

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION APPEAL TRIBUNAL
CASE NO: 1024/2/3/04

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
LONDON

Tuesday, 20th July 2004

Before:

MARION SIMMONS QC
(CHAIRMAN)
MR MICHAEL DAVEY
MRS SHEILA HEWITT

B E T W E E N:

FLOE TELECOM LIMITED
(IN ADMINISTRATION)

Appellant

-and-

OFFICE OF COMMUNICATIONS

Respondent

Supported by

VODAFONE LIMITED

-and-

T-MOBILE (UK) LIMITED

Interveners

MR EDWARD MERCER of Messrs Taylor Wessing
appeared for the Appellant.

MR MARKIN HOSKINS (instructed by OFCOM) appeared for the
Respondent.

MR THOMAS IVORY, QC (instructed by Messrs Herbert Smith)
appeared for the Intervener Vodafone.

MR MEREDITH PICKFORD appeared for the Intervener T-Mobile.

(Transcribed from the Shorthand Notes of Harry Counsell & Co,
Cliffords Inn, Fetter Lane, London, EC4A 1LD.
Telephone 020 7269 0370
Facsimile 020 7831 2526)

PROCEEDINGS - DAY 2

1 MR IVORY: Madam, before my learned friend Mr Hoskins
2 continues, may I deal briefly with the confidentiality
3 matter and explain what we have done there? Overnight,
4 thanks to the industry of my instructing solicitor, the
5 relevant documents have been redacted and you should now
6 have, as well as your original bundle 2, a second bundle
7 2 which contains the redacted versions. We have basically
8 removed references to price and weight and that sort of
9 thing. You also have a schedule which explains where the
10 redactions have occurred. A copy of the redacted bundle
11 has been supplied to T-Mobile. I think that disposes of
12 the confidentiality matters.

13 THE CHAIRMAN: Is there anything in the redacted version
14 which would be material to the case?

15 MR IVORY: Not so far as I am aware.

16 THE CHAIRMAN: Are you happy with that, Mr Mercer?

17 MR MERCER: Quite happy, ma'am.

18 THE CHAIRMAN: You have seen the redacted version?

19 MR MERCER: We have been given it.

20 THE CHAIRMAN: You have been given it this morning?

21 MR MERCER: Yes. Unfortunately, my powers of speed reading
22 have not quite reached those of my learned colleagues,
23 but the point about confidentiality is that it does not
24 concern us in the slightest.

25 MR IVORY: They have the full version in any event. Thank
26 you.

27 THE CHAIRMAN: Thank you very much.

28 MR HOSKINS: Madam, I have to go back on myself slightly
29 because I said yesterday that I did not want to say
30 anything about the Authorisation Directive, but on
31 reflection I think I should say something very quickly
32 about it.

33 The reason why I think I probably need to say
34 something is this. Floe say that the RTTE Directive has
35 nothing whatsoever to do with this case because it is
36 about equipment, and I showed yesterday that although the
37 RTTE Directive is principally focused on the issue of
38 equipment it does also deal with the putting into service
39 of equipment. If you are against me on that, it would not

1 make any difference because regulation 4(2) would still
2 be justified under the Authorisation Directive. The
3 Authorisation Directive is in bundle 3 at tab 64. You
4 will see from the title "Directive 2002/20 ... on the
5 authorisation of electronic communications networks and
6 services", so the focus of the Authorisation Directive is
7 on services.

8 If I could ask you to turn, please, to Article 1,
9 it tells us the "Objective and Scope". "The aim of this
10 Directive is to implement an internal market in
11 electronic communications networks and services through
12 the harmonisation and simplification of authorisation
13 rules and conditions in order to facilitate their
14 provision throughout the Community." So the concept that
15 lies behind it is the freedom to provide services, which
16 of course comes from the Treaty.

17 "This Directive shall apply to authorisations for the
18 provision of electronic communications networks and
19 services."

20 In Article 2 we have a "Definitions" section and it
21 tells us that "... 'general authorisation' means a legal
22 framework established by the Member State ensuring rights
23 ...". So general authorisation is a legal framework, it
24 does not have to be a single measure, you do not have to
25 confine it to a bit of paper and say "Here it is", it is
26 a legal framework, and the Wireless Telegraphy Act and
27 the 2003 Exemption Regulations are part of the legal
28 framework by which the United Kingdom has implemented
29 this Directive.

30 Article 3(1) deals with the general authorisation.
31 "Member States shall ensure the freedom to provide
32 electronic communications networks and services, subject
33 to the conditions set out in this Directive." So the
34 general principle is a general authorisation, but it may
35 be subject to conditions, and the Directive deals with
36 conditions at Article 6 headed "Conditions attached to
37 the general authorisation ..." etc. Article 6(1): "The
38 general authorisation for the provision of electronic
39 communications networks or services and the rights of use

1 for radio frequencies and rights of use for numbers may
2 be subject only to the conditions listed respectively in
3 parts A, B and C of the Annex."

4 If one then turns to Annex A which is the
5 conditions which may be attached to general
6 authorisations, and turn to item 17, we will see that we
7 are back with an old friend because you are permitted to
8 impose conditions for the use of radio frequencies in
9 conformity with Article 7(2) of the RTTE Directive, which
10 takes us back to where we were yesterday, and the point I
11 made yesterday is that it has never been challenged, it
12 has never been suggested that the substantive conditions
13 which allow Member States to take action under Article
14 7(2) of the RTTE Directive, particularly efficient use of
15 spectrum, are not fulfilled in this case.

16 The way in which the United Kingdom then has
17 implemented this Directive is that there is a general
18 authorisation by virtue of the general exemption in
19 Regulation 4(1) and that is subject to conditions, i.e.
20 in this case those laid down in Regulation 4(2) and I
21 explained yesterday why the condition in Regulation 4(2)
22 conforms with Article 7(2) of the RTTE directive.

23 So whichever path one goes down, whether it is the
24 Equipment Directive or the Services Directive, we end up
25 in the same place, Article 7(2) and you can impose a
26 condition relating to efficient use of the spectrum. I
27 have taken you at quite a gallop through what is a
28 relatively complex directive, but that is the main point
29 and that is what I wanted to get out of it, unless the
30 Tribunal have any further questions.

31 THE CHAIRMAN: And you use 17, you do not use B2?

32 MR HOSKINS: I know that T-Mobile put forward a different
33 view, but the reason why we say it is Annex A which is
34 relevant is that Annex A deals with conditions which may
35 be attached to a general authorisation. So the way that
36 the UK view it is that the general authorisation is
37 Regulation 4(1) and there is a condition to the general
38 authorisation which is 4(2). Annex B is conditions which
39 may be attached to rights of use for radio frequencies.

1 That heading is not entirely clear, it is slightly
2 ambiguous, but if one looks back at Article 5 it seems to
3 be that Annex B relates back to that because Article 5
4 says: "Members States shall, where possible, in
5 particular where the risk of harmful interference is
6 negligible, not make the use of radio frequencies subject
7 to the grant of individual rights of use but shall
8 include the conditions for usage of such radio
9 frequencies in the general authorisation." So there one
10 sees the concept of individual rights of use, and that is
11 obviously reflected in B except that the word
12 "individual" disappears. It seems from the language of
13 the heading that A tallies with Article 6, a condition in
14 a general authorisation, whereas B seems more allied to
15 Article 5 where one has a system where rights of
16 individual use are required, but that is not the approach
17 the United Kingdom has adopted. I think that even on T-
18 Mobile's argument we still come out smiling.

19 If you remember, I was dealing with the case in two
20 main chunks, one was illegality and the second was going
21 to be objective justification. The final chunk of
22 illegality was the installation argument; that only
23 arises if the Tribunal finds that, contrary to the first
24 limb of Floe's primary argument, Floe did not use its own
25 GSM gateway devices - I made my submissions on those
26 yesterday. If, contrary to my submissions, the Tribunal
27 find that Floe did not use its own GSM gateway devices,
28 we say that does not get it out of the problem, because
29 section 1(1) of the Wireless Telegraphy Act requires
30 authorisation not just for use but also for installation.
31 There is no dispute on the facts, the manner in which
32 Floe has described its activities clearly indicates that
33 it installs the GSM gateway devices.

34 We have dealt with this argument at paragraphs 52
35 to 56 of our skeleton argument and it really raises the
36 same sorts of issues as one has with use, and I do not
37 intend, unless the Tribunal has a particular question, to
38 go through that. It is there in the skeleton and it is
39 simply a fallback if we lose the first limb of the

1 primary argument. That concludes the first part of the
2 case, was the use of public GSM gateway devices by Floe
3 unlawful? The answer we say is a resounding yes.

4 We move into the second part of the case which is
5 to do with exclusion, which one finds in the Competition
6 Act and also objective justification. If I can deal
7 firstly with the question of exclusion from the Chapter
8 II prohibition - and this is a point that the Tribunal
9 raised in their letter - Schedule 3 of the Competition
10 Act, which one finds in Bundle 3 at tab 57, the relevant
11 part of Schedule 3 is at page 1057 and it is paragraphs
12 5(2) and 5(3) of Schedule 3. 5(1) we are not worried
13 about because it is dealing only with Chapter I
14 prohibition.

15 5(2) "The Chapter II prohibition does not apply to
16 conduct to the extent to which it is engaged in order to
17 comply with a legal requirement." The crucial question
18 is, what is a legal requirement? We are given some help,
19 but not really any help for the purposes of this case, in
20 5(3) which tells us that it means a requirement "Imposed
21 by or under any enactment in force in the United Kingdom
22 ... by or under the Treaty ..." etc. So a legal
23 requirement includes a requirement imposed by or under an
24 enactment in force in the United Kingdom.

25 You will have seen our submission on this in the
26 skeleton and in a sense we take the point against
27 ourselves, because we do not grasp onto it and say "Ah,
28 yes, at last there is the answer", but our submission is
29 that Schedule 3, paragraph 5(2) and (3) do not apply in
30 the present case, and the reason we say that is this.
31 Because it says an exception to the Chapter II
32 prohibition it must be construed narrowly, and we submit
33 that the exclusion does not apply to conduct which is not
34 itself required by law but which, as here, is adopted to
35 avoid a breach of the law. It is very difficult, there is
36 obviously a fine dividing line, but another way of
37 putting it is this: in the present case there is a legal
38 obligation which flows from section 1(1) of the Wireless
39 Telegraphy Act plus the Exemption Regulations, and if one

1 takes those together it means that Floe was not entitled
2 to operate public GSM gateways. I will deal with this
3 point in a bit more detail, but we say that Vodafone, at
4 least in certain circumstances, was at risk if it carried
5 on supplying SIM cards and air time of aiding and
6 abetting Floe in carrying out that unlawful act, i.e. the
7 provision of public GSM gateway services. Therefore, any
8 "obligation" on Vodafone can only arise from a
9 combination of a statute which bites on Floe plus section
10 8 of the Accessories and Abettors Act 1861. We say that
11 the combination of those two statutes, an obligation on
12 Floe plus an aiders and abettors obligation arising under
13 a different statute on Vodafone, is not sufficiently
14 direct to be a legal requirement within the meaning of
15 paragraph 5(2) of Schedule 3 to the Act.

16 I think the point is clearly made, I am not sure
17 there is much more I can say about OFCOM's position on
18 it, there is obviously a fine dividing line, in terms of
19 this case, but we say that this case falls on just the
20 wrong side of the line because the obligation is not
21 direct enough and given that this exception has been
22 narrowly construed we say that this case does not fall
23 within the exception. I imagine you may well be hearing
24 further submissions, probably to the contrary, from
25 Vodafone and T-Mobile on this issue.

26 Can I turn to the final main part of the case which
27 is objective justification? We have dealt with this at
28 paragraphs 61 to 83 of our skeleton, but I do not intend
29 to simply work through that because I want to deal with
30 some of the points that have arisen through submissions
31 yesterday. We obviously continue to rely on those
32 paragraphs of our skeleton, but I do not want to simply
33 take you back through them. I want to split it up into a
34 number of issues and the first issue I want to deal with
35 is the question of the legal status of public GSM
36 gateways. As we know, Floe submits that certainly at the
37 time of Vodafone's first refusal to supply, which was 18th
38 March 2003, the legal status of GSM gateways was a "grey
39 area", those famous two words which keep coming back.

1 Those words and that submission are based on paragraph
2 1.4 of the RA's November 2002 consultation document. If I
3 could ask you to look that out, it is in bundle 1 at tab
4 17, page 268. This section is entitled "Executive
5 Summary" so it is not the guts of the document, it is a
6 summary, and 1.4 says:

7 "Leaving aside the question of whether they are
8 fixed or mobile, user stations may - depending on the
9 type of use - also fail Regulation 4(2), which precludes
10 the provision of telecommunications service via exempted
11 equipment. GSM gateways appear to be used mainly for
12 private commercial use ... However, some service
13 providers wish to use a gateway as a link from their own
14 network to a cellular network to carry third-party
15 traffic and thus provide a telecommunications service.
16 This is a grey area at present, as these service
17 providers cannot be licensed under the Wireless
18 Telegraphy Act 1949."

19 It is important not to simply take the words "grey
20 area" in isolation. What, in our submission, the
21 Radiocommunications Agency was saying is that there are
22 people who want to do this, but it is not obvious that
23 they can because they cannot be licensed under the
24 Wireless Telegraphy Act.

25 If one moves on from the Executive Summary to what
26 I call the guts of the document, it becomes very clear
27 that the Radiocommunications Agency view was that public
28 GSM gateway devices were not lawful at that time, and I
29 say that by reference to paragraphs 5.1 to 5.8, beginning
30 at page 271. 5.1 comes under "Regulatory Issues" and
31 says:

32 "There are two issues concerning the installation
33 and operation of fixed stations, GSM gateways and other
34 fixed mobile applications under the Exemption
35 Regulations. (i) ... GSM gateways are not covered by the
36 definition of 'user stations' in the existing Exemption
37 Regulations ..." There is no grey area, it says they are
38 not covered, and yesterday I explained that the current
39 regulatory position is that GSM gateways are covered by

1 mobile stations, so that reason for illegality was an
2 incorrect one and I am not going to rely on it for that
3 reason.

4 The second one (ii) I am going to rely on because
5 again it is very clear what the RA's view was. It says:
6 "Under Regulation 4(2) of the existing Exemption
7 Regulations, user stations may not be used to provide a
8 telecommunications service 'by way of business', i.e.
9 commercially." So that statement relates back to GSM
10 gateways. But there is a further development of the
11 public/private station, which of course this case turns
12 on:

13 5.6. "Regulation 4(2) of the Exemption Regulations
14 provides that ... the exemption from licensing of
15 'relevant apparatus' does not apply to apparatus that
16 provides a commercial telecommunications service to
17 another person via a wireless telegraphy link. This
18 prevents commercial users from usurping spectrum
19 designated for deregulated uses such as low-power
20 devices, cordless telephony and telecommand, as this
21 would be detrimental to the permitted application in
22 those bands.

23 5.7: "It would therefore appear that equipment such
24 as GSM gateways is permitted (i.e. does not fall within
25 Regulation 4(2)) if it is used to provide a private
26 connection to a public network, as it is not providing a
27 telecommunications service to third parties. However, the
28 use of GSM gateway equipment to provide a public
29 connection to a public network is not permitted (i.e.
30 does fall within Regulation 4(2)) as the link does
31 provide a third-party telecommunications service."

32 So if one, rather than simply focusing on two words
33 in the Executive Summary and saying it is all very
34 difficult, actually reads what the RA has said, it is
35 quite clear that its view at the time was that public GSM
36 gateway devices were unlawful for the reason that they do
37 not fall within Regulation 4(2). The upshot of my
38 submission is do not over-egg the two words "grey area"
39 in the Executive Summary.

1 So the RA was of the view that public GSM gateway
2 devices were unlawful at that time, but they were not
3 isolated in that view, it was a widely held view because
4 Oftel held that view, other mobile operators held that
5 view and some other members of the industry held that
6 view. Again, that is an agreed fact that comes from
7 paragraph 12 of the Statement of Facts - the reference
8 for that is bundle 5, tab 92, page 1759. Perhaps we ought
9 to look at that, because there is that proposition which
10 is a simple one and there is another one that I am about
11 to come to, so perhaps it is sensible that I should show
12 it to you quickly. The first sentence of paragraph 12 I
13 want to turn to in a minute, so I will draw your
14 attention to it now. "At the date of disconnection [i.e.
15 March 2003 and indeed any subsequent disconnections]
16 Vodafone and T-Mobile believed that the operation of
17 public GSM gateways was illegal." So Floe accepts that
18 Vodafone believed that the operation of public GSM
19 gateways was illegal. "This view was shared be Oftel, the
20 RA, other mobile operators and some other members of the
21 industry." Then we see below: "... it is Floe's case that
22 at the date of the first disconnections at the least, it
23 was not clear that the regulatory position had
24 crystallised. Floe intends to prove this by reference to
25 the existing witness statement of Mr Happy" and Mr Mercer
26 can obviously take you to that if he wants. Our
27 submission is that the RA was of the view, Oftel was of
28 the view, other mobile operators were of the view and
29 some other members of the industry were of that view. Mr
30 Happy's analysis is, from recollection, largely based
31 around the grey area concept, that was his understanding
32 at the time, but it certainly was not one shared by other
33 players in the industry.

34 Also, very importantly in this case, it was not
35 just those bodies who believed that public GSM gateways
36 were unlawful, the police believed they were unlawful.
37 One gets that from paragraph 2 of Mr Morrow's witness
38 statement which is in bundle 1 at tab 6. You will see
39 from paragraph 1 that he was employed by Vodafone Limited

1 as an Intelligence Manager in the Vodafone Security and
2 Fraud Department.

3 Paragraph 2: "I first became aware of so-called GSM
4 gateways in late June/July 2002 when I received a
5 telephone call from Tony Hutchings, an official working
6 for the National High Tech Crime Unit (NHTCU) which forms
7 part of the police, to inform me that various companies
8 were engaging in illegal activities by purchasing SIM
9 cards for use with a particular mobile network and using
10 them as so-called gateway devices." There is then a
11 description of how gateway devices operate.

12 There are two important points from that. The
13 police believed that public GSM gateway devices were not
14 lawful and the police informed Vodafone that they thought
15 that public GSM gateway devices were unlawful. We say
16 that that was the reality of the position and the
17 understanding of the legal position as at March 2003. In
18 any event, there can certainly be no doubt about the
19 legality of public GSM gateways by the time the DTI made
20 their statement, making public the results of the
21 consultation process, and that statement was made on 18th
22 July 2003, the reference is bundle 1, tab 27, page 334. I
23 do not think we need to look at that.

24 So the position was that the legality of public GSM
25 gateways was well-known and was known by a number of
26 different public and private bodies. In any event
27 whatever anyone else's view of the situation was, Floe
28 accepts that Vodafone believed that public GSM gateways
29 were unlawful. We have already looked at that, it is
30 paragraph 12 of the Statement of Facts, bundle 5, tab 92,
31 page 1759.

32 Mr Mercer submitted yesterday that the company's
33 mindset is irrelevant to the question of abuse, but in
34 our submission that is not correct. If, for example, a
35 company acts with a plainly anti-competitive motive -
36 imagining a dominant company - then that will provide
37 strong evidence of abusive conduct. It must follow
38 similarly that if it has no such motive that is a factor
39 that should be taken into account. I am by no means

1 suggesting that it is decisive, of course it is not, but
2 it is clearly a factor which is to be taken into account
3 when considering the issue of objective justification.
4 The final point in relation to this sub-heading, legal
5 status of public GSM gateways, is that in the final
6 analysis, for the reasons I have submitted in the first
7 part of my submissions, Vodafone's view of the legal
8 position was entirely correct: the use of public GSM
9 gateway devices was unlawful. Vodafone believed it was
10 unlawful and Vodafone was correct in that belief.

11 The next sub-heading I would like to move on to
12 deal with is the Accessories and Abettors Act 1861, and
13 the reason I want to turn to that now is to answer the
14 question was Vodafone at risk of committing a criminal
15 offence as at 18th March 2003, the date of first refusal
16 to supply? The first issue here is what did Vodafone know
17 about Floe's activities, and we find that in Mr Rodman's
18 witness statement at bundle 1, tab 5. It is dealt with at
19 paragraphs 18 to 21 which begin at page 37; rather than
20 having me read them out, if you do not mind I think it
21 would be best if the Tribunal just reads those
22 paragraphs. (Pause for reading). In our submission, what
23 those paragraphs show is that immediately prior to the
24 first refusal to supply on 18th March 2003, Vodafone had
25 strong grounds for believing that Floe was operating
26 public GSM gateway devices. The next question we have to
27 ask ourselves is this, was it a fact that (a) Vodafone
28 was supplying Floe with air time and SIM cards and (b)
29 Vodafone had strong grounds to believe that these were
30 being used to provide unlawful public GSM gateways,
31 sufficient to render Vodafone potentially liable as an
32 aider and abettor? We say the answer is clearly yes.

33 I would like to make that good by referring to
34 Archbold. I have a horrible feeling that this is not the
35 most up to date edition because Brick Court is not
36 swimming in Archbold, but the 2003 Archbold was the one I
37 found when I was scrabbling around trying to find it last
38 night. If I can hand that up, and also an authority that
39 I am going to come back to when I deal with estoppel and

1 legitimate expectation. I will hand them up at one and
2 the same time. (Documents handed to the Tribunal). If I
3 can start with the mental element relating to
4 accessories, which is paragraph 17-67, picking it up over
5 the page at 1571, the first complete paragraph on that
6 page which begins "In *R v Powell and anor*, a House of
7 Lords case, it was held ... that a secondary party is
8 guilty of murder if he participates in a joint venture
9 realising (but without agreeing thereto) that in the
10 course thereof the principal might use force with intent
11 to kill or to cause grievous bodily harm, and the
12 principal does so. The secondary party has lent himself
13 to the enterprise and, by doing so, he has given
14 assistance and encouragement to the principal in carrying
15 out an enterprise which the secondary party realises may
16 involve murder.

