IN THE COMPETITION APPEAL TRIBUNAL

Case No.1024/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5th April, 2005

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

and

OFFICE OF COMMUNICATIONS Respondent
supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMTED Interveners

_____

Transcribed from the Shorthand notes of
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

_____

Miss. Monica Carss-Frisk QC and Mr. Brian Kennelly (instructed by Taylor Wessing) appeared for the Appellants.

Mr. Peter Roth QC and Mr. Gerry Facenna (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent

_____

PROCEEDINGS

THE CHAIRMAN: Good morning.

MR. ROTH: Good morning, madam, members of the Tribunal. On this application I appear with Mr. Gerry Facenna for the Respondents (but the applicants before you), that is Ofcom, and my friends, Miss Monica Carss-Frisk and Mr. Brian Kennelly appear for Appellant in the main proceedings, Floe Telecommunications Ltd ("Floe), and the two interveners are not represented and have indicated they are not taking part.

As you know, this is the hearing of Ofcom's application, made on 20th December last year to set aside part of your order made on 1st December, following your decision on 19th November to set aside on grounds of incorrect or inadequate reasoning Ofcom's Decision of 3rd November 2003 that Vodafone had not infringed the Chapter II prohibition in the Competition Act, and there is a similar Decision and order regarding T-Mobile, and a similar application in the Appeal against that Decision brought by VIP Communications Ltd., which was stayed pending the outcome of this Appeal.

You have, I hope, a small black bundle in addition to two big bundles and your order is at tab 7 of that bundle. That is your order of 1st December 2004. As you see at the bottom of the first page:

> "AND UPON the Tribunal unanimously deciding in a judgment dated 19 November 2004 (the "Judgment") that the Decision should be set aside on grounds of incorrect and/or inadequate reasoning."

Then on the next page, second paragraph:

> "AND UPON the Respondent [Ofcom] having undertaken through counsel at the hearing to open a new investigation into the matter and consider whether Vodafone infringed section 18 of the Competition Act 1998 by disconnecting Floe's telecommunications services, taking account of the Judgment
> (the "Undertaking") …
> "IT IS ORDERED THAT:"

and then para.1 the matter is remitted under para.3(2)(a) of schedule 8. Then:

> "2. Pursuant to the Undertaking, the Respondent re-investigate the matter with a view to issuing either:
>
> (a) a new non-infringement decision pursuant to section 31 of the 1998 Act; or
>
> (b) a statement of objections pursuant to rule 4 of The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI2004No.2751)
>
> in either case within 5 months of this Order."

that is to say by 1st May, and a further Case Management Conference is provisionally fixed for 5th May.

Then there was the further hearing and it is just that part of the order (para.2) and then the related para.3 that of course is being challenged in this application, and the application is made in the alternative either under the liberty to apply or, if not, as a fall back we sought permission to appeal to the Court of Appeal and you will recall that by your further order, which I will not take you to, it is in the bundle, you decided to hear this matter under the liberty to apply in the original order. Again there is a parallel application in the VIP Appeal and, as I understand it, VIP has agreed to be bound by the outcome of this one. So that is where we are.

We did make clear in the Notice of Application expressly, and I repeated that, as you may recall before you when I first appeared in this matter, that this application is not brought as a delaying tactic. The reinvestigation pursuant to your remittal and the order I have just read, started at once. It has proceeded independently of this application, but before developing the argument I think it is appropriate if I just bring you up to date very quickly as to where the reinvestigation is. In December 2000, following your order, Ofcom immediately put together a full case team. Given the importance and the complexity of the issues raised that comprised a case leader, a case manager, a lawyer, an economist, a technical expert and a policy adviser and they have been working on the two cases – the Floe case and the VIP case – solidly since then.

You will recall that in your Judgment you pointed out the issue of the proper scope of the Vodafone licence is an issue of wide ramifications for all mobile network operators, not just Vodafone and T-Mobile. You indicated at para.283 of your Judgment that it would be appropriate for Ofcom to invite comments more widely than usual before taking a new Decision and that has indeed been done. Ofcom prepared and published a statement on the scope of the MNO licence. They have had 13 responses by 31st March. Those responses are now being evaluated; they are also having meetings – they have had meetings with the MNOs and equipment manufacturers and industry representatives. But they are now running some 4 to 6 weeks behind for deadline in the order as things stand today and an issue of a non-infringement Decision (if there were to be a non-infringement Decision) would take less time than the issue of a Statement of Objections, because a Statement of Objections (if there were to be one) will involve more work and drafting on market definition and on dominance on which, as you will recall, no conclusion was reached last time.

So, cutting this short, depending on the outcome of today's application my clients will have to come back and seek an extension of time under that part of the order if it stands. It

would clearly be quite wrong for me to pre-judge the outcome of today's application and it would equally be wrong to take up time now going into all the detail with regard to that. But if the order stands and such application is to be made it will be supported by witness statements setting out the position, and I just wanted to give a quick summary and bring you up to date.

THE CHAIRMAN: We have – I think it is 5th May, is it not?

MR. ROTH: We have 5th May, but that is five days after the time expires, so the application will be put in before.

THE CHAIRMAN: Right.

MR. ROTH: I do not know whether or not you might be able to indicate at the end of today how this application is to be decided. I am sure you will wish to reserve your reasons but it may be that you can give an indication, maybe not, but that is a matter very much for you.

THE CHAIRMAN: We have a complete open mind at the moment, so it would have to be that one or other of you had persuaded us to so much today, otherwise I do not think we would give an indication today.

MR. ROTH: I fully understand. Then depending how things develop we may need to make an application later in the month. I turn to the submissions on this Application. We have just received, as you know, a suggested timetable. I have to say, not having had that before, I have prepared a rather fuller opening. I have fully taken account of the fact that you have very helpfully read the detailed skeletons that both sides put in; that enables one, of course, to go much more shortly than otherwise.

THE CHAIRMAN: That was only a suggestion and I do not want to straightjacket you, so as long as we have a timetable that we finish today.

MR. ROTH: Yes, I am sure we are all very concerned to finish today, and I do not anticipate a problem, but I think it will be a slightly longer opening, but do cut me short if it is material you have looked at.

I am going to deal first with the question of express or alleged ----

THE CHAIRMAN: Have you between yourselves got a timetable so we know effectively how long you are each having, or do you want us just to go for the day and see what happens?

MR. ROTH: We have not worked out a timetable together. We had both I think come, and Miss Carss-Frisk will correct me if I am wrong, anticipating the normal sort of opening, response, reply – that was how we came here.

THE CHAIRMAN: Are you going to take the whole morning?

MR. ROTH: I think I may take most of the morning. I would have thought until, say, 12.30. That is my anticipation.

MISS CARSS-FRISK: I am sure that we can keep within the time allotted on this timetable. We were going to say that we were happy to play it any which way, as it were.

THE CHAIRMAN: Yes.

MR. ROTH: May I deal first with the question of the express, or what is alleged to be the implied power under the statute and then, on the basis that there is no such power in the Tribunal under the Statute as ordinarily read, consider whether such power can be derived either through EC law or by reason of s.3 of the Human Rights Act having regard to the European Convention on Human Rights. That is the order I propose to follow.

I deal first with the Statute. The order for remittal that you made was, of course, made under Schedule 8, para.3. I was proposing, although it is in the bundle, to deal with the Statute in the purple book – it is all there and it does make it easier. Schedule 8 is at p.104. There is para.3 and then para.3-[(A)] dealing with Decisions of the Tribunal. Paragraph 3 says it applies to: "… any appeal under section 46 or 47 other than –" two kinds of appeal which are the two kinds dealt with under para. 3A. Then:

> "(1) The [Tribunal] must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> "(2) The [Tribunal] may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –"

and then there is "(a) remit", and (d) and (e):

> "(d) give such directions, to take such other steps, as the [OFT] could [itself] have given or taken, or
>
> "(e) make any other decision which the [OFT] could [itself] have made.
>
> "(3) Any decision of the [Tribunal] on an appeal has the same effect, and may be enforced in the same manner, as a decision of the [OFT]."

Then there is para. 3A which applies to two particular kinds of appeal, and those two particular kinds of appeal are appeals dealing with commitments, where the Regulator has accepted or varied commitments instead of taking a decision finding a violation. I will take you to those in a moment.

> "(2) The Tribunal must, by reference to the grounds of appeal set out in the notice of appeal , determine the appeal by applying the same principles as would be applied by a court or on an application for judicial review.
>
> "(3) The Tribunal may –
>
> > "(a) dismiss the appeal or quash the whole or part of the decision to which it relates; and

"(b) where it quashes the whole or part of that decision, remit the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal."

If one goes back then to s.46 of the Statute, which is on p.58, you will see under s.46(3) that (g) and (h) are the two commitment decisions which are subject to para.3(a) in Schedule 8. The other kinds of decision subject to para.3. S.47, third party appeals, again under s.47 it is (b) and (c) which are the parallel to (g) and (h) of s.46(2) that come within para.3A – again it is commitments.

In the present case Ofcom's Decision was a non-infringement decision and accordingly no direction were made by Ofcom in that Decision, but the nature of directions that may be made in decisions of the OFT or Ofcom – perhaps I might say "the Regulator" because the Statute always says OFT though we are dealing with Ofcom. There set out in Chapter III of the Competition Act in s.25 and following. Chapter III (p.42) is headed "Investigation and Enforcement". Section 25 is the power to investigate, s.26, the powers when conducting investigations, requiring people to produce documents and you see s.26(6)(a) to give explanations of documents. Section 27 "Power to enter business premises without a warrant" on notice, s.28 "Power to enter business premises under a warrant" – warrant issued by the High Court or, I think, in Scotland the Court of Quarter Session. s.28A – power to enter domestic premises – a director's home – under a warrant. Those are the investigating powers of the OFT.

Then "Decisions following an investigation", s.31. "(1) If as a result of an investigation [the Regulator] proposes to make a decision he must –" give notice, and

"(2) For the purposes of this section and sections 31A and 31B "decision" means a decision of the [the Regulator] –

(a) that the Chapter I prohibition has been infringed;

(b) that the Chapter II prohibition has been infringed;

(c) that the prohibition in Article 81(1) has been infringed; or

(d) that the prohibition in Article 82 [of the EC Treaty] has been infringed.

31A is the power to take commitments that I have referred to, and review them. Section 32 is important, "Directions in relation to agreements".

"(1) If the [Regulator] has made a decision that an agreement infringes the Chapter I prohibition[or that it infringes the prohibition in Article 81(1)], [it] may give to such person or persons as [it] considers appropriate such directions as [it] considers appropriate to bring the infringement to an end."

Then:

"(3) A direction under this section may, in particular, include provision --

(a) requiring the parties to the agreement to modify the agreement; or

(b) requiring them to terminate the agreement."

Section 33 "Directions in relation to conduct":

"(1) If the [Regulator] has made a decision that conduct infringes the Chapter II prohibition [or that it infringes the prohibition in Article 82], [it] may give to such person or persons as [it] considers appropriate to bring the infringement to an end."

Then:

"(3) A direction under this section may, in particular, include provision –

(a) requiring the person concerned to modify the conduct in question; or

(b) requiring him to cease that conduct.

Then s.34 deals with enforcement, that the OFT can apply to the court for an order to enforce directions. Section 35, the power of the Regulator to take interim measures. Then s.36, power to impose penalties.

Then with regard to appeals to this Tribunal one goes on to s.46 on p.58, whereby:

"(1) Any party to an agreement in respect of which the [Regulator] has made a decision can appeal …"

and under

"(2) Any person in respect of whose conduct the [Regulator] has made a decision may appeal to [the Tribunal] against, or with respect to, the decision."

A "decision" means, and I would ask you please to note in subsection (3) a whole range of things, namely:

"(a) as to whether the Chapter I prohibition has been infringed,

(b) as to whether the prohibition in Article 81(1) has been infringed,

(c) as to whether the Chapter II prohibition has been infringed,

(d) as to whether the prohibition in Article 82 has been infringed,

(e) [a decision] cancelling a block or parallel exemption,

(f) [a decision] withdrawing the benefit of a regulation of the Commission …"

EC Regulation under the EC Competition Regulation, which is Regulation 1 of 2003, and decisions on commitments, and decisions on penalty.

Subsection (e) there: "cancelling a block or parallel exemption". It may be relevant to note what that is dealing with. It refers back (a parallel exemption) to s.6 of the Statute (the block exemption), parallel exemption is s.10 – s.10 Parallel Exemptions – I will not read the section but as the Tribunal may know, the point being this: under the Statute where the European Commission has given a block exemption from Article 81 for agreements that may

affect trade between Member States, the device used by the draughtsman – and it is, if I may say so, quite an ingenious device, which is now being copied in on the jurisdictions –is to say if there is an agreement which does not affect trade between Member States, therefore would not benefit from the EC block exemptions, nonetheless there shall deem to be a parallel exemption insofar as there is an agreement affecting trade only within the UK. So by reason of s.10 the EC block exemption those agreements get parallel exemption within the UK. That is what s.10(1) to (4) deals with and it is called the "parallel exemption" as (3) states.

Section 10(5) says:

"In such circumstances and manner as may be specified in rules made under section 51, the [Regulator] may –

(a) impose conditions or obligations subject to which a parallel exemption is to have effect;

(b) vary or remove any such condition or obligation;

(c) impose one or more additional conditions or obligations;

(d) impose one or more additional conditions or obligations;

(e) cancel the exemption altogether."

So although it has effect in the UK as a parallel exemption, if a Regulator can modify it they can oppose additional provisions that are not in the EC block exemption, or they can indeed cancel it altogether, and then there are provisions for how that can be done.

So that is the decision that s.46(3)(e) is referring to when it talks about a decision cancelling a parallel exemption. The decision cancelling block exemptions relates back to s.6 and I do not think I need read that, but that is the block exemption provision, those are just straight block exemptions given by the Regulator in the domestic regime.

Then s.3(f) is the power under the EC Regulation for a national competition authority to withdraw the benefit of an EC block exemption within that Member State. Against that background of what the OFT's powers are and the decisions and directions it can make, and the appeals that can be brought from those decisions to this Tribunal, I turn back to schedule 8, para.3. The question that arises, and is raised directly by Floe's argument is what is the meaning in para.3 of (d) and (e)? Floe's contention, as you will have seen, is that setting a timetable is something you have express power to do under (d) or (e). They say as Ofcom could itself set its timetable for investigation, these are wide words, it means therefore the Tribunal can do the same to Ofcom, and that the wide wording in (d) and (e) cover any steps that Ofcom might take in relation to a matter remitted to it for investigation.

We submit that there is a fundamental distinction between decisions that Ofcom takes internally as part of its management of an investigation on the one hand and directions,

decisions or other steps that it may take with legally binding force in its determination or conclusion of an investigation. Because, of course, Ofcom can decide internally what is its target date for a Decision – it can even announce what is its target. It will decide how many people are on the case team – I have just told you how many people are on the case team, and that was a decision of Ofcom. It will decide what the composition should be – should there be an economist or not? They decided we need an economist, we need a technical expert and the parties will be informed who is the team leader. It will also decide in the course of the investigation which, if any, of its powers to use – whether it needs to go into business or premises to get documents under the statutory power, whether it needs to seek a warrant to go into the home of a director. They are all matters the Regulator will decide, and have to decide, and they are all steps that it will take. But that, we submit, is emphatically not the power that is being given to this Tribunal under Schedule 8, otherwise Schedule 8 is giving the Tribunal complete jurisdiction to micro-manage the investigation – that is not the jurisdictional role of paras. (d) and (e). Those words are not to be read literally in a vacuum.

What do they mean? We say it is very clear. They refer to the various forms of decision and direction that the Regulator can make which can be appealed – the decisions which can be appealed to this Tribunal under s.46 – and the directions which could have been ordered by the Regulator, or the steps it could have taken for concluding the investigation if it had decided the case differently. To give an example: suppose there is a complaint of excessive pricing, an infringement of Chapter II prohibition, and the OFT investigate and they find and take a Decision there is no excessive pricing, there is no infringement. There is an appeal to the Tribunal. The Tribunal holds that the Decision is wrong and they set aside the Decision and they hold there was excessive pricing and they direct the dominant company to reduce the price by 10 per cent. within three weeks. In other words, the form of direction that the OFT could have made under s.33 if it had found an infringement.

Take another example: there is a parallel exemption for vertical agreements in the UK which follows by reasons of the EC block exemption for vertical agreements (s.10 power of exemption). Suppose that the OFT looks at the market in the UK and finds the operation of this parallel exemption in its judgment where there is no effect on inter-State trade, purely domestically within the UK, distorts competition on the United Kingdom and so they take a Decision, as you saw they can take a Decision under s.10(5)(d) to cancel the exemption. Then there is an Appeal to this Tribunal, as you saw there can be an Appeal from such a Decision under s.46(3). Then the Tribunal decides the OFT was wrong, and they set aside the Decision, but they do not remit it to the OFT. Instead, the Tribunal says "We are seized of the matter; we have all the material before us. We will instead not cancel the exemption, we have

quashed that Decision, but we will impose a condition on which the power of exemption shall operate. The condition we impose is that the supplier's market share should be no more than 20 per cent. whereas the parallel exemption said 30 per cent."

Those are two out of many possible examples to illustrate how para.3 gives this Tribunal a broad and flexible power to give a final resolution to the case in the way that the Regulator could have done.

THE CHAIRMAN: It seems to me that what you are really saying is that it is a question of the meaning of "direction". Does direction mean a direction to a third party, or does it mean a direction internally?

MR. ROTH: We say it means a legally binding direction and if it is a direction the whole point of it ----

THE CHAIRMAN: To a third party?

MR. ROTH: To a third party. As the OFT could have made under s.32 or s.33, for very good and, we would say, obvious reasons, exactly. It is nothing to do with the internal management of an ongoing or new investigation which, under ordinary principles, is the province of the authority carrying out the investigation. That is why, in a case covered by para.3, we say there is no power to direct a timetable for the Regulator's work. There is no power to direct the size of the case team, and whether it should have an economist or not. None of those exercised by the Regulator would be legally binding. The Regulator can start without an economist and the thing goes on so much we need an economist, or we need a different kind of economist – I keep learning there are various kinds of economist – to be added. Exactly the same applies to para.3(a), the next following paragraph of Schedule 8, which deals with remission expressly and 3(b), slightly broader wording – the actual wording there "direction to reconsider" which clearly is a direction to the Regulator.

THE CHAIRMAN: It was a direction from this Tribunal.

MR. ROTH: From this Tribunal to the Regulator to make a new Decision in accordance with the Ruling of the Tribunal. Whether that actually adds much in practice to para.3 as distinct from a straight remittal under para.2(a) of para.3 I think is doubtful because, in practice, whenever you remit clearly the Regulator is going to take its new Decision in accordance with your Judgment, because if they do not there will be another Appeal and they know what will happen. Floe says that para.3A is unlikely to be wider than para.3 as under para. 3A you are dealing with an Appeal by way of Judicial Review and that may well be right, but the point for a remittal to take a new Decision and the concern to avoid delay, which would be a very understandable concern of this Tribunal sometimes, is just as applicable to a Judicial Review Decision as to a merits Decision. Paragraph 3A(b) is certainly not narrower than

para.3(2)(a). We say the same point applies to both. It also applies to the other source of this Tribunal's jurisdiction that has so recently been exercised, under the Enterprise Act 2002, s.120. If I could ask you to look at that, it is in the purple book at p.226.

This is, of course, dealing with mergers and the merger regime, and gives power of application to the Tribunal from Decisions of the OFT – it specifically says:

> "… OFCOM, the Secretary of State" or the Competition Commission under this Part in connection with a reference or possible reference in relation to a relevant merger, or special merger …"

for a review of that decision. Then:

> "(5) The Competition Appeal Tribunal may –
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

So exactly the form of words that you have in para.3(a) of Schedule 8. In merger cases (which this is dealing with) time is particularly of the essence where share price may be time sensitive. So in such cases, and there have now been two of them decided by this Tribunal, they are heard by the Tribunal with great expedition – that has applied in both the two merger cases before you. I think the wording in para. 3A, like the wording in s.120(5) comes from the wording of the power of the High Court on Judicial Review, which is now set out in Part 54 of the Civil Procedure Rules. I think that is the origin of that formulation, and you can see that in bundle 2 of the authorities' bundles, tab 50. If you go to Rule 54.19, which is on p.7 on this print-out. "Courts Powers in Respect of Quashing Orders".

> "(1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.
>
> "(2) The court may –
>
> (a) remit the matter to the decision-maker; and
>
> (b) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court."

And I think that is where the ----

THE CHAIRMAN: That was 1999, was it not? CPR?

MR. ROTH: But Part 54 came much later, because with CPR not all the rules came in together.

THE CHAIRMAN: It is to do with the plain English, is it not? The idea is now to specify actually what it all means ----

MR. ROTH: So people can understand.

THE CHAIRMAN: -- and that is why the Schedule 8 words in para.3 are short and para.3A are long.

MR. ROTH: I think that is exactly my point. I think it is just different in 3, because 3A came in in 2004, so it reflected what had happened in the meantime with the ----

THE CHAIRMAN: Right. They did not want to make a distinction between the two by putting more words in, it is just the new way of writing.

MR. ROTH: Having reflected on it that is my understanding of what happened, and therefore that is exactly right.

THE CHAIRMAN: Yes, that is very helpful actually. It is plain English getting into these Statutes.

