IN THE COMPETITION APPEAL TRIBUNAL

Case No 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31st January 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(**In administration**) — Appellant

supported by

WORLDWIDE CONNECT (UK) LIMITED — Intervener

and

OFFICE OF COMMUNICATIONS — Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMTED — Interveners

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H E A R I N G
DAY TWO

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APPEARANCES

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

Mr. Brian Kennelly (instructed by Taylor Wessing) appeared for the Intervener Worldwide Connect Limited.

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

Mr. Charles Flint QC (instructed by Herbert Smith) appeared for the first Intervener, Vodafone Limited.

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

DAVID JAMES RODMAN, Sworn

Examined by Mr. FLINT

Q Your full names, please, Mr. Rodman? A. David James Rodman.

Q And your address? A. Vodafone, The Connection, Newbury, Berkshire.

Q Could you be handed, please, bundle 1, the witness statements bundle, at tab 21. You have made three statements in these proceedings. The first is at tab 21. May I ask you to confirm that is your first statement and is it true? A. Yes.

Q Then your second substantive statement for this stage of the proceedings is at tab 22. Again, can I ask you to confirm that that statement is true? A. Yes.

Q And then you made a supplementary third witness statement which we have at 22(a) dated 20th January of this year. Again, is that statement signed by you and is it true? A. Yes.

Q I want to ask you one question arising out of evidence given yesterday by Mr. Stonehouse. He told the Tribunal (and the transcript reference is p.50, lines 1-6) that he had been informed – it appears by Mr. Perron – that he, Mr. Perron had had meetings with you relating to the supply of SIM cards to Recall. Is that true? A. No.

Q Did you have any meetings with Mr. Perron? A. No, none.

Q Did you have any meetings with anyone relating to the supply of SIM cards to Recall? A. No.

Cross-examined by Mr. MERCER

Q Does that apply to Airmax companies as well as Recall? A. Yes.

Q Is Vodafone Limited a well-resourced company? A. There are approximately 9,000 people who work for Vodafone UK.

Q And is it always dependent upon your chance encounters at weddings with regulatory information? A. No.

Q So, in this case, was it pure luck or good chance? A. It was a fortuitous meeting at a wedding with a friend.

Q You took advice from counsel in the summer of 2002. That advice is dated 21st August, from memory. That would be about right? A. 21st or 22nd, I think, yes.

Q Let us work back on a time line from there. When did you deliver the instructions to counsel for that advice? A. I did not deliver the instructions to counsel. That was done by Vodafone's internal legal advisers. I believe they went to counsel somewhere around 15th August.

Q Do you know when they delivered the instructions before they went to see counsel? A. I think they delivered the instructions on 15th.

Q Back from that, presumably they sent instructions to counsel at your request? A. We had a course of action that we were considering following, and they advised that we should go to external counsel to take advice on that course of action.

Q And when did you ask the legal department was it OK to take the course of action you were planning? A. Well, they were involved in meetings when we discussed the proposed course of action, and it was their advice that we should approach external counsel.

Q And when were those meetings? A. Those meetings were in early August.

Q Before 12th August? A. Yes, I believe so.

Q And your realization that there were difficulties in respect of gateways generally – when did that start? A. I started looking into gateways in the latter half of June.

Q Tell me the process. You had been to the wedding and come home and realized something was wrong and you had communications from RA. What did you do? A. It was not just attending the wedding. We had an email. A colleague of mine, Robert Borthwick, had had an email, well, a conversation with an ex-colleague who worked at Energis. He told him that I mentioned data and had approached Energis and offered to deliver inter-connect traffic as on net traffic. We had reports of congestion in Milton Keynes. We had communications from the RA. I had met this friend at a wedding. There was clearly something going on, and we decided to investigate, and I decided to look and see how prevalent the use of SIMs in gateways were on the Vodafone network.

Q And you learned about gateways and their possibility and their existence. What didn't you like about them? A. We had evidence they were causing severe congestion. I was concerned that if their use increased on the Vodafone network, that that congestion would be exacerbated, and then we would have to invest in infrastructure in order to alleviate that congestion, and that, in my view, would be loss-making investment because the price of an on net call was below its cost.

