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IN THE COMPETITION APPEAL TRIBUNAL

Case No 1024/2/3/04

New Court
48 Carey Street
London WC2A 2JT

Friday 6 February 2004

Before:

The President
SIR CHRISTOPHER BELLAMY QC
(Chairman)

MR MICHAEL DAVEY
and
MRS SHEILA HEWITT

B E T W E E N:

FLOE TELECOM LIMITED

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

MR EDWARD MERCER and MR PATRICK CLARK appeared on behalf of the Appellant.

MR MARK HOSKINS appeared on behalf of the Respondent.

MS ELIZABETH MCKNIGHT appeared on behalf of the Potential Interveners.

CASE MANAGEMENT CONFERENCE

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1 THE CHAIRMAN: Good morning, ladies and gentlemen.

2 The Tribunal's proceedings at a Case Management
3 Conference of this kind are relatively informal. I would
4 like to begin by seeing if I can establish who it is we
5 have got here. I think we have got Mr Mercer from Taylor
6 Wessing. Is that right?

7 MR MERCER: Yes.

8 THE CHAIRMAN: Good morning, Mr Mercer. Mr Clark, you are
9 with Mr Mercer. Then Mr Hoskins for OFCOM and Ms
10 McKnight for the potential intervener. Good morning.

11 Our normal procedure is to go through the agenda
12 for the Case Management Conference. I think in this
13 particular case we would like to start with two matters.

14 The first that I think we ought to sort out fairly early
15 on is the position of Vodafone, who applies to intervene
16 in this case.

17 I think we have seen, Mr Mercer, that that is
18 formally opposed. I do not know if you have anything
19 further to add to what you have said in writing already?

20 May I say, I think it is possibly a little bit difficult
21 to resist Vodafone's intervention since they were the
22 party complained against. It is their conduct that is in
23 issue. They probably have, in the words of our rules, "a
24 sufficient interest", which is all they need to establish
25 to intervene. The question of costs and the question of
26 exactly what role they play in the proceedings are
27 questions we tend to address in terms of Case Management
28 rather than in terms of the principle of whether they
29 should be intervening at all.

30 MR MERCER: If you examine the arguments put forward by
31 Vodafone, it is essentially a matter of guesswork -
32 "Well, we made lots of submissions to OFCOM and some of
33 these are what they based their decision on". That could
34 be said by any person in a complaint about somebody with
35 significant market power. I look, Sir, to what
36 distinguishes this matter.

37 If you were merely to take Vodafone's argument and
38 say that that gives them sufficient interest and they

1 should be allowed to intervene, then essentially one is
2 saying that anyone whose conduct is appealed against
3 should have that right without differentiating or
4 distinguishing. Vodafone's submission does not
5 distinguish this as being different from any normal case.

6 It does not say that there is a dichotomy between the
7 views of Vodafone and OFCOM. It does not say anything
8 very specific about what interest it is they wish to
9 protect. It may well be that this is a matter, as it may
10 transpire over the course of the morning, to have as its
11 nub a single point, a single point essentially of the
12 analysis of the regulatory position.

13 Sir, I would not try to argue that were this matter
14 to proceed beyond a decision on that basic point of the
15 regulatory analysis, whether or not a use of public GSM
16 gateways is lawful, if the matter got beyond there it is
17 quite possible that you would want to consider remitting
18 it back to OFCOM for a decision and you might wish to
19 give directions in respect of that. I could not deny at
20 that stage that Vodafone might have, in the interests of
21 fairness, a very strong case to be heard. But we are not
22 there yet. Nobody is saying that there is a difference
23 between OFCOM's position and Vodafone's.

24 THE CHAIRMAN: Are you able to articulate for us the single
25 point that you have just mentioned?

26 MR MERCER: Yes, Sir.

27 THE CHAIRMAN: I think that might be helpful because we were
28 about to come to what the issues in this case are likely
29 to be and if you are able to boil it down that is
30 probably helpful.

31 MR MERCER: Can I preface some remarks on that, Sir, by
32 pointing out that we were instructed quite late in this
33 matter and the terms of our instructions only settled
34 last Friday, although we had done some preliminary work
35 in assisting in a meeting before that. As a result of a
36 case conference with the client last night, Sir, I have
37 instructions now to seek leave to amend the notice of
38 appeal, because the single fundamental point does not

1 exactly come out and hit you between the eyes from
2 reading the notice of appeal, though it is obliquely
3 referred to.

4 The point is this. In the complaint before OFCOM
5 my client never got over the first hurdle. You can see
6 what the hurdle is if you look at paragraph 38 of the
7 Decision.

