

IN THE COMPETITION

APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Square
London WC1

Friday, 2nd April 2004

Sir Christopher Bellamy (President)
Mr Michael Davey
Ms Shelia Hewitt

BETWEEN

FLOE TELECOM LIMITED
(in administration)

Appellant

-and-

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED

Intervener

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Mr Edward Mercer and Mr Patrick Clark appeared for the
Appellant

Mr Mark Hoskins and Mr John McInnes appeared for the Respondent

Miss Elizabeth McKnight and Mr Stephen Wiskin appeared for the
Intervener

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CASE MANAGEMENT CONFERENCE

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1 (At 10.30 a.m.)
2 THE PRESIDENT: Good morning, ladies and gentlemen.
3 I think the main business we have today is, first of all,
4 Floe's application to amend its Notice of Appeal and any
5 consequential matters that arise in relation to case
6 management in the Floe case. Secondly, the Case Management
7 Conference in the VIP case and, in particular the
8 relationship between the VIP case and the Floe case, if
9 any, and how we should handle the two cases.
10 I think if I may turn, first of all, to you Mr
11 Mercer, we have had your amended Notice of Appeal since
12 the last occasion and you have seen Ofcom's reaction to it
13 and you have been kind enough to give us some further
14 observations. I do not know if there is anything specific
15 you would like to add at this stage, or shall I turn to Mr
16 Hoskins and see whether he wants to make any specific
17 points?
18 MR MERCER: Sir, unless you have any questions on the material
19 submitted, I think Mr Hoskins and I have both set our
20 other stalls.
21 THE PRESIDENT: Yes.
22 MR MERCER: With the exception, in my case, of one argument,
23 sir.
24 THE PRESIDENT: Yes.
25 MR MERCER: And that goes to discretion rather than questions
26 relating to "come to light". That is this: if Floe did not
27 mention what it needed to mention in the course of its
28 original complaint, and if it proves that the primary
29 argument did not come to light after the Notice of Appeal
30 was served, then it is something on which Floe has not had
31 a decision from Ofcom, or its predecessor legacy
32 regulator, Oftel. In which case it must be open to Floe
33 to ask that question ab initio, to start the questions
34 again.
35 Therefore, sir, that is what my present instructions
36 would be to do.
37 THE PRESIDENT: To make a new complaint?
38 MR MERCER: To make a new complaint.
39 THE PRESIDENT: Yes.

1 MR MERCER: If that should be the case, sir, I think it would
2 be sensible, in terms of attempting to prevent what Mr
3 Hoskins would call a further waste of costs, to adjourn
4 the matter to enable Ofcom to consider the matter -- I
5 have, sir, a sneaking suspicion that they are not
6 necessarily going to agree with it wholeheartedly -- and
7 then for Floe to appeal. An adjournment, sir, would enable
8 the two matters to once again catch up with one another.

9 THE PRESIDENT: Yes.

10 MR MERCER: Apart from that, sir, unless there is anything I
11 can help you with in respect of what we have submitted, I
12 will close.

13 THE PRESIDENT: Thank you very much, Mr Mercer. Yes, Mr
14 Hoskins. We have got two considerations, I suppose, very
15 provisionally in mind, or two aspects I think to this. The
16 first is whether the proposed amendment, or amendments
17 rather, in the plural, are within the restrictive
18 parameters of Rule 11 of the Tribunal's Rules.

19 It may, in the scale of things -- we will hear Mr
20 Mercer on this in a moment but let me put the point to you
21 first -- be necessary to draw some distinction between the
22 main primary argument, which is the argument of law as to
23 the true construction of section 1 of the Wireless
24 Telegraphy Act on the one hand, and the discrimination
25 issue on the other hand, which I think are the two heads
26 of amendment that remain in dispute, if I have understood
27 it correctly.

28 MR HOSKINS: Yes, sir, that is correct.

29 THE PRESIDENT: In relation to the discrimination argument, it
30 is true that was raised during the administrative stage
31 but it is not raised at all in the appeal. It does, or
32 might, involve quite a considerable factual investigation,
33 it might affect third parties and might open up a
34 considerable further dimension to the case. One might ask
35 oneself how far, in any event, that would be an
36 appropriate development since, on one view at least, if
37 Floe is or was or should be deemed to have always been
38 authorised, it does not need the discrimination argument.
39 But if it was not authorised and was acting unlawfully, it

1 might be a little difficult to see how the discrimination
2 argument would overcome any illegality that there was.

3 So it may be that on the discrimination argument,
4 subject to any observations Mr Mercer is likely to make in
5 a moment, the Tribunal may not be, at this provisional
6 stage, wholly against the position that you advance.

7 In relation, however, to the primary argument of law,
8 it is an argument of law basically; it is not an argument,
9 as far as we can see, that requires any additional
10 evidence. It is an argument that may be or probably --
11 well, if correct, and I have no idea if it is correct or
12 not, but if correct, it would be of central importance.

13 We, as the Tribunal, I think feel somewhat
14 uncomfortable about the case proceeding on a basis which
15 would prevent us from going into what is a pure question
16 of law and perhaps deciding the case on either an
17 incomplete or perhaps even false basis when, in a
18 subsequent appeal, the point may be properly pleaded and
19 may turn out to have more significance than perhaps one
20 first thought. I mean, for example, if Floe were to lose
21 this appeal as pleaded but we would decide in a subsequent
22 case that the point we had not allowed them to argue was
23 right, everyone would look somewhat foolish, I would have
24 thought, in some ways.

25 There are, at least provisionally I think, our
26 provisional view is there are strong general arguments for
27 allowing the point of law to be elaborated before the
28 Tribunal.

29 One question is, what is the technical route by which
30 that is achieved? I think there are possibly two or three
31 ways of looking at it. One is to say that although this
32 point is undoubtedly, in a sense, a new point in that the
33 case has never been argued before, Floe's essential
34 position has always been that it has not needed any more
35 authorisation than it has actually had. So one could
36 perhaps say that this was an additional basis, or an
37 additional argument for advancing a proposition that is
38 central to Floe's case and therefore may not necessarily
39 be technically a new ground within the meaning of Rule

1 11(3).

2 It may be of some significance that although Floe
3 had, at an earlier stage apparently, some access to legal
4 representation at the time the appeal was actually put in,
5 it was in liquidation and it was not formulating its
6 Notice of Appeal with the assistance of legal advice, and
7 those matters may have some bearing on the approach the
8 Tribunal should take in a case like this. So there are
9 arguments, I think, as to the proper scope of Rule 11.

10 The other way of looking at it would be for the
11 Tribunal, as I think we probably can, and if we think it
12 necessary should, simply invite the parties to argue the
13 point so that we are, as a Tribunal, in the position to
14 see this case in the round. I do not see any reason why
15 the Tribunal cannot, of its own motion, invite the parties
16 to argue a point of law that is in the public interest to
17 have resolved, or that it would be proper for the Tribunal
18 to refuse to look at a point of law of prima facie
19 relevance to the case simply on the basis that in a
20 home-made appeal an unrepresented party had not properly
21 pleaded it. That might be taking things, however strict
22 one may be, a little far.

23 So those were the two sort of avenues of approach
24 that we had been considering amongst ourselves as the
25 Tribunal. That, as it were, puts you in the picture as to
26 our preliminary thinking.

27 MR HOSKINS: That is very helpful, sir, thank you. Before
28 plunging into the detail, can I deal with this at the
29 general level, which is what is the Tribunal's function?

30 THE PRESIDENT: Yes.

31 MR HOSKINS: I fully understand the temptation to say, well
32 this point has been raised therefore we should deal with
33 it, but with all due respect that is not the Tribunal's
34 function and it is not a court's function. Take the
35 example of judicial review: even the Administrative Court
36 is tied by the pleadings of the parties. The detailed
37 grounds have to be set out in a claim form, the detailed
38 grounds of defence have to be set out in the defence.