MR. ROTH: It is plain English, though one spends more time sometimes considering plain English than words that are obscure but have been interpreted and it has been decided what they mean. We say therefore exactly the same principle applies under s.120 and you will know that under s.120 (the two cases of the Enterprise Act) the two cases so far have been appeals to this Tribunal by way of Judicial Review against decisions of the OFT, if you look at s.120 you will see it also covers decisions of the Secretary of State which would be a special merger reference, such as the Defence Industry or whatever, where again they can remit and send it back to the Secretary of State to take a new decision. We say exactly the same applies. You could say to the Secretary of State "You must take your new decision in accordance with our Ruling", but you cannot say "and you must take it within six weeks, or two months", or whatever.

THE CHAIRMAN: Just to be clear, if we look at para.3(2)(a) of Schedule 8 you would say that if this had been written today and the way that we need to interpret it is the words in 3A(3) get written in to remit the matter to the OFT because that is all they mean?

MR. ROTH: I think so, yes, and that is implicit in what is there anyway and it is now, as you say, plain English spelt out.

THE CHAIRMAN: Yes.

MR. ROTH: And that is why we do not have them in 3A, which is commitments, and why you do not have them in 120, is dealing with the sort of steps that the Regulator can take in its original Decision, which I have shown you, so that this Tribunal can put itself in the place of the Regulator if it is not going to send it back, but can deal with the matter completely.

THE CHAIRMAN: And, of course, if it is Judicial Review we cannot do that.

MR. ROTH: If it is Judicial Review you cannot do that. That is why, as I say, on Judicial Review when you see it is relevant to look at authorities from the courts on the powers of the court

when quashing a decision from a public authority or a statutory body with the consequence that the authority has to take a fresh decision, because neither side, I think I can say, has found any direct authority in the sense of a reasoned Judgment discussing the question before you today.

THE CHAIRMAN: What we wonder about that is whether that happens in interlocutory applications which are not reported, and therefore we do not know about them, and whether possibly you or Miss Carss-Frisk has had some experience of that to know what the court does?

MR. ROTH: Interlocutory applications from – in Judicial Review?

THE CHAIRMAN: In Judicial Review, so it is not reported decisions.

MR. ROTH: I am thinking of cases where there is a statutory power in the court hearing the full case when quashing to remit or the effect of its order is there has to be a ----

THE CHAIRMAN: Yes.

MR. ROTH: -- so it is the final order in the case.

THE CHAIRMAN: Yes.

MR. ROTH: No authority discussing the question of whether the court can or cannot then, in making that final order – which is the order you have made in the case disposing of the appeal (then a new decision, query a new appeal but maybe not) – actually decide if we can or cannot impose a timetable.

THE CHAIRMAN: Yes, the point has not been taken, but we just wonder whether there is a practice which we do not know about?

MR. ROTH: One area that we looked at because it has generated so much law is planning, because it also has a statutory power to remit.

THE CHAIRMAN: Yes.

MR. ROTH: I am aware of no discussion of that at all, but there are authorities which do look at the restriction on what courts can do in that situation. Probably the highest authority is the General Medical Council case *General Medical Council v Spackman* [1943] AC 627, in the House of Lords. This is in your first bundle ----

THE CHAIRMAN: I have not taken you out of order now?

MR. ROTH: No, no.

THE CHAIRMAN: It is where you were going?

MR. ROTH: Yes, absolutely. It is in the first bundle, tab 1. I will not read the headnote. It is a case from 1943, it has got a rather dated ring to it because the issue was the doctor had been struck off by the GMC because he had been named in the divorce court as a co-respondent in a divorce proceedings involving his patient. The GMC said this is absolutely shocking and he is not fit to practise as a doctor. He brought Judicial Review of the GMC's finding because he

wanted to call evidence before the GMC challenging the finding in the divorce court of adultery, and they refused to let him call evidence. They said "This has been dealt with by the divorce court". Then on the construction of the relevant section of the Medical Act, the House of Lords held the GMC was wrong to treat the court finding as conclusive, there was strong prima facie evidence but the doctor was entitled to challenge it and he should not have been condemned without a fair chance to exculpate himself, and so the GMC must establish the facts for itself and the matter should be reheard. The relevant passage is at the end of the opinion of Lord Wright (p.645). At the top of the page Lord Wright says:

> "Thus, in my opinion, in the present case the council has to take the inquiry up afresh. There is, in my opinion, no force in certain objections which have been raised. The council very properly have treated the decree of the Divorce judge as prima facie evidence. So it is, and very strong evidence too, especially considering that the respondent did not appeal but paid the £1000 of damages awarded against him. That, however is no reason for refusing him the full and fair opportunity of stating his case before the council."

Then on at the bottom of p.646, somewhat repeating the previous point – he is talking about statutory duty – he says:

> "… but he [the doctor] must surely be entitled to deny the charge before the council and bring his evidence if he contests the justness of the decision of the court. If the decision of the court is to be made conclusive, the law must be changed by Parliament. In my opinion, the decision which has been brought up to the court on *certiorari* ought not to stand. The council ought to take up the inquiry again."

Then he adds this:

> "I do not seek in any way to suggest or forecast how they will hold it. The discretion and responsibility for the procedure are theirs. I would dismiss the appeal."

We say he is there enunciating a very obvious feature of the process of retaking a decision after an original decision has been quashed. That is to say it is back in the province of the original decision maker, and the court cannot circumscribe how the original decision maker acts unless there is some statutory provision enabling it to do so.

There is one much more recent case with a much more modern ring, which is at tab 5 of this bundle, the case of *MacKay v London Borough of Barking, Dagenham Housing, Council Tax Review Board* [2001] EWHC Admin 234. Do you have the full Judgment?

THE CHAIRMAN: Westlaw UK.

MR. ROTH: Yes, that is the full Judgment by Mr. Justice Collins. This is a case – again I will not read into in detail – about housing benefit entitlement. Here the claimant had been disqualified

from benefit for rather complex reasons and his appeal to the Local Authority Housing and Council Tax Review Board failed, and then he brought Judicial Review of the Board's conclusions and they were quashed for lack of reasons. The judgment, if you go right to the end, para.52, you see the Judge says:

> "Accordingly, for the reasons I have given, as I have said, this decision cannot stand and must be quashed. The matter will go back to the council to be reconsidered."

He adds:

> "52. There has been far too long a delay already since the Claimant has been awaiting a proper decision for over two years. Accordingly, this must take priority when it is reconsidered by the authority."

Then there is some discussion about the change in the name of *certiorari*, and then at the bottom of the page Mr. Knafler (for the Applicant) says:

> "My solicitor has raised a very interesting point which is whether it would be possible to put a time limit on the reconsideration."

The Judge states:

> "I do not think I can do that. I do not think I have any power to do that. I have indicated my view that it ought to be done as soon as possible because of the delay that has already occurred."

THE CHAIRMAN: He was not referred to the European Court of Human Rights' decisions on this.

MR. ROTH: No, I have not come ----

THE CHAIRMAN: No, but he was not referred to them?

MR. ROTH: He was not, no. He did it under domestic law. I accept that is not a reasoned decision on the point but there is a Judge, if I may say, of huge experience in public law both in the Bench and at the Bar, in a case where he is clearly concerned about delay, refusing an application to put a time limit on reconsideration because he says he believes he has no power to do so. He says he can only indicate, as indeed clearly this Tribunal can indicate, and nothing I say should be seen as suggesting the contrary. Clearly you can say that you hope and expect that this matter will now be dealt with quickly, or it will take priority, or whatever.

There is also an illustration – perhaps no more than an illustration, but nonetheless, a powerful illustration – of the way the court will not control the decision making process, even by declaration, although it has clearly got a jurisdiction to make declarations in the High Court, by the Court of Appeal's Judgment, which is under tab 2 of this bundle, which is *West Glamorgan County Council v Rafferty and others*. Again a case with modern resonance because this was the case concerning a county council which had a problem with gipsies. The Council got a possession order against gipsies that were camped on a site that it owned, which

was alleged to be a nuisance to adjoining land owners, and the gipsies challenged the decision of the Council by Judicial Review, and they succeeded, and the Council appealed to the Court of Appeal. You will see from the headnote on the first page that:

> "For some ten years a county council was in breach of its duty under s.6 of the Caravan Sites Act 1968 to exercise its statutory powers in order to provide adequate accommodation 'for gipsies residing in or resorting to [its] area'. The council had made unsuccessful attempts over that period to provide such accommodation."

Then it talks about the site:

> "On 16 September 1985 the council resolved to institute proceedings to evict the gipsies from the site because it intended to call for tenders for the redevelopment of the site, was concerned about the nuisance and damage being caused to neighbouring occupiers and considered that it would be a bad example if the council was to be seen to be tolerating trespassers on its land for a long period. The council did not offer alternative accommodation to the gipsies or consider whether the gipsies might remain on a different part of the land until temporary alternative accommodation was found for them."

So they got a possession order and it was quashed on Judicial Review. On the top of the next page:

> "The judge granted an order of certiorari to quash the decision and made a declaration that the council was not entitled to seek possession of the site until it had made reasonable alternative provision for gipsies occupying the site. The council appealed against the order of certiorari, the declaration and the setting aside of the possession order."

It was held by the Court of Appeal:

> "The court was not precluded from holding that a public authority's decision was void for unreasonableness merely because there were factors on both sides of the question. If the weight of factors against a decision ought to be recognised by a reasonable council, properly aware of its duties and powers, as being overwhelming then that decision could not be upheld if challenged."

and so on. Then further down:

> "It followed that the council's appeal in both the judicial review and the possession proceedings would be dismissed and the quashing of the council's decision of 16 September 1985 upheld, although the declaration in the judicial review proceedings would be seta side because the council ought to be left free to deal with the situation as it thought best, having regard to its statutory duty and powers."

One sees that last point at p.17 in the report, where Lord Justice Ralph Gibson (with whom the other two judges agreed) said:

> "I would therefore, for the reasons given, uphold the decision of Kennedy J to quash the decision of the county Council to take proceedings for eviction of the gipsies at the Briton Ferry site. I take a different view, however, of the declaration which Kennedy J also made that:
>
> > 'The County Council is not entitled in law to seek possession of the land … until such time as the County Council makes some reasonable alternative provision for the accommodation of gipsies.'
>
> "I would set aside that declaration, which I think should not have been made. It is not possible for the court to decide in advance that any decision to claim possession of the land at Briton Ferry, or any part of it, must be perverse unless the county council has first made 'reasonable' alternative provision for the accommodation of gipsies."

He talks about the circumstances, and then half way down that final paragraph of Lord Justice Ralph Gibson's judgment:

> "In my judgment, no declaration should be made in any terms. The county council is free, and must be left free, to deal with the situation as it thinks best having regard to its duty and powers, which will have been clarified by the judgment of Kennedy J. and by the decision of this court. It would be wrong for this court, as I think, to try to indicate what sort of plan or provision for recovery of possession of this site would be 'reasonable'. We have neither the right nor the knowledge to formulate any such suggestion and the county council does not need guidance from us. There is no reason to suppose that the county council will again make a decision with reference to this matter which could be described as perverse. If any such challenge is made hereafter to any further decision of the county council the matter will have to be considered and decided in the usual way. For my part, therefore, I would allow the appeal of the county council to the extent of deleting the declaration from the court's order in the judicial review proceedings but otherwise I would dismiss that appeal."

THE CHAIRMAN: That is a slightly different situation, is it not, because the court was sort of handcuffing the decision maker, because it was saying that you have to allow these people to stay there unless something else happens. It was pre-empting the decision rather than just saying you have to make a decision within a time.

MR. ROTH: It is certainly a very different situation, but setting a timetable and deciding in advance what is going to be reasonable, before representations are received by a decision maker, before

one knows indeed how many representations are going to be received by a decision maker, what issues they will raise, what sort of follow-up investigation or fact finding might need to be made. It is also, of course in a very different context and different form, a kind of straightjacket being imposed on the decision maker, and that is something that goes into the province of the decision maker if it then turns out that it is said to be taking an unreasonable time, exactly as here, then it can be challenged and will be considered on the facts. But in exactly the same way as Lord Justice Ralph Gibson said there, there is no reason to suppose in advance that the Regulator is going to set out wanting to take an unreasonable time – unless there is evidence of bad faith which does not arise in this case at all. So that is why we say it has analogy in that sense.

So we say that in properly interpreting 3(2)(d) and (e) of Schedule 8 there is no express power in the Tribunal to direct a timetable because that is dealing with directions of a quite different kind, not internal management matters of the Regulator, or under s.120 of the Commission or Secretary of State.

On proper construction, and general principles, it is not for this Tribunal to set an out of time limit or, indeed, as this order does, the order that we are here challenging, a time limit for particular stages – issue a statement of objections within X months. If there is no express power Floe contends in the alternative there is an implied power. As to that, we submit in the first place that a court or tribunal which is given express statutory powers in some detail by an Act of Parliament should be very cautious about implying further powers which are not set out, particularly where the result of implying further powers is to extend the court's own jurisdiction over another statutory body, otherwise of course you get into a situation where you amend an Act of Parliament in your own favour.

We have dealt with implied powers in our reply skeleton at para.3, which is in the slim bundle at tab 4. We say there that Floe contends in the alternative that there is an "implicit" power of the Tribunal to direct a timetable by reason of its express power to remit a case to the regulator. We say that where a statute expressly sets out the jurisdiction of a court or public body, there is implicit only such powers as are incidental to the statutory jurisdiction to enable it properly to be exercised, having regard to the purpose of that jurisdiction. That we accept, that there will be implicit powers that are truly necessary or incidental to the express power, so that it can properly be exercised. An example of that is the case of *Bodden v Metropolitan Police Comr.* [1990]2QB 397 at 405, a case that is here referred to and which is in your big lever arch file at tab 4.

I will not read the headnote, but if I can just explain, it was a damages claim against the police for wrongful arrest. It followed Mr. Bodden demonstrating outside Bow Street

Magistrates' Court in the street using a loud hailer. He was a rather unfortunate character, he was using a loud hailer to interrupt the proceedings, but he actually interrupted the proceedings not of the case he was concerned with but some completely different case, but that did not help him when he was arrested. He brought a damages claim against the police for wrongful arrest, and he succeeded in the County Court and the Police Commissioner of the Metropolitan Police appealed, and the lawfulness of his arrest depended upon the power of the Magistrate to have him detained for contempt. If the Magistrate had power to detain him for contempt the arrest was lawful, if he did not it was unlawful. So the construction of s.12 of the Contempt of Court Act was at the heart of his case, and the heart of the appeal.

If I can pick it up in the report at p.402 at E:

"The plaintiff had applied for, and obtained, an order that his claim in Westminster County Court be tried by a jury but, when the case was called on before Judge Lipfriend on 18July 1988, the parties requested the judge to decide a preliminary question of law and for this purpose made certain admission before him. For the plaintiff it was conceded that the noise made by him interrupted the proceedings of the court. For the defendant it was conceded that, if the magistrate had no jurisdiction to deal with the plaintiff's contempt of court then the arrest which was subsequently effected by two police officers was unlawful. The defendant abandoned an additional plea that the arrest could be justified …"

Then:

"It was further conceded that the magistrates' court was an inferior court and had no inherent jurisdiction to deal with contempt of court. Accordingly, the scope of its jurisdiction to deal with such matters failed to be determined under section 12 of the Contempt of Court Act 1981."

So that was the key issue.

"Having heard argument, the judge held that the magistrate had no jurisdiction to require the plaintiff to be brought before him, that the two officers concerned were not acting in the course of their duty and that the arrest and detention of the plaintiff was unlawful."

He was awarded damages of £1500. The judge gave his reasons, and then at the top of p.403 Lord Justice Beldam sets out s.12. I think I should just ask you to read that because it is necessary to understand a key point in the case:

"A magistrates' court has jurisdiction under this section to deal with any person who – (a) wilfully insults the justice or justices…"

and it is (b):

"wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

(2) in any such case the court may order any officer of the court, or any constable, to take the offender into custody and detain him until the rising of the court; and the court may, if it thinks fit, commit …."

and that was the key point – "… and detain him until the rising of the court". Then, going on to p.405 at E:

"In argument before us it was contended for the plaintiff that the power given to magistrates to order the detention of the offender under section 12(2) did not include a power to order the defendant's officers to bring the plaintiff before the magistrate; the only power given was to take him into custody and detain him until the rising of the court. It was further contended that the magistrate had no power to inquire into the circumstances of the interruption for the purpose of deciding whether the person detained was acting wilfully.

"In giving the magistrates' court jurisdiction to deal with the different kinds of contempt referred to in section 12(1)(a) and (b), Parliament obviously intended to confer all incidental powers necessary to enable the court to exercise the jurisdiction in a judicial manner. After all, the powers were being conferred on justices who could be expected to discharge their functions as responsibly as when they were exercising their ordinary criminal jurisdiction. It is, moreover, clear from the construction of section 12(2) that the purpose of the power to detain an alleged offender until the rising of the court was to ensure that the magistrates dealt with the matter as soon as they conveniently could without thereby interrupting the proceedings of the court; further, before committing the offender to custody, it is obvious that magistrates would, in cases where the circumstances demanded it, have to inquire into them because they can only exercise this power 'if [they think] fit'".

So one can fully see where there is an implicit power on the police to bring the defendant, after detaining him until the rising of the court, before the magistrates, that was obviously ancillary to the express power in s.12(2) of the Contempt of Court Act to enable it to be exercised, having regard to its purpose.

Here in the provisions that this Tribunal is concerned with in this case, by contrast the statutory power to remit is not designed to deal with delay by the Regulator. Its clear purpose is to enable the Regulator to take a fresh decision in the light of this Tribunal's ruling, where you consider that it is more appropriate for the Regulator to take a new decision than for you in this Tribunal to do so yourselves. It is not necessary to attach a time limit to enable a statutory purpose to be fulfilled. We will see that in a moment when we look at the past practice of this

Tribunal, there are several cases where it has not been done. The Tribunal may think it is desirable in some cases to attach a time limit but that is, of course, a very different thing. There is certainly no principle of statutory construction that allows a court or tribunal jurisdiction to do whatever it thinks might be desirable – that would be a very broad proposition.

Also on the question of implicit power it is necessary to consider how would that fit into the overall statutory scheme. Again, we have dealt with this in that para.3 to which I was referring in our reply skeleton, where we say in 3(b) that the suggested implicit power would be contrary to the express scheme of the legislation. Neither the 1998 Act nor the 2002 Act set out a time limit for regulatory investigations of alleged infringement of the Chapter I or Chapter II prohibitions. By contrast, the position for inquiries by the Competition Commission the legislation does set out timetables for both mergers and market investigations. So when the statute wants to impose a timetable it says so.

Finally, on this part of our submissions we say there are two other fields which it is helpful to consider by way of analogy. First, the jurisdiction of this Tribunal under the Communications Act 2003, and it is s.195 of the Communications Act. I am afraid I have to jump to the other big bundle, but you have the Act. It is not in the purple book. It is at tab 44 of bundle 2. The Communications Act, s.195, and these are appeals under s.192 and the point that we are making is in s.192

> "(2) "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."
>
> "(3) The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.
>
> "(4) The Tribunal shall then remit the decision under appeal to the decision-maker with such direction (if any) as the Tribunal considers appropriate for giving effect to its decision.

That is clearly a very different form of words from the form of words in 3 and 3(a) of Schedule 8, and clearly is giving the Tribunal a more interventionist power of direction. So obviously when Parliament wants to do that it does so.

Secondly, there is the position of the High Court where there is again an express power, statutory power, to remit in planning cases which concern planning enforcement notices. We address that in our original skeleton argument at para.11 (tab 2, small bundle) where we say that in planning appeals against an order of the Secretary of State regarding an enforcement notice, there is a statutory power in the High Court to remit the matter to the

Secretary of State, and that is s.289 of the 1990 Town and Country Planning Act, and the Rules of the Supreme Court, order 94 which is still, in fact, in force – order 94 has not been replaced yet. That power of remission is similar to the power set out in para.3(2)(a) of Schedule 8 of the Competition Act, 1998 when it makes such an order for remission the court does not direct the timetable by which the Secretary of State must make a fresh determination. That would be to trespass into the province of the Secretary of State in a manner not authorised by the statute.

Section 289 is in the bundle 2 at tab 48. Section 289 "Appeals to High Court relating to enforcement notices and notices under s.207", decisions of the Secretary of State. 289(5) on the second page, says:

> "(5) In relation to any proceedings in the High Court or the Court of Appeal brought by virtue of this section the power to make rules of court shall include power to make rules –
>
> (a) prescribing the powers of the High Court or the Court of Appeal with respect to the remitting of the matter with the opinion or direction of the court for re-hearing and determination by the Secretary of State.

That is done in order 94, which you have under tab 51. It is order 94, Rule 14(7) which says:

> "(17) here the court is of opinion that the decision appealed against was erroneous in point of law, it shall not set aside or vary that decision but shall remit the matter to the Secretary of State with the opinion of the court for re-hearing and determination by him."

It is a rather complicated way of getting to the end result but that is where it is. We point out that in so ordering a remission the High Court never directs a timetable for re-determination for the Secretary of State. Floe, in its skeleton in response, says we cite no authority for that, but we say in that regard, first, there is a decision by Mr. Graham Eyre QC, sitting as a deputy High Court Judge, which makes some comment on the operation of the predecessor to this section from the same terms, which was s.246 of the 1971 Act, and that is *Kingswood District Council v Secretary of State for the Environment*, and that you have in bundle 1, tab 6. This is from the Journal of Planning Law. It was a case, as I said, under the previous Act, the 1971 Town & Country Planning Act, and the parallel section to s.289 is s.246. This case concerned directly s.245 not s.246 but, as he makes clear, the Deputy Judge considered sections 245 and 246 together. He held that the matter goes back to the Secretary of State for a complete reconsideration, in other words, *de novo*, and he said this about the broad discretion of the Secretary of State as to how he conducts the retaking of his decision. So perhaps it is of some assistance. That is at p.255, the last paragraph on the page:

"He [the judge] added further that the way in which the Secretary of State started *de novo* was entirely a matter for the Secretary of State, subject of course to the statutory provisions and the regulations or rules which bound him, but he had a discretion, subject to those rules, to deal with the matter as he wished, and provided he observed his statutory duty, and acquainted himself with the development plan provisions and the other material considerations, the method, subject to the statutory provision and the rules, he used was a matter for discretion."