8 THE CHAIRMAN: Whether it was unlawful?

9 MR MERCER: Whether it was unlawful. Much as I agree with
10 the first sentence of paragraph 38 - I have a few qualms
11 about the second sentence - essentially we have a greater
12 difficulty if what was being done was unlawful. It will
13 be our contention, Sir, that it was not unlawful and that
14 the analysis of the regulatory position of the use of the
15 relevant apparatus was incorrect.

16 The fundamental keystone of the decision taken by
17 OFCOM, what goes through it like letters in a Blackpool
18 stick of rock is the fact that there was no consent
19 given, no express authority for the use of the relevant
20 apparatus given by Vodafone, because they believed that
21 such express consent was necessary.

22 THE CHAIRMAN: When you say "they" believed, do you mean
23 OFCOM?

24 MR MERCER: OFCOM, yes. It is our contention that that is
25 incorrect, that in fact the relevant apparatus was, for
26 the purposes of section 1 of the Wireless Telegraphy Act
27 1949, being used by Vodafone and Vodafone had, for the
28 purposes of wireless telegraphy, control over that
29 apparatus.

30 THE CHAIRMAN: Do you mean the Floe apparatus being used by
31 Vodafone?

32 MR MERCER: Yes. It will be our contention that ownership
33 of that apparatus is irrelevant in the circumstances and
34 that control is the test. That test is the same test as
35 providing an electronic communications network or
36 services pursuant to the Communications Act 2003. That
37 test, according to at least, I think, the Government, is
38 more or less the same test as was in the

1 Telecommunications Act 1984 for running a system.

2 THE CHAIRMAN: You do not happen to have the section numbers
3 to hand, do you?

4 MR MERCER: Not in the Communications Act, Sir. In the
5 Telecommunications Act 1984 one used to look at sections
6 4 and 5.

7 In the circumstances the only person who could be
8 seen to be running the apparatus was Vodafone because not
9 only did they have control of the SIM card, which they
10 supplied and without which the apparatus will not connect
11 to the network, but they also turned off the IMEI for the
12 relevant apparatus. That, Sir, is a 25 digit code number
13 embedded in the apparatus which basically identifies it.

14 When it is switched off the apparatus is unusable.

15 THE CHAIRMAN: When you say "the apparatus", do you mean a
16 mobile?

17 MR MERCER: In this case it is a fixed unit. Thus showing
18 that under all of the tests that have been applied in
19 recent years - there is no reported case on the subject,
20 Sir - it was Vodafone who had control of that apparatus
21 and therefore it should be deemed to be part of their
22 system. Therefore its operation was lawful and no
23 exemption had to be found for its use.

24 As an alternative and a secondary point, one might
25 examine the degree of authorisation which was in fact
26 given and parts of the OFCOM reasoning which turned a
27 requirement for Vodafone in respect of giving express
28 written consent into an obligation on Floe Telecom.

29 THE CHAIRMAN: An obligation on Floe to do what?

30 MR MERCER: To get written express consent before the
31 apparatus could be lawfully used.

32 THE CHAIRMAN: Would that subsidiary point involve looking at
33 the arrangements between Floe and Vodafone, the
34 correspondence that had passed between them and matters
35 of that kind?

36 MR MERCER: I do not think we would be seeking to rely on
37 any more than has already appeared. It is the
38 interpretation and analysis of that which we question.

1 THE CHAIRMAN: We at the moment, as the Tribunal, as far as
2 we are aware have not got the contractual arrangements
3 between Floe and Vodafone or correspondence passing
4 between them and so forth and so on. Presumably the
5 Director had it in the file at some point, but we have
6 not got it. But never mind. We will park that for the
7 moment.

8 MR MERCER: If you get past the first point, then you get to
9 a stage which I submit OFCOM never really got to, which
10 was to consider what other objective reasons there might
11 be for Vodafone acting as they did, what the results of
12 an action were and the consequences, As I said earlier,
13 it might well be that whenever it got to that stage, that
14 is the stage at which the Tribunal might want to consider
15 what was remitted back to OFCOM.

16 THE CHAIRMAN: So putting what you have told us in the
17 context of the existing notice of appeal, do we
18 understand that the point about the possible difference
19 between private and public gateways effectively
20 disappears?

21 MR MERCER: All of the issues and points I think reappear
22 but in different guises and with different uses.

23 THE CHAIRMAN: Yes.

24 MR MERCER: As the notice of appeal itself makes clear, and
25 with no disrespect to my client, it was made completely
26 by a layman in a hurry and still bears the stains of the
27 Christmas pudding on the draft as it was written over the
28 Christmas holiday period.