39 THE PRESIDENT: Yes.

1 MR HOSKINS: And there is no power, in the Administrative
2 Court, which is a court of inherent jurisdiction because
3 it belongs to the High Court, to say, "Well we have read
4 the parties' pleadings but, actually, now we come to think
5 of it, there is another point that we think is
6 fundamental. We are going to deal with it."
7 That is not the function of a court, it is not the
8 function of a Tribunal, of this Tribunal.
9 THE PRESIDENT: Yes.
10 MR HOSKINS: It is not to set forth to find out what the law
11 is in a position; it is to resolve a dispute between the
12 parties. It is important to set this dispute in context
13 because what has happened here -- and I would like to go
14 through some of the detail on how the complaint came to be
15 made and how the appeal was drafted etc. I do want to come
16 on to that because I think it is important and there is
17 some further information which has come to light.
18 THE PRESIDENT: Yes.
19 MR HOSKINS: But what has happened is that Floe have had a
20 complaint against Vodafone; they have put forward a
21 complaint to Oftel; Oftel has fully investigated that
22 complaint. I do not think you have seen the bundle of
23 papers, but I am sure you will accept it from me that this
24 was not simply, 'Look, here is a complaint. It is not
25 particularly well-drafted, we will get rid of it.' It was
26 thoroughly investigated.
27 THE PRESIDENT: Yes.
28 MR HOSKINS: Vodafone also were required to provide a great
29 deal of information so as we could properly investigate
30 it.
31 THE PRESIDENT: Yes.
32 MR HOSKINS: Following that, there was a decision of
33 non-infringement. So there is no sense of Floe having been
34 shut out from having its case heard because it puts its
35 case, and as I will show you, it puts its case having had
36 the benefit of legal advice and it puts its case with the
37 benefit of an experienced consultant. So it is not simply
38 some poor, old lady who turns up at court having been
39 hoodwinked by some nasty local authority.

1 THE PRESIDENT: No.

2 MR HOSKINS: It is a commercial company undertaking a business
3 which it knew had a degree of risk in it. We see that from
4 the papers, consulting with the DTI etc. It was well able
5 to look after itself and it did look after itself. It took
6 advice from Mayer Brown, it took advice from Mr Happy. So
7 a process has been gone through.

8 Having gone through that process, we then have the
9 appeal. Again, I will show you the context in which the
10 appeal was drafted but, again, the notion of Floe being a
11 poor lamb at the mercy of Ofcom taking technical points,
12 simply does not stand up. It does not stand up.

13 THE PRESIDENT: Yes.

14 MR HOSKINS: There is a fundamental issue for the Tribunal
15 which is when a complaint has been made with the benefit
16 of both legal and other professional advice, when a
17 complaint has been fully dealt with by the relevant
18 regulatory body and when an appeal has been made, is it
19 really something that the Tribunal wants to encourage that
20 when either the original complainant or their new lawyers
21 say, "Well, I have thought of a new point nobody has run
22 before", we unravel a whole system.

23 So you understand why, from Ofcom's perspective, we
24 say that is not what is intended to happen. There is a
25 system, there is a statutory system, there is a regulatory
26 system that is designed so that complaints can be fully
27 aired, that appeals can be dealt with properly. What
28 should not happen is that if one then gets to this stage,
29 someone happens to think of a new argument and it is
30 simply, "Oh well, because someone has raised a new
31 argument and because we cannot immediately see it is a bad
32 one we must let it in." That is the general policy
33 perspective.

34 What I would submit is that the suggestion that
35 because this argument has been raised now it should be
36 heard because otherwise it is on a false basis, is wrong
37 in law because it steps outside the regulatory system.

38 THE PRESIDENT: But if it is a pure point of law that goes to
39 the heart of the validity of the regulatory regime we are

1 discussing, do those observations of yours apply with
2 quite the same force?

3 MR HOSKINS: Sir, I will boldly say that they do. The reason
4 why I say that is because the question is not -- the
5 criteria laid down in the Tribunal's own rules is not, "If
6 it is a question of law, we can allow it in." The rules
7 are set out in Rule 11.

8 THE PRESIDENT: Yes.

9 MR HOSKINS: Rule 11 has to be satisfied. So in my submission
10 the starting point has to be -- and I keep saying I want
11 to come to it because I do want to come to it -- let us
12 take the framework of Rule 11 and see where we get to, but
13 one cannot start outside Rule 11 and say, "Well, it is
14 only a point of law therefore not a great deal of
15 evidence" etc.

16 You made the point, sir, in relation to
17 discrimination. It is not just more evidence, it is the
18 interest of third parties.

19 THE PRESIDENT: Yes.

20 MR HOSKINS: Of course Vodafone are sitting here, T-Mobile are
21 sitting behind watching what happens.

22 THE PRESIDENT: Yes.

23 MR HOSKINS: The process has been gone through. This argument
24 has obviously implications on third parties in the same
25 way.

26 THE PRESIDENT: Yes.

27 MR HOSKINS: There is no evidence needed, but the same sort of
28 points are -----

29 THE PRESIDENT: But if the argument was right -- if the
30 argument was right, and I have no idea whether it is right
31 or not -- it would be a complete waste of time to go
32 through with these appeal proceedings, would it not?

33 MR HOSKINS: It would not be a complete waste of time because
34 if the appeal is brought, Floe may win it and then Floe
35 will be happy and it will not have been a waste of time.
36 If Floe loses it, then the proper regulatory procedure
37 will have been followed. It comes back to my initial
38 point: it is not this Tribunal's function to say, however
39 it comes to the Tribunal's attention, oh well we can think

1 of another point, it is our job to make sure that the law
2 is in perfect state.

3 With all respect, your function is dispute
4 resolution, albeit here in the context of a regulatory
5 framework. That happens all the time.

6 THE PRESIDENT: But in most jurisdictions in this country, if a
7 point of law pops up at some stage in the case, most
8 jurisdictions would allow that point to be argued, subject
9 to any orders as to costs, would they not?

10 MR HOSKINS: Sir, that is correct but the problem is that your
11 Tribunal is a creature of statute and the only power you
12 have to allow this argument in, in my submission, is
13 through Rule 11, in particular Rule 11(3) and I will come
14 to that.

15 So certainly when it comes to assessing how Rule 11
16 applies, if we get to the discretionary stage then all the
17 points that you are putting to me will obviously weigh
18 heavily in the balance.

19 THE PRESIDENT: Yes.

20 MR HOSKINS: We only get to that stage having done the Rule 11
21 exercise because if this is a new ground, and I will
22 submit that it clearly is -----

23 THE PRESIDENT: Yes.

24 MR HOSKINS: ----- unless the Rule 11(3) conditions are
25 satisfied, it is not a matter of discretion; you simply
26 have no jurisdiction to consider the point.

27 THE PRESIDENT: Yes.

28 MR HOSKINS: It has to be left as it is.

29 THE PRESIDENT: Yes.

30 MR HOSKINS: The danger is, of course, in my submission there
31 is no escape for the Tribunal. It has, in this case, to
32 look at Rule 11. In applying Rule 11, certainly you will
33 be applying it to the facts of this case, you have got to
34 decide it, it has got to apply in other cases. If you take
35 an overly generous view of Rule 11 in this case, you are
36 setting a trend.

37 THE PRESIDENT: Yes.

38 MR HOSKINS: You are going to find in the future that when
39 these sorts of complaints are made, when the regulatory

1 body, be it OFT, Ofcom, has expended a lot of resources in
2 dealing with something, that someone will pop up at the
3 end of the day and say, "We have thought of something new.
4 It is a point of law, you must hear it." That is why it is
5 important that we go through the hoops that are laid down
6 in the legislation.

7 THE PRESIDENT: The only question here is it is not really the
8 whole regulatory system that is involved because there
9 would not have been any problem if they had included this
10 point in their original Notice of Appeal filed on 31st
11 December, or whatever date it was. I think it is 2nd
12 January actually.

13 MR HOSKINS: Sir, that is not quite true. I am sorry to
14 interrupt, but if that has been the case, then of course
15 there would have been the Freeserve argument, and this
16 does take account of the system as the whole. As this
17 Tribunal said in Freeserve, it is not appropriate, indeed
18 it is not possible for an Appellant to the Tribunal to
19 raise a completely new ground that was not raised before
20 the regulatory body. That is for precisely the sort of
21 practical reasons that I have been trying to explain this
22 morning because there is a system as a whole.

23 So with respect, if they had put it in, yes it would
24 have been in the appeal, but the immediate answer from
25 Ofcom would have been, yes the argument is there but they
26 are not entitled to run it, and that is regardless, again,
27 of whether it is a point of law or a point of fact.

28 THE PRESIDENT: That is where I am a bit less persuaded at the
29 moment. I think there may be distinctions to be drawn
30 between points of law that go to the heart of the
31 jurisdiction and other new issues.

