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**IN THE COMPETITION**

Case Nos 1094/3/3/08

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

31 March 2008

Before:  
**LORD CARLILE QC**  
(Chairman)

**DR ARTHUR PRYOR**  
**PROFESSOR PAUL STONEMAN**

BETWEEN:

**VODAFONE LIMITED**  
(Vodafone)  
and

Applicant

**OFFICE OF COMMUNICATIONS**  
(“OFCOM”)

Respondent

With Intervenors:

**BRITISH TELECOMMUNICATIONS PLC**  
**O2 (UK) LIMITED**  
**HUTCHISON 3G UK LIMITED**  
**ORANGE**  
**T-MOBILE UK LIMITED (“T-MOBILE”)**

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*Transcribed from tape by*  
**Beverley F. Nunnery & Co.**  
*Official Shorthand Writers and Tape Transcribers*  
*Quality House, Quality Court, Chancery Lane, London WC2A 1HP*  
*Tel: 020 7831 5627 Fax: 020 7831 7737*  
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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Tim Ward (instructed by Herbert Smith) appeared on behalf of the Applicant.

Mr. Pushpinder Saini QC and Mr. Alan Bates (instructed by the Office of Communications) appeared for the Respondent.

Mr. Aidan Robertson (instructed by BT Legal) appeared on behalf of the Intervener British Telecommunications PLC

Miss Kelyn Bacon (instructed by O2 (UK) Limited) appeared on behalf of the Intervener O2 (UK) Limited

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of the Intervener Hutchison 3G.

Miss Sarah Love (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange.

Mr. Meredith Pickford (instructed by T-Mobile) appeared on behalf of the Intervener T-Mobile.

1 THE CHAIRMAN: You have all had a copy of the agenda for the case management conference  
2 and I thought it might be helpful if I were simply to take us through the agenda – not in  
3 precisely the order in which it is set out – and then if anyone wishes to make any comments  
4 as we go along no doubt you will do so, and will of course be very welcome to do so.  
5 First, what I hope is a very straight forward matter, the forum of the proceedings, which I  
6 presume everyone agrees should be England and Wales. (After a pause) Thank you.  
7 Secondly, the request for permission to intervene by T-Mobile, Orange, Hutchison 3G, O2  
8 and BT PLC – is any party objecting to those interventions. Yes, Mr. Saini?

9 MR. SAINI: We do not object in principle, but I shall have some observations to make in  
10 relation to timetable, in particular in managing the interventions. In relation to item 2 there  
11 is no formal objection by my clients.

12 THE CHAIRMAN: We shall have some things to say too, Mr. Saini, about timetable and  
13 managing the interventions, and it may be the moment for me to say that we intend to  
14 impose a fairly firm timetable, and fairly rigorous case management. I must say the  
15 number of people in this room fills me with concern, and if everybody in this room wanted  
16 to participate in this hearing they would be likely to get about three sentences each, so we  
17 will come back to case management, if we may, in a moment.  
18 There will then be leave to intervene in respect of all five interveners who have intervened  
19 so far. I think it is unlikely there will be any further interveners unless anyone has any  
20 information to the contrary, but certainly the Tribunal has not heard of any other likely  
21 interveners to date.

22 Shall we turn next to issues, if we may? The latest document that we have is Ofcom's  
23 defence of 28<sup>th</sup> March, together with its three annexes for which much thanks. That, in the  
24 Tribunal's view, gives a reasonably clear definition of the issues as viewed down that  
25 particular lens, but others may wish to view the issues down a very different lens from that  
26 used by Ofcom.

27 Our provisional view is that if there is disagreement about the issues as defined in Ofcom's  
28 defence, and if there are other key issues then they should be identified very clearly and  
29 preferably concisely in Vodafone's reply and in the statements of intervention. It seems to  
30 us on reading the extensive papers so far that we are to a great extent concerned here with  
31 the process of consultation and the analysis that took place as a result of that consultation  
32 with at least one essential question being: are Ofcom's conclusions robust and soundly  
33 based. That is just thrown into the issues' part as a starter – does anyone want to say  
34 anything about issues, please? Mr. Ward, you look as though you might want to?