Again, the court is not going to give any directions to the Secretary of State as to how, when and what manner he proceeds on a reconsideration.

THE CHAIRMAN: What you say is that the time that it takes requires you to know all those sorts of things?

MR. ROTH: Absolutely, and even the Regulator will now know at the outset, that is why the undertaking that was offered to you was a best endeavours because one does not know what turns up, and one cannot always think clearly and pre-judge how they are going to deal with representations put to them and what points might be raised. I can say that in any case, but I say that particularly in this case having regard to the observations you make in the judgment about the wide-ranging implications and the need for extensive consultation, and the complexity of the matter.

THE CHAIRMAN: They knew that when they offered an undertaking in relation to six months.

MR. ROTH: Yes, but it was a best endeavours undertaking.

THE CHAIRMAN: Yes.

MR. ROTH: And that is why they would not offer an unqualified undertaking.

THE CHAIRMAN: But what you say is, I think, that in order to give a time you have to get into what the underlying internal administration and procedures are.

MR. ROTH: Absolutely, and you will have to keep it under review as the investigation proceeds. If you recall the original Decision, it was taken quite quickly, but of course it was not a good decision.

THE CHAIRMAN: And if the Tribunal is not to get into those sorts of things, then how can it get into timing?

MR. ROTH: Absolutely, and because of that it is a basic principle, unless there is clear statutory provision to the contrary it shall not do so. Counsel for Floe can say correctly that there is no decided authority under the planning law with regard to remission under s.289 of the 1990 Town & Country Planning Act or, indeed, s.246 of the 1971 Town & Country Planning Act. What we can say is that in more than 30 years of consistent practice in planning cases, countless planning appeals, this does not happen, they do not direct.

I come then to the point that has been raised against us saying that there is a consistent practice of this Tribunal with regard to directions. Floe submits that there is such a consistent practice and we are seeking to depart from it in our argument to you. We say, with respect, that that is not correct. Can I take it from our reply skeleton (small bundle, tab 4) at para.4? The quotation in the heading "The well-established jurisprudence of the Tribunal", that is from Floe's skeleton argument. We make two preliminary points. First, the issue of jurisdiction raised by the present application has never been argued before and so there is no precedent. Secondly, practice cannot extend the jurisdiction. Then we say that in fact in less than four years since the first decision there have been only four decisions (excluding this case) by this Tribunal and its statutory predecessor (the Competition Commission Appeal Tribunal). Those four cases are set out at the top of p.4. In two of them the Tribunal did direct timetable and in two of them it did not. I will not go to all of them, they are all in the bundle.

Freeserve (the last of those four cases) is one of those two where the Tribunal did direct a timetable and may be worth perhaps a moment of explaining, because it arose in a very special way, because what happened there is that Oftel offered an undertaking to give a further Decision expanding on the reasons that had been found insufficient by the Tribunal, and they offered an unqualified undertaking to give a Decision with expanded reasons in two months, and it was against that background the Tribunal said that "We would like you, in fact, Oftel, to do more than that, and so instead of two months it is better you should have three months, and then they made an order accordingly. That is how that arose, and that is in your bundle 2, the same bundle as the planning legislation at tab 34. It is headed "Judgment on Costs", but it goes a bit beyond that as you see. On p.2, line 17, the President said:

> "Two consequential issues have arisen which we have had to consider this morning.
>
> "The first issue is what order, if any, the Tribunal should make about the further conduct of this case and, in particular, whether "the matter" should be remitted to the Director pursuant to para.3(2)(a) of Schedule 8 of the 1988 Act."

That is the first issue, the second issue is costs.

> "We deal first with the further progress of this case. As the Tribunal noted in its judgment at para.262, "there have been developments in the market in question since the Director took the contested decision…"

I wonder, could I perhaps ask you to read down to the bottom of p.4?

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

MR. ROTH: Thank you for doing that. Picking it up then on p.6, line 10, the President said:

> "It is true that if this procedure results in a certain amount of further time being taken, it may be that longer than the original two months suggested by the Director is

necessary. We think it is more important for a sound conclusion to be reached on these issues than it is for the matter to be rushed.

"What we would propose is that any new decision should be taken by the Director within three months of today's date, but there should be a general liberty to apply to the Tribunal for further time if that proves necessary. The Tribunal is likely to be sympathetic to any such applications."

So yes, that is one of the only two cases where there was an order setting a time limit on a remission but it was in this rather special situation where the Regulator offered an unqualified undertaking to take further steps within a shorter period.

THE CHAIRMAN: His "unqualified" was not a "best endeavours" undertaking?

MR. ROTH: It was not a best endeavours, that is right. The other cases are listed there – *Institute of Independent Insurance Brokers*, *Bettercare Group Ltd.*, *Aberdeen Journals*. Then as we find out in para.7(b) in the skeleton, if it is relevant to look at the practice of the Tribunal in remitting, then the practice in remitting under s.120 of the Enterprise Act is also relevant. We refer in the skeleton to the *IBA Health Ltd.* case. There was a very tight timetable for the hearing before the Tribunal, but no time limit imposed in the order to remit. Since our skeleton was filed there is a further instance in the *Unichem* case decided just last Friday, for again a remission by this Tribunal, again no timetable prescribed. Again, a case of considerable urgency being a merger.

Floe seek to rely also on the *Argos and Littlewoods* case, and that is in bundle I have just been looking at, at tab 36. This was the case where Argos and Littlewoods were found to have engaged in resale price maintenance of various children's toys and games, including delightfully "Monopoly" was one of the games in which they were keeping up the price, and "Action Man" and things like that. That case did not involve remission under para.3 of Schedule 8. If you look, please, in the Judgment at para.30 under the heading "The choice before the Tribunal":

"30 The main issue with which this judgment is concerned, therefore, is what is the correct course to follow as regards these three new witness statements."

Pausing there, the issue arose in this way. For the hearing of the Appeal, the OFT sought to adduce three new witness statements which had not been available at the investigation stage leading to the Decision, although they expanded the matter because they contained new material which was not referred to in the Decision under appeal. The Appellant companies objected to that and said they should not be admitted. The Tribunal considered the three courses open to it with regard to these statements: "(a) that the material should be excluded altogether", which is what the Appellant company said.

"(b) that the material should be admitted in its entirety, as the OFT suggests, and that the case should proceed accordingly; or

"(c) that the matter should be remitted to the Director, with a view to the Rule 14 procedure being followed in relation to the new witness statements, and Rules 15 and 17 of the Director's Rules being complied with in relation to any facts found by the Director in reliance on the new witness statements."

So those were the three options that they considered, and the Tribunal rejected (a) and (b) and then considered (c). That one finds in towards the end of the Judgment at para.85. After rejecting options (a) and (b) the President says:

" 85 In the light of the above, we turn to option (c) at paragraph 30 above, which is to remit this matter to the Director to enable Rules 14, 15 and 17 of the Director's Rules to be complied with in respect of the witness statements in question.

"86 Dealing first with the mechanics of any such course of action; it seems to us that several procedural possibilities arise.

"87 The first procedural possibility is that the Tribunal should simply stay the appeal, with a view to the OFT undertaking a supplementary Rule 14 procedure in respect of the three witness statements in question. That would involve the OFT serving a supplementary Rule 14 notice, which need not be an elaborate document …"

and so on. Then para.88:

"88 The second procedural possibility is for the Tribunal to remit the matter back under Rule 17(1) and/or Rule 17(2)(j) of the Tribunal's rules, with a view to a similar procedure being followed.

"89 Rule 17(1) of the Tribunal's rules provides:

'The tribunal may at any time, on the request of a party or of its own motion, at the pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings'."

"90 Rule 17(2)(j) of the Tribunal's rules provides:

'the tribunal may give direction to enable a disputed decision to be referred back (or in Scotland, remitted) to the person by whom it was taken'."

"91 It seems to us that this power of "referral back" under Rule 17(2)(j) is a power that can be used at an interlocutory stage …"

Madam, pausing there, that is picking up your point, I had not realised that was made by interlocutory stages of a case.

"… since it occurs in the context of numbers 'case management type' powers set out in Rule 17, which itself occurs under Part V of the Tribunal's rules under the heading 'Preparation for deciding the application'. It seems to us that this is a useful and flexible power that can be used, if necessary, relatively early in the appeal process, notably as a means of sorting out procedural difficulties. Alternatively the Tribunal's wider power to give directions under Rule 17(1) would also, so it seems to us, constitute a legal basis for referring the matter back to the OFT, and/or staying the appeal pending a resumption by the OFT of the administrative stage in respect of the three witness statements in question."

Then they refer to para. 9 (1)(f) of Part II of Schedule 8, which is the enabling provision for the Tribunal's rules:

"(f) for enabling the tribunal to refer a matter back to the [OFT] if it appears to the tribunal that the matter has not been adequately investigated."

"93 Rule 17(2)(j) of the Tribunal's rules allows the Tribunal to refer a matter back, without requiring that it appear to the Tribunal 'that the matter has not been adequately investigated'. Section 48 of the 1998 Act provides that the Secretary of State may make rules…"

and so on.

"94 In those circumstances, it seems to us that it is not necessary for us, in order to refer the matter back under Rule 17(2)(j), or indeed Rule 17(1), to find that the matter has not been adequately investigated. If, contrary to our view, it were necessary for us to find that the matter had "not been properly investigated" before we could refer the matter back, we would be prepared to make such a finding."

and they explain why.

"95 The third procedural possibility is for the Tribunal to make use of its powers under Schedule 8, paragraph 3(2) of the 1998 Act, according to which …"

and there is set out the provision.

"96 We are inclined, provisionally, to the view that these powers are more appropriate to the final disposal of the appeal, but they are, on their wording, wide enough to encompass the present situation.

"97 We do not, for present purposes, need to decide the precise boundary between these three procedural possibilities, although in our view a stay of the appeal combined with a direction under Rule 17(2)(j) seems the most appropriate possibility for implementing option (c)"

Then what they decide is in para.102:

"102 For the foregoing reasons, the Tribunal proposes to stay the appeal with a view to the decision being remitted to the OFT so that the three witness statements at issue may be put to the parties in accordance with Rule 14 of the Director's Rules …"

They then proceeded to impose a timetable for that. So what happened there is a very different situation from this case. It was a stay of the appeal proceedings by the Tribunal.

THE CHAIRMAN: What were the terms of the order though?

MR. ROTH: I think that it was stayed. The terms of the order are in the supplementary bundle which has been put in by Floe (which is also a black bundle) at tab 5: "Upon handing down an interim judgment … it is ordered that …the appeals are stayed, the decision is remitted to be subject of a procedure in accordance with Rule 14 of the Director's Rules, and then there is the timetable set out.

THE CHAIRMAN: They did set out a timetable?

MR. ROTH: They did set out a timetable, oh yes, I am sorry, I thought I said that.

THE CHAIRMAN: No, sorry.

MR. ROTH: Oh, absolutely, they set out a detailed timetable in that case. The point that I was making is that that was not a case where they disposed of the appeal, they stayed the appeal proceedings and, having considered the various procedural powers they said that in their view - and it is para.97 "a stay of the appeal combined with a direction under Rule 17(2)(j) seems the most appropriate possibility for implementing option (c)", that is true, they do not recite Rule 17(2)(j) in the order but we say it is very clear what is happening. In para.96 they comment on the appropriate use, the sort of case where Schedule 2 para 3(2) applies, they say "provisionally", but they say "the final disposal of the appeal".

If one looks then at the Rules and we can see how this works. Perhaps we can take it from the new Rules, which are in the same terms as the old Rules that is to say the 2003 Competition Appeal Tribunal Rules, which are in the purple book at p385. You see the heading there "Case Management" "19 Directions".

"(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other direction as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.

"(2) The Tribunal may give directions –

Then you see:

" 2(h) "as to the fixing of time limits with respect to any aspect of the proceedings;

and then:

"(j) to enable a disputed decision to be referred back in whole or in part to the person by whom it was taken."

It is now Rule 19, at the time of the *Argos* Decision it was Rule 17 of the old rules.

THE CHAIRMAN: So could we have used **this** rule to do it?

MR. ROTH: In our submission no, because you set aside the Decision, you gave a final Judgment setting aside the Decision.

THE CHAIRMAN: Had we not done that?

MR. ROTH: We say that the case management directions are dealing with something that is in the run up to the full hearing. The situation in *Argos* was one party, being the OFT, wanted to put in further evidence not in the Decision, for the hearing of the Appeal. Case management hearing "can we do that or not?" "No", so we send it back so we can go through the proper procedure, but quite different from orders that can be made at the final conclusion of the Appeal when you are giving Judgment on the Appeal – this was not the Judgment on the substance of the Appeal. I have to say I do not know so much about the build-up to the final hearing in this case because, as you know, I was not involved in it, but I saw from reading your Judgment, which is the source of my knowledge, that there was an amendment to the Notice of Appeal, there was a change in the argument. It may be – I do not know, that at some point there it would have been possible to say "Well, there is no point continuing like this, it has changed so much, it should go back", and you refer it back, consider the new arguments or whatever, and take a new decision on that basis, and take a decision that reflects that. It may be that it could have come within the case, but I would not like to commit myself to that without knowing more about exactly what happened.

THE CHAIRMAN: Let us take it slightly hypothetically. During the course of a hearing, which was intended to be the final hearing, it transpires that if you construe certain documents one way you would need further evidence, but if you construed them another way you might not. One possibility would be to stop the hearing at that point, decide the construction and then decide

what to do. Alternatively, one can get to the end and say "You do not have enough facts, you must now look into that." They are two sides of the same coin in effect. One of those, I think you would say, "yes, you can stop the hearing, decide the law or the statutory construction, or the contractual construction or whatever, and then give some directions". In the other – I am not sure – you are saying "if we get to the end we cannot do that and we cannot use Rule 19"?

MR. ROTH: I am sorry, it is not quite what I am saying. I think what I am saying – or seeking to say – is this, if you are going to come to a decision which therefore indeed could go up to the Court of Appeal, you are going to decide the case.

THE CHAIRMAN: Well it can be appealed, because, in effect, if you took a point of law on a CMC that could be appealed.

MR. ROTH: Yes, I suppose that is right, madam, yes. But it is really a question which will vary from case to case. Whether this is probably seen as case management of the proceedings, such that you want to stop the proceedings, and normally as the Tribunal says in *Argos* it is a power that may be used relatively early in the proceedings, but it is a matter for the judgment of the Tribunal in the particular case whether this is something you feel it is appropriate to do by way of case management and say "We are going to waste a lot of time having a full hearing on an unsatisfactory basis". Or, whether you feel, no – and the parties will have views, of course – whether it is go on and you give the judgment, and one side seeks to persuade you on the material before you to uphold the decision, and the other side says to quash it, and you may decide, well actually we are going to set it aside and remit it.

THE CHAIRMAN: But the effect may be exactly the same.

MR. ROTH: The end result may be the same, but the stage at which it might happen will be different and, one suspects, the cases in which one power or the other will be exercised will be very different. One can see why in the *Argos* case, given that these witness statements were being put before the Tribunal at the beginning of the proceedings ----

THE CHAIRMAN: That is a very simple case.

MR. ROTH: It is fairly simple. In your case where you have, I think, a two day appeal hearing with evidence, and I think there was an expert witness I think I saw referred to.

THE CHAIRMAN: No, no evidence.

MR. ROTH: There was a Dr. Ungo or something?

THE CHAIRMAN: Yes, but he did not give us any evidence.

MR. ROTH: Oh he did not give evidence?

THE CHAIRMAN: No, we only had his witness statement.

MR. ROTH: Witness statement, yes, sorry – not oral evidence?

THE CHAIRMAN: No, because I think we say in the Judgment that it cannot be relied on in the circumstances in which it was put.

MR. ROTH: In which it was originally confirmed.

THE CHAIRMAN: It was not cross-examined?

MR. ROTH: And you will produce a full Judgment and you are not exercising case management powers, that is clear.

THE CHAIRMAN: So you say Rule 19 applies where you are exercising case management powers?

MR. ROTH: Absolutely, that is clear from the heading. It says so.

THE CHAIRMAN: Yes.

MR. ROTH: The Tribunal indeed has very broad case management powers, there is no question about that, and that includes various times, time limits for skeleton arguments, written statements, time limits also that can apply as they were in *Argos*. Then there is a clear contrast with the situation in Schedule 8, para.3.

Now, I come to the issues of EC law and then Human Rights. EC law is relied on on the basis, as I understand it, as follows. If the Tribunal is not empowered by the Competition Act as domestic law allowed, then you have such a power by reason of European Community Law. European Community Law of course applies by virtue of s.60 of the Competition Act, the consistency principle. Perhaps one should look at s.60 quickly, familiar though it perhaps is. It is p.68 of the purple book: "Principles to be applied in determining questions".

> "(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> "(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law."

And then (5):

> "(5) In subsections (2) and (3), "court" means any court or tribunal."

So that of course applies to this Tribunal. The principle of European law that is relied on as the principle of effectiveness, that is to say that any remedy arising by reason of Community law must be effective and that the person claiming the remedy must not be disadvantaged compared to the remedy that might arise under domestic law, nor must there be obstacles that make the exercise of that remedy excessively difficult – a well known fundamental principle of EC law, an important principle and, as Floe rightly says, the principle applies to competition law. But as a general principle of Community law of course applies to all areas of Community law, remedy for infringement of the right to free movement of goods or free movement to persons or whatever. We accept that principle comes within s.60(2).

There is no basis for finding that the European Courts, the Community Courts, have held that setting a timetable for the competition authority is mandated by that principle, in fact, quite the opposite. Can I ask you, to save time by taking it from our skeleton argument (original skeleton argument, tab 2, small bundle) at para.14 where we say that although the EC statutory framework is of course different, the Tribunal has sought to decide procedural principles as regards the enforcement of competition rules, so far as possible, consistently with the corresponding provisions of EC law: *Pernod-Ricard v OFT* [2004] CAT 10 at [229]. The Community Courts have no jurisdiction to issue directions to the EC Commission as to how it should conduct matters – this is competition investigations – following either the annulment by the Court under Art 230 [ex 173] of a Commission decision, that is a quashing order effectively, or a declaration by the Court under Art.232 [ex 175] that the Commission has failed to act because there is specific jurisdiction to deal with delay by making a declaration the Commission has failed to act.

Just by way of cross-reference without perhaps taking you to the case *Viho v Commission* [1995] ECR 11-17 is in bundle 1, tab 8. *UPS Europe v Commission* is in big bundle1, tab 9. *UPS Europe* is perhaps the most striking, because there was a complaint of failure to act by the complainant, UPS Europe. They made a complaint of competition infringement to the Commission and four years after the complaint they had not got a decision and the allegation of failure to act was upheld by the court. They said indeed, the Commission had delayed and had failed to act and the complainant asked the court to impose a timetable for a decision and the Court of First Instance said "No", we have no jurisdiction to do that. Perhaps it is worth quickly looking at the judgment at tab 9, bundle 1. You see the heading: "The request that a time-limit of one month be imposed for the Commission to take action under Article 176 of the Treaty".

"48 At the hearing the applicant asked the Court to impose on the Commission

a time-limit of one month to take the measures required following the judgment in accordance with the first paragraph of Article 176 of the Treaty. Otherwise, the applicant submits, a further action under Article 175 of the Treaty would be necessary. The applicant submits that its request is admissible having regard to the general nature of the third head of claim in its application.

"49 The Commission contends that the Court of First Instance has no jurisdiction to impose such an obligation.

"Findings in the Court

"50 This request must be rejected as inadmissible. The Court of First Instance has no jurisdiction to issue directions to the Community institutions. Consequently, pursuant to Article 175 of the Treaty, the Court may only declare that there has been an unlawful failure to act. It is then incumbent on the on the institution concerned to take the measures necessary to comply with the judgment of the Court."

So they cannot impose a time term. Of course, the jurisdiction of the Court of First Instance comes under the Treaty, but when the European courts have no jurisdiction to impose a timetable on the European Competition authority the consistency principle in s.60 of the UK Act (Competition Act) cannot mean that this Tribunal must impose a timetable which otherwise you would have no jurisdiction to do, in order to adopt a position that is consistent with Community law. That, with respect, cannot be right. It would create an inconsistency. As this Tribunal observed in *Pernod-Ricard* there is a desirability of following the same procedural approach as applies to competition in the Community jurisdiction. *Pernod-Ricard* is at tab 7 of this same bundle.

THE CHAIRMAN: Do you want us to look at that? I think we are probably familiar with it.

MR. ROTH: Yes, the reference is in our skeleton, it is para.229. We say that is particularly appropriate. The consistency principle, of course, goes back to the Competition Act 1998 that was there from the beginning. But it is particularly inappropriate to take a different approach, know that the Regulators in the UK are applying not only the Competition Act, but are also applying Articles 81 and 82, and some cases are being devolved to national authorities by the European Commission, and then may go on appeal to this Tribunal. So, far from Community Law leading to a conclusion that you will import a power to direct a timetable so it goes in the opposite direction.

