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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 October 2005

Before:
MARION SIMMONS QC
(Chairman)

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) LIMITED

Interveners

Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellants.

Mr. Rupert Anderson QC and Mr. John McInnes (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Stephen Wisking (of Herbert Smith) appeared for the first Intervener, Vodafone Limited.

Miss Robyn Durie, Regulatory Counsel, T-Mobile appeared on behalf of the Second Intervener, T-Mobile (UK) Limited.

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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
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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good morning.

2 MR. WISKING: Would it be convenient if I start?

3 THE CHAIRMAN: Yes, it would be, but could I just mention two matters. First of all, I am just
4 checking that no one is making an application for this hearing to be in camera?

5 MR. WISKING: There may be an issue in that regard.

6 THE CHAIRMAN: I know what happened, if that is what you are going to ----

7 MR. WISKING: Yes.

8 THE CHAIRMAN: Are your clients here?

9 MR. WISKING: They are, and they are happy to leave at the appropriate point. It may be that we
10 can confine that part of the hearing to a very limited piece.

11 THE CHAIRMAN: Yes.

12 MR. WISKING: Obviously that will need to be addressed in the transcript as well.

13 THE CHAIRMAN: Well everybody knows what the problem is and we should all be very careful
14 not to disclose any potentially confidential information and we will have to be careful with the
15 transcript when it comes out, subject to the Ruling. That is the first point.

16 The second point is that I appreciate very much the rapid response to our letter and the
17 questions that were asked, and the answers seemed to lead to two further questions. The first is
18 to Ofcom, and the question is: when were the names of the companies now identified, i.e. not
19 A, B, C, X and Y, first provided to Ofcom by Floe? Can I give you the second question
20 because it is a short question: – and that is to Floe – when did Floe receive the evidence in
21 relation to those names, i.e. did they know about it at the time of the second investigation?

22 MR. ANDERSON: If I could answer that first question, I have a correction to make from the
23 transcript of last time, which is at p.14, at the top of the page.

24 THE CHAIRMAN: Shall I get that?

25 MR. ANDERSON: Page 14 in my version where I say:

26 “My instructions are that although Floe were invited to provide everything that they
27 considered relevant to us they provided no particulars, no names and no specific
28 instances at all.”

29 That was not strictly right and the position is as now set out in para.128 of the Defence.

30 THE CHAIRMAN: I have not looked at the Defence yet.

31 MR. ANDERSON: There was identified another service provider which Ofcom had already spoken
32 to and ruled out from the point of view of discrimination.

33 THE CHAIRMAN: Is that A, B, C, X and Y?

34 MR. ANDERSON: It is neither A, B, C nor X and Y. We have called it, rather stupidly, “Company
35 X” in the Defence.

1 THE CHAIRMAN: We call it “Company Z” in this case.

2 MR. ANDERSON: It should be “Company Z”, yes. It is not a company identified in this recent
3 dispute. It is a separate company altogether.

4 THE CHAIRMAN: It is nothing to do with what we are talking about now?

5 MR. ANDERSON: No. The information, the particulars of companies identified now, was
6 identified to Ofcom for the first time in the letter of 26th September – subject, of course, to
7 what was contained in my learned friend’s witness statements.

8 THE CHAIRMAN: That is very helpful. Mr. Mercer?

9 MR. MERCER: The answer is that information came to light in fact only after the Decision letter
10 had been issued.

11 THE CHAIRMAN: In the second Decision?

12 MR. MERCER: In the second Decision. In respect to why it was found out, that is down to me,
13 ma’am, because the instruction I gave to Mr. Stonehouse and Mr. Happy (assisting Floe) were
14 to find the most recent example.

15 THE CHAIRMAN: When did you tell them to do that?

16 MR. MERCER: Only after the second decision letter had come out, ma’am.

17 THE CHAIRMAN: It might become relevant, we will see what happens, as to whether that could
18 have been done earlier – we will see how Mr Wisking puts it.

19 MR. WISKING: Perhaps it might be helpful just to summarise where we are having got to this
20 point. As the Tribunal is aware para.10 of the Appeal, and para.2(e) of the appendix to the
21 Appeal make an allegation of discrimination, and that allegation is that Vodafone knowingly
22 provided SIMs for use in commercial multi-use Gateways since mid-2002, and effectively has
23 done so on a systemic basis.

24 The Appeal provided no particulars of that allegation, but a week later Floe on
25 26th August provided a number of witness statements. Two of those witness statements do
26 provide, or make allegations, of one particular instance, and that is to be found in para.4 of
27 Mr. Happy’s witness statement, and para.4 of Mr. Stonehouse’s.

28 THE CHAIRMAN: Shall we look at that?

29 MR. WISKING: Yes.

30 THE CHAIRMAN: I have Mr. Happy’s.

31 MR. WISKING: And Mr. Stonehouse – Mr. Stonehouse is probably the best one to start with, it
32 contains a fuller statement, it is para.4 of that, where he says:

33 “I have also had discussions with Recall Support Services Limited (“Recall”) who are
34 a provider of telecommunications services and were at one time, I believe,
35 a subsidiary of a large defence company or aeronautical company.”

1 And he goes on to make the allegation that Vodafone and T-Mobile have been supplying
2 knowingly SIMs for use in Gateways by Recall.

3 THE CHAIRMAN: And this is a witness statement which you have had all the time?

4 MR. WISKING: Yes. Paragraph 4 of Mr. Happy's witness statement, this is in vaguer terms, but
5 also makes reference to Recall Support Services and makes the general allegation that mobile
6 network operators have been selling SIMs for years for all kinds of Gateways.

7 So that is what we had and obviously that is a matter that we are in the process of
8 taking instructions on as part of preparing the Statement of Intervention. Nevertheless,
9 because of the way it is put in these very vague terms, we sought particulars on 8th September
10 effectively asking for full details of who it is alleged Vodafone knowingly supplied SIMs for
11 use in Gateways in order, as I explained at the last case management conference, that we could
12 deal with those allegations.

13 THE CHAIRMAN: It is quite clear in the third sentence of para.4, is it not?

14 MR. WISKING: Of?

15 THE CHAIRMAN: Sorry, of Mr. Stonehouse.

16 MR. WISKING: Well that is one allegation, but it is put in such vague terms and it is not linked
17 back to the, albeit vague, allegations; there are references to certain circumstances in the
18 Notice of Appeal.

19 THE CHAIRMAN: Quite. Anyway, you then ask for particulars.

20 MR. WISKING: We ask for particulars, and the response came back "Well, effectively, we told you
21 about Recall but there are other instances which you are not allowed to have because they are
22 confidential".

23 THE CHAIRMAN: Have you got that? Is that their response of 26th September?

24 MR. WISKING: It is their response – actually it is an earlier response, it is a response to 16th
25 September, and there are responses to letters from both us and from Ofcom.

26 THE CHAIRMAN: I have the responses.

27 MR. WISKING: And in relation to para.10 of the Appeal, Ofcom in fact asks: "Please specify who
28 are alleged to have provided SIMs for use in commercial multi-use Gateways?" And it stated
29 that this information is to be provided on confidential terms. Identify the customers ----

30 THE CHAIRMAN: Where are you reading from?

31 MR. WISKING: I am sorry, I am reading a consolidated version of that.

32 THE CHAIRMAN: I have here their letter of 16th September.

33 MR. WISKING: Yes, I will just turn that up.

34 THE CHAIRMAN: David Happy, para.4:

1 “If Vodafone disputes, for example, that we have given SIMs to Recall then please let
2 us know and we will forward further documentary evidence if it is necessary.”
3 Then John Stonehouse, para.4: “These documents are not in our possession.” That letter is to
4 you, and then there is a letter to you of the same date.
5 MR. WISKING: Yes.
6 THE CHAIRMAN: And then there are the questions in respect of further Amended Notice.
7 MR. WISKING: Yes if, for example, you look at the letter from Taylor Wessing of 16th September
8 to us ----
9 THE CHAIRMAN: The one that starts: “Much as we are quite happy ...”
10 MR. WISKING: Yes, p.7 of the annex to that letter, which responds to the request for particulars in
11 relation to para.2(e) of the appendix to the Notice of Appeal, which asks effectively for
12 particulars of all the instances. The response is, “Well, it is confidential, except ----”
13 THE CHAIRMAN: Sorry, which response is it?
14 MR. WISKING: This is at the bottom of p.7 of the annex to Taylor Wessing’s letter.
15 THE CHAIRMAN: Paragraph 2(e): “This is confidential except as disclosed in the evidence filed so
16 far.”
17 MR. WISKING: Yes, and then further down there is the point you made, if Vodafone disagrees
18 presumably “let us know”, and then all those involved are aware of the situation. “This is
19 confidential”. So in essence we have asked for full particulars, we have been given one
20 instance and we are told the rest is confidential. A similar response can be found in relation to
21 Ofcom’s request for information.
22 THE CHAIRMAN: (After a pause) Is there any evidence of anyone else except Recall which is
23 referred to in Mr. Stonehouse’s and Mr. Happy’s witness statement?
24 MR. WISKING: This was our concern that there were these references being made to further
25 confidential instances of evidence ----
26 THE CHAIRMAN: After this, did you go back and ask again?
27 MR. WISKING: Yes, we asked again on 21st September, to which Taylor Wessing responded on
28 26th September.
29 THE CHAIRMAN: Yes, 168, which question is it? Paragraph 2(e) “Please provide the identity of all
30 the commercial multi-use Gateways which you say Vodafone has provided since ----”
31 MR. WISKING: It also appears in relation to para.10, where the allegation is repeated.
32 THE CHAIRMAN: You repeat Ofcom’s request?
33 MR. WISKING: Yes, and the response was “We provided some information to Ofcom, but we are
34 not providing it to you because it is confidential”.
35 THE CHAIRMAN: That was in?

