control limits his ability to
7 change his price does not mean that he has no longer got SMP.

8 THE PRESIDENT: I have not quite grasped this difference between the existence and the exercise
9 of SMP which does crop up in other legal contexts, but I have not fathomed it out yet in this
10 context.

11 MR. FOWLER: I will try and explain it in that way, in those circumstances plainly a party who is
12 subject to an ex ante price control cannot exercise SMP.

13 THE PRESIDENT: But it does not mean to say he is not dominant or whatever the phrase is?

14 MR. FOWLER: It does not mean to say he has not got it.

15 THE PRESIDENT: Yes.

16 MR. FOWLER: And if that were the case as a result of the BT Agreement, that would have the same
17 sort of effect, and we say that is not relevant to a finding of whether he has SMP, merely
18 whether he can exercise it. Secondly, we say in any event ----

19 THE PRESIDENT: If he cannot exercise it ----

20 MR. FOWLER: It does not stop him having it. And we say in any event the agreement does not
21 cover certain matters in which he might be able to exercise SMP, such as we point out in our
22 defence the non-discrimination in other parties, for example. Thirdly, we say in any event they
23 could get out of the Agreement ----

24 THE PRESIDENT: Under the various routes that are available, you say?

25 MR. FOWLER: Yes. So for all those reasons we say, first, if BT did have countervailing buyer
26 power it is irrelevant and, secondly, if there was some sort of constraint on prices that too is
27 irrelevant under the Agreement and therefore, it is common ground that in the Decision we did
28 not reach a finding on either of those matters. If we are right in our approach then the Tribunal
29 will not need to trouble itself with those questions. If we are wrong in our approach then
30 plainly Ofcom has not investigated those questions and there is a problem with the Decision
31 and that is a problem that either the Tribunal could seek to resolve by itself considering
32 whether BT had SMP at the time the Agreement was entered into, and whether there was some
33 constraint on Hutchison's prices.

34 THE PRESIDENT: Which, on your case, would involve the Tribunal going further than the findings
35 you have actually made?

1 MR. FOWLER: Indeed, yes, I would involve going further, or you could remit that matter to Ofcom.
2 Certainly, as to the second it seems to us that on no view would you be in a position to reach
3 a conclusion as to whether or not their prices were constrained or, as they say, heavily
4 restrained under the terms of the Agreement, because the evidence that has gone in on that
5 issue on all sides is put forward on the basis ----

6 THE PRESIDENT: On the costs' side?

7 MR. FOWLER: On the costs side is put forward on the basis ----

8 THE PRESIDENT: Can we park the costs, I want to come to that as a separate issue in a moment?
9 So your position would be that we simply do not need to go into what did or did not happen
10 during the negotiations, all we have to do is to read the Decision, and see whether Ofcom's
11 approach in the Decision is legally correct for the reasons that you give?

12 MR. FOWLER: Indeed, yes, Sir. For that reason I would slightly disagree with what Mr. Green says
13 about proceeding on the assumption that BT has countervailing buyer power. It seems to me –
14 our case is – that you should proceed on the assumption that it is irrelevant whether they did or
15 did not have countervailing buyer power at the time of the agreement. As I say, if we are
16 wrong on that we proceeded on a wrong assumption.

17 THE PRESIDENT: Can I just see if I can get my head around what the Appellant is saying under
18 item 2.2 of its recent letter to the Tribunal:

19 “It is the Appellant’s primary submission that the Respondent took the view, even
20 assuming that BT did exert countervailing buyer power when the Agreement was
21 entered into, which assumption the Respondent did not fully investigate but concluded
22 that it was at the very least possible.”

23 Is it your position that you reached no finding whatever on this issue in the Decision, or that
24 you assumed, for argument’s sake that it was at the very least possible but still was not
25 relevant?

26 MR. FOWLER: We observed that it was not possible, but that it was not relevant, that is our
27 position.

28 THE PRESIDENT: Sorry, say that again, you said was ----

29 MR. FOWLER: It was possible, or at least that there was an imbalance in the negotiating position as
30 between the parties, I think was the way it was put in the Decision, but did not reach any
31 conclusion on the question of whether there was countervailing buyer power at the time the
32 Agreement was made.

33 MR. SCOTT: It is in the Decision. It is paras. 3.29 and following paragraphs.

34 MR. FOWLER: Yes, it is p.22 and following, I think – para. 3.31.

35 THE PRESIDENT: In 3.31 you say it was a relevant factor in the relative bargaining positions.

1 MR. FOWLER: Yes.

2 THE PRESIDENT: A bit more guarded than saying, even by implication that there was
3 countervailing bargaining power, I would have thought.

4 MR. FOWLER: I think in the way it is expressed that is absolutely right, Sir. But our point is we
5 simply did not reach a conclusion on the question however we put it, and we consider, and still
6 consider that the question is irrelevant. It is not that we have proceeded on the assumption that
7 they did have countervailing buying power, we proceeded on the assumption that it was
8 irrelevant. Subsequently, as a result of the end to end connectivity obligation being clarified, it
9 was clear that they did not have countervailing buyer power.

10 MR. SCOTT: Just sticking with the end to end connectivity, as we understand it at the moment the
11 Appellant is suggesting that there is a lack of legal obligation and Ofcom is saying that as a
12 result of the guidance given to BT, BT is under no illusion that it has a choice?

13 MR. FOWLER: Yes, our position is that it may be to the outside world, as it were, there might have
14 been some question as to whether the universal service obligation imposed on BT an obligation
15 of end to end connectivity. When we put out that policy statement it made it quite clear that
16 that did embrace an obligation of end to end connectivity and the obligation had been there all
17 along, in fact. It was merely making it clear to third parties that it existed.

18 MR. SCOTT: It may help the tribunal if we know the Appellant's position on that particular issue,
19 whether you still challenge that obligation or accept the obligation on BT?

20 MR. GREEN: Well, we can only construe the documents. It does not seem to us that there is
21 anything which can remotely be said to be an obligation and it is not clear to us whether or not
22 an obligation could be imposed under either Article 82 or Chapter II of the Competition Act.
23 So there may be a construction, but it does not seem to us that it is relevant in any event for the
24 reasons that we have set out.

25 If I can just briefly comment on ----

26 THE PRESIDENT: Well I think I want to hear Mr. Barling first, if I may, Mr. Green.

27 MR. BARLING: Sir, if the Tribunal were to be content to deal with the case on the narrow basis put
28 forward by Mr. Fowler, which is effectively testing whether the issue of countervailing buyer
29 power on BT's part is legally irrelevant, then one can see that that would be a way of confining
30 the case, and confining the evidence to some extent. Of course, those issues – even if kept
31 within that narrow compass – would still affect BT because as one realises from what
32 Mr. Green has just said, that would throw into high relief the nature and extent of BT's
33 regulatory obligations in relation to end to end connectivity, because that is one of the
34 fundamental bases on which Mr. Fowler says that it is legally irrelevant whether BT has
35 countervailing buyer power.

1 However, my concern, and the concern of those who instruct me is whether Mr. Green
2 is really willing, as it were, or whether the Tribunal would consider it appropriate to decide it
3 on that narrow basis. I was not sure, having heard Mr. Green, whether he was wanting to say
4 that if the Tribunal were against him, as it were, or if he went down on that point he would
5 then want the Tribunal effectively to investigate the wider issues. I was not clear, he may have
6 meant that.

7 THE PRESIDENT: Well at the moment, the point we are on concerns the negotiations that led up to
8 the interconnection agreement.

9 MR. BARLING: Yes.

10 THE PRESIDENT: And the question that we need to go into, we may need to make findings of fact,
11 as to what happened in those negotiations and, in particular, as to whether in fact BT had any
12 countervailing power in those negotiations ----

13 MR. BARLING: Sir, can I just say how what I have just said ties in with that?

14 THE PRESIDENT: Yes.

15 MR. BARLING: If the very narrow approach is you only try the legal relevance point as to whether
16 Ofcom were correct in treating countervailing buyer power as legally irrelevant for their
17 purpose, and that is all the Tribunal is going to decide, then the negotiations would be almost
18 certainly, I might need just to reserve but it seems to me at the moment that they would be
19 irrelevant, you would not need to make any findings about what happened during those
20 negotiations. But if, as it were, the Tribunal is going to go further than that – and this may
21 depend upon what remedies the Tribunal would decide to adopt in relation to that narrow point
22 – if the Tribunal said “We accept that Mr. Green is right, it was not legally irrelevant” then the
23 Tribunal will have to say “Do we remit it?” and that will be another investigation for Ofcom,
24 “or do we actually go on and now do it properly?” which would then need the evidence. It may
25 be to some extent that this is remedy dependent. But on the narrow point it would seem to me,
26 with respect, that the negotiations would not be needed to be gone into.

27 THE PRESIDENT: So we would not need to go into the interesting matters fully explained in
28 Mr. Locker’s statement, for example?

29 MR. BARLING: Not if that was the only point that the Tribunal was deciding, but you would, of
30 course, if you were having to go any further than just deciding the legal irrelevancy point you
31 would then have to presumably at least look at that evidence for any other points to see at least
32 whether that evidence threw up anything which was relevant to the forward looking approach,
33 and whether there were elements revealed there that might impact, or might still exist in the
34 period going forward. It seems to me that that is the dilemma.