So I come finally to Human Rights. I am sorry, I have slightly overrun. The Human Rights' point arises only on the hypothesis that this Tribunal would not have this power on the

ordinary interpretation of the Statute. The primary submission of Floe is that there is express power, implicit power in the Statute. It is only if that is unsuccessful that one calls in aid any resort to the European Convention on Human Rights, and the Human Rights Act. Then it applies, of course, only if in determining this case there is a determination of Floe's civil rights and obligations within the meaning of Article 6(1) of the Convention. We, Ofcom, are prepared to assume for the purpose of argument that that is the case without formally conceding the point and, as you know, the issue of what is a determination of civil rights and obligation has generated a lot of law and I fear if we had had to debate that we would be here for another day.

THE CHAIRMAN: So for this purpose we are assuming that ----

MR. ROTH: We are assuming that it is.

THE CHAIRMAN: If this went up you are not ----

MR. ROTH: We are reserving our position.

THE CHAIRMAN: The point is put by Floe as based on the Human Rights Act, s.3, but we say in fact it would arise under Community law as well, since the principles of the conversion are adopted as fundamental principles of Community law. So they are applied through Community law even without the Human Rights Act. That is set out expressly in the Treaty of the European Union, Article 6, which you have in bundle 2 at tab 55.

> "Article 6
>
> "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> "2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

An application of that in a competition situation is in the case referred to by Floe in their counsel's skeleton, a case of *Baustahlgewebe GmbH v Commission* [1995] ECR II-987 which you may guess comes from Germany, which is in bundle 1, tab 16. Just to explain, this was a cartel decision by the Commission of welded steel mesh producers all over Europe. This particular producer, Baustahlgewebe was fined 4½ million (now Euros) then ECU. Baustahlgewebe appealed to the Court of First Instance who reduced the fine to 3 million Euros but otherwise dismissed the appeal against liability. This is the Judgment on Baustahlgewebe's further appeal to the higher court, the European Court of Justice. You will see the grounds of appeal at para.15 of the Judgment, p.5 of the transcript.

"15. In support of its appeal, the appellant claims that, because the duration of the proceedings as excessive, the Court of First Instance infringed its right to a hearing within a reasonable time as laid down in Article 6(1) of the Convention … and, by delivering its judgment 22 months after the close of the oral procedure, infringed the general principle of promptitude."

And then there are other grounds of appeal. So the first ground is the court in fact had infringed its Article 6(1) right, and it could take that point in a Community context, as you will see from the judgment on that first ground of appeal, which starts at para.26.

"Breach of the principle that proceedings must be disposed of within a reasonable time."

"26. The appellant maintains …"

and there is their contention in that paragraph, and the Commission's response in para.27. Then at para.28 of the court's reasoning:

"28. First, it must be noted that the proceedings being considered by Court of Justice in this case, in order to determine whether a procedural irregularity was committed to the detriment of the appellants interest, commenced on 20th October 1989, the date on which the application for annulment was lodged, and closed on 6 April 1995, the date on which the contested judgment was delivered. Consequently, the duration of the proceedings now being considered by the Court of Justice was about five years and six months.

"29 It must first be stated that such a duration is, at first sight, considerable. However, the reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, by analogy …)"

and there are set out judgments of the European court – it says the "European Court of Rights", it is the European Court of Human Rights. So they rely on the jurisprudence of Strasbourg. The court then goes through the various eminence. The importance of the proceedings for the appellant, and said yes, they are important – that is the conclusion at para.34.

"34. In view of all those circumstances, it must he held that the procedure before the Court of First Instance was of genuine importance to the appellant."

Then they turn to the complexity of the case and they say "yes", it is complex. They then turn at para.37 to the conduct of the appellant before the court. They conclude at para.40:

"40. It has not thus been established that the appellant contributed, in any significant way, to the protraction of the proceedings."

Then they look at the conduct of the authorities. They conclude at paras.45 to 49:

"45 It must be emphasised, as far as the principle of a reasonable time is concerned, that two periods are of significance with respect to the proceedings before the Court of First Instance. Thus, about 32 months elapsed between the end of the written procedure and the decision to open the oral procedure."

and they discuss that. In para.47 they say:

> "47. In the light of the foregoing considerations, it must be held, notwithstanding the relative complexity of the case, that the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time.
>
> "48. For reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, it must be held that the plea alleging excessive duration of the proceedings is well founded for the purposes of setting aside the contested judgment in so far as it set the amount of the fine imposed on the appellant at ECU 3 million.
>
> "48. However, in the absence of any indication that the length of the proceedings affected their outcome in any way, that plea cannot result in the contested judgment being set aside in its entirety."

So there is Article 6, through European law being applied in a competition setting and actually finding that the court had breached Baustahlgewebe's Article 6 rights. So one has it under EC law as much as under the Human Rights.

We say that on the Human Rights' issue there are two questions to be considered. The two questions we say are: first, is there on the facts of this case an actual or imminent breach of the Article 6 requirement for determination within a reasonable time? Is there on the facts of this case an actual imminent breach of the Article 6 requirement for determination within a reasonable time? Secondly, if "no", is there a basis for imposing a time limit when there is no breach of a reasonable time requirement, because in theory there might be in the future?

The basic principle regarding Article 6 and the reasonable time obligation and the extent of that obligation, was set out by the European Court of Human Rights in the case of *Hornsby v Greece* in 1997. That is in bundle 1 at tab 25. I think you have a copy without a headnote, can we hand up the copy from the European Human Rights Reports, because it is rather easier to see what the case is all about, and maybe if we could kindly ask you to substitute that for the copy that is in the bundle. I think I can take it from the headnote, it saves a lot of time.

"The applicants are U.K. citizens living on the island of Rhodes. They are graduate teachers of English, and decided in 1984 to apply for authorisation to set up a private English school on the island. It was refused on the ground that only Greek nationals could be granted such an authorisation. Further attempts to obtain authorisation proved fruitless, and they decided to make an application, contesting the use of nationality as a condition, to the Commission of the European Communities, who referred it to the European Court of Justice. It was held that Greece was in breach of its obligations.

The applicants applied again to the relevant authority, and were once again refused. They appealed to the Supreme Administrative Court, who set aside the decision as unlawful. Again, the applicants applied for authorisation, and this time they received no reply. They brought proceedings in three separate jurisdictions, including an action for damages in the Rhodes Administrative Court, and finally secured acceptance by the latter that the refusal of authorisation had been unlawful. However, it did not feel that the damage claimed had been established.

The applicants had also asked the Minister of Education to intervene. Finally, a presidential decree recognised the right of European Community nationals to establish private language schools in Greece requiring, however, that anyone wishing to do so obtain either a Greek secondary-school leaving certificate, or pass a special examination in Greek language and history."

Now they brought a claim for violation of Article 6(1) and it was held by seven votes to two that Article 6(1) is applicable in the case and had been breached. Then at para. 3 below:

"3. Article 6: effective judicial protection of civil rights.

"(a) The Court reiterates that, according to its established case law, Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before the courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 should describe in detail procedural guarantees afforded to litigants without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of

the rule of law. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6; moreover, the Court has already accepted this principle in cases concerning the length of the proceedings."

Then there is (b), and perhaps I can go down to (c)

"(c) By refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision in the present case the Greek authorities deprived the provisions of Article 6(1) of all useful effect. There has accordingly been a breach of that Article."

The *Hornsby* principle, and we quote from the judgment in our skeleton as you will have seen, has been followed many times. We give some examples, and I think you very helpfully gave us some cases at the Case Management Conference. One of those is at the next tab, *Burdov v Russia*, a very short case, tab 21. This was compensation for a victim of the Chernobyl disaster, Mr. Burdov. He got judgment in his favour in March 1997 and it was reinstated in May 1999, but it was not enforced until March 2001. This failure of enforcement was held by the European Court of Human Rights to be a violation of his Article 6 right. You see at para.37 the conclusions on that point (p.6):

"37. By failing for years to take the necessary measures to comply with the final judicial decisions in the present case, the Russian authorities deprived the provisions of Article 6(1) of all useful effect."

But the breach was not that the court did not direct a timetable for enforcement. The breach was that for a very long period enforcement was ineffective. So the result of this jurisprudence is that we are accepting for the present purposes that Article 6(1), the reasonable time obligation, applies to all aspects of the determination. It applies to Ofcom for the investigation. It applies to this Tribunal, if I may say so, with regard to the hearing of the Appeal. It applies to the re-investigation on remittal and, if there were to be an infringement decision, it would apply to the enforcement of that decision against Vodafone. In the specific context of competition law it is, of course, decisions from the Community courts that provide examples of the application of this reasonable time obligation. You will have seen that *Baustahlgewebe* is just one, a breach there by the Court of First Instance. Several other cases have looked at the time taken by the investigating authorities, the European Commission. In each case it is very much a question of all the circumstances, the complexity of the case and how the investigation proceeded and whether, looking at each stage, any stage involves a breach. We have set them out in our skeleton in reply at tab 4 of the small bundle, in para.20, those EC cases – *SCK and*

FNK v Commission, and I am not going to take up time by taking you to those in detail now. The effect of them is summarised there. Perhaps I can just give you the cross-references.

THE CHAIRMAN: Yes.

MR. ROTH: *SCK and FNK v Commission*, the first one on p.10 of our skeleton, is at tab 17 of bundle 1. *Irish Sugar v Commission* is at tab 18 of bundle 1; and *JCB Service v Commission* is at tab 19. In fact, in none of those did they find, despite quite extensive time taken, that there was a breach of the reasonable time requirement. That does not mean that the Commission could not have conducted its investigations more quickly. It does not mean that European Commission is not sometimes rather slow. They held that there is no breach of a fundamental right, whether under Article 6 or the parallel fundamental right derived through – they are not directly applying Article 6 they are applying the fundamental principles of EC law.

We say, with respect, that Lord Bingham put the matter very succinctly with regard to the reasonable time obligation derived from Article 6, in an appeal to the Privy Council from Scotland, the case of *Dyer (Procurator Fiscal, Linlithgow) v Watson and another* [2002] 4A.E.R. (bundle 2, tab 32). They are very different facts from the present case, about criminal proceedings in Scotland, but the passage is at para.52 in the opinion of Lord Bingham.

> "52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive."

I am asked to read para.51 starting at about seven lines up:

> "While, for the reasons already given, it is important that suspects awaiting trial should not be detained longer than reasonably necessary, and proceedings (including any appeal) should be determined with reasonable expedition, there is also an important countervailing public interest in the bringing to trial of those reasonably suspected of committing crimes and, if they are convicted, in their being appropriately

sentenced. If the effectiveness and credibility of the administration of justice are jeopardised by excessive delay in bringing defendants to trial, they are liable to be jeopardised also where those thought to be guilty of crime are seen to escape what appear to be their just deserts."

The reasoning of Lord Justice Bingham's judgment was agreed with by Lords Hutton, Millett and Rodger – I think all except Lord Hope who gave a very full judgment of his own.

We say that the Strasbourg case relied on by Floe, which is the case of *Mitchell and Holloway v The United Kingdom* does not depart from established convention principles. It is an example of their application. The *Mitchell and Holloway* case is at tab 30 – a judgment of 2003. Just to explain this is a case which arose out of High Court proceedings in the Chancery Division, where the applicants – Mr. Mitchell and Mr. Holloway – were defendants and counterclaimants. It was set down for hearing in October 1991, but it was heard only in March 1994. That was the critical period of delay which the court assessed. They start the assessment at para.50 of the judgment:

"50 The lapse of time between the beginning of the substantive proceedings and the end of the enforcement proceedings (*Hornsby v Greece*) amounts to 10 years, 4 months and 17 days."

There is then a deduction down to 9 years, 5 months and 7 days.

"51 The Court reiterates the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation."

The same criteria as set out in *Baustahlgewebe*. They then go through the various provisions. Then in para. 53:

"53 The Court observes that the applicants complain in essence about one period of delay for which they hold the Government solely responsible. The period covers 31 October 1991 (when the plaintiffs filed the notice setting the case down for hearing) and March 1994 (when the first hearing date was set in the substantive proceedings).

"54 The Government, while acknowledging that the delay in listing the case for trial was "undesirable" and due to the congestion of the courts at the time, argued that the applicants were nonetheless responsible for contributing to this delay. The Court however is not persuaded that the applicants can be blamed for applying for a fixed date hearing to cover the anticipated 15-20 day trial or for not resorting to steps such as applying for a transfer to another division of the High Court. It considers that the

> delay derives, first and foremost, from the failure by the State to organise its system in such a way as to meet its Convention obligations particularly when it appears that neither a fixed date nor a 15-day hearing were unusual matters in the Chancery division of the High Court. The applicants' adjournment from March to April 1994 was justified (by late discovery of documents by the plaintiffs) and is, in any event, a relatively minor delay.
>
> "55 The Government also alleged that it was the applicants' responsibility to make an application to the court to expedite the hearing during this period, observing that the Lord Chancellor's office had informed them of this possibility in November 1991 and that, when they requested an expedited hearing in February 1994, this was granted. The applicants have pointed out that their experienced counsel and solicitors advised them that an application for expedition would not have had any prospect of success since it was only in exceptional circumstances, which did not pertain in their case, that a court would allow parties to jump the existing queue. Article 6(1) was not applicable in domestic courts at that time and it cannot be considered that reliance on arguments in that context would have been at all decisive. It may also be noted that, though the application for an expedited hearing was granted in February 1994, that was in the context of obtaining a date after yet another adjournment which resulted overall in the trail being set back another month.
>
> "56 In any event, even if a system allows a party to apply to expedite proceedings, this does not exempt the courts from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities."

I think I can stop there. So on the facts there there was a breach of the reasonable time requirement because the obligation to have a system for expeditious administration of justice was not fulfilled and those facts are vilified from the competition investigation or time period that applies in the present case, and it is relevant to ask, of course, as this is the case before you, what has happened in this case when one is looking at Article 6. Can I perhaps hand up a one page chronology? [Document handed to the Tribunal] This shows the key aspects of the progress of this case. You see from that that on 18th July there was the complaint by Floe to Oftel of the breach of the Chapter II prohibition. Decision taken on 3rd November – not, I respectfully suggest, an excessive period at all. About two months later the Notice of Appeal to the Tribunal. A month after that Floe applied to amend the Notice, which application was opposed. In April you give Floe permission to amend, and Floe abandon the original Notice of Appeal. The Appeal was heard on 19th, 20th July of 2004, you gave judgment on 19th

November. On 1st December you decide to remit the case to Ofcom for a fresh decision and it is at that hearing that Ofcom offered the undertaking to use best endeavours to complete the re-investigation in accordance with its published guidelines, that is six months if a non-infringement decision, or 12 months if an infringement decision. So on that chronology in this case there is no conceivable basis for saying either that the past conduct by Ofcom, that is to say its investigation and initial … nor its indication in the undertaking it was prepared to offer on 1st December, that there was breach of the reasonable time requirement under Article 6(1) – we are nowhere near that situation. Indeed, there is no finding to that effect made by the Tribunal nor, indeed, for a moment, is that suggested by Floe in their skeleton argument. So the answer to question 1 of my two questions: is there any actual or imminent breach – one might even add "anticipated breach" though we say that is not the test – by Ofcom of the Article 6(1) obligation, which we assume rests upon it, the answer is clearly "no".

Madam, I have about 10 minutes left but notice the time.

(The Tribunal confer)

THE CHAIRMAN: What we think is that if you are only going to take 10 minutes you could finish and then if there is anything else over the adjournment we think about we could just address that, and then you would have a free run this afternoon.

MR. ROTH: Thank you very much. That takes me in conclusion to my second question: is there a basis for imposing a time limit when there is no breach of the reasonable time requirement, because in theory there might be in the future. So then one is talking about a hypothetical possibility. It is always possible to imagine a hypothetical case, for advocates to suggest what conceivably could happen. If one looks at the Statute itself, Schedule 8, para.3, there is nothing there that on its face involves a violation of the Convention – it is not doing something that is not Convention compliant. It does not prohibit the exercise of any fundamental right – it is not that sort of Statute. It does not criminalise anything that should be allowed. We say it is a provision that simply sets out the powers of this Tribunal on appeals. We say in those circumstances you cannot use s.3 of the Human Rights Act to say that the Statute would need to be interpreted in a certain way to address what might be done in a hypothetical case which is not before the court. Therefore, so the argument would go, you need to interpret it as having this power to deal with that hypothetical case and, having interpreted it on the basis of a hypothetical case, this power is there in the Statute and it can be used in any case not involving a violation of Article 6. That, we submit with respect, cannot be right. It involves using the Human Rights Act as a means to achieve sweeping amendments of legislation to an extent that is not required to avoid a breach of fundamental rights under the Convention. It can only be to the extent necessary where there is an actual or imminent violation.

We say it is wrong also for another reason. One needs to look at the acts or events complained of in the particular circumstances in which they occur when asking whether those acts or events give rise to a violation of the Convention. That is why we say that the observations of Mr. Justice Patten in the Chancery Division in a VAT case are so apposite as a general approach. It is the case of *Bennett v Customs & Excise Commissioners*, which is in bundle 1, tab 25. May I ask you once again ask you kindly to substitute a copy with a headnote, from Simon's Tax Cases. The issue in this case, taken shortly, was whether a particular provision of the VAT Act 1994, s.73, was incompatible with Article 6 of the Convention. One sees that at paras.44 and 45 of the judgment. At the end of para.44 the Judge says:

> "I therefore turn to Miss Lonsdale's main submission which is that s.73(1) in that form is not compatible with the requirements of Article 6."

There were two cases relied on and you will see that the second one is *Hornsby v Greece* that I have referred you to already, and the Judge quotes from *Hornsby v Greece*.

The point about s.73 was that it allowed the withdrawal of an initial tax assessment and its replacement by a new assessment after the Tribunal had ruled on an appeal against the first assessment, and that is what was said to constitute the violation. The judge says, after quoting at length from *Hornsby v Greece* at para.49 of his judgment, after the quotation:

> "49 These cases demonstrate that the right to a fair hearing by an impartial tribunal embodied in Article 6 ought not to be regarded as satisfied unless the judicial process not only guarantees a hearing which is procedurally fair, but also provides for the effective enforcement of the decision of the tribunal. Miss Lonsdale submits that this requirement could not be satisfied in relation to appeals under s.83 of the 1994 Act if the commissioners may exercise the power contained in s.73(1) so as to make a new assessment following an adjudication and so nullify the effect of the tribunal's decision or to use the words in *Hornsby*, to render the proceedings devoid of purpose."

The Judge holds first that that is not a proper interpretation of s.73 and continues, if I can take it up at para.51:

"51 It therefore seems to me that the challenge under Article 6 on grounds of lack of an effective remedy fails for these reasons alone. But if one takes into account the additional safeguards provided to the taxpayer by the operation of the doctrines of issue estoppel and *res judicat*a and by the remedy of judicial review as outlined in this judgment then a challenge becomes impossible. It is of course dangerous to consider questions of infringement of the

convention at too high a level of generality. What needs to be determined is whether the acts or events complained of in the particular circumstances in which they occur amount to a contravention having regard to the remedies available. Judicial review with its objective approach and the absence of any de novo consideration of the merits may be an insufficient safeguard in certain cases …"

– referring to some.

> "The adequacy of judicial review in a human rights context must depend upon the subject matter of the decision which was appealed against, the nature and content of the dispute and the nature of the issues arising for determination. Judicial review will in my judgment be a perfectly adequate remedy for controlling attempts by the commissioners to re-litigate issues already decided in earlier tribunal proceedings. I therefore reject the challenge based on lack of remedy."

So here one is addressing human rights with the question of the fundamental right to determination within a reasonable time, and where there is a violation of that Article 6 right it is to be looked at stage by stage as the cases show. You saw the summary of the Community cases, you saw the *Baustahlgewebe* case – investigation, appeal, enforcement. In the case of investigation, as at any stage, it depends very closely on the circumstances – the number of representations made to the Regulator not just by the parties but by third parties, what new points may be thrown up on the complexity of the issues, although further fact finding is required? So one cannot say in advance, with respect, that unless there is a decision within X months there will be a breach of the fundamental right to a decision in reasonable time. You can only assess whether there is a breach of that fundamental right with hindsight when all the circumstances are known. It is *ex post* and not *ex ante* – if I am allowed to use Latin. There is not a single decision in Strasbourg or Luxembourg or indeed, I believe the UK, where the court says in advance that there is going to be a violation of a reasonable time obligation under Article 6, because if such a breach should occur then, as Mr. Justice Patten points out in *Bennett* when asked "Are remedies available?" the answer is "yes" – in this country, judicial review in the High Court where the court can make a mandatory order, so there is a court with the appropriate power to deal with this. Or in certain circumstances if there is delay in producing in producing an infringement decision, say, that is grounds for reduction of the penalty as you saw in *Baustahlgewebe* as a remedy, or conceivably there might be damages.

So we say that there is no basis in Article 6 of the Convention for interpreting and applying para.3 of Schedule 8 of the Competition Act to give the power which otherwise would not apply to make a direction that you made in para.2 of your order of 1st December on the facts of the present case.

I think I am one minute over, I am sorry. That concludes what I have to say, subject to the allowance you kindly gave me in effect over lunch, any questions of course you may have after lunch.

THE CHAIRMAN: We will come back after lunch. Shall we come back at 5 past 2?

(Adjourned for a short time)

MR. ROTH: Do you have any questions?

THE CHAIRMAN: We do. First of all, just before we rose, you were saying that the complainant's relief for a failure to meet a reasonable time is an application for Judicial Review for a mandatory order? What is the order on the mandatory order?

MR. ROTH: The mandatory order will be that the decision maker take the decision or whatever it may be, and there mandatory orders of the High Court will sometimes set a timetable.

THE CHAIRMAN: They will set a timetable?