17 It is submitted that this should be the approach
18 whenever it is alleged that the defendant is guilty as an
19 aider and abettor i.e. someone who assists the commission
20 of the crime whether by the supply of the instrument
21 [which we say is very important here] by means of which
22 the crime is facilitated or committed, by keeping watch
23 at a distance from the actual commission of the crime, by
24 active encouragement at the scene, or in any other way),
25 whatever the crime alleged. To realise something might
26 happen is to contemplate it as a real not a fanciful
27 possibility ... [This is important] Thus, if A supplies
28 B with a jemmy, realising that B may use it for the
29 purposes of burglary, and B so uses it, A will be guilty
30 of burglary, even though he had no idea what premises B
31 intended to burgle."

32 Let us switch the names. If Vodafone supplies Floe
33 with SIM cards and air time, realising that Floe may use
34 those for the purposes of providing public GSM gateway
35 devices, and Floe so used them, Vodafone will be guilty
36 of aiding and abetting the operation of those public GSM
37 gateway devices. So there is the necessary mental
38 element, it is House of Lords case law and that is the
39 Archbold commentary. If one switches the names and the

1 facts one falls four-square within the example given by
2 Archbold.

3 The other elements of aiding and abetting are found
4 at page 1600. The heading halfway down the page is
5 "Secondary parties" and if I can pick it up from the
6 second paragraph under that heading. "The courts have
7 tended to construe these words [aid, abet, counsel or
8 procure] so as to coincide with the common law in
9 relation to felonies ... This is unsatisfactory ... It is
10 submitted that the better approach is to give the words
11 their natural meaning; thus an aider and abettor may be
12 present giving active assistance to the principal; he may
13 be some distance away ... or his act of assistance could
14 be far removed in time and place (as in the case of the
15 supplier of a gun who knows that it is required for the
16 purpose of committing murder)." So again the final
17 example is the supply of something which is to be used in
18 a crime is sufficient. Over the page at 1601, the *mens*
19 *rea* section refers back to the section I have already
20 taken you to, that is paragraph 17-67 and onwards.
21 Capacity obviously is not an issue here, "Presence: For
22 the reasons given at 18-9, *ante*, [which we have just
23 looked at] it is submitted that presence at the
24 commission of the offence is unnecessary to guilt as an
25 aider and abettor."

26 Then "Participation" at 18-14. I think it is
27 probably sufficient simply to look at the quotes that
28 Archbold sets out at the foot of the page by Devlin J in
29 *National Coal Board v Gamble*. "A person who supplies the
30 instrument for a crime or anything essential to its
31 commission aids in the commission of it; and if he does
32 so knowingly and with intent to aid, he abets it as well
33 and is therefore guilty of aiding and abetting." So
34 supplying the instrument, supplying the means to commit a
35 crime is sufficient to make one an aider and abettor.

36 In our submission, as at 18th March 2003, given
37 Vodafone's state of knowledge of Floe's activities,
38 Vodafone would have been at clear risk, we say, of being
39 an aider and abettor to criminal acts if it had continued

1 to supply SIM cards and services by way of air time, but
2 of course we know that Vodafone refused to supply. I am
3 going to come back to that theme because it is an
4 important part that underpins this case, it is probably
5 the crux of this case.

6 If I can move on to Hilti, Floe submits that
7 Vodafone was not entitled to take action itself but,
8 rather, should have reported the matter to the proper
9 authorities. In some detail at paragraphs 69 to 76 of our
10 skeleton we explain why Vodafone's position was
11 distinguishable from that of Hilti, but without going
12 through that I would just like to draw on the main points
13 of difference, which are these. As I have just
14 demonstrated, in the present case Vodafone would have
15 been at risk of committing a criminal act itself if it
16 had not taken steps to prevent its SIM cards and airtime
17 from being used to commit unlawful acts. We say that
18 competition law cannot oblige an undertaking to engage in
19 a criminal act or even to expose itself to a risk of
20 doing so. That is what applying the refusal to supply
21 principle in this case would do, because if one is saying
22 that Vodafone was not entitled to refuse to supply, one
23 is saying *de facto* that it should as a matter of
24 competition law have continued to supply, and that would
25 have led them to committing a criminal act, as I have
26 outlined. Some of the other differences between the
27 present case and *Hilti* are underscored by reference to
28 the Commission decision in *Hilti* which the Tribunal can
29 draw their attention to. I do not think that particular
30 authority is in the bundle, but we were told that we did
31 not need to supply copies. I hope the Tribunal has copies
32 of the decision to hand?

33 THE CHAIRMAN: The Commission Decision?

34 MR HOSKINS: It is the Commission Decision, precisely. We have
35 dealt with the court judgment in the skeleton but there
36 was actually a lot more detail in the Commission Decision
37 about the background, and that is why I want to take this
38 part from the Commission Decision. If one looks at
39 paragraph (87) of the Decision, you will see that the

1 title there is "Objective justification" and one sees:
2 "Hilti has expressed concern over certain aspects
3 concerning the reliability, operation and safety of PAFS,
4 which may be summarised as follows ..." Item 5 is that
5 they were substandard and dangerous, and those are the
6 allegations we saw from the court's judgment.

7 Then paragraph (88): "Hilti itself accepts that the
8 above concerns relating to the safety, reliability and
9 operation of its PAFS are not sufficient to justify the
10 commercial behaviour which is the object of this Decision
11 ..." So Hilti itself is not putting this point very
12 highly. "It does however maintain that all its actions
13 have been motivated by a desire to ensure the safe and
14 reliable operation of its products, and not by any
15 commercial advantage it may have derived from such
16 action." It almost sounds like a plea in mitigation
17 rather than a not guilty plea - but I should stop
18 wandering into criminal law because I will get myself
19 into trouble.

20 Paragraph (89): "As regards Hilti's claim that its
21 behaviour even if not the least restrictive possible to
22 attain its objectives was motivated purely by safety
23 considerations, the Commission would make the following
24 points ..." and I am going to pick up on some of these
25 points and compare them to the present case. First of
26 all, the Commission said, "The abuses and alleged safety
27 problems go back to at least 1981. Hilti only approached
28 the Commission two years later in 1983 with an informal
29 and verbal proposal for a distribution system designed to
30 overcome these safety problems. This was only after a
31 complaint had been lodged with the Commission and
32 communicated to Hilti." So obviously Hilti said it had
33 these concerns, but it sat on them and did nothing until
34 someone actually complained to the Commission. The
35 position here is very different.

36 Mr Mercer said that Vodafone let things continue
37 for nine months, but that really is not a very fair
38 description of what Vodafone did because what Vodafone
39 did is set out in the Statement of Facts and comes up in

1 Vodafone's evidence as well. It is summarised in the
2 Statement of Facts at bundle 5, tab 92, paragraphs 19 to
3 27 which begin at page 1760, and I think this is largely
4 taken from Mr Rodman's evidence. At paragraph 19: "During
5 the latter half of 2002, Vodafone identified the use of
6 SIMs in public GSM gateways by reference to its call
7 traffic data, from which it is able to pinpoint SIMs
8 generating unusually large volumes of on-net call traffic
9 from the same cell-site." Mr Rodman describes that
10 process taking place.

11 Then 21: "In January 2003, Vodafone decided to
12 contact the largest operators which it suspected of using
13 public GSM gateways ... and ask them to explain what they
14 were doing." Floe was one of the operators identified. In
15 February 2003, you will remember, there was a completely
16 normal commercial meeting scheduled, but Mr Rodman was so
17 concerned that he decided to attend the meeting and to
18 raise the issue of public GSM gateway devices with Floe.

19 Following that meeting and following further
20 investigation, which again Mr Rodman deals with in his
21 witness statement, Vodafone wrote to Floe on 10th March
22 2003 asking it formally, within 14 days, to demonstrate
23 'to Vodafone's satisfaction that these SIMs are being
24 used for legal purposes only'. Vodafone stated further
25 that: 'Failure to comply will result in the suspension of
26 the service to Floe Telecom without further notice and
27 Vodafone reserves the right to take such further measures
28 as it deems appropriate'."

29 Then Floe's response on 13th March was that it did
30 not deny that it was providing public GSM gateway
31 services - and we now know that it certainly was - and it
32 stopped a direct debit for £135,000.

33 So this is not a Hilti situation where, long after
34 the event, when a complaint has been made, Hilti turns up
35 and says "Ah, well all along we were worried about
36 reliability", this is Vodafone being proactive. It was
37 informed by the police that public GSM gateways were
38 unlawful, it took steps to investigate the position and
39 raised the matter expressly with Floe, and then it

1 refused to supply. Vodafone is between a rock and a hard
2 place; Mr Mercer says "Look, they let this continue for
3 ages" whereas in fact what Vodafone was doing was
4 investigating very thoroughly what the position was and
5 giving Floe a chance to explain its position. Of course,
6 if Vodafone had not carried out such investigations, the
7 complaint from Floe would be - regardless of what I have
8 just said - "Vodafone is being precipitous, it is being
9 judge, jury and executioner." Vodafone behaved entirely
10 properly, it became aware of the problem, it investigated
11 the problem thoroughly, it raised it with Floe, it
12 refused to supply, so there can be no question of
13 Vodafone letting things slide in the way that Hilti did,
14 there can be no question either of Vodafone behaving
15 precipitously.

16 The next point I would like to pick up in the
17 Commission Decision is still (89) number 3. "In the
18 meantime the subsequent evidence showed Hilti continued
19 and extended its abusive practices even though it had
20 been warned such practices were unacceptable if they were
21 proved." So the continuation there was Hilti had been
22 warned that it may be guilty of abusing a dominant
23 position and nonetheless carried on with their practices
24 of tying. Again, the position here is very different.
25 Vodafone had been told that public GSM gateways were
26 unlawful by the police (Mr Morrow's statement) and when
27 they became aware of the problem they did not simply
28 carry on with their abusive practices, in fact they did
29 the opposite, they carried on supplying until they had
30 investigated the problem and only then refused to supply.
31 So, again, we are very far removed from Hilti, in fact we
32 are at the opposite end of the spectrum from Hilti.

33 Then moving on to paragraph 4, it is the second
34 bullet point in paragraph 4 I would like to look at where
35 it says: "Hilti never wrote to or communicated with the
36 complainants to express its concern about the
37 reliability, fitness, safety or otherwise of their
38 nails", so again it is Hilti behaving unilaterally and
39 precipitously. I have already made the points on that:

1 Vodafone did specifically raise the issue with Floe, it
2 did so at the business meeting with Floe and it did so in
3 the letter that was written to Floe on 10th March. So it
4 gave Floe every opportunity to explain the position
5 before it took action.

6 Moving on then to paragraph 92 of the Decision,
7 "Hilti purports to have decided unilaterally that the
8 independents' nails were unsafe or unfit for use. On this
9 basis Hilti attempts to justify the policies which are
10 described in this decision and the general thrust of
11 which have the object or effect of preventing the entry
12 into the market of the independent nail producers. Hilti,
13 a dominant company, therefore attempted to impose its own
14 allegedly justified safety requirements without regard to
15 the safety and product liability requirements that
16 already existed in the different Member States. The
17 Commission examined carefully the different national
18 safety requirements, standards or recommendations
19 relating to nail guns and consumables in the EEC and
20 certain other countries. It also examined the guidelines
21 issued by the professional or trade associations. In the
22 EEC with the exception of Spain none of these provisions
23 oblige or recommend the user to use Hilti nails with
24 Hilti nail guns." So the point here being made is that
25 Hilti took the law into its hands because there were
26 standards which existed but which Hilti chose to ignore
27 and to apply its own standards, if you like.

28 The position here is obviously very different; it
29 is not that Vodafone ignored the relevant legal
30 provisions, it had reference to the relevant legal
31 provisions which said that public GSM gateway devices
32 were not lawful and it is because of the existence of
33 those standards that Vodafone took the action it did. So
34 it is not that it ignored relevant standards, it is that
35 it had regard to not just relevant standards here but
36 relevant legal provisions. Of course, as I have already
37 said, Vodafone was not acting in isolation, Vodafone's
38 view of the illegality of public GSM gateway devices at
39 the time when it first refused to supply, March 2003, was

1 shared by Oftel, the RA, the police, other mobile
2 operators and other members of the industry, and I have
3 already given you the references for all those beliefs.

4 The final point is paragraph 95. "Finally, the
5 Commission does not understand Hilti's claim that it
6 would be liable, even criminally so, if it had not taken
7 the action (which is the object of this Decision) to stop
8 the use of consumables it deems unsafe in its nail guns.
9 In view both of the existing national safety rules and of
10 the fact that Hilti warns users in its instruction manual
11 ... not to use non-Hilti consumables, the Commission
12 considers Hilti cannot be considered liable for accidents
13 or damage caused by the use of non-Hilti consumables in
14 its nail guns." So the Commission looked at whether Hilti
15 could be liable and said "We do not think it could", but
16 here, for the reasons I have submitted, Vodafone was
17 clearly at risk, at the very least, of committing a
18 criminal act if it continued to supply after March 2003.

19 I appreciate that it is not necessarily the most
20 principled way to approach the issue, to take Hilti and
21 say "Look at all the differences", because my primary
22 submission, as we put in the skeleton argument, is that
23 we have to look at each case on the circumstances of each
24 case, but I hope that is a useful exercise to show that
25 we are not just distinguishable from Hilti, we are the
26 other end of the spectrum from Hilti. All the things that
27 were thrown at Hilti to criticise its behaviour are
28 actually things that in contrast we did, which supports
29 the position of Vodafone. For example, Hilti did not
30 raise the issue with the people it was complaining about,
31 Vodafone did etc. I think that is a very striking way of
32 showing that Vodafone is very firmly on the right side of
33 the line when it comes to objective justification.

34 The three authorities that Floe referred to
35 yesterday, in our submission do not take the matter any
36 further. As I have said, to decide whether there is
37 objective justification one has to look at each case on
38 its merits, it is not really very helpful to pick out
39 single sentences from voluminous authorities, and indeed

1 the paragraphs that Floe referred to do not even refer to
2 abusive dominant position, let alone refusal to supply,
3 the passages referred to are all raised in the context of
4 Article 81 analysis. Let us look at one of the passages
5 and see where it takes us. Let us look at the first one,
6 which was SCK. Mr Mercer relied on paragraph 194 of SCK:
7 As regards, first, the allegedly more effective
8 monitoring of the statutory requirements carried out by
9 SCK, the alleged operation added value. It must be borne
10 in mind that it is in principle attached to public
11 authorities and not to private bodies to ensure that
12 statutory requirements are complied with", and we see
13 from the top that the context of this is a refusal by the
14 Commission to exempt SCK's prohibition on hiring, so SCK
15 was seeking an Article 85(3) exemption from the
16 Commission" and it looks like a system of certification
17 for cranes. What TFI are saying is it is all very well
18 you, SCK, setting up a system of certification, but that
19 is not your job because there is already a public
20 authority doing that job, but there is another very
21 crucial difference as between that quote and what
22 happened in the present case, because Vodafone was not at
23 all ensuring that statutory requirements were complied
24 with, it was not seeking to be judge, jury and
25 executioner, it was taking steps to ensure that it did
26 not commit a criminal offence. That is a very important
27 difference. It is not that Vodafone out of public
28 spiritedness said "Let's go round all the telecoms
29 operators we deal with to make sure they are not doing
30 anything bad because we are public spirited", it wanted
31 to ensure it did not commit a criminal offence.

32 I do not think there is any need to look at the
33 passages in either *Albany* or *Cement* because they do not
34 take the matter any further. You have a general reference
35 to *Hilti* but one has to look at the particular facts of
36 this case and they are very different.

37 Can I move on to another point that was raised
38 yesterday which has the heading "The effect of the
39 pending consultation" because Floe points out that

1 Vodafone took steps to block access to its network whilst
2 the Radiocommunications Agency's consultation was on-
3 going. Vodafone first refused to supply on 18th March 2003
4 and the government announced the results of the
5 consultation, which had begun in November 2002, on 18th
6 July 2003. So the results were announced four months
7 after the first refusal to supply, and we say the answer
8 to this is simple - and again it is a theme I am going to
9 keep coming back to, I do not apologise, because it is
10 what this case is about - competition law cannot require
11 a company to commit a criminal act on the basis that the
12 act may cease to be criminal at some unspecified time in
13 the future.

14 The next sub-heading I would like to deal with is
15 sections 172 to 174 of the Communications Act 2003, which
16 is a matter the Tribunal raised yesterday. Those
17 sections introduce a pre-prosecution procedure - if I can
18 use that shorthand - with effect from July 2003. There
19 are two points to make in relation to those sections.
20 First of all, Vodafone initially refused to supply
21 services on 18th March 2003, i.e. prior to the entry into
22 force of those sections, and therefore we say the
23 decision to refuse to supply and indeed the refusal to
24 continue to supply must be assessed in that context. When
25 the decision to refuse to supply was initially taken,
26 there was no pre-prosecution procedure. When that
27 procedure was introduced in July 2003 we submit it would
28 not be reasonable to suggest that what Vodafone should do
29 is say "We refuse to supply because of the risk of
30 prosecution in July 2003; now there is new pre-
31 prosecution procedure so we must now supply and wait and
32 see what happens." Let me put it this way, the die had
33 already been cast, the commercial regulatory position had
34 been taken under a previous regime and there was nothing
35 in the introduction of this new pre-prosecution procedure
36 which would have any effect on the understanding of
37 whether that refusal or continued refusal was objectively
38 justified.

39 There is another point. The second point is that

1 although these sections did introduce a new pre-
2 prosecution procedure, it does not alter the fact that
3 Floe's activities continued to be unlawful. The
4 enforcement mechanism does not alter the illegality that
5 flows from section 1(1) of the Wireless Telegraphy Act
6 and the Exemption Regulations; therefore, regardless of
7 the new procedure Vodafone would have acted unlawfully if
8 it had aided and abetted Floe's activities.

9 The next sub-heading is the Floe-Vodafone
10 agreement. I have already dealt with this issue in
11 another context yesterday so I will take it pretty
12 quickly, but I am afraid I will repeat myself to a
13 certain extent. We say it is significant that Floe does
14 not allege that the agreement expressly permitted the
15 operation of public GSM gateways. The highest that Floe
16 puts its case is to say that the operation of public GSM
17 gateways was not specifically precluded by the agreement.
18 An example of where they say that is paragraph 6(e) of
19 their skeleton argument. As I demonstrated yesterday,
20 under clause 8.1 of Schedule 6 of the Agreement, Floe
21 undertook not to use or allow others to use the services
22 and/or equipment for any improper, immoral or unlawful
23 purpose including the transmission of defamatory
24 material. Therefore, as I submitted yesterday, the
25 agreement did exclude Floe from using Vodafone's air time
26 and SIM cards to operate public GSM gateways because such
27 gateways were unlawful. Therefore, at the contractual
28 level, Floe did not have a contractual right under its
29 agreement with Vodafone to operate public GSM gateway
30 devices, quite the opposite, it was prohibited from doing
31 so.

32 As I have said, it is important in this case to
33 distinguish the contractual level from the competition
34 level because they are two distinct types of analysis.
35 Even if Floe did have a contractual right of the type it
36 claims, i.e. to receive air time and SIMs that it could
37 use in public GSM gateway devices, that would not alter
38 the legality of Vodafone's conduct under the Competition
39 Act. As a matter of contract law, an obligation under a

1 contract which involves the committing of an unlawful act
2 would be unenforceable as a matter of public policy, I
3 believe that is common ground, but similarly, we say, and
4 I am afraid it is my mantra, competition law cannot
5 oblige an undertaking to engage in criminal conduct,
6 regardless of the existence of any contract to that
7 effect or not. So if Floe did have a contractual right of
8 the type it claims, and if, as it did, Vodafone refused
9 to supply, competition law cannot say "You had an
10 obligation to fulfil that contract as a matter of
11 competition law even though that led to the committing of
12 an unlawful act." It is the same public policy point,
13 whether one looks at it as a contractual point or a
14 competition law point.

15 The next sub-heading is to do with the notion of
16 the restriction on use clause which Mr Mercer referred
17 to. I think the way he put it was this, he submitted that
18 Vodafone should have inserted a restriction on usage
19 clause into the contract in order to control the use of
20 SIMs in public GSM gateways. But this is purely
21 hypothetical, because what the Tribunal must consider is
22 whether there has been an abuse of a dominant position on
23 the basis of facts and the actual agreements which were
24 made. As I have shown, the contract placed an obligation
25 on Floe not to use services and/or equipment unlawfully,
26 but despite that prohibition Floe operated unlawful
27 public GSM gateways. In those circumstances we say
28 Vodafone was clearly entitled to continue to refuse to
29 supply Floe. It is not helpful, it is not relevant to
30 imagine what may have occurred if in August 2002 Vodafone
31 and Floe had had a different discussion about what form
32 the contract might take and what would have happened if a
33 restriction on usage clause had been put in. It is too
34 far removed and is not actually before the Tribunal.
35 Indeed it would be a different complaint from a
36 competition perspective, if there were one at all it
37 would have to be something along the lines of why did
38 Vodafone not put a particular clause in this contract? It
39 simply does not run, it does not make sense in this

1 context.