Q Below its cost? A. In my view, in Vodafone's view, yes.

Q So finance comes into this quite early in quite a big way? A. As I said, I was concerned that if the use of gateways – I mean, when we looked at it in June it was relatively small scale and there were something like a thousand SIMs that we believed were being used at gateways. My concern was that if that effect mushroomed, we would have to invest in infrastructure to alleviate that congestion.

Q And why was that a problem? A. It is a loss-making investment.

Q You have done the sums on that, have you? A. Our view was the price of an on net call was below its cost. That was borne out by Oftel's own cost model, and if we were just investing in additional capacity to support on net calls, my view would be that would be loss making.

Q That would mean because the SIMs were using existing tariffs you were already giving people calls at below cost? A. Some calls are priced below cost, but the average user does not only make on net calls; they make off net calls; they make international calls; they make calls to fixed lines, and therefore in the round they are profitable.

Q So your motivation was essentially financial? A. No, it was not essentially financial. I was concerned about congestion and I was concerned about the consequences for Vodafone should the use of COMUGs mushroom on our network.

Q What was your concern with congestion? A. Well, that the man-in-the-street would not be able to make a phone call.

Q In your second witness statement you talk about "Emerald"? A. Yes.

Q And Emerald is a Gateway operator, so you say? A. We believe so, yes.

Q And yet it was complaining about congestion. Do you think that this indicates that Gateway operators as well as everybody else is concerned about getting access to their customers? A. Well a Gateway operator would be concerned about the capacity of … for site, yes.

Q Because presumably they would not want to offer their customers a service that did not work properly? A. Presumably, yes.

Q Now, in relation to congestion and what you did next. So you took advice from counsel and from what we have seen from the unredacted advice, etc., counsel was concerned about you and competition law? A. It is mentioned in the advice, yes.

Q Did you attend any conferences with counsel? A. No.

Q So all you have is the advice and what you were told by your legal department? A. Yes.

Q But there was, from what we have seen, a concern? A. Yes.

Q How was that concern expressed to you? What were the practical results of that concern? A. Well Vodafone took the advice, they noted the statements from the RA on the illegality of Gateways, considered the matter and took the view that we would be justified in suspending SIMs that were located in COMUGS.

Q What do you think the RA's view was at that time about the legality of Gateways? A. I am not a lawyer, but my advice was that the RA thought that COMUGS were illegal.

Q What else was illegal? A. Generally, or?

Q In respect of Gateways – just COMUGS? A. No, the RA appeared to take the view that private Gateways were illegal.

Q And is that the view that Vodafone took at the time? A. No.

Q It is not? So you did not think private Gateways were illegal? A. My advice was that private Gateways were arguably legal.

Q Have you subsequently been told, assuming of course that the entire regulatory framework on which it is built actually stands up, assuming that the regulations were validly in force, is that correct?

MR. FLINT: Ma'am, with respect he cannot answer whether legal advice is correct or not, nor – and I am just putting down a marker – can he be required to answer legal advice he has received.

THE CHAIRMAN: Except that the opinion and anything around that has been waived.

MR. FLINT: Privilege in the opinion, that part that has not been redacted has been waived.

THE CHAIRMAN: I thought the parts that were redacted had not been redacted because of privilege, they had been redacted because ----

MR. FLINT: Well they are not relevant.

THE CHAIRMAN: -- they are irrelevant.

MR. FLINT: They are confidential and not relevant to the issues, that is correct.

MR. MERCER: I will put it another way. Has Vodafone's opinion as to what is and is not "lawful" changed? A. Not to my knowledge.

Q So why in December 2004 did Vodafone issue an all agents' memo saying things had changed. "We have been told that what we are operating is not quite right and you should stop giving SIMs for any Gateways unless we are effectively the billing party – we Vodafone are the billing party"? A. I wasn't responsible for that notice, but I believe it came on the back of Ofcom's statement on the legality of Gateways.