1 THE PRESIDENT: I suppose – and I am just thinking aloud here – although mentally one is
2 drawing a distinction between what happened in the negotiations and whether there is SMP
3 during the relevant period from 2004 and 2006, in practice life is not like that, life is
4 a continuum. In order to determine what a situation is in a given period, and whether that gives
5 rise to a relevant degree of market power you might have to look at the antecedents in order to
6 throw light on what was going on in that period.

7 MR. BARLING: That may well be right.

8 THE PRESIDENT: So it may be artificial to try to slice it up like this.

9 MR. BARLING: It may be, but I do think on that narrow scenario you might be able to exclude it.
10 I am not at all sure that that is the way that the case is going to be determined, and we are very
11 much obviously in the hands of the parties and the Tribunal.

12 THE PRESIDENT: So if that narrow basis was a feasible basis you would not have any objection to
13 it as I understand it, but if in deciding that point or in looking at the later point as to what the
14 situation was in 2004, 2006 ----

15 MR. BARLING: Or remedies.

16 THE PRESIDENT: -- or remedies, we were to draw on or make assumptions about what was going
17 on in the negotiations ----

18 MR. BARLING: Yes, or any assumptions even about the possibility of countervailing market
19 power.

20 THE PRESIDENT: Or even about the possibility of countervailing market power which it is alleged
21 by the Appellant that it was assumed that there was at least a possibility, even that point,
22 I imagine, you would put in issue, would you? You would put that assumption in issue?

23 MR. BARLING: We would submit that the Tribunal ought at least to have regard to the available
24 evidence which would include the evidence of those negotiations which is probably the main
25 external evidence.

26 THE PRESIDENT: So looking at 2.2 in Freshfield's recent letter of 17th November, the first
27 paragraph: "Even assuming that B T did exert..." etc., you would submit that that is not an
28 assumption that we should make, even implicitly?

29 MR. BARLING: No, we would submit that it would be unfortunate to proceed even on the
30 hypothetical assumption inevitably that is going to play a part in a Judgment ----

31 THE PRESIDENT: Yes.

32 MR. BARLING: -- and it may be inappropriate in our submission to go forward on that kind of
33 assumption, particularly when, in a sense, Ofcom obviously takes a view, as I understand it,
34 that that also would be improper, and that is not an assumption that they made other than as
35 background, their decisive assumption was that it was irrelevant and I have some difficulty

1 I have to say in working out precisely what the distinction is between the first two alternative
2 approaches, it appears to be an indication that you can have a look at some evidence, but not
3 necessarily very much and in order to make some kind of definitive finding as to the possibility
4 that BT had countervailing buyer power – it sounded a rather extraordinary way of proceeding.

5 Perhaps while I am on my feet I ought just to say, and I do not want to trespass on to
6 other issues and I hope I am not, that in view of what Hutchison have suggested about BT's
7 participation – if I am pushing at an open door here I will just sit down – there seems to be
8 a suggestion that somehow BT has no real interest in being here. I would invite the Tribunal to
9 say that it is very clear that it has a substantive interest in being here, namely, its regulatory
10 obligations, its hugely important contractual position – some 250 of these agreements exist in
11 very much this form with other parties – its market position and indeed its conduct are all
12 subject to scrutiny.

13 THE PRESIDENT: I have been very conscious of BT's position, Mr. Barling and I, for myself, am
14 struggling with how to proceed with this case on some assumed basis in which the assumption
15 might, in certain circumstances, be adverse to BT without BT having the fullest opportunity to
16 put in issue the assumption?

17 MR. BARLING: I appreciate that. I see that.

18 THE PRESIDENT: That to me seems to be a key difficulty in trying to decide this case on narrowly
19 framed legal issues, whatever the wisdom of trying to do that is.

20 MR. BARLING: I agree, and with respect Mr. Fowler's approach may well not involve that problem
21 on the assumption that making no assumption rather than an assumption if I understand
22 Mr. Fowler's ----

23 THE PRESIDENT: Experience tends to suggest that one gets half way through a legal issue of this
24 kind and then you suddenly realise that you cannot actually look at it in the narrow way it was
25 originally framed.

26 MR. BARLING: I agree, there is always that risk.

27 THE PRESIDENT: And we have all been in that situation.

28 MR. BARLING: Indeed. On that point, Sir, I am not sure there is much more I can say.

29 THE PRESIDENT: No, that is helpful. Yes, Mr. Green?

30 MR. GREEN: One has to be very careful here. The Decision itself, as explained by Ofcom in the
31 Defence, operates either as Mr. Fowler has put it, upon the assumption that whatever BT's
32 position it is utterly irrelevant – whether they have it or they do not have it – that is how
33 Mr. Fowler has just explained it quite unequivocally. He says the Decision is predicated upon
34 no assumption whatsoever about countervailing buyer power because it is utterly irrelevant
35 either way. We say, reading the Decision and the Defence, that they have concluded that it is

1 irrelevant but they have conceded the possibility that BT may have countervailing buyer
2 power. We therefore say again you do not have to decide it because the Decision itself
3 incorporates the assumptions and that is what we are challenging, the Decision, not a fresh
4 finding. We are not inviting the Tribunal necessarily (unless we have to) to make a fresh
5 finding. So either on Mr. Fowler's hypothesis and analysis of the Decision, or our own, we do
6 not have to make a finding of whether there was countervailing buyer power, and it is only if
7 we are wrong on that do we say we will go down that route, and we do not close the door on
8 that. Mr. Barling is therefore suggesting that if the assumptions in the Decision, even
9 Mr. Fowler's explanation this afternoon, and the commentary set out in 3.31 and indeed in 3.32
10 of the Decision, which also says:

11 "It may be that existing contractual arrangements between '3' and BT make it difficult
12 for '3' to raise charges from their current level."

13 - another indication that the contract does prevent price increases.

14 THE PRESIDENT: Sorry, you were reading from where?

15 MR. GREEN: 3.32 of the Decision itself, which is consistent with 3.31 that it is possible that the
16 initial interconnection negotiations led to countervailing buyer power. But the point is either
17 way, whether we argue it on our analysis or Mr. Fowler's you can make an assumption,
18 because it is the assumption which, whoever is right in their construction of the Decision, it is
19 the assumption which exists in the Decision. If it is open to Mr. Barling to say "We are going
20 challenge the assumptions which are in the Decision", or even a hypothetical assumption made
21 by the Appellant, then frankly he should have put in his own Notice of Appeal, and he is
22 effectively asking the Tribunal for fresh relief against an assumption, we say, is in the
23 Decision. We are entitled, as Appellants, to say we read para.3.31 and 3.32 and we invite the
24 Tribunal to draw certain conclusions.

25 THE PRESIDENT: Well for all kinds of reasons it would be very difficult for BT to appeal this
26 Decision, would it not?

27 MR. GREEN: Well he has a right under the Act if he is affected. He does not have to be the
28 addressee under the Communications Act in order to launch an Appeal – he could have done
29 so. But as an Intervener we do submit he does not have the jurisdiction to come in and invite
30 the Tribunal to upset a finding, or even a half finding in the Decision, which is effectively what
31 Mr. Barling was suggesting. As I say, we do not shut the door on ----

32 THE PRESIDENT: I think Professor Stoneman has a question.

33 PROFESSOR STONEMAN: Can I just ask you to clarify, with respect to your argument? Are you
34 talking of 2002 or 2004? Are you talking of countervailing buyer power at the date of the
35 Agreement, or at the date of the Decision? It was not clear in what you were saying.

1 MR. GREEN: There is no difference between the two dates. The negotiations we say, and setting
2 aside the way we frame the Notice of Appeal or Reply, we would say that we had no
3 negotiating power in 2002. Embedded in the contract was therefore a price which reflected
4 a lack of SMP. That contract then runs for a number of years. It can only be terminated by
5 a long Notice, and the price can only be changed in various ways. We did not change the
6 price, and we could not change the price, and therefore we did not have SMP when the
7 Decision was taken in 2004 and, as of that date, looking forward for the period of the Decision
8 we could not have had SMP during that period because of the contractual mechanisms which
9 would have prevented that.

10 PROFESSOR STONEMAN: So just to clarify, in 2004 and looking forward for two years the period
11 of the Decision, you are saying you did not have significant market power because of the
12 nature of the Agreement?

13 MR. GREEN: That is a principal plank of our ----

14 PROFESSOR STONEMAN: Right, so it is the nature of the Agreement in 2004 that matters, not the
15 process that led up to the nature of the Agreement in 2004?

16 MR. GREEN: We start with the proposition that we did not have SMP in 2004, you can look at the
17 price which is set out in the Agreement itself, that is not reflective of market power and it is
18 not suggested that that price was in 2004 an indication of market power, and then the question
19 is over the next 18 to 24 months, could we raise that to a supra competitive level, could
20 exercise any market power? Answer: absolutely impossible because we were tied down by
21 a contract.

22 PROFESSOR STONEMAN: Well why does it matter that the contract as of 2004 between
23 yourselves and BT might or might not incorporate significant market power in 2002? This is
24 the issue we tried to address. Do we need to go into what happened in 2002? Or is it really
25 what matters is the nature of the contract that exists in 2004?

26 MR. GREEN: We say it is the latter because it is not suggested ----

27 PROFESSOR STONEMAN: So that is an important point, it is the latter. It is the nature of the
28 contract in 2004.

29 MR. GREEN: Because it is not suggested that we had SMP at the outset, it is not Ofcom's case that
30 the price which was embedded in the contract is a price which reflects an ability to act
31 independently vis à vis price.