1 MR. WARD: Very briefly, Sir. Of course, we do prefer to formulate our case in the way that we  
2 propose to put it forward. It is not that Ofcom's presentation does a great violence to our  
3 case but we will take up the invitation to plead in reply the issues as we would propose to  
4 develop them in the appeal.

5 MISS BACON: Sir, I only say that we, of course, have not seen Ofcom's defence so we cannot  
6 actually comment because we have not seen the non-redacted versions.

7 THE CHAIRMAN: Thank you for reminding me of that and of course you will have the  
8 opportunity so to do. The indication so far is that certainly Ofcom and Vodafone do not  
9 feel that there are many facts and issues that can be agreed in writing between them as  
10 contesting parties. Obviously the Tribunal would welcome any agreed facts or issues if  
11 they could be put in writing, but there will be no order as such unless anyone asks for an  
12 order that agreed facts and issues be put in writing; the documents in the case so far give  
13 reasonable clarity about agreement and disagreement in any event. Does anyone want to  
14 add anything to that observation?

15 (After a pause) Now to timetable. There is – I am hesitating about using the word  
16 “urgency” – a degree of expedition plainly required in this case because of the issues facing  
17 all parties and interveners. We would like to hold a two day hearing on 11<sup>th</sup> and 12<sup>th</sup> of  
18 June and then work backwards from that in relation to other dates. It is difficult to find a  
19 mutually convenient date for all parties and the more parties there are the more likely it is  
20 that the Tribunal will impose its own date in any event, but are there any comments upon a  
21 hearing date of 11<sup>th</sup> and 12<sup>th</sup> June, which is convenient to all three members of the Tribunal  
22 as constituted?

23 MR. SAINI: Sir, I have a difficulty with those dates, I have a trial in the Chancery Division  
24 between 9<sup>th</sup> and 17<sup>th</sup>, but I am certainly free for the rest of June, and also for substantial  
25 parts of May.

26 THE CHAIRMAN: You are a new Silk so you are going to be busier than everyone else, are you  
27 not, Mr. Saini? Congratulations. Any other observations on the dates? (After a pause) Is  
28 it just that week?

29 MR. SAINI: Indeed, yes.

30 THE CHAIRMAN: Well we are going to have to discuss that. What about the following week, if  
31 we are able to find two days in the following week?

32 MR. WARD: I would be content with that, Sir.

33 THE CHAIRMAN: We will discuss that when we retire. We had looked at May as a possibility  
34 but I think it proves impossible, it is just too soon for members of the Tribunal because of

1 various commitments. We will do our best to help you but I cannot guarantee that we will  
2 be able to do so.

3 MR. SAINI: I am obliged.

4 THE CHAIRMAN: Does anybody else have problems with the following week? No, right.

5 Well let us work back for the sake of argument, because a week does not make a huge  
6 amount of difference in terms of dates. May we work back from 11<sup>th</sup> June, just to give us  
7 something to measure it by, to other documents? With a number of interveners in this  
8 matter the Tribunal would welcome the opportunity of having skeleton arguments available  
9 in good and digestible time; what we were going to suggest was that skeletons should be  
10 available by 16<sup>th</sup> May. Is there any problem with that? (After a pause) Good.

11 Now, we turn to the question of Vodafone's reply, the final statement of Mr. Howard  
12 Roach, the statements of intervention and any other witness statements, because I think we  
13 have to make provision for that possibility. Our suggestion would be that those items – and  
14 I will repeat what they are: Vodafone's reply, final statement of Mr. Howard Roach and  
15 any other witness statements, and the statements of intervention – should be available by  
16 25<sup>th</sup> April. Any comments about that? I thought that would bring a few people to their  
17 feet. Yes, Mr. Ward, you are in the front row.

18 MR. WARD: Well, if I may at least go first. The only point I would make about that from the  
19 point of view of Vodafone is that we know that H3G are going to oppose our position in  
20 this appeal, we have not opposed their intervention in any way but it would, of course, be  
21 useful for us to deal with whatever they are going to say in our written reply.