1 MR. WISKING: That was in 26th September ----

2 THE CHAIRMAN: So they told you again about Recall?

3 MR. WISKING: Well no, in the version ----

4 THE CHAIRMAN: You are blanked out from ----

5 MR. WISKING: We are referred to the response to Ofcom, and the Ofcom response that I have is
6 blanked out.

7 THE CHAIRMAN: Right, so you have not got anything below: “This information has been removed
8 from the copy given to Vodafone and T-Mobile?”

9 MR. WISKING: In relation to paragraph ----

10 THE CHAIRMAN: 2(e)?

11 MR. WISKING: Sorry, it is both 10 and 2(e), but in relation to para.10 it says “The information in
12 this paragraph is sent in confidence, and has been removed from the version of this note ----”

13 THE CHAIRMAN: I see. So you have nothing else below that?

14 MR. WHISKING: Below the words “(T-Mobile)” I have nothing.

15 THE CHAIRMAN: All right, just hold on. (After a pause) And you have nothing under appendix
16 para.2(e)?

17 MR. WISKING: No, it just says the information has been removed from the copies given to
18 Vodafone and T-Mobile.

19 THE CHAIRMAN: Right.

20 MR. WISKING: So the position is we know about one instance. We have effectively pressed to find
21 out whether there are any others. We have been told it is confidential and we are aware that
22 certain information has been passed to Ofcom but not to us.

23 THE CHAIRMAN: You do not know what is below that?

24 MR. WISKING: No, no. We then write again for completeness on 29th and make the point that we
25 do not see how this information can be confidential since the allegation is “you know it”. The
26 response is a little incoherent because the response of 10th October is “We do not need to tell
27 you because you know”, and later on goes on to say “Well, you do not know because these
28 operators are hiding their activities” which obviously contradicts the allegation. That is what
29 we are faced with and we have spoken on the phone trying to resolve this and we have made an
30 effort, but unfortunately we are back before the Tribunal.

31 This has to some extent been superseded by what has been discussed this morning,
32 but as I understand it – I spoke to Mr. Mercer yesterday and he confirmed that these were
33 matters which I could put to the Tribunal – the allegations that we have in the witness
34 statements together with what is in a letter that came yesterday ----

35 THE CHAIRMAN: Which your client has not seen?

1 MR. WISKING: Which they have not seen, first of all have not been put to Ofcom at all. I think that
2 was confirmed this morning. Secondly, they are the totality of the allegations which are made
3 under the “discrimination” head. Thirdly, which I think is quite relevant, this is apparent from
4 the Appeal and Mr. Mercer confirmed this, Floe is not currently challenging Ofcom’s findings
5 made in respect of those instances which were raised in the context of the two investigations
6 – I think it is the A, B, C, X, Y, Z cases.

7 THE CHAIRMAN: So they are raising a new allegation, and ----

8 MR. WISKING: -- no others.

9 THE CHAIRMAN: And no others, and subject to the letter that has caused the problem – we will
10 not say what was in it – the two witness statements which are public are Recall, because they
11 say “Recall”, you knew that?

12 MR. WISKING: Yes.

13 THE CHAIRMAN: So subject to whatever was in the new letter the question is, is it confined to
14 Recall? You say it is from what you were told yesterday?

15 MR. WISKING: Yes. So that is where we are, and I think it raises two issues. The first is whether
16 or not Floe is actually entitled to raise these allegations in the Appeal, and secondly, and I put
17 this in a general way, the confidentiality of the allegations. Is it convenient to address those
18 now?

19 THE CHAIRMAN: Yes.

20 MR. WISKING: On the question of whether Floe is entitled to raise the allegations, it might be
21 helpful just to take the Tribunal to the *Freeserve* Decision which sets out the basis of the
22 review by the Tribunal. (Document handed to the Tribunal) That is set out at p.39 of the
23 Decision, and effectively at the top of that page, it is the end of para.114, where the Tribunal
24 says:

25 “What, it seems to us, a complainant needs to do is to persuade the Tribunal that the
26 decision is incorrect or, at the least, insufficient, from the point of (i) the reasons
27 given; (ii) the facts and analysis relied on; (iii) the law applied; (iv) the investigation
28 undertaken; or (v) the procedure followed.”

29 Further down, para.116 deals with the question of the extent to which an appellant is entitled to
30 put new material before the Tribunal when challenging a Decision. The Tribunal says there
31 that it is

32 “... difficult to justify a rule of law to the effect that a complainant may not submit
33 new material to the Tribunal that was not before the Director. Apart from the lack of
34 a legal basis for such a rule, there is the practical difficulty that, until he sees the
35 decision, the complainant does not know what grounds he has for an appeal, nor will

1 he necessarily know what steps the Director has or has not taken in the course of his
2 investigation. In the nature of the appellate process, certain points raised by the
3 complainant before the Director are likely to become fully developed, as indeed may
4 the arguments of the Director.”

5 The important passage, we submit, is the following passage:

6 “We accept, however, the Director’s basic argument that, in principle, the original
7 complaint sets the framework within which the correctness of the Director’s decision
8 is to be judged, taking account of the material that he had or ought reasonably to have
9 obtained. An Appeal is not an occasion to launch what is in effect a new complaint
10 and then expect the Director and the Tribunal to deal with the matter on an entirely
11 new basis.”

12 THE CHAIRMAN: I think I indicated last time that there is consideration here that it was
13 a reinvestigation.

14 MR. WISKING: That it was a reinvestigation?

15 THE CHAIRMAN: Yes, that it had been remitted to Ofcom and therefore then it may be that the
16 complainant needs to be much more upfront.

17 MR. WISKING: Indeed, and the issues are well articulated by the time you come to reinvestigation
18 and, as you have heard from my friend, and I have seen in the Ofcom file, that every
19 opportunity was given to all the parties to put any material before Ofcom, and it comes back to
20 the point that I made before that this material was not before Ofcom; nor is it the kind of
21 material that Ofcom is in a position to get.

22 THE CHAIRMAN: I suppose if it is unavailable, if you take the ordinary rules of the courts, if it is
23 unavailable and it becomes available afterwards and could be subject to a new complaint, then
24 it may be in exercising our discretion it is better to come in at this stage than to have to send
25 the whole thing back again.

26 MR. WISKING: There are two points to make about that. First of all, this is the only allegation and
27 it is viewed against the allegation which is made in the Appeal papers, which is not Vodafone
28 once supplied SIMs, but systemically supplied SIMs. It is also telling that Floe made these
29 allegations in the context of the first investigation and you might remember that it was
30 a subject of Floe’s I think it was called the Amended Notice of Appeal, but it was never
31 pursued at the hearing.

32 THE CHAIRMAN: Was it never pursued or was not allowed in?

33 MR. WISKING: It may not have been allowed in.

34 THE CHAIRMAN: I think it may not have been allowed in by the Tribunal – I think that was before
35 I came into the case before I was sitting.

1 MR. WISKING: Well I am not sure, I do remember a case management conference where there was
2 some discussion about the coherence of the allegations of discrimination and whether it was
3 not pursued or not allowed in, it was not taken any further.

4 THE CHAIRMAN: It certainly was not the subject matter of the previous hearing.

5 MR. WISKING: And certainly not in the skeleton submissions made by Floe.

6 MR. ANDERSON: My understanding is that Sir Christopher Bellamy excluded it being part of the
7 case.

8 THE CHAIRMAN: That was my recollection, yes.

9 MR. WISKING: That was also before my time.

10 MR. MERCER: It is also mine, ma'am, as I am the only person who was, I think apart from
11 Miss Durie, at both hearings. You may also recall it was the subject of considerable discussion
12 at the hearing on 1st December last year.

13 THE CHAIRMAN: Yes, because there was the question of whether it was part of the reinvestigation
14 or not?

15 MR. MERCER: Yes.

16 THE CHAIRMAN: But it did become part of the reinvestigation because you did put in evidence of
17 A, B, C, X and Y.

18 MR. MERCER: Yes.

19 THE CHAIRMAN: So the question is how did the new one that you have now put in not get into
20 that?

21 MR. MERCER: Yes, ma'am.

22 MR. WISKING: But also that A, B, C, X, and Y are not to be pursued.

23 MR. ANDERSON: Of course, A, B, C, X, and Y were part of the original complaint which had been
24 excluded by the President at the first hearing.

25 THE CHAIRMAN: Ah, so they were not new ones?

26 MR. ANDERSON: So they were just repeating the same ones, apart from one company – the
27 company dealt with in para.128 of the Defence, which we are now calling “Company Z”.