2 The final point on objective justification is to
3 deal with the question of Vodafone's knowledge, and again
4 I touched on this to a certain extent yesterday. As I
5 said, I will leave the question about whether Vodafone
6 knew that Floe intended to operate public GSM gateways,
7 but let us assume for the moment that certain Vodafone
8 employees did know that that was Floe's intention. It may
9 be that those employees based in the commercial
10 department were not aware that public GSM gateways were
11 unlawful, but let us also assume that they did. So at the
12 level of negotiation of the contract there were certain
13 Vodafone employees who knew Vodafone intended to provide
14 public GSM gateway devices and who knew that such devices
15 were unlawful. At the contractual level of analysis could
16 Vodafone be estopped from refusing to supply services to
17 Floe so as to operate public GSM gateway devices, i.e.
18 can they be held to their knowledge of how the contract
19 was to operate? The answer is clearly not because
20 estoppel is an equitable principle and it cannot be
21 invoked so as to require one party to a contract to
22 perform that contract so as to participate in or to
23 further an unlawful purpose. No equitable principle would
24 be applied to that effect. Although it is a different
25 level of analysis, it is the same policy point, at the
26 competition law level as a matter of public policy
27 competition law cannot require companies to continue to
28 continue to provide services and equipment where you have
29 strong grounds to believe that those are being used for
30 unlawful purposes, and which might render the company
31 itself liable as an aider and abettor.

32 That completes the road map I set out for myself at
33 the start, but there is one issue I still have to deal
34 with which arises from yesterday and that is the question
35 you asked me to think about overnight about the estoppel
36 on legitimate expectation point in so far as it relates
37 to Ofcom - I have dealt with estoppel now in relation to
38 Vodafone. The question arises in this way, in his
39 Decision the Director General for Telecommunications

1 assumes that it might be possible, under certain
2 conditions, for Floe to operate public GSM gateways under
3 the authority of Vodafone's WT Act licence. However, the
4 Decision found that the conditions for such authorisation
5 had not been fulfilled. Prompted by Floe's primary
6 argument which was introduced by way of amendment, Ofcom
7 now seeks to argue that it was not in fact possible for
8 Vodafone to authorise Floe to operate public GSM gateways
9 because Vodafone itself was not entitled to do so under
10 its licence. That is what I have called the second limb
11 of the primary argument. The question the Tribunal has
12 asked is whether Ofcom is prevented from raising this
13 argument by virtue of the principles of estoppel on
14 legitimate expectation.

15 Earlier I handed up a number of authorities and the
16 remaining two I handed up are relevant to this issue. The
17 first one is an extract from *Wade and Forsyth* on
18 Administrative Law.

19 THE CHAIRMAN: What date is the decision?

20 MR HOSKINS: It is the eighth edition but it does not have a
21 date on it.

22 THE CHAIRMAN: Do you know what date it is?

23 MR HOSKINS: It is probably about six or seven years old but
24 it is the most recent edition.

25 THE CHAIRMAN: I think it is out of date.

26 MR HOSKINS: The eighth edition?

27 THE CHAIRMAN: I do not know whether that is the last edition,
28 but I think the passage is out of date.

29 MR HOSKINS: Can I take you through the passage and if there
30 is a point you wish me to deal with, I will deal with it.
31 I do not think the basic premise that I want to rely on,
32 subject to my knowledge, has changed, but obviously you
33 will correct me if I am wrong.

34 "Estoppel and public authorities. The basic
35 principle of estoppel is that a person who by some
36 statement or representation of fact causes another to act
37 to his detriment in reliance on the truth of it is not
38 allowed to deny it later, even though it is wrong."

39 Then at the head of the next paragraph: "Legal

1 rules about estoppel and waiver are applicable to public
2 authorities as well as to other persons", and then there
3 are examples of the way in which estoppel can apply to
4 public authorities.

5 Then over the page at 243, "But, just as with
6 contracts, the ordinary rules must give way where their
7 application becomes incompatible with the free and proper
8 exercise of an authority's powers or the due performance
9 of its duties in the public interest." We will come onto
10 that again in a minute.

11 Then at the head of the next paragraph: "An
12 essential element in estoppel is that the aggrieved party
13 should have been induced to act to his detriment." So
14 unlike legitimate expectation, which we will move onto,
15 in relation to estoppel detrimental reliance is still
16 necessary.

17 Then at the head of the next section, "Estoppel and
18 ultra vires. In Public law the most obvious limitation on
19 the doctrine of estoppel is that it cannot be invoked so
20 as to give an authority powers which it does not in law
21 possess. In other words, no estoppel can legitimise
22 action which is ultra vires" and there are some examples
23 of that principle being applied.

24 When we are looking at the notion of estoppel we
25 say it cannot prevent Ofcom from raising the second limb
26 of the primary argument, for two reasons. First of all,
27 estoppel may only be applied where the aggrieved party
28 has been induced to act to his detriment. We say this is
29 not so in the present case. In the Decision, the Director
30 General found that the conditions for authorisation had
31 not been fulfilled, with the result that Floe's complaint
32 was rejected. Floe appealed that decision but cannot be
33 said to have been induced to act to its detriment as a
34 result of the approach which was adopted in the Decision.
35 The reason why there is no detrimental reliance on the
36 decision is because the end result is the same, Floe does
37 not have a valid authorisation to operate public GSM
38 gateway devices under section 1(1) of the Wireless
39 Telegraphy Act.

1 The second point is that estoppel cannot be invoked
2 so as to give a public authority powers which it does not
3 in law possess. To put it another way, no estoppel can
4 legitimisate action which is ultra vires. How does that
5 apply to the present case? Here we say Floe cannot argue
6 that Ofcom is estopped from submitting that a certain
7 activity is unlawful if the Tribunal finds that that
8 activity is in fact unlawful or, I should say, not
9 permitted by law because we are dealing with the
10 authorisation here.

11 The way we put it is this. Estoppel cannot be
12 relied on so as to require a public body to treat
13 something as lawful or authorised when it is in fact
14 unlawful or unauthorised. Estoppel cannot alter the law.
15 I will give a practical example of how that applies in
16 the present case in a minute, but I want to deal with
17 legitimate expectation first. In relation to legitimate
18 expectation, the case law is less developed and is
19 developing, and certainly some authorities suggest that
20 it is not always necessary, depending on the
21 circumstances, for a party to demonstrate detrimental
22 reliance.

23 I will not go into that issue because I think there
24 is a trump card, which is this: as with estoppel, a
25 legitimate expectation cannot be relied upon so as to
26 require public bodies to treat something as lawful which
27 is unlawful, or something as authorised which is
28 unauthorised. The authority for that is a European
29 authority, the final clip I handed up. It is case T-2/93,
30 *Air France v Commission of the European Communities* and
31 it is reported at [1994] ECR II-323. paragraph 102 is a
32 very simple proposition, the final sentence: "It follows
33 that a Community institution cannot be forced, by virtue
34 of the principle of the protection of legitimate
35 expectations, to apply Community rules *contra legem*."

36 I must admit that I have looked for an English
37 authority which encapsulates this point in the same way
38 and could not find one, but in our submission the
39 principle of legitimate expectations was actually

1 recognised in Community law before domestic law and one
2 sees in the case law quite often a nod to Community law.
3 Our submission is that it would be extraordinary if the
4 position that one finds in the Community case law were
5 not followed by English courts, that must be the
6 position. Indeed, that is bolstered by the fact that the
7 courts have taken the same approach to estoppel, estoppel
8 cannot make something lawful which is unlawful, and the
9 same must apply to legitimate expectations.

10 What does that mean in the present case, if the
11 Tribunal were to find against me? What happens is that if
12 the appeal succeeded - and of course this estoppel point
13 would not necessarily mean that the claim would succeed
14 because even if we were precluded from arguing the
15 secondary limb of the primary argument, the primary
16 argument would still fail if Floe were the user and if
17 Floe had not in fact been authorised because the
18 conditions were not fulfilled. So it is only part of the
19 case, but let us assume that Ofcom is estopped or cannot
20 run this argument and that Floe wins the other bits of
21 the case that it has to win so that the appeal succeeds.
22 The case would have to be, we submit, remitted back on
23 the question of dominant position at least to Ofcom,
24 because there were no findings in the decision that
25 Vodafone was dominant in any relevant market. Ofcom would
26 be required to reconsider its decision on dominance and
27 on abuse in light of the Tribunal's findings.

28 Because of the principles, as I have indicated,
29 that neither estoppel nor legitimate expectation can make
30 something lawful which is unlawful, we say Ofcom could
31 not and should not be required to reconsider its decision
32 on the basis that authorisation under Vodafone's Wireless
33 Telegraphy Act licence was in fact a legal possibility,
34 when the true position is that it was and is a legal
35 impossibility. Neither the principle of estoppel nor
36 legitimate expectation can require a body to treat
37 something as lawful which is in fact unlawful.

38 Madam, that is all I intended to say on estoppel
39 and legitimate expectation, but obviously if there is

1 anything else that you would like me to consider I would
2 be happy to do so.

3 THE CHAIRMAN: I think there are some new cases in relation to
4 legitimate expectations and effectively estoppel. There
5 is *R v East Sussex Council exp Reprotech* which is 2002,
6 UKHL 8, where Lord Hoffmann considers legitimate
7 expectation. I do not know whether that case deals with
8 it in the way you have put your submissions and I do not
9 know whether you have come across it, but it is the
10 latest case. Possibly we ought to look at that because we
11 ought to be dealing with it on the latest basis, even if
12 it does not actually affect your submissions. I do not
13 know whether it does or does not.

14 MR HOSKINS: I shortcut it because I did not think it was
15 necessary to go through all the levels of legitimate
16 expectations because it would have brought me out to my
17 final submission, which is why I have not done it. I do
18 not know how you would like me to deal with it, but if I
19 could be provided with a copy at lunch I could look at
20 that.

21 THE CHAIRMAN: If we provide you with a copy, because if we
22 are going to consider legitimate expectations in any way
23 we have got to actually cite our cases.

24 MR HOSKINS: Sure. If you can provide me with a copy I am
25 quite happy to look at that over lunch, and if I need to
26 make submissions I can do that this afternoon.

27 THE CHAIRMAN: I am raising it, but it may be that you do not
28 want to say anything.

29 MR HOSKINS: Thank you very much. Unless there are any other
30 further questions, those are my submissions.

31 THE CHAIRMAN: (After conferring with other members of the
32 Tribunal). What might be convenient is we possibly do
33 have some questions. It is ten to twelve so if we break
34 for ten minutes, then we will come back and that may be
35 the most appropriate way to deal with that.

36 (Short adjournment).

37 THE CHAIRMAN: Mr Hoskins, first of all can I ask you to look
38 at volume 1, tab 22, page 293? It is an exchange of e-
39 mails as we understand it between Floe and the regulator.

1 MR HOSKINS: And the Radiocommunications Agency.

2 THE CHAIRMAN: The one at the bottom is the first one and the
3 one at the top is the second one.

4 MR HOSKINS: "Thank you, and Richard and Robert very much for
5 your time and openness at today's meeting. From Floe's
6 point of view the meeting was extremely beneficial. I am
7 currently going through my notes and would appreciate
8 clarification on one area where my notes are not too
9 precise" - so it is after the meeting. "When we were
10 discussing enforcement, Cliff stated that the RA had
11 decided not to take any precipitive action against
12 gateway users during the consultation period. Could you
13 tell me whether or not this advise (sic) was by default,
14 also directed at the mobile operators and under what
15 grounds the RA would take action, and what action would
16 the RA take against mobile operators who did (or have
17 taken) precipitive action. Thanks again for your time."

18 The RA have replied: "RA can speak only for itself
19 in its decision to forbear the enforcement of the
20 Exemption Regulations pending the outcome of the
21 consultation. From the outset we have said we will only
22 act if we received complaints of interference due to
23 unlicensed use.

24 That said, individuals (including companies) are
25 perfectly entitled to act on the law as it stands. If
26 they do act, that is a contractual matter between them
27 and their customer."

28 That could be read effectively to be saying that in
29 competition law or public law terms the
30 Radiocommunications Agency led Floe to believe that they
31 would not enforce the Exemption Regulations until the end
32 of the consultation period, and that if Vodafone refused
33 to supply that would be a contractual matter, not a
34 competition matter. So could it be said that Floe had a
35 legitimate expectation from the Radiocommunications
36 Agency that there would be no enforcement and therefore a
37 refusal to supply by Vodafone could not be said to be
38 objectively justified? It may be Vodafone could refuse to
39 supply contractually, but not competition law-wise, so it

1 is a question of whether your argument is turned the
2 other way.

3 MR HOSKINS: Could you give me a moment to compose myself as
4 there are several thoughts going through my head at the
5 present?

6 THE CHAIRMAN: I can imagine.

7 MR HOSKINS: (After a pause). I have managed to write down
8 five, I think that will probably do. The first point is
9 that the Radiocommunications Agency is not a competition
10 authority, it was never responsible for enforcement of
11 the competition rules. In this sector the competition
12 authority was the Director General for
13 Telecommunications/Oftel so it cannot be a representation
14 by a competition authority about enforcement of
15 competition or the way in which competition will be
16 applied, and that of course is a fundamental part of
17 legitimate expectation, there has to be a representation
18 and the person who makes the representation can be bound.

19 THE CHAIRMAN: What status does it have then?

20 MR HOSKINS: Can I take instructions on that?

21 THE CHAIRMAN: I have three questions and I am just wondering
22 whether it would be helpful to you if I gave you all
23 three questions and then we rose for a moment and you
24 could take instructions if that is necessary?

25 MR HOSKINS: Can I sit and then I can take the questions down
26 more easily?

27 THE CHAIRMAN: Yes.

28 MR HOSKINS: Thank you.

29 THE CHAIRMAN: The second one is has the regulator properly
30 understood Vodafone's licence? It would have appreciated
31 it only covered base stations, on your submission. Could
32 the regulator have issued a licence to Floe or to
33 Vodafone for gateways and, had they done so, could that
34 in turn have legalised the contracts?

35 The third question is not really a question at all,
36 but I think the Tribunal would appreciate if you could
37 expand your submissions on the entire agreement clause
38 and the background to the contract, and as to the effect
39 of the business plan, and whether that really could be

1 ignored in looking at the agreement. What is going
2 through the Tribunal's mind is that if gateways were
3 contemplated by the agreement, then I think on your
4 submissions, of necessity, these gateways would be public
5 gateways so the agreement would never work. That may be
6 something you want to leave to Vodafone, I do not know,
7 but I think we would appreciate if you could make some
8 submissions on it.

9 MR HOSKINS: I am not quite sure I understand the point in
10 question 3. Is it assuming that Floe were providing
11 public gateways what is the conclusion or if they are
12 providing private gateways what is the conclusion?

13 THE CHAIRMAN: The difficulty is that it was an agreement for
14 resale and the background to the agreement, the matrix of
15 the agreement, is gateways. Floe was an intermediary,
16 therefore our understanding of your submissions is that
17 if they are an intermediary it will always be a public
18 gateway.

19 MR HOSKINS: Yes, that is right.

20 THE CHAIRMAN: Therefore, if you look at the contract in the
21 round, commercially, then it looks as if it would be an
22 agreement for services in relation to public gateways.

23 MR HOSKINS: Yes.

24 THE CHAIRMAN: Which would, on your submission, be illegal to
25 start with.

26 MR HOSKINS: Yes.

27 THE CHAIRMAN: I think we would like to know whether that is
28 your submission or not.

29 MR HOSKINS: That is the subject. The factual background is
30 what did Vodafone know, and that is included within the
31 business plan, but assuming that certain employees at
32 Vodafone knew that Floe was intending to provide public
33 GSM gateways under the contract, even assuming that those
34 employees knew that that expectation would be unlawful,
35 my point is that a contract which is unlawful or which
36 provides for the commission of a criminal act is
37 unenforceable as a matter of public policy. Therefore,
38 Floe may have some sort of claim against Vodafone, if
39 that is the correct scenario. Floe might have some sort

1 of claim against Vodafone for misrepresentation or
2 something, but as a matter of public policy they could
3 not enforce the contract because they cannot enforce it
4 to commit an unlawful act, and as a matter of competition
5 law, competition law cannot step in and say "We see you
6 have a contract to provide services; we recognise the
7 provision of those services would lead to the commission
8 of unlawful acts but competition law requires you,
9 Vodafone, to comply with your contract even if it is
10 unlawful." It is the same as the public policy point,
11 public policy will not require a body to perform an
12 unlawful contract. That is absolutely clear.

13 THE CHAIRMAN: We understand that submission, but I think what
14 concerns the Tribunal is that had it been correct that
15 the Vodafone licence had been as wide as was thought,
16 then there could have been written authorisation.

17 MR HOSKINS: Yes.

18 THE CHAIRMAN: The question would be whether or not the
19 agreement was written authorisation and it would not have
20 been illegal.

21 MR HOSKINS: Yes.

22 THE CHAIRMAN: That was in everybody's mind at the time.

23 MR HOSKINS: Yes.

24 THE CHAIRMAN: So on that basis there is an argument to say
25 that it is not unlawful.

26 MR HOSKINS: On the presumption that authorisation was
27 possible.

28 THE CHAIRMAN: Yes. Then you come back to my other questions
29 about whether or not it could be made lawful some other
30 way, and therefore that ought to have been explored in
31 the light of the fact that we are talking about objective
32 justification. When one points to clause 8(1) and says it
33 was up to Floe to make it lawful otherwise it was
34 unlawful, I think what concerns us is to make sure that
35 we understand your submission, that that submission is
36 made having regard to all those other facts.

37 MR HOSKINS: In terms of clarifying the submission in
38 relation to issue 3, I think that is our submission on
39 that. So the further question, as I understand it, is

1 by virtue of some new licence authorisation or whatever,
2 the obligation was on Floe to get it. It did not get it.
3 That therefore cannot be held against Vodafone or the
4 regulator in some way, shape or form, because obviously
5 the regulator has to be approached.

6 THE CHAIRMAN: It sort of goes back to the first question,
7 does it not, because if everybody was under the
8 impression that there was sufficient in the Vodafone
9 licence, then once the regulator and/or Vodafone
10 considered that that was wrong, one way of dealing with
11 it would be to see whether a licence could be provided.

12 MR HOSKINS: The regulator is not part of the equation and he
13 cannot be in terms of refusal to supply. The question is
14 not what can and should the regulator have done, the
15 question can only be what should the parties have done?

16 THE CHAIRMAN: Yes, but what Vodafone could have done is told
17 the regulator. Let us assume that that is what happened
18 and Vodafone said "Look, we have got this difficulty, we
19 entered into this agreement, we all thought it was
20 alright, we thought that the agreement was authorisation.
21 We now know that that is not the case, can we now
22 regularise it?" So it is to do with objective
23 justification.

24 MR HOSKINS: Factually the obligation was on Floe at the
25 outset. It is a black letter, contractual obligation,
26 Floe is responsible for getting authorisation. Regardless
27 of the fact that both parties - or at least individuals
28 in Vodafone and individuals in Floe - may have been under
29 a misapprehension as to the legal position, the
30 obligation was on Floe. Secondly, with respect, one must
31 not become too fanciful about what Floe could or could
32 not have done. Once the situation had arisen, Vodafone is
33 faced with a situation where it is at risk of committing
34 criminal acts, and indeed it may or may not have already
35 fallen into it by carrying out an investigation whilst
36 suspecting what was going on. My point is that a company
37 in that position is entitled to take immediate action to
38 protect its position, to ensure that it is not committing
39 a criminal act. It was entitled to do so under the

1 contract and I will show you why it was entitled to do so
2 under the contract. It is clause 8.1 which you have
3 already seen, which was an obligation on Floe not to use
4 the services or equipment unlawfully.

5 It is also important to look at clause 16.2 of
6 schedule 6 which is at page 259. "Vodafone shall have the
7 right to terminate this Agreement immediately on written
8 notice to Floe if (a) Vodafone reasonably believes" - so
9 reasonable belief is enough - "that the services are or
10 the equipment is being used in an unauthorised way or for
11 criminal activities."

12 So Vodafone has carried out an investigation, it
13 realises or has strong grounds to believe that Floe is
14 using public GSM gateway devices, it is at risk of being
15 an aider and abettor, what does it do? It invokes its
16 contractual rights. In our submission that is enough to
17 say that it is objectively justified, but let us take it
18 a stage further. Let us imagine that competition law
19 imposes an extra obligation on a company like Vodafone
20 not simply to invoke its contractual rights in order to
21 protect itself from criminal liability, but to approach
22 the regulator. My instructions are that although it has
23 not been done, it would in principle have been possible
24 for the regulator to have modified Vodafone's licence to
25 extend its scope, but only following public consultation.
26 So we are imagining that Vodafone, at risk of committing
27 a criminal act by virtue of supply, rather than stopping
28 the criminal act goes to the regulator and says "Can you
29 look at the position and see if you can extend our
30 licence." That has to follow public consultation and that
31 may or may not result in the situation where the licence
32 is extended.

33 It is the same point I raised in relation to other
34 consultation, it cannot be reasonable competition law to
35 require a company like Vodafone to continue to supply
36 when it believes that it may well be committing a
37 criminal act, pending the result of a consultation that
38 may or may not regularise the position.

39 THE CHAIRMAN: Even in circumstances where the RA has said

1 that they are not going to prosecute?

2 MR HOSKINS: Yes, and I will come on to that now. The RA did
3 not simply say "We are not going to prosecute", there is
4 more in that letter than that. If we turn back to it, it
5 is tab 22, page 293. The question is even if the RA said
6 it was not going to prosecute; the fact that the RA is
7 forbearing from prosecuting does not mean that Vodafone
8 would not have been acting unlawfully. A decision by a
9 prosecuting body - in this case a regulatory body - to
10 forbear from enforcing legislation does not legitimise
11 conduct which is unlawful under the legislation.