32 MR HOSKINS: Sir, even if one takes that distinction, one
33 cannot ignore the fact that we are where we are now, and
34 unless Rule 11 conditions are satisfied, there is no
35 jurisdiction for the Tribunal.

36 THE PRESIDENT: Yes.

37 MR HOSKINS: I mean, yes, it is a point of law raised by Floe,
38 but I am afraid I will meet that because there is a point
39 of law against it which is unless you are satisfied that

1 Rule 11 conditions are satisfied, you have no
2 jurisdiction, and in deciding how Rule 11 applies that is
3 not just to be done in the context of the case by Floe, it
4 will apply the next time someone pops up and says, "We
5 have thought of another new argument."

6 THE PRESIDENT: Yes.

7 MR HOSKINS: Can I take you to the Rule 11 point?

8 MR HOSKINS: Yes.

9 MR HOSKINS: Obviously that is where we are getting to, that
10 is going to be the crux of this matter because there have
11 been some developments there. I have seen Floe's most
12 recent written submissions. What is still not clear to me
13 is whether Floe now accept that the primary argument is
14 actually a new ground or not because the distinction is
15 obviously crucial.

16 In our skeleton argument we have set out our analysis
17 of the legal position. My understanding is, again from
18 Floe's supplementary submissions, that they accept our
19 legal analysis. What that means is there is a distinction
20 between Rule 11(1) and Rule 11(3). Rule 11(1) means that
21 the Tribunal has the power to grant permission to amend a
22 Notice of Appeal, and that is a general discretion, but in
23 relation to new grounds of appeal, then the permission can
24 only be granted if one of the specific and restrictive
25 conditions set down by the rules apply.

26 THE PRESIDENT: Yes.

27 MR HOSKINS: The ones that Floe rely on are that there is a
28 matter of law that has come to light since the appeal was
29 made and that it was not practicable to include such
30 ground in the Notice of Appeal.

31 So first of all, we have to say, is it a new ground?

32 THE PRESIDENT: Yes.

33 MR HOSKINS: I am not sure what Floe's position is on that
34 anymore so I think I probably need to explain what our
35 position is.

36 THE PRESIDENT: Yes. If we have to get as far as Rule 11, that
37 is the point that is in the Tribunal's mind at the moment,
38 what is the extent of the concept of ground, bearing in
39 mind the, probably to most people, somewhat obscure

1 genesis of this rule which is related to an equivalent
2 rule in the CFI which is, in turn, related to rather
3 technical distinctions in Continental pleadings between a
4 ground and an argument in support of a ground.

5 MR HOSKINS: Sir, there is a going to be a grey area, I cannot
6 pretend otherwise, between what is a new ground and what
7 is an argument in support of an existing ground.

8 THE PRESIDENT: Yes.

9 MR HOSKINS: I will develop that in the context of this case,
10 but my caveat, and I am sorry to repeat it, is this: you
11 cannot simply look at that distinction and seek to apply
12 it in the context of this case as such. In setting an
13 attitude as to how liberal a Tribunal is going to be
14 towards Rule 11(1) and Rule 11(3), you will, whether you
15 like it or not, be setting a precedent.

16 THE PRESIDENT: Yes.

17 MR HOSKINS: This is dealt with in our skeleton argument at
18 paragraph 11 onwards. I think Floe quibble slightly with
19 this way I put the case, or their primary argument, but I
20 do not think anything turns on that because we have all
21 read it, but the primary argument is that on a proper
22 interpretation of section 1 of the Wireless Telegraphy Act
23 1949, public gateways services are lawful because the
24 relevant user is the mobile network operator.

25 THE PRESIDENT: Yes.

26 MR HOSKINS: Sir, in our submission that argument is not a
27 point of detail or an extra argument; it is fundamental.

28 THE PRESIDENT: Probably so fundamental that a competent
29 regulator ought to have considered it of their own motion.

30 MR HOSKINS: No, sir, because every single regulatory body who
31 was involved accepted that the Wireless Telegraphy Act
32 operated in a certain way and that is the way that Oftel
33 understood it, it is the way that the Radio Communications
34 Agency understood it, it is the way that the DTI
35 understood it and it is the way that Ofcom understand it.

36 What one has is lawyers putting their thinking caps
37 on because they are backed into a corner and coming up
38 with an argument. But to suggest this argument is a strong
39 one, with respect, is not -----

1 THE PRESIDENT: I am not suggesting at all, or making no
2 comment whatever on the strength of the argument. That is
3 a different point, but we are in a situation where, in
4 paragraphs 39 and so forth of the decision, the Director
5 poses himself the question: are the public GSM gateway
6 services provided by Floe illegal? In paragraph 40 he
7 refers to section 1 of the WTA and concludes that Floe is
8 not licensed to use under that Act and then continues with
9 the analysis.

10 It is the Director's conclusion that the public
11 services gateways provided by Floe are illegal that is put
12 in issue by the original Notice of Appeal.

13 MR HOSKINS: With respect -----

14 THE PRESIDENT: So it is not exactly as if we are in a sort of
15 completely new ball park.

16 MR HOSKINS: With respect, sir, we are because everyone -- and
17 by "everyone" I mean not just Oftel and all the agencies I
18 have identified, but Floe itself were operating on the
19 basis that public GSM gateways were unlawful if they were
20 not licensed.

21 Let me break that down. They were assuming that the
22 user, as the term is used in the 1949 Act, was not
23 Vodafone but was Floe. That was Floe's own basis upon
24 which it made the complaint, upon which it made
25 submissions in relation to the complaint, upon which it
26 made its appeal. That was Floe's own understanding of the
27 position.

28 All that has happened is that they are running out of
29 places to go. They have gone to new lawyers, they have put
30 the cold towels around their head and have come up with a
31 construction argument. The whole basis of this, up to
32 date, has been that the user, within section 1 of the 1949
33 Act, was Floe, not Vodafone.

34 THE PRESIDENT: If you are in a position to shoot the point
35 down in five minutes, I am not quite sure why you are so
36 anxious to prevent it being ventilated.

37 MR HOSKINS: The reason why we are so anxious is because there
38 is a practical concern and a very -----

39 THE PRESIDENT: And the practical concern is what?

1 MR HOSKINS: Is that when an undertaking has made a complaint
2 to Ofcom, Ofcom has investigated it fully, an appeal has
3 been put in, it should not be possible for a party simply
4 to turn around and say, "Aha, we have thought of a new
5 argument." That is a waste of regulatory time, if I can
6 put it like that.

7 THE PRESIDENT: Waste of regulatory time. Yes.

8 MR HOSKINS: There is an obligation on parties, when they make
9 a complaint, to think about it and to do it properly.
10 There is an obligation on parties when they lodge an
11 appeal to think about it. It should not be a matter taken
12 lightly. The danger of adopting a liberal approach in a
13 case like this is that it is then very easy for a party to
14 scribble down a few ideas, a couple of sides, and see what
15 happens and, as the things goes on, to keep adding to it,
16 to keep adding to it.

17 Any possibility of procedural efficiency is seriously
18 weakened if it is simply possible to continually come up
19 with new ideas and to put them in. In our submission, that
20 is not how the rules are designed. The rules are designed
21 to have some streamlining of dealing with these sorts of
22 complaints. That is precisely why we feel so strongly
23 about it.

24 THE PRESIDENT: Yes.

25 MR HOSKINS: We are confident we will defeat the argument, but
26 there is a very serious point of principle here and it
27 cannot simply be waved through.

28 THE PRESIDENT: But you regard the argument as an argument, as
29 a wholly unfounded argument?

30 MR HOSKINS: Yes.

31 THE PRESIDENT: Yes.

32 MR HOSKINS: If there is something in it, then Oftel, Ofcom,
33 the Radio Communications Agency, Floe, everyone else in
34 the business would have thought of that a long time ago,
35 but you have to remember -----

36 THE PRESIDENT: That is not necessarily a persuasive approach.

37 MR HOSKINS: The Radio Communications Agency had consultation
38 on this, sir, and everyone in the industry was involved.
39 It would be, in my submission, surprising -----

1 THE PRESIDENT: I will come to you in a moment, Mr Mercer, do
2 not worry.

3 MR HOSKINS: ----- if, coming out of that consultation, the
4 whole basis upon which the industry and the regulators and
5 the government was operating was fundamentally flawed,
6 that that had not come out in the consultation.