MR. ROTH: Usually the do not, but there are occasions where they have.

THE CHAIRMAN: And what is their power to set the timetable?

MR. ROTH: That, we say, is exactly the example of an implicit power, because a mandatory order is designed to deal with inactivity or delay, and that is the purpose of getting a mandatory order, so ancillary to that will be setting a time.

THE CHAIRMAN: So do you say that the courts on Judicial Review, if there is evidence of delay, can set a time?

MR. ROTH: If it is a quashing order, or what we used to call "certiorari" ----

THE CHAIRMAN: Yes.

MR. ROTH: -- then they do not.

THE CHAIRMAN: But why could they not do both together?

MR. ROTH: Because a quashing order means there has been a decision and it is quashed, and a new decision making process has to start; as a result it goes back. They cannot say "We anticipate there is going to be delay in the new decision making process". It is just at the beginning, a mandatory order, and that is why, of course, it is very rare to have a mandatory order because usually on a quashing order the court says "This is a public authority, we can rely on them now to act responsibly and to act upon the terms of the judgment that has been given, and there is no need to go further." They would not make a mandatory order as well. A mandatory order can only be granted when you can actually show to the court that this decision making process started so long ago and has still not been concluded so you can show that there actually is delay.

THE CHAIRMAN: So what would happen if you have a case where it quashes the decision because the decision is wrong, but it also took a long time to get there? Would the court then say "I am

going to quash the decision and I am going to make an order, a mandatory order"? You have no experience of that?

MR. ROTH: I have no experience of that and say that would be wholly exceptional. That would be saying notwithstanding comments we have made about the last time, we are assuming that there is going to be a repeat.

THE CHAIRMAN: On Judicial Review does the Administrative Court, when it quashes an order and then the Secretary of State, or whoever it is, takes a longer time than the complainant likes, is that a permission to apply? Or is it a new Judicial Review?

MR. ROTH: It would then be a new ----

THE CHAIRMAN: It is a new application for Judicial Review? They do not have permission to apply?

MR. ROTH: It would be a new application I believe – Miss Carss-Frisk will correct me if she thinks that is wrong, but my understanding is that would be a new application.

THE CHAIRMAN: It probably would be a new application?

MISS CARSS-FRISK: I think so, yes.

MR. ROTH: And it would be complaining about, not the subject of the first application, which was the decision that was wrong, but the time being taken thereafter to make a new decision.

THE CHAIRMAN: Thank you very much, that is very helpful. No, actually I do have something else on that, because we are talking about the competition regime in this country.

MR. ROTH: Yes.

THE CHAIRMAN: And the idea that it should be dealt with in this Tribunal and not in a tribunal that is specialist and not in other Tribunals. Now if it is right that – I am not saying it is not right – but having now understood the position that the courts, under their inherent jurisdiction or on an application, make a mandatory order in circumstances where there has been a delay, then this Tribunal, having its specialist jurisdiction, does it have a jurisdiction in your submission for a complainant to come here? Or do you say that there is no statutory jurisdiction and no implied jurisdiction equivalent to the inherent jurisdiction of the court? What I am trying to get at is if there is an inherent jurisdiction of the court the inherent jurisdiction is rather like an implied necessary jurisdiction. Therefore, if there is something that can be implied – you understand?

MR. ROTH: I understand. It is a fact, and it may be an unsatisfactory fact, but it is a fact, that there are certain aspects of judicial control of the Competition regime that are not in the jurisdiction of this Tribunal and remain in the jurisdiction of the Administrative Court. There have been, I think, two applications for judicial review to my knowledge, maybe others not to my knowledge, concerning investigations by the OFT, one being a case concerning a third

party – it was to do with the *Attheraces* investigation, which was heard recently by the Tribunal.

THE CHAIRMAN: Yes.

MR. ROTH: At the stage of the OFT investigation I think the British Horseracing Board, or the Jockey Club or both wanted to intervene and the OFT said "No". So they had to go to the Administrative Court and seek ---- Now, you may say, and with respect if you did I would be inclined to agree, it is much more satisfactory if this Tribunal, as the specialist tribunal, was seized of the entirety and if the Act said that all matters of Judicial Review concerning the OFT and the Regulators should be heard by the Competition Appeal Tribunal, but that is not the position. It went off and they gave permission; I think after permission was given the matter was then settled. There was another application concerning another case that I know also went on Judicial Review to the High Court. So it is the case that certain aspects of judicial control of the Regulators remain with the Administrative Court because the jurisdiction of this Tribunal is … statutory jurisdiction. If you say to me that does not make perfect sense I would not ----

THE CHAIRMAN: You would agree.

MR. ROTH: It is no doubt that that is the situation.

THE CHAIRMAN: But, correct me if I am wrong, they are not situations where this Tribunal has decided the matter, has been involved in it, has got to a Decision, has said "You need to reconsider it having regard to what we are saying and therefore in one sense the Tribunal has some understanding of what needs to be done – I am not micro-managing but has some understanding of what needs to be done – and therefore some understanding of what a reasonable time is because they know what was in their mind as to what needed to be done, and the Administrative Court does not have either that knowledge which has been learned during the hearing, nor the general expertise of the Tribunal, and so that is slightly different in a remitting case, to a case where there is an investigation and thinks it might have been better if we had the whole of the jurisdiction, but that is another matter. But in this sort of jurisdiction where we are talking about a decision that we have been involved in and have come to a decision there may be a distinction.

MR. ROTH: I would make two responses to that. First, the general question of the expertise of this Tribunal, I would say with respect that applies even in the examples that I gave.

THE CHAIRMAN: I agree with you.

MR. ROTH: Because there too you know much more of what is involved in an OFT investigation than the Judge doing an Administrative Court list who might know about immigration but knows nothing about what an OFT investigation involves.

The second point, you say in a case where you have actually heard, where it is a remittal but you have particular knowledge about it, of course I accept that completely, you do, but that would be true of course of a merger – Judicial Review under s.120 – and the one thing that was made very clear in the *IBA* appeal in the Court of Appeal – I think we cite it in our skeleton argument – that although this Tribunal is a specialist tribunal, it must not on that account act differently from the way the Administrative Court would act with regard to the degree of scrutiny or scope of its powers. The principles on which it must work must be the same.

THE CHAIRMAN: Yes, but I think what I am exploring at the moment is, yes, this Tribunal would act in the same way as the Administrative Court, but it is this Tribunal and not the Administrative Court, so the *IBA* would help me.

MR. ROTH: The Administrative Court on remitting a case to the Secretary of State would never say to the Secretary of State "We direct that you produce your decision in three months".

THE CHAIRMAN: No.

MR. ROTH: Even though they heard what he did the previous time, they have seen the Decision, they have seen what is involved, they do not do so, and they do not do so because they had no power to do so.

THE CHAIRMAN: Yes, but they do do a mandatory order – I am not saying that you have delayed, I am just thinking about what would happen.

MR. ROTH: There were various hypothetical questions which can arise if, on a complaint, a Regulator does nothing, can one say that there is some implied ----

THE CHAIRMAN: There is no decision?

MR. ROTH: There is no decision, can you say that there is an implied negative, I do not know. I think the President has suggested that extra-judicially once.

THE CHAIRMAN: There are other cases, in the tax area there are cases where the tax authorities do not make any decision and it is held to be a 'no decision' is a decision.

MR. ROTH: And then it could come to this Tribunal, but you would be treating it as a negative decision, you would not be making a mandamus – you would be deciding on the basis of the decision.

THE CHAIRMAN: That leads me to my second point. We understand your submissions today that Ofcom have proceeded efficiently and effectively, but can we just look for a moment at the submissions that were before us on the last occasion - divider 9 is the transcript.

MR. ROTH: This is not when I was before you.

THE CHAIRMAN: No, this was Mr. Hoskins. You will see there at p.18, line 29 – there had been discussion as to the difference between five and six months and what was going to be done, etc. and the consultation and that sort of thing. If we pick it up at line 29 there:

> "In terms of priorities, first of all Ofcom has to prioritise those matters it has a statutory duty to deal with in accordance with the statutory timetable. Once it has prioritised those then there is no magic in the difference between an investigation and a re-investigation. The question of whether to prioritise any type of investigation will depend on the subject matter that is at stake, and in particular, for example, where there is a potential for serious consumer detriment, that will be prioritised. So it is perfectly possible that one will have an initial investigation with serious consumer detriment that would be prioritised over a new investigation if that was felt to be appropriate. There is no magic in a new investigation; it depends on the subject matter."

And then I referred to the *Freeserve* case and then Mr. Hoskins continued:

> " Madam, yes, that is one of the factors to be taken into account, and in Freeserve what was at issue was the provision of broadband, which you will see at para.12 is where it is developed:
>
> > "These considerations apply particularly in a case where the allegation is one of predatory pricing or margin squeeze in a fast developing market of national importance such as broadband."
>
> "Clearly, nationwide broadband market, I would submit is of greater importance than the particular commercial activities that are at dispute in the present case. So yes, that is one of the factors, but if we are talking about wider public interest, *Freeserve* was up **there** on the scale, but, with respect, Floe is approaching the bottom of the scale."

I will not continue but that is the way it was presented on the previous occasion.

MR. ROTH: Yes.

THE CHAIRMAN: Now the complainant is entitled to have his rights and obligations determined within a reasonable time. You say you look at that afterwards, and the question is whether you can look at it before. But what happens is that the Regulator has made a decision within a reasonable time which is successfully challenged, so you have the first reasonable time period. When it is challenged and the court makes the decision that there has to be a new consideration by the Regulator, the court then is looking at the additional time which it is going to take for the reconsideration so that the complainant's right to having the decision within a reasonable time is complied with, because the first decision has already taken place and it should have been done within that period of time and that, of necessity, must be a reasonable

time because it has been done within that time and everything in addition to that is a delay of the original decision. Do you see what I mean?

MR. ROTH: Yes, I understand.

THE CHAIRMAN: That rather concerns us, I think.

MR. ROTH: But I think, with respect, that is not the way it is approached – indeed, it could not be. One has to look at assessing Article 6 for each stage. Suppose a decision maker takes an unreasonably long time to reach a decision and then that decision is challenged and it comes to the court, it does not mean that the court, if it does not produce a decision in two weeks is going to be causing a breach of Article 6, and that suddenly it has to operate incredibly fast because you look at the total period and therefore the court is responsible for prolonging the delay. Each body has its obligation to comply with Article 6.

THE CHAIRMAN: But we are in one particular sphere of judicial review, because often the body making the original determination is not "Article 6-able."

MR. ROTH: That may be, yes.

THE CHAIRMAN: So one is looking at that decision making, and if no decision had been taken it is what we were discussing before, it may well be there is a non-decision or whatever. So they are entitled to have that done within a reasonable time. Any time period which it is going to take after that is an addition to that reasonable time, and therefore the question is whether that what is before the court, or the Tribunal, is of necessity an extension of the time period which is of necessity unreasonable.

MR. ROTH: I understand. On the other matter you raised on the transcript, can I just take instructions for a moment?

THE CHAIRMAN: Yes.

MR. ROTH: (After a pause) On the first point, as I understand it, you did indicate, I am told, that Ofcom should give the matter priority and they have done so, so they have responded to it.

THE CHAIRMAN: Absolutely, yes.

MR. ROTH: That is a different thing from setting a timetable, as I hope I have said and I referred to Mr. Collins' judgment where he says that "I hope or expect that the decision maker will now deal with this matter promptly", and that is a perfectly proper thing for a court to say.

THE CHAIRMAN: I absolutely accept that they ----

MR. ROTH: That is what has happened in this case. The other point, the sort of accumulating total, yes, I fully agree it is the totality that has to be conceded, but within that you look at each stage and you say that now this has gone back for re-investigation and a new decision, has that re-investigation in the circumstances taken such a time that one says that this is unreasonable time

in breach of Article 6. You can have a regard to the totality of the period but you also have to have regard to what has to be done in the process of taking the new decision.

THE CHAIRMAN: I am just thinking – because you have the original decision which of necessity one must say was a reasonable time, and on your submission the courts cannot interfere until there is an unreasonable time – whether the consequence of there having to be a remission puts the court into a situation where there has been an unreasonable time and therefore a situation where – I know you do not go as far as this but I am looking to see whether it could go as far as this – on your submissions the court could interfere?

MR. ROTH: So that if you are saying where the initial Decision had taken an unreasonable time, there is then a remission ----

THE CHAIRMAN: Well let us just take it on that basis, yes.

MR. ROTH: On that basis, there is a remission, the court says that this has taken an unreasonable time therefore it is necessary now ----

THE CHAIRMAN: Yes.

MR. ROTH: If I have it correctly, that is the point you are putting?

THE CHAIRMAN: Yes.

MR. ROTH: In that situation Article 6 could come into play.

THE CHAIRMAN: Yes.

MR. ROTH: Whether therefore, if one were similarly in the Administrative Court there would be a requirement to give a mandatory order – I can see that it could come into play, but I think the need to make such an order would only arise if there is a basis for saying it is now not going to be dealt with quickly. If the Regulator said to you "I hear what you say but we have a lot of other cases, very short staffed, and we do not think this is so important. Even though it has taken a long time before we are not going to deal with it quickly". Then one could say there is an anticipated breach and in deciding there is an anticipated breach we look at the totality of the period. But then I think in that hypothetical situation I would see that there was an argument there.

THE CHAIRMAN: Would we have jurisdiction?

MR. ROTH: That would be on an Article 6 basis, I can see how there that sort of argument could get off the ground, but it is a very far fetched possibility I would submit, and certainly not the case before you.

THE CHAIRMAN: No. What you say is that you would have to have an unreasonable time, you do not take the Decision that has already been made and say well that was done within

a reasonable time, but any new decision must make the whole time period unreasonable, and therefore I have that jurisdiction. You have to start with an unreasonable time to start with before you would entertain the submission.

MR. ROTH: You have to have a basis for finding that there is an actual or imminent breach of Article 6.

THE CHAIRMAN: Thank you. I think Mr. Davey has some questions.

MR. DAVEY: Yes, Mr. Roth, it is the essence of your case in regard to the time period under Article 6, that it has to be *ex post*, that you wait until the time has elapsed before you seek your remedy?

MR. ROTH: Unless there is a basis for saying that you can tell that there is an imminent breach which would be I suppose would be *ex post*.

MR. DAVEY: You have to wait until it is quite clear that the patient is *in extremis*, shall we say, before you start offering any treatment – if I may use a medical analogy.

MR. ROTH: The analogy is always slightly difficult, but the point being that it is not preventive medicine ----

MR. DAVEY: No preventive medicine, yes.

MR. ROTH: -- to take the medical analogy. I would not go as far as saying you wait until *in extremis*, you wait until you can tell that the fundamental right is to be violated. It is a fact that, unlike the patient whom one wants to be well right through, the fundamental right in fact is not a right to everything being done very quickly. A fundamental right only applies in a serious case, if there is not a very serious case fundamental rights just do not come into the picture.

MR. DAVEY: Is it wholly satisfactory that you have to wait like that?

MR. ROTH: You are dealing with public authorities who can be normally relied on to act in a responsible manner. There are no grounds for suggesting they are in bad faith, and there is therefore a degree of restraint in which the court will start telling them they have to do things. They are subject to the obligation of Article 6. They are subject to a risk conceivably of damages if they cause loss through violations of human rights, and that applies right through the situation.

Can I give you another example? Suppose this Tribunal decides a case – not this case – a case where the OFT has found an infringement, Article 82 as they now can, a Chapter II prohibition, and the company that has been fined appeals to the Tribunal. It is a difficult case, it goes on and Judgment is reserved. You give a Judgment and you uphold the Regulator but the company goes on to the Court of Appeal, gets permission, goes to the Court of Appeal. It persuades the Court of Appeal that it is a difficult area of Article 82, difficult law – say,

discriminatory pricing. The Court of Appeal decides this Tribunal is wrong and says that we hold that the principle under Article 82 is this. So then the question is on that correct interpretation of the law as determined by the Court of Appeal, has there been an infringement or not. They say well complicated facts, economic evidence, much better that it goes back to the specialist tribunal because you are much better placed to assess it now on the law as the Court of Appeal stated it. A perfectly normal situation.

But can the Court of Appeal then say "This has all taken rather a long time now. There has been a Decision, there has been an appeal with reserved Judgment, it has all gone on for a long time – an Article 6 situation – we will therefore direct, we must direct if it is Article 6, that the Tribunal will hear this within a month, it will produce its judgment within three weeks". Could they make such a direction? It is absolutely unheard of. They never make such a direction. They may say "We are concerned about the time this has taken, and we hope and expect that the Tribunal will give the matter priority", but they would not direct a timetable because they know that this is a responsible body subject itself to Article 6 obligations as *Baustahlgewebe* shows. Each body within its own institutional competence has to carry out responsibility.

MR. DAVEY: So at all events you are saying that it must be *ex post* and that there has never been a case so far as you know of an *ante post*?

MR. ROTH: So far as I know dealing with reasonable time, because assessing whether there is such a breach *ex ante* is so difficult because you do not know what is going to happen as it is very fact dependent, as all the cases show, in the course of the investigation, the course of the decision taking which starts *de novo*, a fresh procedure. Of course, there are all sorts of other obligations that apply in the decision taking – listening to both sides and acting fairly, and so on, there are a lot of other public obligations that have to be dealt with.

MR. DAVEY: Thank you.

MRS. HEWITT: Mr. Roth, Ofcom is a public sector regulatory body. It has a governing board of non-executive directors, and they set the policy and objects for the organisation. In terms of corporate governance and accountability this board would also be tasked to set performance targets and objectives both for the organisation and for its staff. These would be set within certain financial and HR constraints. These objectives one would presume include, for example, its investigation arm having to reach a certain number of decisions within certain timescales, within the allocated resources. I wondered whether you could comment if this is so, and how this fits in with your earlier remarks that the timescale of the decision making process is, in fact, fact dependent, as you have described it – it varies from case to case, depending on the particular circumstances and complexity of the issues relating to each case.

MR. ROTH: I have the advantage of having the legal director of Ofcom, can I take instructions on the question? Thank you. (After a pause) Thank you very much. The position is this that Ofcom publishes guidelines for its competition investigations. They are set by the competition group in Ofcom and approved by the Board. They are guidelines not absolute time limits. The executive members of the board responsible for competition investigations is charged with producing the most effective outcome within the context of competition law enforcement and allocating resources accordingly. In the *Freeserve* hearing I am told that executive member of the Board, a Mr. Kit Meek, in fact came to the Tribunal and explained how Ofcom seeks to prioritise its cases to achieve that outcome, and its objectives are very much the same as the objectives of this Tribunal. But it is recognised, both within Ofcom, and in the published guidelines, that particular investigations may take shorter or longer than the published guidelines because any particular investigation will be very fact dependent and some therefore maybe longer, and some it is hoped will be resolved more quickly.

I hope that gives a full answer to your question.

MRS. HEWITT: And are these guidelines in the public realm?

MR. ROTH: Yes, they are. They are published and they are on the website, I think, of Ofcom.

MRS. HEWITT: Thank you.

THE CHAIRMAN: Thank you very much, Mr. Roth. Miss Carss-Frisk, I have noticed the time and I do not want you to feel under any pressure at all, we want to hear all your submissions, and we hope that among your submissions we will get the answers from you to the questions that we have just put.

MISS CARSS-FRISK: I am sure. We submit in summary that the power of the Tribunal to direct a timetable when it remits to a Regulator such as Ofcom has a very clear basis in the words of para.3 of Schedule 8 to the Act and that power is, in any event, necessary to secure effective protection of competition law rights as a matter of EC law and domestic law, and indeed in order to safeguard the rights under Article 6 of the Convention. That is a nutshell summary of what we say.

I propose to begin with the words of para.3(2) themselves, without reference now to EC law or the Convention. You have them, certainly at tab 42 of bundle 2, and you may just want to have them open in front of you. The words are, of course, very wide indeed, the Tribunal may give any direction, take any step or make any decision that the OFT (or in this case Ofcom) could itself make. That is looking at paras.3(2)(d) and (e). It is important to note that it is not disputed by Ofcom that the setting of a time for an investigation is a decision or direction or step which Ofcom can take or make, granted that they say "Oh well it is not a

decision or step or direction within 3(2)", but they certainly have not tried to suggest – nor could they – that it is not, on the ordinary meaning of the words – a decision, or a direction or a step, that Ofcom could take or make internally.

So what Ofcom are really saying at this stage, still leaving to one side EC law or the Human Rights Convention, is that for some reason one should read down the ordinary meaning of the words in para.3(2), one should read them down to have some narrower scope than what they really have on their ordinary and natural meaning. We say that there is no jurisprudential basis, and none has been suggested, for that kind of exercise of reading down what the words appear to mean on their ordinary meaning. There is nothing in para.3(2) – if we focus now on 3(2)(d) and (e) – to indicate that the words "directions, steps or decisions" are limited to, say, directions at the end of an investigation or limited to directions for decisions or steps that are aimed at third parties as opposed to decisions, directions or steps taken, as it were, internally within Ofcom. That, of course, is what Ofcom now submits – they say one has to find that kind of limitation on the words. If we take each of the words separately for a moment, and look first at the word "decision", as I understand Ofcom they are really saying look at s.31 of the Competition Act (which you also have in the same tab in bundle 2) and there you see the word "decision" defined, and really that indicates what the word "decision" should be taken to mean in para.3(2). You do indeed have a definition of the word "decision" in s.31(2) (p.11 of the print out) but, one sees that of course it says "For the purposes of this section and sections 31A and 31B "decision" means…" etc. So it is a very specific definition of "decision" there, not expressed to extend to the use of that word in para.3(2).