28 THE CHAIRMAN: And Company Z had not been told to you the first time around, but was told to
29 you the second time around, but you had already investigated the companies A ----

30 MR. ANDERSON: And concluded that there ----

31 THE CHAIRMAN: -- was no discrimination?

32 MR. ANDERSON: Yes, yes.

33 MR. WISKING: The second point to make is a practical one and the Tribunal makes the practical
34 point about “Well, should we allow this in?” One of the consequences of allowing this in is we

1 have in the correspondence pressed Floe to provide the evidence and, aside from the two
2 witness statements, which are at best vague, nothing else has been forthcoming. However,
3 I think you referred to a passage in one of the letters where it says “Well if you disagree with
4 us there is lots more evidence we will provide.” I fear, therefore, that if we do disagree, and
5 I am reluctant to give evidence from the Bar table but I suspect we will disagree, there will be
6 a cascade of further evidence which we will need to respond to, and that is a very practical
7 reason for not allowing this in. If new allegations are to be made like this they should be made
8 fully formed and not as a kind of tactical device – “We will make the allegation, see what they
9 do and then we will respond with evidence which we apparently have but we are not prepared
10 to disclose.” That seems to be Floe’s position.

11 So I would submit that there are two good reasons for excluding: (i) the principal
12 reason based on the *Freeserve* Decision that this was not a matter before Ofcom, and it is no
13 good Floe saying, as I suspect it might, “Well we make this broad allegation of discrimination
14 and therefore we can do what we like”. I do not think that is what *Freeserve* intends. It was
15 intended to allow a complainant or an appellant to develop a point. So, for example, if Floe
16 was disputing (which they are not) Ofcom’s Decision about A,B,C,X,Y and Z it may be that
17 they could produce further evidence in relation to those cases which ----

18 THE CHAIRMAN: It is not only them, “Ofcom did not investigate those properly and in fact I have
19 some more examples as well”?

20 MR. WISKING: Well I reserve my position, we are not there anyway, but my reading of that case
21 is that yes, it might be that there is some matter that Ofcom did not consider in relation to case
22 A, and we have some more evidence of that. I think that is what is intended by *Freeserve*.

23 THE CHAIRMAN: Not to start a new complaint.

24 MR. WISKING: Not to start a new complaint. Secondly, there is the very practical point that the
25 new complaint we have is not fully formed. If that leads to a cascade of more material that will
26 be disruptive to the proceedings. Those are my submissions on the first point.

27 The second point, which may need to take us into camera, and it may be that it is
28 better for the Tribunal to deal with the first point first ----

29 THE CHAIRMAN: Yes.

30 MR. WISKING: -- is whether the information is truly confidential. We only get to that point, of
31 course, if the Tribunal determines that Floe should be allowed to raise these allegations.

32 THE CHAIRMAN: What do you want to do, Mr. Mercer? Would you want to deal with them
33 separately or together?

1 MR. MERCER: I would prefer to deal with them together, ma'am, because I am feeling a bit shy
2 this morning about really opening up in front of Mr. Wisking's client, because I fear that I am
3 going to stray into all kinds of particular matters and I ----

4 THE CHAIRMAN: Well I do not quite understand at the moment, since we are now dealing with
5 only one company and since ----

6 MR. MERCER: It is explaining that point in front of Mr. Wisking's client – exactly that point – that
7 is going to give me some difficulty.

8 THE CHAIRMAN: Do you mind explaining it before Mr. Wisking?

9 MR. MERCER: No, because due to yesterday afternoon's little incident, Mr. Wisking knows – or
10 might well be able to guess what I am about to say, particularly from the nature of our
11 conversation yesterday afternoon.

12 THE CHAIRMAN: Mr. Wisking has a duty of disclosure to his client and that has to be resolved as
13 well. Now, I do not know if that has been solved.

14 MR. WISKING: In relation to the letter or in relation to what we might hear?

15 THE CHAIRMAN: Well what you hear this morning.

16 MR. WISKING: The difficulty is I do not know what I might hear.

17 THE CHAIRMAN: I know. In relation to the letter that has been resolved, has it?

18 MR. WISKING: The letter has been resolved. My client has not seen the letter.

19 THE CHAIRMAN: No, and your client is quite happy not to know the information.

20 MR. WISKING: Correct.

21 THE CHAIRMAN: But you are not happy to be here?

22 MR. WISKING: I am very happy to be here!

23 THE CHAIRMAN: You are not happy to hear something which you do not know whether or not
24 you should disclose it to your client?

25 MR. WISKING: I am not comfortable giving a blanket undertaking.

26 THE CHAIRMAN: I appreciate that.

27 MR. WISKING: And I am not sure what could be said that falls into that category because the point,
28 with respect is a very narrow one.

29 THE CHAIRMAN: I know, but I do not understand what Mr. Mercer might say. The difficulty is
30 that Mr. Wisking has a duty of disclosure to his client and he cannot get informed consent not
31 to disclose to his client when he does not know what you are going to say and he is in the
32 difficult position that he is actually the solicitor who is advising his client and therefore he
33 cannot divorce his mind once he hears it. What happened yesterday he knows what it is and he
34 knows that he can say to his client "Don't worry, it will not cause too much of a problem", but
35 he does not know what you are going to say, so I can understand Mr. Wisking's concern about

1 sitting here without saying that it is going to be confidential in here and not to his client. The
2 name of the company we are addressing has already been disclosed.

3 MR. MERCER: Yes, ma'am, it has, but it is what I want to say immediately after that that I have
4 some difficulty in doing in front of Mr. Wisking's client.

5 THE CHAIRMAN: But Mr. Wisking is his client for that purpose, and if you do it to Mr. Wisking
6 he cannot give an undertaking that he is not going to tell his client.

7 MR. MERCER: So it cannot be treated by him in the same way as yesterday afternoon, accidental
8 disclosure?

9 THE CHAIRMAN: No, that should not have happened, but it did, and he knew what was said, and
10 he was able, because he knows what it was, to take instructions from his clients without
11 identifying what the information was. But we cannot do it in court in that way. The difficulty
12 is that maybe one ought to start off on a different basis: is this material confidential at all? If it
13 is confidential then we may have to find a way of dealing with it.

14 MR. MERCER: Can I just address you generally on the issue for a moment, in theory? This
15 argument that we have with Mr. Wisking is really nothing to do in one sense about
16 confidentiality, because we have gone on from that issue. Why do we have an argument?
17 Why we are here really is because Mr. Wisking, on behalf of his client, will not give an
18 undertaking that having received that information they will not act upon it.

19 THE CHAIRMAN: Well I do not think I can enter into that because they say that if they are
20 committing a criminal offence they have to act on it, and they are not prepared to give that
21 undertaking.

22 MR. MERCER: Yes, but with respect Messrs. Vodafone, not even Messrs. Herbert Smith, are
23 a properly constituted court for the purpose and I strongly suspect that my client's rights under
24 Article 6 of the ECHR would be engaged at that point.

25 THE CHAIRMAN: Mr. Mercer, what I do not understand is that Vodafone know from the witness
26 statements that there is an allegation against Recall?

27 MR. MERCER: Yes, ma'am, that is where I get into great difficulty. It is the nature of the
28 allegation, it is why the two sentiments – Mr. Wisking almost said this morning “Why is it that
29 the allegations about SIM cards are split in the witness statements?”

30 THE CHAIRMAN: What do you mean, “split in the witness statements”?

31 MR. MERCER: Well ----

32 THE CHAIRMAN: You cannot say?

33 MR. MERCER: I cannot say. You appreciate mine and my client's position. We have been given
34 information to a degree significantly in confidence by those trying to assist.

1 THE CHAIRMAN: The difficulty is that in an ordinary court there is no confidence. In certain
2 areas, for example: patent law where they recognise commercial confidence, and in this court
3 where we recognise commercial confidence, we set up procedures where there can be
4 confidentiality if it can be established that there is a real risk to confidence and it is
5 commercially sensitive, and very sensitive. When one does that, one must make sure that one
6 is not putting anybody who is within the ring in a difficult position, and Mr. Wisking is at the
7 moment saying – as I understand it – that you think that you may be compromised if
8 a confidentiality ring was established for the purposes of whatever Mr. Mercer wanted to say
9 this morning. I am not pushing you at all.

10 MR. WISKING: No, but as I indicated before a fundamental question is ----

11 THE CHAIRMAN: Whether it is in our out.

12 MR. WISKING: One, whether it is in or out; and two, whether there is even an issue about the
13 confidentiality. So in a sense you do not get to ----

14 THE CHAIRMAN: Except that the difficulty is that Mr. Mercer says that he cannot explain what the
15 issue about confidentiality is, that is the problem.

16 MR. WISKING: Well looking at this purely hypothetically, the problem with confidentiality is,
17 I suspect, that the very people that we need to talk to about the allegations are the people we
18 would not be allowed to talk to. There are numerous problems but that is just one of them. For
19 example, it may well be that we would need to take instructions from Vodafone Security
20 Department. I suppose those are the very people that Mr. Mercer would not want us to talk to,
21 and so there is a problem there. We say the preparation of our defence should not be impaired
22 by these sorts of constraints.

23 THE CHAIRMAN: Well it looks as if I am going to have to decide the substantial point first and if
24 it is let in we will have to decide the confidentiality.