29 THE CHAIRMAN: So what are you going to ask us for, Mr
30 Mercer? Are you going to ask for leave to put in what is
31 effectively a new notice, or a supplementary document of
32 some kind that explains in writing what you have just
33 told us orally, or what?

34 MR MERCER: I have taken the view that the best way forward,
35 Sir, was not to regard this as being a re-ordering of the
36 notice of appeal, something within its four corners, but
37 to regard this as better being dealt with by making an
38 application for leave to amend.

1 THE CHAIRMAN: And to make that application we would need a
2 document of some kind, I think?

3 MR MERCER: That was my understanding. I had also formed in
4 my mind the opinion that if the Tribunal were minded to
5 consider that application, then they might want to set a
6 timetable for the application being made and the new
7 document being appended to the application.

8 THE CHAIRMAN: Yes. That has all been very helpful. It was
9 initially provoked by the situation we were dealing with
10 as regards Vodafone, so I think possibly at this stage
11 what I should do is to ask Ofcom and Vodafone if they
12 have any reaction to what has happened so far.

13 Mr Hoskins?

14 MR HOSKINS: Reaction? Surprise.

15 THE CHAIRMAN: I do not think anyone should be entirely
16 surprised, if I may say so. The question of what kind of
17 authorisation one does need under this act was already a
18 point that the Tribunal had got in mind.

19 MR HOSKINS: Sir, I am not trying to be difficult, but it is
20 a question of how the matter is taken forward viz-a-viz
21 the Regulator and obviously viz-a-viz the Tribunal.

22 The specific point which has been made has not been
23 made before. I do not just mean in the notice of appeal.

24 It is also not something that featured certainly as a
25 primary argument in the complaint investigation process.

26 The first question is, if an amendment is to be
27 made in this form we are obviously going to be into the
28 Freeserve case law which says that the appeal is not the
29 opportunity to raise new points. It may well be that the
30 only way we can deal with that is to see the amendments.

31 Perhaps we will be allowed and then we will have to make
32 the legal submissions, but I just put down the marker
33 that we are heading for trouble because we are heading
34 for a new complaint. That is point one.

35 Point two is that if an application to amend is to
36 be made, this is the first indication we have had. I do
37 not believe my friend appreciates professional
38 difficulties, etc., but the practical reality is here we

1 are today. We have had a notice of appeal. We were in a
2 position to serve our defence next week. It is pretty
3 well complete. My friend says the notice of appeal will
4 still stand but it appears as if that has now been pushed
5 into the background and what we are going to have is a
6 new main point, which is the one described this morning.

7 I think the only way forward on that is that if
8 they wish to amend the notice, they will have to produce
9 the proposed amendment and seek permission to do so and a
10 timetable will have to be worked out.

11 When it comes to the question of costs, we are
12 going to come on to the pre-emptive costs order, but this
13 is precisely one of the points that we were seeking to
14 make in the written submissions, which I hope you have
15 seen.

16 THE CHAIRMAN: Wait a minute. Which?

17 MR HOSKINS: It should have come in yesterday, Sir. I can
18 make the point now and we can deal with the detail when
19 we come to it.

20 THE CHAIRMAN: Excuse me, Mr Hoskins. (To the Clerk of the
21 Court) Did we have some submissions in yesterday?

22 THE CLERK: Yes, Sir. You have received it.

23 THE CHAIRMAN: Thank you. I have got it in front of me.

24 MR HOSKINS: Sir, it is the very last paragraph of that
25 note, which is that one of the purposes of the
26 possibility of awarding costs is to deal with the conduct
27 of the proceedings. I appreciate the difficulties of
28 Floe. It is a company in administration. They want to
29 get the appeal in but of course they did not have the
30 normal time. The fact that they had to do it quickly was
31 in a sense partly because they waited too late in doing
32 it. But if a completely new point is to be raised, we
33 have wasted a lot of time already in preparing a defence.

34 It is ready to be served next week and again I put down
35 a marker, because again it is not something that the
36 Tribunal can deal with today. But that is an issue we
37 are going to be raising and it is something which is
38 going to be relevant today in relation to the application

1 for a pre-emptive costs order, because the whole point of
2 being able to give costs is a sanction in terms of the
3 way in which these things are run.

4 I am sorry, but there are lots of markers there.
5 There is a lot of huffing and puffing on my part. The
6 reality is that in relation to this, all we can say, if
7 there is a new case to be made, we need to see it. If
8 permission is to be given so be it and we need a new
9 timetable. I am not sure that I can say much more.