32 PROFESSOR STONEMAN: Basically, the point for the Tribunal is did that contract in 2004 exhibit
33 significant market power?

1 MR. GREEN: Not quite, because you take a starting point of 2004. If it is not suggested at that point
2 that the price embedded is reflective of SMP, then question: “Can that position ever change
3 over the next two years”, so maybe we are *ad idem*.

4 PROFESSOR STONEMAN: I may be jumping ahead too far here, but I did not think you wanted us
5 look into prices?

6 MR. GREEN: We have a different perspective on the question of how costs would move over the
7 period of the two years, and that is the debate between Mr. Mickel and Mr. Myers.

8 THE PRESIDENT: Let us come to the costs at this point. As you were explaining it a moment ago,
9 Mr. Green, I slipped back a bit, because it seemed to me you are saying your essential case was
10 that we had an extremely difficult position when we were negotiating this agreement, that the
11 position was effectively frozen when the agreement was entered into and although there are
12 these various alleged ways of getting out of the Agreement or adjusting it, none of them are of
13 any practical use, therefore “We never had any SMP” – over and out – which as a train of logic
14 one can understand, but it does involve going into, or at least not closing one’s eyes to what
15 actually happened in the lead up to the Agreement.

16 MR. GREEN: Only if we were saying that as a fresh proposition. We are submitting that that is the
17 basis of the Ofcom Decision. It was not suggested that in the BT agreement, as of 2004, there
18 was reflected SMP, save that on a forward looking analysis we could leap from the contract to
19 a position of unrestrained price setting. So it is, we submit, quite clear from the position that
20 Ofcom’s position was not that we had that SMP in June 2004 but that on a forward looking
21 basis we had the ability to set prices freely. So it should not be an issue between us that, as of
22 June 2004, we had SMP. Ofcom’s position is there may have been some countervailing buyer
23 power which prevented it but it is forward looking. We have not been concerned to date with
24 that position, and it is not the position we are challenging. We do not have to advance the
25 proposition about the status quo ante because it is not in dispute – it cannot be in dispute.
26 We are looking on a forward looking basis from 2004 onwards. Can we just Houdini-like
27 escape the shackles of the contract.

28 THE PRESIDENT: But you are still, at the moment at least, seeking to leave open all the arguments
29 about the imbalance during the negotiations, that are set out at length in the Notice of Appeal.

30 MR. GREEN: That was because the Notice of Appeal was focusing upon what was a somewhat
31 oblique statement in the Decision. That has been clarified, and we hope we clarified the
32 position in the Reply and in our letter. We would only seek to keep that alive if it was
33 necessary. But if it is not necessary then we will not burden the Tribunal with it. We do not
34 fight shy of it, if we have to we will but we are not saying it has to be done. It would certainly

1 give my clients considerable pleasure to have a battle with BT in front of the Tribunal on the
2 issue of countervailing buyer power, but it may be an unnecessary expense.

3 MR. FOWLER: Could I just clarify one point on what my friend was ascribing to me in saying that
4 I was submitting that our case is that it is irrelevant whether BT has countervailing buyer
5 power. That is not our case. Our case is clear, and stated in the Decision, that BT does not
6 have countervailing buyer power at the time of the Decision. That is stated quite explicitly at
7 para. 3.33. What we say is irrelevant is whether they did have countervailing buyer power at
8 the time that the agreement was negotiated. It is that that we say is irrelevant and therefore that
9 the negotiations are irrelevant.

10 (The Tribunal confer)

11 THE PRESIDENT: We will need to retire at some point to have a think about these various
12 submissions, but before we do, could we just go 'round the track on the second issue which
13 seems to us to be floating around somewhat, namely, the relationship between the charges paid
14 under the Agreement and relevant costs. The Notice of Appeal again originally at 1.3(a) made
15 an allegation about the relationship between termination charges, the termination charges that
16 resulted from the negotiations and the Appellant's costs. We have now had quite a lot of
17 evidence about that, not all of which has found its way to BT I think because of the
18 confidentiality issues.

19 The second point in our consideration, which we would like a bit of clarity on, is how
20 far the parties feel we need to go into that issue and make some kind of judgment on that
21 evidence. That is in particular a matter that is raised by Ofcom in its submissions of 19th
22 November.

23 What in general is your position on this, Mr. Green? Do we have to take a view on any
24 of this or can the case be decided without going into it?

25 MR. GREEN: On this issue we do not realistically see how the Tribunal will ever be able to grasp
26 with the complexities of how costs will move over the next two years in the 3G market – that
27 was an enormously complex issue. The way in which the Decision was originally framed in
28 para. 3.32 – I do not intend to be critical in saying so – was not entirely clear, but the last part
29 of 3.32 of the Decision says:

30 “It may be that existing contractual arrangements between ‘3’ and BT make it difficult
31 for ‘3’ to raise charges from their current levels. However, there is no arrangement in
32 this contract for BT to ensure that charges fall over time from their current level (in
33 line with costs).”

34 And then they refer to a small piece of evidence. But the principal proposition is that nothing
35 in the contract prevents prices from falling in line with costs.

1 THE PRESIDENT: It is the other way around, is it not, that nothing in the contract ensures that
2 charges will fall in line ----

3 MR. GREEN: Yes, prices will fall, yes, to reflect decreases in cost.

4 THE PRESIDENT: Yes.

5 MR. GREEN: Yes, to which we say (a) that is a simple matter of construction, but even if it were
6 true, and that begs the question of how the charge notice, contract variation system operates,
7 but even assuming it were true we say “so what?” It would only be true if Ofcom was going to
8 advance the proposition that over the period of the Decision, the 18-24 months 3G’s costs were
9 going to come down to such a degree that the price embedded in the Agreement itself would
10 then be supra competitive and reflective of SMP. Now, Ofcom has not advanced that case.
11 We put in a piece of evidence which said that is just simply improbable. We then had a riposte
12 from Mr. Myers addressing the way costs might move within Hutchison and we have a riposte
13 to that.

14 Now what, amongst other things, that exchange of evidence has highlighted is that the
15 task of trying to work out how costs will move is just vastly complex. Set in the context of the
16 Decision itself it becomes really a very narrow issue. We say that it is simply wrong to say
17 there is no arrangement in the contract for BT to ensure that charges fall over time, but even if
18 it were correct, in the absence of Ofcom saying that over the 18-24 month period costs are
19 going to collapse to that extent does not really add up to anything, it is just not a relevant point.
20 If you found that that was correct, but yet that was something which motivated the Decision,
21 we do not contemplate that the Tribunal would feel comfortable with then engaging in an
22 exercise evaluating how costs moved over the next 18 to 24 months. That is classically
23 a matter for Ofcom.

24 When Oftel was trying to calculate its 2G LRIC model it took it nearly three years to
25 perfect it and it would also give rise to issues as to whether or not you are into the realms of
26 price control which have to be referred to the Competition Commission. So there are a number
27 of reasons why we suspect that you would simply exercise your s.195 power to remit, and it
28 would not be our position that we would invite you to make any findings of fact on that.

29 THE PRESIDENT: As the Notice of Appeal is framed which, in formal terms, is what we have to
30 decide the case by reference to, an enormous amount of weight is placed on the relationship
31 between the termination charges payable under the Agreement, and what is described as any
32 reasonable estimate of the Appellant’s costs.

33 MR. GREEN: If we had to go so far as to prove a negative in this Appeal, to show that it was
34 improbable that our costs would fall to that degree then we believe we have done that, but we
35 do not believe it is our burden to prove a negative that our costs would fall.

1 THE PRESIDENT: The Notice of Appeal started, as I understood it from a completely different
2 point. The Notice of Appeal simply said “We do not have any countervailing power, see the
3 relationship between our prices and the cost.” It was as simple as that. 1.3(a) last sentence,
4 1.3(d) last sentence, 1.8 and later on in various places when the argument is developed in more
5 detail, supported by Mr. Mickel, who produces a whole lot of calculations to show that the
6 competitive level, which I think everybody is talking about, but let us not worry about that for
7 the moment, is well above what you finished up paying.

8 MR. GREEN: We have set out the grounds of Appeal more fully in para.3.6 onwards, which we deal
9 with the question of construction, which is whether it is correct to say the contract does or does
10 not contain this fetter. Having gone through the construction point we say there is no evidence
11 in 3.9 to suggest that our charges would become excessive by reference to the costs during the
12 period. So if it was not entirely clear -----

13 THE PRESIDENT: 3.9 of the?

14 MR. GREEN: Notice of Appeal.

15 THE PRESIDENT: Yes, thank you. Well if we do not have to go into it, what is all this evidence
16 doing in our files.

17 MR. GREEN: It may be one of those cases where Pandora’s box was unwisely opened, and the best
18 thing to do is to shut it on this aspect of the matter as soon as possible, but we did feel we had
19 to at least cover the possibility that Ofcom was in fact saying there was implicit in its Decision
20 a finding that our costs would reduce, which just did not seem to my clients to be even
21 remotely credible. Now, what has then come out from Mr. Myers is he says “I have done
22 nothing other than some rough estimates, and I am not going to carry out my own cost
23 modelling exercise, but I am going to have a few pot shots at Mr. Mickel.

