IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1071/2/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

14th September 2006

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR PETER GRINYER
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYHOOK LIMITED Applicant

and

OFFICE OF FAIR TRADING Respondent

supported by

ALCATEL SUBMARINE NETWORKS LIMITED Intervener

Mr. Kenny Shovell (of the Applicant) (assisted by Mr. David Greene of Edwin Coe) appeared for the Applicant.

Mr. Mark Hoskins (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Jon Turner and Miss Renit Kreisberger (instructed by Blake Lapthorn Linnell) appeared for the Intervener, Alcatel Submarine Networks Limited

Mr. Euan Burrows (of Ashurst) appeared for the potential Intervener, Level 3 Communications Limited

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CASE MANAGEMENT CONFERENCE

THE CHAIRMAN: Good afternoon.

MR. GREENE: Can I explain the position in relation to representation today?

THE CHAIRMAN: Yes.

MR. GREENE: My name is David Greene, from solicitors, Edwin Coe. We are, I think, likely to become involved in the case in the short term and I thought it would be useful if I attended today in order to assist the Tribunal as far as possible, but I do not think my knowledge is sufficient, and it would be wrong of me to displace the director on this occasion but I will rise if I think I can assist the Tribunal, and I am sure you may have some questions about procedure.

THE CHAIRMAN: I am sure that is very helpful and it is very good of you to have come today.

MR. GREENE: Mr. Shovell is going to present the case, or deal with the points raised in the management conference today.

THE CHAIRMAN: Right. Can I just introduce ourselves for the benefit of Mr. Shovell? David Summers is on my left, Professor Grinyer on my right, and you know who I am, I am Marion Simmons.

We have read file 1 but we have not yet read files 2 to 12, so I thought you should know what we actually have read.

This is a case management conference to decide how to proceed and not to make any substantive decisions, whether it is on procedural matters or substance. All we are doing is seeing the way forward. Can we just put the Appeal in context? There appear to be three separate court routes available to Cityhook, and in no particular order I will mention this appeal route first. Our jurisdiction is if the OFT has decided that there has been either an infringement or a non-infringement of Chapter 1 of the Competition Act. We are not actually clear at the moment whether Article 81 is a relevant consideration in this case. If there is a decision of infringement then of course Cityhook could rely on such a decision for the purposes of a follow-on action in damages whether in this court or in the High Court.

The second court route is for Cityhook to establish in private litigation that there has been an infringement and that route, as we understand it, has been taken by Cityhook and we have seen the claim form which was exhibited to the Intervener's application.

The third route is Judicial Review, which would require Cityhook to make a separate application to the Administrative Court. The Administrative Court would then review the decision on priorities which has been taken by the OFT. The OFT has suggested to Cityhook in correspondence that the Judicial Review route is a more appropriate route than the appeal before us. We make no comment as to whether or not that is correct but having regard to the limited time within which a Judicial Review application must be made we raise this matter

now. I do not know whether Cityhook want to address us on it but if it is appropriate to inform us what the position is on Judicial Review then that might be helpful, and it might be helpful as to how we proceed today as well, but before doing so let me make some other comments about today's hearing.

If we turn to the agenda for today, we have two applications from Interveners, the first is from Alcatel Submarines Network Limited, and they wish to intervene at the initial stage as I understand it. Our present view, subject to any submissions today, is to permit that application on what we have seen in writing.

The next application from an Intervener is from Level 3 Communications Limited. As we understand it you wish to intervene only if the Appeal is found admissible?

MR. BURROWS: I think we have not even reached that view, but we are concerned to preserve our rights under Rule 15(2)(f).

THE CHAIRMAN: Right, so what you would be asking for is an adjournment of your application to be heard?

MR. BURROWS: Exactly right, an immediate adjournment.

THE CHAIRMAN: Yes, and at the moment, subject to what we hear, we would consider that to be a sensible approach as well.

The next matter on the agenda was the forum of the proceedings and that would appear to us to be England and Wales, we do not think that this is a Scottish case or a Northern Irish case.

The next item is disclosure. It appears from the OFT's submissions that there is an issue as to disclosure and it seems to us at present that this may need to be fully argued, and the relevant authorities on disclosure, as disclosure is ordered in the Administrative Court, may be relevant to our decision on that issue here. This may depend on the involvement of solicitors on behalf of Cityhook. What I was going to suggest on a way forward on that was for the OFT to assist us by providing the necessary authorities and their submissions on it and we would list a further hearing to deal with the disclosure matter as an isolated issue if it is still contentious. What I do not know is if Mr. Greene is going to be involved in that part of it but we can come on to that in a moment.

Confidentiality: again, that may be a matter which we deal with at the same time as disclosure because, as I understand it, the disclosure may have confidential items in it so we could deal with the whole thing.

Timetable: we are going to need to discuss the timetable and that depends on what the procedural stages are up to a hearing on the admissibility question. It also may be affected by the question of Judicial Review and whether that is a process that is going to be taken because, if it is, then possibly we need to adjust our timetable, but we can talk about that.

We would like to mention two further matters which arise out of the OFT's letter of 23rd June 2006 and the annex. In para.21 of the letter it refers to "... further work being necessary before a Statement of Objections could be issued ..." particularly on the effect of the parties' behaviour on competition. We note that the Chapter I prohibition refers to "object or effect", and that has raised a question in our mind as to whether the OFT considers that work on the effect was particularly necessary. At first sight, and this is a pure first sight, collective boycotting and collective setting of fees might fall within the "object" category.

We also note that in para.24(c) of that letter it is stated that "... neither the collective boycott, nor the collective setting case are clearly a hardcore infringement." Two questions have come to our mind as to this. First, as to why the OFT has come to that view having regard to its definition of "hardcore infringement" in its footnote 13 at p.12 of the annex to the letter (The Response to Consultation).

The second question is that in the OFT's response to the consultation (which is the annex, as I said) the hardcore infringement point is referred to under the heading "Collective Boycott Cases" but it is not expressly referred to in the paragraphs which I think are 43 and 44, which deal with the collective setting cases, and it appears on the face of it that there might be a discrepancy there between the letter and the response.

There is just one other thought that has crossed our mind which we thought we ought to air and that concerns the transfer provisions in the concurrency regulations. At the outset we note that it was decided that the OFT and not Oftel were best placed to make this investigation and we just wonder whether that question of transfer was revisited before the OFT decided to write the letter of 23rd June and in that regard we would draw attention to the OFT's guidance on concurrency which does contemplate that there can be effectively transfers during an investigation (para.3.17).

Those are our opening remarks, I do not know – are you happy to continue or do you want us to rise for a moment?

MR. HOSKINS: Can I just see what those behind me would like me to do? (After a pause) I think we would like a few minutes.

THE CHAIRMAN: Mr. Hoskins would like a few minutes – you would obviously like a few minutes, so we will rise until 25 past 2.

(The hearing adjourned at 2.15 p.m. and resumed at 2.25 p.m.)

THE CHAIRMAN: Mr. Hoskins?

MR. HOSKINS: Madam, I can deal with the points under three headings and the first one I would like to deal with is something that was not raised in your opening remarks but I think it does colour what comes afterwards, which is how is the question of jurisdiction to be determined

procedurally. You will have seen from our submissions that we say that it should be dealt with as a preliminary issue.

THE CHAIRMAN: Yes.

MR. HOSKINS: Two ball park points: that is the way it has always been done; and secondly, obviously in a case such as this it s the sensible way to make sure that resources are not wasted if it transpires that the Tribunal does not have jurisdiction. So we say that is procedurally how this should happen. Then if there is to be a disclosure issue going to the preliminary issue disclosure could only be relevant to the question of the nature of the Decision letter.

THE CHAIRMAN: Well is that right, Mr. Hoskins, because could it be that there was a decision prior to writing the Decision letter. The Decision letter may be form not substance. So if there is a Decision – just assume that a Body makes a decision in the way that one makes a decision and then, for whatever reason, writes a decision letter which says something completely different.

MR. HOSKINS: Madam, the challenge has to be to the Decision, the legal Decision is the Decision letter.

THE CHAIRMAN: No, that is the form of the Decision, that is not the substance of the Decision.

MR. HOSKINS: Madam, that is the Decision.

THE CHAIRMAN: No, that is recording a decision, but there may be two decisions. There may be a decision that there is an infringement, and there may be a decision that for whatever reason we are going to write this letter of 23rd June.

MR. HOSKINS: Madam, if there were any suggestion of that – I will come on to how we deal with it because I am trying to avoid substantive issues but you picked me up on the way I present the argument – if indeed it were to be said that the Office, having taken a decision on ground A decided on purpose to cover up the reason for the decision and put up a decision on ground B that would be a very serious allegation.

THE CHAIRMAN: I am not saying ----

MR. HOSKINS: Of course not.

THE CHAIRMAN: They may not have covered it up in that serious allegation way, but there may be enough for a decision and then for whatever reason one writes the other letter.

MR. HOSKINS: With respect, madam, that is a sort of approached influenced by conspiracy theories if I can put it like that. What happens is one takes the Judicial Review context and there is a challenge to a decision and in the Judicial Review context one has generally the Decision letter as one does in this case, and certainly in all my experience in the Administrative Court I have never come across the suggestion that where you have a decision on its face which sets out the reasons the court will nonetheless require, for example,

disclosure of internal documentation to see if that is not in fact the real decision. In the Administrative Court the practice is not to disclose internal documents – I have done it very occasionally on a very limited basis, but certainly the approach in the Administrative Court is very far removed from the situation you have just described.

THE CHAIRMAN: I think we are going to have to look into that as to what the material is that is permitted in the cases.

MR. HOSKINS: Let me deal then with how that issue should be dealt with in terms of timing.

THE CHAIRMAN: I think we will need to know, will we not, how it is put by Cityhook?

MR. HOSKINS: How what is put, madam, I am sorry?

THE CHAIRMAN: How they are putting the question of the Decision, what they say the Decision is?

MR. HOSKINS: Yes. The question is one of timing on disclosure because what the Tribunal has said – I am thinking actually of one of the other *Claymore* Decisions, not the one that we provided in the bundle – it said that disclosure is not automatic in this Tribunal, which is clear from the Rules, and that the general test is that it must be "necessary, relevant and proportionate."

THE CHAIRMAN: Well there is *Quark* is there not, which says that the public Body has a duty to give disclosure.

MR. HOSKINS: Yes, there is *Quark* but that is in the context of Judicial Review which is not necessarily the same as the Tribunal rules. The Tribunal may, of course, refer across and be inspired by Judicial Review, but in the Tribunal it is not automatic and even in Judicial Review circumstances certainly "necessary" and "relevant" would come in and arguably "proportionate" would as well if a public Body were to go to the court and say "There is a proportionality issue here", that is clearly part of the White Book.