Equally, if you go on in the same tab and you look at the definition of "decision" in s.46 and 47 there you also have a reference to what a "decision" means, particularly if you look at s.46(3) you see that it says: "In this section "decision" means …" etc. Well we are not trying to suggest that we are here within s.46(3) concerned with that kind of decision but the point is simply that the Statute is saying very specifically for the purposes of these provisions the word "decision" has a particular, if you like, narrow meaning. In our submission, it is highly significant that when you then get to para.3(2) in Schedule 8 of the same Statute, it does not have anything to limit the meaning of "decision" or to say that it has the same meaning, say, as in s.31, or s.46. That, we would suggest, shows that Parliament here has intended the word "decision" to have a broader meaning as in its ordinary natural meaning – a decision.

Equally, if we turn to the word "directions" in para.3(2)(d) that word is not given any particular definition in s.3(2) either. Now, Ofcom says to you surely it must mean directions that can be given by Ofcom under s.32 and 33 of the Act? But there is nothing in para.3(2) to give that word that limited meaning, and again we would suggest that Parliament has shown

that it is perfectly capable of giving a specific definition to these sorts of words, but it has not done so. For these purposes it has not said it has to be directions aimed at third parties at the end of an investigation.

If one then goes to the third set of words – word or words – the taking of other steps in para.3(2), here Ofcom have not actually suggested to you that that phrase reflects some specific power elsewhere in the Statute that it refers to. Clearly the phrase "taking of other steps" is very broad on its face and whilst, as I said, Ofcom has tried to link the word "decision" to s.31 (we submit wrongly) they have tried to link the word "directions" to s.32 and 33, and we would suggest wrongly, but they have not managed understandably to link the phrase "taking of other steps" to any specific power in the Act. That again, we would submit, shows how Parliament has intended here to ensure that this Tribunal brought powers to ensure the effectiveness of its remedies ultimately of course for the overarching purpose of ensuring an effective competition regime and indeed, the phrase "take such other steps" is perhaps particularly apt to include internal steps that Ofcom may take, including setting for itself a timetable so that is a step that Ofcom can take, and that by virtue of para.3(2) this Tribunal can take on the disposal of the Appeal.

Ofcom then say the way you somehow limit the meaning of these words is by setting them in context. That is, as I understand it, the way they seek to read them down. But what is the context here? As I just suggested, in our submission, the overall context is the purpose of the statutory scheme to ensure effective competition regulation and, as part of that, for this Tribunal to be able to grant effective remedies. That is what the statutory scheme is all about. In that context it makes perfect sense for this Tribunal to have the power to set a timetable where necessary for a re-investigation. There is nothing whatever inconsistent on that basis with the Tribunal having that power and the over arching statutory purpose – quite the contrary.

Of course, the Tribunal must exercise its powers rationally and, if you like, sensibly and in accordance with the statutory purpose. Plainly, if it were not to do that it would be open to challenge – say, for example, that it completely irrationally directed that a re-investigation could only be carried out by certain named individuals, or something like that where there was no rational basis for that. Of course, that would then be open to challenge, and we accept as I said the purpose here is really to ensure an effective remedy. So one has to find that the Tribunal was doing whatever it is doing for that purpose. That will clearly imply some limit to what the Tribunal can do. We are certainly not suggesting that the Tribunal can, as it were, turn itself into the sectoral Regulator, and suddenly just take over and do everything that

a Body like Ofcom could ever do. What it can do, however, is make rational, sensible directions to ensure the effective implementation of its Judgment, the granting of an effective remedy.

It really is not much good, we would say, for Ofcom to say "Well, the Tribunal could engage, as it were, in permissible micro-management and therefore it cannot have the power in issue here". One can almost always think of really extreme examples of the exercise of a power that does not make any sense at all, but that does not mean that the power does not exist. If the power is exercised wrongly, invalidly, for an improper purpose then of course it can be challenged. That really is not the point.

On that basis there is no reason at all why the words in para.3(2)(d) and (e) should not be given their ordinary meaning which is a broad one. However, if you were to disagree with us on that, we do submit in the alternative that if one focuses simply on para.3(2)(a) – the power to remit – there is surely implicit in that power also a power to direct a timetable where that is necessary in the Tribunal's view. It is well established, and I do not think this is really disputed, that there can be implicit ancillary powers that are attached to express statutory powers, as it was put in the *Attorney General v Great Eastern Rly Co* (1889) 5 App Cas 473 whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised is not, unless expressly prohibited, to be held to be *ultra vires*. You have the *Great Eastern Rly Co.* case at tab 3. It is Lord Selborne, and just for your reference it is p.4 of the print out that you have. Unless the Tribunal would like to look at it, in the interests of time I should probably move on. Ofcom indeed have said that they accept that principle, and they refer to the *Bodden* case as an example of that. The way they put it is that such powers are incidental to the statutory jurisdiction as enable the Body properly to exercise its express power, having regard to the purpose of the jurisdiction. That I think is paraphrasing a bit, but not much, from the Ofcom reply skeleton, para.3.

Here again one has to look at the purpose of the jurisdiction and if we are right in saying that the over arching purpose is to ensure an effective competition regime, including effective remedies of this Tribunal, then surely the power that we argue for is indeed comfortably incidental to the express power in para.3(a) and, as I said, that is moving to one side what you already have in 3(d) and 3(e). If, as Ofcom have now accepted, the High Court can set at timetable when it grants a mandatory order, then it is very, very difficult to see why a similar power should not be implicit for this expert Tribunal when it seeks to give effect to its own Judgment – it really does not make any sense.

Then Ofcom seek to say that this kind of ancillary power is actually contrary to the express scheme of the Statute, and they say that is one reason why one cannot imply such

a power under para.3(2)(a). The way they put that is they say that neither the 1998 Competition Act, nor the 2002 Enterprise Act have any statutory time limits as such for regulatory investigations under Chapters I and II, or in relation to Chapter 1 and II prohibitions. But the fact that there are no statutory limits in our submission in no way suggests that there cannot be an implied power for the Tribunal to impose a time limit in such cases as are appropriate where the circumstances so require. Of course, statutory time limits are by their nature rather inflexible and it may be for that reason that it has not been thought appropriate by Parliament to lay those down but, as I say, that certainly does not suggest that there cannot be a power for a Tribunal where it is required in its view to impose a flexible time limit that will vary on all the circumstances of the case. In fact, one can of course turn this round and say well all the more reason, if there is no statutory time limit, for the Tribunal to have the power, in its reasonable judgment, to impose a time limit where required. So it certainly is not right that the power we say you have is somehow inconsistent with any express part of the scheme at all.

We do rely on the existing case law of this Tribunal. We accept that it does not go back a million years, and we accept that there has not been a large number of cases dealing with this. We accept that the point before you today does not seem to have been argued in the previous cases. Nevertheless, it is very significant that this Tribunal has thought in the past that it has this power to impose a time limit where appropriate; and that it has thought in effect that that is a necessary part of its armoury to deal effectively with competition law. If this expert Tribunal thinks that that is so, then that is surely a powerful indicator that that is what the statutory scheme here requires; and so that it is indeed a power that you have in para.3(2)(d) or (e) or indeed implicitly in para.3(2)(a).

I know you are very familiar with the Decisions we have; and not surprisingly we attach particular importance to the *Freeserve* case which I know that you also attached importance to when you imposed the time limit back in December last year. What we say, very briefly, is that it was actually on its facts a very similar case to this one. An undertaking was given to reinvestigate, so it was not necessary to order remission in that sense, but the timetable was then imposed. That was not a matter of undertaking. You have what we would say is a very important passage in para.11 of the Decision dealing with the timetable where the Tribunal talks about the need to be able to impose a timetable really to ensure effective protection and effective remedies. Perhaps if I could just invite you to go incredibly briefly to that, it is tab 35, bundle 2, p.3, para.11. Just to remind you – I know you have already referred to this para. back in your December Ruling – we do say that this is a very important passage which shows why the Tribunal does indeed need to have this sort of power. (Pause for reading)

A couple of other features we would ask you to note, and would not even ask you to look those passages up unless you would like to, is that in *Freeserve* the Tribunal actually went so far as to impose an additional obligation on Oftel (as it then was) namely that it and the parties should provide a report on progress by a date and time fixed by the Tribunal before the final Decision (tab 35, p.5, para.20) Obviously, if Ofcom's submission before you is right then that was something that the Tribunal had no power to do. You may also just want to note that in fact the Tribunal's view was that Oftel should consult in that case with various parties and that was not actually ordered, it was in the end the subject of an undertaking. One has reference to that at pages 4-5, tab 34. You see the order that was made at tab 35, para.2. That is really just by way of illustration that there are various circumstances where this Tribunal has thought it makes sense and is required for it to intervene in that sense in an investigation by the Regulator, and we would say quite rightly.

Then we refer to the *Aberdeen Journals* case – I do not think there is any need to look it up now (bundle2, tab.37). It is accepted that that was a case where there was a remission and there is a timetable set. No discussion of the jurisdiction of that, it was simply done.

Then we have the *Argos* case (bundle 2, tab.36) where, as you have seen earlier today, it was actually a remission after an interim judgment about whether certain statements were admissible or not, and it was decided to remit. The point we make is that the Tribunal went through various jurisdictional bases for remission and we would say it is not clear in the end which of the jurisdictional bases it actually fastened on, but one does see from paras. 95 and 96 – please forgive me if again I just say this without actually asking you to turn it up, do tell me if that is not convenient?

THE CHAIRMAN: No, that is all right.

MISS CARSS-FRISK: One sees that it was of the view that it could make the order under paras.3(2)(a) and (d) of Schedule 8. You have seen the order that was ultimately made, with the timetable, at tab.5 of our supplementary bundle. Again, no discussion as we have had in this case about jurisdiction but the Tribunal clearly taking the view that it had that power. It is interesting that Ofcom have accepted today that as part of your case management powers under Rule 19 you do indeed have the power to remit, as it were, in the course of the determination of an Appeal. We do not seek to suggest to you today that that was a power that was, or could have been exercised in this case. We are obviously aware that what happened on 1st December 2004 was that there was a remission under para.3(2)(a), so we accept that for today's purposes we are concerned with para.3(2), but we do say that it would be very surprising for the Tribunal to have a power to intervene in that way in the course of an appeal under Rule 19 and not have that power at the end of the case when it disposes of the appeal when, in fact, bearing

in mind what has gone before by way of delay, there may be all the more reason for the Tribunal to impose a timetable. That would be very strange indeed.

So far as concerns this point that Ofcom made that it is somehow undesirable for the Tribunal to look into the internal procedures of Ofcom, which you would have to do to form a view about when Ofcom can reasonably be expected to do things, if the Tribunal can do that under Rule 19 in the course of an appeal then it makes no sense at all for it not to be able to do that at the end of the day when it disposes of the appeal. We respectfully say, in relation to that point, in any event at whatever time a tribunal or court looks at the question of reasonableness of time it will have to look at, as it were, the internal workings of the Regulator to see whether what was done was reasonable or not. That cannot be escaped and it is difficult to see why there should be some fundamental objection to that. For those purposes it really does not matter whether this is looked at at an earlier stage, as in this case before the reinvestigation has started, or at a later stage as Ofcom would urge it can only happen *ex post facto* when there already has been an unreasonable delay. I will have more to say about that in due course, but in terms of can you ever look at the internal workings, the answer has to be of course you can, and the court can if it ever comes before a court.

Finally, so far as the existing jurisprudence of the Tribunal is concerned, Ofcom have mentioned various cases in their reply skeleton where a timetable was not imposed – *Institute of Independent Insurance Brokers* (tab 38), *Bettercare Group Ltd.* (tab 39), *IBA Health Ltd* (tab 40). We would simply say the fact that in those cases the Tribunal did not see fit to impose a timetable does not in any way suggest it did not think it had the power to do so. In fact, if you look at the *Bettercare* case, and again, if I may, I will just give you the reference – (tab.39, p.92, para.292). The Tribunal actually refers to the possibility of consequential directions upon remittal although it then does no see fit to make any such directions. Similarly, if you look at *IBA Health Ltd.* at tab 40, which was the Appeal under s.120 of the Enterprise Act, the Tribunal remitted to the OFT, no direction as to timetable, but at p.78, para.269, it did make it clear that it thought it had power to make further consequential directions. It did not specifically refer to timetable, but one would have thought that further consequential directions would pre-eminently include the possibility of a timetable. So in our submission those cases do not really assist Ofcom and they are entirely consistent with our submission that this Tribunal has thought so far that it has this power and that it is an important part of its armoury. Indeed, it is of some significance that up until fairly recently Ofcom seems to have accepted that the power was there and, indeed, at the 1st December hearing last year accepted that. That is not to say they may not be right as a matter of law now – they may be – but it would perhaps be a little surprising if they were, given that everyone had, up to quite recently, assumed that

this was a sensible thing that this Tribunal had power to do. But I cannot make too much of that – just a little bit.

THE CHAIRMAN: They did in this case as well.

MISS CARSS-FRISK: Indeed, absolutely, they did in this case, so there we are. Other jurisdictions and other cases, of course it is a pretty big plank of Ofcom's submissions that they say well, if you look at the Judicial Review context the court does not have power to direct a timetable if it remits. I have to say that we had not appreciated until today that they were prepared to accept that there was a power to impose a timetable if a mandatory order was made, but they have accepted that which I would suggest makes our task a little easier here. We would say as an overall submission that actually if put to the test the court does on Judicial Review have a power to impose a timetable when it remits a case to the relevant public authority if that is appropriate. In answer to something that arose earlier today I cannot say that I am aware in an interlocutory situation or otherwise that this has been a frequent practice, or a common practice – I cannot. But, having said that, in our submission it really would be very surprising if, after hearing full submissions – and I am not even leaving to one side the Human Rights Convention and, indeed, EC law – it would be very surprising if the Administrative Court heard full submissions, formed the view that this was necessary to dispose of the matter effectively if they said on due consideration "no" we cannot do this, particularly if it is accepted that they can do it if they turn the order they make into a mandatory order, as opposed to (what is frankly very much the same thing) a quashing and a remission for the relevant body to reconsider. Once you get to that stage it really is highly technical and, in our submission, the Administrative Court would be most unlikely to entertain that sort of technical argument that if they quash and remit they cannot impose a timetable, but if they make a mandatory order they can. If that really were right they would always then make a mandatory order.

THE CHAIRMAN: Why did Mr. Justice Collins not make a mandatory order in *MacKay*?

MISS CARSS-FRISK: That is, indeed, a good question.

THE CHAIRMAN: He thought that he would like to have had the power. Is it an area where there is a special procedure or something?

MISS CARSS-FRISK: I do not believe there is. I think what is true is that mandatory orders have traditionally not been asked for with any frequency and therefore not been frequently granted, certainly in my experience they have been the kind of remedy that has rather been on the shelf and most people tend to simply say "Can I have a quashing order and a remission?" or possibly a declaration.

One has to say about the *MacKay* case that, of course, the question of timetable really did come up – as one sees from the transcript – very much as an afterthought, right at the end of the case, and one has Mr. Justice Collins simply saying off the cuff "Well I do not think I can do that", but having heard no argument at all about it and certainly not, of course, as was pointed out earlier, no argument about the Human Rights Convention or indeed EC law if that were relevant. We really do submit that if the court were to hear full argument on a point of that kind in appropriate circumstances it would say that it is just a nonsense if we cannot do this. That is not to say that the court would do that in every case as a matter of course. There would always have to be good reason for doing it, but if push came to shove in our submission it would so decide. But happily you, of course, do not have to decide today whether that is right or not for the Admin. Court.

THE CHAIRMAN: In the Admin. Court I mentioned interlocutory applications, because we only see decisions that have been fully argued and then we see the decision we do not always see the order.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: I think you are saying it is no usual when the order is made that there is any time limit in it?

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: What happens, for example, when the Body being reviewed concedes and so there is only an order, there is no decision? Are there time limits sometimes put in those, or not?

MISS CARSS-FRISK: I do not believe so, but it is always difficult because one speaks of one's own experience, but based on that I do not believe so.

THE CHAIRMAN: You have a pretty wide experience of what goes on there.

MISS CARSS-FRISK: Yes, it so happens that seems to be what I have been doing quite a lot.

THE CHAIRMAN: Yes.

MISS CARSS-FRISK: I think that is unusual. It may happen, but I have to say I cannot think of a particular example off hand. (After a pause) Yes, I am actually reminded rightly by Mr. Kinnelly that of course Mr. Justice Collins in *MacKay* did not actually say "I would want to make the order but I do not think I can", so one should not perhaps draw too much from that. We know what he said.

So far as the cases that Ofcom referred to are concerned, *General Medical Council v Spackman* (tab 1), very briefly, that was a Judicial Review sometime ago. We say actually what Lord White said in that case is equally consistent with him having thought that the power was there to make some consequential direction but he did not think it was right to make it in

that case. That case, of course, had nothing to do with delay or time limits, or anything like that.

As far *West Glamorgan County Council v Rafferty* (tab 2) we would say it is clearly not any authority for the proposition that the Judicial Review court has no power to impose a time limit. That was, as I think Mr. Roth accepted, a rather specific case where the Judge had given a declaration as to how the Council should conduct itself, and we would say very much a case that turned on the particular circumstances there, where the Court of Appeal thought that the Judge had simply gone too far in interfering with the substance of what the Council could do by saying, in effect "You cannot seek possession of this piece of land until you have given reasonable accommodation to travellers". The Court of Appeal said that really that is going too far, it is interfering in substance – I am paraphrasing here, but that is the tenor of Lord Justice Ralph Gibson's Judgment. There was also the concern that one could not know that that was necessarily right, because there could be circumstances where it would be reasonable for the Council to seek possession even though it had not provided reasonable accommodation. So very much turning on those facts and very different from the power we are concerned with here, which is all about procedure and not about in any way interfering with the substance of what Ofcom might do.

The *MacKay* case was next, and I think I have probably said everything I would want to say about that. I suppose what we just ought to add to those submissions is that even if it were right, contrary to what I have just said, that the Judicial Review court did not have the power to impose a time limit when it quashes and remits, even if that were right, then that certainly does not suggest that the same applies to you under para.3(2) because it is important that you are very much a specialist tribunal and, of course, you deal with appeals on the merits, specifically under para.3(2) which is different, clearly, from the Judicial Review jurisdiction which, as we know, is more limited and which you have replicated in relation to those appeals to you that fall under para.3(a) but that is a different matter. I do not need to remind you of how specialist you are, but clearly not only do you deal with merits appeals but you also have various powers that the Admin. Court does not, in particular very wide case management powers under Rule 19; and so the whole framework within which you operate is different from the Admin court. So if there is a distinction – we suggest there is not, but if there is – then it is perfectly sensible for you to have greater powers than the Admin. Court does so far as time limits are concerned.

As I have said, if we look at para.3(a) of Schedule 8, that does refer to a different kind of appeal, one where judicial review grounds have to be shown, and that is the right approach, as the Tribunal has said. It was suggested earlier today that maybe, as I understood it, para.3(a)

is actually using plain English in a way that para.3(2) is not, and that actually maybe they really mean the same. We would urge a bit of caution on that because in our submission there may be – we accept there may be – a question mark as to the extent of your powers under 3(a), although again we would say they are equally broad on timetable, but we accept there may be an issue on that because it is a Judicial Review jurisdiction as it were, we would say that the words of para.3(2) that we are concerned with are particularly wide. So it is conceivable, although we do not argue for that, there would be a distinction. It would be a little odd, given that para.3(a) was introduced as we understand it by amendment in 2004, if the chance was not taken then also to amend para.3(2) if it really was intended that they should be entirely the same in this respect?

THE CHAIRMAN: Are you saying that under 3(2)(a) "remit the matter to the [OFT]" is wider than 3(b):

> "… remit the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal."

I can understand that (d) and (e) because they are not in 3 – I understand that point – but I think your submission might be that the new (b) is wider than the old (a)?

MISS CARSS-FRISK: Our submission is actually that whether we are under 3(a) or 3(2)(a) the power is the same and that in either case the Tribunal can impose a timetable where appropriate. That is so *a fortiori* – sorry to use the Latin – under 3(2) if one also looks at 3(2)(d) and (e), but leaving those to one side, no, we do say that the power exists under either 3(2)(a) or 3A(3)(b). My only concern is that if it were thought that really when you are in the realm of a Judicial Review type jurisdiction ----

THE CHAIRMAN: I understand the point.

MISS CARSS-FRISK: -- it is only if there is a difference then we say 3(2)(a) is possibly wider.

THE CHAIRMAN: Yes, but I was wondering why you were suggesting that it was not just a plain English alteration in 3A(3)(b):

> "where it quashes the whole or part of that decision, remit the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal."

and 3(2)(a) which is "remit the matter to the [OFT]" and it does not go on to say what you can do.

MISS CARSS-FRISK: We really say that it is surprising that the same wording just was not then introduced expressly into 3(2)(a) that is all. If something is introduced at that point and the intention is really that it all means the same, and it should be plain English then one might think ----

THE CHAIRMAN: So are you saying that there may be something in 3(2)(a) which is wider than is given in (3)(b)? I find that difficult because you say (3)(b) includes a power to impose timetable, therefore ----

MISS CARSS-FRISK: I am so sorry if we are going around in circles, but I do want to stress that we say that in either case there is the power to impose a timetable, but where our provision is particularly wider is really in 3(2)(d) and (e) ----

THE CHAIRMAN: Which is not in (3)(b) ----

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: -- because it is a judicial review point.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: I just wanted to make sure that was your submission.