24 Now, I think in reality with the benefit of hindsight that is not a terribly useful exercise
25 for either parties to engage in because it just highlights the fact that we need not get into that,
26 and it is plain that Ofcom is not saying that they have carried out a cost modelling exercise
27 which would lead them to a conclusion that our costs would reduce in that way, and it is not in
28 the Decision, which is the most important point.

29 MR. SCOTT: Your client is in an interesting position, because it has entered this mobile voice
30 termination market with a new technology and so far as a consumer is concerned and having
31 regard to the framework Directive we must have regard to consumers and not simply to BT.
32 A consumer making a call to a mobile is not concerned with whether it is going over 2G or 3G.
33 Is that correct?

1 MR. GREEN: A call going across another operator's network will not get the benefits – I may be
2 corrected on this, I am not the technical expert – as I understand it they do not get the benefits
3 of the technical enhancements due to 3G unless they are 3G subscribers.

4 MR. SCOTT: I entirely understand that, but our concern in this market – “market” as defined by the
5 European Commission and followed by Ofcom – as I understand it is a market for voice
6 termination, not a market for the enhanced facilities that 3G provides?

7 MR. GREEN: Yes.

8 MR. SCOTT: The burden of my question is this, so far as consumers are concerned, are the actual
9 short term costs – by “short term” I mean over this two year period – of your client relevant to
10 the consideration of what a competitive price is?

11 MR. GREEN: I must say I think that is too complex a question to answer.

12 MR. SCOTT: Let me try to unpack it. The difficulty with which your clients are faced is that they
13 have 100 per cent. market share, so there is no competition for calls to your client's
14 subscribers. So that establishing what a competitive price is is not an easy thing to do. I mean
15 you can do it by reference to other networks, and there we would see a price differential. The
16 question is in what ways can your client sustain a premium over a competitive price level?

17 MR. GREEN: I understand the question, I am not certain I am in a position to give a full answer at
18 this stage.

19 MR. SCOTT: I think that is right, but in terms of our approaching what you are saying about price,
20 these are some of the considerations that we would have to bring to bear not simply studying
21 your costs.

22 MR. GREEN: I have to say, just as an appellate lawyer standing here attacking the second part of
23 a para.3.32 I simply say Ofcom have taken a narrow point about the existence of the clause in
24 the contract. If it is Ofcom's position that they are not suggesting the cost will move and they
25 are not putting that in the Decision as something for us to attack, then we will not grapple with
26 it. We may have gone too far even attempting to grapple with it in the first place, but I think
27 that has highlighted in our minds the difficulty of anybody dealing with this in an appellate or
28 a judicial structure, as opposed to a regulatory structure. But it is not our principal position that
29 we have to grapple with that.

30 THE PRESIDENT: So we just leave all this material on one side, Mr. Myers, Mr. Mickel, and ----

31 MR. GREEN: That is probably the best solution. I rather gather from what Mr. Fowler said earlier
32 that he would not be anxious to deal with that or to invite you to deal with it either, but he will
33 clarify his own position.

34 THE PRESIDENT: His position is, I think, dependent on what your position is.

1 MR. GREEN: That may not be. We do not believe that we have to put any of that material in front
2 of you in order to succeed on this point, because we do not think there is anything in the
3 Decision which raises that properly as an issue which we therefore have to address. With the
4 benefit of hindsight we would not have done it in the first place, but we did.

5 THE PRESIDENT: Yes.

6 PROFESSOR STONEMAN: If we take that, all right it is not relevant to this point, but is it relevant
7 to any other point that you are going to make, for example, the position of countervailing buyer
8 power? Is it not the fact that the extent of countervailing buyer power will be reflected in the
9 difference in the price and the costs?

10 MR. GREEN: In theoretical terms that is right, and again if this was an inquiry being conducted by
11 the Tribunal afresh that might be something which is gone into, but this is an appeal against the
12 Decision and we are simply focusing upon what is in the Decision. I do not think we would be
13 saying that that part of the evidence that has come forth on that issue is directed at the question
14 of countervailing buyer power.

15 THE PRESIDENT: So as I understand it, what you are really saying is that the allegations in the
16 original Notice of Appeal which were put forward with commendable enthusiasm at the time
17 are effectively now abandoned insofar as you are alleging that the relationship between what
18 you say are the Appellant's costs and the termination charges is indicative of a lack of
19 significant market power.

20 MR. GREEN: We have attacked simply the proposition in para.3.32. That is what we have attacked.
21 It seemed to us there was an express statement and then there might have been something
22 which was implicit, and it is the implicit statement that has given rise to the difficulty. The
23 express statement is that even if we cannot raise prices, "and that may be the case", says
24 Ofcom, nonetheless, there is nothing which requires charges to fall as costs collapse, to which
25 we say (a) that is nonsense; and (b) in any event, so what? Unless you were going to go on
26 Ofcom and say that it was highly probable that within 18 to 24 months your costs would
27 collapse. But they do not say that, and it was perhaps us reading too much into the latter part of
28 3.32, which led us to put in the evidence of Mr. Mickel, but it was not stated in the Decision
29 that over the next 18-24 months, costs will collapse to that degree.

30 One of the things that Mr. Myers's statement has made clear is that Ofcom does not
31 have a handle itself on how costs will collapse. It has not done its modelling of 3G. That
32 reinforces our conclusion that that just simply is not part of their implicit thinking in the
33 Decision.

34 MR. SCOTT: Just one small point on this period, are we right in believing that by virtue of the
35 Agreement BT's countervailing market power has been anaesthetised?

1 MR. GREEN: You are assuming that that existed at the outset.

2 MR. SCOTT: If there is was a countervailing market power, does the existence of the Agreement,
3 and the Notice periods it contains necessarily anaesthetise any market power that exists?

4 MR. GREEN: Not for the period of the Decision, because the Agreement embeds a price which does
5 not reflect SMP, and we cannot move from that, and therefore we cannot exercise SMP during
6 the currency of the contract. We are wedded and bedded into it.

7 THE PRESIDENT: That takes us all back into what the price does or does not reflect?

8 MR. GREEN: But it is not suggestion, there is no part of Ofcom's Decision that the price in the
9 contract reflects power of the price in any way, shape or form, and if that was part of their
10 implicit thinking, or express thinking, one would find a long explanation of how that could be,
11 and we would have then engaged in a full frontal manner, but it has never been part of this
12 Decision that the price in the Agreement reflects SMP. It is the Houdini-like ability to escape
13 which is said to give rise to the SMP. We would be looking at an entirely different decision if
14 they were suggesting that an XP constituted an unconstrained price. It is pointed out that at
15 5.31 it is said that the price is not an excessive price, it is accepted that there is no excessive
16 price embedded in the Agreement. But it must be quite clear that if they were going to suggest
17 that that price was reflective of SMP that would have been an enormous part of the Decision,
18 because it would have been conclusive regardless of anything else they would have said "You
19 are locked into an agreement at XP" and for the next five years you have monopoly power
20 unless SMP is resolved.

21 MR. SCOTT: Yes, for obvious reasons we do not want to mention numbers at this point, but our
22 recollection is that the negotiations proceeded and reached, shall I say, "a mid point" between
23 some parties and some other parties.

24 MR. GREEN: That depends how you construe the negotiation. We asked for a higher price, it was
25 flatly rejected. It was then suggested to us by BT, contrary to what Mr. Locker says, that we
26 should go for a price comparable to somebody else, and we then felt we had to accept that. But
27 that is begging the question as to how you construe the evidence.

28 THE PRESIDENT: I think we had better see what the other parties say on the costs matter.

29 Mr. Fowler, what approach should we adopt to the evidence of Mr. Myers, Mr. Mickel and
30 others?

31 MR. FOWLER: Sir, the evidence of Mr. Myers, and our case in this respect was directed at what we
32 had understood to be the Appellant's case, which is that the prices in the Agreement reflected
33 the exercise of countervailing buyer power on the part of BT, and that those had got locked in
34 and carried forward, that is what we had thought the position was, not that it was directed at
35 that one passage in para.3.32 of the Decision to which my friend refers. It was at that that

1 Mr. Myers was directing his evidence, and it was directed at that in order to neutralise what
2 were simply inferences rather than hard facts, as to the relationship between costs and price.
3 And again, Mr. Harbord and the further evidence of Mr. Woodward that has been put in
4 subsequent seems to be directed at neutralising Mr. Myers, but the issue of the relationship
5 between prices and costs in the BT Agreement we say again is an irrelevant issue. It is not
6 a relevant issue because again the same point I made earlier, if there is any restraint it goes to
7 the exercise of SMP and not to its existence. It does not address other matters than price in
8 which SMP is being capable of being exercised, and in any event there is the let out via the
9 dispute resolution process – that is our position, whatever the relationship it is not relevant to
10 the question of the existence of SMP on a forward looking basis.

11 THE PRESIDENT: Just help me with this distinction between “existence” and “exercise” being
12 developed here. One can see in a regulatory framework, if there is a company that in ordinary
13 terms would be regarded as dominant, and the Regulator comes and puts some price control on
14 the company you would not necessarily any longer say that the company was dominant,
15 although one has to say in parenthesis that we have had the contrary argued now several times
16 in relation to the buying power of the National Health Service, vis à vis pharmaceutical
17 companies.