THE CHAIRMAN: But if there is a public duty in Judicial Review why is there not a public duty here?

MR. HOSKINS: It brings us back to the question we have just been discussing, which I have parked because I am going to deal with it in timing rather than dealing with it today. There clearly is a serious issue there, it is just a question of timing. In order therefore for there to be disclosure in this case it has to be necessary, relevant, and proportionate and, on top of that, one has the extra layer in relation to the public policy of protecting internal documentation. I mention that in particular, obviously there is also the issue about third party confidentiality but that is something the Tribunal is used to dealing with, but this internal documentation point is a problem, it is an issue that has been there in the previous cases but has never really been fleshed out.

THE CHAIRMAN: So we are going to have to consider that?

MR. HOSKINS: We are going to have to consider it, it is just a question of the most efficient method of dealing with it. We would submit the most appropriate way to deal with it is to order a preliminary issue on the nature of the Decision, for the Office to put in its evidence on the basis it is set out in the skeleton it would do so, and then ----

THE CHAIRMAN: When you say "evidence" you mean your witness statement or the documents behind it?

MR. HOSKINS: What we have said in the skeleton is that we would give witness statements as to the general approach to priority, the application of those principles in this case and dealing with certain of the factual matters that were raised in the notice of appeal relating to the factual background, but we will not at this stage provide any internal documentation because the principle that we are seeking to protect is that such disclosure does not take place in exceptional circumstances.

THE CHAIRMAN: I know we are going to discuss this at some length at some other hearing, but I have some difficulty in understanding what is meant by "internal documents" because everything you do is effectively internal documents and so that effectively means you do not give anything.

MR. HOSKINS: What one has in a case such as this is the Decision letter, which is either adequately reasoned or it is not. A party may seek to raise the sort of argument, madam, that you floated might be available to them, which is "Okay, the Decision letter says this, but in fact it is just a cover for another reason". But certainly – again one takes the analogy of Judicial Review – internal documentation is not disclosed. It is not commonplace for public bodies to disclose internal documents.

THE CHAIRMAN: I have certainly seen internal documents being disclosed.

MR. HOSKINS: It does happen sometimes, but we have referred in the skeleton to the legislation on this issue. There is clearly a public policy issue there and in Judicial Review certainly – I am sorry to press my experience – it is not common, it is not done as a matter of course that internal documentation will be disclosed.

THE CHAIRMAN: You are going to have to make that case out.

MR. HOSKINS: Absolutely, yes, I am simply dealing with the most efficient method of doing it, and what we are suggesting is, as we suggest in the skeleton is that we put in the evidence that we have indicated we will put in, we will not disclose any other documents that are internal because that is what we are trying to protect. When the Tribunal has that evidence we say it will then be in a much better position, when we come to have the argument, to decide what is and is not necessary in terms of necessity, relevance and proportionality.

THE CHAIRMAN: So you are saying that, first of all, you want to put in your evidence?

MR. HOSKINS: Yes.

THE CHAIRMAN: Then we can consider disclosure because we will then have it against the background of whatever you have put in.

MR. HOSKINS: And what I suggest would be helpful – although it is obviously up to Cityhook whether or not they wish to do it – in this sort of area rather than having a blanket request (particularly in an investigation that has been going on for four years) to say: "Give us all the internal documentation for four years", you are going to struggle, in our submission, to show that all of that is necessary, relevant and proportionate. But having seen the way we put our case to make a specific application for disclosure saying these are the categories of documents that we say are required, and this is why, and then we can have a structured debate about disclosure.

THE CHAIRMAN: When you are preparing this witness statement, you are preparing it against your internal documents, I assume? So you are going to be looking at your internal documents.

MR. HOSKINS: We have knowledge of them, yes, of course, yes.

THE CHAIRMAN: So at that stage if the public duty applied here, and any of those documents were material to the issue then those would be documents which may be disclosed on Judicial Review voluntarily. Where I am groping to is whether, while you are doing that exercise, you might like to consider whether there are certain documents which you would disclose voluntarily?

MR. HOSKINS: I think the problem with that, madam, and obviously I am speaking on my feet ----

THE CHAIRMAN: I am also "speaking on my feet" in that sense.

MR. HOSKINS: One of the problems in this area – obviously I had to think about this in preparing what we were going to say today – is that one finds a number of principles that clash, but not necessarily surprisingly authorities that tell you how to resolve the clash. So one has a number of principles pulling in different directions and Judicial Review is a good example, full and frank disclosure sounds as if that would require everything, but the reality is that in the Administrative Court it is not commonplace to disclose internal documentation which leads to a decision.

THE CHAIRMAN: But I just wondered when they do and when they do not, that is what I hope we are going to get some help on when we look into it.

MR. HOSKINS: Certainly that is one of the things we will have to look into. I had a chance to look at it briefly before today, but it is surprising how little there is. It may be a full investigation uncovers that.

THE CHAIRMAN: It may be that cases of this sort are the sort of cases that you do disclose. I suppose it may be that this sort of case is the case you do not disclose, but there may be a category of cases in which one does it and it may turn out that we can analyse that category and see whether this sort of case falls within or outside that category.

MR. HOSKINS: Precisely, but what we are keen to do if we are to have – and clearly we are going to have – a debate about disclosure is to have a structured debate, structured both in the sense that you have suggested in terms of the law, but also structured in terms of what information is actually necessary to decide the particular issue in this case.

THE CHAIRMAN: It may be possible to put the onus on the appellant to say what documents are in your files makes it very difficult on an application which is similar to a Judicial Review application and that is why the courts have said that there is a public duty, and that is why I am wondering whether, in the first instance, one could consider whether there were documents which you would voluntarily disclose and/or possibly the categories that you would not disclose.

MR. HOSKINS: A potential difficulty in that sort of exercise, of course, is it being clear to the Tribunal what is not being given and why, because one does not want to give the impression to the Tribunal – "Here is a witness statement, here are some documents" and nothing else. We have to be very careful.

THE CHAIRMAN: That is why I said it is possibly an indication about what you are not disclosing.

MR. HOSKINS: Yes.

THE CHAIRMAN: But anyway you will have to go and think about that.

MR. HOSKINS: Yes, but I think all those of us who have practised have been in a position of having to draft a specific disclosure request, admittedly I am thinking here of commercial litigation.

THE CHAIRMAN: Yes, but at the moment Cityhook is not represented officially and we are not sure at the moment on what basis they are represented and whether they will be represented on the disclosure application so I think we have to look at it both ways.

MR. HOSKINS: Because obviously the timing issue I am suggesting is structured, we will deal with that point because we will know whether or not they are going to be represented and then we will know whether the onus falls on Cityhook or whether it falls on the Tribunal and us – it probably falls on all three of us all the time.

THE CHAIRMAN: I think probably. I am not sure that in the Judicial Review cases where they say that you have a public duty that that depends on whether or not there is somebody who is unrepresented, that public duty applies generally.

MR. HOSKINS: Absolutely, yes, absolutely. All I was going to say in terms of an analogy of sitting down to draft a specific disclosure request is of course we have all had the situation where you do not know exactly what the other side has, but you know what your own case is and therefore it is generally helpful to start the debate with the claimant or the appellant saying "Given the way I want to put my case these are the categories of documents that I think are relevant."

THE CHAIRMAN: Anyway, Mr. Hoskins, we have probably explored that sufficiently.

MR. HOSKINS: Thank you.

THE CHAIRMAN: What you are saying is that you want to put in some evidence. Having regard to what our discussion has been today you will go and consider what you are going to give in that evidence?

MR. HOSKINS: Yes.

THE CHAIRMAN: At that juncture we can look and see what else should be within an application for disclosure, and then we can consider disclosure.

MR. HOSKINS: It can be focused on either by the claimant – hopefully the claimant indicating what categories it thinks are relevant and, if not the Tribunal may take that upon itself.

THE CHAIRMAN: We may have to have a hearing to deal with it, yes.

MR. HOSKINS: But we say the merit of that is its structure. These are difficult issues, surprising, it seems they have not been dealt with – certainly, not so surprising in the Tribunal given that we are still in relatively early days – and we need to dig deeper into the Judicial Review field.

In relation to the other items raised which relate to details in the annex, the reason why I introduced my submissions by saying that it is important if we are having a preliminary issue or not is, with respect, all those issues will only rise if the Tribunal has jurisdiction.

THE CHAIRMAN: I am not sure that that is necessarily correct, because those matters may go to the question of whether there is a Decision or a non-Decision – a Decision for a non-infringement or an infringement.

MR. HOSKINS: The reason I hesitate, madam, is obviously I have had slightly longer to read the papers but I cannot see how that would arise in this case. Even if one takes the structure of the Appeal one has the annex to the Decision which sets out detailed responses to the consultation on the provisional closure letter and one sees effectively what was said against the closure, and then what the Office says. Those questions, with respect, are really going to the exercise of the discretion. If one is looking at what is the nature of the Decision – perhaps we can just take up the Decision – the structure of it is quite stark. I have it at tab 1 of Cityhook first file.

THE CHAIRMAN: Yes, I have it elsewhere.

MR. HOSKINS: If I can pick it up at p.2, "Grounds for the Investigation". What one has there setting out the history, the procedural history of what has happened. Then when one gets to para.15 the Decision is quite open, at that stage it was felt that it was appropriate, there was sufficient evidence on file to authorise the drafting of a Statement of Objections and one sees that in para.15.

Then the first part of para.19 is dealing, if you like, with the normal investigative process. The case team submitted its draft Statement of Objections for peer review in August 2005. There was a case scrutiny meeting, etc., that is the normal process. Then in the second half of that paragraph we are told that there was a programme of re-organisation, one of the aims was better case prioritisation:

> "Against this background both the Collective Boycott Case and the Collective Setting Case were reviewed afresh by the newly appointed Senior Director competition case worker and the new Branch Director of Competition Enforcement 4."

and then we are told that for reasons of administrative priority the drawbridge was brought down.

When we come to look at the question of: "Is this an infringement decision, or a non-infringement decision, or a decision to close on administrative priority?" when we get to the sort of detailed argument that comes out of the annex that is really not going to help the primary question.

THE CHAIRMAN: The question that comes to mind is when one has gone so far down an investigation to get to a draft Statement of Objections whether by closing it at that stage that is actually saying: "Well, it is non-infringement", and that is why what was going through my mind whether the other matters that I raised assist in that regard – I am not saying whether they do or they do not but that is the thought process.