7 THE PRESIDENT: I think even the consultation regarded matters
8 as something of a grey area, did it not?

9 MR HOSKINS: Not on this point, sir, no.

10 THE PRESIDENT: I see.

11 MR HOSKINS: Certainly not on this point.

12 THE PRESIDENT: I see.

13 MR HOSKINS: I do not want to get into strength of argument
14 or whatever.

15 THE PRESIDENT: No, we are not on that at the moment.

16 MR HOSKINS: Precisely. That is for another day. I am trying
17 to look at whether we are 11(1) or 11(3).

18 THE PRESIDENT: Yes.

19 MR HOSKINS: I think to do that one has to look obviously at
20 Floe's original grounds for appeal. They are at Floe's
21 bundle, tab 14, page 176.

22 THE PRESIDENT: I am not sure we are entirely working off the
23 same bundles at the moment, Mr Hoskins. Do not worry, we
24 have got Floe's Notice of Appeal.

25 MR HOSKINS: I am sorry. It is page 176 of my -----

26 THE PRESIDENT: What page is it in the Notice of Appeal?

27 MR HOSKINS: I see, sorry.

28 THE PRESIDENT: In its internal numbering, I am sorry.

29 MR HOSKINS: I was provided with a bundle which Taylor Vinters
30 had put together which was their application.

31 THE PRESIDENT: Sorry. We have been working on the papers
32 within a different bundle.

33 MR HOSKINS: I have had that problem as well.

34 THE PRESIDENT: Page 176, did you say?

35 MR HOSKINS: Yes, page 176. It is the first page behind tab
36 14.

37 THE PRESIDENT: Yes.

38 MR HOSKINS: What one sees there under "Summary" are the three
39 grounds of challenge.

1 THE PRESIDENT: Three "reasons", yes.
2 MR HOSKINS: I would say they are grounds.
3 THE PRESIDENT: You would say they are grounds. Yes, I am only
4 quoting what it says, but you say those are grounds.
5 MR HOSKINS: If those are not grounds, it is difficult to know
6 -----
7 THE PRESIDENT: What is a ground, yes.
8 MR HOSKINS: ----- what is a ground. I think I would struggle
9 if that was not the case. Number two, "A failure by Oftel
10 to base its investigation on the legislation prevailing at
11 the time."
12 THE PRESIDENT: Two is probably the ground, is it not?
13 MR HOSKINS: Taylor Vinters say this is the ground which the
14 primary argument comes under.
15 THE PRESIDENT: Yes.
16 MR HOSKINS: It is an articulation and extrapolation of that
17 ground.
18 THE PRESIDENT: Yes.
19 MR HOSKINS: One finds the particulars of that ground at pages
20 179 to 180.
21 THE PRESIDENT: Yes.
22 MR HOSKINS: It has just been pointed out to me, page 178 -- I
23 am not going to play with language all day -- but "Summary
24 of the grounds for contesting the decision".
25 THE PRESIDENT: Thank you. Yes.
26 MR HOSKINS: The "reasons" are converted into "grounds". But
27 pages 179 to 180, do you see the heading in the middle of
28 page 179 "Failure to base its investigation on the
29 legislation prevailing at the time"?
30 THE PRESIDENT: Yes.
31 MR HOSKINS: If one reads that, two things become apparent:
32 first of all is that the primary argument is not raised at
33 all; secondly, and more importantly, is that the reasons
34 which underpin that ground are made on the assumption that
35 Floe, to be acting lawfully, has to have been authorised
36 by Vodafone.
37 In other words, the whole premiss of this ground is
38 that the user, going back to the wording in the Act, is
39 Floe, not Vodafone.

1 If the fundamental basis of Floe's grounds in its
2 original Notice of Appeal is inconsistent with the new
3 ground/argument they wish to put forward, then in our
4 submission it cannot be said to be a new ground because it
5 is inconsistent.

6 THE PRESIDENT: But it must be a new ground, is your argument?
7 MR HOSKINS: Precisely, because of the inconsistency.

8 THE PRESIDENT: Yes.

9 MR HOSKINS: Again, this is not a helpful form of advocacy but
10 it is one we all use: if this is not a new ground, what
11 is?

12 THE PRESIDENT: Yes. The discrimination point does not surface
13 at all in the Notice of Appeal, but at least illegality or
14 a failure to properly apply the legislation surfaces in
15 this home-made document, albeit incompletely.

16 MR HOSKINS: Sir, with respect, it becomes a meaningless
17 exercise. If one is simply saying, at the most general
18 level, oh here is a heading that if they had thought about
19 it, they might have squeezed this under therefore it is
20 not a new ground, that renders Rule 11(3) meaningless.

21 THE PRESIDENT: Yes.

22 MR HOSKINS: What one has to do is to look at the grounds and
23 the arguments in the original appeal and compare them to
24 the new one as a matter of substance.

25 THE PRESIDENT: Yes.

26 MR HOSKINS: That is for the two reasons I have put forward:
27 (1) one the primary argument is not there; and (2) it is
28 inconsistent with what is there.

29 THE PRESIDENT: Yes.

30 MR HOSKINS: It has to be a new ground.

31 THE PRESIDENT: Yes.

32 MR HOSKINS: Sir, then we say it is a Rule 11(3) issue and
33 therefore the Tribunal only has jurisdiction to allow the
34 amendment if one of the relevant conditions is satisfied.

35 THE PRESIDENT: Yes.

36 MR HOSKINS: Floe relies on two conditions, 11(3)(a) and
37 11(3)(b).

38 THE PRESIDENT: Yes.

39 MR HOSKINS: 11(3)(a) is "there is a matter of law which has

1 come to light since the appeal was made"; and (b) is "it
2 was not practicable to include such ground in the Notice
3 of Appeal."

4 The way in which Floe say that these conditions are
5 satisfied is this: first of all, they say, "We were not
6 assisted by a legally qualified person in preparing the
7 Notice of Appeal"; and secondly, "We were not aware of the
8 primary argument until 21st January 2004."

9 THE PRESIDENT: Yes.

10 MR HOSKINS: If I can look at those two arguments, first of
11 all under the heading "not practicable", it is important
12 to understand what actually happened here. Sir, there has
13 been an agreed chronology which the parties -- well, I say
14 the parties, which Floe and Ofcom have produced. I hope
15 you have been provided with copies of that.

16 THE PRESIDENT: I think we have it, yes. Yes.

17 MR HOSKINS: The first entry is 20th June 2003, "A meeting at
18 Ofcom with Floe and Mayer Brown Rowe & Maw to discuss
19 possibility of Floe submitting a complaint concerning
20 anti-competitive conduct by the mobile operators. Mayer
21 Brown had acted generally for Floe for some time and were
22 giving Floe advice on the disconnection issue at this
23 time."

24 THE PRESIDENT: Yes.

25 MR HOSKINS: So one sees Mayer Brown, a leading City firm,
26 instructed by Floe in relation to the submitting or the
27 possible submitting of a complaint to Ofcom.

28 THE PRESIDENT: Yes.

29 MR HOSKINS: On 27th June 2003 Mayer Brown wrote to Vodafone
30 on behalf of Floe in relation to this dispute, so Mayer
31 Brown are still acting. On 18th July, which is only 21
32 days later, Floe submitted a complaint to Ofcom, the
33 Director General of Telecommunications.

34 So the notion that Floe has been acting without legal
35 advice has to be treated carefully.

36 THE PRESIDENT: Yes.

37 MR HOSKINS: It is clear that when they began this regulatory
38 process, they had very good legal advice, but those legal
39 advisers did not put forward the primary argument. Query,

1 | because they did not think of it. Query, because they
2 | thought there was nothing in it.

3 | That should not really matter for the Tribunal. The
4 | point is that they had very good legal advice in relation
5 | to this particular issue.

6 | THE PRESIDENT: Yes.

7 | MR HOSKINS: The second crucial point that comes out of the
8 | chronology is July to October 2003. Mr Happy first heard
9 | an argument similar to the primary argument through the
10 | Mobile Gateway Operators' Association, and of course the
11 | appeal, drafted by Mr Happy, was lodged with the CAT on
12 | 5th January 2004, some months later.

13 | THE PRESIDENT: Yes.