18 But if you are dealing not quite with that example, but with a situation perhaps
19 a bit closer to the present one which is a situation of a monopoly buyer and a monopoly seller –
20 oversimplifying dramatically – the monopoly buyer/seller says “I may have this monopoly on
21 a supply/demand side, but that is completely neutralised by a countervailing monopoly on the
22 other side, with the result that I do not actually have any significant market power because
23 I am up against a monopoly supplier, and why is that not relevant to the existence of SMP as
24 distinct from the exercise of SMP, if there is a distinction between those two.

25 MR. FOWLER: Briefly, we would say it is a different position here from the position you describe.
26 The position here is one where we say at least, at present or at the time the Decision was made,
27 BT has no countervailing buyer power and was not in the position at that time, even if there
28 were a new agreement, to exercise any countervailing buyer power. The question therefore
29 being addressed is whether there is a carry over effect from the pre-existing agreement which
30 somehow neutralises the SMP that might otherwise be thought to result from the 100 per cent.
31 market share and high barriers to entry in H3’s market.

32 THE PRESIDENT: That takes us all back into how it was entered into and the negotiations and all
33 the rest of it.

34 MR. FOWLER: Yes, but we say you do not need to look at that because our approach is to say that
35 there is no carry over effect for the reasons I have given. Perhaps I put it the other way around,

1 the other two were reasons first, they can get out of it anyway. It does not cover all matters,
2 only price, and in any event if it were relevant it went only to exercise, stopping them doing
3 something they might otherwise be able to do rather than to the existence – the existence being
4 conditioned by the current state of BT's countervailing buyer power. That current state, we
5 say, is one in which there is no buying power, and therefore the carry on effect should not be
6 treated as continuing a pre-existing buying power, it should merely be treated as controlling
7 H3's ability to exercise its market power.

8 THE PRESIDENT: But your ultimate conclusion is that like the Appellant's, we do not need to
9 really examine all this evidence?

10 MR. FOWLER: Our ultimate conclusion is we have not examined it – we are not in a position to
11 examine it on the evidence that is here, which is merely an hypotheses, an indicative – and if
12 we are wrong not to have examined it, and if there is some relevance in the relationship
13 between the costs and the charges under the BT Agreement, then that plainly is a matter that
14 ought to be remitted if that is something that we should have taken into account. If that is right,
15 on either scenario if we are right in our approach this evidence is irrelevant, if we are wrong in
16 our approach then it needs to be remitted, and again the evidence ought to be dealt with in that
17 context.

18 THE PRESIDENT: Yes, thank you. Mr. Barling, you are probably a bit in the dark about all this?
19 You have not a clue what we are talking about! [Laughter]

20 MR. BARLING: I must say clearly everyone will, I am sure, be hugely relieved if one does not have
21 to go into evidence about costs and that must be a good thing if it is avoidable. However, I did
22 notice that Mr. Green gave you a somewhat less than unequivocal answer to the question of
23 whether he was abandoning the submission in 1.3(b) and 1.3(d). If it is not suggested that
24 there is something in the price itself, something by the nature of the price itself, that the
25 Tribunal needs to get into in order to indicate either that BT has countervailing buyer power or
26 that they do not have SMP, if that is not necessary, and that is what Mr. Green is really saying
27 then three cheers! But if he is still saying that there is something in the nature of the price,
28 probably by reference to something to do with the cost that we have not been able to see, then
29 I would have thought that somehow that has to be resolved. If Mr. Green can give an
30 assurance about that, I am sure everyone will be very happy. He almost got there, but I am not
31 sure he quite abandoned it.

32 THE PRESIDENT: Mr. Green, on that last point can we take it that all arguments derived from the
33 level of charge that was finally negotiated under the Agreement are in effect not relied on for
34 the purposes of establishing the proposition that you are seeking to establish?

35 MR. GREEN: I am not entirely certain I know what Mr. Barling was talking about.

1 THE PRESIDENT: Well he is in a slight difficulty ----

2 MR. GREEN: Yes, quite.

3 THE PRESIDENT: -- because your clients have objected to him seeing a lot of this.

4 MR. GREEN: If Ofcom, as I now think Mr. Fowler has made clear and as we understood the
5 Decision to be, is not suggesting that the contract price was reflected in its own right of SMP,
6 then we do not have to say anything about it because that is just not an issue.

7 THE PRESIDENT: Well there are two points, was the contract price reflective of SMP, which is not
8 what Ofcom is saying? There is then your argument, which is that the contract price is actually
9 reflective of absence of SMP, and I am seeking to establish whether that argument is pursued
10 or not. As you say, when you look at the relationship between the contract price and its costs
11 you can plainly see an absence of SMP. That is the argument in the Notice of Appeal.

12 MR. GREEN: We have said that looking at other evidence in the Decision, which is to the effect
13 that a price above 20p is the way Ofcom view the price as being excessive, then we are so
14 vastly below that that not even Ofcom could -----

15 THE PRESIDENT: Well there is a difference between saying it is not alleged that it is excessive,
16 and saying "It is actually shown on the evidence that it is so far below any reasonable level,
17 that that in itself shows lack of SMP. That was the argument in the Notice of Appeal.

18 MR. GREEN: We would not believe that we have to go that far, unless the Tribunal were to ----

19 THE PRESIDENT: Well you cannot chuck it back on us, I just want ----

20 MR. GREEN: I can try! [Laughter]

21 THE PRESIDENT: Which bit of the Notice of Appeal is actually pursued and I had gathered earlier
22 that you were saying that if one had stopped and seen things in the round as one can now that
23 one has the Defence, you would not necessarily have advanced the argument in 1.3(a), 1.3(b)
24 and 1.8, for example, that the level of charge is such as to really conclusively rebut any
25 suggestion that there ever was any SMP.

26 MR. GREEN: I think we are entitled to make, for example, the points in 1.8 because they are based
27 upon the construction of the Decision that they are to ensure that Ofcom does not come back
28 and say that they can draw any comfort from the price embedded in the contract. We are
29 entitled to say that nothing would suggest that that is anything other than an ordinary price, in
30 other words you cannot deduce anything from it, you cannot draw from it that it reflects SMP.
31 If we can go thus far and we do not believe we have to prove that it was not an SMP price
32 because that is not what Ofcom is suggesting against us and we are only looking at the
33 Decision. What we have said in 1.8 is that the termination charges are presently set at an
34 average rate of X, which is well below Respondent's own assessment of an unrestrained price

1 for 2G. Then we refer to the fact that the Decision records that the respondent had seen no
2 evidence of excessive pricing ----

3 THE PRESIDENT: If we take the last sentence of 1.3(d) which says that section E(v) explains that
4 the level of termination charges, which is lopped into the BT Agreement and forms a ceiling
5 of the Appellant's charges to other MNOs is well below, and then it make an allegation as to
6 what it is below. Is that an assertion of fact that you still rely on?

7 MR. GREEN: That may be one that we do not need to rely upon. We can rely upon 1.8 and
8 I suspect, and perhaps I can be absolutely clear on that by speaking to my client, but I suspect
9 we would not have to rely upon that assertion of fact, because it is not in the Decision and we
10 can simply rely on that which is in the Decision, insofar as it is relevant to anything.

11 THE PRESIDENT: That would similarly apply to the second sentence of 1.3(a) which is to the
12 effect that BT held and exercised countervailing buyer power in its negotiations with the
13 Appellant to compel the Appellant to give it termination charge at such a level that in this case
14 shows that BT had the countervailing buyer power at the time of the negotiations and thus by
15 contrast your clients did not.

16 MR. GREEN: It might well apply to that as well, and I think that may well be a factual assertion
17 which we do not need to establish, and the Tribunal does not need to grapple with.

18 THE PRESIDENT: I think what we may need from you is a written letter identifying for us
19 formally, without going to the extent of serving an amended Notice of Appeal, whether there
20 are particular sentences in this existing Notice of Appeal which are not proceeded with.

21 MR. GREEN: We can certainly do that.

22 PROFESSOR STONEMAN: In the context of the discussion we have just been having I would like
23 to explore the extent to which everybody has the same definition of significant market power.
24 The Appellant seems to be using that there is significant market power if a company can act in
25 a completely unconstrained manner. Is that correct?

26 MR. GREEN: I am not sure that I would use "completely", I mean there may be questions of degree.
27 Our benchmark has been the European Commission's guidelines – I will have to get them out
28 and check them.

29 PROFESSOR STONEMAN: I think I had them in front of me a minute ago – "... to an appreciable
30 extent", "independently of". Now, a number of times this afternoon you have used the term
31 "unconstrained" ----

32 MR. GREEN: Yes.

33 PROFESSOR STONEMAN: -- is that the same?

34 MR. GREEN: Whether or not an undertaking has SMP will obviously be a quantitative conclusion.
35 You may have an ability to raise prices by a few percentage points without having any impact

1 on demand, but that would not be sufficient to conclude that you had SMP, so it is going to be
2 to a significant degree that you are going to have the ability to raise prices.

3 PROFESSOR STONEMAN: I am just wondering to what extent it will be the case that the parties
4 disagree over the extent that is necessary, the extent of “unconstrained-ness” that is necessary
5 to establish SMP?

6 MR. GREEN: I am not certain that is an issue between us on this Appeal, and I do not think it comes
7 out of either our Notice of Appeal or the Defence. Ofcom has not sought to quantify different
8 levels of market power, or power over price, and this is a fairly binary choice – we either have
9 it or we do not. It is not that we have some and an incremental amount more in some way has
10 enabled us, or will enable us to acquire SMP.