MR. HOSKINS: Our submission is, and again you will have seen it from the skeleton ----

THE CHAIRMAN: We know what your submission is.

MR. HOSKINS: -- is that this Decision speaks for itself, this is the Decision. It is clear from this that it cannot be an infringement – I do not want to trespass too much into arguments we may have if this Tribunal has jurisdiction. It cannot be an infringement Decision because the Act tells us that there can only be an infringement Decision if the parties who are the subject of the Decision have had a chance to make representation so it cannot be that.

THE CHAIRMAN: So it will have to be a non-infringement Decision.

MR. HOSKINS: It can only possibly be a non-infringement Decision. Interestingly that is of course not what Cityhook's Appeal is suggesting, their focus is very much on there was so much suspicion the Office gave the impression it was going to find an infringement, so that is not

actually the way they are putting it, but one comes to a non-infringement Decision. Again this Decision is very candid because it accepts that there is evidence of potential infringement, and it accepts that with further work it could well be that an infringement would have been found – we do not know, but it accepts that as a premise, and it is very clear, the Decision was despite that we are not going to do any more work on it.

With all due respect, one has to be very careful about these sorts of cases because these cases are going to come up again, administrative priority, the Office has only recently started – perhaps because of its reorganisation – taking this sort of step, and it is going to come up again and again and it is very dangerous in our submission if one is to treat these as full blown merits' type appeals, and we say that would be the wrong way to deal with it.

Secondly, the starting point in these sorts of cases should be the Decision letter, and it is only if, having read the Decision letter and having seen the Office's evidence, that it looks like there is a real problem somewhere, or a real issue which has to be dubbed down into that that digging down should be done. Again, I guess this ties in with my first submission, one should not start at the first CMC on the basis of "we need to see everything". I am not saying that is what the Tribunal is doing, I simply state that as an example. One should start with a focused approach and say "Let us get the Decision letter, let us see what the Office has to say and then let us come back to this and see if we need to take it out of the norm." The reason why this has come up particularly in this case, not surprisingly, is of course precisely because there is so much documentation and there is a certain amount of irony in the Office closing a file because it wants to devote resources elsewhere and then finding itself in a full blown merits-type case. I am not saying that will not be necessary in some cases, but it is a problem to be careful to judge properly whether that is necessary or not.

THE CHAIRMAN: There is an irony you have raised, and there is another irony because this investigation has been going on for many years and the cost of that investigation is very highly significant – I will not say how much because I am not sure I have the right figure in my mind but it was a very large sum – and one had got to Statement of Objection.

MR. HOSKINS: Yes.

THE CHAIRMAN: And then all of that work is abandoned, and in abandoning it one goes through the procedures for abandoning it and therefore has all the consultation and all of that, so again quite a lot of cost involved in that. Then one gets to the situation here and there is further cost, and it does cross one's mind as to whether all of that cost and resources added to the first lot, where the priority is, but that of course is not a matter for this Tribunal.

MR. HOSKINS: No, but I do not think that detracts in a sense – my opening remark was this should be a preliminary issue. Why should it be a preliminary issue? It is because it is important to focus on what has to be decided at each stage and if one follows the logic of my submissions ----

THE CHAIRMAN: I am not sure anybody is saying that it should not be a preliminary issue.

MR. HOSKINS: I want to develop that. Jurisdiction is a preliminary issue, disclosure should be targeted and the scope of submissions that have to be made in order to determine jurisdiction should also be targeted. The gist of my submission, I guess, at this stage is saying it is too early and it is premature to assume that we have to go into all the details of the annex before one sees how the Office is going to put its case. It may well be that if that is the way it is to be done ----

THE CHAIRMAN: It is not only how the Office puts its case it is how the Appellant puts its case.

MR. HOSKINS: Yes, well that is very much part of my submission. One can either say everything is relevant but we say that would be completely inappropriate in this case but if we are to start digging down into internal documentation, etc., internal reasoning, there has to be a good reason for doing so and it has to be a reason that has been raised by the Appellant, if they are capable of doing so, or indeed by the Tribunal if they are not.

THE CHAIRMAN: There may be a stage before the stage you are addressing because we have a litigant in person who has prepared his notice of appeal, but if there is now a legal representative who is going to step in maybe that ought to be reviewed before you put in your evidence so you know where you are directing it to. It might be the stage before.

MR. HOSKINS: If the Appellant is going to reconsider the way it puts it case in the light of legal advice then it is sensible that we know that now rather than after we have addressed the case that is currently put.

THE CHAIRMAN: So we need to see what is said.

MR. HOSKINS: Madam, yes. I do not think I am particularly disagreeing with anything – I may be wrong, I may be right, I am simply trying to encourage particularly because of the heavy amount of documentation in this case a structured and a focused approach and hopefully the way we have suggested would achieve that.

I think the only other point I had to raise, and again it was not what was mentioned in your opening remarks but I hope it is to raise it, and that is the scope of the Appeal, but it ties in, madam, with what you have just said. We raised, by way of letter to the Tribunal and copied to Cityhook, this issue of how the opening part of the notice of appeal and the closing part refers to a challenge to the decision to close the file on the Collective Boycott and Collective Setting Investigation, but there is as far as we can see no argument whatsoever going to the

Collective Setting investigation and I know from having seen the High Court pleadings that Cityhook is only taking the Collective Boycott Claim forward in the High Court – it does not seem to be interested in the Collective Setting, which of course you will have seen from the Decision letter, it was not the subject of Cityhook's initial complaint, it is something that the Office decided to take up of its own volition. So it would be helpful if Cityhook is really only concerned about Collective Boycott for us to know that know as part of the process of focussing on the issues. That was the only other matter I wished to raise.

THE CHAIRMAN: Thank you very much.

MR. HOSKINS: Thank you.

MR. SHOVELL: Shall I have a go at responding to some of the points raised?

THE CHAIRMAN: Yes.

MR. SHOVELL: Madam Chairman, you have raised quite a few of the points already that we intended to raise with you which explains our silence to date. Several matters where we had exactly the same issue we find the Office of Fair Trading's 23rd June letter quite opaque and confusing and therefore we feel it is essential to have disclosure of the documents underneath so that we can understand that.

One of the areas of confusion which you have again picked up on is that we made a complaint that BT, Level 3, Global Crossing, Tyco, Alcatel and a number of other leading telecoms' companies banded together to form a cartel to prevent Cityhook's technology from being deployed in the market. We say that they entered into an agreement which had as its object preventing competition, so we are confused by the OFT letter suggesting that they have made a decision not to proceed because of the effect point. We feel that that has been further confused by the Wayleaves investigation which they have taken, and we are concerned that they may have made a decision that the Wayleaves investigation did not have an effect on competition and that that decision may have somehow coloured the decision in relation to the Cityhook investigation. So counsel is correct that we do not have a High Court interest in the Wayleaves investigation but until we understand how the OFT ran the two investigations and made their decisions we feel it is appropriate to keep both of those investigations under consideration.

You asked about the three jurisdictions and we have been transparent with all jurisdictions because they clearly have an entitlement to know. We launched High Court proceedings on a protective basis given the OFT's position there is a stay application scheduled for tomorrow at 12 o'clock where we understand that a number of defendants have suggested that the High Court proceedings be stayed pending the CAT Appeal. We have put in writing on record to those defendants that we agree that in principle unless something fundamentally unexpected

came out of this CAT hearing today, so our expectation is that the High Court proceedings will be stayed tomorrow unless someone else objects to that.

In relation to Judicial Review it may be that we need to file a protective application, we need to take legal advice. My lay instinct is that the Competition Appeal Tribunal is far better placed to deal with an appeal against an OFT decision and it would seem to me that maybe the best approach, if we file at all with the Administrative Court would be to immediately stay such application, so at the moment we would expect that the CAT would be the only Body considering the matters in dispute between the parties and therefore your timetable can reflect that clearly. If anything changed we would feel obliged to notify you immediately.

THE CHAIRMAN: You appreciate the time limits on the Judicial Review?

MR. SHOVELL: Unfortunately, yes.

THE CHAIRMAN: You have a very short time.

MR. SHOVELL: Unfortunately we are aware of the time, and the difficulty of litigants in person producing one track of jurisdiction is difficult enough, three is ----

THE CHAIRMAN: To have to do three at once is very unfortunate.

MR. SHOVELL: We understand from a disclosure point of view clearly each jurisdiction is entitled to understand what the other ones are doing.

THE CHAIRMAN: (After a pause) If it would help, we would be prepared to provide you back with one set of documents so that you can use those to lodge them at the Administrative Court.

MR. SHOVELL: Thank you I will check how many we have left. That is a kind offer, if we could revert off-line on the timing of how we make that application.

THE CHAIRMAN: Am I right in thinking you are being advised in relation to that application, so we do not need to explore that further as to what you need to do? Is that all right?

MR. SHOVELL: That is okay apparently.

THE CHAIRMAN: Because otherwise we would have to try and make sure you understood what you needed to do, but if you ----

MR. SHOVELL: I believe we are going to be advised on that point, so much as I am very tempted by the kind offer I think we should leave it at that.

In relation to the disclosure point, I read the skeleton arguments that counsel very helpfully submitted to the OFT and they passed on to us. I do not think it is helpful for me to go through the entirety of them given that there is going to be a hearing to discuss this, but it may be helpful to make a few immediate thoughts on the comments that counsel has made. He refers to 500 lever arch files in the OFT's possession. Just to be clear I would have the expectation that disclosure of the OFT would be a tiny fraction of that. If it helps them understand the sort of documents that will help us to understand the OFT's decision making process, whether it

did make a non-infringement decision because of effect or otherwise, it seems to focus on quite a narrow channel. If our lawyers later feel that there are other documents that are relevant then I dare say we will revert. But it seems to us that the case team concluded that the Competition Act had been breached. They told us that they intended to issue a Statement of Objections, they told some of the parties that they intended to issue a Statement of Objections. Rather strangely a letter from the Chairman of the OFT suggests that we should not have had an expectation that they would issue an Statement of Objections – that is in our bundle, it is a letter dated 20th May 2006. However, a peculiarly helpful act by one of the Interveners, Alcatel, has confirmed that they too had an expectation that a Statement of Objections would be issued. It is para.16 of Alcatel's permission to intervene. They explain:

> "In the meeting between the OFT's case team and ASM [Alcatel Submarine Networks Ltd] on 24th January 2005 the OFT informed ASM that it was likely to be a recipient of a Statement of Objections setting out the OFT's case in respect of both the suspected Collective Boycott and the Collective Setting infringements."