22 THE CHAIRMAN: Yes, I take your point.

23 MR. WARD: In terms of the amount of time you suggested of course we have no difficulty with  
24 that.

25 MR. ROBERTSON: Sir, I appear for BT and it seems to us it would make sense to allow a  
26 period of time between the service of Vodafone's reply and the statements of intervention.  
27 We are mindful though we do not want to be doing anything that simply duplicates what  
28 Vodafone put in, so it would make sense for us to see what Vodafone put in by way of  
29 reply, have a period to digest that and then settle our statement of intervention. I would  
30 suggest a minimum of a week – ideally two weeks – between reply and statement of  
31 intervention. We do not think that would hold up the hearing of this case, particularly as  
32 you might want to revisit the actual dates in the light of the date that you finally settle on  
33 for the main hearing of this action and that might give us a week's extra leeway.

1 THE CHAIRMAN: If we were to have H3G's statement of intervention by 25<sup>th</sup> April, and then  
2 to allow a little slippage for the other documents is that going to cause anyone any  
3 difficulty?

4 MR. ROBERTSON: It does not cause us problems.

5 MR. WARD: We would be very happy with that.

6 THE CHAIRMAN: Right – I am just thinking aloud at the moment, not ruling – H3G's  
7 statement of intervention suggested 25<sup>th</sup> April, other statements of intervention 2<sup>nd</sup> May and  
8 Vodafone reply 9<sup>th</sup> May, and skeletons 23<sup>rd</sup> May – how about that?

9 MR. ROBERTSON: I think it would make more sense to put in statements of intervention from  
10 those interveners who support Vodafone after Vodafone's reply, because there is no point  
11 in us anticipating what Vodafone are going to put in the reply. You could switch the dates  
12 that you have there for reply and statements of intervention and put them around the other  
13 way, so that you have the reply first and then the statements of intervention.

14 THE CHAIRMAN: So Vodafone's reply by 2<sup>nd</sup> May, statements of intervention – I will put it in  
15 order – H3G's statement of intervention 25<sup>th</sup> April, Vodafone reply 2<sup>nd</sup> May, other  
16 statements of intervention 9<sup>th</sup> May, skeletons 23<sup>rd</sup> May.

17 MISS ROSE: I represent H3G, we are content with that, the only thought I have is that it is  
18 possible if more evidence is put in either by Vodafone in reply, or by the other interveners  
19 that we might want to respond to that, so it is possible ----

20 THE CHAIRMAN: This is in the realm of hypotheticals that we do not really need to concern  
21 ourselves with at the moment, is it not, Miss Rose?

22 MISS ROSE: It is simply that we need to ensure that there is sufficient time to do that full  
23 skeleton argument to go in.

24 THE CHAIRMAN: I am inclined to leave the timetable as we have suggested it and if anybody  
25 wants to apply for more time they can.

26 MISS ROSE: I am not asking for more time, just simply flagging up that there is a possibility  
27 that we might want to serve more evidence when we have seen the reply from Vodafone,  
28 and then the statements of intervention.

29 THE CHAIRMAN: Consider the possibility flagged.

30 MISS ROSE: I am grateful.

31 MR. WARD: Sir, if I may just say one further thing – we would be entirely happy with that  
32 order of submission. The only point that does strike me is that that timetable allows us a  
33 week to deal with H3G's intervention. We have not yet heard what you have to say about

1 case management in regards to the interveners, but if that submission were very wide-  
2 ranging or diffuse, that might be quite difficult for us.

3 THE CHAIRMAN: What we were proposing to suggest by way of case management might run  
4 something like this: It is based on a desire to avoid duplication and for us not to have  
5 multiple submissions on the same issues. What we wanted to suggest was that the  
6 interveners, other than H3G, should determine between themselves what issues they have in  
7 common and such interveners should then decide between themselves who is to be the lead  
8 intervener in respect of each shared or common argument, in other words so we do not have  
9 four arguments on the same issue. All the parties here are very expertly represented, and  
10 have very expert back up teams, and the Tribunal is entitled, as we see it, to manage the  
11 case in a way that is designed to avoid prolixity, so we would ask the interveners to do that.  
12 We would also suggest that arguments that are not common should be identified with a time  
13 estimate to be given for the presentation of each such argument that is to be pursued, so that  
14 we can know how much time really is needed for the hearing; that H3G should be permitted  
15 to submit separately arguments not replicating matters being covered by Ofcom and  
16 additionally under the “case management” heading, that any cost and benefit data relied  
17 upon should be summarised if possible in schedule form containing the propositions made  
18 by each party in a separate column - a Scott schedule-type form. Any comments on those  
19 suggestions?