25 MR. ANDERSON: May I suggest, as a possible way forward ----

26 THE CHAIRMAN: Yes.

27 MR. ANDERSON: -- if my learned friend, Mr. Mercer, was able to indicate to the Tribunal whether
28 he wished to stray beyond what is contained in the fuller copy of the most recent response
29 which the Tribunal has seen and which we have seen, but Vodafone has not seen, and if his
30 problems arise out of the contents of that then I would suggest the Tribunal is very well placed
31 to take a view on whether it is appropriate or not for Floe to rely on any of that material unless
32 disclosed to Vodafone. Our view would be that they could not, and should not be allowed to as
33 a matter of natural justice and, in any event, the entire debate is outside the scope of the
34 Appeal, so we would agree with what my learned friend has been saying on behalf of
35 Vodafone as to the scope of the Appeal. But that might assist the Tribunal to get a clearer

1 picture of what Mr. Mercer's difficulties are if they are confined to what is contained under
2 para.10 in that response.

3 THE CHAIRMAN: It may be, even though it is Vodafone's application, that we could look at the
4 letter of 11th October between you and Mr. Mercer.

5 MR. ANDERSON: The letter of 11th October?

6 THE CHAIRMAN: That is the one you are talking about, is it not?

7 MR. ANDERSON: No, I am talking about the letter of 26th September, which you will recall they
8 sent a redacted version of that response to Vodafone and that sets out, as far as I can see,
9 a fuller picture of the recall allegation.

10 THE CHAIRMAN: This is under appendix para.2(e) or para. 10?

11 MR. ANDERSON: Well under para.10 one gets more detail. If you just read that through right
12 down to and including in particular subparagraph (f), and compare that with the two paragraph
13 4s in the witness statements of Stonehouse and Happy, one gets a fuller picture. It is that
14 information that Mr. Mercer is not prepared to disclose to Vodafone.

15 THE CHAIRMAN: (Pause for reading) Yes.

16 MR. ANDERSON: Of course, Ofcom's position is we have taken our decision, we have closed our
17 investigation. There is nothing we can do with this information unless we were to launch
18 a new investigation. If this matter is to be ventilated before the Tribunal at all, and we would
19 agree with Vodafone that it should not, in our view it cannot possibly be ventilated without
20 Vodafone having access to that material. It is at the receiving end of the accusations.

21 THE CHAIRMAN: And if the complaint had been made to you, you would have done the same as
22 you did with A, B, C, X and Y ----

23 MR. ANDERSON: We would have investigated it.

24 THE CHAIRMAN: -- and you would explain how you had done it?

25 MR. ANDERSON: And we would have had powers, serving notices on Vodafone and so on, which
26 we cannot now do. It is quite clear from Mr. Mercer that he has only pursued this investigation
27 after the second Decision, although one sees from his letter of 16th December his allegation is
28 that the discrimination of which this are particulars, was occurring from the date of the first
29 Judgment is what they claim, so we would say in the circumstances the best course for the
30 Tribunal is simply to exclude all this from this case, you have enough on your plate to get on
31 with without this.

32 MR. MERCER: I am sure they would all love that. The answer, ma'am, is that discrimination has
33 been a part of this case right from the beginning and it finally got in here, and it should not be
34 a surprise to Ofcom to know that there are, in our submission, sufficient instances of occasions
35 when the general allegation of discrimination was made in the course of the investigation.

1 Neither should it be a surprise that what it is quite likely that we would like to say about it is
2 they did not actually investigate things terribly thoroughly.

3 THE CHAIRMAN: Mr. Mercer, what is going through my mind is why did the President exclude it
4 last time? Was it because there was not sufficient evidence?

5 MR. MERCER: No, ma'am, not as far as I recall.

6 THE CHAIRMAN: Do we have the Decision?

7 MR. ANDERSON: Mr. McInnes's recollection, and I would need to check ----

8 THE CHAIRMAN: We are just checking.

9 MR. ANDERSON: -- is that the allegation of discrimination was not in the original Notice of
10 Appeal and an application was made to amend it to bring it in. The point why the President
11 decided not to allow that amendment I do not know.

12 THE CHAIRMAN: We will see if it is there. It may be it was not in the original ----

13 MR. MERCER: It was in the original complaint, but not in the original Notice of Appeal.

14 THE CHAIRMAN: And he did not allow you to amend the Appeal?

15 MR. MERCER: As I recall, ma'am, he laughingly said that we had enough to deal with without
16 having to deal with that.

17 THE CHAIRMAN: (Pause for reading) I can read out what the President said – it is para.60 of his
18 Decision on 30th April 2004:

19 “The Second Alternative Argument is, however, in a different category in our view.
20 The issue of discrimination was originally raised in Floe's complaint, but it does not
21 appear anywhere in the Notice of Appeal. It is a point which would apparently
22 require further factual investigation, possibly extensively. It potentially affects third
23 parties not before the Tribunal. If Floe's activities are lawful, as a result of Primary
24 Argument, or the First Alternative Argument, Floe does not need the Second
25 Alternative Argument. On the other hand, if Floe's activities are unlawful it is
26 difficult to see how an uneven enforcement of the law could aid Floe. We would not
27 therefore be minded to give permission to raise the Second Alternative Argument, in
28 the exercise of our discretion under Rule 11(1), without it being necessary to consider
29 the application of Rule 11(3) in relation to the Second Alternative Argument.”

30 MR. MERCER: Yes.

31 THE CHAIRMAN: So he was saying at that stage effectively it was not necessary to go into it and it
32 required a lot of evidence.

33 MR. MERCER: Yes, and I think the root point was that though it had been in the original complaint
34 it was not in the original Notice of Appeal and the comment was made I think, ma'am, in the
35 context of things being within the four corners of the original Appeal.

1 THE CHAIRMAN: Yes.

2 MR. MERCER: Ma'am, forgive me going back over a point but, forgive my ignorance, I am at
3 a loss to understand why the whole problem just cannot be solved by Mr. Wisking's client
4 giving an undertaking not to take precipitate action until the matter is decided.

5 THE CHAIRMAN: He is not prepared to do it and that really closes the door to it, does it not?

6 MR. MERCER: It seems to me that that is the pragmatic and practical solution.

7 THE CHAIRMAN: They consider that the need to look into it; if it means they are committing
8 a criminal offence they would have to take some action. They cannot be absolved once they
9 know.

10 MR. MERCER: That may well be resolved when the issues in the matter are before the Tribunal.

11 THE CHAIRMAN: It is not a matter for me, it is a matter for them. Let us see what Mr. Wisking
12 says.

13 MR. WISKING: You accurately stated the position. There are other matters, however. There is
14 nothing before the Tribunal about the disposition of this business, e.g, what does Mr. Mercer
15 mean by precipitate action? Are we allowed to deal with breaches of contract, non-payment of
16 invoices. There is nothing in front of the Tribunal that Mr. Mercer has advanced about what
17 this business is doing or what we are meant not to do in relation to it, we cannot give an
18 undertaking.

19 THE CHAIRMAN: But in any event that is stage 2.

20 MR. WISKING: Indeed, we have not got past stage 1.

21 THE CHAIRMAN: We have not got past stage 1. Stage 1 is whether we allow it in anyway. As
22 I understand it this information was not provided to Ofcom for the purposes of their Decision.
23 It would require a new investigation into that complaint and therefore there cannot be an
24 Appeal against an investigation that has already occurred, because the investigation has not yet
25 occurred. So the only basis upon which one could consider letting it in is if it was considered
26 that, for whatever reason, it is appropriate that new evidence is put before this Tribunal which
27 ought to be considered. I am going through this so that you can then address me

28 MR. MERCER: Yes.

29 THE CHAIRMAN: One of the issues when you are considering whether new evidence should be
30 put before this Tribunal is what investigation would be required, and what is being said is that
31 it would need proper inquiries, proper notices to Vodafone. Vodafone would be given some of
32 this information in any event during those inquiries, and Ofcom have quite properly set out
33 exactly how they would approach it and how they would approach the others. In those
34 circumstances you will have to convince me that it is right to bring it in at this stage when it
35 was not part of the complaint, and the fact that the complaint was discrimination you will have

1 to convince me that is sufficient, because it seems to me that if you do not actually identify the
2 discrimination that you are alleging Ofcom cannot investigate it.

3 MR. MERCER: Well I see things as being rather more straightforward, which is that we made the
4 allegation and we told them we were making the allegation.

5 THE CHAIRMAN: What is the allegation?

6 MR. MERCER: The allegation is discrimination, that there are people out there who are operating
7 SIM cards in extremely large quantities.

8 THE CHAIRMAN: How are they supposed to investigate that allegation?

9 MR. MERCER: Well, ma'am, I am not Ofcom, but if you asked me I would start by looking at the
10 websites of RB Net and BandX and start looking for what kind of minutes are publicly traded
11 in respect of this and if they did that they might well have found, for example, that there are
12 minutes traded. I would go out and I would be looking, talking to and using my investigative
13 powers which exist in respect of companies like those listed and asking them questions about
14 what is going on in the industry.