10 THE CHAIRMAN: Thank you very much, Mr Hoskins.

11 Well, Ms McKnight?

12 MS MCKNIGHT: Mr Mercer makes two points really. He
13 suggests that even on the basis of the current notice of
14 appeal he does not find our grounds for requesting
15 permission to intervene to be persuasive. I do not know
16 whether you wish me to address those or whether that is a
17 little pointless now and that I should move on to the
18 second point?

19 THE CHAIRMAN: I think we do not need to hear you on that.

20 MS MCKNIGHT: Thank you.

21 As regards the proposed amendments to the notice of
22 appeal, I think we would certainly be all the more
23 certain we would wish to intervene if an appeal on these
24 new grounds were to be permitted, the reason being, of
25 course, that Vodafone will have evidence as to the way in
26 which Floe advanced its case when it was seeking to sort
27 out its arrangements with Vodafone.

28 THE CHAIRMAN: Do you mean that this is at the pre-complaints
29 stage, before the switch off, or whatever?

30 MS MCKNIGHT: That is right, but it seems from the
31 correspondence that I have read to date, though obviously
32 not with this point in mind, that Floe seemed to
33 contemplate that it would have legal difficulties with
34 its public GSM gateways and contemplated changing the
35 ownership arrangements so as to create a different
36 contractual and ownership structure specifically to
37 address the Wireless Telegraphy Act concerns. One can
38 contemplate that that sort of evidence and Vodafone's

1 reaction to the way the case was put then would be part
2 of its case as to why its conduct would not infringe the
3 Chapter 2 prohibition. That is something we would wish
4 to put to you when the opportunity arises.

5 THE CHAIRMAN: Thank you.

6 Mr Mercer, do you have any point on what has just
7 been said?

8 MR MERCER: I disagree with Mr Hoskins that it is a
9 completely new point. The point in its general form has
10 been around from the beginning of the matter. What is
11 new is a different analysis.

12 THE CHAIRMAN: And that is an analysis of law, I suppose you
13 would say?

14 MR MERCER: I would say it is an analysis of law, Sir, yes.

15 THE CHAIRMAN: Thank you.

16 MR MERCER: As for who needs to be involved in looking at
17 that, these are questions really that need only be dealt
18 with between the appellant and the respondent, the
19 respondent, after all, now incorporating the Radio
20 Communications Agency, which is the body responsible for
21 these areas.

22 MS MCKNIGHT: Sir, in response to that, could I explain why
23 I think it would be important for Vodafone to be
24 permitted to intervene even in respect of this issue of
25 law?

26 Clearly Vodafone has just as much interest in
27 participating in the debate as to what is the correct
28 interpretation of the Wireless Telegraphy Act as does
29 anyone else. It has a licence to use Spectrum. It is
30 very important that persons who have not been granted
31 such a licence should not be able to engage in activities
32 which we would say require to be authorised by a licence
33 and if the Tribunal were to make a ruling on the correct
34 interpretation of the Wireless Telegraphy Act and then
35 perhaps to remit the matter back to OFCOM it would be
36 most unfair if Vodafone had not participated in that.

37 THE CHAIRMAN: Thank you. (The Tribunal conferred)

38

R U L I N G

1
2 THE CHAIRMAN: In this Case Management Conference the first
3 issue the Tribunal has to deal with is whether the
4 company, Vodafone Limited, should be allowed to intervene
5 as a party to the proceedings.

6 The proceedings are an appeal by Floe
7 Telecommunications Limited against a decision by what is
8 now OFCOM dated 3 November 2003 under Chapter 2 of the
9 Competition Act. That decision concerned a complaint
10 submitted by Floe to the Director against Vodafone which
11 alleged that Vodafone had breached Chapter 2 of the
12 Competition Act in various ways and in particular by
13 disconnecting Floe in relation to Floe's GSM gateway
14 service. The Director rejected Floe's complaint in his
15 decision and Floe now appeals against that rejection.

16 Vodafone applies to intervene on the grounds that
17 they have a sufficient interest within the meaning of
18 Rule 16 of the Tribunal's Rules. That application is
19 opposed by Floe, principally on the grounds that
20 Vodafone's participation is unnecessary for the
21 determination of these proceedings and that to permit
22 Vodafone to participate will only add to the costs
23 unnecessarily.