12 Furthermore, it is not simply that the RA said it
13 was going to forbear full stop, it said: "From the outset
14 we have said we will only act if we received complaints
15 of interference due to unlicensed use", i.e. if such a
16 complaint was made then the RA would consider
17 prosecuting. If Vodafone during the period of the
18 consultation had continued to supply, knowing as it did
19 that Floe was using public GSM gateway devices, it would
20 have exposed itself to prosecution, because the
21 prosecution would have been brought following a
22 complaint, and it would be no defence to say the RA was
23 forbearing unless it got a complaint, because if a
24 complaint triggered it, Vodafone would be caught and
25 would be criminally liable.

26 I do not know whether that ties the two together,
27 but in terms of objective justification it comes down to
28 my mantra, a company which believes it is at risk or may
29 already be committing a criminal act - it is not required
30 to jump through hoops and go to the regulator and
31 consultation etc - when it has a black letter contractual
32 right to terminate, it is entitled to protect its
33 position, it is entitled to ensure that it does not act
34 in a criminal way. I do not know if that deals with all
35 the concerns.

36 In relation to the RA letter there is also the
37 question of legitimate expectation. I do not know if you
38 want me to deal with that, but the other points we made
39 in relation to the legitimate expectation context is that

1 the RA was a body whose statutory function was to manage
2 and regulate the spectrum. It did not have any
3 competition powers, so any representation about
4 competition law cannot be made by the RA, but insofar as
5 the RA did say something about what individual companies
6 could or could not do, it made very clear that it is a
7 contractual matter between them and their customer and I
8 have shown precisely why on the black letter of the
9 contract. It is quite clear that it was Floe's obligation
10 to get any necessary licences, it did not do so, either
11 at the outset or even when it became aware that there was
12 a problem. Furthermore, there was a specific obligation
13 on Floe not to act unlawfully and a specific right for
14 Vodafone to terminate if it believed Floe was acting
15 unlawfully. Neither of those things is surprising,
16 neither of those things is anti-competitive. One would
17 expect any company entering into this sort of contract to
18 protect itself in those ways to ensure that it did not
19 get involved in criminal activities. There is nothing
20 unusual or surprising, it is precisely what one would
21 expect the company to do. So it is very difficult to see
22 why Vodafone, having protected itself by inserting these
23 clauses in the contract, should somehow - and it is
24 through the back door here that Floe could have brought
25 some sort of action against Vodafone. It probably could
26 not because it is public policy it could not enforce the
27 contract, so it comes back to the competition complaint.
28 To then pull the rug from under Vodafone and say "You
29 have protected yourself from acting unlawfully but what
30 about this, what about that", it is too far a step from
31 the commercial reality of the situation and it would be
32 very unfair to Vodafone in those circumstances to say it
33 could not rely on those contractual rights, because they
34 are perfectly reasonable contractual provisions in the
35 contract.

36 The other point regarding a legitimate expectation
37 claim based on that letter is the date of it, it is
38 February 2003. It is agreed in the Statement of Facts
39 that Floe had been providing public GSM gateway services

1 since at least August 2002, so it is not a situation
2 where Floe, having seen this letter from the RA, thinks
3 fantastic, we can start our business because the RA says
4 it is forbearing. They have already taken the decision to
5 commit to this way back in August 2002, and I have
6 already demonstrated that certainly at least by March
7 2003 but also before - we looked at the November 2002
8 consultation document of the RA - the general view was
9 that these things were unlawful because they were being
10 provided for commercial purposes. So Floe decided to
11 enter into a venture which, if it did not know it should
12 have known, was unlawful - not just a grey area but was
13 unlawful. If anyone looked at the regulations, that would
14 have been pretty clear. To say that somehow, in February
15 2003, having already pitched itself into this business it
16 had a legitimate expectation as to the legality of that
17 business, simply does not run, it is too late in the
18 timescale.

19 Those are all the points I want to make, both in
20 terms of objective justification and legitimate
21 expectation, unless there is anything else that is
22 worrying the Tribunal.

23 THE CHAIRMAN: The difficulty with your argument that Floe
24 should have known from the start is so should Vodafone
25 have known, and if one looks at the agreement
26 commercially with the background paper, and subject to
27 what Vodafone are going to say ---

28 MR IVORY: If it is of any help, madam, that is hotly in
29 issue.

30 THE CHAIRMAN: I can appreciate that, and what I am saying is
31 purely in order to explore it on the Ofcom side, it is
32 all subject to what you say. If one looks at it that way
33 then Vodafone knew as well. It may be that we should wait
34 and hear what Vodafone are going to say about that.

35 MR HOSKINS: In relation to that, this is what happens with
36 unlawful contracts because public policy will not enforce
37 an unlawful contract. Let us presume - I do not want Mr
38 ivory to get upset with me - that certain individuals in
39 Vodafone knew it was unlawful but nonetheless did the

1 deal and Floe knew or should have known it was unlawful
2 but nonetheless did the deal, public policy will not
3 enforce that contract under any circumstance. In our
4 submission it makes no sense then to say that competition
5 law would step in over and above that and say that
6 Vodafone was not objectively justified in refusing to
7 supply in those circumstances, even if Vodafone knew,
8 because the point is that at some stage, as I said,
9 someone higher up the food chain - and it looks like Mr
10 Rodman from his witness statement - realised what was
11 happening and realised that this was unacceptable. When
12 that happens competition law cannot require the company
13 to do anything other than terminate the unlawful
14 activities.

15 THE CHAIRMAN: Following through from that, if that is right
16 then how does Chapter II arise at all because competition
17 law cannot step in, it is not a competition law matter,
18 so why are we dealing with abuse of a dominant position?

19 MR HOSKINS: It would be a competition law matter if it was
20 not objectively justified, but my point is that when one
21 is looking at objective justification and one is looking
22 at the question of was Vodafone entitled to refuse to
23 supply, because of the public policy that the courts will
24 not enforce that contract, one cannot apply competition
25 law so as to say that Vodafone was wrong to refuse to
26 supply when that supply would have led not only to Floe
27 committing unlawful acts but to Vodafone committing
28 unlawful acts. It would make no sense if contract law
29 said we will not enforce an unlawful contract if Vodafone
30 were held liable for a Chapter II prohibition breach for
31 refusing to supply under an unlawful contract. That is
32 the point I want to make.

33 It may well be that Floe in the event is hard done
34 by, maybe they did not know and one feels sorry for them
35 because they are not a great big company, they are acting
36 unlawfully etc and one may think Vodafone should have
37 known better, but it does not really matter because once
38 someone in Vodafone realises that someone else in
39 Vodafone has acted in a way they should not have done,

1 the person who has realised that something wrong is being
2 done cannot have his hands tied by the risk of a breach
3 of the Chapter II prohibition. Vodafone in that
4 circumstance, when it realises what it has happened, must
5 be entitled to take the necessary steps, otherwise a
6 company is placed in an almost impossible position
7 because on the one hand we are acting unlawfully and on
8 the other hand, if we pull the plug, is it going to be
9 suggested that we are guilty of a competition abuse and
10 are they going to be seeking damages for breaching the
11 competition rules? It does not make any sense to put a
12 company in that position, and the reason it does not make
13 any sense, as I have said, is because of the public
14 policy.

15 THE CHAIRMAN: Thank you very much.

16 MR IVORY: Madam, would you like me to start?

17 THE CHAIRMAN: It is probably a little bit late. Shall we
18 discuss the timetable?

19 MR IVORY: Certainly, madam.

20 THE CHAIRMAN: You were supposed to have 45 minutes up until
21 now so we are 45 minutes behind. There is effectively 45
22 minutes at the end of this timetable because it was to
23 end at 3.30 so we can deal with that by going on.

24 MR IVORY: Yes.

25 THE CHAIRMAN: There was another 15 or 20 minutes that we had
26 not written into this timetable. How does everybody think
27 we are doing?

28 MR IVORY: I will endeavour, madam, for my part to take it
29 quite briskly and I think you are familiar with many of
30 the issues. There are obviously points that you
31 yourselves will be interested in ---

32 THE CHAIRMAN: Probably the questions that we have just asked
33 assist in that in the way that you are going to present
34 it now.

35 MR IVORY: Yes, madam. I will endeavour to deal with it in
36 about an hour, that sort of time frame, but obviously if
37 you feel I am taking it too slowly then you will of
38 course say, equally if you think I am taking it too
39 quickly then of course you must also say.

1 THE CHAIRMAN: So you could be from two until three.

2 MR IVORY: That is what I will try, madam.

3 THE CHAIRMAN: How are you doing?

4 MR PICKFORD: Again, madam, we would endeavour to finish
5 within our allotted half an hour.

6 THE CHAIRMAN: So 3.00 to 3.30.

7 MR MERCER: Madam, if I keep to a point about every 35 seconds
8 I shall take about half an hour.

9 THE CHAIRMAN: So we should finish by four o'clock.

10 MR MERCER: I would think so.

11 MR HOSKINS: At the moment I would be surprised if I need
12 another half an hour, I cannot imagine there will be
13 anything too controversial that I will hear from my left.

14 THE CHAIRMAN: So we seem to be within the timescale. Good.
15 Two o'clock.

16 (Lunch adjournment).

17 MR IVORY: There has been a lot of material that has been put
18 before you and a lot of points that have been raised, but
19 can I start by taking you back to the arguments on this
20 appeal, which is ultimately what you have to decide. For
21 all the material that has been put before you, the
22 answers to this appeal are simple and, dare I say it,
23 blindingly obvious. There are at least two obviously
24 fatal flaws in both the new primary argument and the
25 first alternative argument. In relation to the new
26 primary argument - just to identify them, although you
27 will be familiar with them - the proposition that it was
28 not Floe but Vodafone who used Floe's public gateways,
29 based on the proposition that "use" means "control" which
30 is plainly wrong, that is the first fundamental flaw.

31 The second fundamental flaw, which is quite
32 different from that, is that even if Vodafone was the
33 user of the gateways, the proposition that the public
34 gateways are radio equipment so as to be covered by
35 Vodafone's existing licence under the 1949 Act is, again,
36 obviously wrong. That second point, which is the second
37 fatal flaw in the primary argument, is also the first
38 fatal flaw in the first alternative argument. Floe's
39 public gateways could not have been authorised under

1 Vodafone's existing licence, so that is the first
2 fundamental flaw in the first alternative argument.

3 The second fatal flaw in the first alternative
4 argument is that, granted that the alleged tacit or
5 implicit authority that had been granted by Vodafone to
6 Floe was, admittedly, not in accordance with the licence
7 granted to Vodafone by the Secretary of State under the
8 1949 Act, in particular condition 8, Floe clearly had no
9 authority under or in accordance with that licence
10 granted by the Secretary of State for the purposes of the
11 1949 Act, because any authority tacitly granted by
12 Vodafone to Floe was not in accordance with that licence.
13 So that is the second fatal flaw in the first alternative
14 argument.

15 With respect, madam, both the primary argument and
16 the first alternative argument are simply unarguable, and
17 there does not seem to be anything left now of the second
18 alternative argument, so that is the end of the matter.
19 It really is as simple as that. Tempting as it may be to
20 stop there, I will not.

21 Can I start, taking it in a little more detail,
22 with the new argument on this appeal which is their
23 primary argument now? There are two elements to it:
24 first, that it was Vodafone and not Floe who used Floe's
25 gateways and, second, that such use by Vodafone was
26 authorised by Vodafone's existing licence under the 1949
27 Act. That is how the primary argument is put in the
28 Amended Notice of Appeal itself; there are the two
29 elements to it and you can see that in the Amended Notice
30 of Appeal, schedule 1, paragraph 1, the last sentence,
31 and paragraph 8, which makes clear the two elements. We
32 need not turn that up now. I think Mr Hoskins suggested
33 yesterday that the second element might have been
34 something raised in response to Ofcom, but if you look at
35 the Amended Notice of Appeal the primary argument itself
36 recognises that there are the two elements to it. In
37 order to win the primary argument, they have got to
38 succeed on both points and in fact they are clearly wrong
39 on both points.

1 So far as the first point is concerned, who uses
2 the apparatus, the answer is simple, and there are two
3 obvious signposts here. The question of who uses that
4 equipment for the purposes of section 1(1) of the 1949
5 Act is a question of the ordinary natural meaning of the
6 word "use" - on House of Lords authority that is right.
7 So it is not a lawyers' meaning, it is not a technical
8 meaning, it is the ordinary natural meaning, how a layman
9 would use the word. The answer to the question who used
10 Floe's gateways, in layman's language, is given by Floe
11 itself in the original complaint. Could I ask you to look
12 at that quickly in bundle 1, tab 26? This is the formal
13 complaint by Floe to Oftel, 14th July, and it is the top
14 of page 3 of the complaint which is at page 306. I would
15 just draw your attention to the first sentence at the top
16 of the page under "GSM Gateway Services" - "Floe employs
17 GSM Gateways to provide discounted mobile termination to
18 UK companies ..."

19 Of course, there it says "employs" not "uses" but
20 it is the same thing, Floe employs or uses GSM Gateways.
21 That was their own description of the position in
22 layman's language. That of course was written before they
23 instructed their present lawyers, who came up with this
24 clever and new meaning of the word, but on House of Lords
25 authority it is how the word is used in layman's
26 language, which is the applicable test, and you have the
27 answer to it in layman's language in the complaint
28 itself. That is the first obvious point.

29 Moving on to the next signpost, there is a lot of
30 material before you on the technical aspects of how the
31 gateways and the network operate and how they interact
32 and so forth, some of it pretty complicated and
33 sophisticated technology. All the details are there if
34 you need them, but the question of who uses a public
35 gateway can again be answered very simply, because it is
36 common ground that for this purpose a public gateway
37 operates just like a mobile phone. That is the Statement
38 of Facts, paragraph 13, which Mr Hoskins has already
39 taken you to. The use of a mobile phone is something we

1 can all relate to and understand. I take out my mobile
2 phone, I switch it on and I use it to make a call; a
3 perfectly ordinary, unexceptional sentence, but in that
4 sentence lies the answer to the use argument. I switch on
5 my phone and use it to make a call. The ordinary natural
6 meaning of the word.

7 On Floe's case I am not using my mobile phone, if
8 it has got a Vodafone SIM card in it, it is Vodafone or
9 whichever mobile network operator's SIM is in it who is
10 using it. That is not the natural, ordinary meaning of
11 the word, but it goes further than that, it is actually a
12 contradiction in terms, if you think about it, to say
13 that when I switch on my mobile phone and use it to make
14 the call, I am not using it, someone else is. It is a
15 contradiction in terms, just saying it demonstrates that
16 it is so.

17 By barring the SIM or the equipment identification
18 number, the IMEI of the mobile phone or gateway, Vodafone
19 can prevent a person using the equipment to access
20 Vodafone's network, but that is not Vodafone using the
21 equipment, on the contrary that is Vodafone preventing
22 someone else using it to access Vodafone's network. It
23 makes a complete nonsense of it to suggest that Vodafone
24 is preventing itself from using it. Madam, that is all
25 very simple stuff, but it is the ordinary, natural
26 meaning of the word and that is precisely the test, on
27 House of Lords authority, and it really is as simple as
28 that.

29 Floe says use means control and that use of a piece
30 of apparatus under the 1949 Act is to be equated with
31 running a telecommunications system under the 1984 Act.
32 Throughout schedule 1 to the Amended Notice of Appeal,
33 and in the skeleton argument, and in his oral argument
34 yesterday, Mr Mercer constantly referred to control. I
35 will not bore you with taking you through the skeleton
36 paragraph by paragraph, it is all about control. The
37 mobile network operator does not actually control the
38 mobile phone or a public gateway, all it can do is
39 prevent it being used to access its network, nothing

1 more, but in any event it is the wrong question. The
2 question is not who controls it, but who uses it. It is a
3 different word with a different meaning, control. It is
4 not the same as use. When they say control they really
5 mean control the use of which again, as Mr Hoskins
6 pointed out yesterday, is not the same.

7 Again, if you stop to think about it, that very
8 phrase "control the use of" pre-supposes that someone
9 else is using it, which you are then controlling, because
10 it is again a nonsense to speak of you controlling use by
11 yourself. It does not make sense. Also, if I may
12 respectfully adopt madam Chairman's point made yesterday,
13 that under the new section 1A to the 1949 Act, there
14 within a single section of the Act it uses the two words
15 control and use, clearly recognising that they mean
16 different things.

17 Floe cites no authority in support of its
18 proposition that use in section 1(1) of the 1949 Act
19 means control, and it is actually contrary to the House
20 of Lords authority in *Rudd* that it bears its ordinary,
21 natural meaning. So where does this idea of control come
22 from?

23 The answer, apparently, is from some guidelines
24 issued by Oftel on who runs a telecommunications system
25 for the purposes of the 1984 Act. Again, madam, I will
26 not ask you to look it up now but you will recall
27 paragraph 6 of Schedule 1 to the Amended Notice of Appeal
28 which indicates that that is where they get this idea
29 from. So it is Oftel's interpretation of different words,
30 in a different Act, with different purposes. That is the
31 only authority cited in support of this proposition and
32 it is completely and utterly irrelevant.

33 Moreover, the argument is inconsistent with the
34 regulations made under section 1(1) of the 1949 Act, as
35 Floe concedes. The main purpose of those regulations was
36 to exempt people using mobile phones from having to get
37 individual licences in order to do so. On Floe's case,
38 mobile phone users were not the users at all anyway, and
39 therefore they did not need a licence. So on that

1 argument, as they themselves concede, the regulations are
2 completely otiose. They do not shrink from that, they
3 castigate this legislation as "a fig leaf of legislation,
4 designed for a different age", that there is no need for
5 it and that "the whole unsuccessful edifice under the
6 1949 Act is unnecessary". That is quoting from their
7 skeleton argument at paragraphs 17 and 25, and yesterday
8 Mr Mercer referred to it repeatedly.

9 Madam, at this point, if not long before, the clock
10 has well and truly struck 13. Like it or not, that is the
11 law of this country and this Tribunal, like any other
12 court, has to construe it and apply it in accordance with
13 its purpose, not ignore it, regard it as nonsense or,
14 which comes to the same thing, construe it and apply it
15 in a way which defeats its purpose and indeed defies it
16 of any purpose. To adopt Floe's phrase of the
17 unsuccessful edifice here, is not the legislation that
18 Floe's argument would fly in the teeth of the wording and
19 purpose of that legislation and in effect seeks to
20 disregard it. That is the first point on their primary
21 argument. I have taken it fairly briskly, there is a lot
22 more detail, both in the skeleton argument and even more
23 so in the statement of intervention, but I make no
24 apologies for taking it quite briskly because it is a
25 very, very simple point and it is unanswerable.

26 Can I now then, madam, move on to the second point
27 on the primary argument which also has a fatal flaw in
28 it? Even if Floe somehow manages to get over all that and
29 persuades you that Vodafone not Floe was the user of
30 Floe's gateways, the primary argument still fails because
31 of the second point that such use was not and could not
32 have been authorised under Vodafone's licence under the
33 1949 Act in any event. Vodafone's licence under the 1949
34 Act only authorises the installation and use of radio
35 equipment as defined in schedule 1(1), so the use of a
36 public gateway could only be authorised under the licence
37 if it was radio equipment as defined, and it plainly is
38 not. Mr Hoskins has taken you through the material on
39 that and I will not repeat what he says.

1 Mr Mercer for Floe recognises, as he has to, that
2 for the purposes of this part of the primary argument he
3 has got to show that public gateways are radio equipment
4 as defined and, in particular, that they are base
5 transceiver stations forming part of the network,
6 otherwise they are not within the definition and, hence,
7 outside the scope of the licence. Nothing daunted, Mr
8 Mercer says that they are base transceiver stations, as
9 he has to in order to run the argument. He has no choice
10 but to try to say so, but he has no evidence in support
11 of it, it is contrary to the agreed facts - see the
12 Statement of Facts, paragraph 17 which Mr Hoskins has
13 already taken you to and I will not ask you to look at it
14 again - and there is a good deal of technical evidence
15 directly on the point, saying it is not.

16 On the agreed facts and on the evidence before you
17 there is only one possible conclusion, with respect, that
18 you can come to on this issue, and that is that the
19 public gateway is not a base transceiver station and,
20 hence, is not within the scope of the licence. I do put
21 it that high, madam, that is the only possible conclusion
22 you can come to on that point on the material before you.
23 That point alone, in itself, is sufficient to kill the
24 primary argument. Even if Mr Mercer managed to persuade
25 you on the use point, he would still lose the primary
26 argument on this second point which is unanswerable.
27 Again, I have taken it fairly briskly, madam, and if
28 there is anything that you wish to ask me about that,
29 please do not hesitate to say.

30 I am now going to move onto the first alternative
31 argument because it conveniently follows the point that I
32 have just made on the primary argument, because the same
33 point is also the short, simple answer to the first
34 alternative argument. Just to remind myself if no one
35 else what the first alternative argument at this juncture
36 was, it is that if the use of the public gateways was
37 prima facie illegal under section 1(1) of the 1949 Act,
38 then its use of them was authorised under Vodafone's
39 licence under the 1949 Act on the basis that Vodafone

1 knew or possibly ought to have known that Floe intended
2 to use the SIMs supplied under the Agreement as public
3 gateways and tacitly authorised that use under its own
4 licence. That is the first alternative argument.

5 You can see straightaway that if it is right - as
6 it plainly is we say - that public gateways are not
7 within the scope of the Vodafone existing licence because
8 they are not radio equipment, then Vodafone could not
9 have authorised their use under its licence even if it
10 had purported to do so. So this second point which arises
11 under the primary argument is not only a conclusive
12 independent answer to the primary argument, it is also a
13 conclusive answer to the first alternative argument and
14 disposes of it as well.