14 | MR HOSKINS: So Mr Happy, by his own admission, had been aware
15 | of the primary argument in some way, shape or form since
16 | late summer/early autumn 2003, well before he put in the
17 | Notice of Appeal.

18 | THE PRESIDENT: Yes.

19 | MR HOSKINS: Mr Happy is, he tells us in his witness
20 | statement, an experienced consultant and part of his job
21 | is assisting companies who make complaints to regulatory
22 | bodies.

23 | THE PRESIDENT: Yes.

24 | MR HOSKINS: So the notion that Floe, in this context, is to
25 | be equated to a litigant in person, in my submission is
26 | simply untenable. It had legal advice, it had the
27 | assistance of Mr Happy.

28 | It is interesting, in the papers provided by Floe to
29 | the Office, Mr Happy's fees were £18,000. It is not simply
30 | a friend of a friend helping out drafting something.

31 | THE PRESIDENT: Yes.

32 | MR HOSKINS: Mayer Brown were paid £15,000, Mr Happy was paid
33 | £18,000. So the notion that somehow it is terribly unfair
34 | to Floe just simply does not stack up. They entered the
35 | process with their eyes open, they entered the process
36 | fully advised and all that has happened is that having
37 | come towards the end of the line, having lost, they have
38 | gone to new lawyers who have thought up a new argument.

39 | Certainly in my submission that is not a reason for

1 this Tribunal to say, "Oh well, someone has raised a point
2 of law, it is very important we let it in" because, with
3 respect, that does undercut the whole point of the system
4 which is at least a degree of procedural efficiency, both
5 before the regulatory body but also before this Tribunal.

6 THE PRESIDENT: Yes.

7 MR HOSKINS: In our submission, once one understands what has
8 actually happened here, to say it was not practicable to
9 include the point falls away.

10 THE PRESIDENT: Yes.

11 MR HOSKINS: The second basis relied on is "new matter of
12 law". Again, we have developed that in our skeleton
13 argument.

14 THE PRESIDENT: Yes.

15 MR HOSKINS: In our submission, a new matter of law is, for
16 example, a legal judgment which comes out after the appeal
17 has been lodged. A new point of law coming to light is
18 not, "We have gone to new lawyers and they have thought up
19 a new point for us." If that were the position, again it
20 would render Rule 11(3)(a) meaningless because it would
21 mean that wherever anyone thought up a new point, they
22 would simply pop up and say, "Thank you, we will raise
23 that point now."

24 So sir, I think it comes to this: in our submission,
25 it is important not to be bewitched by Floe's pleas to be
26 a poor litigant in person; it was not, it is not. It is
27 also very important -- and I say this with all due respect
28 -- for the Tribunal to recognise that it is a creature of
29 statute. It has a statutory function to fulfill within an
30 overall regulatory framework.

31 In our submission, if the Tribunal were to allow Floe
32 to raise the point in this case (1) we would be taking a
33 hatchet and simply hacking away at what underpins the
34 rules, by which I mean the need for some form of
35 procedural efficiency, which means that parties simply
36 cannot turn up at this stage in the day and say, "Aha, I
37 have thought of something else."

38 THE PRESIDENT: Yes.

39 MR HOSKINS: Sir, that is all I wanted to say on primary

1 argument. I can address you on the discrimination point.
2 THE PRESIDENT: I do not think at the moment you need trouble
3 us on the discrimination argument.
4 MR HOSKINS: Thank you. Unless you have any questions, that is
5 all I propose to say.
6 THE PRESIDENT: Thank you. Miss McKnight.
7 MISS MCKNIGHT: Thank you, sir. We would support what Ofcom have
8 said in respect of all of the issues that have been
9 discussed this morning, but we would want to make one
10 further point as to why we think the primary argument
11 should not be introduced.
12 THE PRESIDENT: Yes, of course.
13 MISS MCKNIGHT: And that is that we consider it cannot be
14 determinative of the ultimate appeal. The reason we say
15 that is that the question that is raised in the appeal is
16 whether Vodafone could be said to have acted abusively in
17 disconnecting SIM cards that Floe was using.
18 THE PRESIDENT: Yes.
19 MISS MCKNIGHT: The way that the Appellant now appears to put it
20 is that if the primary argument is correct, and of course
21 we would say it is not, then Floe was acting lawfully at
22 all times, it was simply not governed by section 1 of the
23 Wireless Telegraphy Act, and it cannot have been proper
24 for Vodafone to cut off the SIM cards.
25 THE PRESIDENT: Yes.
26 MISS MCKNIGHT: We say that that reasoning is flawed.
27 THE PRESIDENT: Right.
28 MISS MCKNIGHT: We say that it is quite clear from all the
29 paperwork, including the paperwork which Floe submitted
30 with its complaint, that Floe and Vodafone were under the
31 common apprehension that Floe did require to be authorised
32 as a user of the SIM card apparatus. If it now transpires
33 that this novel argument is correct, that simply does not
34 alter the position that Vodafone informed Floe that it
35 intended to cut off SIM cards because they were being
36 used, as Vodafone believed, unlawfully.
37 THE PRESIDENT: Yes.
38 MISS MCKNIGHT: Floe came back and said, "Our conduct would be
39 unlawful but for the fact that you have authorised it

1 through the contract." Vodafone gave proper consideration
2 to that point and did not agree with it, but Floe never
3 suggested that Vodafone ought to give consideration to
4 this wholly new argument that Floe simply was not within
5 the scope of the Wireless Telegraphy Act.

6 THE PRESIDENT: Vodafone, at its highest, according to you,
7 even if that new argument is correct, would have been
8 acting under a sort of mutual mistake of law, and
9 reasonably in the circumstances?

10 MISS MCKNIGHT: Yes. The way I would put it is that Vodafone had
11 a bona fide belief that the Wireless Telegraphy Act was to
12 be interpreted, as I think is clear, as meaning that Floe
13 was the user. It was fortified no doubt in that view by
14 the fact that the Radio Communications Agency appeared to
15 share, or clearly shared that view.

16 THE PRESIDENT: Yes.

17 MISS MCKNIGHT: It was fortified in that view by the fact that
18 exemption regulations purported to grant an exemption for
19 certain personal users of SIM cards which would have been
20 quite unnecessary had this novel argument been correct.

21 So Vodafone was acting pursuant to a bona fide
22 belief; we say it was a reasonable belief if we have to go
23 that far. We say that Vodafone invited Floe to correct
24 Vodafone's understanding of the situation.

25 THE PRESIDENT: Yes.

26 MISS MCKNIGHT: And it is common ground that this argument was
27 simply never raised.

28 THE PRESIDENT: Yes.

29 MISS MCKNIGHT: So we say that Vodafone must have been
30 objectively justified even if, regrettably, everyone was
31 under a misapprehension as to the true state of the law.

32 THE PRESIDENT: Yes.

33 MISS MCKNIGHT: For completeness, I would say also that we
34 think, as a matter of discretion, the Tribunal could take
35 account of the strength of the primary argument, as it now
36 appears, in deciding whether to allow it in.

37 THE PRESIDENT: Yes.

38 MISS MCKNIGHT: We just wanted to put it on the record that we
39 do think that the primary argument is definitely

1 incorrect. We do not think this is a finely-balanced -----
2 THE PRESIDENT: Do you want to spend a moment on that?
3 MISS MCKNIGHT: Yes, just one moment, because I do not want to
4 take you to cases which obviously would take in a full
5 examination of the argument.
6 In part, it appears that Floe relies on the fact that
7 if all the other parties are correct in their
8 interpretation of the Wireless Telegraphy Act, then the
9 Wireless Telegraphy Act would now be incompatible with the
10 new communications directives.
11 THE PRESIDENT: Yes.
12 MISS MCKNIGHT: We say that is irrelevant because all of the
13 events which form the subject of the complaint and the
14 appeal as against Vodafone occurred before the United
15 Kingdom had reached the longstop date for implementation
16 of those directives and before it had made any effort to
17 implement them. So those directives -----
18 THE PRESIDENT: Directives are enforced, though, are they not?
19 MISS MCKNIGHT: Yes. The legal position is, as we understand it,
20 that the United Kingdom should not, in the interim period,
21 take any action to frustrate the implementation of the
22 directives on their due date, but that it is not obliged
23 to bring forward the date for implementation earlier than
24 the longstop date.
25 THE PRESIDENT: Yes.
26 MISS MCKNIGHT: Our second point is that whilst Mr Mercer quite
27 correctly says in paragraph three of his Schedule 1 of the
28 draft primary argument that there are no cases which
29 directly consider what is meant by the term "use" in
30 section 1 of the Wireless Telegraphy Act, there are in
31 fact cases where the point is obliquely considered, which
32 we would wish to come to.
33 I just have a note of them if you would like me to
34 hand it up, just their references, but I do not actually
35 have copies to discuss today. Would you wish to have them?
36 MR HOSKINS: Just very briefly. I do not know if you have
37 given Mr Mercer a list of the cases that you have in mind.
38 MISS MCKNIGHT: I have it here.
39 THE PRESIDENT: Just, in a few sentences, elaborate what you

1 say they say.