20 MR. ROBERTSON: It seems sensible for the interveners to make sure that at the main hearing  
21 they do not duplicate each other and if we can do so by way of agreement, and I cannot see  
22 there is going to be a problem with that, identifying who is going to lead submissions on  
23 discrete issues. I just want to clarify that it was not your thinking that that would cut down  
24 the scope of our statement of intervention?

25 THE CHAIRMAN: No, we are talking about the management of the hearing now. I would not  
26 expect that to cut down the scope of the statements of intervention. We do very much hope  
27 that the statements of intervention will manage to be shorter than each 75 pages long.

28 MR. ROBERTSON: Sir, that is about seven times longer than I anticipated putting in.

29 THE CHAIRMAN: I am glad to hear it – repetition never improves an argument. Mr. Ward,  
30 you look frustrated?

31 MR. WARD: I am not frustrated at all; I am happy to think aloud. I was simply thinking we do  
32 have seven parties, the case management proposal you have made, which we respectfully  
33 agree with, does, of course, allow for all seven parties to make at least some oral  
34 submissions.

1 THE CHAIRMAN: Of course.

2 MR. WARD: It simply comes to mind that it may be prudent to allow the possibility of a third  
3 day, or at least diarising the hearing at this stage and if, of course, the submissions can be  
4 dealt with in two days the better for everyone.

5 THE CHAIRMAN: That is exactly as I was thinking, that we have to make provision for a third  
6 day – it may not be a third consecutive day, that is all. When we retire we are going to try  
7 to accommodate Mr. Saini if we can - we will do our best. Having made those remarks,  
8 and having had that discussion about case management does anyone want to return to the  
9 timetable before we move on to the confidentiality ring issue?

10 Provisionally it seems to us that it is inevitable that there should be a confidentiality ring of  
11 some kind in this case. We are concerned that the order for the confidentiality ring should  
12 be restricted tightly so that there can be no suggestion or implication that the confidentiality  
13 ring of itself becomes an instrument of anti-competitiveness, so we ask that the  
14 confidentiality ring order be restricted to what is strictly necessary. I think all the parties  
15 here have been involved in other cases in confidentiality rings and are familiar with the type  
16 of order which the Tribunal usually makes in such circumstances, and we would simply ask  
17 you – if you are content for this – to submit a draft order by, say, 14<sup>th</sup> April (again a  
18 negotiable date if you really want to negotiate) and if necessary then the Tribunal will just  
19 have to deal with it but hopefully it can be agreed and in an appropriate form similar to that  
20 made in other telecom. cases. Any comment on that?

21 MR. WARD: Sir, we do not oppose the proposal in principle at all, it is eminently sensible. The  
22 only issue I wish to ventilate briefly is the question of whether the confidentiality ring could  
23 be confined to external advisers, or indeed in the interests of equality perhaps simply  
24 counsel, because all the parties are represented by counsel. There is obviously sensitivity  
25 here for the reason you have already adverted to in respect of the presence of so many  
26 competitors.

27 MR. ROBERTSON: For BT I would strongly resist that. I need someone that, as external  
28 counsel, I can take instructions from. I am instructed by BT Legal. We had anticipated  
29 naming two individuals in BT Legal to take part in the confidentiality ring; without those  
30 individuals I am not in a position to take instructions.