24 Mr Mercer, for Floe, this morning has indicated
25 that one of the principal points in the appeal which he
26 will seek to bring forward by way of an amendment to the
27 existing notice of appeal will be the true construction
28 of the relevant provisions of the Wireless Telegraphy Act
29 and the Regulations made thereunder, in particular
30 bearing on the point as to whether Floe's use of the
31 relevant products or services was lawful or unlawful, the
32 Director having found in the Decision that the public GSM
33 gateway services provided by Floe were not lawful.

34 Ms McKnight, for Vodafone, in addition to
35 submitting that Vodafone has a sufficient interest, also
36 emphasizes that Vodafone has a close interest in the
37 correct interpretation of the Wireless Telegraphy
38 legislation with which this appeal is concerned.

1 The Tribunal is of the view that Vodafone does have
2 a sufficient interest in these proceedings and should be
3 permitted to intervene. The original complaint was made
4 against Vodafone. The proceedings are likely to touch on
5 Vodafone's conduct in relation to Floe and the
6 interpretation of the relevant legislation also affects
7 Vodafone's interest, so on that ground we are satisfied
8 that Vodafone has a sufficient interest to intervene. We
9 will give directions later in this Conference as to
10 exactly what form that intervention should take.

11 As regards the intimation that has been made to us
12 that Floe would wish to amend its notice of appeal, it
13 seems to us that we are not yet in a position to rule on
14 that. In fact, we have not been invited to rule. We
15 have only had a first intimation of a proposal to amend
16 the notice of appeal and probably the best course in
17 dealing with that is to set a timetable for that
18 application and we will then have to see whether the
19 Tribunal is in a position to grant it or not, bearing in
20 mind the rather limited provisions of Rule 11.3 of the
21 Tribunal's Rules, which somewhat restrict the
22 circumstances in which notices of appeal can be amended.

23 I think what we will do at this stage, if we may, is to
24 discuss with the parties the timetable for this possible
25 application and how the rest of the written procedure
26 should fit in with that.

27 I think, Mr Mercer, the next question is how we
28 should proceed in relation to your possible application
29 for leave to amend. This is something that does need to
30 be done in writing in the first instance and the question
31 is what sort of time you need for that.

32 MR MERCER: 14 days.

33 THE CHAIRMAN: 14 days. I would have thought that was more
34 or less what we had in mind ourselves. If we say that
35 you have 14 days to submit a proposed amendment to the
36 notice of appeal, we then probably have to give OFCOM and
37 Vodafone a period to respond to whether that amendment
38 should be made. I would have thought probably 14 days

1 for that response at this stage.

2 MR HOSKINS: That is what I was going to ask for, Sir.

3 THE CHAIRMAN: Good. That will take us to 5 March. It may
4 well be that we cannot take matters, procedurally
5 speaking, very much further than that at the moment. It
6 rather depends on what then happens to the amendment.
7 Perhaps I could signal to the parties that we had
8 pencilled in the Tribunal's diary a second Case
9 Management Conference in this case for 23 March in the
10 afternoon starting at 2 o'clock.

11 MR HOSKINS: Sir, in relation to football shirts I must
12 admit that I had 23 March pencilled in as a possible run-
13 over day. Maybe that is just my clerk being cautious and
14 it is not in the Tribunal's diary as a run-over day.

15 THE CHAIRMAN: That is true, Mr Hoskins. I think we will
16 indicate that we are anticipating a further Case
17 Management Conference in the week beginning March 22. I
18 am not sure that we can actually fix a date now. It
19 depends on peoples' diaries. We cannot be sure when
20 football shirts will finish. I think we will have to be
21 in touch with you about a date but somewhere in that
22 week, just to see where we are. We certainly had in mind
23 that what the issues in this case are do need to be
24 sorted out to some extent, because it is not completely
25 apparent from the notice of appeal what it is the
26 appellant is asking us to decide.

27 On that basis the defence is nearly ready, Mr
28 Hoskins, but is there much point in proceeding with it
29 until we see what it is that Floe wants to say?

30 MR HOSKINS: I think one of the things that concerns us is
31 to what extent any of the issues that are in the current
32 notice of appeal are going to be persisted with.

33 THE CHAIRMAN: That is a point which has occurred to
34 certainly more than one member of the Tribunal as Mr
35 Mercer was proceeding.

36 In your application, Mr Mercer, you do need to tell
37 us fairly precisely what it is that Floe is now
38 persisting in, as it were. That is to say, if it turns

1 out that we are against you on the legal point that you
2 have indicated, that may or may not be implicit in the
3 existing notice of appeal, are there other points that
4 you want us to decide or not, or is that it effectively?

5 I am not asking for an answer now, but we do need to set
6 at this stage the parameters of this case and not have a
7 moving target.