2 MISS MCKNIGHT: Okay. The first one, which is Rudd v Secretary
3 of State for Trade & Industry.

4 THE PRESIDENT: Rudd?

5 MISS MCKNIGHT: R-U-D-D.

6 THE PRESIDENT: Yes.

7 MISS MCKNIGHT: That discusses whether the word "use apparatus"
8 includes "have available for use", and it concludes that
9 it does not, but it does say that "use" is to be construed
10 according to its ordinary meaning. Some of the discussion
11 in the case, we say, casts serious doubt on whether the
12 primary argument can be correct.

13 THE PRESIDENT: Right.

14 MISS MCKNIGHT: The second case, R v Blake, considers whether
15 particular apparatus, cassettes of music which are used in
16 playing music which will then be transmitted by wireless
17 telegraphy, whether those tapes are themselves wireless
18 telegraphy apparatus and discusses what mens rea is
19 required for -----

20 THE PRESIDENT: That is in a criminal context, is it?
21 Leah

22 MISS MCKNIGHT: Yes, in a criminal context. Section 1 of course
23 is a criminal provision.

24 THE PRESIDENT: Yes.

25 MISS MCKNIGHT: Which is why Vodafone was so concerned not to
26 condone what Floe was doing.

27 THE PRESIDENT: Yes.

28 MISS MCKNIGHT: The discussion of mens rea makes clear there
29 that the mens rea is simply one has to know that one is
30 using apparatus but not that one is using it unlawfully
31 without a licence.

32 THE PRESIDENT: Yes.

33 MISS MCKNIGHT: But the examples that are given of a person who
34 would not even know if he were using the apparatus are if
35 someone, who walks past a transmitter station whilst
36 chatting to a third party, does not realise that his
37 conversation is being picked up by the transmitter; he is
38 using the transmission apparatus but he is not knowingly
39 doing so.

1 THE PRESIDENT: Yes.

2 MISS MCKNIGHT: We say that this supports a wide construction of
3 the term "use" and, again, will, on examination, prove
4 inconsistent with the primary argument, but that is very
5 much sort of foreshadowing points we would make if the
6 argument were to be introduced.

7 We support what Ofcom have said about the fact that,
8 on the true facts, Floe did have access to legal advice in
9 putting both its original complaint and, by implication,
10 the Notice of Appeal.

11 We would wish also to emphasise that Floe is not to
12 be regarded as a company which was inexperienced in
13 telecoms matters. Floe itself makes much of the point in
14 its principal case that it disclosed its business plan to
15 Vodafone before signing up a contract with Vodafone.

16 THE PRESIDENT: Yes.

17 MISS MCKNIGHT: It relies on that as showing it intended to run
18 public gateways. But the business plan also shows that
19 Vodafone had a senior management team, including someone
20 responsible for legal and regulatory affairs, two of its
21 principal executives had extensive experience in the
22 telecoms sector.

23 Also on page 35 of its business plan, it said this:
24 "Floe is aware that, as a mobile service provider, it is
25 developing applications and services that will, in some
26 areas, test Oftel and the mobile telecoms regulatory
27 regimes in the United Kingdom because the company is not a
28 licensed mobile network operator. To ensure that the
29 business is not adversely affected by loose or ineffective
30 legislation, or by the slow turning of the Government
31 wheels, Floe is working closely with and currying
32 sponsorship of the regulatory department of the Department
33 of Trade & Industry" and it goes on to discuss the role of
34 the DTI in regulating the telecoms sector.

35 We say that Floe would have had ample opportunity,
36 through the expertise of its own executives and through
37 its access to expert advice, to sort this argument out if
38 it really thought it was worth running. The fact that it
39 did not do so, we think supports the view that there is

1 very little merit, if any, in the primary argument and
2 that no discretion should be exercised in favour of
3 allowing it to be introduced.

4 That is all I wish to say on that point. Thank you.

5 THE PRESIDENT: Thank you very much, Miss McKnight. Yes, Mr
6 Mercer. Would you be in a position to spend a couple of
7 minutes just elaborating for us the bare bones of the
8 primary argument?

9 MR MERCER: Yes, sir. While we are on about the primary
10 argument and just how novel it is, I have actually asked
11 Ofcom to tell me when they first heard the primary
12 argument and I have not actually had an answer yet to that
13 correspondence. In fact, it was not a plain refusal but a
14 certain reluctance I think was shown.

15 I can tell them, because the argument, as I recall
16 it, first arose in the context of a general discussion
17 with the DTI and Oftel of terminal equipment in around
18 1991.

19 THE PRESIDENT: 1991?

20 MR MERCER: Yes, sir. I think that is probably before Mr
21 Hoskins was instructed by Ofcom. I am not sure if he may
22 have left school.

23 THE PRESIDENT: That must have been in a different context,
24 must it not?

25 MR MERCER: In a different context. It was consideration
26 generally of terminal equipment in the telecommunications
27 industry.

28 THE PRESIDENT: Yes.

29 MR MERCER: The argument arose because, on one side of the
30 industry, a different definition of what constituted
31 terminal equipment and a different regime was instituted
32 on the fixed line side to that which was adopted on the
33 wireless telegraphy side; the wireless telegraphy side
34 adopting a view of terminal equipment, what they called
35 "user stations", more in keeping with the traditional
36 qualities of the Wireless Telegraphy Act 1949 which was
37 really based on technology of a rather different nature,
38 more like citizen span, where, if you have something that
39 communicates on the required frequency, you do not need to

1 put a SIM card or any other form of authorisation
2 technology into the user station before it can be used on
3 the network.

4 The argument, I think, actually is also not that
5 difficult. I could put my colleague, Mr Clark, into the
6 witness box so he could testify that within ten minutes of
7 reading the Decision Notice in this case for the first
8 time -- I know because he printed it off me -- I walked
9 into his room and said, "I think I have got an argument
10 here and I have seen this before."

11 THE PRESIDENT: Yes.

12 MR MERCER: So I do not think it is that difficult.

13 THE PRESIDENT: Yes.

14 MR MERCER: I do not think it is that unusual. I think what it
15 is, however, sir, is highly inconvenient. I fully accept
16 that for the mobile network operators and for Ofcom it is
17 highly inconvenient. Highly inconvenient does not
18 necessarily equate to wrong and I drafted the Amended
19 Notice of Appeal and I read Blake and a number of other
20 cases before drafting what it is.

21 THE PRESIDENT: Yes.

22 MR MERCER: And we can have an interesting argument in the
23 future as to their relevance or not.

24 THE PRESIDENT: Yes. You take the view they are not relevant?

25 MR MERCER: I take the view that they may be interesting but
26 they are not really relevant.

27 THE PRESIDENT: Yes.

28 MR MERCER: If anything, they show a wide use of the word
29 "use" and also indicate that use may occur even when that
30 is not in the knowledge of the user, which of course would
31 be useful to my side of the argument.

32 According to statistics that I have seen in the last
33 few years and over the last three or four years, there
34 have been about 350 decisions of telecommunications
35 regulators, in particular Oftel, and seven appeals. That
36 is an appeal rate of about 1:50. That is because we did
37 not have an effective appeal mechanism in this country
38 before, and I quite accept that Mr Hoskins's client may
39 find it difficult to come to terms with the fact that

1 | there is now an effective appeals mechanism about
2 | decisions.