15 THE CHAIRMAN: So your complaint against Ofcom is that they did not properly investigate the
16 discrimination, not that they have not investigated this particular ----

17 MR. MERCER: And if they had they would have easily found, for example, the large one that we
18 are all talking about this morning.

19 THE CHAIRMAN: Which is identified in the witness statements?

20 MR. MERCER: Yes. Now I quite agree with you that anybody in Floe's position has to be up front
21 with the Regulator during the course of the investigation, and I do not see that Floe was other
22 than up front in saying and in making a general allegation. With respect, Floe does not have
23 the powers that Ofcom does; and if we were able to find out this sort of thing I certainly do not
24 see why they should not. It is not as if we are talking about something which is not widespread
25 in our submission. People keep saying "Well you have been making this allegation all along",
26 well we have and that is because it has been going on all along and it is one of the disturbing
27 factors of the case in our opinion.

28 While we are on the subject of information, ma'am, you will note the Ofcom's letter
29 of yesterday afternoon to the Tribunal in which they say that they are disclosing the names of
30 A, B, and C and other people to Vodafone.

31 THE CHAIRMAN: Yes.

32 MR. MERCER: You may disagree with me, ma'am, but that horrifies me because it then becomes
33 difficult to establish, for example, when it has been reported that SIMs have been turned off in
34 respect of these companies you have to start then examining when it happened – was it before
35 or after they were told by the Regulator. Part of the whole nature of Floe's case, ma'am, is that

1 people in an allegedly dominant position like Vodafone should not go around acting as they do.
2 We all know the case references from European cases that clearly state that those in a dominant
3 position should take extra special care in the way they act.

4 Part of the difficulty we are coming up against this morning, ma'am, in the exchange
5 between you and me is that I really have little concern as to whether or not Vodafone think
6 what my client is doing is a criminal act, because until it is proved to be a criminal act they
7 should not be acting as if it is, because they are not a properly constituted court and they are
8 not the judge. That is a real part of this case, that people in their position just should not have
9 the power through their dominance to go "Oh, it looks to us in our opinion that that is
10 a criminal offence, we'll just switch that off, shall we?" That is wrong, and that is an abuse.

11 THE CHAIRMAN: But that is not the problem we have.

12 MR. MERCER: It is exactly the problem we have here, ma'am.

13 THE CHAIRMAN: Because if they went and did it in A, B, C, X or Y, A, B, C, X or Y can
14 complain.

15 MR. MERCER: They could do.

16 THE CHAIRMAN: We are dealing with Floe.

17 MR. MERCER: There is a public interest point here, ma'am. It is very difficult for Floe to say
18 "Thank you for telling me but I can't do anything about the very good example of what is
19 going on that you told me about, because if we do tell the other side the first thing they will do
20 is switch you off."

21 THE CHAIRMAN: The first question is: should we let it in? The second question is: how do we let
22 it in? Is it confidential, and what steps do we take if it is?

23 MR. MERCER: As to whether or not it should be let in, just to summarise what I hope I have been
24 trying to get across, it has been part of the case right from the beginning, from the original
25 complaint, we keep saying this is what is going on, and all that happens is reactive
26 investigation – not proactive investigation, and that is not good enough. What we are doing is
27 providing evidence that discrimination does exist. You can look at it another way which is that
28 the discrimination which is alleged continued during the period of investigation, but they did
29 not find it.

30 On that point, is there anything else that I can help you with?

31 THE CHAIRMAN: I do not think so, thank you. I think Mr. Anderson might want to say
32 something.

33 MR. ANDERSON: Only very briefly on this question of investigation. Of course, there is a
34 threshold that we have to pass before we can launch an investigation under s.25 of the Act, we
35 need to have a reasonable suspicion. We cannot simply embark upon an investigation against

1 the industry as a whole simply because Floe waves a flag and shouts “Discrimination”. We
2 need to have some basis upon which to investigate. We need to have some indication of who
3 is being discriminated against and by whom. Those allegations when made by Floe were
4 investigated by Ofcom and dealt with in the second Decision – companies A, B, C, X and Y.
5 That is the full extent of the investigation that was undertaken, and was an entirely reasonable
6 limit to place on that investigation. These new allegations have not been investigated – as
7 I say, we have enough to be getting on with at the moment – but on any view we could not
8 investigate these matters without Floe or Vodafone being in a position to comment on them.

9 If we took the view that what has now been alleged gave reasonable grounds for
10 suspicion then we might pursue the matter, but that is not the position we have arrived at. The
11 question at the moment is whether it should be included within the scope of this Appeal, and
12 for the reasons that my learned friend has indicated, and indeed the President indicate the last
13 time round, we submit that it is not appropriate to include these further allegations in the scope
14 of this Appeal.

15 THE CHAIRMAN: You did investigate A, B, and C ----

16 MR. ANDERSON: Yes.

17 THE CHAIRMAN: -- if the results of that investigation had been that in one or more cases there
18 were bouts of suspecting discrimination then what may you have done?

19 MR. ANDERSON: That may well have required us to go on and consider further issues on the
20 whole question of infringement, the kinds of issues we have identified in the Defence as issues
21 we did not look at. As soon as one gets to the point of believing there may be something in an
22 accusation of abusive conduct then one moves on to the next stage. Our investigation covered
23 what was alleged against Vodafone, we dealt with it, and came to the conclusion there was not
24 discrimination and now we need to move on to the next question of dominant position, market
25 share, restriction of competition, effect on trade and all that sort of thing.

26 THE CHAIRMAN: And the point Mr. Mercer was making is that it is sufficient that he waves the
27 flag that says “Discrimination” on it. You are saying it is not sufficient that you wave a flag
28 that says discrimination, you have to wave a bit more. Well he waved a bit more he waved
29 A, B, C, X, Y and Z, and you investigated A, B, C, X, Y, Z, and it came up negative, and he is
30 not challenging that. Had one or more of A, B, C, X, Y and Z what he is saying now is you
31 ought to have taken steps to go into the market and have a look in any event.

32 If one of those (or more than one of those) had come up positive then would you have
33 widened – or is there a possibility that you might have widened – your ----

34 MR. ANDERSON: I do not know without going back and looking at all the s.26 Notices quite how
35 wide the investigation. One would need to look and see exactly what we did ask Vodafone,

1 T-Mobile, and whoever else, exactly what was going on. But we undertook an
2 investigation ----

3 THE CHAIRMAN: I just want to make sure that we have looked at it properly before we Rule.
4 I wonder if we ought to look at your Decision on this, on the way the grounds of Appeal have
5 been put.

6 MR. ANDERSON: Paragraph 313 onwards. You will see at 316 Vodafone makes the complaint
7 and you will see that at 316 Vodafone makes a complaint. It has named certain companies, we
8 have investigated those.

9 THE CHAIRMAN: They named three companies, yes. (Pause for reading)

10 MR. ANDERSON: You will see from 318, it does not appear the investigation is confined to those
11 three companies, but it is more general.

12 THE CHAIRMAN: "... including three companies".

13 MR. ANDERSON: "... including three companies", and you will see, if one turns over the page,
14 325, there is reference to a large number of disconnections, certainly beyond the three
15 companies identified, so we have certainly looked at the issue in a broader sense and
16 nonetheless reached the view that we reached.

17 THE CHAIRMAN: So your question must have been broader because they have identified 38
18 companies?

19 MR. ANDERSON: Yes.

20 MR. WISKING: I can confirm that there was a series of questions in the s.26 request which went
21 beyond the specific instances related to the traffic monitoring and so forth that Vodafone had
22 undertaken, and the suspension of SIMs more generally.

23 MR. ANDERSON: My colleague, Mr. McInnes will correct me if I am wrong, but I do not believe
24 that the company that is the subject of this morning's debate was identified to Ofcom and
25 therefore no questions would have been asked specifically in relation to that company.

26 THE CHAIRMAN: Well that is admitted effectively because it is said, I think Mr. Mercer told us
27 this morning, that it was only after the first Decision – well no, it must have been only after the
28 second Decision ----

29 MR. ANDERSON: Only after the second Decision, yes.

30 THE CHAIRMAN: -- that this came to light.

31 MR. MERCER: I wonder if I might just call your attention to one matter, which is para.319. On the
32 basis of this Decision the only people who appear to have been contacted in this investigation
33 are Messrs. Vodafone and that is something on which I think we would want to place some
34 emphasis.

1 THE CHAIRMAN: Yes, but in para.325 it says: “Vodafone has confirmed that it has disconnected
2 SIMs used by a total of 38 companies”, so it looks as if the question must have been “Can you
3 give us all the disconnections?

4 “.. including companies that had purchased SIMs directly from Vodafone Corporate
5 and which Vodafone suspected of operating Commercial Multi-User GSM Gateways
6 and also SIMs used by its service providers where Vodafone suspected either those
7 service providers, or the service providers’ customers were using the SIMs in
8 Commercial Multi-User GSM Gateways. Vodafone stated this amounted to between
9”

10 and something has been taken out there, “... SIMs in total”. Now that is quite a wide
11 investigation that went on.