8 MR MERCER: I can assure you, Sir, there is no-one who would
9 like to do that more than me.

10 THE CHAIRMAN: Yes, quite. I know you have not had time yet
11 to get fully into it.

12 MR HOSKINS: Sir, on that basis it seems there is little
13 point in us serving a document which may become
14 irrelevant and obviously in terms of the documents we put
15 before the Tribunal, etc., that will be conditioned by
16 relevance. Our submission would be that there is no
17 point in us submitting the defence. We may as well wait
18 until we see what is the case that we have to meet and
19 deal with it at that stage.

20 MR MERCER: I could not disagree with Mr Hoskins on that
21 point, Sir.

22 THE CHAIRMAN: Well I think that is probably as far as we can
23 take it. Similarly for any statement of intervention
24 that Vodafone wanted to submit.

25 MS MCKNIGHT: We have not been served with the notice of
26 appeal as it now stands. I wondered whether it would be
27 helpful for us to see that?

28 THE CHAIRMAN: That will happen automatically now that you
29 are an intervener.

30 If we can now look at the agenda for the Case
31 Management Conference. I am not sure that we have many
32 other things that we can usefully discuss. Certainly as
33 far as documents are concerned, and I am looking now in
34 Mr Mercer's direction, I do not know how far it will
35 continue to be relevant, but at the moment the Tribunal
36 does not have Floe's original complaint or the contract
37 and other relevant correspondence between Floe and
38 Vodafone or the correspondence between Floe and OFCOM in

1 | dealing with the complaint, so to the extent that those
2 | materials are relevant I think, in the context of your
3 | proposed amendment, it would perhaps be useful in an
4 | annex to fill in the gaps in the documents that we
5 | presently have, insofar as they are relevant.

6 | MR MERCER: I would love to assist, Sir, but I have not got
7 | a number of the documents and neither has my client ever
8 | been given a number of the documents referred to in the
9 | OFTEL decision. There are references to e-mails from
10 | Vodafone. We have not even got a copy of Vodafone's WT
11 | Act licence, because they, unlike Telecommunications Act
12 | licences, have never been public documents. We have an
13 | idea what the template looks like but we do not actually
14 | have the original.

15 | MR HOSKINS: Sir, in relation to that particular point, the
16 | licences are confidential. The relevant conditions, 7
17 | and 8, are actually in the template so I am not sure that
18 | that is a debate that we will be able to take much
19 | further, certainly not today. If there are documentary
20 | requests all we can suggest is that Floe write to us in
21 | terms of the documents they think they need and take it
22 | from there.

23 | THE CHAIRMAN: I would have thought that is probably
24 | sensible. I would have thought that in general, subject
25 | to confidentiality considerations, the documents that
26 | figure as footnotes to the decision are documents that
27 | are potentially relevant to the hearing of the appeal.

28 | MR HOSKINS: Sir, can I suggest, if it would help, because I
29 | am trying to make things easier rather than harder, we
30 | can supply copies of the documents that are in the
31 | footnote to the decision to Floe.

32 | THE CHAIRMAN: I think that would help, Mr Hoskins.

33 | MR HOSKINS: Subject to confidentiality, which leads me into
34 | another point. At the moment certainly the
35 | confidentialitys are Vodafone's. There may have to be a
36 | process whereby we put together the bundle of documents
37 | and show it to Vodafone and say to Vodafone "Do you have
38 | any confidentiality objections to any of these

1 documents". If they do, I guess, given the time
2 constraints, we will have to supply redacted versions to
3 Floe and there will have to be a hearing before the
4 Tribunal to settle any confidentiality issues. If that
5 seems a sensible way forward it is certainly something
6 that we are happy to do.

7 THE CHAIRMAN: That is sensible, but it may be somewhat
8 difficult to maintain confidentiality in relation to
9 matters that the Director has relied on in the decision.
10 We will have to see.

11 MR HOSKINS: Sir, with respect what I am trying to protect
12 is not what we would do. It is what Vodafone would do to
13 be confidential. I am sure Ms McKnight has heard the
14 indication.

15 MS MCKNIGHT: Yes.

16 THE CHAIRMAN: One needs to go through that procedure.
17 In general in that connection the Tribunal would be
18 particularly happy if the parties could treat this case
19 in a non-confrontational manner and insofar as there can
20 usefully be any kind of collaboration among the advisers
21 for the various parties to define the issues and to
22 assemble by agreement the documents you think the
23 Tribunal ought to have obviously we would be very
24 pleased. We do not know at this point whether there is a
25 fundamental issue behind this case or not, but if there
26 is it is desirable that it is dealt with in as full a
27 manner as possible without undue "antagonism" creeping
28 into the proceedings.