MISS CARSS-FRISK: Absolutely, thank you. I shall try and go as quickly as I can. The planning cases, we do not really have an awful lot to say about those. The first point, again we would not accept that there is not a power there to impose a timetable if necessary. I know Ofcom say that has not happened over 30 years and, I have to say, we have not found anything to contradict them on their survey as to what has been done over 30 years, but there is no suggestion that that has been argued or that there is a decision which actually says in terms that in the planning context this cannot be done.

If one looks at *Kingswood DC v Secretary of State for the Environment* case that you have at tab.6, in our submission that does not take us any further because it just does not address that particular point. If there is any difference between the planning context and this – the context we are concerned with here – then of course one gets that from the fact that under s.289 of the relevant Act it is an appeal on a point of law or by way of case stated. So again you are there, of course, closer to the Judicial Review type jurisdiction than our jurisdiction which is a merits' appeal. I say that only as a fall back because, as I have said, in our submission if it were put to the test there would be a power to direct a timetable equally in the planning context.

I think the final jurisdiction, as it were, that Ofcom referred to by way of analogy was under s.195 of the Communications Act 2003, which you have at tab 44 of bundle 2. Again, without taking up too much time on that one, there you see under s.195(3) that the Tribunal is required to decide what, if any, is the appropriate action for the Regulator to take in relation to the subject matter of the appeal. Then under 195(4) the Tribunal is required to remit the matter to the decision-maker with such directions, if any, as it considers appropriate. So it is a very different creature, if you like, from the sort of appeal that we are concerned with in that on the one hand it is actually narrower than what you are concerned with under para. 3(2)

because the Tribunal has no option to either just quash or to take the final substantive decision itself. It actually has to remit under this power and in a sense the provision is also broader because it has to give directions when it remits if appropriate. So, as I said, it is a different kind of appeal function which may have to do with the very broad range of matters that can be appealed in this context and no doubt particularly complex without going into the details of that under the 2003 Act. But certainly the fact that you have there a requirement to give directions in effect in no way suggest that there is not a power to make directions for you under para.3(2). That simply does not follow, and we submit that is why s.195 does not help Ofcom.

So much for para.3(2) looked at without the assistance of EC law or the Convention. If I may I will now move on to what we say about how each of those assists us if we need them. We say that para.3(2) must be construed in a manner compatible with Community Law which requires that the Tribunal should have the power in question in order to ensure the effective implementation of its Decision and, more broadly, an effective competition regime. We have set out some probably very basic case law about this in our skeleton, and I am sure I will not need to take you to most of that – I will just mention it if I may. Of course, it is extremely well established that domestic law must be construed in a manner compatible with Community Law, the *Marleasing* principle and we have referred to the *Oceano Grupo Editorial* case that you have at tab 9, there is no need to go to it. Obviously to the extent that you are concerned with Community law it is clear that the *Marleasing* principle applies. But, as Ofcom indeed rightly accept, even in a case where you are not concerned directly with Community law because of s.60 of the Competition Act you have, insofar as possible, to apply the same principles as apply under Community law. That, of course, was recognised to apply also to procedural matters – in the *Pernod-Ricard* case which you have at tab.7. All of that is happily common ground.

Where does that leave us then in terms of what Community law requires? Clearly we would say, and I think this is accepted, there is an obligation for this Tribunal to ensure the effective protection of the relevant rights, and that is particularly important in relation to one of the fundamental rights under Community law such as competition. We have referred, as authority to that, to the *Eco Swiss* case at tab 11, and indeed the *Courage* case at tab 12 making the same point but again, that is not disputed as I understand it. So we know that we are within the realm of fundamental Community law.

The one case that I should perhaps refer you to is actually the *Factortame* case, because of the emphasis that that case places on the notion of an effective remedy because we say what you get crucially from Community law in this case, via s.60 if you like, is this notion

of effective remedy wherever possible. *Factortame* you have at bundle 1, tab 14. The reference there to the ECJ of course concerned the power of the national court to grant interim relief in relation to Community law rights and if you would go to para.21 of the Judgment that is really the key paragraph, and perhaps the Tribunal would be so kind as to read that paragraph.

THE CHAIRMAN: (Pause for reading) Does that mean if the Statute did not provide us with a right to do it, it would not be non-compatible?

MISS CARSS-FRISK: If it were a question of Community law, so that you were looking at Articles 81 and 82 say, then it would appear that you would actually have to ignore that positively. Here it may be slightly different because we are really concerned with the importation of Community Law through s.60 which, of course, says apply in effect Community law principles so far as possible. Happily, we do not actually need to go that far at all because in our submission there is no question of having to ignore or read out anything in para.3(2). At most if you have to tinker with it at all, you have to read it, as we would say, giving the words their ordinary meaning, but at most what EC law would do is to give you that extra push over the edge, if you need it, to say really to ensure an effective remedy we have to accept that 3(2)(d) and (e) mean that we can impose a timetable or 3(2)(a) means that.

We have also referred for good measure to the principle that Community law rights – exercise thereof – should not be rendered excessively difficult, and we have referred to some cases in that in our skeleton. I do not think I should take up time on that, it is just an additional way in which we put this argument about effectiveness. We also said in our skeleton that of course Community law recognises that firmness requires determination within a reasonable time, and that is entirely common ground and, in fact, my learned friend took you to the *Baustahlgewebe* case, which we have cited, and you have it at tab 16 – there is no need at all to go back to that. The only thing I would just ask you to note about that case, which is quite helpful – para.29 of the judgment, just for your note – is that when it talks about what is a reasonable time there, and it applies in effect the Human Rights Convention test, you look at all the circumstances and so forth, it places particular emphasis on the impact on the individual whose rights are at stake, and it refers to us an important factor whether the appellant's economic survival is at stake and here, of course, as I know you are very aware, my client's position really is that its economic survival is at stake, and as I know was put to you at previous hearings for my client, it really does require a speedy resolution of this dispute, so that if it is successful it can then apply for damages under s.47(a) of the Act if there has been an infringement, and that is absolutely crucial for my client, that that should happen very

quickly. So all we say is in this case, *Baustahlgewebe*, you have very clear recognition of the importance of that factor when you look at time limits.

At this point we would as rhetorically "Can there be any doubt, if you look at all of this, that the Tribunal has the power to direct a time limit where appropriate? Can there be any doubt, particularly in the light of Community law? Ofcom's only answer to that point, as we understand it, is well, under Community law the courts have no power to remit to the Commission and so they have no power to direct a timetable, and therefore I suppose they say that Community law does not require that. We say that is simply not an appropriate comparison because it is a fact, for whatever reason, that under the Community framework, the Treaty, and indeed the ECJ Rules, there is no power to remit under Article 2(30) – actions for annulment – or Article 2(3)(2) – declaration of failure to act. So if there is no power to remit it is hardly surprising that there is no ancillary power to give a direction as to the time limit within which the Commission must do whatever it is. It is, as it were, an entirely different framework in that sense, and that does not in any way suggest that in our framework here Community law does not require a power to direct a timetable, because the over arching principle we would suggest is the principle of effectiveness of rights, effectiveness of competition or rights, effectiveness of remedy which, as we have seen from *Factortame* is very clearly recognised in Community law. That means that once you have the power to remit – as you clearly do in this case under 3(2) – there has to be also the ancillary power to direct a timetable if that is what is required for it to be effective. So that is in truth what the so-called "consistency principle" and indeed s.60 of the Act require.

At that point, subject to any possible questions from you, I would then finally move on to the Human Rights Convention. As you know, we say to the extent that we need it, we rely on s.3 of the Human Rights Act, to say you must construe para.3(2) compatibly with the Human Rights Convention, and that means that you must construe it that it gives you the power to ensure compliance with Article 6 by directing a timetable where that is appropriate.

There is a sort of issue as to whether we are within the realm of Article 6 at all - is this about a dispute as to civil rights or obligations? I know Ofcom have said they do not take the point today but they reserve it. I do not know if the Tribunal would like any assistance on that point – we have put it in a footnote in our skeleton. Briefly, what we would say is that it is really very clear that Article 6(1) applies, because where Strasbourg has arrived at is that if the subject matter of a dispute is of a pecuniary nature then one is concerned with civil rights and obligations. So you have the two cases we mention in a footnote – there is the *Tre Traktorer Aktiebolag v Sweden* case (tab 27) about the revocation of a licence to serve alcohol in a restaurant, and Article 6 was held to apply because in effect this concerned the commercial

interests of the company in that case. Their business was very badly affected by the removal of the licence. Then the *Editions Periscope v France* case, which was really about a failure by the French authorities to grant a certain beneficial tax status to the applicant. The applicant complained about that and said really it was entitled to damages because of what the French authorities had done – or failed to do. That was sufficient to put it all within the realm of pecuniary subject matter, and so Article 6(1) applied. Just looking to the future, as it were, what we would submit if we really had to is that clearly here, where Floe are looking to a possible claim for damages under s.47(a) of the Act, there is no doubt that we are concerned with a pecuniary subject matter, and there civil rights and obligations are engaged.

Moving on from there, of course one needs then to look at the crucial question of how Article 6(1) operates in the circumstances of this case. We know that although the Article on its face refers to having a hearing within a reasonable time, it is absolutely clear that that is taken to include enforcement of any judgment or final decision after a hearing. No dispute about that at all – we get that very clearly from *Hornsby v Greece* and other cases, and that is common ground. I would not ask you to look at *Hornsby* again, the only little thing I would add about that is for your note, if you look at paras. 40 and 41 of that Judgment, you will see a particular reference to the importance of administrative bodies being, as it were, part of the State, complying with the need for expedition, and not to be engaged in undue delay. The Strasbourg Court is really saying, as I understand it, if you are a public authority there is a particular obligation on you to act expeditiously in implementing any Judgment given against you, and that is of some assistance in this case we would say.

Really, it is common ground therefore that a Judgment or Decision by a Tribunal such as yourselves has to be implemented expeditiously, reasonably, without undue delay. It is important that although in some cases it may be right to look at the whole period that has been taken from the start of the relevant legal proceedings to the end when the Judgment is executed, because it could be argued that overall there has been undue delay. That is certainly not the only approach and, as you see from *Hornsby* itself, and indeed from the *Burdov v Russia* case that you looked at earlier (tab.21) the Strasbourg Court has certainly been content to look specifically at whether the Judgment or Decision has been implemented within a reasonable time. Of course, the reason I say that is that when you have Mr. Roth putting before you this schedule showing how long the proceedings have taken so far, I think he would say to you "Look at all that – overall it is not so bad". One point we make in relation to that is actually that is not so relevant because we are really focusing on what is a reasonable time for Ofcom to reconsider and reach, as per your order, a non-infringement Decision, or provide a Statement of Objections. That is really the key question against the background that

you have had one investigation and one Decision that you have found to be wanting and it is then for Ofcom to reconsider.

I should say we would not go so far as to say that the mere fact that you have said that Ofcom got it wrong in their initial Decision means that we are immediately moving into the territory of unreasonable time or undue delay simply because the matter has to be remitted. In our submission that probably would be going a bit too far on the Strasbourg cases given that they do indeed emphasise that one looks at all the circumstances of each case and so forth. But clearly, having said that, it is a very relevant factor that, as I said, we are at a stage where one decision was taken. You said that was wrong, it has been remitted and there is that extra delay inevitably because of the remission. Obviously there is also the point that I know you made when you imposed the timetable which is that surely it has to be possible for Ofcom to act rather more quickly when they are retaking a Decision, so it is a relevant factor in that way.

As I understood Ofcom's submissions they actually accepted that if it had been clear that an unreasonable period of time had already gone by when you looked at it, say, in December last year, then at that stage you could have intervened, but because that was not clear and the unreasonableness, as it were, was to come in the future if Ofcom did not get their skates on, then you could not intervene, and if that is right then in our submission shows the absurdity of the idea that you could not intervene if you think that there is going to be an unreasonable delay.

What, of course, is fundamental under the Human Rights Convention is that the State and its public authorities must act in a way that safeguards the rights. The authorities must ensure that those rights are not breached and, in fact, as it was put in a case called *Sporrong and Lonnroth v Sweden* which is more about property rights perhaps, but as it was put there the Convention is about securing rights which are practical and effective. You have that case in our supplementary bundle, tab 4, para.63. I am sure there is no dispute about that proposition. So rights must be safeguarded. They must be practical and effective. That plainly, we would say, means that you do not just wait to see whether a right has actually been breached and then say "Ah well, now the courts of the State have to provide some *ex post facto* remedy". It is not sufficient under the convention to breach rights, as it were, at its heart's content. I am not suggesting it was, but the idea that it can just do that then "Oh well, if the court can grant the remedy that is sufficient." It is for the State to make sure the breaches do not occur. That, we would have thought, is fairly straightforward. So in our submission in a case like that must mean that if you think in order for your remedy to be effective, and to be implemented within a reasonable time there has to be a timetable, then Article 6 requires that you direct that timetable, and s.3 of the Human Rights Act requires that you interpret your

powers under para.3.2 in a way that enables you to do that. Otherwise, you are indeed left with anyone such as my client who might then say that their rights have been breached. They are left with only the opportunity to apply for Judicial Review for which it would have to raise obviously more money to start a different legal proceeding, to say after the event well now our Article 6 rights have been breached, this has taken too long, but at that stage (certainly in this case) it is likely to be too late, frankly, this comes back to the point about the real need for expedition for a client such as mine. What can the applicant get at that stage? Well maybe a declaration that rights have been breached, it has taken too long – possibly, although that is by no means certain; some damages, but of course that is all discretionary under the Human Rights Act. Possibly, as per Ofcom's earlier concession today, at that stage some mandatory order with a timetable from the Administrative Court, but one does ask "What good is that really going to be at that stage, and does it make any conceivable sense in terms of time, resources, effectiveness to say someone like Floe would have to go off to the Administrative Court and ask for a timetable at that stage when they have already suffered an undue delay because you do not have the power to prevent a breach occurring. That simply does not make any sense under the Scheme of the Convention or otherwise, and we do suggest that is not the law either.

That is not to say, of course, that Article 66 requires a timetable in every case – plainly not. There has to be material on which the court, or you as the Tribunal can form the view that this is required to safeguard someone's Article 6 rights, but in this case you had that material because you investigated with Ofcom what their position was, they made submissions about that. They indicated that they required a longer timescale, so they made it very clear that that is how things were likely to go if they were as it were left to their own devices. You then took the view that that was not good enough. Whether or not you expressly referred to Article 6 does not matter, what you had in effect is you are saying Ofcom is proposing to act in a timescale that we do not think is reasonable, we do not think is effective, therefore not compliant with Article 6. How do you prevent a breach of Article 6? Well by imposing a timetable. We would suggest that actually it is really as simple as that, and solves all the problems of Ofcom's idea that you just have to leave it to the victim, as it were, to go off to the Admin. Court later and seek a remedy at that stage.

I may not even need to say this, but the Convention itself recognises that you can be a victim of a breach of the Convention at a stage when there has not actually yet been a violation, but where there is a risk that some measure will be implemented in relation to you so that you suffer thereby. We have an extract from the **Lester & Pannick** book, which Ofcom have also referred to. Our extract is in the supplementary bundle, tab.2. It is a very

short paragraph, p.50, para.2.7.2(c), where at (c), talking about who is a 'victim' under s.7 of the Human Rights Act, which of course reflects the Strasbourg cases:

> "(c) To establish that they are 'victims', individual complainants do not need to show that their rights have been violated by 'an individual measure of implementation'. It suffices that they 'run the risk of being directly affected by' the measure of which complaint is made."

So simply to make it clear that the idea that action may be required or appropriate to protect rights even before something has happened is by no means unfamiliar for the Strasbourg case law. Of course, as you know, under s.7 and s.8 of the Human Rights Act it is actually possible for the court to intervene to restrain a possible breach of Human Rights. I am not saying that we are within the realm of that in this case because here we are really concerned with the Tribunal itself acting Human Rights compliantly by ensuring that its own decision is implemented efficiently within a reasonable time. So it is not really a question of you restraining Ofcom from breaching Human Rights so much as you yourselves acting compatibly with Human Rights in relation to your own judgment. So we do not even need to go in that sense to s.7 and s.8 of the Human Rights Act. As I have said it really is actually quite straightforward as to what is needed to make sure rights are not breached.

Ofcom then say "Ah well, you cannot say that there would be a breach here", and they refer to various EC law cases where it seems quite long periods of time were found there to be acceptable. But in relation to that our answer is that everyone agrees – and it has been said many times – that you have to look at the facts of each case, the individual circumstances. Here what is very relevant is that Ofcom itself has set guidelines for when it should investigate or should be able to complete investigations – six months for an initial 'no infringement' Decision and then 12 months. So that is the context in which reasonableness has to be judged. Of course, we also have this Tribunal having said, I think in the *Freeserve* case that really three months would be the normal expectation on a reconsideration upon remission. So that is the kind of context we are operating within, and in that context you reached the decision you did about what was required which, in our submission, was an unassailable conclusion as to what was required for an effective remedy and to protect Article 6 rights. It does not really help Ofcom to say in other contexts, other decisions rather longer time limits have been acceptable. That may be, but you reached a view within this context which we would suggest was a perfectly reasonable and sensible one.

If one looks at the *Dyer v Watson* case (tab 32) you will remember Lord Bingham saying that the threshold of proving a breach of the reasonable time requirement is a high one and no surprisingly Ofcom has fastened on that. But again, one has to see that observation

very much in the context in which it was made. You remember I asked Mr. Roth to look atone paragraph, I think I was para.51 in that Judgment, which showed the context of concern that it would not be possible to bring alleged criminals to justice if it was said that a time had elapsed that would make it unreasonable then to prosecute them at that stage. Clearly there there was a very strong particular countervailing public interest and one can readily see how, in that situation, Lord Bingham was prompted to say that it is a high threshold. That is a very different situation from the one we have here.

I do not think at this stage I need to look at any of the other cases that Ofcom have referred to – I am looking at *St. Brice* and the *Bennett* case – they are not really, with respect, on point. They are in a different context again.

So far as the operation of s.3 is concerned, again I probably do not need to say much because I do not think it is disputed that if we are within s.3 of the Human Rights Act, if what we have said so far is right, then the strong interpretative obligation in that section does provide the basis for you to find the requisite power in para.3(2) if you could not otherwise find it. We have given the reference to the *Ghaidan v Godin-Mendoza* case in a footnote, and that case does indeed make it clear just how strong that interpretative obligation is, so that you can read out words, and read in words, and do all sorts of things – even of course where there is no ambiguity at all in the Statutory provision. Here, we are not talking reading in or reading out, or fiddling with the Statutory language, we would say we are actually talking about really a very straight forward reading of para.3(2) which, of course, is where we started off with my saying that actually you do not even need EC law or the Human Rights Act.

So for all those reasons we would invite you to reject the application and hold that you have what we would say is a fairly modest power to indicate or direct a timetable where required.

THE CHAIRMAN: Can I just ask you, in the question of our powers to direct a timetable and when we should do that, I want in a way to take it out of the context of this case, because I think the application is a general application, but this case illustrates there is a perception from the complainant, and there is a perception from Ofcom because looking at this case at the complainant there are reasons why there should be speed, particular reasons.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: Looking at Ofcom, for example, in submissions made to us they were saying they were not going to prioritise this – just assume that was the submission.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: Now, in what circumstances do you say that we should use our discretion generally to make that order?

MISS CARSS-FRISK: In circumstances where on the information before you it appears that unless you say "This has to be done within X time", Ofcom is likely to take a period of time that would not in your view be reasonable and would therefore involve undue delay and unreasonableness for the purposes of Article 6. So if you take the view that a particular complainant really needs consistently with its Article 6 rights to have the matter determined, say, within three months, and Ofcom say to you "we are not going to prioritise it because we take a different view as to priorities" then really if you take the view that that sort of period of time is simply not consistent, i.e. anything beyond three months is not consistent with the complainant's Article 6 rights, then in our submission you have to say to Ofcom, "Sorry, we have to safeguard the complainant's Article 6 rights, and regardless of your wish to prioritise differently we have to give effect to those rights."

Of course, another point that should be made here is that, as you know from the *Burdov* case, it is never a defence in these cases for the public authority or the State to say "We have not got the resources". To that extent the rights are inflexible. Again, having said that, I should just perhaps add this, that of course, we would not suggest that Ofcom could not come back to the Tribunal if circumstances had changed, to say for the following reasons we really cannot do better than this. No doubt there could be arguments that would quite properly be taken into account by you in relation to the Article 6 question. What I was suggesting was that an argument simply "We think that we would like to prioritise differently" would not be good enough if you had formed the view that really someone's rights had to be determined within a shorter time. No doubt one cannot draw up, as it were, a finite list of what might be relevant considerations. So, as I say we would not suggest that it would be impossible for Ofcom to come back to try to argue that actually the time table should be extended.

THE CHAIRMAN: Well there is always the permission to apply provision?

MISS CARSS-FRISK: Yes, precisely, that is what I had in mind really.

THE CHAIRMAN: So if it turns out that that was not a reasonable period, they cannot do it within that period, that is a matter for the Tribunal?

MISS CARSS-FRISK: Absolutely, and that we would suggest also deals with the concern put forward by Ofcom that really the Tribunal cannot know in advance how it is all going to pan out. Answer one is that you do have a good deal of information if you investigate the permission as you did in this case, but answer two: if things do not change then it is possible for Ofcom to come back under the liberty to apply and say "The following has now occurred, and that should be taken into account."

THE CHAIRMAN: What you would say is that we look at the circumstances of the complainant and the submissions of Ofcom as to what a reasonable time is having regard to those circumstances and impose it in that way?

MISS CARSS-FRISK: Absolutely, indeed. All the circumstances as set out in the various cases, but as I said obviously one key factor is the economic survival of the applicant if that is relevant, as it happens to be in this case.