12 MR. MERCER: Yes, ma’am, and the point which is being made in return is, well, that is very
13 interesting but you did not look very far. If you had gone out into the market, here is an
14 example – an example which we describe is literally thousands of SIMs with one operator
15 given the period approximately two years from the date of the events of the original complaint,
16 still in operation ----

17 THE CHAIRMAN: But, Mr. Mercer, we are only talking about one operator now, the one that is
18 identified in Mr. Stonehouse’s and Mr. Happy’s witness statement.

19 MR. MERCER: Yes.

20 THE CHAIRMAN: So one question is: was that operator part of the 38 companies that were subject
21 to this investigation?

22 MR. MERCER: I think the reference to 38 companies are those which Vodafone ----

23 THE CHAIRMAN: “... including companies that have purchased SIMs directly from Vodafone
24 corporate and which Vodafone suspected of operating commercial Multi-User GSM Gateways
25 ...” It is quite a wide ----

26 MR. MERCER: Our allegation clearly is that the company concerned is not part of the 38, and what
27 it is a prima facie example of is that there are substantial examples of companies who are not
28 included.

29 THE CHAIRMAN: You do not know that, you have no evidence that it is not part of the 38.

30 MR. MERCER: My belief, having talked to the company concerned is that they are not part of the
31 38, they have not had their SIMs switched off – by Vodafone I currently add.

32 THE CHAIRMAN: Right.

33 MR. MERCER: I come back again to the fact that you do not need to be as bright as me, and know
34 as much about telecoms. as I do, which is precious little, to be able to look at the website of
35 some of the trading companies, like BandX or RB Net to know that people are trading GSM

1 Gateway minutes – you can tell that from the rates being used, and the fact there is no CLI and
2 things like that. This thing is going on and I am finding it quite surprising that Ofcom wants
3 to close their eyes to it.

4 THE CHAIRMAN: Mr. Anderson, you were interrupted?

5 MR. ANDERSON: Only to reiterate that we conducted what we considered to be an appropriately
6 broad investigation into the allegation of discrimination. It seems to be what Mr. Mercer is
7 suggesting, that we should have sought from Vodafone the identity of every single person to
8 whom they sold SIMs – millions of them – pursued each of them to find out what the nature of
9 their business was to see if they could have been undertaking illegal Multi-User GSM services.
10 It is just simply impractical. We have had two new companies mentioned today that were
11 trading in SIMs, well if that was part of their case on discrimination ----

12 THE CHAIRMAN: One new company.

13 MR. ANDERSON: Band X and RB Net, they say they trade in minutes of SIMs, well if that was
14 part of his allegation, or evidence on discrimination, something he says anybody would have
15 known about, he should have mentioned it and we would have investigated it. What is
16 happening now is new allegations, new specifics outside the scope of the Decision and
17 inappropriate for this Appeal. I do not really see that there is much more that I can add.

18 MR. MERCER: Mr. Anderson gives a distorted view of what Ofcom had to do. You just have to
19 know about the industry, and you just have to know how it works, and they have got people
20 who are supposedly experts in this part of the industry and experts in conducting
21 investigations, and it is not, as Mr. Anderson tries to suggest, looking for a needle in
22 a haystack. The evidence is out there if you go looking for it.

23 THE CHAIRMAN: Mr. Mercer, that rather cuts against you, because if the evidence is out there and
24 they could have found it at the time then you could have alerted them to it earlier.

25 MR. MERCER: We had thought the nature of the general allegations made was enough to do that.
26 Clearly we were wrong in that, ma'am.

27 THE CHAIRMAN: You told them A, B, C, X, Y and Z. There is no reason that you should not
28 have told them the names of other companies?

29 MR. MERCER: Well we could have gone on *ad infinitum*, ma'am.

30 THE CHAIRMAN: Well it is not *ad infinitum* because there is only a limited number of companies
31 that are in this industry and are doing this.

32 MR. MERCER: We gave them what we thought were pretty good examples, ma'am, and I draw
33 your attention to the fact that it does look from the Decision letter (as far as we read it) that the
34 only people who were asked about these companies were Vodafone. They did not ask the
35 companies themselves.

1 THE CHAIRMAN: Mr. Wisking, do you have anything to add?

2 MR. WISKING: I do not think I do. I think the point I was going to raise, and I think the Tribunal
3 has already identified this point, the allegations are systemic and long running discrimination.
4 We have only one instance that is being raised, and Floe is not challenging the findings of
5 Ofcom on the other instances it has raised.

6 The second point my friend made which is we hear from the Bar table all the ways in
7 which you can investigate this, and this was never put to Ofcom – I have seen the Ofcom file,
8 there is no reference to all these other companies or the way in which one could investigate the
9 issue.

10 The third point perhaps is one that explains Mr. Mercer's difficulty. He says this is
11 going on, but of course his allegation is that Vodafone knows it is going on and I think his
12 difficulty, his only evidence, when Mr. Happy says in para.7 that this is going on but no one
13 knows about it because the Gateways are hiding. He says that they ensure they restrict the
14 number of minutes going through a particular SIM to prevent it being brought to the operator's
15 attention. So in essence the position is worse, that Floe actually knows it is going on, it is
16 difficult for Ofcom to find, it is difficult for Vodafone to find it because they are hiding, and
17 Floe never put that to Ofcom, and that is where we stand.

18 MR. MERCER: I can deal quite quickly with that. There are two types of mystery Gateways, the
19 ones who, by using dynamic minute allocation hide themselves, that they never come up
20 showing enough minutes going through to raise the attention of fraud departments of Messrs.
21 Vodafone and the other MNOs. Then there are other Gateways, we allege, where parts of
22 Vodafone and, in particular, those parts associated with sales, know full well what is going on
23 and are quite happy to permit because of the commissions it raises, people providing
24 Gateways. It should not be assumed, ma'am, I think, from what I have seen, that Vodafone's
25 legal and regulatory departments necessarily know everything.

26 THE CHAIRMAN: You say that because the sales' people know, therefore Vodafone knows?

27 MR. MERCER: SIMs are sold, we would allege with the active connivance of the sales' and
28 marketing departments, and that they know what they have been sold for.

29 THE CHAIRMAN: So you are saying that the question that should have been asked of Vodafone is
30 "Have you sold any SIMs for GSM Gateways?"

31 MR. MERCER: For commercial marketing in Gateway use, yes, ma'am.

32 THE CHAIRMAN: We do not know, do we, if that question has been asked?

33 MR. ANDERSON: I do not suppose it would have been asked in those terms. What Ofcom does is
34 serve s.26 Notices on Vodafone and then Vodafone then answers them.

1 THE CHAIRMAN: Yes, and the question that was asked, or we think was asked, because we have
2 para.325, is “Have you disconnected SIMs?” Not, “Have you supplied SIMs which you have
3 not disconnected?”

4 MR. ANDERSON: We can look at what the actual questions are, I do not know precisely what is in
5 the s.26 Notices, that is something when we get on to disclosure one could ----

6 THE CHAIRMAN: That is Mr. Mercer’s point, is it not? That it is no good what he has
7 disconnected because what has been disconnected will not be discrimination. The question is
8 what has not been disconnected?

9 MR. ANDERSON: That is the point I was making. One needs some material to go on before we
10 can investigate.

11 THE CHAIRMAN: Yes, but he says there is a general point here, discrimination.

12 MR. ANDERSON: Yes.

13 THE CHAIRMAN: And that we know that SIMs have been supplied for commercial use and have
14 been disconnected, so you can start with that as a premise.

15 MR. ANDERSON: Yes.

16 THE CHAIRMAN: So the next question is: well, how do you find out if there has been any
17 discrimination? A question that Vodafone could have been asked, and might have been asked
18 is “Have you supplied any SIMs for GSM Gateways for commercial use?”

19 MR. ANDERSON: “Knowingly supplied”.

20 THE CHAIRMAN: Well, if they do not know they will not be able to answer, so “Have you
21 supplied any for that purpose?”

22 MR. ANDERSON: I cannot answer the question as to precisely what questions were asked.

23 THE CHAIRMAN: The likelihood is if they had been asked that originally they would certainly
24 – well depending on what the commercial use problem is – they would have said “yes, but we
25 cut them off”, because that I what para.325 0000

26 MR. WISKING: We would not have known at the time, but ----

27 THE CHAIRMAN: But at some point, yes.

28 MR. WISKING: -- we would have detected them, and we have gone through a process here. It is
29 a difficult question to answer in those terms, because obviously, as has been alluded to, we
30 were asked something and I am not sure of the figure, but there are perhaps in excess of 50
31 million SIMs out there.

32 THE CHAIRMAN: No, I think one is looking at it from the wrong end of the telescope, because if
33 you confine the question to “Have you supplied any for commercial use GSM Gateways?” then
34 it is not the million of SIMs that are out there, it is asking, effectively the sales’ department,
35 whether they have supplied them for that purpose. What Mr. Mercer was saying is that the

1 sales' departments know but the rest of them at Vodafone do not, and that question would have
2 identified it. You might come back and say "No, no, we have not." If you are right, the
3 answer would be that you have not. But I think Mr. Mercer's complaint is that the question
4 that needs to be put I think is this narrow question which would then have given Ofcom the
5 answer, and it may well have been put.

6 MR. ANDERSON: As I say, without looking at the s.26 Notices I cannot say precisely what was
7 asked. We do know, for example, we were asking Vodafone about the criteria they used for
8 identifying commercial Multi-User Gateway service provision.