15 Even if we are wrong about that, there is a second
16 knockout point on the first alternative argument just for
17 good measure, and that is this: Floe's use of the
18 equipment - in order for that to be legal under section
19 1(1) of the 1949 Act, it is not sufficient for Floe to
20 show that its use was authorised by Vodafone, who had a
21 licence granted under section 1(1) of the 1949 Act by the
22 Secretary of State, Floe's use must be properly
23 authorised under the licence granted by the Secretary of
24 State, and if it is relying on an authority granted to it
25 by Vodafone under its licence for that purpose, such
26 authority must be validly granted under and in accordance
27 with the terms of that licence granted by the Secretary
28 of State, otherwise Floe's use is not authorised under
29 that licence by the Secretary of State.

30 Can I ask you to look at the legislation again on
31 that at Bundle 3, tab 55, going to section 1(1) to see
32 how this works in relation to Floe. "No person [Floe]
33 shall establish or use any station for wireless
34 telegraphy or install or use any apparatus for wireless
35 telegraphy except under the authority of a licence in
36 that behalf granted under this section ..." It now says
37 by Ofcom and it used to be by the Secretary of State
38 until the Communications Act came into force. In order
39 for Floe to be covered under section 1(1) it must show

1 that its use of the gateway is under the authority of a
2 licence granted under this section by the Secretary of
3 State (or now Ofcom). In other words, it must be properly
4 authorised under a licence granted by the Secretary of
5 State.

6 Just to make the point good, madam, the section
7 goes on to say "and any person who establishes or uses
8 any apparatus for wireless telegraphy ... except under
9 and in accordance with such a licence shall be guilty of
10 an offence."

11 Floe concedes, as it has to, that any authority
12 allegedly granted by Vodafone to Floe was not in
13 compliance with the terms of Vodafone's licence and, in
14 particular, condition 8 which requires that consent to be
15 in writing. What Floe says is that a breach of the
16 condition in Vodafone's licence is your (Vodafone's)
17 problem, not our problem. Madam, again I will not ask you
18 to look it up now unless you wish me to, but the
19 references for that are the Amended Notice of Appeal,
20 schedule 2, paragraphs 1(c) and 1(d) and paragraph 28 of
21 the skeleton. They concede that it is a breach, as they
22 must, but they say that is your, Vodafone's, problem, if
23 it is a breach. They are wrong about that because in
24 order for them to be protected under section 1(1) it is
25 not sufficient if it is authorised by Vodafone, it must
26 be properly authorised under and in accordance with the
27 licence granted by the Secretary of State and if, as is
28 conceded, this alleged tacit authority is in breach of
29 the terms of Vodafone's existing licence granted by the
30 Secretary of State, it does not help them on section
31 1(1). So, again, their use of the gateways is clearly
32 illegal.

33 That, madam, is again a conclusive answer and an
34 independent answer to the first alternative argument,
35 quite apart from the first point that it is not within
36 the scope of the licence in any event. If we are right
37 upon either of those two points, that disposes of the
38 first alternative argument and it does not matter one jot
39 whether Vodafone knew or ought to have known that Floe

1 intended to use SIMs supplied under the agreement in
2 public gateways. It does not matter on that basis.

3 Again, just in case I might be wrong on both
4 points, I will go on to deal with that, but before doing
5 so perhaps at this juncture I can try and pick up a
6 couple of points which were raised by the Tribunal
7 yesterday. The Tribunal asked what is the difference
8 between public and private gateways for the purposes of
9 Regulation 4(2) of the Regulations? The first point and
10 obvious point is that it does not actually matter for the
11 purposes of this appeal, which is concerned with public
12 gateways. Leaving that aside, let us deal with the point.
13 It is not simply the difference between a single and a
14 multi-party user. There is that difference, but it is not
15 the important distinction for the purposes of regulation
16 4(2). The key distinction for the purposes of that
17 regulation is that a private gateway is not merely used
18 by a single customer, it is the customer's own gateway
19 attached to its switchboard, it belongs to him and he
20 uses it for his own purposes to make a call. That is the
21 key difference when it comes to the concluding words of
22 Regulation 4(2).

23 Can I take you to that, madam, in bundle 3, tab 58,
24 the 1999 one, and I think the 2003 one is at tab 69.
25 Perhaps it is convenient just to take it at tab 58, going
26 to regulation 4(2) which is at page 1065 of the bundle.
27 The key words on this point, if you want to know the
28 distinction for the purposes of regulation 4(2) between a
29 private and a public gateway, lies in the last line or
30 so, the words "by means of which a telecommunication
31 service is provided by way of business to another
32 person." There is quite a lot in between, but if you
33 actually read it carefully that relates back to "relevant
34 apparatus" at the end of the first line.

35 What it is carving out from the exemption is where
36 the relevant apparatus (which is providing the wireless
37 link and telephony link and so forth) is apparatus by
38 means of which a telecommunication service is provided by
39 way of business to another person. In the case of the

1 private gateway that does not apply because the private
2 gateway is the customer's own gateway. I say "own
3 gateway" you have acquired it either by way of purchase
4 or I suppose it could have been by way of financing, but
5 either way it is its gateway which it uses for its own
6 purposes to make a call. It is not using it to provide a
7 telecommunication service by way of business to another
8 person, a third party. In that regard, madam, it is just
9 like a mobile phone again. A mobile phone is not caught
10 by regulation 4(2) because it is not being used to
11 provide a telecommunication service to a third party, the
12 subscriber uses it for his own purposes to make a call,
13 and it is the same with the private gateway.

14 Mr Mercer suggested that a mobile phone was caught
15 by those last words of regulation 4(2) saying that
16 Vodafone or other mobile network operators are providing
17 a telecommunication service by means of the mobile phone.
18 There are two answers to that. The first, which Mr
19 Hoskins made yesterday, is that that argument ignores the
20 key words "to another person" which is somebody different
21 from the telecoms system provider and the user of the
22 apparatus, it is a third person to whom you are providing
23 the relevant apparatus to provide a telecommunication
24 service. Mr Mercer's argument ignores that, as Mr Hoskins
25 rightly pointed out yesterday. Secondly, madam - I am
26 sorry to come back to it, but as a matter of statutory or
27 any other construction it is key - his argument again
28 renders the regulations otiose and defeats the very
29 purpose of the regulations, the prime object of which was
30 precisely to exempt mobile phone users from the need to
31 get an individual licence. As an approach to statutory
32 construction that is, with respect, just hopeless, a
33 complete non-starter.

34 A public gateway in contrast is completely
35 different. The public gateway belongs to the telecoms
36 service provider, it is its gateway which it uses to
37 provide telecommunication services to third parties of
38 its customers. In practice, of course, it will be lots of
39 customers because otherwise it does not make sense

1 commercially, but that is not the critical point. The
2 critical point for the purposes of regulation 4(2) is
3 that the operator of that public gateway is using it to
4 provide a telecommunication service to third parties.
5 That is the key point. It is not so much by way of
6 business, madam, although of course it has to be, but the
7 key point - and I will not go back to it but you referred
8 yesterday, madam, to a number of documents on this point.
9 If you look, with respect, at those documents less from
10 the point of view of commercial and by way of business
11 and more the reference to third parties, I think you will
12 see the point emerge. That is the key point, it is using
13 it to provide a telecommunication service to third
14 parties. That is the difference between the two for the
15 purposes of the regulations.

16 Moving on to another point, madam, that you raised
17 yesterday, you said the question is - and I may not have
18 got this down precisely - if Vodafone knew Floe were
19 going to provide GSM gateways, whether public or private
20 upon what basis did Vodafone enter into the contract?
21 Madam, the key difference again is public and private
22 gateways. Vodafone did know that Floe intended to put
23 SIMs into private gateways but not public gateways. That
24 is the evidence of Vodafone's witnesses and there is no
25 evidence to the contrary. It makes a big difference,
26 because the business plan on the face of it, where they
27 are proposing to sell private gateways, is a perfectly
28 legal business. That is what Vodafone thought they were
29 doing. Vodafone understood that Floe would be using SIMs
30 supplied under the agreement in mobile phones and private
31 gateways. That is the evidence of Mr Morrow (tab 3,
32 paragraph 4). That is obviously on the basis that private
33 gateways were legal, as they are. You will see that Mr
34 Morrow and others refer to Premicell devices - that is
35 what private gateways used to be called, Premicell
36 devices - and they have been around for some years. You
37 will see, for example, in Mr Rodman at tab 5, paragraph
38 12, that Vodafone Corporate had been supplying Premicell
39 devices. No one, so far as one can tell, had questioned

1 the legality of those until you come to
2 Radiocommunications Agency press release at tab 16 of
3 bundle 1, dated 23rd August. That is the first time, so
4 far as one can see from the documents, that anyone is
5 questioning the legality of those, and they query it on
6 the basis that they are not mobile stations but fixed
7 mobile stations - whatever that means.

8 As to that, madam, a number of points. That was the
9 Radiocommunications Agency's view being expressed there,
10 not Vodafone's. Second, it post-dates the agreement. The
11 agreement itself had been the subject, of course, of
12 discussions for many months prior to this, but it was
13 actually signed on 12th August before that press release.
14 Third, granted that it was the view of the
15 Radiocommunications Agency, it is wrong, for the reasons
16 explained in Mr Rodman's second witness statement, and
17 now accepted by Ofcom, and indeed in the Statement of
18 Facts. You may recall from paragraph 17 of the Statement
19 of Facts, which Mr Hoskins took you to yesterday, it is
20 there agreed that gateways are mobile stations.

21 Madam, the next point is that if anybody had
22 thought about this point at the time, before the
23 Radiocommunications Agency's press release, and even if
24 you thought there might be a technical point there, that
25 is what you would see it as, a technical point and no
26 more than that, because if it were right, madam, it would
27 render illegal all sorts of things which could not
28 possibly be regarded as illegal - ATM machines, traffic
29 lights, vending machines are three examples that appear
30 in the correspondence. So if there was anything in the
31 point, which it turns out there is not, it is an obvious
32 anomaly. It is one of the points which is there, but if
33 you take it then it rules out all sorts of things which
34 would be ridiculous.

35 THE CHAIRMAN: Can I just make sure that we understand? What
36 you are saying is that Vodafone believed that Floe was
37 getting SIMs, putting them in the gateway and selling the
38 gateway to whomever.

39 MR IVORY: Precisely, like mobile phones, selling mobile

1 phones and private gateways, and Vodafone supplied them.
2 That is precisely it, and that is a perfectly legal
3 business, and that is what Vodafone thought they were
4 doing. Then, of course, as you have seen from the
5 evidence, Vodafone get contacted by the police in the
6 second half of 2002 about public gateways which were
7 illegal. The police thought they were and were saying
8 that. That is what they were worried about, and they did
9 not know that Floe were going to use their SIMs to put in
10 public gateways which it turns out is what they were
11 actually doing and which is what the police had been
12 contacting them about in the second half of 2002. So that
13 is the basis upon which Vodafone entered into the
14 agreement. Turning to another point which I think you
15 made yesterday, madam, and again I hope I have got this
16 down accurately, did Vodafone as well as Ofcom consider
17 that Vodafone did have the ability to authorise the use
18 of public gateways under its licence? In that context you
19 mentioned estoppel by convention, *Amalgamated Instruments*
20 and so forth. In that connection, madam, you referred to
21 tab 22 at pages 291 and 297. Page 291 is a letter from Mr
22 Mason of the Radiocommunications Agency to Floe of 20th
23 March 2003 and 297 is a further e-mail from him of 27th
24 May 2003. Tab 30 is the letter from Mr Rodman of Vodafone
25 to Oftel of 6th August and then tab 34 is a further e-mail
26 from Mr Mason to Oftel of 8th September 2003. I think
27 those are the documents that are relevant.

28 The first point to note about those, madam, is that
29 they are all long after this agreement was entered into.
30 There is no question of any of those supporting a common
31 understanding upon which the parties acted in entering
32 into the agreement, which is the classic estoppel by
33 convention. In fact, they are all after 18th March when
34 Vodafone disconnected Floe. Next, with one exception
35 which I will come to, they are not Vodafone documents,
36 they are documents from Mr Mason of the
37 Radiocommunications Agency, not Vodafone, and Vodafone is
38 not even the recipient of them either. The one exception
39 is tab 30, can we have a quick look at that, it is in

1 bundle 2. The second page of the letter, page 388, I
2 think is what you were referring to. You will see from
3 387 it is a letter from Mr Rodman to Oftel of 8th August
4 2003 and I think that the passage you were referring to
5 and quoting from is sub-paragraph (c) on page 388,
6 specifically the reference to - and it picks it up in
7 quotes "... without the authority and permission of a
8 licensee [i.e. Vodafone] is unlicensed use and will be
9 illegal." I think that is what you were referring to
10 there, madam.

11 That is quoting from the Decision which had been
12 announced on 18th July. I will not ask you to turn it up
13 but you will see it is tab 52 where that is quoted from.
14 The point that Mr Rodman is picking up there is that it
15 is, on the government's view, illegal, and the reason why
16 he is picking it up and making that point is to complete
17 the loop and emphasise what he has said earlier in the
18 letter. You need to read the letter in its context,
19 madam, to understand what he is getting at, but can I
20 take it back to the first two paragraphs on page 387? He
21 has just received a copy from Oftel of Floe's complaint
22 of 14th July, and you will see he says in the second
23 sentence: "I should say at the outset that Vodafone
24 believes this complaint to be completely without
25 foundation and a spurious attempt to resurrect an illegal
26 activity." That is what he is concentrating on, madam,
27 the illegal activity. Then he refers to the fact that
28 Oftel's inquiry is still at an early stage and so forth,
29 and then he develops that in sub-paragraph (a). "As Oftel
30 is aware, the Radiocommunications Agency has recently
31 concluded its consultation on the exemption status ..."
32 and then he quotes what they have said on their website.
33 Then if I can pick it up halfway down that paragraph, "In
34 other words the business in which Floe is engaged - that
35 of providing a public telecommunication service by means
36 of GSM gateways - was and still is illegal. It is
37 difficult to understand how Floe Telecom can seriously
38 try to invoke the Competition Act in these circumstances.
39 Vodafone does not accept that it has a dominant position

1 in any relevant market, but even if it did, illegality is
2 clearly an objective justification for termination of
3 supply. Vodafone cannot, therefore, be in breach of
4 Competition Law for taking action to prevent such illegal
5 conduct." Then the following paragraphs, madam, develop
6 that and lead to paragraph (c) which we have just seen.
7 What he is saying there is that it is clearly illegal and
8 he is quoting the government's decision in support of
9 that, that is all he is doing there, no more and no less
10 than that.

11 In fact, as you can see if you follow the
12 correspondence through, Vodafone did not actually think
13 they could have licensed it under their existing licence,
14 and you get that if you turn over, still in the same
15 bundle, to tab 50 where you will see a letter of Vodafone
16 to Oftel of 23rd October, which is responding to a request
17 from Oftel (which I think you will find at tab 46)
18 basically to produce all your documents, and there is
19 quite a lot that is produced in response to that. The
20 covering letter is quite long, so I will take you if I
21 may to a relevant paragraph on this point. If you go to
22 paragraph 3.1, this is under the heading "Could Vodafone
23 simply have given its written consent to allow Floe to
24 operate what would otherwise have been illegal? During
25 the conference call on 13th October Oftel said it had
26 always been an option for Vodafone to simply consent. We
27 have already supplied information to Oftel to the effect
28 that Vodafone has not given its express consent to Floe,
29 or indeed anyone else, to operate the public gateways. In
30 addition we would make the following points in support of
31 this line of argument."

32 Then if you go to 3.6, "It seems to us that the
33 Radiocommunications Agency has concluded publicly on more
34 than one occasion" - there is quite a lot of detail in
35 between, but this is the conclusion - "that the issue of
36 whether the public GSM gateways can operate legally is
37 not a simple case of the MNO giving its consent to a
38 public gateway operator as Oftel suggested." If you go
39 to the next section, paragraph 3.12 - I am not bothering

1 with all the details of this because it is quite detailed
2 reasoning and some of it is not terribly importaant, but
3 if one goes to 3.12 and 3.14 one can see that those are
4 the crucial paragraphs. 3.12 reads: "The public gateway
5 is not part of any mobile network operator's network
6 (which in Floe's case it is not and never was) then in
7 order to connect to the network the gateway equipment
8 would have to be a user station as defined. However,
9 Floe's public GSM gateways cannot be user stations as
10 defined because they fall outside the regulations and
11 always did so and were always illegal, as confirmed by
12 the RA on 18th July. In addition, public GSM gateways
13 cannot be radio equipment because they do not communicate
14 with a user station, they can only communicate with a
15 network." So there loud and clear is the point that they
16 are not radiocommunications equipment.

17 Then if you go to 3.14: "Even if, despite all of
18 the above, Vodafone could have authorised the operation
19 of public GSM gateway equipment, Vodafone would still
20 have to be responsible under the 1949 Act ..." and so
21 forth. Madam, reading that letter it is fairly clear that
22 Vodafone is not actually thinking that this could be
23 authorised and dealt with under their licence.

24 Ofcom certainly have changed their position on
25 that, as they have freely accepted, but Vodafone has not
26 changed its position, that always was its position, and
27 they are not estopped from anything. This is of course
28 long after the event in any event.

29 I also note in passing, whilst we have got this
30 document open, a point that I think is worth making. This
31 document, which was put into the bundle at Floe's
32 request, also makes it clear that Floe themselves at this
33 time thought gateways were illegal, during the
34 discussions that had been going on on this. You will see
35 that in the middle of page 614, the second bullet point:
36 "Floe themselves believe that their operated was illegal"
37 and then it is section 2 of the letter, and in the
38 interest of time I will not waste time on it now, but you
39 will see from that letter that throughout the discussions

1 which had been leading up to this point Floe themselves
2 thought and had conceded that the use of public gateways
3 was illegal. So if there is any common understanding
4 throughout this period, it is common understanding of a
5 rather different type, namely that these were illegal.

6 So far as the estoppel by convention argument
7 raised by madam chairman yesterday is concerned, we say
8 that so far as the material before you goes, there is no
9 evidence that that was Vodafone's understanding; the
10 material as far as it goes indeed suggests the opposite.
11 Can I also at this point put down a very gentle marker,
12 if I may, about raising an argument on estoppel by
13 convention for an appeal at this juncture, when it
14 necessarily depends upon facts, not least Vodafone's
15 understanding - and indeed what Floe's understanding of
16 it was - whether it had been communicated, whether it was
17 a shared assumption and whether they conducted their
18 affairs on that basis. Estoppel is not raised in the
19 complaint, it was not raised in the original notice of
20 appeal nor indeed in the amended notice of appeal. If it
21 had been, madam, it would have been specifically
22 addressed in Vodafone's letter. I very tentatively
23 suggest, madam, that it is, with respect, not for the
24 Tribunal at this hearing to consider that.

25 Madam, there are further points about whether, even
26 if there was any basis of estoppel, it could possibly
27 have the effect of requiring a person to act unlawfully,
28 to which the answer is plainly no. Even under a contract
29 it could not do so, let alone estoppel, and I know Mr
30 Pickford has got some authorities that may be relevant on
31 that, but I will leave that to him.

32 Madam, can I come back to the question of whether
33 Vodafone knew or ought to have known that they were using
34 not private gateways but public gateways. In the
35 interests of time there are a couple of inter alia points
36 at paragraphs 50 and 51 of my skeleton to do with the
37 suggestion that even if tacit consent is not enough, for
38 the reasons we are trying to explain, even if it were
39 there was not tacit consent, for the reasons I have

1 explained at 50 and 51.

2 Can I, in the interests of time, just move on very
3 quickly to what Vodafone did understand was the nature of
4 Floe's business, that it was private gateways and not
5 public gateways, madam? The first point to note is that
6 the evidence on this that is before you is in the witness
7 statement of Mr Young at tab 3 where he says he did not
8 know about public gateways. Perhaps it is worth just
9 looking at that briefly. It is tab 3 in bundle 1, page
10 24. Taking it quickly, having made the point that the
11 version of the plan that Floe are relying upon is not the
12 one that he saw, he says in the fifth line. "I understood
13 from the plan which I saw and from discussions with Simon
14 Taylor [the chief executive of Floe] that Floe intended
15 to provide a range of least cost routing services to
16 customers, including what I knew to be Premicell-type
17 products." Then he goes on to explain what a Premicell-
18 type device is, and it is what is now referred to as a
19 private gateway.

20 Then if you look at paragraph 4 he refers to the
21 version of the business plan which Floe is relying on and
22 he says nothing there suggests that Floe intended to use
23 SIM cards "for the purpose of providing what I now know
24 to be public gateway services. I note that all the
25 devices featured in Appendix A are typical private
26 gateway devices. If I had seen this business plan I would
27 have inferred from it that Floe intended to provide only
28 private gateway services of the kind with which I was
29 familiar. Indeed, neither I nor, so far as I am aware,
30 anyone else at Vodafone was aware that Floe was intending
31 to use the Vodafone's SIM cards in what I now understand
32 to be public gateways ..."

33 Madam, you will see from that that it is not just
34 the business plan, there were actually discussions -
35 because of course the negotiations went on for a long
36 time - between Mr Young and Mr Taylor, in the course of
37 which, he says, Mr Taylor explained to him that what they
38 were proposing to use was private gateways. Floe has
39 produced no evidence to contradict that, still less any

1 witnesses to say that in those discussions we told
2 Vodafone that we were going to use them in public
3 gateways.

4 THE CHAIRMAN: Can you expand on least cost routed services?

5 MR IVORY: That is explained in Mr Rodman's witness statement
6 at page 33, paragraph 5. He actually explains there what
7 they do with the private gateway. Actually that is not
8 specifically on private gateways, he deals with that
9 later, madam.