29 MR HOSKINS: Again, if we provide the documents referred to
30 in the decision, then obviously Floe can write to us if
31 it thinks there is anything else that needs to be before
32 the Tribunal. I think that is the way to get the
33 dialogue going.

34 THE CHAIRMAN: What do you need in order to frame your
35 amendment, Mr Mercer?

36 MR MERCER: I think in order to do that and the other tasks
37 which you referred to, Sir, precisely defining what is in
38 and what is out, I think as a base I need all the

1 documents referred to in the decision. As regards the
2 licence I can access the template but I do not know if
3 there is any other condition which impacts until I have
4 seen it. I hear what Mr Hoskins says about it being
5 confidential. I cannot imagine which bits of it are
6 confidential.

7 MR HOSKINS: It relates to the Spectrum issues. I think the
8 way to deal with this is obviously confidentiality again.

9 We have an interest in this and also Vodafone do and
10 that would be one of the things that we would have to
11 discuss with Vodafone. I imagine what would probably
12 happen is the version may well be redacted at least in
13 some form. It may well be more than a template. I do
14 not know at the moment. If there is an issue it is
15 something we will have to deal with in front of the
16 Tribunal as to whether the remaining bits can or cannot
17 be disclosed and whether there is some sort of
18 confidentiality issue. I know that that is not
19 necessarily something that the Tribunal likes but it is a
20 possibility and we can take it forward from there. I do
21 not think in the mean time we can do any more than point
22 to the template. We will raise it with Vodafone and do
23 what we can on that basis.

24 THE CHAIRMAN: I was just thinking of the two weeks that Mr
25 Mercer originally asked for for doing his amendment. If
26 he would like to have at least some of these documents in
27 order to finalise it we need to see what the feasibility
28 is of you sending him at least some of the documents
29 referred to in the decision.

30 Presumably you have got them handy somewhere, Mr
31 Hoskins?

32 MR HOSKINS: Sir, can I take instructions on that?

33 THE CHAIRMAN: Yes.

34 MR HOSKINS: (after a pause for taking instructions) Sir,
35 we will endeavour to get the documents to Floe by 5 pm on
36 Wednesday. By that I mean that we will have consulted
37 with Vodafone by then so a bundle will be provided. It
38 may be redacted for reasons I have described, but that is

1 certainly something we will work to.

2 THE CHAIRMAN: That is helpful. Thank you very much.

3 MR MERCER: I will fight back my enthusiasm to draft it

4 until Wednesday, Sir.

5 THE CHAIRMAN: Well I think we will still leave you with your

6 two weeks, Mr Mercer. You can start thinking about it

7 mentally.

8 MR MERCER: If we get the documents by then I do not think

9 we will be in too much danger of missing the time table.

10 THE CHAIRMAN: I have just one point to raise. As you will

11 appreciate, the normal procedure now is that the notice

12 of appeal is served on Vodafone. The existing notice of

13 appeal is headed "Confidential". At first sight we

14 cannot see anything in it that is confidential, so it may

15 just have been a precaution by the author of the

16 document.

17 MR MERCER: It was a precaution, Sir.

18 THE CHAIRMAN: Yes. If there is anything confidential that

19 you wished to protect viz-a-viz Vodafone, now is the time

20 to signal it, but I do not think there is.

21 MR MERCER: No.

22 THE CHAIRMAN: I think as far as we are concerned, the only

23 other point we have got that we can usefully discuss at

24 the moment is this issue of the pre-emptive costs'

25 request made by Floe. I think, Mr Mercer, if I may say

26 so, it is extremely difficult for us at this point to

27 take any position on costs in this appeal at this early

28 stage of our knowledge of the case. Our general case law

29 on costs - I am thinking of a case called Aquavitae which

30 we decided some months ago - is not necessarily to follow

31 the rule that costs follow the event. Sometimes costs

32 simply lie where they fall, especially if the issue is

33 one that is of general importance in a regulatory system.

34 But beyond that I think it is very difficult at this

35 stage to be very definite about costs. On the whole, I

36 suppose, interventions tend to be cost neutral. It is

37 not often that interveners have costs awarded in their

38 favour but, on the other hand, at this stage we do not

1 know how this case is going to develop and if there were
2 suggestions that the appeal had not been reasonably
3 brought or had involved the creation of unnecessary
4 costs, then that obviously is something that we would
5 have to deal with when that submission was made.