Cityhook was left with the same impression at the same time. We are left confused by the OFT's decision making in this case. We understand a proportion of it but round about 13th October 2005 a Statement of Objections, which we understand was of the order of 600 pages – it might have been paired down a bit by that stage – was handed for Panel review. That Statement of Objections had with it core exhibits. Now, I do not know how large those core exhibits were, whether that is five lever arch files, or ten lever arch files but it is not 500 lever arch files, so there is a useful start point to disclosure, the Statement of Objections plus the core exhibits attached to it.

We understand that new OFT management – despite four years of investigation – concluded the case should not proceed. We reached the same instinctive conclusion, Madam Chairman, you articulated earlier that after four years of investigation to suggest that there is insufficient evidence seemed to us to be in the ball park of a non-infringement decision and in order to properly understand that we thought it was necessary to see the papers surrounding the U-turn between 13th October Statement of Objections with exhibits, and the 24th January 2006 provisional decision to close.

One of the papers, as we understand it, was prepared for Mr. Fingleton (CEO of the OFT) which was discussing impact on market, impact on consumers, I think which could fall into the category of "effects." We share your confusion as to whether the OFT has closed down this investigation on the basis that it is decided there has not been an infringement because of effects. If they have we would understand that as (a) an appealable decision; and (b) for the same reason that you articulated has been made in error. So from a discovery perspective we

understand that it has to be proportionate; we are not asking for 500 files. As far as how much time it would take the OFT to produce those documents they already have 15 copies of the Statement of Objections with exhibits which have been reviewed by numerous people within the OFT, and therefore that is a photocopying exercise.

As to the two or three other internal briefing papers that followed between October 2005 and January 2006 again it is hard to imagine that it is an oppressive amount of documentation. I understand counsel's concern that there should be restrictions on OFT documentation being circulated and he makes the point that public Bodies cannot be prejudiced from having brain storming activities freely discussing things for fear that those documents would one day get on the record. I would suggest that as a matter of commonsense during an investigation that cannot apply to something like a Statement of Objections because by its very nature the case team believed it was ready to be publicly served about a month after the Panel Review Meeting. So that document cannot be viewed as something which was in any way hypothetical, speculative or brainstorming. It was considered the measured and reasoned conclusion of four years of investigation and so we do not see that there should be a public policy concern about that being released. With those chain of documents between October and January I suspect under the 80:20 rule we will have the vast proportion of any disclosure that is necessary and I do not believe that that would be oppressive on the OFT.

As far as us stating our case, it is the Catch 22 that you identified earlier. We find their letter confusing and it is very difficult for us to articulate exactly how their decision was made without sight of the documents during that key period.

THE CHAIRMAN: I think that is very helpful that you have effectively identified two areas of documentation and I am sure the OFT have heard what you have said and will consider that.

MR. SHOVELL: Are there any other questions?

THE CHAIRMAN: Well the other question is whether it would be helpful if you looked at your notice of application and whether you wanted to review it at this stage because I am not sure from your notice of application that it is clear that you are putting it on the basis that there is I think you just said a "decision of non-infringement", and it may be helpful if you actually set out why you are saying that now so that the OFT can consider it.

MR. SHOVELL: I am obviously happy to do anything that the Tribunal thinks is helpful. The only general concern I have is we are expressing there a hypothesis of how the OFT may have arrived at its decision. We are trying to read through a letter from the OFT which seems to us fluid and confusing and therefore the best that we can do is run hypotheses. If we had a small amount of disclosure as previously described it would be much easier for us to articulate our case rather than be pure guesswork.

THE CHAIRMAN: The problem that you have is that we only have jurisdiction if there has been a decision ----

MR. SHOVELL: I understand.

THE CHAIRMAN: -- and the decision has to be a decision of infringement or non-infringement. The difficulty with a decision of infringement is that the OFT's procedures are such that a draft Statement of Objection then goes out to consultation and it is only at the end of that, so Mr. Hoskins is saying he would submit it cannot be a decision of infringement. So then one comes to a decision of non-infringement, and from what I understood you were saying just now that is the way that you would like to put your case. If that is the way that you would like to put your case I just wonder if you revisit the way that you put it in the notice of application, you might want to expand what you have said.

MR. SHOVELL: If I could just have a 30 second consultation? (After a pause) I am not entirely any the clearer in our response.

THE CHAIRMAN: Do you understand what I am ----

MR. SHOVELL: Yes, I completely understand the question, my lack of clarity as to the decision is how to respond to it.

THE CHAIRMAN: What I think Mr. Hoskins may say is that what is in your letter – and this is why they wrote you a letter about going for Judicial Review ----

MR. SHOVELL: I understand.

THE CHAIRMAN: -- that what is in your letter on the face of it are questions relating to Judicial Review but are not questions relating to the Decision, as to whether or not there is a decision of an infringement, rather than a decision as to priorities. I say "on the face of it" ----?

MR. SHOVELL: I understand the nature of the question that you are raising.

THE CHAIRMAN: What I am wondering is whether or not it would be helpful, both for you and for the OFT, if you clarified that.

MR. SHOVELL: On p.2 of our letter at (f) we explain "Overall it appears that in its 23rd June 2006 letter the OFT has sought to conceal ...." actually I should go through the previous few points. "The OFT conclusion that the Act was infringed", and in that case I am referring to management that was in place before the 2006 Review was done, so I should possibly phrase that as "the OFT previous conclusion that the Act was infringed." "The fact that the OFT infringement conclusion was communicated to certain telecoms' companies, and that only after a change of Chairman, a second change of Branch Director, a change of CEO the new OFT management decided to implement a U-turn and abort the case." I can understand why counsel would wish that clarified, but the "U-turn" was intended to imply that previous OFT management were clear that the Act had been infringed, and I guess it falls into a category of

whether new management either were not sure whether it was infringed, which is what Mr. Hoskins is suggesting, or whether they did, in fact, decide on a technical defence on effects that it had not been infringed. My problem is that it is only hypothesis at this stage for us and it can only ever be hypothesis until we actually understand the thinking and documentation behind that.

THE CHAIRMAN: Well maybe we will ask Mr. Hoskins in a moment. I can understand now how you are putting it and the only question is whether you might want to review the documents so that you might be able to put it more clearly which might make it easier to know what documents are relevant and what documents are not relevant.

MR. SHOVELL: Can I ask Mr. Greene if he might make a few remarks?

THE CHAIRMAN: Yes.

MR. GREENE: It is only this, madam, I think what is being put, and I think explained to day, is it is the U-turn process which has become highlighted in this Appeal. A Statement of Objections was to be issued and Cityhook was told it was to be issued in October and there was a subsequent U-turn and it is that decision making process after that that I think becomes the centre of this Appeal.

THE CHAIRMAN: What I understand you are saying, which is sort of what I was discussing with Mr. Hoskins before, is that if you get to a stage of doing a draft Statement of Objections and then reviewing that Statement of Objections and deciding that you are not going to take the case further, then that in itself could amount, depending on the circumstances, to a decision of non-infringement. If at the same time you take a decision – which is why I do not think it is a conspiracy theory as Mr. Hoskins was talking about – at the same time you are reviewing files and you take another decision that in fact you are not going to go any further that is a different decision, but at the same time as taking the priority decision you are actually taking a decision of non-infringement, it is all part of the same ----

MR. GREENE: Well not only part of it I think the possibility is that the decision that is made and communicated, actually simply is caused by an earlier decision in someway, and that is not a conspiracy point, but simply a causation point.

THE CHAIRMAN: No, it is not saying there was anything wrong in doing that, it is saying that on the facts that is what happened.

MR. GREENE: Exactly.

THE CHAIRMAN: Now whether it would be helpful to set that out because clearly the submissions Mr. Hoskins was making did not appreciate that that was the way that that was being put, and so I just wonder whether it would be helpful for that to be set out before the OFT put pen to paper, because then they would know the direction in which they should put pen to paper.

MR. GREENE: Well insofar as it is not explained and they do not understand it from today, I see no particular difficulty. I think the timing is a question – the timing of that process.

THE CHAIRMAN: Well it will not take you long. I do not know what your arrangements are but it would not take very long for you to put pen to paper like that.

MR. GREENE: I think that is absolutely right. I suppose my difficulty is our arrangement yet with Cityhook, I am not quite sure how long that may take.

THE CHAIRMAN: I must say if Mr. Shovell has done all this work it is a very impressive piece of work.

MR. GREENE: Oh indeed and of course running also a High Court case and possibly a Judicial Review in the process.

THE CHAIRMAN: And possibly a Judicial Review case as well, and previously this investigation.

MR. GREENE: I suppose my slight difficulty standing here is that it may need some review, and insofar as ----

THE CHAIRMAN: Can I suggest something? I would suggest that when we make the directions we put in a possibility of doing this and then it either gets done or it does not get done, and that gives you the opportunity to go away and consider it.

MR. GREENE: Yes, I think that is right, it is a sensible approach. There are two other points if I might address them? First, the preliminary issue, I think you have interpreted and I do not think this side would have objection to it being dealt with ----

THE CHAIRMAN: It is the sensible way of dealing with it.

MR. GREENE: That would be a sensible way to deal with it. The other matter is the disclosure, and I think Mr. Shovell has now tightened down the range of disclosure and I think my learned friend has been talking about targeting, but of course it is very difficult for the Appellant in these circumstances to know where the target in the way the OFT itself was setting that target. Insofar as you are minded to allow a process of a statement first, I do think there should be some degree of direction that disclosure should be at least strongly considered as exhibits to that statement for the period that has been identified, and possibly for the documents that have been identified. I would strongly put that to the Tribunal at this stage.

THE CHAIRMAN: I think what has happened in the discussion is that certain documents have now been identified – or two categories have been identified – and that will have to be considered as to whether those categories will be voluntarily disclosed.

MR. SHOVELL: Can I make a general statement in that I understand the OFT's reluctance or reticence to give disclosure of anything as a point of principle, and I sympathise. As an investigating Body their inclination, once they have made a decision is to move on to those other priorities. This case seems to me unusual – or at least I hope that in the context of the

OFT it is unusual – that a case that was supposed to be concluded in 18 months only reached the point of Statement of Objections after four years, that is quite a substantial overrun even in the building community. I think having amassed 500 lever arch files of evidence and taken four years having indicated that it would issue a Statement of Objections in 2004 and then indicated again in 2005 I would hope that this is an extreme case as far as the OFT and its case handling, and its decision making. If it assists the OFT in giving voluntary disclosure in this particular case to distinguish this from the other cases then as a matter of fact that would seem to be reasonable.