11 PROFESSOR STONEMAN: So in your view is some equal to SMP or does it have to be a lot to be
12 SMP?

13 MR. GREEN: I am not certain I am capable of answering that!

14 PROFESSOR STONEMAN: I would like to hear what Ofcom have to say as well. Can we have
15 a response from Ofcom?

16 MR. GREEN: There is a statutory definition, Article 14(2) of the Framework Directive, and if that is
17 the definition we are working with then that is the definition which Ofcom has an obligation to
18 apply.

19 PROFESSOR STONEMAN: Yes, that is “an appreciable extent”?

20 MR. GREEN: Well it is a position equivalent to dominance, that is to say a position of economic
21 strength according it the power to behave to an appreciable extent independently of
22 competitors, customers and ultimately consumers, and that may, of course, be glossed by case
23 law on dominance.

24 MR. FOWLER: That is certainly the context within which Ofcom has examined the question “to an
25 appreciable extent”, and looking at the matter as it has by reference to the market share of p.3,
26 the barriers to entry, and the question of whether there is any countervailing buyer power, and
27 that is the basis on which it has approached it, not on the basis that it must be able to act in
28 a way that is totally unrestrained by competition.

29 MR. SCOTT: You mentioned consumers, Mr. Fowler has mentioned 100 per cent. market share and
30 when we place our Judgment in the public domain we may need to explain the relationship of
31 the consumer to all this insofar as BT is an intermediary, and that may mean that we need
32 a better understanding of how the calls are flowing and how the moneys are flowing in this
33 situation where often with number portability a consumer cannot tell when dialling a number
34 whether that number belongs to a subscriber from ‘3’ or from any other mobile network

1 operator so at some juncture we may need from you a little “teach-in” on how it is all now
2 operating.

3 MR. GREEN: If there are factual matters that we can collectively help with then I am sure some sort
4 of agreed statement of facts and documents could be produced, and if the Tribunal were to
5 identify issues they would like assistance on collectively I am sure that we could find some
6 way of doing it in an uncontroversial manner.

7 MR. SCOTT: Yes, I think it is just the ability to set out for the benefit of the reader what is actually
8 happening and explain that.

9 THE PRESIDENT: I think we will rise now for a few minutes, but while we are doing that could
10 you also perhaps collectively think about the other issue that we must address this afternoon,
11 which is confidentiality. There is some fairly wide claimed confidentiality at the moment.
12 There are at least two aspects to it. There are first of all matters that should not be in the public
13 domain because they are confidential and there are secondly matters that are not in the public
14 domain, but there is no reason to keep them confidential from BT because BT knows them
15 already, for example, the course of the negotiations – so there is that distinction as a first
16 distinction.

17 As far as matters that are in the public domain are concerned (or are not in the public
18 domain) one also has to bear in mind that the Tribunal also has to write a Judgment. In order
19 to write the Judgment we have to explain what the arguments are and in explaining that there is
20 a limit to what we can keep confidential, as it were, and it may be in the light of that it is
21 possible to narrow down somewhat what is really confidential in this case and what is
22 confidential vis à vis BT, because it strikes us at the moment, Mr. Green, that the
23 confidentiality claims are very wide indeed.

24 MR. GREEN: Part of the issue we have with confidentiality will turn upon any decision you make
25 about the scope of the evidence. For example, if certain categories of evidence no longer
26 become relevant then there will be no issue between ourselves and BT. Plainly some matters
27 are not confidential vis à vis ourselves and BT in relation to negotiations, but we take that on
28 board.

29 THE PRESIDENT: Yes, well if you would just like to have a think about that while we are having
30 a think about other things.

31 (The hearing adjourned at 3.37 p.m. and resumed at 4.04 p.m.)

32 THE PRESIDENT: In the Case Management Conference that has been proceeding this afternoon the
33 Tribunal has been grappling with the question of whether the issues in this case can be further
34 refined in the light of the present state of the pleadings. The underlying issue in the Appeal is
35 whether or not the Appellant has significant market power as found in the Respondent’s

1 Decision of 1st June 2004. In relation to that issue we have been discussing this afternoon two
2 main questions.

3 The first of those questions is the relevance of the antecedent negotiations that led to
4 the Appellant entering into the relevant Interconnection Agreement with BT, which gave rise
5 to the call termination charges in question. In the original Notice of Appeal the Appellant was
6 alleging that the Respondent had given insufficient weight in its Decision to an imbalance of
7 bargaining power between the Appellant and BT in those antecedent negotiations, particularly
8 as regards the time pressure the Appellant said they were under. As a result the charge that was
9 negotiated fell well short of the level that might otherwise have been the case. That charge then
10 became embedded in the relevant Interconnection Agreement; there was no way out from that
11 Agreement the Appellant argues, and that taking all those things together the Appellant
12 submits that it was quite impossible to find that it, the Appellant, had significant market power
13 as the Respondent finds in the Decision. That submission as we originally understood it would
14 involve the Tribunal going into considerable detail as to what occurred in fact during the
15 negotiations in question.

16 What has since developed is that the Appellant has somewhat refined its submission
17 which is now to be found under the heading: "Item 2.2" in a recent letter from the Appellant's
18 solicitors to the Tribunal, in relation to which it is said that para.3.31 in particular of the
19 Decision found by necessary implication that the question of whether or not BT exerted
20 countervailing buyer power when the Agreement was concluded was not relevant to the
21 subsequent analysis in the Decision of the Appellant's SMP for the period 2004 onwards.
22 Alternatively, it is said that the Respondent did not make any finding as to BT's countervailing
23 buyer power and ought to have done so. Neither of those arguments (so it is submitted) would
24 result in the Tribunal actually going into the question of what happened in the negotiations,
25 and whether those negotiations support or not the suggestion that the Appellant had no SMP. It
26 is only in a third and final alternative that the Appellant submits that it would be necessary for
27 the Tribunal to enter into the merits of the negotiations and decide whether, in the course of
28 those negotiations, BT in fact exercised countervailing buyer power.

29 The Respondent submits also that it is essentially irrelevant as to whether or not BT had
30 countervailing buyer power at the time of the negotiations. What is relevant is the position as it
31 was at the time of the Respondent's decision in 2004. The Respondent has other submissions
32 which for present purposes I need not elaborate upon, but will no doubt be important in due
33 course. BT for its part has put in evidence about the course of the negotiations in reply to the
34 evidence produced, and the assertions made by the Appellant in the Notice of Appeal. The

1 immediate question that we have to try to grapple with is how far in the Appeal we need to go
2 into the course of these negotiations.

3 Experience suggests that it is sometimes risky to approach cases on the basis of various
4 assumptions without having a full understanding of the background in which those
5 assumptions are being made. The view is that at this stage it is somewhat premature to decide
6 whether this case can be decided on the narrow question of whether in para 3.31 of the
7 Decision Ofcom adopted a proper approach or introduced proper reasoning without having
8 a full knowledge of the background. On the other hand, in fact, to deal with one or more of
9 these arguments without having to make detailed findings of the course of the negotiations.
10 In those circumstances it seems to us at the moment that we should not, as it were, exclude
11 from consideration, by way of background, the evidence that we have at the moment in the file
12 as to the course of the negotiations. I have in mind particularly the witness statement on behalf
13 of BT filed by Mr. Locker, and the evidence from the Appellant to which that is in part a reply.

14 The practical conclusion of that would be that if the Appellant wished to reply to that
15 evidence so that we have a full picture in front of us then it should in principle be permitted to
16 do so. That however simply means that we have all the evidence there by way of background,
17 and we can understand the context. Insofar as there are matters that remain disputed it may
18 well be that we do not actually need to decide the matters, but at least we have it all there in the
19 background if we need to.

20 However, that leaves the exact state of the argument in a degree of uncertainty. We are
21 not entirely comfortable with a situation in which in the letter of 17th November 2004 the
22 Appellant has set out its position while the Notice of Appeal, which was served on 28th July
23 2004 still formally maintains a rather wider position and effectively invites us to enter into the
24 facts of the relevant negotiations. What we think should be done on this particular point is that
25 the Appellant should reconsider the Notice of Appeal; eliminate from the Notice of Appeal any
26 matters that it is not now pursuing, or if those matters are only pursued in the alternative or in
27 the second alternative and indicate very clearly in the Notice of Appeal what the Appellant's
28 position is. That should be done so that we have a clear match between what is in the Notice of
29 Appeal and how the Appellant's grounds of Appeal have subsequently developed. The
30 Tribunal has to decide its cases on the merits by reference to the grounds in the Notice of
31 Appeal and we think we should make sure that we have actually got the grounds clearly set out
32 in the Notice of Appeal so there should not be any room for misunderstandings later on.
33 However, as we said we think all this evidence should remain in the file by way of background
34 until we have seen a little bit further how matters develop.

1 The second issue that we have sought to address is an allegation set out in the present
2 Notice of Appeal to the effect that if one compares the termination charges that were agreed
3 between BT and the Appellant, with the Appellant's costs of termination, one can immediately
4 draw the conclusion that the Appellant had no significant market power. That issue would
5 involve the Tribunal going in significant depth into the relationship between the Appellant's
6 costs and the termination charges in question. We have now had a great deal of evidence on
7 that point, initially from the Appellant, and now from the Respondent, and again from the
8 Appellant in its reply.