9 THE CHAIRMAN: There may have been enough there.

10 MR. ANDERSON: That may have been sufficient, but what may well not have occurred is that
11 Ofcom specifically asked Vodafone if they knowingly supplied SIMs for commercial Multi-
12 User Gateway.

13 THE CHAIRMAN: I am not sure one would say "knowingly"----

14 MR. ANDERSON: No, but "Are you aware of having done that?" because that would in our view
15 be asking them to answer a question the answer to which may be admitting to a criminal
16 offence, and there may be difficulties in a Regulator putting a question in that form. We can
17 look at the s.26 Notice and identify to you ----

18 THE CHAIRMAN: Have you got the s.26 Notices with you?

19 MR. ANDERSON: I have not got them with me, no. They are part of the disclosure exercise which
20 we are going to turn to now having finished the Defence last night, but they have been
21 disclosed, so to the extent that the Tribunal has the disclosure documents the Tribunal has the
22 s.26 Notices, I just do not physically have them here today. Of course there was more than one
23 s.26 Notice served on Vodafone.

24 THE CHAIRMAN: Should I rise for a moment and just see whether we can find out what happened
25 in relation to that.

26 MR. ANDERSON: Of course.

27 THE CHAIRMAN: Before I do that, Miss Durie, you have not said a word in relation to this, did
28 you want to – and I note the time?

29 MISS DURIE: No, that is fine.

30 THE CHAIRMAN: You are just sitting here noting?

31 MISS DURIE: Noting, particularly since the allegations about Recall are also made against
32 T-Mobile.

33 THE CHAIRMAN: Right, but you were not going to add anything?

34 MISS DURIE: No, my learned friends have covered it adequately.

35 THE CHAIRMAN: You have a time constraint?

1 MISS DURIE: I do, I am afraid, yes, if I could be excused.

2 THE CHAIRMAN: Yes. I will rise for five minutes.

3 (The hearing adjourned at 12.35 p.m. and resumed again at 12.50 p.m.)

4 MR. ANDERSON: I thank the Tribunal for letting me look through your bundles on disclosure, and
5 as in many cases nothing is quite as black and white as one would like it to be. The position
6 appears to be that we asked Vodafone how they identified the Multi-User Gateway providers
7 and they gave us the criteria that they applied for identifying this use, and then the names of
8 companies that, using these criteria, they had identified. We then asked them “Did you stop
9 supplying all those that you suspected of operating these GSM Gateways?” To which the reply
10 was “In accordance with its standard procedure as described in its response to the first Notice,
11 as far as it is aware Vodafone suspended all suspected SIMs where it did not receive evidence
12 of lawful use and except where SIMs were barred by the relevant service provider instead.” It
13 follows from that that the information Vodafone has provided to Ofcom is that in every case
14 where we suspected unlawful use we disconnected – putting the shoe on the other foot. In
15 other words, there were no examples of a service provider acting in this way that was not
16 disconnected.

17 THE CHAIRMAN: So, let us go back to the first question. You asked them how they identify the
18 Multi-User providers?

19 MR. ANDERSON: Yes.

20 THE CHAIRMAN: The answer was “The number of calls going through”, was it not?

21 MR. WISKING: Well it is a combination of traffic analysis and then subsequent investigation which
22 might be letters, it might be site visits.

23 THE CHAIRMAN: Yes, but it was looking at what was going on rather than looking at the original
24 contract?

25 MR. WISKING: Yes, but what I think is alleged is, it is a bit like heaven and hell that the fraud and
26 regulatory departments have found it is the rogue salesmen and, in effect, what is being asked
27 is “How did you detect them?” and Ofcom are satisfied that the manner of detection is
28 appropriate. Then, having detected them “Did you suspend SIMs?” or whatever, and the
29 answer is “We did”. So there would be a problem if, on Mr. Mercer’s case, the regulatory
30 department, which he says does not know what the sales’ department is doing, has detected
31 Gateways and then said “We will not do anything about them because it is important to the
32 salesmen.

33 THE CHAIRMAN: What it seems to me, Mr. Mercer, is this, that you say that the sales’ department
34 knew. Now, the fact is that whether they knew they sold them for GSM Gateways or not, just

1 assume they knew – they sold me one and I was going to use it for a GSM Gateway. If I was
2 using it for a GSM Gateway, then on the traffic analysis it ought to come up.

3 MR. MERCER: Yes, ma'am.

4 THE CHAIRMAN: Therefore, if Vodafone identified all the people on traffic analysis they ought to
5 have identified all the people using it, whether Vodafone knew at the start or not. So the 38
6 ought to be the 38.

7 MR. MERCER: Yes, except for one thing, you see, ma'am, that I alluded to earlier, which is
8 dynamic traffic allocation, which is a means, in a multi-SIM situation, of allocating – you
9 choose a number which you imagine is below the figure chosen by certain parts of Vodafone
10 and you programme the equipment to never hit that number of minutes.

11 THE CHAIRMAN: Then you are trying to deceive Vodafone, and why would you try to deceive
12 Vodafone if they sold it to you for that purpose?

13 MR. MERCER: Well you might do it for a number of purposes. You might do it, for example, and
14 I am just taking a hypothetical example, because your deal relates to a certain number of
15 minutes per month, per SIM, and over that amount you may pay more. So there are perfectly
16 legitimate reasons for doing that on occasions.

17 THE CHAIRMAN: No, but on this occasion?

18 MR. MERCER: You might do it for a perfectly legitimate reason in not wishing to overload
19 a particular cell which you have dynamically allocated to yourselves.

20 THE CHAIRMAN: Then how do you say that they discriminated, because they would not have
21 known that they were within the offensive group, because they were not causing the black
22 number of lines, or that amount of traffic.

23 MR. MERCER: Yes, but without going back on all of the evidence, the evidence from Floe, as
24 I understand it, is that when they tried to discuss technical matters with Vodafone and talked
25 about shortening the number of minutes or whatever, or finding a means of getting around the
26 problems that Vodafone had, that literally call is over and switch off, there was no discussion.
27 Vodafone discriminating because, let us put it in two propositions: first, they are choosing
28 arbitrary minutes per SIM card level which – I have not read all of the documentation – I do
29 not even yet know whether that limit has ever been disclosed to Floe; and secondly, because
30 there are people in its own organisation who are knowingly, or recklessly - because I would
31 add “recklessly” ----

32 MR. WISKING: Which is an amendment to your pleading.

33 MR. MERCER: -- selling SIMs.

34 THE CHAIRMAN: For commercial use?

1 MR. MERCER: For commercial use. Some people stay in business – and some do not – doing the
2 same thing. The whole point of the allegation is in some cases it is with the connivance of
3 people in Vodafone. In some instances, even when fairly senior people in Vodafone get to
4 hear about it nothing happens. Part of what we have been told is that in one instance Vodafone
5 write saying “We are going to switch off”, there is then a meeting, and they are not going to be
6 switched off any more. It is that kind of behaviour, ma’am ----

7 THE CHAIRMAN: Mr. Mercer, we are only talking about one operator. We are not talking about
8 lots of operators. The seven operators that you have previously mentioned have all proved
9 negative, and you accept that.

10 MR. MERCER: That is not quite what I said. I said I am not challenging what Ofcom say in their
11 Decision letter, but it is our point they only asked one side, they did not do a proper
12 investigation, so what were they likely to find?

13 THE CHAIRMAN: What do you say in your Notice of Appeal? I think it is p.8.

14 MR. MERCER: “The reality of the situation is that throughout the period concerned ...”

15 THE CHAIRMAN: I am just reading it. (Pause for reading) It says: “Indeed, Vodafone recently took
16 a decision not to switch off”.

17 MR. MERCER: Yes, that is what I have just alluded to, ma’am, yes.

18 THE CHAIRMAN: Is that one that the one which you are giving?

19 MR. MERCER: Yes, ma’am.

20 THE CHAIRMAN: Which is the Mr. Happy and Mr. Stonehouse example?

21 MR. MERCER: Yes.

22 THE CHAIRMAN: Well on that basis if they took the decision not to switch off then they took that
23 decision knowingly, because otherwise it does not help you?

24 MR. MERCER: Yes, ma’am.

25 THE CHAIRMAN: And therefore if they knew it there is no reason not to give them the
26 information?

27 MR. MERCER: You can turn that round to the reverse, ma’am, and say that they should know who
28 it is because they should have a better handle on what is going on. What is my fear at the end
29 of the day, what is the difficulty, is the commercial repercussions. We just create more Floes
30 because of what is – I might say pejoratively – the trigger happy intentions of Vodafone. If
31 you positively identify this I think there is a substantial danger, given the past actions of
32 Vodafone of switching off, and commercial repercussions will follow.

33 The only point I make, and I think it is a good one in terms of public policy is at the
34 least until these sorts of issues start to be clarified and the Floe case comes to some form of

1 further conclusion there should be a standstill, that is all I am asking for. Otherwise people just
2 are not going to talk to us in the first place and we are never going to get to the bottom of this.

3 THE CHAIRMAN: The only question that is before me at the moment is whether this evidence
4 should go in.

5 MR. MERCER: Yes.

6 THE CHAIRMAN: All right? That is the only question before me. If the evidence goes in we then
7 have to decide the confidentiality point.