6 I do not know if there are any particular
7 submissions you would like to make to us on the costs'
8 issue?

9 MR MERCER: Well we had the benefit of reading Mr Hoskins'
10 submissions last night on the costs issue, with which, in
11 the nicest possible way, we take some exception. We
12 principally take exception to the point about conduct,
13 because of course the company is under the control of the
14 Administrator, who is an officer of the court and as an
15 officer of the court he has his duties to the court in
16 addition to any others he might have in regard to this
17 matter. Having acted and advised for a number of
18 administrators in the telecommunications' field, that
19 being the way of the industry over the last couple of
20 years, that is something which insolvency practitioners,
21 in my experience, take extremely seriously.

22 THE CHAIRMAN: Have we got the benefit of Mr Frost sitting
23 behind you at the moment?

24 MR MERCER: Unfortunately not, Sir.

25 THE CHAIRMAN: So he is an officer of the court and takes
26 that very seriously.

27 MR MERCER: And that should be borne in mind in respect of
28 conduct.

29 Secondly, and very importantly, Mr Hoskins kind of
30 dismissed out of hand the concept that this was of any
31 general importance.

32 Our information is that between 50 and 100
33 businesses are interested in the outcome of this matter
34 because the machinations of last summer and this decision
35 have either exterminated or driven underground a large
36 part of a section of an industry.

37 THE CHAIRMAN: Can you refer to the machinations of last
38 summer? Do you mean the 18 July statement?

1 MR MERCER: Yes, and the decisions after that.
2 If Floe was right, Sir, mobile penetration in this
3 country is over 80 per cent and the population is now
4 about 58 million. You can work out how many millions of
5 people might be involved.
6 THE CHAIRMAN: So it has potentially a wide-ranging effect.
7 MR MERCER: Yes, Sir.
8 THE CHAIRMAN: That said, what order, if any, do you seek
9 from us at this stage?
10 MR MERCER: I would like to adjourn the application, having
11 made those points, until the Tribunal has had a chance to
12 look at the substantive point that emerges and the
13 defence to that.
14 THE CHAIRMAN: So you are not asking us to deal with it
15 today.
16 MR MERCER: No, but I am flagging up, Sir, that it is a
17 point which is extremely important to the Administrator,
18 who has limited resources. You can see that he has had
19 limited resources by pulling down the statement of
20 affairs from a Companies House website. It has a great
21 many creditors and not very many assets. The present
22 cash in hand of the business going forward is measured in
23 a few thousand pounds, I am instructed, at this present
24 moment in time. It might be increased through sales of
25 various parts of the business over the next few months,
26 but they are not great indeed and what is used up
27 elsewhere does not go to the creditors. The
28 Administrator has his basic duty. He is to do his best
29 under the terms of the administration for the creditors.
30 THE CHAIRMAN: Yes. I think if Mr Mercer is not actually
31 making an application today, then it is probably best not
32 to make any pronouncements upon it beyond what we have
33 already got in writing and beyond what the Tribunal has
34 already said, Mr Hoskins, and we will simply return to
35 the point if and when it arises at a later stage in the
36 proceedings.
37 MR HOSKINS: Absolutely, Sir.
38 THE CHAIRMAN: We will not deal with the costs issue at all

1 today.

2 Mrs Hewitt quite rightly reminds me that we were
3 interested to know what is the status of what is
4 apparently a parallel complaint to the European
5 Commission that is referred to in the notice of appeal
6 and whether that has any bearing at all on these
7 proceedings.

8 MR MERCER: Can I take instructions for a moment. (After
9 taking instructions) Correspondence has been sent to the
10 Commission, Sir, but no response has yet been received.

11 THE CHAIRMAN: I see.

12 Forgive my ignorance. Are we in a situation where,
13 in relation to the regulations made under the Wireless
14 Telegraphy Act, there are governing EC Directives which
15 the regulations are supposed to reflect, or is that not a
16 point which arises in this case?

17 MR MERCER: I do not believe that that is a point which
18 arises.

19 MR HOSKINS: We do not understand that there is an EC point.

20 THE CHAIRMAN: Thank you.

21 We have no other points we wish to raise from our
22 side, but you may have points you wish to raise, Mr
23 Mercer?

24 MR MERCER: No, Sir.

25 THE CHAIRMAN: Mr Hoskins?

26 MR HOSKINS: Nothing from us, Sir.

27 THE CHAIRMAN: Very well then. We will, at least
28 provisionally, meet again on a date to be fixed in the
29 week beginning 26 March and see where we are at that
30 stage.

31 (The hearing concluded)