THE CHAIRMAN: We have got really out of order here because you really ought to have started but Mr. Hoskins started.

MR. GREENE: Well I do not know whether it is now time for the OFT to comment.

THE CHAIRMAN: Well I think it is for Mr. Turner, who is trying to get up, I think.

MR. SHOVELL: Can I raise one point in relation to the intervention of Alcatel?

THE CHAIRMAN: Yes.

MR. SHOVELL: I read the fax that Level 3 sent last night, which was along the lines of: "... on the procedural matter whether there is jurisdiction we add very little to this process and therefore we wish to have our application to appeal contingent on the CAT deciding it has jurisdiction." That seemed to me to be an entirely rational and logical suggestion to minimise cost and effort and confusion. I would have thought that it was logical for Alcatel Submarine Networks to be in exactly the same position. I was not quite sure of the logic of two identically placed Interveners being treated differently procedurally. Whilst Mr. Turner I understand is highly eminent in this area, so when I suggest that he brings nothing to the party I mean that as no disrespect to him professionally. It struck me that OFT was perfectly capable of arguing its position as to whether you have jurisdiction and it did not really need any other Interveners to help it argue its position as to whether the CAT has jurisdiction. So my suggestion on the position of the Interveners is that Level 3 have summarised it intelligently and it should be followed, and that Alcatel should be treated the same way as Level 3 if it is up to the CAT's discretion.

THE CHAIRMAN: We will hear what Mr. Turner says on that.

MR. TURNER: Thank you, madam. I do not apprehend that there is any opposition to our intervention at least on the substance of the case, and presumably therefore we could be granted permission at least for that without any demur on the part of Cityhook. But if it is necessary to do so I can briefly outline why we say ----

THE CHAIRMAN: You want to be here now, as I understand it, you say you have an interest?

MR. TURNER: On the issue of jurisdiction we say we should be granted permission to intervene immediately. As to our role, we would propose also to play a part in relation to any preliminary issue on jurisdiction. Briefly speaking, first, we are obviously affected by a decision of admissibility, we have an interest therefore.

Secondly, I can assure the Tribunal there will be no duplication. We understand that the OFT has the primary role. Any submissions that we make will be limited to brief supplementary points if necessary and there will be no duplication.

Thirdly, as the Tribunal is aware certainly I, as counsel, have appeared in the cases on jurisdiction and therefore I am particularly well placed to assist the Tribunal in relation to those if the need should arise.

Fourthly, in fact there is not a complete identity of interest between the Office of Fair Trading and ourselves, even in relation to the question of admissibility. Alcatel participated in the Office of Fair Trading investigation and we are affected in particular as to whether findings of fact were made in the course of that investigation, which is an issue that may arise in the course of the adjudication of the admissibility point. If the Tribunal were to make a decision on that issue, of course, it relates to s.58 of the Competition Act under which findings of fact made by the OFT in the course of an investigation may, unless the court otherwise directs, be binding on a party in civil litigation.

THE CHAIRMAN: I saw that point in your submissions. We probably do not want to get into it today as to whether or not there has to be an appealable decision for the purposes of those findings of fact.

MR. TURNER: It is unclear from the face of the section itself.

THE CHAIRMAN: So you are suggesting that it may be – I do not put it any higher – it maybe under s.58. If there are certain findings of fact which are made by the OFT during the course of an investigation, then even if they do not get to a Decision because there has been an appeal here (or whatever) that is sufficient to bring those findings of fact as relevant to and binding on a court?

MR. TURNER: That may be the case, I rely only on the express wording of the section itself.

THE CHAIRMAN: Well I will not make any comment – it is an interesting point.

MR. TURNER: So for those reasons in combination we say that we should be granted permission to intervene not only in relation to the substance, but also on jurisdiction. As I say, I can assure the Tribunal we shall not add significantly to the cost or prolong the proceedings.

THE CHAIRMAN: Normally you would not get the costs from anybody anyway, so you suffer the costs.

MR. TURNER: Yes. Madam, the second issue with which we are concerned is the format of the preliminary issue. We do support the OFT's approach to the procedure for the hearing of the preliminary issue.

THE CHAIRMAN: Do you think we ought to decide whether you are here before you make those submissions?

MR. TURNER: I am obliged.

THE CHAIRMAN: Do you have anything to say on the Intervener?

MR. HOSKINS: Not on the Intervener, no, madam.

THE CHAIRMAN: Would you like to say anything now that you have heard Mr. Turner?

MR. SHOVELL: I suppose some small points. The subtle issue he raises about findings of fact I understand his point could have merit in the second phase of your investigation if you are deciding whether to issue an Statement of Objections or direct the OFT to issue an Statement of Objections or make a final decision, however I do not understand how you deciding whether you have jurisdiction itself could amount to a finding of fact. If you decide that you do not have jurisdiction I do not understand ----

THE CHAIRMAN: The point is that if there are findings of fact that have already been made by the OFT, and that might become much more apparent in this appeal process, in the jurisdiction side, but it is actually the findings of fact at the OFT stage, if that became more apparent – and this depends on the construction of s.58 so there is a possibility on one construction that you would be able to rely on those findings of fact in the High Court litigation even though you did not have a full decision that you could rely on of infringement.

MR. SHOVELL: How would Alcatel be prejudiced by finding out about that after you had reached your decision on jurisdiction? I do not understand how they are prejudiced by ----

THE CHAIRMAN: Well they say they have an interest at this stage in order to protect their position. Is that how you put it, Mr. Turner, or could you put it better than that?

MR. TURNER: Well if any issue arises as to whether a finding of fact was or was not made we need to be there in order to argue our point on it.

THE CHAIRMAN: Because the decision would be dependent on findings of fact.

MR. SHOVELL: I have one final point from a practical point of view, we are discussing disclosure of Statement of Objections which we understand is covering numerous companies in the telecoms' industry, BT, Level 3 – I will not go through the list for the sake of the record – I would imagine that there are tremendous complexities of confidentiality if Alcatel are to be given that information at this stage, whereas there are no complexities of confidentiality in giving that documentation to Cityhook. So it would strike me that we would spend time on principles like that which would not otherwise need to be spent at that time. As a matter of

fact, the more parties there are to any kind of inquiry the escalation of time is enormous, and I speak from personal experience in the High Court proceedings, having eleven law firms representing an army of lawyers each saying the same thing slightly differently is tremendously time consuming, and I am concerned that Mr. Turner, eminent as he is, will find numerous ways to say the same thing slightly differently to the OFT, and that itself will put a burden on us and also put a burden on the CAT which, weighing up on a proportional basis, is not necessary.

THE CHAIRMAN: Thank you very much.

MR. GREENE: What I am a little unclear about from Mr. Turner is precisely what findings of fact he is talking about because insofar as those findings of fact sit in the Statement of Objections they will not go to the admissibility point. What I think he might be saying is that the admissibility point, the finding of fact or the finding – even though I have some logical problem with it – he is looking at is "Is there a decision?". We will go to the question of "is there a decision which can be appealed in this Tribunal?" I think we are perhaps moving towards the fact that there is a decision of non-infringement sitting behind it, and he cannot particularly have an interest in that process. Yes, he could have an interest in a finding of that nature, but ----

THE CHAIRMAN: I think what concerns him – and Mr. Turner tell me if I am wrong – is that in the process of looking at whether there is a decision of infringement or non-infringement it might become apparent that whether there was a decision of infringement or of non-infringement certain findings of fact were made by the OFT and there may therefore then be some submissions in the High Court that those findings of fact are binding on the High Court – I am not saying this is right or wrong – the question would then be whether or not there were those findings etc., and he would like to be here to protect that position in order that if we do go down that road he can make submissions as to whether those are findings at this stage. Is that correct?

MR. TURNER: Yes, in deciding whether the OFT reached a decision on infringement you have explained that you will look at what the OFT actually did and the discussion so far has proceeded on that basis. In doing that, the question will arise as to whether the OFT reached conclusions on certain subsidiary issues of fact or not? If so those decisions on the issues of fact may have an effect in parallel civil proceedings, and we wish to be there to protect our position in relation to that issue.

THE CHAIRMAN: Even if, at the end of the day, there had been no decision?

MR. TURNER: Yes.

THE CHAIRMAN: That is what I understood that you were saying, and that is a matter of a construction of s.58 which we are not going to get into.

MR. GREENE: Well, madam, I understand the s.58 point and the interpretation of it. I am still a little lost about how these are relevant to the admissibility point.

THE CHAIRMAN: Because if we are looking to see whether they made a decision – whether of infringement or non-infringement – we have to see what they found, and therefore there will be certain findings either that there were or there were not certain facts, and so we would be looking at that – or we would or we may be looking at that – and if we do go down that road of looking at that in order to see whether or not there is a decision he would like to be here to protect his position, because he would possibly like to be submitting "No, no, no, those are not findings of fact." His interest in doing that is that even if it was decided that this was not an appealable Decision he is worried that those findings of fact could bind him in the High Court.

MR. GREENE: I am entirely in your hands.

THE CHAIRMAN: It is a complicated argument.

MR. GREENE: Well if there is a finding of fact there is a finding of fact, because that lies behind the Decision. The ultimate question is: "Is there an appealable Decision at this stage?" Those findings of fact may lie behind it but they are findings of fact, but I suppose I ask for a bit of clarification as to what is intended. Is it intended on behalf of the Intervener in some way to overturn those findings of fact, or in some way affect those findings of fact?

THE CHAIRMAN: We are not sure where we are going to get to at the moment because we do not know what is going to happen at the next stage of this preliminary point. So the question is that there is that risk and because of that risk Mr. Turner says that he ought to be here. He says that he is not going to duplicate it, he is going to be very careful not to increase the costs or the time or everybody's resources, and he has this problem on s.58 – if it is a problem.

MR. GREENE: Can I just ask one procedural point? Is it intended then that the Intervener will take some part in any argument about disclosure, for instance? What part are they going to take in that or are they simply going to turn up when the issue is dealt with substantively before the Tribunal. I am not sure at the moment that that is a matter that we need to explore – I do not know what Mr. Turner thinks – but I would have thought we would have to consider at each stage whether or not the Intervener has a particular interest which is not a duplication of the OFT's interest and whether he can provide something which is of use.

MR. GREENE: If that be the case is a possible answer to that that any final decision about intervention at this stage is actually adjourned?

THE CHAIRMAN: What normally happens is that one allows the Intervener to intervene, but one can then decide through the CMC and directions, what particular matters he is allowed to

address us on and whether he addresses us only in writing or orally. He does not have to be given a free rein.

MR. GREENE: No, would you propose then that there should be some limits, or what limits would the Intervener propose to the intervention in this process?