8 MR. MERCER: Yes, ma'am.

9 THE CHAIRMAN: But at the moment the question is should the evidence go in, and because you
10 are saying that you are not prepared to show Vodafone that evidence, Vodafone cannot address
11 it and give us any submissions in relation to it, as to whether or not it should go in or not, or
12 what the consequences of going in are. So we have to look at it in the limited way that we are
13 looking at it.

14 MR. MERCER: Yes, ma'am. But if one understands the general submission made by Vodafone it is
15 that they do not act in that way. We know what they are saying, what they told Ofcom "We do
16 not act in that way", when clearly they do. It is quite open for Ofcom to make investigations
17 by contacting the relevant executives at the company concerned, and asking them. It was good
18 enough on the last occasion just to ask Vodafone.

19 THE CHAIRMAN: But you have not explained to me why you say that you could not have got this
20 evidence before. You see it is a different allegation, if you say to Ofcom "You did not do your
21 investigation properly", that is one allegation, and it is a different allegation to say "We have
22 this particular one" which you ought to have investigated.

23 MR. MERCER: Ma'am, I look at a slightly different perspective, which is that we have made the
24 allegation, back comes the decision letter and now we are saying "You are wrong, look at
25 this".

26 THE CHAIRMAN: Well if you are saying "Look at this", then you have to provide the evidence.
27 How can they look at it in any event if you do not provide the evidence? And you know what
28 they did for A, B, C, X, Y and Z.

29 MR. MERCER: But we have provided the evidence to Ofcom, ma'am.

30 THE CHAIRMAN: But you are saying they cannot use it.

31 MR. MERCER: Oh they can use it, they can go and talk to the company concerned, and talking to
32 one side was good enough the first time round, and we know what Mr. Wisking is going to say
33 because he said it, which is that they are not aware of any instances where this has occurred.
34 Otherwise, he would not be asking the questions in the first place, would he? What I am
35 saying is, for the purposes of what Ofcom need to do next, they have everything they need and,

1 I do not think, in the context of the *Freeserve* Decision or whatever, this is not a new
2 allegation. The allegation is exactly the same. What this is is up to the evidence, and it
3 happens, because of the number of SIMs involved, to be a very substantial example. It is
4 a very large example, and a very pertinent example. We are not going outside the realms of the
5 revised Notice of Appeal and saying “This is something that we bring up at some later stage in
6 the proceedings”.

7 THE CHAIRMAN: Well it is very difficult to tell from your grounds of Appeal precisely what you
8 are appealing against in the Decision, because you have not done it in relation to paragraphs.
9 The only evidence that potentially you can adduce is the evidence of this one company.

10 MR. MERCER: Well, I am sure if I had the resources of the investigations’ department of Ofcom
11 before me, or even that of the fraud department of Vodafone, I might be able to do slightly
12 better, but with the limited resources before me that is the best, I am afraid, that I could do. At
13 the risk of repeating myself, this is a very substantial example. We are talking about thousands
14 of SIM cards. We are talking about the involvement in the project of a subsidiary of a well
15 known High Street bank.

16 THE CHAIRMAN: And are you saying that they did not fall within the identification system or
17 procedures of Vodafone use?

18 MR. MERCER: No, the answer is “No”, they did not.

19 THE CHAIRMAN: They did not fall within it, they fell outside it?

20 MR. MERCER: No, they are below it.

21 THE CHAIRMAN: They are below it.

22 MR. MERCER: As one would rather suspect very many operators are at the moment.

23 THE CHAIRMAN: They fell through the sieve?

24 MR. MERCER: Yes, which of itself, ma’am, may tell us something about the sieve. Is there
25 anything else that I can help you with?

26 THE CHAIRMAN: I do not think so.

27 MR. ANDERSON: If I could just come back on two small points. What you asked me, ma’am,
28 before the very short adjournment was “Did Ofcom ask the right question to identify an
29 organisation in the kind of position that Floe contends this company to have been in?” The
30 answer to that was “yes”, we asked Floe “How do you identify anybody in the same category,
31 if you like, as Floe?” They gave us the material, we were satisfied that the sieve was narrow
32 enough to catch people, and then we asked them “Do you disconnect all of them?” ----

33 THE CHAIRMAN: Right, hold on, I think that is quite important. You say that you were satisfied
34 the sieve was narrow enough.

1 MR. ANDERSON: Yes, if he wants to challenge that, so be it, that is not a discrimination. We are
2 on a discrimination point. That was the investigation we undertook. The sieve is sufficient,
3 and we asked Vodafone: “And do you disconnect everybody that the sieve identifies?” and
4 their answer was “yes”. Now, that was the basis upon which we took the decision. We
5 investigated any other specific instances of discrimination – companies X, Y, Z, A, B and C
6 – and concluded no discrimination.

7 It simply cannot be right for Floe now to come along and identify some post-Decision
8 instance and say that is material that demonstrates Ofcom got it wrong. It is a new complaint
9 and we could investigate it but we cannot investigate it in the context of this Appeal, we would
10 have to launch a new investigation. Our investigative powers only kick into play if we launch
11 an investigation, and that is not in the context of this Appeal, so there is nothing we can do
12 about this further allegation.

13 THE CHAIRMAN: And what you say is that that would mean that you would investigate a different
14 sieve?

15 MR. ANDERSON: Exactly. You go back to an entirely different basis. It is the objective criteria
16 aspect that was raised, I think, in the previous Appeal as well as in this Appeal – we have
17 looked at the criteria and we have reached the view that we have reached. You may be
18 perfectly entitled to come to the view that Ofcom have got it wrong, that those criteria were not
19 capable of identifying anyone, but that is a separate question as to whether Vodafone has
20 knowingly continued to supply undertakings in an equivalent position to Floe, and all that we
21 have now is post Decision material i.e. a new complaint.

22 THE CHAIRMAN: Putting to one side for the moment the particular evidence here, is the real
23 question whether or not the criteria was sufficient or it should have been some other criteria?
24 Does it matter?

25 MR. ANDERSON: It is very difficult to see how there could be any other criteria. We know from
26 Floe’s own evidence ----

27 THE CHAIRMAN: What is being said is that this company and other companies, who have not
28 been identified and therefore would not be part of our evidence, fall below the criteria that is
29 used, and therefore fall outside, I should say, the criteria that was used and their traffic is less
30 for various reasons.

31 MR. ANDERSON: I do not want to give, and could not give technical evidence, but there must
32 come a point where, if you lower the threshold too much, you will catch far too many people
33 and that will then become an undue burden. So the question is striking a balance, if you like,
34 but once you have struck that balance and Ofcom is satisfied that that balance is right, Ofcom
35 will, of course, look at any specific instances brought to its attention that might be anomalies to

1 the application of those objective criteria. What we now have is an example of a so-called
2 anomaly – not something that we can take a view on because it is really something that only
3 Vodafone can deal with, we cannot deal with it. But that is where we stand, so on any view
4 investigating this matter is going to be a new matter, and that is essentially the reason why we
5 say the Tribunal should not trouble itself with it.

6 Secondly, of course, if the Tribunal does wish to trouble itself with it, it cannot now
7 do so without Vodafone leading the front line rather than Ofcom.

8 THE CHAIRMAN: Well we are not dealing with that, let us just deal with the trouble. It is now 10
9 past 1 – I do not think you have anything more to say?

10 MR. WISKING: I do not think I have. I think we seem to have come round in a very long circle,
11 that is where I started, which is a new allegation with nothing else.

12 Just on the question of the sieve, I think that is a red herring in the sense that Floe's
13 case seems to be now "Well, you have discriminated against us because we are not good
14 enough to evade the sieve in the way that others are", and you have the evidence of Mr. Happy
15 who says that that is what others are doing. They try and work out what is the traffic
16 monitoring and profiling that goes on and to adjust their traffic to avoid it.

17 As you identified, of course, that is quite different from the allegation made here
18 because of course there would be no need to do that if your activities were with the connivance
19 of Vodafone, or indeed any of the other mobile operators.

20 THE CHAIRMAN: Thank you. It is 10 past 1, what I suggest I do is rise, write a Decision, but
21 I will do it immediately and then let you have it either later this afternoon – but back in your
22 offices – or tomorrow, hopefully, because it is important so I will do it like that. If we need
23 a formal handing down I can formally hand it down without anybody here, just to identify
24 when I delivered it. Is that all right?

25 MR. MERCER: Yes, ma'am.

26 MR. WISKING: Yes.

27 MR. ANDERSON: Yes.

28 THE CHAIRMAN: If we have to get on to the confidentiality then we will have to resolve that
29 afterwards. We can either try to do that on the telephone or maybe, having aired some of it
30 today, it can be resolved.

31 MR. WISKING: Just as a matter of formality we shall probably reserve our position on the question
32 of costs.

33 THE CHAIRMAN: Yes. And there is no issue before me about what happened yesterday with that
34 letter, that has been dealt with.

35 MR. WISKING: As far as we are concerned, yes.

1 | THE CHAIRMAN: Yes. Thank you all very much.

2 | (The hearing concluded at 1. 10 p.m)

3 |