Q How definite were the RA's statements about the legality of certain types of Gateways in the summer of 2002?

MR. FLINT: With respect, he cannot say how definite their statements were, that is a matter of inference for anybody who was there.

MR. MERCER: I will try and put it another way. Did there appear to be, in your dealings with the RA, in May/June 2002 any doubt about what they thought was legal or lawful or unlawful? A. I did not deal with the RA in May/June 2002.

Q I see. Who did? A. I think Mr. Borthwick had a meeting with the RA on Gateways.

Q Could I ask you to look at volume 2(b) document 5? It is a document we referred to yesterday afternoon on a couple of occasions, and the same paragraph I think, which is para.1.4. Would you like to read para.1.4? A. (After a pause) Yes.

Q In the third sentence, it begins: "This is a grey area at present …" to what is that referring?

MR. FLINT: The witness cannot answer what a document means on behalf of another party. He can answer to his own document, and he can answer to his state of mind or belief at the time. But if we are just simply going to read through documents and ask him what it means in my respectful submission that is not proper cross-examination.

MR. MERCER: It says, I think, that the question of legality of certain forms of Gateways is a "grey area", which is an expression of view by the RA. Is that what you understood the RA's position to be at that time, November 2002? A. No.

Q No? A. No.

Q On what would you base your view? A. Well I had seen the reference in para.1.5. I had seen the statement issued on 23rd August. I had seen the website notice issued on 4th October. I believe that they state in those notices that their view is that public Gateways as we knew them then were illegal.

Q So reading that the RA believed that the area was a grey one did not change your view at all of anything? A. I am not a lawyer, I don't take a legal view. I do not recall reading this document and referring the matter to a lawyer.

Q If you turn over to para.6, and "Proposal 2" – The proposal – the second proposal in the consultation was that the restriction on the type of service provided by means of Gateway should be removed, and you knew and you recognised that because you subsequently lobbied against it? A. Yes.

Q Did you have any subsequent meetings with the RA about this consultation document after it was issued? A. We had a meeting in January 2003.

Q And what did the RA say at that meeting? A. The RA said lots of things at that meeting, what are you referring to?

Q Did the RA give you any indication that they were about to prosecute anybody for a breach of Regulation 4.2? A. No.

Q Did you ever ask them to prosecute anybody for a breach of 4.2? A. No.

Q Why not? A. Well, from my recollection ----

Q Mr. Rodman, you are saying it is a serious problem and you are concerned about congestion and you are losing money, etc, and you do not ask them to prosecute – why not? A. Well two things. One, at the end of August as I have said we took external advice, we had seen the statements from the RA, we considered the matter internally and the advice was that we were justified in disconnecting SIMs that were located in COMUGS. My understanding is at some point the RA said they were not taking action against COMUGS so the option of referring it to the RA didn't exist. I have since learned that Mr. Morrow of Vodafone contacted the RA and told them "We may disconnect some SIMs that were located in COMUGS" and they did not seek to prevent him.

Q But nobody at Vodafone ever asked the RA, and the RA would have been the prosecuting Body for that, would it not as far as you know? A. As far as I am aware, yes.

Q How many complaints from the public have you had about congestion caused by COMUGS?

MR. FLINT: Over what period?

MR. MERCER: Let us put it into a couple of periods. Let us start with May to September 2002?

A. It is not information I have ever sought out. I have no idea how many complaints we got about congestion related to COMUGS. I got complaints from the engineers about congestion relating to COMUGS.

Q Whose engineers? A. Vodafone's engineers.

Q It was the internal complaints that you were taking note of? A. It was the internal complaints that I had access to.

Q Mr. Overton yesterday said that he had not had any warning from you about COMUGs until the late autumn of 2002. Would that be correct? A. Yes. The first time I spoke to John Overton about COMUGs was at the end of October/early November 2002.

Q Did it ever strike you that Vodafone might be entering into contracts for the provision of SIMs for use in such apparatus earlier than that? A. I had no knowledge of that, no.