THE CHAIRMAN: Mr. Turner?

MR. TURNER: So far as the preliminary issue is concerned, the point that I was going to make was that although it is not provided for in the OFT's skeleton argument we would envisage putting in as necessary brief written submissions, say, seven days after the filing of the OFT's skeleton argument. Therefore, following the structure indicated by Mr. Hoskins at para.18 of his skeleton argument what would happen would be that first, Cityhook has clarified its notice of appeal as I understand it.

THE CHAIRMAN: Well, may clarify.

MR. TURNER: Or may clarify. The OFT in any event wishes to put in evidence and there has been some discussion about the focusing of that evidence and the witness statement, with or without supplementary exhibited documents. After the exchange of skeleton arguments, and after the OFT's skeleton argument in particular, we would propose to add, if required, brief supplementary submissions within seven days of the OFT. In that way we do not apprehend that there would be any duplication of effort or any crossing of wires. So that would have been our proposal for the admissibility stage of this case.

THE CHAIRMAN: You probably do not know yet, but do you think you want to appear at the hearing?

MR. TURNER: We would propose to appear at the hearing. Having said that, I will sit down until you have made a decision on intervention.

THE CHAIRMAN: Yes.

MR. WILSON: If I could make a point. My name is Mike Wilson from Cityhook. I am a lay person – as you perceived Kenny is not quite so "lay", and we have unappointed representatives on my right hand side. The point I am going to make here is that we are dealing with an alleged cartel and it would appear to a lay person that the OFT have jumped into bed with the cartel on this point. It would appear that the cartel believe that the OFT does not have the skill to protect itself and to argue its own case, which concerns me greatly. I am hearing something about witness statements being made and, depending on the persons in the OFT who propose to make those witness statements and, given that we have already demonstrated today that the OFT has attempted to conceal some of the facts and to exaggerate some others, I would perhaps not rely on certain persons within the OFT and their witness

statement because they have essentially substantially written all their letters, the same person, and I could imagine the same person giving a witness statement and its all tying up.

That is all I have to say, thank you.

THE CHAIRMAN: Thank you very much.

(The Tribunal confer)

THE CHAIRMAN: We consider that Alcatel does have a sufficient interest in the outcome of the whole of the matter and also the question of jurisdiction that it should be able to intervene. The question of what the Intervener should do in the proceedings at this stage will be dealt with in relation to the directions on the CMCs.

All right, now you want to get up again, Mr. Turner, and deal with the next part – is that right or not – because I stopped you?

MR. TURNER: There was only one supplementary point in view of the way the discussion has gone. For completeness, and so that Alcatel's position is clear, the point you canvassed with Mr. Hoskins before the Tribunal rose, madam, you referred to para.21 of the Decision letter which became the focus for discussion and the issue of effects. I raise this now only to clarify it for Alcatel's benefit, both our position and to help to understand the nature of the case which is being made in the Tribunal. The part that you refer to states that this would have to include in particular in both cases – that is in relation to both of the two allegations – a more thorough analysis of the effect of the parties' behaviour on competition.

THE CHAIRMAN: Yes.

MR. TURNER: Now there was a reference there to "in particular" in both cases – a more thorough analysis of the effect on competition. We had laid emphasis on what that then led on to over the page in 24(b) on p.5, where under the heading "The Strength of the Evidence That There Has been an Infringement" first, the reference to gathering evidence as to effects is mentioned. Then the OFT went on to say that this would include an investigation of the plausible counter-arguments, whether in fact or law that the parties could put forward in their defence to justify their conduct. Therefore, in our submission, from the face of the document itself effects may be the wrong focus. The true focus so far as we are concerned will be that the case had not reached the stage at which a decision – a conclusion – had been reached, where the OFT had made its mind up because, as it is recording here, there was still the other side of the story to hear from the defendants, which includes ourselves, and that is one of the submissions that we will make in relation to jurisdiction.

THE CHAIRMAN: But that of course goes to the question of whether there is a decision on infringement, not to whether there is a decision of non-infringement?

MR. TURNER: That goes as to whether there is a decision on infringement in relation to the question as whether – leaving aside effects – the OFT might have made its mind up on object. That deals with the point that was canvassed before the break.

So far as a decision of non-infringement is concerned, that is where we would desire some clarification of the case, as you were canvassing with Mr. Greene. Does Cityhook allege that a non-infringement decision in this case was reached by the OFT on the merits? Listening to the discussion and, of course, we have not seen the notice of appeal, we heard very clearly the point that there was a U-turn. But a U-turn may be for all kinds of reasons and the decisive question for the Tribunal will be whether the U-turn was as a result of a decision of non-infringement on the merits. I make that point so that it can be taken into account by Cityhook.

THE CHAIRMAN: I think that is very useful, thank you very much.

MR. SHOVELL: I just wanted to pick up on one point. We suggested earlier that we found the OFT's 23rd June letter confusing and misleading in a number of respects, and counsel for Alcatel has relied on one of the bits that we found misleading, so it seemed appropriate to mention why. It suggests that the OFT thought it was necessary to conduct a further investigation into potential counter arguments, but the investigation had been going on for four years. We understand that all of the parties concerned here have made vigorous and numerous representations as to what counter-arguments should be put before we had been asked in s.26 Notice to address potential counter-arguments about two years earlier, so again without looking behind that letter we are not able to comment on counsel's comments in that regard at all.

THE CHAIRMAN: Yes, but this is why it might be helpful if you did expand on what is in your notice of application in order to highlight these sort of points, so that everybody understands why you are confused.

MR. SHOVELL: Okay.

MR. HOSKINS: I would just like to deal with a number of points. First, the need for clarification of Cityhook's case. We say there is a need for clarification and it should not simply be an option for Cityhook. By way of example, certainly, when I read Cityhook's notice of appeal, and particularly pp.2 and 3 which deal with the background to the investigation, there is an allegation there of a missing 18 months which seems to refer to a period beginning from some time in 2003 onwards. It is not quite clear where it begins and ends, but it is a period 2003/04. Very helpfully today we find out that the real concern is a period of October 2005 to January 2006. Against the background of a four year investigation it is obviously crucial for the Office to know with some precision what Cityhook's case is. The way it is put is that it is chicken and egg. We do not really know what our case is going to be until we have had disclosure, but

with respect the chicken and egg does not exist in the legal situation. It is incumbent upon a party to put forward its case on the basis of the information it has. That is not to say that if further down the line disclosure is ordered and Cityhook wishes to amend its case it cannot apply to do so because it should not be excused at this stage from being clear about what its case is.

THE CHAIRMAN: Mr. Hoskins, I think that both Mr. Shovell and Mr. Greene have heard what we have said today. We do not know what arrangements are going to be made in relation to legal representation and having heard what we have said today they will have to take that away and consider it. So I am not sure there is any benefit in going further than just giving them the opportunity to do something about it and then see where that takes us at this stage.

MR. HOSKINS: My concern simply is they may end up being legally represented, they may not, but one can see simply today that there are a number of potential issues – factual, legal – leading us off quite deep into the woods potentially.

THE CHAIRMAN: You want to take it stage by stage and I think the answer to take it stage by stage. We do not quite know what the position is going to be on the Appellant's side. Let us give them the opportunity to do it. If they take the opportunity then all is well and good. If they do not take the opportunity then you will have to consider whether you want to come back and make an application that they do.

MR. HOSKINS: Madam, that in a sense is what I am trying to avoid. I do want to take it stage by stage ----

THE CHAIRMAN: I know you are trying to avoid it but we do not know what the position is today so one does not know how to deal with that application.

MR. HOSKINS: All I am suggesting is there are two scenarios. If they are simply invited to clarify and they do clarify, fine – because there are only two options, either they do or they do not – if they do not we can see today we are going to have problems with the case as is. The Tribunal then will be saying "shall we order you to clarify?" It is a decision that can be made today and our submission is that there is clear merit in requiring clarification particularly because Mr. Shovell, in his own submissions to the Tribunal, has put forward a more particularised case, but it is not one that leaps out at you from here. So our submission is that one can see where this is going, and this is the stage at which they should be required to clarify their case, it would be helpful to us and, to be perfectly honest – I hope this is not putting it too high – probably helpful for them as well to do it. So we would ask for an order that they clarify their case in light of what has been said today, because if it is just an invitation we may find ourselves in problems two months down the line and we will just be having exactly the same discussion again.

What I would submit should happen is that they should clarify their case. We will obviously of course take account of everything that has been said today as well both by the Tribunal and by those speaking on behalf of Cityhook and we should be allowed to submit our evidence, and we will take a view on whether we think it is appropriate to include it in disclosure at that stage or not. Once we have done that there can then be, if necessary, a hearing to do with disclosure and that could either be prompted by an application by Cityhook or indeed by the Tribunal if the Tribunal sees fit, and once that disclosure has been dealt with we are into Cityhook's skeleton argument, the Office's skeleton argument, Intervener's if, indeed, it is deemed appropriate for them to take part in that way, and then the hearing of the preliminary issue. That is what we say should happen in relation to timetable.

The penultimate point, I raise the issue: is Cityhook pursuing the Appeal in relation to the Collective Setting case?

THE CHAIRMAN: They say they are.

MR. HOSKINS: My understanding is that they are. I just put down a marker that if the Tribunal has jurisdiction – and again we are going to have to come back to whether that has to be further particularised, but that is, as we said in the skeleton, a matter for another day, but I think it is important to recognise that that is a not fully formed case at the moment. I simply have to put on the record, in relation to Mr. Wilson's comments, obviously the office strongly rejects the suggestion that it has jumped into bed with any cartelist, or that those who make witness statements are not to be trusted, but I simply do that to put that on the record.

MR. SHOVELL: I just want a small factual clarification about witness statements. As we understand it the OFT core team was Marie Barb Gerard, Annette Baxter and they were assisted by a number of other people. We understand that Marie Barb Gerard, who would probably be best placed to serve a witness statement, or Miss Baxter, is on maternity leave and I am not sure if she has returned to the OFT.

THE CHAIRMAN: I think we have to leave it to the OFT as to who they decide will prepare the witness statement and put it forward, and then if you say there is a problem with that then that will have to be raised thereafter, but I think it is a matter for the OFT.

MR. SHOVELL: In practical terms we thought that Miss Baxter was probably closest to the evidence in the case handling, if that was of assistance.

(The Tribunal confer)

THE CHAIRMAN: We are not persuaded that we should order Cityhook to clarify the case, although from the discussion that has gone on today it may be thought that it would be helpful to do so. I thought it would be helpful if I said that before we went on with the rest of the directions. If you are going to clarify the case how long do you need?