3 | But the fact is that effective appeals means using
4 | discretions, to give latitude to what is in effect, and I
5 | still maintain, a litigant in person. It seems to me
6 | rather unfair in the extreme to take the livelihood away
7 | from a company that enabled it to have proficient legal
8 | advice of Mayer Brown Rowe & Maw on the one hand, and then
9 | say, well it was used to using it, it should continue even
10 | after we had bankrupted it, in being able to afford that
11 | advice, because that is what these disconnections -- let's
12 | not beat about the bush here. Our allegation is that what
13 | Vodafone did bankrupted Floe and it could not afford
14 | highfalutin advice. I assure you, compared with the fees
15 | of most law firms for fighting an appeal in the CAT,
16 | £18,000 is but a drop in the ocean.

17 | The fact is that it comes down to two things: either
18 | it is within the four corners of the appeal to begin with,
19 | and we say that it is because the whole premiss of this
20 | matter is whether or not a use of GSM gateways is lawful.
21 | That is our whole premiss. I agree with Vodafone that
22 | there are still issues to be decided after we have got
23 | through that hurdle. I do not discount that. I will say
24 | that that puts a different spin on events and I will
25 | undoubtedly say that, in fact, nobody really had much of a
26 | clue about the legality of this area prior to a date
27 | somewhere in 2002, least let alone the DTI and Radio
28 | Communications Agency.

29 | I will say that Miss McKnight's client read the
30 | business plan and knew full well what Floe was going to do
31 | and could not, because of its industry knowledge, have had
32 | any doubt whatsoever that if you do it and then you decide
33 | you did not like what it was doing and started to turn off
34 | and was handed on a plate, a very convenient, large plate
35 | marked 'Ofcom and Radio Communications Agency', with a
36 | reason for doing so.

37 | That is a future discussion, sir, to be had after we
38 | get through this point.

39 | THE PRESIDENT: Yes.

1 MR MERCER: As for novelty, I think novelty can only mean --
2 the words are "come to light." Come to light to whom?
3 Come to light generally? Come to light to the Lord Chief
4 Justice? Come to light to whom? It can only mean to the
5 Appellant. That is a sensible rule, despite what Mr
6 Hoskins said, because it means that points that come up
7 and are considered and are novel can be dispatched in the
8 same appeal procedure, the saving of public time and
9 money.

10 THE PRESIDENT: Yes.

11 MR MERCER: Indeed I really do not see that there is so much
12 of a principle involved as Mr Hoskins in all of this this
13 morning, sir. I much rather wished we had spent just five
14 minutes, or five minutes aside discussing the primary
15 argument as he seems to suggest is necessary because I
16 think that would have been a much better public use of
17 everybody's time.

18 Unless I can help you with some of the other matters,
19 sir, I think I would be going over old ground.

20 THE PRESIDENT: No. Thank you very much, Mr Mercer.

21 (The Tribunal conferred)

22 THE PRESIDENT: Mr Mercer, would you care to elaborate for us
23 the possibility that you mentioned at the outset, and that
24 was broadly that if we were against you on the main issue,
25 that you would consider asking us to adjourn these
26 proceedings and make a new complaint, to get a ruling on
27 that, as I understood it, a limited point of law,
28 introduce a new appeal, invite us to join the new appeal
29 to the old appeal and then, as it were, pick up things
30 from where we left off? Have I understood that correctly?
31 That is the first part of the question.

32 The second part of the question is whether that
33 procedural situation, if it were to arise, could perhaps
34 give rise to exceptional circumstances under 11(3)(c) of
35 our rules?

36 MR MERCER: If you forgive me, sir, I am just refreshing
37 myself on the exact wording of 11(3)(c).

38 THE PRESIDENT: Yes, of course. I do not know if you have a
39 copy of the rules to hand.

1 MR MERCER: I do. (Brief pause) I think, sir, that you have
2 grasped my argument exactly.

3 THE PRESIDENT: Yes.

4 MR MERCER: And in probably fewer sentences than I expressed
5 it, for which I am grateful. I suppose at the back of my
6 mind in making it is to point out the ridiculousness of
7 going round and round in circles and the waste that that
8 involves.

9 THE PRESIDENT: Yes.

10 MR MERCER: And that a victory by Mr Hoskins in having this
11 knocked out would be a pyrrhic victory of which nobody
12 would benefit whatsoever. In some ways I think the
13 circumstances are exceptional in that there is a point of
14 law that seems to have been overlooked, and I do not know
15 why it has been overlooked or how it has been overlooked.
16 What I do know -- and I am not exactly a Jeffrey Robertson
17 so I do not go in for passion advocacy -- is that it is a
18 good point. I know because it is a point which has been
19 discussed by telecoms lawyers for some years.

20 It is the question of an almost anomalous position
21 whereby my mobile handset is being used by me, not by the
22 people who actually control it, not by the people who
23 actually have power over whether it functions, what
24 frequencies it uses or whatever.

25 It is a point which have been discussed over many --
26 or one or two glasses of wine.

27 THE PRESIDENT: I see. So you are not ----

28 MR MERCER: I am surprised in the circumstances that this has
29 not come out.

30 THE PRESIDENT: Yes.

31 MR MERCER: It surprises me, I suppose, that it has not come
32 out so far. Part of the reason for it not coming out is
33 that Oftel went to one source for its legal
34 interpretation, went to the RA, which is not a bad place
35 to go in the circumstances, but it did not come to an
36 independent view in the circumstances. It merely took the
37 view of the existing regulator. It is funny because I
38 always thought most of the regulators, when you ask them
39 for a legal opinion, usually put at the bottom "This is

1 our opinion, but of course it is subject to the
2 interpretation by the courts."

3 They merely took the orthodoxy hook, line and sinker.
4 It would have been most inconvenient to have taken another
5 line. I quite admit that.

6 I think this case is different from most others to
7 which 11(3)(a) would normally have applied. There, I think
8 you are talking about suddenly the investigator walking
9 through the door with fresh evidence of a cartel. You are
10 talking about things coming to light about meetings or
11 evidence that were not known about previously.

12 THE PRESIDENT: Yes.

13 MR MERCER: Here you have something which is not known about
14 to the Appellant. I keep coming back to this: when it
15 comes to "come to light", who does it mean come to light
16 to? I think it can only mean the Appellant.

17 THE PRESIDENT: Yes.

18 MR MERCER: And that is the only person to whom it can refer.

19 THE PRESIDENT: Yes.

20 MR MERCER: I think we succeed on that point, sir. As it being
21 an exceptional circumstance, I think that it is
22 exceptional in the fact that it is a reasonably obvious
23 point that has not come to light before and it has always
24 been at the centre of the appeal.

25 THE PRESIDENT: Yes.

26 MR MERCER: If I can help you any more, sir?

27 THE PRESIDENT: Thank you very much.

28 MR HOSKINS: Sir, can I -----

29 THE PRESIDENT: Do you want to come back on that last -- sorry,
30 what has happened to my microphone. The mike seems to have
31 packed up. (Brief pause) Never mind. Do not worry.

32 MR HOSKINS: I think there are four points I have to deal
33 with. The first one is I am very flattered that Mr Mercer
34 thought I was still at school in 1991, but unfortunately I
35 am older than I look.

36 Three more substantial points. Mr Mercer's way out of
37 this, "Oh we will all just go back to the beginning", I am
38 speaking without instructions here, but as a matter of
39 legal principle that is not as easy or obvious as it

1 sounds because if they were to come back and say, "Aha,
2 here is a new point", in my submission it would be within
3 Ofcom's power and discretion to say, "I am sorry, we have
4 already spent substantial time and money investigating
5 your complaint. You have lodged an appeal with the CAT,
6 you have made a mess of it. You cannot just come back
7 round to us and expect us to invest more public time and
8 money because you have thought up another point."

9 I am not saying that is not what Ofcom would do, but
10 it would certainly have, in my submission, as a matter of
11 law, discretion to do so.

12 The second point is Mr Mercer said that Oftel did not
13 take an independent view. That is not correct, it did take
14 an independent view. I do not think I need say any more on
15 that.

16 THE PRESIDENT: No.

17 MR HOSKINS: The third point splits in to two in a way. The
18 question put to Mr Mercer was what about Rule 11(3)(c), is
19 this exceptional? Mr Mercer said it is exceptional because
20 a point of law has been overlooked.

21 This is not an exceptional case. A company who has
22 had legal advice on a particular issue -- I do not want to
23 go over old ground-- who engages a consultant, to put in
24 an Appeal Notice and then thinks of a new point, again if
25 that is exceptional, then you are going to find, very
26 quickly, that Rule 11(3) has no teeth whatsoever because
27 everyone who comes before you will be exceptional.