10 THE CHAIRMAN: I think this is rather important, we must
11 clearly understand it.

12 MR IVORY: Yes, of course madam.

13 THE CHAIRMAN: If you look five lines down, where it says: "A
14 least cost routing company will generally connect its own
15 equipment to the customer's switchboard equipment (PABX)
16 and carry the traffic itself, up to a point of handover
17 ..." Is that not an intermediary?

18 MR IVORY: That is basically a company that is going to carry
19 the traffic, that is from the customer's switchboard to
20 the point of interconnection. I do not think that is a
21 private gateway that is being referred to there. It could
22 be a fixed line carrier there, madam.

23 THE CHAIRMAN: This is supposed to explain what a least
24 routing service is.

25 MR IVORY: That is what you asked me, madam, yes. He is not
26 addressing it there, madam, in the context of private
27 gateways, he deals with that later on at paragraph 11
28 where he mentions private gateways. A private gateway is
29 attached to the customer's switchboard and is therefore
30 part of the customer's switchboard, but as regards the
31 user, the customer uses the private gateway, it is his
32 equipment attached to his switchboard.

33 THE CHAIRMAN: I understand that, but Mr Young said least cost
34 routing and I understand at the moment, from paragraph 5,
35 that least cost routing was the first limb of public
36 gateways. There are two limbs to public gateways, there
37 is the possibility of a single user, but done through an
38 intermediary, and then a possibility of multi-users.

39 MR IVORY: In practice it will be the latter, madam, because

1 you would not do it for a single customer. In theory you
2 could, but in practice commercially you are running a
3 telecommunications system, you have at the end of a
4 public gateway switch to route into a mobile network
5 operator, so that in practice it will be multi-customers,
6 lots of people.

7 THE CHAIRMAN: Is that agreed?

8 MR IVORY: It is certainly my understanding of it, madam.

9 Forgive me a moment. (Mr Ivory takes instructions). What
10 my solicitor has explained to me, and I am very grateful,
11 is Mr Rodman in this part of his witness statement is
12 explaining generally telecommunications systems and least
13 cost service providers in that context, which will
14 include all sorts of animals like, for example, madam,
15 fixed carriers. There are all sorts of possibilities, it
16 is just generally part of his general description of the
17 type of entity that operates in the telecoms world. He
18 has covered the least cost carrier covers many different
19 animals. When it comes to the private gateway, which you
20 could have attached to the switchboard, which is the
21 customer's apparatus, he is using it and he is using it
22 to make a call. That gateway will take it directly into
23 the mobile network operator's network. He could also have
24 his fixed lines carried across a least cost route
25 carrier. So far as the use of the gateway - which is
26 wireless not fixed line - is concerned, that is important
27 because although we have been focusing on mobiles which
28 are wireless, there are of course all sorts of services.
29 There is another completely different type of telephone
30 call which is the fixed line call, and the private
31 gateway that is attached to his switchboard, that
32 connects directly into the mobile network operator's
33 network and he is using it - when the private customer
34 uses it he uses it for his own purposes to make his own
35 calls.

36 THE CHAIRMAN: Would that be a least cost routing service?

37 MR IVORY: I am not sure that that is a technical term, madam.

38 THE CHAIRMAN: If we go back to Mr Young at page 24 ---

39 MR IVORY: He says yes it could be, madam. What he is there

1 saying is "a range of least cost routing services to
2 customers, including ... " the private gateway. It is a
3 range of services which will include, for example,
4 beneficial rates on fixed calls. So far as the Premicell-
5 type products are concerned, that is something that Floe
6 are going to be supplying and they are going to be
7 selling it to customers, private gateways. That is the
8 way a private gateway works. It is then installed and
9 used at the customer's premises by the customer. It is a
10 general description of the type of services that Floe is
11 providing, a range of least cost routing services. One of
12 the things they will be doing is selling private
13 gateways.

14 THE CHAIRMAN: It does not say that, "Floe intended to provide
15 a range of least cost routing services to customers,
16 including what I know to be Premicell-type products."
17 Providing it is part of the service. Although it does not
18 say it is going to sell.

19 MR IVORY: That is what they were doing. He is focusing on
20 what the devices were, that is what he has been asked
21 about.

22 THE CHAIRMAN: It is the same device, whether it is private or
23 public.

24 MR IVORY: No, madam it is not, it is fundamentally different.
25 It is a completely different type of equipment, madam, as
26 he says, and that is why he says in paragraph 4, where he
27 refers to appendix A to the business plan relied upon by
28 Floe, that these are Premicell-type devices. I do not
29 think we have any pictures of public gateways but they
30 are completely different. We have pictures of the private
31 gateway devices in the business plan, which is at bundle
32 2, tab 33. At appendix A you will see various pictures of
33 the equipment, and these are what are called Premicell
34 devices or private gateways. They are quite neat, well-
35 presented equipment because they are actually going to
36 sit on the customer's premises, as opposed to a public
37 gateway which will be heaven knows how many times the
38 size of this and which will not be attractively packaged
39 because it will be sitting in some hole underground or

1 wherever, attached to the network operator's switch.

2 THE CHAIRMAN: Where is the evidence for this?

3 MR IVORY: Madam, you have seen Mr Rodman's evidence where he
4 says these are Premicell-type devices. Madam, in terms of
5 evidence there is absolutely no evidence on the other
6 side about this and they are the ones who are saying we
7 knew from this business plan that they were not public
8 gateways. The evidence before you is Mr Young's evidence
9 which is no, they are not, and this is what he is
10 referring to because these are Premicell-type devices,
11 they are private gateways. A public switch, madam, is
12 going to carry calls for heaven knows how many customers
13 and it is going to be not in the customer's premises -
14 that is in the agreed Statement of Facts - it is going to
15 be on the network operator's own site or in a site which
16 he has leased and which he owns. It is totally different
17 equipment, and if that is challenged then I invite the
18 other side to produce the evidence. It is different
19 equipment. (Pause while the Tribunal confers).

20 THE CHAIRMAN: Sorry.

21 MR IVORY: Not at all. The only evidence of Vodafone's
22 knowledge, what they understood they were doing, is Mr
23 Young's witness statement which I have taken you to, and
24 he says they understood they were going to put the SIMs
25 in private gateways. There is no evidence to the
26 contrary, no witness statement repudiating what he says
27 he was told in discussions as well as in the business
28 plan, still less any suggestion that Floe actually told
29 him in those discussions. All that is relied upon, madam,
30 is the business plan, and you have seen what he says in
31 his witness statement about that, that (a) he did not get
32 this version and, (b) even if he had it would not have
33 told him that they were using public gateways, on the
34 contrary they were Premicell devices. He does in terms
35 confirm that appendix A are Premicell devices, private
36 gateways, in contra-distinction to private gateways. If
37 you ask me what is the evidence of that, the answer is
38 that is what he is drawing the contrast with in his
39 witness statement.

1 Madam, you asked for help on the various different
2 versions of the business plan and I will deal with this
3 very quickly because time is running short. The one
4 received by Vodafone is at tab 54, the one that Floe says
5 Vodafone received is at 1/13, and they admitted yesterday
6 that they have no evidence that it was the one sent to
7 Vodafone, and it is not. It purports to be dated 9th May
8 2002, whereas the version which is at 3/54 is dated
9 January 2001, and that fits with the e-mails which are in
10 bundle 2 at pages 623 - which are referred to in Floe's
11 skeleton possibly - in March and May from Mr Young to
12 individuals at Floe.

13 THE CHAIRMAN: You are saying you saw the earlier one.

14 MR IVORY: Exactly, madam, yes, and it is the only one we had
15 until we got the copy from Ofcom which is the complete
16 version of the one we see at 1/33. On that, it is not
17 just the pictures which Mr Young confirms are private
18 gateways, it is always in the text. If I can ask you to
19 pick up the version which Floe rely on at 1/13, at page
20 209 the paragraph just opposite the second hole punch
21 under "Product 1", Floe rely upon the last sentence, and
22 in the skeleton argument it is claimed that that is a
23 description of public gateways. That is not right, as we
24 understand it. Mr Mercer has no evidence to support that,
25 and as we understand it, it is wrong. You can tell just
26 from looking at it that it is wrong. The first sentence
27 of that paragraph makes clear that it is private
28 gateways, "This first product is a total fixed-to-mobile
29 service solution provisioned by a range of fully approved
30 PABX add-on solutions ..." which is where you attach it
31 to the customer's switch, the PABX switch, you attach the
32 gateway to the switch. That is what makes clear or at any
33 rate suggests, as we would say, that what they are
34 referring to are private gateways. The last sentence,
35 madam, seems to be something different. As we understand
36 it, what it is referring to is that the company will also
37 form agreements with fixed line carriers to terminate
38 Floe's own customers' calls to fixed lines at
39 preferential rates, and then the next reference is to

1 allow Floe to carry overflow mobile minutes to its
2 central public switch for onward distribution to the
3 relevant mobile network. As we understand it, in return
4 for the preferential rate which it is going to get from
5 the carriers on calls on fixed lines, it will carry
6 overflow mobile traffic for the fixed line carriers which
7 they cannot carry themselves due to capacity limits. That
8 is the reference to overflow mobile terms, and it is
9 going to go to a central public switch for onward
10 distribution. As we understand it, that would be via a
11 standard fixed connection, not a GSM gateway. Madam, if
12 it is said there is no evidence for that, maybe not but
13 equally he has got no evidence and he is the one relying
14 upon that. You can tell just from reading it, even
15 without technical knowledge, it is not GSM gateways.

16 Neither does the version which we did see, at
17 bundle 3, tab 54, tell you it either. If we just have a
18 quick look at that. I am sorry to take time on this, but
19 I realise you regard it as important and therefore it is
20 probably right to deal with it. Tab 54, bundle 3, at page
21 962, just below the second hole punch, Floe rely upon the
22 reference to high ARPUs (Average Revenue Per User) in
23 excess of eight times current handset figures. That is
24 what they rely upon, that is the sole thing they rely
25 upon in this document to suggest that we knew they were
26 going to be public gateways. You can tell even from just
27 reading that sentence that it is entirely consistent with
28 private gateways, because even private gateways are going
29 to use more than an individual handset. Moreover, you can
30 tell from the immediately preceding sentence at the
31 bottom of the previous paragraph that it is private
32 gateways. "To achieve this Floe will attack the switch
33 rooms of small to medium businesses and use ... to
34 directly connect the PABX to the Vodafone mobile network
35 via the ..." That is attaching the gateway to the
36 customer's switch on its premises, that is the private
37 gateway.

38 THE CHAIRMAN: It is only a private gateway if it is the
39 customer's gateway.

1 MR IVORY: Yes. You might lease it as opposed to purchase it,
2 but whichever way he does it, it is his gateway which is
3 attached to his switch on his premises and he uses it for
4 his own purposes to make calls. That is what it boils
5 down to. I do not think the evidence establishes whether
6 Floe as regards the private gateways was selling them or
7 leasing them, it could be one or the other, but if you
8 proceed on the simple case itself, where they sell the
9 private gateway to a customer, in exactly the same way as
10 a company sells mobile phones.

11 THE CHAIRMAN: I appreciate that, it is whether the evidence
12 stacks up to that.

13 MR IVORY: That is not my problem, the evidence. It has been
14 said that we knew they were public gateways, and the
15 answer to that is no, we cannot tell from these
16 documents. If you go to page 16 of that document (972 of
17 the bundle) you will see the following assumption: "Each
18 SIM generates a minimum of 750 minutes per month." Madam,
19 with a public gateway you would be talking about,
20 according to Mr Rodman's evidence, something in the order
21 of four hours a day. You will see in the third bullet
22 point the reference to the cost of acquiring and
23 installing CPE - that is customer premises equipment,
24 equipment that is going into a customer's premises, i.e.
25 a private gateway. If you go back to page 963 - I will
26 not go through all the references in our skeleton, but
27 just to show you that they are replete with references to
28 private gateways. In the paragraph just below the second
29 hole punch you will see the reference in the first
30 sentence to "Working closely with leading manufacturers
31 of customer premises equipment ..." and again on page 20
32 of the document you will see at the top of the page,
33 "Floe will use a range of unique customer premises direct
34 mobile access equipment" and so forth. There are other
35 references in our skeleton too.

36 The fact of the matter is that Vodafone did not
37 know that Floe would be using public gateways, that is Mr
38 Young's clear and unequivocal evidence. Floe, in
39 contrast, has produced no evidence to the contrary, all

1 it relies on to suggest that Vodafone knew or ought to
2 have known about the public gateways is a single sentence
3 in one or other version of the business plan, which does
4 not refer to public gateways, when the documents as a
5 whole are replete with references indicating private
6 gateways.

7 As regards the diagram at appendix A, there is no
8 evidence from Floe, nor could there be, madam, that that
9 is your normal public gateway equipment. We have got Mr
10 Young's evidence that they Premicell type devices as he
11 describes them.

12 Finally, madam, if, as Floe contends, Vodafone knew
13 it was going to use public gateways at the time of the
14 agreement, why did Mr Taylor, chief executive of Floe,
15 deny that they were doing so at the meeting on 6th
16 February? I will not ask you to look it up now, madam,
17 but the references are in Mr Rodman's witness statement
18 at paragraph 19 and Mr Young's at paragraph 10. There is
19 no evidence refuting that and you will see the reference
20 for that picked up in the correspondence, Vodafone's
21 letter to Floe of 10th March, the first paragraph, which
22 says you will recall "You denied at the meeting that you
23 were using them for this purpose" and it then goes on to
24 say "We have done our tests since" and refers to the
25 figures and then asks them to explain if they think they
26 are using them. You will recall that evidence, and that
27 refers specifically to the documentary evidence
28 supporting the proposition that Floe did not tell the
29 truth at that meeting on 6th February. If Vodafone is
30 supposed to have known about this all along, why did they
31 lie about it? It is as simple as that.

32 Passing on very quickly to *Hilti*, Mr Hoskins made
33 detailed submissions this morning explaining why the
34 factual position in *Hilti* is totally different from this
35 case. I will not waste time repeating what he said, but I
36 adopt his submissions and at this juncture all I will do
37 is emphasise the importance of those submissions. They
38 are important.

39 THE CHAIRMAN: Can I just raise one point? It may be accepted

1 in criminal law - and I am not saying it is or it is not
2 - that for the purpose of aiding and abetting, if you go
3 to the police and you tell the police the story before
4 the crime is committed, that is not aiding and abetting.
5 Therefore, on that basis, if you had gone to the
6 authorities, you would not be at risk in relation to the
7 crime of aiding and abetting.

8 MR IVORY: I do not know about the first proposition upon
9 which it is based, madam, that you go to the police - I
10 do not know about that.

11 THE CHAIRMAN: That is my question really because if that is
12 right it makes a slight difference.

13 MR IVORY: With respect, no, madam. If I do not know the
14 answer to that and I go to the police and I will then be
15 in no fear of prosecution myself, particularly if I carry
16 on, on the face of it that is not right as a matter of
17 law and I know of no practice still less any evidence to
18 suggest otherwise. If I do not know, madam, as a lawyer,
19 how are my clients supposed to know that, if it is true
20 in the first place which, with respect, I take leave to
21 doubt. We live in the real world here; I am sorry, can we
22 just look at what happened here? These people lied to
23 Vodafone about what they were going to do with this
24 equipment, Vodafone understood that they were going to
25 use it for private gateways which are and at all times
26 have been legal. It turns out that they were not using
27 them for that at all, they were using them as public
28 gateways, and when we confronted them with it on 6th
29 February they lied to us about it. We then produced the
30 evidence to demonstrate that on the face of it they were
31 public gateways and we have given them every opportunity
32 to explain if we were wrong, to explain if they thought
33 they were and why.

34 What do they do in response to that? They terminate
35 the direct debit, which not merely prevented the payment
36 of the £135,000 but prevented any further payments being
37 due thereafter as a result of which £500,000 is due. What
38 is Vodafone supposed to do in those circumstances? It
39 finds its customer is, on the face of it, acting

1 illegally. Whatever competition law is about, it is not
2 about protecting competition against illegal activities,
3 still less can there be any complaint from a competition
4 law point of view if you then act to protect yourself
5 when you yourself may be at risk of criminal liability on
6 aiding and abetting grounds? I am not for a moment
7 suggesting that Vodafone thought about section 8 of the
8 1861 Act, I do not think I would have if I had been in
9 their position, but I would have been extremely concerned
10 about my own position. The police had contacted Vodafone
11 and told them it was unlawful and warned them about this,
12 that is what prompted this. The other thing is, look at
13 who were the individuals at Vodafone handling this
14 matter. They were Mr Rodman, head of regulatory policy,
15 and Mr Morrow who is head of fraud and security. They
16 were jolly worried, probably not only purely on the law
17 but on the regulatory position as well, regulation and
18 the legal position.

19 Madam, I have got to be careful, I am not going to
20 make positive submissions on the aiding and abetting
21 front because I must not forget that my client is said by
22 Floe to have known about this all along. At the very
23 least I will say that on any view, in those
24 circumstances, Vodafone was at significant risk if it
25 carried on supplying Floe, that it would be at risk of
26 being criminally liable as an aider and abettor. You have
27 seen the law on that, the classic instance of the aider
28 and abettor, as Mr Hoskins referred to this morning, is
29 the man who sells the equipment to someone.

30 THE CHAIRMAN: The question was not put on the basis that you
31 are now addressing it, the question was put if you are
32 wrong and you did know. We are going to have to decide
33 whether you thought that these were private gateways in
34 the sense that you are putting it. If they fell into the
35 public sphere, that is why I am putting the question.

36 MR IVORY: At the time when we disconnected them we believed
37 - and I think it is demonstrated - that they were public
38 gateways, that is why we were disconnecting them. We did
39 not know at the time of the original Agreement.

1 THE CHAIRMAN: I understand that is your case. Your submission
2 is you did not know.

3 MR IVORY: Yes.

4 THE CHAIRMAN: I understand that, but if the situation was
5 that you did know ---

6 MR IVORY: At the date of the agreement, madam?

7 THE CHAIRMAN: Yes.

8 MR IVORY: So what, with respect? That is why I carefully went
9 back to the primary argument and the first alternative
10 argument. None of this matters, madam, I am sorry to
11 reinforce that.

12 THE CHAIRMAN: Because this is an illegal contract?

13 MR IVORY: There is that point as well, absolutely, but you
14 may recall why I went through the answers to the primary
15 argument on this appeal and the first alternative
16 argument and made the two points, one that it could not
17 have been authorised under the licence because it is not
18 radio equipment and, secondly, even if it is, granted
19 that it is conceded that authorisation was given in
20 breach of condition 8, it could not have been authorised
21 and it was not an authorisation in accordance with the
22 terms of the licence anyway. So on the face of it they
23 were still in breach of section 1(1). You may recall,
24 madam, that at that point I said if I am right on either
25 of those two points it does not matter whether Vodafone
26 knew or not. That is right, madam, with respect. Any
27 suggestion that Vodafone acted improperly or arbitrarily
28 is, with respect, without foundation. It is all very
29 interesting to speculate now as to what might or might
30 not have been done, madam, but in the real world at the
31 time Vodafone had a major problem. They had a customer
32 who was apparently acting illegally and they were at
33 severe risk themselves of continuing to supply, knowing
34 of the illegality. That is sufficient for my purpose, and
35 certainly for competition purposes, madam, if that is not
36 objective justification I do not know what is.

37 Sorry, I have got ahead of myself a little bit, but
38 I do not know whether somewhere in there that answers
39 your question, but one does have to look at it in the

1 real world. In terms of the contractual position, if you
2 look at clause 8 and clause 16.2, giving a right to
3 termination upon reasonable grounds, if you reasonably
4 believe that they are engaged in illegal activities, I do
5 venture to suggest, madam, that any court in the land,
6 whether commercial, contractual or competition, looking
7 at that clause could not possibly find anything to take
8 exception to, still less exercising it if the grounds
9 were made out. You cannot be required to carry on with
10 something that is illegal, or if your customer is acting
11 in a way that is illegal, a *fortiori* if you yourself get
12 involved in it and could be criminally liable if you
13 continue to supply. As I say, I am not making positive
14 submissions on that, you have seen the law on it and you
15 can see why at the very least Vodafone was at very severe
16 risk.

17 I am now really running out of time. On *Hilti* I was
18 going to take you to the decision of the court. Mr
19 Hoskins took you to the decision of the Commission and if
20 you are still in any way troubled by it I am very happy
21 to take you to the decision of the court, but time is
22 running short.

23 THE CHAIRMAN: We know what the decision of the court says.

24 MR IVORY: Indeed, madam, but the important point is that it
25 is a decision on the facts and it is actually rejecting
26 factually the submission that we were not acting with
27 intent to drive out competition, as they plainly were,
28 indulging in all sorts of anti-competitive behaviour. It
29 was deemed factually in the submission that we did all
30 this, motivated solely by concern about customers and if
31 you actually analyse it carefully, particularly the
32 decision of the court at paragraphs 115 to 118, you need
33 to look at those against the preceding paragraphs which
34 set out the Commission's Decision where it rejected that
35 argument by the defendant on the facts, and it sets out a
36 whole series of arguments in the Commission's decision,
37 only one of which is the point about failure to report to
38 the police. So it is actually purely a decision on the
39 facts, madam, it does not establish any proposition of

1 law and certainly not any proposition of law which
2 involves you being required to carry on making a supply
3 to a customer who is engaged in an illegal activity, nor
4 could it be, if you think about it, because it would be
5 plainly wrong.

6 Madam, I do not think there is anything left of the
7 second alternative argument that I have not already dealt
8 with, so can I then by way of conclusion say that
9 Vodafone's position on all the arguments is set out in
10 detail in the statement of intervention and the skeleton.
11 Inevitably, given the time constraints, I have not
12 covered everything in the skeleton but I do stand by it.
13 I have tried not to repeat Mr Hoskins' submissions but I
14 adopt them. Granted that we have been selective, madam, I
15 hope it has been helpful to focus on the key points.