THE CHAIRMAN: You would say that because we have to comply with Article 6 and ensure that it is done as expeditiously as possible, or is done in a reasonable time ----

MISS CARSS-FRISK: Yes, in a reasonable time.

THE CHAIRMAN: Reasonable time, yes, not expeditiously, in a reasonable time ----

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: -- at the end of any hearing of this sort coming to our Decision we have to consider that, and therefore we have to hear when we remit from Ofcom as to what time period they indicate they can do it within.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: The complainant can make submissions.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: And then we can consider that and decide whether what Ofcom is saying does comply with our own duty, or whether we have to impose a time limit?

MISS CARSS-FRISK: Yes, absolutely. Plainly, if you do not enter into that exercise at all then there is at least a risk then that you have not safeguarded Article 6 rights in the way that, as a Tribunal, you should, so certainly it makes sense for that to be done in every case.

THE CHAIRMAN: So following that, as you have seen in a number of the cases there have been undertakings by the Regulator.

MISS CARSS-FRISK: Yes.

THE CHAIRMAN: It is on those undertakings that this Tribunal can comply with its duty and, if the undertaking is not given, even though it is being said we will do it in six months, or eight months, you would say that we have to put it in the order?

MISS CARSS-FRISK: Yes, if the undertaking is not given then one would say that there is material for you to consider, that it really is required to impose a timetable in order to safeguard the rights, because there must then be at least a very real risk that those rights will not be safeguarded obviously if an undertaking is given then that is a different matter.

THE CHAIRMAN: Yes.

(The Tribunal confer)

THE CHAIRMAN: Thank you very much. I think you have done that in exceptional time, and very thoroughly done.

MISS CARSS-FRISK: Thank you.

MR. ROTH: I will also be, of course, fairly brief, but I wonder if you could very kindly give me just three minutes – if I could withdraw for a few minutes?

THE CHAIRMAN: Shall we go out?

MR. ROTH: That would be helpful, yes.

(The hearing adjourned at 4.20 p.m. and resumed at 4.30 p.m.)

MR. ROTH: Thank you very much. Miss Carss-Frisk started by basing reliance for the main point of her case on paras.3(2)(d) and (e) in Schedule 8, and on the natural objective meaning of those words. But the natural and objective meaning of words, as Lord Hoffmann has said several times now, can only be assessed in the context in which they are used. Here they are used under the powers of this Tribunal for the final disposal of an appeal and that is why in that context their meaning is that the Tribunal can use those powers in the final disposal of the case in the same way that the OFT could use powers in the final disposal of the case.

Miss Carss-Frisk focused on the word "direction" – first on the way of decision, I think. The whole provision of Part 1 of Schedule 8 regarding appeals in fact comes under s.46 – it is s.46(5) – which is the section that sets out the various meanings of what a decision is; they are related provisions. She made a particular point of the wording "… take such other steps as the OFT itself could have taken…" and she said we have not managed to link this phrase to any powers of Ofcom under the Competition Act. With respect, that is not right. We have linked it, and I did spend a little time I thought taking you to the powers of the Regulator as regards the parallel exemption in s.10(5) and I gave the example of the Regulator that takes a Decision cancelling an exemption, a Decision which is then appealed to the Tribunal. The Tribunal sets aside the Decision and says "We set aside that Decision", we are going to impose a condition on the parallel exemption. In other words, we are going to take a step that the OFT could have taken under s.10(5)(a) or (c), and that is exactly how "take other steps" links to one of the manifold powers that the OFT have under the provisions of the Statute – all powers that are dealing with third parties and not internal management powers of OFT or the Regulator. Miss Carss-Frisk accepted that the logic of her argument was that this Tribunal has power to decide the size of the case team that should investigate, or the qualifications of the case team, because those are all internal matters that the OFT, Ofcom, or the Regulator decides; or indeed the budgetary allocation to be given to a case. But she says that of course they have to be exercised rationally and if the Tribunal acted irrationally then presumably the Court of Appeal would intervene. But, with respect, there would be nothing

irrational in the Tribunal saying "We think this case leads a large budget of X", or "We think this case needs a well qualified economist" that is not an irrational view, but you do not have power, we say, to direct how resources, budget and manpower of Ofcom are used, although on Floe's argument that is indeed precisely what you do because those are all steps that the Regulator can take. We say that is clearly wrong and that is not how Parliament has sought to delineate the powers of an appellate tribunal.

The next argument was that incidental to the powers comes the power to remit under 3(a) of Schedule 8. Reference was made to the *Great Eastern Rly* case, the case of the statutory powers of a company and whether a company is acting *ultra vires* by entering a lease in that case. I think it is common ground that what is incidental has to be assessed, having regard to the purpose of the express power that is set out. But we say that in asking what is the purpose of the express power you have to look at that specific statutory power. You do not just say that the purpose of the Statute is to regulate competition so anything that is incidental to a competition regime can be implied. It is incidental, is it is said, to subparagraph (a), the express power to remit a case to the Regulator, so one asks the question "what is the purpose of the power to remit?" The answer is that the Tribunal has decided that the new Decision should be taken by the Regulator rather than by this Tribunal itself, which would have the power, of course, to take a substitute decision. That is the purpose of the power to remit. It is not to deal with delay or inactivity, and therefore it is not incidental to start imposing a specific timetable.

Reference was made to the *Freeserve* case and in particular to para.11. At this stage of the afternoon I do not ask you to turn it up. Paragraph 11, which I am sure, madam, that you and your colleagues will re-read, shows why the Tribunal considers it important that when a case is remitted it is dealt with as a matter of priority, as I hope I have made clear. I make no objection, and do not seek to challenge the Tribunal stating in its Judgment an expectation that a case will be dealt with by the Regulator as a matter of priority or with expedition. As you heard, in answer to one your questions, you having said that it is indeed being dealt with as a matter of priority. But that is a very different thing, with respect, from saying that it is necessary to direct a timetable of X months for a non-infringement Decision, or Y months for a Statement of Objections. A timetable then so specific that the Regulator as the case proceeds may have to keep coming back with reasoned applications supported by evidence to this Tribunal to get the timetable adjusted to Y plus Z months.

THE CHAIRMAN: If we make a recommendation that it should be dealt with with priority – that is as high as you put it, I suppose, a recommendation – and you accept that, we do not know that

you have accepted it because you do not actually come back, is there any way of that recommendation being enforced? That is the difficulty is it not? We can make a recommendation but in order for the complainant to get the benefit of that (a) they need to know it, and there is no transparency that you have accepted it; and (b) they have to have a means of saying you are not enforcing it.

MR. ROTH: Well transparency, they can write and ask us and we will reply and tell them, just as when you ask me I told you, so there is no secrecy about the way Ofcom will conduct itself. The point being made is that unless you really take the view that there is bad faith by the Regulator and we have reached a situation that there is such lack of trust between the Tribunal and the Bodies that regularly appear before you – and I think you can go beyond a recommendation, "we expect that it will be dealt with as a matter of priority" – the Regulator will do so. They are not in the business of flouting the Tribunal ----

THE CHAIRMAN: I am not in the realms of bad faith, we are not talking about bad faith, what we are talking about ----

MR. ROTH: Well it follows.

THE CHAIRMAN: Yes, but you have to look at it from the point of view of the complainant. We are only here as between the complainant and the Regulator effectively. One has to look at it from the point of view of the complainant. The complainant, it may not be bad faith, it may be for all other reasons that something happens and it is not done quite in the way that you intend it to be done. Alternatively, the complainant wants to challenge it.

MR. ROTH: The form of challenge that brings the matter before you, and Miss Carss-Frisk waxed eloquent about the economic difficulties of her client, is by seeking interim measures, because there is now a fresh investigation and therefore there is the opportunity of seeking interim measures and appealing a refusal to give them and the matter comes straight back before you. One of the first questions you would ask is "What is happening to the Decision on the remission?" That is all there in the Statute. The point being made to me is that there is regular contact between Ofcom and the complainant; they do know there are information requests, answers to those requests that are going, so they know when they are supplying information. It is not as though they are operating completely unknown in their activities to the complainant. But there is the remedy of coming back – if the case is one of economic plight as described – and seeking interim measures, as there was originally in the first place, and since 1st May of appealing any refusal. So there is that judicial control in this Tribunal. I do stress that when you say that you expect that the matter will be dealt with as a matter of priority Ofcom may not like it but they will adhere to that indication – as, I would hope, would the Secretary of State in a case concerning the Government.

Indeed that links with almost the next point, which is the mandatory order. Miss Carss-Frisk said very frankly we do not hear a lot about mandatory orders. They have been – I think her phrase was – "very much on the shelf", and I respectfully agree. But they have not been on the shelf because those who practise before the Administrative Courts are unaware of them. They are on the shelf, seldom used, because they are not justified and one cannot obtain a mandatory order simply because the court thinks that a case should be dealt with quickly. They will only be justified, and will only be granted if there are grounds for finding that there has been or is imminent and serious inactivity or delay. Otherwise, it is expected that the public bodies subject to the Judicial Review jurisdiction are well respected and will act responsibly.

THE CHAIRMAN: Yes, and it is quite usual in the Administrative Court to make an expectation or recommendation statement.

MR. ROTH: Absolutely.

THE CHAIRMAN: And the Secretary of State, or whoever it is, normally abides by it.

MR. ROTH: Absolutely, and they take advice and that is why often indeed all you have is a declaration without any binding direction of any sort, because it is known that public authorities will respond and that is, if one may say so slightly pompously, one of the benefits of being in this country.

It was said that the contrast between the Rule 19 case management powers in the Tribunal Rules, and the powers of para.3 Schedule 8 that we explained and set before the Tribunal, was said Miss Carss-Frisk, a very strange distinction. We say, with respect, there is nothing strange about it whatsoever. Case management is about the course of proceedings before this Tribunal while the proceedings are current, and how you control them. Schedule 8, para.3 when there is remission is about a fresh investigation, a new investigation, *de novo* (particularly *de novo* in this case in view of the criticisms that you made in your Judgment) by the Regulator. So it is a very different situation.

Miss Carss-Frisk drew a distinction with a Judicial Review jurisdiction and I think you asked her some questions about para.3(a), 3(b) and 3(2)(a), and the different wording. I do reiterate what I said earlier; we think it is a plain language ----

THE CHAIRMAN: Plain English.

MR. ROTH: It was done by statutory instrument which added bits, it did not start re-writing parts, so it is not surprising they did not revise the language.

THE CHAIRMAN: I am not sure that in the end she did not rather agree that there was no difference between those two; she relies on (d) and (e).

MR. ROTH: On (d) and (e), well I have addressed you on (d) and (e). Just on the judicial review point, it is important because if there is no real distinction and s.120 is the sole language, as I showed to you – s.120(5) as para.3(a) and 3(b) – is it surprising that you could not have a timetable direction when it is a judicial review provision. In fact, if there is concern about the need for a quick decision, in the field of competition law that applies all the more than a major situation than in any other field of competition law. Those are the cases where this Tribunal has, if I may put it this way, bent over backwards to have an extremely quick hearing because of the great urgency. If you cannot impose a timetable in a judicial review case when there is a particular need for urgency – in a merger position – it would be very odd if, by distinction, you can do so when it is a Chapter I or Chapter II investigation.

THE CHAIRMAN: But probably you can impose a timetable if the circumstances are appropriate – if it purely just says "judicial review" – because the Administrative Court does do that on a mandatory order, it is a question of degree.

MR. ROTH: But they do not do it on a remission.

THE CHAIRMAN: No.

MR. ROTH: So that is why I say it would not have the power, the Administrative Court does not do it just when it ----

THE CHAIRMAN: Why can you not make an application which is remit and make a mandatory order?

MR. ROTH: The Administrative Court would not make a mandatory order in those circumstances unless there is some compelling reason to expect imminent delay.

THE CHAIRMAN: Yes, but there could be. I was in a case once where this happened, where - it was not the Secretary of State but just assume it was the Secretary of State – the Secretary of State had been extremely dilatory, had gone uphill and down dale making various decisions in a very dilatory manner, and finally after a number of years it comes before the courts and there would be no reason in such a case for the court to say (a) the Decision must be remitted and they must make a proper Decision; and (b) they must do it within a proper time, i.e. I am going to make in that case a mandatory order.

MR. ROTH: I can see that on the facts as you set them out, madam, because there are grounds to say there has been extraordinary delay in this case.

THE CHAIRMAN: You could have both.

MR. ROTH: You could have both.

THE CHAIRMAN: It is not just that you cannot do it because it is a remission and not a ----

MR. ROTH: I do see that, but the point I am making is that in the case before the Tribunal where clearly there is a need for urgency the Tribunal has recognised it, the Regulators have

recognised it, because the Tribunal therefore expects things must be done quickly, it does not therefore direct ----

THE CHAIRMAN: It does not need to do it.

MR. ROTH: -- a timetable. We come then to Community law. There is no dispute at all, I think, between the two sides on the principles, that s.60 of the Competition Act applies. It is accepted by Floe's counsel (as indeed it would have to be) that the European Courts cannot impose a timetable for a new investigation by the Commission when a Decision of the Commission is quashed. What s.60 provides is that there should be no inconsistency between the principles applied by the Community Courts in resolving corresponding questions under EC law, and by the UK Courts and this Tribunal. So the issue is really very simple: how is this question decided under EC law? The *Factortame* case, which concerned the right of the English Courts to suspend a statute that interfered with the right of free movement, the freedom of establishment of the fishermen, that is neither here nor there. We know how the Community Courts deal with this question. Of course, the Community Courts operate under their statutory framework derived from the Treaty. But even where the Community Courts have a power which perhaps this Tribunal does not have, a power of holding there has been a failure to act, even then they cannot direct a timetable, and that is why we say far from producing consistency what it produces is inconsistency and that is now what s.60 directs the Tribunal to achieve.

It was said that if there is no power to direct a timetable then there would be no effective remedy, and the principle of effectiveness under Community law applies. We submit it cannot be said that in the *IBA* case before this Tribunal the remedy was not effective where there was a remission without a timetable. It cannot be said that in the *UniChem* case where there has been a remission without a timetable the remedy is not going to be effective, or in the *Bettercare* case – one of the cases that both sides have referred to – there was not an effective remedy. There is a great difference, and it is a fundamental point addressing the whole of Floe's submissions, between what the Tribunal may think is desirable and what is necessary in the sense that in its absence the remedy will not be effective. There is no basis for saying "If you do not direct a timetable in the present case the remedy will not be effective", particularly in the light of the undertaking that was offered to you at the hearing on 1st December, although it was a best endeavours undertaking.

It was said that it would be absurd if you could not intervene if you think there is going to be unreasonable delay, and this is under the ECHR. That, I think, was the high point of Floe's submission on the ECHR. But even on that you need to find that there is going to

be "unreasonable delay" – the phrase that was used so much – unreasonable delay in the sense of a violation of the fundamental right under Article 6. As Lord Bingham said in *Dyer v Watson* – I do not ask you to look it up again now, but I know that you will look at it – in a paragraph that is clearly speaking generally about how reasonable time in Article 6 works, not just in a criminal case, it is a very high threshold. Thinking that it would be appropriate or desirable for a Regulator to produce a Decision, or a Statement of Objections, or send out information requests, within a particular time is a very different thing from the Tribunal saying "If this is not done within five months, if we do not get a Statement of Objection within five months, that will be a violation of Article 6". Miss Carss-Frisk I think said that in effect that is what you were saying, although you did not use the language of Article 6, but I am not sure, I only read the transcript of the Decision, that anyone's mind was particularly addressed, if I may say so, to Article 6 at the time, and I do not think you were addressing Article 6. It would have to be on the basis that they actually concluded that under the Article 6 threshold, which one sees applied in the different cases, of course, depending as we all recognise, very much on the facts of each case, that there was a violation of Article 6 – or that there was going to be a violation of Article 6 – and we certainly do not accept that that is, in effect, what you were saying. Or, that if Ofcom acted in accordance with the undertaking offered to you and you had not imposed the timetable, well that would be a breach of Article 6 – clearly not.

Reference was made to **Lester & Pannick**, and it is the only matter I would ask you to just look at – it is not something I have referred to, which is in the small supplementary bundle at tab 2, para.2.7.2, dealing with who is a victim for the purposes of the Human Rights violation. You see on the bottom left of the first page it says:

> "[2.7.2] Under Convention jurisprudence, the following principles have been established:
>
> (a) The court must 'confine itself, as far as possible, to an examination of the concrete case before it. It is accordingly not called upon to review the system of the [domestic law] *in abstracto*, but to determine whether the manner in which this system was applied to or affected the applicants gave rise to any violations of the Convention'. So individuals may not 'complain against a law *in abstracto* simply because they feel that it contravenes the Convention'.

Then there is (c) which was read to you by Miss Carss-Frisk:

> (c) To establish they are 'victims', individual complainants do not need to show that their rights have been violated by 'an individual measure of

> implementation'. It suffices that they 'run the risk of being directly affected by' the measure of which complaint is made."

But one sees from footnote 7 what is the basis of that statement, the *Marck v Belgium* case, and then *Norris v Ireland* which is there explained:

> "… a man complaining about the Irish criminal law prohibiting homosexual relations between consenting male adults was held to be a 'victim' even though he had not been prosecuted and even though (as the ECt HR accepted at 196 para.33) 'the risk of prosecution in the applicant's case was minimal' because the policy was, and had been for some time, not to enforce the prohibition. The applicant, as an active homosexual, was held to 'run the risk of being directly affected by the legislation in question' because a change in policy was possible at any time, and the existence of the legal prohibition reinforced popular prejudice and increased the anxiety of homosexuals."

One can fully see that. That is a very, very different situation from the present case. *Marck*, which relied on the statement, was a case of an unmarried mother and her child who were the two applicants who complained that under the provisions of the Belgian Civil Code the child was not the automatic heir to her estate, whereas if it was a legitimate child she would have been, and the money would go to the relatives of the mother and not to her natural child, unless and until she took various steps in fact to go through a formal adoption process for her own child. The Belgians say that this is all hypothetical because she has now gone through the adoption process so it is all right. But she was directly affected because she and her child, the two of them, were clearly disadvantaged directly by that legal provision and had to incur the expense of going through the adoption process. That is the sense in which the observation in para.(c) is based. It is a very, very different thing from saying from saying that here there is nothing in the paragraph of Schedule 8 that in itself disadvantages Floe Telecom., but there is the theoretical possibility that it could all take so long that there could then be violation of Article 6, although nothing that has been said in any way establishes either that there has been an Article 6 violation. That is not, as I understand, in the submissions we have heard even alleged at the moment; or that there is about to be one, or likely to be one if the matter proceeds as Ofcom has told you it is proceeding.

If Floe's submissions were correct, indeed a timetable, not only could be but should be – would have to be – directed in a very large number of cases not just by this Tribunal but in the Administrative Court, where Decisions are quashed and new Decisions have to be taken by the Decision-maker in a case where either European, Community Rights are engaged, or Human Rights are engaged.

We say in conclusion, picking up the question that you addressed to my learned friend after the end of her submission, Ofcom will respect the statement of the Tribunal that they should prioritise this case. It is not alleged we have not done so. There is the remedy of interim measures if necessary, and the challenge that is being brought by this application is to the subjection of the Regulator to the straightjacket of an *ex ante* timetable. Ofcom, in its investigation, has to have regard, of course, to the rights of Floe as complainant, but also to the rights of Vodafone as the company liable to be found to have infringed the Chapter II prohibition and subject, we heard, to the decision of the damages' claim, because we heard that is what is in line, not to mention the possible financial penalty; and because of the wide implications of this case for the other mobile network operators. It is no answer to say "Oh well, you can come back under liberty to apply", because it means that then Ofcom has to keep making applications as the investigation proceeds to justify every weeks here or there for revision of the timetable. It would mean that effectively the new investigation is conducted under your continuing supervision as if it were proceedings before this Tribunal, which it is not. It is now in the province of the Decision maker, as it was when the original Decision was being taken – to go back to my example, if the case goes from this Tribunal to the Court of Appeal and then comes back to this Tribunal it is then in the province of this Tribunal who, I am sure, would follow an indication from the Court of Appeal about expedition, but this Tribunal is master of its own house, and so are the Regulators and so are the Appellate Courts and that is the balance in the system of judicial control.

Those are our submissions. Thank you very much for sitting late, I am sure we all appreciate that.

MISS CARSS-FRISK: Madam, a very short factual point. Just that in fact my client did apparently apply for interim measures and they were refused – with reference to the point being made about ----

THE CHAIRMAN: But did not appeal to us?

MISS CARSS-FRISK: No.

MR. ROTH: Just to clarify that, they were refused. They were refused for lack of evidence, and they were invited to resubmit their application with more evidence, and I am sure the correspondence can be furnished to the Tribunal if you would like it. That is the situation, and of course they have a right to appeal to this Tribunal.

MISS CARSS-FRISK: I gather we applied twice, so there we are.

THE CHAIRMAN: You never appealed to us though?

MISS CARSS-FRISK: That is correct.

THE CHAIRMAN: Can I thank you both very much. As I have already said, they were both very, very clear and very thought provoking submissions and we will take time to consider our decision. So I cannot give you an indication now, as you asked me to do at the beginning, one really needs to consider what you have both been saying. You have kept to time very well as it has turned out, so thank you both very much.

MR. ROTH: I think probably to protect our position we may have to make an application under the original order. That can be dealt with through the usual channels.

THE CHAIRMAN: Yes, if that is dealt with through the Registry perhaps nearer the time.

MR. ROTH: Yes.

THE CHAIRMAN: Thank you.

(The hearing concluded at 5.05 p.m.)