9 As we had understood it, as the argument developed, in fact, the Appellant's principal
10 criticism focuses on the Respondent's approach to costs in para.3.32 of the Decision and in
11 particular to the absence of any apparent mechanism for charges to fall in line with costs in the
12 course of the Agreement. As we understood the way matters were being explained to us, the
13 Appellant was not now asking us to make a finding that the charges were at a level relative to
14 its costs so that we could draw from that fact alone the fact that the Appellant had no SMP.
15 The Appellant, as we understood it, was proceeding on the basis that it was sufficient from the
16 Appellant's point of view that the Respondent had not found in the Decision that the relevant
17 charges were excessive. That clarification in our view gives rise to a certain mis-match
18 between what the Appellant's position now is and what the Notice of Appeal says. We have in
19 mind, among other passages, para.1.3(a) last sentence, and para.1.3(d) last sentence, and parts
20 of s.E(5) of the Notice of Appeal. Again in this respect we would invite the Appellant to serve
21 an amended Notice of Appeal, or at least a covering letter setting out in what respects various
22 parts of the Notice of Appeal are no longer relied on so it is completely clear what issues as to
23 costs arise as between the parties.

24 That, as it were, tidies up the procedural situation. However, as far as the evidence is
25 concerned, we now have (as with the case of the negotiations) quite a lot of background
26 material on the issue of costs, quite a lot of expert evidence, much of which in our view is of
27 background interest to the Tribunal in understanding some of the issues which present
28 themselves in this case and the general context in which the case arises. Again, it may be that
29 we do not need to take any position at all in the various points that are made in that evidence,
30 but we would not at this stage wish to exclude it from the file or say definitively that we are
31 not going to pay any regard to it or that it may not be relevant. That, I think, would have the
32 result, formally speaking that if the Respondent wished to serve any further evidence in reply
33 to the evidence served by the Appellant in the Appellant's reply then in principle we would not
34 exclude the Respondent from doing so. That would not mean that these matters would
35 necessarily be matters upon which the Tribunal would need to make a Ruling in its Judgment,

1 it would simply achieve a fuller background against what we hope and anticipate would be
2 narrow issues for us to address in our Judgment.

3 It therefore follows from that that in procedural terms the result of what we have said is
4 that we should ask the Appellant to serve a revised Notice of Appeal in a time frame that we
5 will shortly discuss and that if any of the existing parties wish to respond to the evidence that
6 we have already got on either of the two issues I have mentioned – the negotiations or the costs
7 – then we will not prevent them from doing so.

8 However, that would still leave us with the question of confidentiality, vis à vis BT and
9 vis à vis the public domain, which is not a matter that we have yet had a chance to go into and
10 upon which we shall invite the parties' brief observations in a moment.

11 MR. GREEN: Do you wish us to deal with confidentiality?

12 THE PRESIDENT: Well so far as we can, it is getting a bit late and we may not be able to get that
13 far with it, but let us see how far we can get.

14 MR. GREEN: I do not think there is really going to be an issue. I have spoke to Mr. Barling about it.
15 We did actually provide BT with non-confidential versions of everything relating to BT in
16 September. The Statement of Intervention may be slightly at odds with the position, but I do
17 not think that need trouble the Tribunal. What we have suggested to BT, and it appears to be
18 accepted is that we will double check that everything which is related to ourselves and BT has
19 been provided and if there are any gaps we will provide it. In relation to the residue it largely
20 concerns paragraphs in the Notice of Appeal or Pleadings which concern either our relations
21 with third parties for example, Vodafone, or our internal perceptions of the market place and
22 how we would deal with negotiations in the future, or matters relating to our internal costs.
23 So they would be matters which we would submit in any event are genuinely confidential
24 between ourselves and BT. We will clarify to BT in a letter what the remaining blanked out
25 matters relate to. If they have any issue they can discuss it with us and it may be that if there is
26 then a dispute they can come back to the Tribunal. But we have actually provided back in
27 September, and pursuant I think to an order of the Tribunal all the matters which are non-
28 confidential as between ourselves and BT to BT, so I hope that the matter is not as prominent
29 as it perhaps otherwise appears.

30 So far as the public is concerned, we would simply wish to retain confidentiality with
31 residual matters insofar as they do concern relations with third parties – internal perceptions of
32 the market, or internal costs' matters.

33 THE PRESIDENT: Well on that point, Mr. Green, we had quite an extensive request for
34 confidential treatment from the Appellant, I think it was as long ago as August, covering quite

1 a lot of matters. It may be now that not all the things that were first thought to be subject to
2 confidential treatment are still asserted.

3 MR. GREEN: At that stage we did not know who was going to intervene, and so matters between
4 ourselves and BT were confidential were included.

5 THE PRESIDENT: I think the most convenient way of dealing with it is as follows – and this is as
6 much from the Tribunal’s point of view as anybody else’s, because we need to know what we
7 can say and do in public hearings and what objection is taken to matters that might eventually
8 go into a Judgment. I think we would invite the Appellant to look again at what they originally
9 identified in the Pleadings as business secrets. I am looking, just for the sake of example, of the
10 Reply which has quite a lot of business secrets – there are quite a lot of places where the words
11 “business secret” crop up – and there is a limit to how far we can accord business secrecy to
12 the essential matters that the Appellant is relying on in order to progress its Appeal if you see
13 what I mean. It may be that these matters can be put in the round or in general terms, but we
14 have to include in our Judgment things that are necessary in order to explain what on earth the
15 argument is. Do you see what I mean?

16 MR. GREEN: Yes.

17 THE PRESIDENT: To take 2.13(a)(ii) one may not need the exact details but it is very difficult to
18 understand what is going on without alluding to some extent to what degree that is the case. So
19 if you could kindly write to the Registrar with a refined and hopefully more limited request for
20 confidential treatment, that would be one way of dealing with it, and then we will cross that
21 bridge when we get to it.

22 So that I think, unless there are any other points that anyone would like to raise, just
23 leaves us with timetabling issues.

24 MR. FOWLER: On the question of confidentiality, and I am sure that my friend and those
25 instructing him will consider this in response to your request, but we have objected to the cover
26 of confidentiality over Mr. Myers’ statement in particular which is really dealing with matters
27 which do not involve confidential information at all, they are simply about Ofcom’s possible
28 approach to 3G costs in general.

29 THE PRESIDENT: Thank you for reminding me of that, and we had indeed noted it. What I am
30 very much hoping is that the Appellants will be able to make a revised and more limited claim
31 for confidentiality, if indeed they claim confidentiality for anything and insofar as it remains
32 open then we may have to rule on it, but I am not by any means saying that if there is a more
33 limited claim for confidentiality that more limited claim will necessarily be allowed, because
34 we have to take into account Ofcom’s submissions on all those points too. It certainly did seem
35 to us as a matter of first impression that if certain models are publicly available, and if the

1 models have simply been modelled on various assumptions that do not in fact disclose any
2 confidential information it might be a bit difficult to see how the results of the modelling is
3 confidential. That is more or less as far as we had got in our internal deliberations, so thank
4 you for reminding me of that point. Mr. Barling?

5 MR. BARLING: Just to say that we are very happy with the Tribunal's suggestion that they review
6 it and see whether it really is necessary in view of what Mr. Green was saying about our
7 Statement of Intervention, we were really just reverting to the paragraph in the Notice of
8 Appeal where, under the heading of "Summary of negotiations with BT" there are large gaps,
9 and secrets claimed and it may be that some of those are dealing with matters not relating to
10 the negotiations with us, but ----

11 THE PRESIDENT: But you have not had any of that – or you have had it?

12 MR. BARLING: We have had the bits in square brackets, where things are written in square
13 brackets, we have that. I do not think it is necessary to get into this now but there are whole
14 chunks of things in ps.33 and 34 of the Notice of Appeal, para.6.10 – this is all under the
15 heading "Summary of Negotiations with BT".

16 THE PRESIDENT: Yes.

17 MR. BARLING: And if one looks at (c), (d) and (e) we have nothing there.

18 THE PRESIDENT: You have not had that at all?

19 MR. BARLING: No, and they are just taken out. We have had (f) through to (j), the text we have,
20 but we do not have (k).

21 THE PRESIDENT: I had understood from Mr. Green on some perhaps "without prejudice" or
22 "limited" basis that you had had everything, but I may ----

23 MR. BARLING: No, no we have not, but we obviously have all the correspondence between
24 ourselves and them in relation to negotiations, and that is, as I understand it, what we have, but
25 there is quite a lot of it that we do not have, that is simply taken out of the pleadings. We are
26 happy though, Sir, with your suggestion and as I understand it Mr. Green has already said they
27 will look at it again. What we do not have and we have been told – we do not want to see their
28 costs, we appreciate that those matters we would feel unhappy about if the boot was on the
29 other foot.

30 THE PRESIDENT: Have you got the underlying witness statement to which this ----

31 MR. BARLING: Some we have, some we have not. We have ----

32 THE PRESIDENT: Mr. Westby?

33 MR. BARLING: We have Mr. Westby but with large chunks taken out.

34 THE PRESIDENT: Is it Mrs., Miss or Ms. Laurent?

1 MR. BARLING: We have that, we have most of that being redacted, and there are large redactions
2 in Mr. Westby's statement under the heading "Negotiations with the Appellant in relation to
3 Agreement with BT", there are large chunks redacted from that in our copy. It may be as I say
4 that they are dealing there with matters that they generally would not want competitors to see.