MR. GREENE: I think our time is slightly difficult in terms of arrangements ----

THE CHAIRMAN: I appreciate that but I have to work out a timetable.

MR. GREENE: I have a personal difficulty next week because I working abroad.

THE CHAIRMAN: If I gave you 14 days?

MR. GREENE: I think 14 days ----

THE CHAIRMAN: -- would be fair?

MR. GREENE: And I think it would be on a pretty standard of 'if so advised' 14 days?

THE CHAIRMAN: Yes, if so advised. That is 29th September. So, if so advised to clarify case is 29th September. So that starts our timetable running, Mr. Hoskins. You then want to put in a witness statement and such disclosure as you consider appropriate to provide. How long is that going to take you?

MR. HOSKINS: Can I just take instructions? (After a pause) Madam, could we have two weeks thereafter for that?

THE CHAIRMAN: I said 29th so I have brought it up to the Friday, so I will keep going on Fridays, so that 13th October. Monday, 23rd October we could have a hearing on disclosure – whether that is a final hearing on disclosure or whether that is another CMC I am not sure.

MR. HOSKINS: It is probably difficult to tell just now because we will have to wait and see what evidence we put in and what disclosure and what view the Appellant takes of that.

THE CHAIRMAN: Shall we fix 23rd October at 10.30, so that we have a date?

MR. HOSKINS: There is no problem with that simply there would have to be a mechanism to tee-up the hearing, so something would have to happen between 13th and 23rd. For example, if there was to be a disclosure application by Cityhook in relation to what category of documents, there may have to be short skeletons before the hearing.

THE CHAIRMAN: Well they get your evidence on the 13th, are you saying 23rd is too early?

MR. HOSKINS: I am just pointing out there will need to be practical steps to tee it up. It may well be that just means time is too fine.

THE CHAIRMAN: Can I tell you why I have done that, because if we do not do that that week, we are going to have to get into the end of November/December.

MR. HOSKINS: Well I think either Cityhook or the Tribunal are going to have to trigger the need for a disclosure application because if everyone is satisfied with what we gave then it goes away. But if someone has a concern we all need to know what the concern is. So there has to be a mechanism to trigger the disclosure application and then there have to be skeleton arguments.

THE CHAIRMAN: Yes, I think it is a good point, I think 23rd may be too early.

(The Tribunal confer)

THE CHAIRMAN: Monday, 13th November, and then we can work back with a trigger. Is that all right?

MR. HOSKINS: Yes, madam.

THE CHAIRMAN: That means that 13th October you get the evidence and whatever disclosure the OFT is prepared to give voluntarily. How long do you need to have a look at that and decide what you ----

MR. GREENE: What is put to me from the side is 14 days. I am just trying to see how that would fit in because obviously there may want to be a response.

THE CHAIRMAN: I think we are probably looking at something like 10 days rather than 14.

MR. GREENE: Yes, it looks like it.

THE CHAIRMAN: So we start off with 13th October and if we said something like 24th October. So 24th October 06 is application for disclosure – yes, that would work because then we would have by something like 6th or 7th November the skeleton arguments in relation to disclosure. Should they be sequential? Would it be helpful if you put yours in and they put theirs in.

MR. HOSKINS: (After a pause) The silence was me thinking. I think it probably is because if Cityhook says "We want these categories of documents" it is probably helpful then for us to say "You cannot have them because ..." and then they can respond.

THE CHAIRMAN: And they then say: "Yes, we want them because ..." So if they are going to tell you on 24th October what they want, when can you do that by?

MR. HOSKINS: I would say it depends what they are asking for but that would not be a helpful comment.

THE CHAIRMAN: 1st November, and then they could put their response in by the 7th.

MR. HOSKINS: Could we maybe do 3rd November and 8th November?

THE CHAIRMAN: (After a pause) So we have 24th October, skeleton argument of OFT ----

MR. HOSKINS: 24th October is an application for disclosure?

THE CHAIRMAN: Application for disclosure and then your skeleton argument ----

MR. HOSKINS: 3rd November.

THE CHAIRMAN: -- and the Appellant's is 8th November.

MR. GREENE: Could I ask for maybe one day's grace on that if only because the service of the skeleton from the OFT ---

THE CHAIRMAN: Can we put you back to 2nd then, because I think 8th is the last day we can do?

MR. HOSKINS: Certainly, yes.

THE CHAIRMAN: Because we have to get all this round to the members.

MR. HOSKINS: Fine madam, yes.

THE CHAIRMAN: So it is 2nd and 8th, and then we have a hearing on the 13th and hopefully that can be a hearing on the particular items of disclosure and insofar as there are legal issues on disclosure we will hopefully be able to deal with them.

MR. HOSKINS: I am anticipating that should resolve all the disclosure issues, yes.

THE CHAIRMAN: So if we heard disclosure on 13th November shall we defer what we then do until 13th November, or should we timetable the rest of it?

MR. HOSKINS: In a sense it is whatever suits the Tribunal best. I know often we set a date ----

THE CHAIRMAN: I know, because then we have it in our diary.

MR. HOSKINS: -- because otherwise if you leave it late ----

THE CHAIRMAN: The diary gets full.

MR. HOSKINS: Exactly, and I do not think it is in anyone's interest to have this drag on indefinitely, so if the Tribunal can fix a date for the hearing, it may well be at some stage we have to change it but generally that would be helpful I would have thought.

MR. GREENE: I certainly agree with that.

THE CHAIRMAN: Then what do we need to do between the disclosure hearing and the hearing of the main preliminary issue?

MR. HOSKINS: I think we can probably move to skeleton argument after that.

THE CHAIRMAN: So at that stage can we have them at the same time or do we need them sequential?

MR. HOSKINS: I would suggest sequentially because then we are into a different issue.

THE CHAIRMAN: And you say Cityhook first on that?

MR. HOSKINS: And we say Cityhook first, absolutely, yes.

THE CHAIRMAN: Is that all right with you?

MR. GREENE: I suppose I question the sequential, whether Cityhook should come first or ----

THE CHAIRMAN: Well it is your application.

MR. GREENE: Yes, it is, I take that – I am just thinking about that.

THE CHAIRMAN: This disclosure point, are we going to have to go off and make a reasoned decision, because if we are going to have to go off and make a reasoned decision then we have to build in the time for doing that. That is the only thing about fixing a date – we do not know yet.

MR. HOSKINS: One option, of course, is to say: "These are the items to be disclosed, reasons to be given later".

THE CHAIRMAN: Well we do not know what we are going to be doing so we cannot. I think the answer is to timetable it and then if it turns out that this is a much more fundamental problem than anticipated we will just have to re-timetable it.

MR. HOSKINS: Either you can say on the day or shortly after "this is what we are getting", but given that there are quite deep legal issues, of course, there may be a possibility of an appeal by the other side – I do not want to get too excited about that but it is possible. But I think if we timetable now with the advantage of certainty of a hearing date for the whole thing, if we need to move it we need to move it.

THE CHAIRMAN: Just assuming for the time being that one has to go away and think about it and can come back quite quickly, so give us a week that is 20th November. Then you would need time to do the skeletons, prepare it, so we are now into the end of December are we not – so that probably means we are into January.

MR. HOSKINS: I think the hearing would have to be the end of December/beginning of January. If there was a date towards the end of December that would certainly work on the timetable but it may not work in terms of convenience, obviously.

THE CHAIRMAN: (After a pause) It would have to be the week of 22nd January because there is not a week before the end of January that I can do.

MR. HOSKINS: That is fine, that is the date.

THE CHAIRMAN: Is that all right for everybody?

MR. SHOVELL: Yes.

THE CHAIRMAN: How long is this going to take do you think?

MR. HOSKINS: I was hopeful it would not take more than a day, but I think it might be sensible to allow two days.

THE CHAIRMAN: 22nd is Monday, do you want to do it Monday and Tuesday, or Tuesday and Wednesday?

MR. HOSKINS: Tuesday and Wednesday is preferable.

THE CHAIRMAN: 23rd and 24th January. We will timetable it 23rd January with a day reserved 24th, so we will try and fit it into one day, it is not that we have two days in the way that we do.

MR. HOSKINS: Absolutely, yes.

THE CHAIRMAN: So going back from that, now that we have done that, we have skeleton arguments. Mr. Turner, I thought we would come back and see what you wanted to put into this timetable – is that all right?

MR. TURNER: Yes.

THE CHAIRMAN: Mr. Greene, you were going to go first, or the question was whether they should be sequential. If they are sequential you do go first because you are the Appellant. I think it is quite useful because they get yours, they can answer yours and then, if necessary, you can answer theirs, whereas otherwise we get a double round.

MR. GREENE: Well I am in your hands.

THE CHAIRMAN: When do you want to do that?

MR. GREENE: The only point I raise is that do I understand that an order in relation to disclosure will be coming out on 20th ----

THE CHAIRMAN: No, you do not understand that.

MR. GREENE: Ah, sorry.

THE CHAIRMAN: What I said was that we would have the hearing on the 13th, assuming that there is nothing too difficult and one can deal with it there and then there will be no problem. If one cannot deal with it there and then and it has to be a reasoned decision we will have to see how difficult it is, and either there will be a decision within a short period after that or we will have to re-timetable it. My week was on the basis that we could not decide it there and then – or we could not give full reasons there and then – but it was going to be very short so it could be done very quickly.

MR. GREENE: The only thing I was trying draw in was the disclosure process itself, a decision having been made ----

THE CHAIRMAN: Well it would not take long, would it.

MR. GREENE: No, presumably not.

THE CHAIRMAN: There is the disclosure process. So it is likely we are talking about the end of January.

MR. HOSKINS: It gives us time, yes, madam. In terms of skeletons – I do not know if this works – but when do you need the last skeleton by, and that could be in a sense the date for ours and then work back.

THE CHAIRMAN: Wednesday of the week before.

MR. HOSKINS: I think that is probably the 17th.

THE CHAIRMAN: Tuesday or Wednesday of the week before. That is really the third skeleton.

MR. HOSKINS: If there is to be a Cityhook response.

THE CHAIRMAN: Yes, if there is to be one, so that would be the third one would it not? So you want to be, say, a week before that.

MR. HOSKINS: That is potentially going to create problems for Cityhook just for the Christmas vacation, which I can say on their behalf.

MR. SHOVELL: It is unusual to have someone concerned about us in that regard, but we will co-operate with a reasonable timetable.

THE CHAIRMAN: Do you mind about the Christmas vacation? Mr. Greene might mind.