16 Reverting to what I said at the outset, madam,
17 there is a lot of material and there are a lot of
18 arguments that have been put before you, but when you
19 come down to answering Floe's arguments on this appeal,
20 the primary argument and the first alternative argument,
21 the answers are very simple. I mean no disrespect to Mr
22 Mercer when I say that this is a case of the emperor
23 without any clothes. As an advocate you are dealt a pack
24 of cards and you have to do the best you can with them,
25 but you have a problem if you have not got the right
26 cards. He has not, madam, and you can see that because on
27 key points he has had to pretend, effectively, that he
28 has got a card when he has not. For example, on the use
29 point, equating "use" with "control" and on the second
30 point on the primary argument, the suggestion that
31 gateways are radio equipment.

32 Madam, unless I can help you further, those are my
33 submissions.

34 THE CHAIRMAN: Thank you very much, I think we have your
35 points.

36 MR PICKFORD: Thank you. Does the Tribunal have the version of
37 my skeleton that has the references included, because we
38 originally provided a version that did not have the
39 references, but then you should have received last week

1 the version that has the references. If you do not, I can
2 hand the version up.

3 THE CHAIRMAN: I believe we have all got them, I am actually
4 working on one without because I had already started
5 working on it and marking it up.

6 MR PICKFORD: I apologise in advance for the somewhat
7 disjointed nature of the submissions that I am about to
8 make, because in order not to repeat those of Mr Hoskins
9 and Mr Ivory I am necessarily concentrating on mopping up
10 a few points that have not necessarily been dealt with
11 already. Of course, we maintain all the points that we
12 put in our skeleton and we also adopt the submissions of
13 Vodafone and, unless I make clear otherwise, the
14 submissions of Ofcom. To the extent that I can give my
15 points some structure, I propose to take them in four
16 parts. Firstly, I am going to deal very briefly with one
17 remaining argument on the primary argument; secondly, I
18 propose to deal with the points that the Tribunal raised
19 in its letter concerning *Hilti*, the schedule 3 exclusion
20 and the RTTE Directive; thirdly, I propose to deal with
21 one of the points that was raised yesterday by the
22 Tribunal concerning estoppel and; fourthly, with the
23 point that was raised this morning which is why it is no
24 answer for Floe to say that Vodafone should have sought
25 to alter the licence arrangements to enable Floe to
26 continue its operations.

27 Turning then to the issue of the scope of
28 Vodafone's licence, the question for the Tribunal is
29 could Vodafone have used the GSM gateway under its own
30 licence, and it has already been explained by Ofcom and
31 Vodafone how a gateway is not a base transceiver station,
32 and that is certainly sufficient to deal with that point,
33 but there is actually a further point, which is let us
34 suppose that Mr Mercer is right and let us just suppose
35 that a base transceiver station is a GSM gateway or,
36 rather, a GSM gateway comes within the scope of that
37 definition. What that overlooks is T-Mobile's point that
38 the frequency bands on which the mobile operators base
39 transceiver stations are permitted respectively to send

1 and receive signals are the opposite frequency bands to
2 the ones which a GSM gateway uses. That can be seen from
3 the evidence in the agreed Statement of Facts at volume 5
4 of the bundle, tab 92. If we can turn very briefly to
5 that, paragraph 17, it reads: "A feature of the GSM
6 system is that the role of mobile stations (such as GSM
7 gateways) and base transceiver stations and the
8 frequencies on which they operate are distinct. GSM
9 gateways transmit on one set of frequencies - which is
10 the same set of frequencies on which the mobile
11 operator's base transceiver stations receive - and they
12 receive on another related set of frequencies - which is
13 the same set of frequencies on which the mobile
14 operator's base transceiver stations transmit."

15 If one looks, for example, at the licence of T-
16 Mobile, which is at volume 1, tab 12, page 198, at point
17 7 on page 204 we see that the licence is precise. It sets
18 out: "The radio equipment is required to operate in the
19 following frequency ranges..." and there are 1800 MHz
20 frequencies for base transmits and 1700 MHz frequencies
21 for base receives. Of course, the agreed Statement of
22 Facts at paragraph 17 makes clear that a GSM gateway
23 receives on the same frequencies as the base transmits -
24 that is how GSM works - and it transmits on the same as
25 the base station receives, so even if it was a base
26 station it still would not be authorised under the
27 licence. This is obviously T-Mobile's licence, but the
28 very same principle applies to all of the mobile
29 operators, and if one wants to see that confirmed one can
30 look at the witness statement of Mr Weiner at paragraph
31 10, at tab 7 of volume 1, page 50. I do not intend to
32 take the Tribunal to it given the constraints of time,
33 but certainly Floe has offered no evidence to the
34 contrary that that position is the same for all mobile
35 operators. So that deals with a discrete point relating
36 to Vodafone's licence.

37 Moving on then to the questions the Tribunal asked
38 in its letter, the first of those relates to objective
39 justification and *Hilti*. We agree with everything that

1 Ofcom has already said about that, but we also make some
2 further points. As Ofcom explained, the unlawfulness of
3 the behaviour of Floe was the stated position of the
4 reference regulatory body, the RA, and also of the police
5 and, incidentally, of almost everyone else in the
6 industry including Oftel.

7 Ofcom took you to the decision of the Commission
8 and pointed out that there was a distinction there with
9 the facts the Commission relied upon, but if one actually
10 goes to the decision of the court of first instance,
11 which is at tab 73 of volume 4, at paragraphs 115 to 117,
12 the court then states: "It is common ground that at no
13 time during the period in question did Hilti approach the
14 competent United Kingdom authorities for a ruling that
15 the use of the interveners' nails in Hilti tools was
16 dangerous.

17 "The only explanation put forward by Hilti for its
18 failure to do so is that recourse to judicial or
19 administrative channels would have caused greater harm to
20 the interests of Bauco and Eurofix than the conduct which
21 it in fact pursued.

22 "That argument cannot be accepted. If Hilti had
23 made use of the possibilities available to it under the
24 relevant United Kingdom legislation, the legitimate
25 rights of the interveners would in no way have been
26 impaired had the United Kingdom authorities acceded to
27 Hilti's request for a ban ..." and it continues.

28 The court of first instance relies upon those three
29 introductory paragraphs in order to go on and make its
30 conclusion at paragraphs 118 and 119, but of course that
31 situation is entirely distinct from the situation that we
32 are faced with here, which is that they have in effect
33 already given a ruling, and it was a ruling that this
34 behaviour was unlawful.

35 We would also point out that the question in issue
36 in this case is essentially an objective question of
37 statutory construction. One can see why, in the case of
38 *Hilti*, there were good reasons why the assessments of
39 safety should be done by public authorities, that would

1 be in order to preserve uniform standards throughout the
2 Member State and indeed throughout the Community in
3 relation to what is essentially a somewhat subjective
4 issue. But no such considerations apply here and Vodafone
5 was perfectly well-placed to form a view of the legality
6 and it formed the view that was in accordance with
7 everyone else in here, apart from possibly Floe and some
8 other gateway operators, and it acted upon it. We say
9 that was entirely reasonable.

10 A second basis on which *Hilti* can be distinguished
11 is also if one considers the nature of the rules that
12 Vodafone was seeking to give effect to in suspending the
13 provision of services to Floe. In the present case the
14 legislative framework, in the form of the Wireless
15 Telegraphy Act and the Exemption Regulations, has amongst
16 its objectives ensuring the efficient use of radio
17 spectrum by allocating different frequency bands for
18 different uses, and it also has as one of its objectives
19 the protection of the valuable interests of those
20 authorised to use that spectrum by preventing
21 interference by unauthorised users. In that respect, in
22 particular, we adopt the submissions of Vodafone that it
23 made in its statement of intervention at paragraphs 36 to
24 39. As the holder of a licence under the Wireless
25 Telegraphy Act we say that Vodafone's legitimate
26 commercial use of particular spectrum was one of the very
27 things that section 1(1) was intended to protect and,
28 therefore, as the intended beneficiary it was entirely
29 legitimate for Vodafone to take its own lawful action to
30 enforce those rights. If it could not have done so, that
31 would have led to congestion and other difficulties which
32 have been identified in the agreed Statement of Facts at
33 paragraph 11, and I believe Mr Hoskins took the Tribunal
34 to those yesterday. If the Tribunal requires further
35 detail, it is also dealt with in the combined response of
36 T-Mobile, Vodafone and others to the consultation of the
37 RA which is at volume 1, tab 18 of the bundle, and the
38 date of that consultation was 23rd February 2003. I do not
39 intend to take the Tribunal there for the time being.

1 It is a matter of public knowledge that mobile
2 operators pay many millions of pounds annually to the
3 government for their exclusive rights in respect of the
4 use of particular spectrum, and we say that it is
5 entirely justifiable for them to seek to protect those
6 rights.

7 This point is supported in the analysis of Cliff
8 Mason from the RA in his e-mail at tab 34 of volume 2 of
9 the bundle, which I will take you to very, very briefly.
10 If one looks at the third paragraph there, he says "All
11 use of radio spectrum must be in accordance with a
12 licence under the 1949 Act, unless covered by a specific
13 exemption. For some services, these may be on shared
14 channels where the sharing and coordination criteria will
15 be defined. For most public operators, spectrum is
16 awarded by competitive means and is licensed exclusively
17 to that operator." We say that is an important
18 consideration which the Tribunal should bear in mind when
19 considering whether Vodafone's action constituted an
20 abuse.

21 We have a further point to make on this, which is
22 that Ofcom were entitled to conclude that there was no
23 abuse of dominance in the first place because there was
24 no evidence of any abusive purpose, and for that we rely
25 on the case of *Tetra-Pak International*. It is probably
26 sufficient to take the Tribunal very briefly to the
27 judgment of the ECJ at volume 4, tab 78, paragraph 41.
28 Here the court was examining the question of predatory
29 pricing and it was looking at the established authority
30 of *AKZO*. It said: "In *AKZO* this Court did indeed sanction
31 the existence of two different methods of analysis for
32 determining whether an undertaking has practised
33 predatory pricing. First, prices below average variable
34 costs must always be considered abusive. In such a case,
35 there is no conceivable economic purpose other than the
36 elimination of a competitor, since each item produced and
37 sold entails a loss for the undertaking. Secondly, prices
38 below average total costs but above average variable
39 costs are only to be considered abusive if an intention

1 to eliminate can be shown."

2 In both cases, therefore, the purpose or the
3 intention is critical. In one case you do not need to go
4 on to examine the intention because you can infer it from
5 the economic circumstances, and in the other case you
6 cannot, but in both you need purpose. We say that applies
7 equally in the present case.

8 Turning then to the issue of the exclusion in
9 schedule 3 to the Competition Act, this is a point where
10 we do take a slightly different approach to Ofcom. If you
11 could just turn up tab 57 in volume 3, the relevant page
12 is 1057. Under paragraph 5(2) "The chapter II prohibition
13 does not apply to conduct to the extent to which it is
14 engaged in in order to comply with a legal requirement.
15 (3) In this paragraph 'legal requirement' means a
16 requirement (a) imposed by or under any enactment in
17 force in the United Kingdom'."

18 Depending on the analysis one adopts of who was
19 using the GSM gateways, there are obviously two
20 possibilities for potentially unlawful activity by
21 Vodafone, and again I am careful in the same way as Mr
22 Ivory was not to make a positive case that Vodafone was
23 acting unlawfully, but certainly there was at the least a
24 very grave risk. On the case presented by Floe, Vodafone
25 was clearly the user of the gateway and we say that it
26 does not have a licence to do so, so that would be
27 unlawful; alternatively, there is a risk that Vodafone,
28 had it continued to supply gateways, would have been
29 engaged in aiding and abetting Floe's unlawful use.

30 In either case we say that in suspending services
31 to Floe, Vodafone would have been acting so as to comply
32 with the legal requirement in section 1(1) of the
33 Wireless Telegraphy Act not to use apparatus or to aid
34 and abet such use except under authority of a licence. It
35 is of course in this case common ground that we do not
36 fall within the Exemption Regulations. We say that on
37 that basis paragraph 5(2) of schedule 3 to the
38 Competition Act plainly applies.

39 Ofcom takes a different construction, they say that

1 it depends on whether the particular provision is
2 positively required by law, and we say if that was the
3 case then the application of paragraph 5 would have a
4 very strange result because its application would depend
5 potentially on the idiosyncratic mode of expression
6 chosen by a particular draughtsperson, and one can
7 illustrate that quite easily. The legislation might
8 provide for A to do X or, alternatively, as I have
9 explained in the skeleton, it might provide that it is an
10 offence if A does Y where Y is the opposite of X. On
11 Ofcom's construction, the former is sufficient to engage
12 paragraph 5, because it is a positive obligation, the
13 latter is not, yet substantively both are exactly the
14 same.

15 Again, for speed I do not propose to take the
16 Tribunal to it, but there is an analogy to be drawn here
17 with mandatory and prohibitory interim injunctions, and I
18 refer to a passage in *Zuckerman*, Civil Procedure at
19 paragraph 9.75 to 9.79, that is at footnote 6 of my
20 skeleton. In that passage Zuckerman makes the point that
21 in many cases the debate about whether something is
22 positively required or a negative prohibition is
23 essentially a sterile one.

24 It should also be pointed out that T-Mobile's
25 construction gives effect to the language of paragraph 5.
26 We say there is nothing in the facts that the relevant
27 legal requirements need be imposed by or under any
28 enactment, which requires that it be a positive
29 obligation. A negative prohibition of certain conduct is
30 still a requirement imposed by or under an enactment.

31 Turning then to the Equipment Directive and the
32 Authorisation Directive and the relationship between
33 them, Ofcom has already put forward one construction of
34 those Directives. We say that is entirely plausible
35 because there is a degree of opaqueness about the
36 Directives, and we indeed adopt Ofcom's submission as our
37 alternative. However, we say there is an alternative
38 which we believe is actually to be preferred, and that is
39 simply that one does not need to concern oneself with the

1 Equipment Directive at all.

2 If one turns to the Authorisation Directive which
3 is at volume 3, tab 64 in particular Article 5 at page
4 1162, one sees there at paragraph 1, "Member States
5 shall, where possible, in particular where the risk of
6 harmful interference is negligible, not make the use of
7 radio frequencies subject to the grant of individual
8 rights of use but shall include the conditions for usage
9 of such radio frequencies in the general authorisation."

10 We say in this case we are outside the general
11 authorisation because the radio frequencies in question
12 have already been the subject of grant of individual
13 rights, and those grants are the licences of the mobile
14 operators under the Wireless Telegraphy Act.

15 If one turns to Article 6 one sees: "The general
16 authorisation for the provision of electronic
17 communications networks or services and the rights of use
18 for radio frequencies and rights of use for numbers may
19 be subject only to the conditions listed respectively in
20 parts A, B and C of the Annex."

21 The point there is that rights of use for radio
22 frequencies may be subject to conditions listed in part B
23 of the Annex, and we say that the rights granted by the
24 Exemption Regulations fall within the scope of that part
25 of Article 6. There is nothing in Article 6 which refers
26 to individual rights, and that can be contrasted with the
27 position in Article 5 which does affect individual
28 rights. So we say that the tribunal should give effect to
29 that difference in language.

30 If one then turns to point B, "Conditions which may
31 be attached to rights of use for radio frequencies" we
32 see that both B1 and B2 are apt to invoke the
33 circumstances of the present case. What Regulation 4(2)
34 of the Exemption Regulations does is that it limits the
35 rights that are granted by Regulation 4(1) by designating
36 the service for which the rights to use a frequency are
37 granted. In particular what it does is it provides that
38 it cannot be used for providing a service by way of a
39 business to another person, and we say that falls

1 squarely within the scope of point B1, "Designation of
2 service or type of network or technology for which the
3 rights of use for the frequency has been granted,
4 including, where applicable, the exclusive use of a
5 frequency for the transmission of specific content .."

6 We also say that the purpose of that condition is
7 to ensure the effective and efficient use of spectrum,
8 and that is clearly within the scope of point B2.

9 We therefore say there is sufficient vires under
10 the Authorisation Directive without even having to look
11 at the Equipment Directive, albeit on that case for
12 slightly different reasons to those advanced by Ofcom,
13 but in the alternative we say if we are wrong on that,
14 that is fine because Ofcom are right, and in neither case
15 does it get Floe home. In relation to the 2000
16 regulations I have nothing further to say because
17 obviously on our primary case we say that they can be
18 ignored in the same way as the Directive can be.

19 In my skeleton I also dealt with a point on
20 installation, but because we are running fairly short of
21 time I intend to just refer to that. It is at points 42
22 to 43 of my skeleton argument.

23 Turning then to the estoppel point, T-Mobile has
24 two submissions to make in relation to that, but firstly
25 to reiterate Ofcom's point. We say that the doctrine of
26 estoppel by convention cannot be relied upon to require
27 performance of an illegal contract; that is one pursuant
28 to which a criminal act is committed. We rely, in support
29 of that proposition, on the case of *Godden v Merthyr*
30 *Tydfil Housing Association*, if I could hand that up to
31 the Tribunal. It is reported in a series of Planning
32 Cases in 1997, but I did not have access to those last
33 night; that is why I have provided the Smith Bernal
34 transcript instead. That case concerns whether the
35 requirement for a contract for the sale of land to be in
36 writing in section 2 of the Law of Property
37 (Miscellaneous Provisions) Act 1989 could be avoided
38 through the doctrine of estoppel of convention. If we
39 turn to page 7 we see that Simon Brown LJ (as he then

1 was) referred to the leading authority of *Amalgamated*
2 *Property Company* to which the Tribunal referred
3 yesterday, and then over the page at page 8 when he goes
4 on to present his analysis, he says as follows:

5 "The central objection to this whole line of
6 argument is to be found neatly stated in a short passage
7 in Halsbury's Laws, to which Sir John Balcombe drew the
8 Court's attention during the course of argument, at
9 paragraph 962 in vol. 16 of the fourth edition.

10 'The doctrine of estoppel may not be invoked to
11 render valid a transaction which the legislature has, on
12 grounds of general public policy, enacted is to be
13 invalid ...'

14 "In none of the cases of estoppel by convention
15 will the court be found to have transgressed that
16 cardinal rule. Rather, parties have, in certain
17 circumstances where the justice of the case requires,
18 been precluded from relying upon this, that or the other
19 technicality of a quite different character; not, as
20 here, a specific statutory requirement for writing which
21 is, of course, designed to avoid just such a factual
22 dispute as the Plaintiff's pleaded case would, if
23 allowed, provoke."

24 We say if that is right then a *fortiori* it cannot
25 be possible for the doctrine of estoppel by convention to
26 override provisions creating a criminal offence. As has
27 been pointed out, if it did override that provision it
28 would place parties such as Vodafone in a quite
29 impossible position, it would mean that in order to avoid
30 abusing a dominant position they would be required to
31 continue potentially to assist in an unlawful act, and we
32 say that cannot be right.

33 The second point I would like to make on estoppel
34 is that quite aside from the illegality issue we also say
35 that the estoppel doctrine really does not have any place
36 in the law relating to abuse of dominance. Certainly,
37 there is no authority that I have been able to find to
38 indicate that it does have a role, and if it did have
39 such a role we say it would lead to very bizarre results.

1 That is probably best illustrated by way of a short
2 example.

3 If one supposes that party A refused to supply
4 party B, but that was held not to be an abuse because
5 party A had some commercially justifiable reason to do
6 so. Now suppose that both parties were under a common
7 mistake of law and they believed in fact that party A was
8 under some competition law obligation to supply party B,
9 then party A realised its mistake and stopped supplying
10 party B, again on the same commercial grounds as in the
11 first example. If the doctrine of estoppel applied in the
12 competition law context, then that could render the
13 refusal to supply in the latter example an abuse whereas
14 it was not an abuse in the former example, but again the
15 only difference between the two cases is that in the
16 second case there was a previous mistake of law. We say
17 that there is no nexus, as it were, between a mistake of
18 law and an abuse of dominance. Abuse of dominance is
19 about exploiting market power and we say if there is no
20 exploitation of market power in the first example, the
21 fact that there might have been some common mistake of
22 law or of fact in the latter example, that cannot make
23 that into an exploitation of market power.

24 My final point concerns the argument that was
25 raised by the Tribunal this morning, and that is the
26 suggestion that Vodafone perhaps should have sought to
27 alter the nature of its licence to enable Floe to
28 continue to conduct its business. It is important to
29 point out that the licence condition is not a mere
30 technical, legal impediment, there are very good reasons
31 why Vodafone had an exclusive licence. As explained in
32 the e-mail of Cliff Mason, that licence is awarded by
33 competitive tender and that exclusivity is to ensure the
34 proper and efficient functioning of the radio spectrum.
35 If Floe were to be licensed, that would interfere with
36 that whole system because, as we have seen, if Floe were
37 to be allowed lawfully to continue its activities that
38 would lead to the congestion and other difficulties that
39 I have highlighted.

1 We also say in relation to that point that as a
2 matter of competition law, it must be right that Vodafone
3 is allowed to rely on the position as it existed at the
4 time it took its particular decision, it should not be
5 compelled as a matter of commercial reality, as a matter
6 of competition law, to act on the basis of some potential
7 future different licensing arrangement which might or
8 might not possibly be brought about.

9 I appreciate that that was a slightly random tour
10 through a number of discrete points, but unless I can be
11 of any further assistance, those are my submissions.