28 THE PRESIDENT: Yes.

29 MR HOSKINS: Sir, you asked me the question, why are we
30 digging our heels in on this? I hope I have made it clear
31 why we have, in terms of our concern to preserve the
32 procedural efficiency of the system. But if Floe's
33 application to amend were to be rejected, what that would
34 do is to send out a very clear signal to future Appellants
35 to make sure that they had put everything in the
36 complaint, or indeed the appeal, at the time that it is
37 lodged. In my submission, that is precisely the message
38 that one gets from the rules and regulations.

39 Of course, sir, as you are well aware, that is

1 precisely the position in Europe and the CFI. They are
2 very restrictive.

3 THE PRESIDENT: My impression is that the CFI would raise a
4 point of this kind of its own motion.

5 MR HOSKINS: My point, in drawing the parallel, is simply to
6 show that there are, for regulatory reasons, restrictive
7 rules.

8 THE PRESIDENT: Yes.

9 MR HOSKINS: It may well be, sir, you are better placed than I
10 to say that the CFI might deal with this differently, but
11 what one has to do -- again, I will not repeat myself --
12 is whether this Tribunal has jurisdiction under Rule 11(3)
13 to do it.

14 THE PRESIDENT: Yes.

15 MR HOSKINS: Because the legislature, the rule-maker has taken
16 a policy decision as to in what circumstances a new
17 argument should be raised.

18 THE PRESIDENT: Yes.

19 MR HOSKINS: I think what I am trying to say in a very
20 long-winded way is this case is not exceptional.

21 THE PRESIDENT: Thank you very much. I think we will just rise
22 for a few minutes now and consider the situation.

23 (Adjourned at 11.45 a.m. and resumed at 12.05 p.m.)

24 THE PRESIDENT: We propose to allow the Notice of Appeal to be
25 amended to plead the primary argument, but not to allow
26 the Notice of Appeal to be amended to plead the
27 discrimination argument. The other two arguments, as we
28 understand it, are not seriously contested.

29 We will give a reasoned judgment in deference to the
30 arguments that have been presented to us, but we do not
31 propose to do that now because we are conscious that we
32 have got another Case Management Conference waiting for
33 us. So we will give reasons in writing for our decision as
34 soon as possible.

35 Does that enable us to move to the VIP case, or are
36 there other matters that we should deal with in this case
37 before we move on? Yes, Mr Hoskins.

38 MR HOSKINS: Sir, there is another matter in relation to Floe
39 which relates to the terms upon which the amendment could

1 be allowed.

2 THE PRESIDENT: Yes. We have not addressed that issue yet.

3 MR HOSKINS: I do not know if you want to deal with that
4 argument now and then move on to VIP. It probably makes
5 sense to deal completely with Floe before we move on but I
6 am in your hands.

7 THE PRESIDENT: I think as far as Floe is concerned, your
8 position was that you would be seeking the costs thrown
9 away effectively?

10 MR HOSKINS: Exactly.

11 THE PRESIDENT: I think our position probably is that we can
12 well understand why you make that application, but I am
13 not sure that it is one we would want to deal with now, as
14 it were, at this stage of the case, though it is a matter
15 that will no doubt arise at a later stage when we get to
16 the issue of costs.

17 I mean, we do not yet know quite whether the primary
18 argument which, on your submission, is a short and
19 unfounded point of law is actually going to add to the
20 costs or not really in any serious way.

21 MR HOSKINS: Sir, it is not the costs of the primary argument
22 we seek because of course they have not been thrown away
23 because we have not dealt with that yet. It is the costs
24 of drafting the defence which we had already just about
25 completed before the last CMC so it is actually a
26 different issue.

27 In terms of whether it should be dealt with now or
28 later, I think there are two points to be made. First of
29 all, again if we were in the High Court it would be dealt
30 with now.

31 THE PRESIDENT: Yes.

32 MR HOSKINS: There is a danger in simply leaving small costs
33 points, because this is a small costs point, just to be
34 left over to the end of the day because in X months' time,
35 it is actually generally far harder to come back and deal
36 with them.

37 THE PRESIDENT: Yes.

38 MR HOSKINS: The second point is again to draw a parallel with
39 the High Court. In this sort of situation, one would

1 expect a summary assessment of costs in the High Court
2 based on a schedule of costs as we produced, and it would
3 be a fairly rough and ready approach.

4 THE PRESIDENT: Yes.

5 MR HOSKINS: That is the way the High Court operates. In my
6 respectful submission, there is no reason why the
7 Tribunal, in this sort of thing, should not adopt the same
8 approach. I am not sure that further down the line the
9 Tribunal is going to be in a better position to deal with
10 it.

11 As I said at the last CMC, we had almost completed
12 the defence, subject to tidying up. There are certain
13 common points in the new appeal, but they are not exactly
14 the same, they are not put in the same way, they are not
15 said to be put in the same way. The structure of the
16 document is completely different, whereas before we had
17 the sort of narrative style. It is ordered differently, it
18 is structured differently this time round. So there are
19 costs thrown away. We have wasted time and effort.

20 There is another point which is simply this: given
21 the timing of Floe's indication that it wished to amend
22 the appeal, and given obviously that we had to have this
23 application and time has passed, I know I can say this
24 because I will be the one doing it, when I sit down to
25 draft the defence for this, I will need to get myself back
26 into the case.

27 THE PRESIDENT: Yes.

28 MR HOSKINS: If you like, the work that I did in producing the
29 original defence, I am not saying it is all gone, but
30 there will be a certain amount of extra work occasioned by
31 returning to it. It is not simply going back to the old
32 document, cut-and-paste, there we are, it is done.

33 THE PRESIDENT: Yes.

34 MR HOSKINS: In my submission, the approach we have suggested
35 which is here is a schedule of costs, it should be a
36 summary assessment, it should be a rough and ready
37 assessment, we say 50% because the reality is, at the end
38 of the day we are not going to come before the Tribunal
39 with here was our draft defence, here is our new one and

1 expect the Tribunal to go through line by line. It does
2 not work like that.

3 MR HOSKINS: Absolutely.

4 MR HOSKINS: So it is on that basis that we say we should have
5 50% of the costs thrown away. You have seen the schedule
6 of costs and you have seen the figures.

7 THE PRESIDENT: Yes.

8 MR HOSKINS: That is all I have to say, sir.

9 THE PRESIDENT: Thank you very much. Yes, Mr Mercer, do you
10 want to add anything on that?

11 MR MERCER: My sympathies to Mr Hoskins on his relatively
12 short-term memory going, and it happens to all of us with
13 age. Ofcom really has got to start looking at appeals as a
14 matter of occupational hazard. This kind of thing happens
15 and, in respect of this appeal, I have done a line-by-line
16 analysis and in my estimation there is not more than a
17 handful of points that he will not have had to look at for
18 the first time that do not appear in some form or another
19 in the amended form of Appeal.

20 THE PRESIDENT: Yes.

21 MR MERCER: He has not wasted his costs. What he has got is
22 something new added on top. He would have to reorder it
23 and that should be a marginal cost, a cost of no
24 significance. In any event, I think that if you were
25 minded to consider an application in this matter, I would
26 want it considered in the totality of the matter as it
27 ended.

28 THE PRESIDENT: Yes, thank you.

29 MR MERCER: Thank you, sir.

30 MR HOSKINS: Can I make two brief observations. I am sorry, I
31 do not want to prolong this unnecessarily. The suggestion
32 "appear in some form or another" is exactly my point. It
33 is not a cut-and-paste job.

34 THE PRESIDENT: Yes.

35 MR HOSKINS: These things happen.

36 THE PRESIDENT: Yes. You say there have been some additional
37 costs.

38 MR HOSKINS: The person seeking the amendment pays for the
39 amendment; that is the absolutely fundamental rule.

1 THE PRESIDENT: Yes. Thank you.
2 (The Tribunal conferred)
3 THE PRESIDENT: I think we will deal with this point on costs
4 in our written reasons for our judgment, Mr Hoskins. Good.
5 Does that take us on to VIP and the relationship between
6 VIP and the Floe appeals?
7 MR HOSKINS: Yes.
8 (The case of VIP Communications Limited
9 was dealt with - see separate transcript)
10 (Concluded at 12.15 p.m.)
11 -----