31 THE CHAIRMAN: So you are dealing with in-house lawyers?

32 MR. ROBERTSON: Yes, we have no external solicitors.

33 THE CHAIRMAN: I think you interrupted Mr. Ward. Mr. Ward?

1 MR. WARD: If I may explain. Of course we understand Mr. Robertons's concern, of course we  
2 do and we anticipated it. The difficulty here though is really this: once an internal adviser  
3 learns the information for one purpose it cannot be "unlearned" for any other purpose. Of  
4 course we trust entirely the bona fides of those who may come into contact with that  
5 material, but that concern evidently has to arise on the part of my clients. Moreover, when  
6 one looks at the type of case this is, what we are really concerned with here is the internal  
7 logic of the work that Ofcom has done. The actual confidential detail of the material which  
8 is in the schedule which the Tribunal has is not really going to bear on the issues at all. If  
9 Mr. Robertson has access to the unredacted version and he feels there is something that  
10 does bear upon the way his client wants to put their case then of course they can come to  
11 my clients and of course it could potentially be dealt with on a case by case basis. But this  
12 case does not turn on the details of Vodafone's costing work, of Vodafone's economic  
13 assessment, it is Ofcom's work really that is at issue here.

14 THE CHAIRMAN: We have had a look – just to familiarise ourselves with what happens in  
15 relation to confidentiality rings – at one or two orders made in other cases, and I notice that  
16 in one case there was a mixture of "in-house counsel" (as they are called) and external  
17 counsel for both BT and I think it was T-Mobile from memory. Is this not something that  
18 should be left for discussion between the parties? One has to bear in mind that in-house  
19 lawyers are bound by exactly the same ethical guidelines as external lawyers in relation to a  
20 confidentiality ring. It would be an absolutely gross breach of professional conduct if  
21 having entered into a confidentiality ring in-house professional advisers were then to  
22 misuse that information, would it not – or have I got the wrong end of the stick.

23 MR. WARD: Sir, I am pleased to say you have. We do not wish to suggest that for even a  
24 moment. There is no aspersion being cast here on anybody at all. It is more the case that  
25 once information has been absorbed, even if of course the people involved would not pass  
26 the information on it inevitably has an effect on their thinking.

27 THE CHAIRMAN: Mr. Robertson has frowned.

28 MR. ROBERTSON: Sir, I find Mr. Robertson's suggestion totally unacceptable. There is no  
29 reason to depart from the usual practice of this Tribunal. This Tribunal can rely upon the  
30 professional obligations that each of those people working in-house for BT have. The  
31 Tribunal in other cases, for example, has included in confidentiality rings lawyers qualified  
32 in jurisdictions overseas; I have had experience of that myself in the *Genzyme* case where  
33 the Tribunal extended a confidentiality ring to include a US admitted attorney. Without  
34 individuals in BT's legal department to instruct me I am simply not in a position to take

1 instructions as to the submissions that I have to advance to the Tribunal on behalf of my  
2 client. That, we submit, is in breach of our client's right to a fair hearing, so we do strongly  
3 object to Mr. Ward's suggestion. In our view this is non-negotiable.

4 THE CHAIRMAN: What I think we shall say, unless I find disagreement to my left or right, is  
5 that all parties should submit a draft order by 14<sup>th</sup> April 2008. I think the Tribunal would  
6 take some persuading away from its established practice with such orders, which has  
7 allowed for mixed in-house and external lawyers and, indeed, economists in certain cases.  
8 If you cannot agree a draft order then I am afraid you will just have to come back and the  
9 Tribunal will make an order, but we would take some persuading, I suspect, away from the  
10 established practice of the Tribunal. I hope that will assist you, Mr. Ward in reaching  
11 conclusions on this matter. Miss Rose?

12 MISS ROSE: The only concern that I have is in relation to the timing of the statement of  
13 intervention because if we are not going to have even a draft confidentiality ring order until  
14 14<sup>th</sup> April I am just wondering whether we will see the full pleadings which clearly we  
15 would need to see before we finalise our statement of intervention, which is due on 25<sup>th</sup>  
16 April.

17 THE CHAIRMAN: Yes. Why do you need more time, I am sorry, I am not getting the point?

18 MISS ROSE: I am suggesting maybe we can bring back the timing closer to today's date for the  
19 confidentiality ring, because we need to see the full pleadings in order to finalise our  
20 statement of intervention.

21 THE CHAIRMAN: Shall we bring it back to 10<sup>th</sup> April? All right, draft order by 10<sup>th</sup> April for  
22 the confidentiality ring. That will give a few extra days, Miss Rose?

23 MISS ROSE: Yes, Sir. The only other issue is when we can expect a copy of the redacted  
24 defence, because clearly we need that as soon as possible?