12 THE CHAIRMAN: Thank you very much.

13 MR HOSKINS: Rather than half an hour I need perhaps five
14 minutes. There are two points that I want to deal with,
15 the first arises out of the point that Mr Pickford has
16 just been dealing with, which was the second question put
17 to me at the end of my submissions, which went like this:
18 could Vodafone have approached the regulator to seek an
19 extension of its WT Act licence so as to regularise its
20 contract with Floe? My submission in relation to that
21 when I dealt with it the first time round was you have to
22 be realistic about what one would expect Vodafone to do,
23 and the point I made this morning was that was not an
24 insignificant matter because it required full
25 consultation etc.

26 There is another point: no one had ever made such a
27 request, so to expect Vodafone to make such a request
28 would have been completely remarkable. For Vodafone to
29 have thought that that was an appropriate way to deal
30 with it would have been completely remarkable. One must
31 be realistic about what the options open to Vodafone
32 were.

33 On a similar theme, which is were there any
34 alternatives open to Vodafone other than refusal to
35 supply, it is important to note that Vodafone did not
36 simply switch off Floe's supply and say cheerio, they did
37 seek to reach a commercial solution that would have
38 permitted Floe to carry on business, and that is recorded
39 in the Decision at paragraphs 58 to 61, bundle 5, tab 85,

1 page 1625. I do not need to take you to that now, but
2 what you see there is that Vodafone sought to make an
3 interconnection agreement with Floe, and such an
4 agreement would have allowed the same traffic to be
5 carried by cable or fibre, i.e. not by public GSM
6 gateways. The reason Floe says that it did not reach that
7 agreement was because Vodafone was asking for the money
8 it was owed, which seems to be an extraordinary reason
9 and certainly does not reflect well on Floe, so in terms
10 of what Vodafone did, prior to switching off supply it
11 had a meeting with Floe to raise the point and it wrote
12 to Floe and explained the position to them. Having
13 switched them off and having had its direct debit
14 cancelled, nonetheless Vodafone still went back and said
15 "Look, let us see if we can sort this out so you can
16 carry on business." One has to be realistic about what
17 one would expect from Vodafone, and in fact in my
18 submission Vodafone bent over backwards to deal with this
19 problem.

20 The second issue I wanted to deal with was to
21 respond to the question that you raised, madam, with Mr
22 Ivory. Again, I should not venture into criminal law but
23 I will take my life in my hands.

24 THE CHAIRMAN: Unfortunately, we are all venturing into
25 criminal law.

26 MR HOSKINS: The scenario was let us assume that it is correct
27 that if you go to the police before a crime is committed
28 and tell the police the full story, you cannot aid and
29 abet a subsequent crime. If that is right, one can see
30 how it might work where someone supplies a gun to another
31 person, then gets cold feet, goes to the police and tells
32 the whole story and subsequently a murder is committed
33 with that gun. But that is not the position here, because
34 what is envisaged here is that Vodafone would go to the
35 regulatory authorities or indeed the police and would
36 continue to supply. That is the premise of Floe's
37 argument: you should not have cut us off, you should have
38 gone to the authorities and continued to supply. If that
39 principle is correct, it cannot be the case that if you

1 are at risk of committing a criminal act by being an
2 aider and abettor, you go to the police and tell them the
3 whole story and then you carry on doing what is a
4 criminal act. On any sensible basis it would be
5 astonishing if that removed the liability as an aider and
6 abettor. Yes, if you go to the police, tell the whole
7 story and stop, but certainly not go to the police, tell
8 the whole story and carry on.

9 We see here the sort of catch 22 situation that
10 perhaps Vodafone was in, because Floe says what you
11 should have done is gone to the police. Imagine what
12 would happen if Vodafone had not just switched off the
13 supply but had rather gone to the police and said "Floe
14 are acting unlawfully". Floe would have howled even more
15 loudly about abuse of dominant position, saying Vodafone
16 are hassling us by going to the police alleging that we
17 are committing a criminal act when in fact what we are
18 doing is completely lawful. The complaint would have been
19 the same but probably would have been a louder one.

20 So the problem Vodafone have is damned if you do,
21 damned if you don't, and what that shows is that one has
22 to be realistic about what one could have expected from
23 Vodafone in the circumstances. All the submissions I have
24 made show that what Vodafone did was more than sufficient
25 to amount to objective justification. That is all I have
26 to say.

27 THE CHAIRMAN: Thank you very much. Mr Mercer.

28 MR MERCER: I am going to try and take half an hour and in
29 that time I will not attempt miracles, but I will try to
30 lift Mr Ivory's blindness on his road to Damascus in
31 terms of one or two things, and go at fairly breakneck
32 speed.

33 The first point I want to deal with is section
34 1(1)(a) of the Wireless Telegraphy Act, the point that
35 you put to me yesterday afternoon, the provision that
36 says when you have something in your possession and
37 control and then it is to be used by somebody else. There
38 are two points on that. Firstly, control in that context,
39 as we all know invariably now it has to be given its

1 ordinary usage and is *sui generis* to possession, in other
2 words its physical possession and physical control.

3 My second point on that is it is interesting that
4 the draughtsman there differentiates physical possession
5 from use which is the next sub-clause. That is
6 interesting because you clearly do not have to possess
7 something to be intending to use it. Actually, while we
8 are dealing with ordinary meaning I would ask you to read
9 the full story of the sad Mr Rudd and his pirate radio
10 station in Liverpool, because it is also authority for
11 the proposition that you do not have to know that you are
12 using something to be using it. In that case he did not
13 know that the equipment was switched on, as I recall.

14 You asked, ma'am to look at section 172 onwards in
15 the Communications Act; I do not really want to say too
16 much about that apart from to point out the obvious,
17 which is that it lays down a procedure before you can be
18 prosecuted.

19 At the end of last week we had a couple of people
20 in a lock-up storage near Heathrow, not planning a
21 bullion robbery but searching through Floe's old
22 documents. We found yet another version of the business
23 plan which we have provided to the other side. I am not
24 sure it really helps us very much, but in the trawl and
25 search for further documents we did find a couple of
26 other documents that I will be referring to as I go
27 through that came to light.

28 I want to deal with a point under the Wireless
29 Telegraphy Exemption Regulations that comes out of an
30 article delivered by somebody else in the November 2002
31 communications document at paragraph 5.6 where the RA are
32 talking about wireless telegraphy apparatus. If you read
33 that it becomes clear that when you are interpreting the
34 Wireless Telegraphy Exemption Regulations and you try and
35 tie all those sub-clauses together, it is the relevant
36 apparatus which is the wireless telegraphy loop which is
37 used to provide a service by means of a business to
38 another. In that, people keep saying that describes the
39 situation perfectly between Vodafone, Floe acting as an

1 intermediary and somebody else, but that is not how it
2 has to be. The way that is drafted provides for a number
3 of possible situations and it does not say "Provide a
4 service by means of a business to a third party" it just
5 says "to another person". That is why I came back
6 yesterday to the point that Vodafone could well be caught
7 by that same provision because every mobile phone may
8 well be unlawful because each of them is used by a mobile
9 network operator to provide a service to another person.
10 Even if, despite all my hard work, you do not go for the
11 primary argument, you cannot but see that a mobile device
12 is used to provide a service by a mobile network
13 operator.

14 While we are on the subject of the Wireless
15 Telegraphy Exemption Regulations, if we draw back from
16 that argument you also get to one related to capable, and
17 what is capable is the wireless telegraphy device and
18 what is it capable of? It is capable of providing a
19 wireless telegraphy link by means of which a service is
20 provided to another person. That has got to include
21 private gateways as well as public gateways, because we
22 are not talking about use there when we are talking about
23 the service being provided by means of a business, we are
24 talking about whether a service is being provided.

25 Mr Hoskins laid substantial stress on the police,
26 though so far as I am aware the police are not the final
27 arbiters of the law in this country - fortunately,
28 neither are Ofcom.

29 Mr Ivory made in his submissions a number of
30 sweeping assertions, one of which was of course public
31 gateway equipment is totally different from a Premicell.
32 That might be so if you define it as being multi SIM
33 equipment, it might be so if it was connected to an
34 entire telecommunications switch, but it does not need to
35 be. The way that it is defined simply means - if I take
36 the other party's definition of a public gateway - that
37 there is more than one person's traffic passing through
38 it. That could be a single SIM gateway. One of the things
39 that the other parties would like us all to believe is

1 that you can transparently look at the piece of apparatus
2 and say that is being used as a public or private
3 gateway, and that is just not possible.

4 Let me give you an example. Let us suppose you put
5 a gateway into Vodafone itself which has, as I understand
6 it, several thousand employees in the Newbury area. What
7 would that look like? Would that look like a little
8 Premicell? I doubt that it would. It would look much more
9 like the apparatus described by Mr Ivory this afternoon.
10 The only differential in the definition of public or
11 private is usage, and it is usage by whom? You could even
12 have a situation as I described yesterday. Let us suppose
13 Floe had not sold a Premicell to a customer, they just
14 said "Put your feed in there" and that device is meant to
15 be on the customer's premises. In that case that device
16 would still be unlawful because it would still be being
17 used, even if you do not buy my total argument, it would
18 still be being used by Floe to provide a service to
19 another person - always supposing of course that you did
20 not buy the primary argument in the first place. So I do
21 not think some of my learned friends are quite as close
22 to reality as they would have us all believe.

23 I want to deal now, very briefly, with the
24 accessory point, because I think Mr Hoskins treads on
25 dangerous ground. I do not want to associate myself in
26 any way with an argument that says I have no duty in
27 respect of paragraph 5 of schedule 3 of the Competition
28 Act, and also however in the same breath I am an aider
29 and abettor, because I have a fear that if I am an aider
30 and abettor it is possible that they may be considered to
31 have a duty. I do not see how I can if I am in Vodafone's
32 shoes be an aider and abettor, and I would point out
33 ma'am it is a conjoined offence, it is aiding and
34 abetting, not aiding or abetting, you have to do both.
35 The aiding is simple, that is selling a gun, the abetting
36 is the intention of knowing what it is going to be used
37 for.

38 Turning that back to a point Mr Hoskins made at the
39 end of his short submission, I do not think that you can

1 tell, just by looking at traffic patterns, by looking at
2 the equipment, what a service is going to be used for in
3 terms of providing a public or private gateway service,
4 unless you know exactly the contractual matrix in which
5 the whole thing is set up. You just cannot tell. In the
6 agreed Statement of Facts it says "typically", but you do
7 not know, you have no real idea until you know exactly
8 the contractual matrix that goes with who owns it, who is
9 running it, and even then it is not beyond the wit of man
10 who have constructed the contractual matrix for what may
11 have looked like in terms of the other parties a public
12 gateway into a private gateway by adoption of a few
13 little principles like logically discrete systems etc to
14 turn one large machine into several small networks,
15 contractually run by individual people.

16 I have submitted a bundle of three documents that
17 we found consisting of one e-mail, one letter from the
18 DTI and one letter from Vodafone, because I want to deal
19 with the reality of a few matters. The first letter I
20 want you to have a look at is the Vodafone letter of 6th
21 May from Tim Harrabin, the strategy director, to John
22 Mittens of the Floe Group. Most of it is unexceptional,
23 except that for once it does not take the stentorian line
24 of the letter that came from the fraud group that we have
25 all looked at, the one that referred to criminality. It
26 is the second numbered paragraph setting out the
27 conditions that Vodafone adopt in respect of reinstating
28 the SIMs that were disconnected. The third one is not
29 exceptional, it is what you might expect: "That Floe and
30 Vodafone are able to find a legally compliant way .." It
31 is interesting that Mr Harrabin thinks that might be
32 possible. So it is clearing the outstanding debtor
33 balance and then, "Provide written confirmation of their
34 intent to work with Vodafone to eliminate use of GSM
35 gateways ..." which I think is pretty clear.

36 All of the three other parties have made reference
37 to what I might describe as the establish and install
38 argument which is you must have installed the apparatus
39 even if you are not using it. Here again we come back to

1 the reality of the industry, and the reality is that the
2 contract that was entered into by Floe and Vodafone
3 implies an authority to install apparatus in which the
4 SIM card is to be found.

5 I want to deal with one point that has been
6 articulated in a particular way today, and it goes like
7 this. When you take out a licence, say to run or use a
8 spectrum in the United Kingdom, there are two elements to
9 what you get. One is the licence itself and the other is
10 the conditions subject to which it is granted. Breach of
11 a condition will usually give rise to some form of
12 enforcement procedure which may end up with you losing
13 your licence, but it does not mean that when you
14 authorise something pursuant to the licence which is not
15 in compliance with a condition, that that matter is not
16 authorised. There is no principle as I understand it in
17 English law that says if you do not comply with the
18 conditions of a licence, that what you are doing is
19 therefore necessarily unlawful, though there may be
20 separate offences in respect of breaching conditions etc.

21 A lot has been made over whether people used or
22 said they were using or what they were doing with public
23 and private gateways. One thing I want to stress is this
24 kind of nomenclature was not available, was not in common
25 usage at the time the contract was entered into, for
26 certain, only later, and Floe consistently, as stated in
27 Mr Happy's witness statement, had real difficulty in
28 understanding the differences and tended to talk about
29 gateways without categorising them as one or the other.

30 I draw your attention to the third item in the
31 bundle of three letters which is three e-mails, the
32 centre one being from Mr Mason to John Stonehouse, the
33 technical director of Floe. The underlining, ma'am, is on
34 the copy that we discovered.

35 "I believe, therefore, that the network operators
36 have the authority under the Wireless Telegraphy Act (but
37 not obligation) to accept by agreement customer equipment
38 that is not covered by the Exemption Regulations.
39 However, the Licensee would remain responsible for

1 compliance with the licence conditions of all equipment
2 used", which is exactly a position I could adopt myself
3 as still existing and what Floe were led to believe was
4 the case.

5 What was the government's view during the period is
6 set out in the letter to Mr Stonehouse again, the third
7 letter in that bundle that we discovered recently, from
8 Stephen Timms, the Minister for Energy, e-Commerce and
9 Postal Services. It is the third full paragraph on the
10 first page:

11 "However, the MNOs can take action on the law as it
12 stands to terminate services that they consider are
13 either unlicensed, not covered by an existing contractual
14 arrangements or otherwise not in accordance with their
15 terms of use."

16 That indicates that the government at least
17 considered that they could be otherwise made lawful,
18 otherwise than through licensing.

19 Mr Ivory made a lot of what was and what was not
20 known at the time the contract was entered into and in
21 respect of the business plan. You may ask yourself a
22 number of questions about the contract and the business
23 plan, but without going into the ins and outs of company
24 law, it is a simple point, were they really expected
25 other than to believe that somebody who signed their
26 contract had the ostensible authority to do so and that
27 that was binding on Vodafone? If Vodafone's senior staff,
28 as Mr Hoskins seems to believe, did not know about it,
29 that is their corporate governance problem, not my
30 client's. We are told Mr Rodman had already had contact
31 from the National High Tech Crime Unit; Mr Rodman is in a
32 senior position, we are told, so why could he not have
33 phoned up the legal department and got them to insert a
34 condition in the contract that would have made it
35 specifically unlawful, or issued the instruction to all
36 wholesale providers with whom Vodafone was doing business
37 not to do it, if they were that concerned about legality?
38 The fact is that during the whole of this period the
39 matter was in flux.

1 Mr Hoskins this morning repeatedly went on that
2 competition law cannot make somebody stop doing something
3 which is unlawful, or they do not have to supply if that
4 would be unlawful. He made a distinction between black
5 letter law and more general things. If you want to look
6 at the black letter law on the subject, he referred to
7 two provisions in the Floe-Vodafone contract. Look at
8 them exactly, because when you do and you interpret them
9 extremely strictly, you can see that what they banned in
10 one case - you get a clue from the use of the word
11 "defamation" - was using the services for unlawful
12 purpose, that means using them for an unlawful content
13 purpose. In the other case, which is the clause which
14 refers to obtaining a licence, you will see that the
15 words used to describe what you use a licence for do not
16 encompass exactly what Floe did. Under the black letter
17 interpretation, the strictest of strict legal
18 interpretations, the contract did not give Vodafone the
19 right.

20 Mr Hoskins repeated that competition law cannot
21 force somebody to do something that is unlawful or to
22 condone it or to permit it. Let me give you an example.
23 Let us suppose that the government decided to remove
24 regulation 4(2) of the WTERs, and said unfortunately we
25 cannot do this for three months, and then in those
26 circumstances Vodafone still, using it as a reason,
27 turned everything off. According to Mr Hoskins, in that
28 extreme situation Vodafone would know it was killing off
29 its competition, but it would be in the clear and there
30 is nothing that Ofcom or this Tribunal could do about it.
31 Without going through all the stages, I hope it is
32 accepted that dominant players have a responsibility not
33 to distort competition and to consider competition
34 matters in what they do.

35 I am going to finish by returning to where I
36 started and the primary argument. My quote from Gilbert &
37 Sullivan yesterday morning was more than apt; Mr Ivory
38 did not quite repeat it word for word, but he was getting
39 there in terms such as ridiculous, preposterous, explain

1 it if you can. He accused me of not wearing any clothes.

2 MR IVORY: I apologise.

3 MR MERCER: If he cannot see me wearing any clothes I
4 apologise for that; whatever I have got is not ironed
5 very well. I continue like this. He talks about use and
6 the ordinary meaning of that, but it is use for wireless
7 telegraphy, that is what it says in section 1, use for
8 wireless telegraphy, and use for wireless telegraphy does
9 not mean quite the same as use in other contexts.
10 Otherwise you get some very strange results. Suppose one
11 day you lose your mobile phone and you need to phone your
12 MNO to tell them, so you go to a call box. You say I want
13 to use the call box, but you would not accept that you
14 had any regulatory responsibility for that call box, it
15 would not be part of a network that you ran, you are
16 merely using it to make a call.

17 One of the problems we have got and why I can quite
18 see how a degree of confusion can seep in, is that we
19 have got use, control of use, we have all kinds of
20 concepts being mixed up. I start with something I told
21 you right at the beginning of my submissions yesterday
22 which is what was the contract between Floe and Vodafone
23 for? It was for the provision of services, and I the
24 customer use a phone to make a call and Vodafone uses
25 that apparatus to provide me with a service, and in so
26 doing they use it for the purposes of wireless
27 telegraphy, because they tell it what frequency to use,
28 the power, the frequency hopping, they know where it is,
29 what kind of signal it has got to send, they know what it
30 is authorised to do and not to do.

31 If there is no link between providing an electronic
32 communications system and the Wireless Telegraphy Act
33 1949 as now amended, then we in this country have got a
34 problem. There has to be a link. If you do not have some
35 form of conjoining of those two pieces of legislation,
36 the Communications Act and the Wireless Telegraphy Act,
37 you have a problem because you are off line, you have
38 missed the point, which is that regulation now consists
39 of two elements: providing electronic communications

1 networks and services and the right to use spectrum,
2 those are the two things for which you can be authorised
3 or not authorised, and if they are not matched in a
4 realistic way then that is a recipe for disaster and
5 indeed you are going to start treading on each other's
6 toes. The dominant element is providing electronic
7 communications networks and services, that is the
8 principal act for which general authorisations are given
9 and conditions are put, the right to use spectrum is
10 secondary to it. It is how you provide that network, how
11 you divide up a scarce resource.

12 You can see that that is how it is intended to be
13 if I give you an example, ma'am, because when you are
14 looking at how conditions are imposed upon a general
15 authorisation, including one as to the RTTE Article 7(2),
16 you do it by means of a condition to the general
17 authorisation on the providing of networks and services.

18 I think, ma'am, that I have come to an end, and
19 unless there is any other way in which I can help you, I
20 will finish now.

21 THE CHAIRMAN: Thank you very much.

22 MR HOSKINS: I am very sorry, but Mr Mercer has introduced
23 some new evidence.

24 THE CHAIRMAN: That is what I was going to ask.

25 MR HOSKINS: If I could have two minutes, I just have a few
26 comments I would like to make and I am very sorry to do
27 that so late in the day. The first point is that all
28 three letters come after the main event, which is the
29 disconnection in March 2003, so it is not clear what
30 relevance if any they have. However, let us assume they
31 are relevant. The first letter from Vodafone to Floe
32 shows precisely that rather than trying to kill its
33 competition, Vodafone was trying to find a workable
34 solution with Floe, and that is what one sees, that if
35 Floe clears the outstanding debt, which is fair enough,
36 and if it agrees that Floe may not use public GSM
37 gateways which are unlawful, and if Floe and Vodafone can
38 find a legally compliant way of carrying such corporate
39 internal traffic, Vodafone will do business with Floe.

1 That is not killing competition, that is trying to keep
2 the competition alive. "I hope you had an enjoyable Bank
3 Holiday in Scotland" are not the words of an executioner.

4 The 15th September 2003 letter from the DTI really
5 lays to rest the ghost that somehow Floe was misled by
6 the authorities because what the paragraph that Mr Mercer
7 referred us to says is, quite clearly, "However, the MNOs
8 can take action on the law as it stands to terminate
9 services that they consider are either unlicensed, not
10 covered by an existing contractual arrangement or
11 otherwise not in accordance with their terms of use."

12 Quite clearly, MNOs can take action under their
13 contracts. That reflects exactly what the RA says in the
14 document we looked at just before lunchtime and that is
15 exactly what Vodafone did. If that is what the DTI says
16 the MNOs can do, if that is what the RA says that MNOs
17 can do, then how on earth can Vodafone be criticised for
18 doing exactly what it has been told it is entitled to do?

19 Finally, the third e-mail I am not going to say
20 anything about because it adds nothing, we have seen this
21 type of thing before.

22 THE CHAIRMAN: Thank you. Mr Ivory?

23 MR IVORY: No, madam, I do not think there is anything I can
24 add.

25 THE CHAIRMAN: Thank you very much. We have quite a lot of
26 arguments and submissions to think about and so in due
27 course we will provide our decision and reasons.

28 _____
29