5 THE PRESIDENT: Well vis à vis BT, subject always to the proviso that none of this may be
6 relevant anyway, but I think we want to know what happened just in case, as it were, vis à vis
7 BT what actually happened in the negotiations does not seem to us to be confidential vis à vis
8 BT?

9 MR. BARLING: No.

10 THE PRESIDENT: As between whatever Appellant says about it. There may be circumstances
11 where it is confidential vis à vis third parties and there may from time to time be reference in
12 those passages to certain facts that are internal to the Appellant which could properly be
13 eliminated, but in principle you should have what they say about the negotiations I would have
14 thought.

15 MR. BARLING: I will leave that there then.

16 THE PRESIDENT: So shall we leave that there in the hope ----

17 MR. GREEN: Sir, we understand we have given them everything. We have no problem, anything
18 which is between ourselves and BT they can have, they have it, there is no difficulty,
19 redactions, as I understand it, are related to matters concerning third parties or internal, but
20 I have said we will check and make sure there are no gaps and, if there are, then we will have
21 to justify them.

22 THE PRESIDENT: Yes.

23 MR. BARLING: I do not know whether, Sir, the Tribunal has the version that BT has? I was rather
24 under the impression that you had a version, not necessarily the one you are working from –
25 but I am not suggesting that a big exercise is done but I suppose just a glance may be at some
26 point to see, if one can see, what is taken out from ours.

27 THE PRESIDENT: Yes. I think Mr. Scott wanted to ask a question?

28 MR. SCOTT: I think the sort of thing where we are likely to have a disagreement is where the
29 Appellant has a perception of BT which was internal to the Appellant and insofar as that is
30 being put forward as an assertion about BT's possible behaviour, it seems sensible for BT to be
31 able to rebut that even though, as a matter of fact, it may have been a perception in the
32 Appellant's mind. So that may be an example ----

33 MR. BARLING: That would be a good example.

34 MR. SCOTT: -- of an internal matter not known to BT being asserted to the Tribunal that may need
35 attention.

1 MR. BARLING: I am grateful, that is a good example, where we would be under a disadvantage if
2 we did not have an opportunity to put it right or to comment on it, whereas it would not do
3 them any harm for us to know about it after the event. Equally, there might be matters where
4 they would be revealing some negotiating stance and they might have a point. So I am happy
5 to leave it at that, but while I am on my feet can I mention one other matter before we go on to
6 timetable.

7 THE PRESIDENT: Yes.

8 MR. BARLING: It is really just clarification on the state of play of the evidence. We took a very
9 minimalist view to our Statement of Intervention because of the very fact that we knew that we
10 were going to have this and really there was an awful lot to discuss. At the moment, at any
11 rate, we have not reached the situation where the Tribunal is necessarily going to decide this on
12 a very narrow basis and has not excluded the possibility that it might be looking at
13 countervailing buyer power as a matter of substance, it is not impossible, at any rate.

14 THE PRESIDENT: It is not impossible – unlikely but not impossible.

15 MR. BARLING: I am grateful for that indication. You did say a few minutes ago as part of your
16 Judgment that there could be another round of evidence once the Amended Notice of Appeal
17 has been seen.

18 THE PRESIDENT: Yes.

19 MR. BARLING: Because other than just detailing the negotiations we have not really put our mind
20 to the question of what we would say if this issue ----

21 THE PRESIDENT: What conclusion, if any, one draws from all that.

22 MR. BARLING: Yes. So it is a question really of not wanting to hold things up unnecessarily, but
23 equally wanting to put in whatever evidence might be necessary. Do you envisage another
24 CMC, when there would be a final ----

25 THE PRESIDENT: I think we do envisage another CMC probably in February. We are not in a
26 position, for various reasons to actually fix a date today because the diaries are getting very
27 complex, but we do envisage another CMC.

28 MR. BARLING: Would it be not necessarily wholly desirable, but conceivable that the matters
29 might have to be dealt with following that CMC in terms of further ----

30 THE PRESIDENT: In terms of further evidence I think, if I may put it bluntly, you are fishing for
31 some sort of indication as to how far BT either could or should put in further evidence that
32 might be relevant to the issues that we may not have in the forefront of our minds but cannot at
33 the moment entirely rule out anywhere.

34 MR. BARLING: You put that very well, yes!

1 THE PRESIDENT: To which the answer is this is essentially up to you, Mr. Barling. I know that is
2 not a very helpful answer but we will not exclude anything that you want to put in front of us,
3 or feel you should put in front of us. Everybody knows that the Intervener has, as it were, this
4 supporting role, so there is a lot that no doubt that can be said through Ofcom, via Ofcom's
5 witnesses ----

6 MR. BARLING: Certainly.

7 THE PRESIDENT: -- and a further excursus via BT's experts on the mysteries of LRIC in this
8 rather recherché area might not be particularly desirable or helpful. But if there were matters
9 more closely related to the issue of countervailing buyer power that you wanted to put in front
10 of us I do not see how we could stop you or would want to stop you.

11 MR. BARLING: I think that is really what I was hoping you would say.

12 THE PRESIDENT: Absolutely. So, timing, Mr. Green? I think we have really invited some tidying
13 up of the pleading so far as you can. We are at 19th November, Christmas is coming, what
14 would be a reasonable time frame for an Amended Notice of an Appeal, by which I do not
15 necessarily mean a completely new document struck through in blue or purple, or whatever
16 colours one uses these days in this word processor world, but at least a very clear statement
17 that certain sentences are no longer relied on or qualified or whatever, what sort of period of
18 time would you like for that exercise?

19 MR. GREEN: (After a pause) Could we have until 17th December?

20 THE PRESIDENT: Yes, that would seem to me to be pretty reasonable.

21 MR. GREEN: It is inevitable that there may, of course, be further rounds of evidence, we will wish
22 to reply to Mr. Locker.

23 THE PRESIDENT: There may be further rounds of evidence, there is always going to be a law of
24 diminishing returns, but we will see.

25 MR. GREEN: It is not impossible in the light of the evidence that the issues become refined further,
26 but we can discuss that further if it happens.

27 THE PRESIDENT: It might technically be that in the light of *de facto* Amended Notice of Appeal
28 there should be a *de facto* Amended Defence and so forth, one cannot really see but I would
29 hope we need not go into great detail in terms of elaborate further rounds of pleadings, but it
30 may be that Ofcom will want to come back on this new document.

31 MR. FOWLER: May I say, Sir, that we are rather concerned about timetable, and to get things
32 moving as fast as possible, because we have to have in mind that we have to get a further
33 market review finished and out by 31st March 2006.

34 THE PRESIDENT: Yes.

35 MR. FOWLER: By which time we would hope to have your Judgment.

1 THE PRESIDENT: We do not want to spend the whole of this period of this Agreement hearing an
2 Appeal.

3 MR. FOWLER: And we would like to have in our hands the Judgment on your approach in advance
4 of that so that we could know and be able to reflect it. That means, working back, one has
5 really to look at fairly shortened time frames at this stage.

6 THE PRESIDENT: Can I just have a word with the Registrar?

7 (The Tribunal confer)

8 MR. FOWLER: May I just modify what I have just said? Although the changes come into effect on
9 31st March 2006, we need to get the market review out and finalised really by January 2006, or
10 at the end of 2005 to allow time for the operators to adjust their systems to any new controls.

11 MR. SCOTT: In terms of the consultation period and bearing in mind you have to consult across the
12 European Union as well as nationally, at what stage would you have to issue your first
13 consultation document?

14 MR. FOWLER: At the moment no date has been announced, although we will have to start work at
15 the very beginning of January.

16 THE PRESIDENT: Looking at it realistically, if the Tribunal in its present constitution was to hear
17 the case, it would probably have to be around next April. How long after the hearing it then
18 takes us to give the relevant Judgment rather depends on whether the hearing can be confined,
19 as Mr. Green rather hopes it can, or not. But on one view the issues could be quite narrow and
20 relate to paras.3.31 and 3.32 of the Decision and one or two other points on one view, in which
21 case a lot of the background, which is always interesting, may not matter. But that is what it is,
22 I think, looking like at the moment. If there are good reasons for bringing the case on earlier
23 then the alternative possibility is to ask for a Chancery Judge to Chair it, basically. So I think
24 the way we would leave that is that if any party is unhappy with that indicative timetable you
25 should write to us and we will see what we can do.

26 So, Mr. Green, if we say 17th December for a revised Notice of Appeal.

27 MR. GREEN: And we will also put any new evidence in, and reply to Locker.

28 THE PRESIDENT: Put in any new evidence you want and then if we make an allowance for the
29 Christmas period and we say 21st January for any final evidence and/or amendments to existing
30 pleadings that any other party wishes to make, we will aim to hold a CMC early in February
31 with a view to hearing the case in April or on some other accelerated timetable if somebody
32 applies for us to accelerate it.

33 MR. GREEN: Realistically there is not much scope for acceleration.

34 THE PRESIDENT: Realistically there is not, no. Realistically we are going not exactly fast, but as
35 fast as we can in the circumstances.

1 | Are there other points or applications that anyone else would want to make? No, good.
2 | Thank you all very much.
3 | (The hearing concluded at 4.50 p.m.)