25 MR. SAINI: Perhaps I can assist on that? As far as we are concerned there is nothing in the  
26 defence which needs to be redacted.

27 THE CHAIRMAN: I was going to ask you that.

28 MR. SAINI: But clearly, Vodafone need to look at the defence and let us know if they have any  
29 specific redactions and we will consider them. The ball is essentially in Vodafone's court.

30 THE CHAIRMAN: Having read the defence carefully and twice, I doubt there is much reaction  
31 needed myself.

32 MR. SAINI: That is certainly our view, so we would be quite happy, subject obviously to  
33 Vodafone having a chance to look at this issue again, to give it to the interveners as soon as  
34 possible.

1 THE CHAIRMAN: Well let us hold to the dates, taking 10<sup>th</sup> as the draft order and simply leave  
2 it to counsel, if I may, to discuss the disclosure point in the hope that that can be done  
3 without any real delay.

4 I think the only other matter left is the question of whether a further case management  
5 conference will be required to which I think our answer is “We hope not”, but obviously  
6 there will be liberty to apply if any party really feels that we must, in which case it will be  
7 facilitated subject to exercise of the Tribunal’s discretion. Is there anything else before we  
8 retire to consider I think just the one outstanding issue of the hearing date? Is there  
9 anything else any party would like to raise? (After a pause) Right, we will now retire and  
10 we will return shortly having considered the matter.

11 (Short break)

12 THE CHAIRMAN: We are taking it that a hearing date of 18<sup>th</sup> and 19<sup>th</sup> June would be  
13 convenient to all with an unwelcome overspill into 20<sup>th</sup> if absolutely necessary. In that case  
14 what we would like incorporated formally into the order is the following. The forum of the  
15 proceeding will be England and Wales. The requests for permission to intervene will be  
16 granted to all those who have applied to intervene so far, that is the five interveners  
17 represented here today. We do not order that there be a document containing agreed issues  
18 but we would welcome such a document if it were possible.

19 Working backwards the hearing, as I said, will be on 18<sup>th</sup> and 19<sup>th</sup> June, with the possibility  
20 of a one day overspill into the Friday of that week. The skeletons for the hearing should be  
21 available on 23<sup>rd</sup> May. We would ask that on the same date an agreed bundle of documents  
22 be available together with relevant authorities with the important parts flagged please, so  
23 that the members of the Tribunal know what to look for particularly – much as we enjoy  
24 reading authorities, of course.

25 We would request, although it is not part of the order, that at the same time if any of the  
26 parties believe it would be useful to give us a reading list of key materials that should be  
27 supplied to the Tribunal, and we would also request a running order as to how the parties  
28 consider that the hearing can best be managed in terms of who deals with what and when –  
29 order of cross-examination and so on. So that is all for 23<sup>rd</sup> May.

30 Still working backwards, the statements of intervention other than that from H3G to be  
31 served by 9<sup>th</sup> May. Vodafone’s reply to be served by 2<sup>nd</sup> May, and H3G’s statement of  
32 intervention to be served by 25<sup>th</sup> April. A Confidentiality ring will be permitted, the order  
33 to be restricted to what is strictly necessary and a draft order, please, to be submitted by 10<sup>th</sup>  
34 April.

1 As part of the order in terms of case management, the interveners, except H3G, will  
2 determine between themselves what issues they have in common. Such interveners will  
3 decide between themselves who is to be the lead intervener in respect of common  
4 arguments. Arguments that are not common will be identified with time estimates to be  
5 given for the presentation of such arguments. H3G will be permitted to present separately  
6 arguments not replicating matters being covered by Ofcom, and any cost and benefit data  
7 relied upon should be summarised, if possible in schedule form containing the propositions  
8 made by each party in separate columns by the date for skeletons, 23<sup>rd</sup> May. There will be  
9 liberty to apply if anybody wishes to request a further case management conference. I think  
10 that covers everything. Is there anything else?

11 MR. SAINI: Sir, may I express my thanks for the consideration given to me.

12 THE CHAIRMAN: We always wish to accommodate new Silks. Right, I think that is it, thank  
13 you all very much.

14 \_\_\_\_\_