MR. GREENE: I am just trying to work out the time, so a hearing on 23rd/24th, so a week before would be 16th – I suppose it depends when the OFT produce ----

THE CHAIRMAN: No, you have to produce your first one. But you should be able to produce it – assuming at the hearing of the disclosure application we know what we are doing, so that soon afterwards you can get on, there should be disclosure by 7th or 8th December.

MR. HOSKINS: There may be some time lag if a category is identified or redactions for confidentiality, but there is certainly enough scope in this and one would imagine it would be done within two or three weeks, certainly.

THE CHAIRMAN: Are you suggesting that may be 23rd and 24th January is too early and we ought to put it forward a bit.

MR. HOSKINS: If we could have the hearing date a week or two later and that makes it easier to fit in the skeletons, and if that suits everyone it makes sense not to impose time constraints that are unnecessary, but I do not want to push it back indefinitely just for the sake of it.

THE CHAIRMAN: If we had it on 30th and 31st then there could be a skeleton on the 9th and a skeleton on the 16th. Would that be better?

MR. GREENE: Yes, I was looking at it from the other end as well, in terms of disclosure.

THE CHAIRMAN: As long as nothing goes wrong in this you should have disclosure a week or so before Christmas, on the worst case – unless the disclosure turns out to be something much bigger than we think and if it does then we are going to have to change the timetable anyway.

MR. HOSKINS: But if disclosure is ordered and certain categories are easy to do then of course we will provide them first, we will not wait until everything is ready.

THE CHAIRMAN: Why do we not say a skeleton argument on the 9th and on 16th and that gives 23rd if you need a reply skeleton, and we would have the hearing on 30th and 31st.

MR. GREENE: So skeletons, 9th, 16th and 23rd.

THE CHAIRMAN: Yes, so you have 9th and 23rd and Mr. Hoskins has the 16th. We cannot put in when you should do disclosure by because we will sort that out at the other hearing.

MR. TURNER: Madam, first of all in relation to admissibility, would it be convenient if we submitted a skeleton, if so advised, on 23rd January which was in accordance with the indication I gave earlier? That way we will be able to see if the Office of Fair Trading has said something and we feel we need to add to it or not, and we will not if there is nothing. Obviously, the others are subject to change and that would be as well.

THE CHAIRMAN: Yes, so 23rd would be skeleton of Alcatel plus Appellant's, if any. Do you think you should do it slightly earlier – I suppose you would not have time because you might want to answer it.

MR. GREENE: It was going to be my point, since an argument is being put on behalf of the OFT to some extent.

THE CHAIRMAN: Could you do it a bit earlier?

MR. TURNER: Yes, if the OFT's is coming in on the 16th, which is the Tuesday we will get ours done by, shall we say, the Friday of that week?
THE CHAIRMAN: Yes.
MR. TURNER: Friday, 19th.
THE CHAIRMAN: Yes, thank you very much. Disclosure is nothing to do with you?
MR. TURNER: Well, in fact, it is in this respect ----
THE CHAIRMAN: Confidentiality?
MR. TURNER: No, we are being sued in the Civil proceedings and in those civil proceedings there is the usual process of disclosure.
THE CHAIRMAN: The Civil proceedings are being stayed, or something?
MR. TURNER: If things go to plan tomorrow those will be stayed. Nevertheless in these proceedings the Office of Fair Trading it is now proposed (or may) produce its own documents which the claimant in the Civil proceedings has not seen, which it may wish to deploy against Alcatel, among other defendants in the Civil case.
THE CHAIRMAN: Well there is a question about that.
MR. TURNER: There are two questions. First, the procedural point I apprehend you are making about the implied undertaking, whether it would apply in these proceedings. Our submission is that it ought to apply but of course the civil procedure rules have now been changed in the High Court, so that instead of the implied undertaking you have a particular rule which deals with restrictions on disclosure.
THE CHAIRMAN: Right.
MR. TURNER: That I a lack of clarity. The second is that, leaving that point aside, we would not want the Office of Fair Trading, which in relation to the stayed Civil proceeding is a third party, to be the subject of a wide ranging disclosure application by Cityhook for the purpose of producing documents that can then be deployed against us in the Civil proceedings. That is why, subject to the implied undertaking point, we do have an interest in disclosure. I put it no higher than that.
THE CHAIRMAN: But if the implied undertaking point applies then there is not a problem, is there?
MR. TURNER: That is right.
MR. HOSKINS: I am not sure that is actually right, because if the documents are referred to in open court my understanding under the current CPR Rules ----
THE CHAIRMAN: This is very complicated.
MR. HOSKINS: -- there is no protection. My own view, I raised it and Mr. Turner is right to raise it, is if it comes up to deal with it at the hearing on 13th November.

THE CHAIRMAN: I think so.

MR. HOSKINS: But it may well be an issue as Mr. Turner says. I agree it may be an issue; I think I should be dealt with and then obviously it is for Mr. Turner to say whether he wants to play a part in that exercise.

MR. TURNER: All I wish to say therefore, because it is difficult and I am not in a position to reach a clear view at the moment, is that to protect our position we would propose – if the Tribunal were minded – to have liberty to appear at the hearing on the 13th, and if so advised to put in brief submissions on the 8th.

THE CHAIRMAN: Yes. Mr. Greene, I am addressing you because it is likely that you are going to be the one who is going to have to deal with this. I think you understand what has just been said.

MR. TURNER: I do understand.

THE CHAIRMAN: The problem is going to have to be resolved and there may be some interesting legal argument about what happens when documents are in open court and whether they can be used in other proceedings, so there is an interesting issue there for the 13th.

MR. GREENE: I understand the problem. As has been said in the High Court, of course, there are the rules that provide in relation to the use ----

THE CHAIRMAN: There are the rules but you cannot use them for any other purpose, but what Mr. Hoskins I think just reminded us is that there is also a problem that if documents are referred to in open court ----

MR. GREENE: Absolutely.

THE CHAIRMAN: -- I do not think the position is clear at all, even in the High Court.

MR. GREENE: No, I thought some clarification had been given about that, that once referred to they come into the public domain in evidence at least.

THE CHAIRMAN: Well I am not sure it is absolutely clear. Anyway, we are going to have to consider that possibly – possibly.

MR. GREENE: I suppose the question is whether that is going to be dealt with by the OFT in their submissions in relation to disclosure, or whether that actually needs the Intervener ----

THE CHAIRMAN: Yes, but in the High Court you would be bound by the rules.

MR. GREENE: We would.

THE CHAIRMAN: Whether the implied undertaking, or there is an implied undertaking within here that they cannot be used for any other purpose when you look at them, and then we have the second question, if they are mentioned here, even though they happen to be in a file, are they in the public domain?

MR. GREENE: Well I understand that argument being taken and being dealt with at the disclosure hearing; I think that is appropriate. I suppose the only question that will arise is to what extent that would be taken by the OFT and needs the intervention at that stage of the Intervener.

THE CHAIRMAN: The alternative is that the implied undertaking applies and this is argued at some later date as to whether those documents can be used, because it may well be that it all becomes hypothetical because there is a decision and the High Court proceedings never get any further.

MR. TURNER: I think there are two points. First, whether in fact there is an implied undertaking in these proceedings, as to which I am not currently clear.

THE CHAIRMAN: On the other hand, they could give the undertaking.

MR. TURNER: They could give an express undertaking, but even then there is a second question which is: which documents as a result of this argument about disclosure are going to be produced? On that we have a particular ----

THE CHAIRMAN: No, I appreciate that. That is the first question.

MR. HOSKINS: In relation to the issue of whether the OFT can deal with this, with respect, I do not think we can because our interests in protecting information ----

THE CHAIRMAN: It is nothing to do with you.

MR. HOSKINS: -- may be different from Alcatel's, and I think Alcatel does have a separate input.

THE CHAIRMAN: They have to deal with it, yes. But I think it may be that the most expeditious way of dealing with it is that we leave it over – subject to some undertaking.

MR. TURNER: Yes, I would say, as we are setting down a disclosure hearing for the moment ----

THE CHAIRMAN: We will leave it in.

MR. TURNER: -- if we were to have liberty to turn up if so advised.

THE CHAIRMAN: You have. You had another point, I think?

MR. GREENE: Can I raise a timetable point? If I am right in saying the Intervener's skeleton is Friday, 19th , I am only concerned it gives us just about a day to respond and then of course there may be some very substantive issues raised in it, in addition to those raised by the OFT and I just wonder if we might put it back one day at least for the weekend?

MR. TURNER: I am content.

THE CHAIRMAN: Thank you.

MR. HOSKINS: Just two very short points – one stating the obvious, of course, the order today will have to direct that the preliminary issue be heard, this all assumes that that is happening. There is one other technical point we have to deal with, which is under the Rules our Defence would be due within six weeks of the notice of appeal ----

THE CHAIRMAN: Do you want to put in the Defence?

MR. HOSKINS: We do not, no.

THE CHAIRMAN: You do not.

MR. HOSKINS: I simply suggest that the time for putting in the Defence is extended generally and it can be revisited as and when necessary, but technically that has to be done.

(The Tribunal confer)

THE CHAIRMAN: Yes, Defence adjourned generally. Is there anything else? I assume that the OFT are going to consider about voluntary disclosure – at least in the areas that have been identified?

MR. HOSKINS: And of course we will take account of everything that we have heard.

THE CHAIRMAN: What has been said, yes. The deadline for interventions is 21st September as I understand it, so it may be that we will have other Interveners, we do not know. It is only the deadline for the application so I suppose we could deal with those – if we do have any – on 13th November.

MR. HOSKINS: Of course it depends if they wish to play a role, but we will have to wait and see.

THE CHAIRMAN: We will have to wait and see, that is why I said if we do have any then I suppose we could deal with the procedural ----

MR. HOSKINS: Yes, if they want to play a role on13th November ----

THE CHAIRMAN: Then we are going to have to fit them in, yes, that is absolutely right. So it might be that will have to have some other hearing to deal with that.

MR. HOSKINS: For the purpose of Interveners, yes. Hopefully, given we now have a model it should not create too much heat and light if someone else wants to come in, the Alcatel model is already there.

THE CHAIRMAN: Yes. Now, of course, that timetable is on the basis that if you decide to go down the Judicial Review route you also decide – and the court agrees – that you want this heard before, and I assume you will have some proper advice as to which course is the most appropriate course, and which one is the more appropriate to come first.

MR. SHOVELL: Understood.

THE CHAIRMAN: Well thank you all very much. Can I say especially thank you, Mr. Greene, because I think it was very kind of you to come today and assist.

(The hearing concluded at 4.35 p.m.)