Q The people who deal with operators such as Floe, Recall etc. in Vodafone, they work on a commission basis? A. I have no idea.

Q What control does Vodafone have, and how does Vodafone exert control, over what some of its, say, trace agents, like Genesis or companies like that exert over their customers? Presumably, there is a very close relationship between Vodafone and its large scale service agent providers? A. There are people in Vodafone who have responsibility for managing the relationship with service providers.

Q Do you share any joint facilities with service providers like that, like billing systems or anything like that? A. I do not know. I think it is possible that there are joint billing systems.

Q And any other management information that is readily available? A. I have no idea what sort of information we share with service providers. I do not work in that area of the business.

<u>Re-examined by Mr. FLINT</u>

Q Mr. Mercer put to you that Vodafone's (or your) motivation was financial. He did not put a period on that, but he made that suggestion, I infer, at that stage in relation to your investigations in the summer of 2002. When you wrote the letter of 10th March 2002 to Floe Telecom complaining that their activities were illegal, was Vodafone's motivation financial? A. No. You will note from the letter that we refer to 29 SIMs that we had located close to Heathrow that were causing congestion.

Q Yes. A. So the answer is no, the motive was not financial.

Q You have given evidence in your witness statement - can I ask you to look at it – tab 22, para.27 about your meeting of 6th February 2003. The Tribunal has heard some evidence from

Mr. Taylor yesterday about that meeting, but Mr. Mercer has decided not to cross-examine you on that point. Can I ask you, were you in court yesterday to hear Mr. Taylor's evidence?

A. Yes.

Q At that meeting did Mr. Taylor say anything to the effect that he did not understand the distinction between public and private gateways?

MR. MERCER: Excuse me, madam, I know I am only a solicitor but my understanding is that you can only re-examine on points I put in cross-examination, and I do not think Mr. Flint is entitled to put that point.

MR. FLINT: Mr. Mercer is technically absolutely correct. This, however, is a fundamental dispute of fact and I shall be submitting in due course that clearly the evidence of Mr. Taylor should be disbelieved about that meeting. In those circumstances, the Tribunal is hearing two witnesses – in fact, more than two witnesses – giving contradictory accounts of that meeting. It therefore must be right and proper that Mr. Rodman is pointed to the salient points on which his evidence diverges from Mr. Taylor so the Tribunal can hear his evidence about it. I can quite understand why Mr. Mercer is extremely reluctant to do so, but in the interests of ensuring the Tribunal has this matter properly dealt with, I was proposing simply to direct the witness to the two or three salient points and establish whether or not the witness adheres to his evidence. But if the Tribunal does not require me to do so, then I – having just made clear what the submissions will be in due course – certainly do not need to do so. The witness's evidence is perfectly clear, but Mr. Taylor did say some slightly different things yesterday and I thought it only right to draw the witness's attention to them, but I am quite happy not to do so if I am not required to.

MR. MERCER: I made my point, madam. If the Tribunal want further information, presumably they will ask questions to the witness themselves.

THE CHAIRMAN: We consider that you asking the question is not appropriate. The evidence is in the witness statements. Whether we ask the question we will consider in a moment.

MR. MERCER: I have no further questions in re-examination.

MRS. HEWITT: Just a few points of clarification. As head of regulatory policy, no doubt you would have looked upon yourself to have seen the Vodafone licence and be very familiar with its constraints and its limitations. How much of that were you able to brief the executives – particularly with the regulation 4.2 and its boundaries? A. I should make clear that at the time I was not head of regulatory policy at Vodafone. I was head of regulatory policy at Vodafone from early 2003. At that point I was seconded from Vodafone group to work in the UK regulatory department on the Competition Commission Inquiry. When this whole issue emerged, we briefed the relevant people within Vodafone about the legality of GSM gateways.

I should actually just emphasise that up until about October/November 2002 to our minds, and on the basis of the date in front of us, the vast majority of traffic carried over COMUGs came from SIMs supplied by independent service providers. So we concentrated on communicating with the independent service providers and approached Jason Rigby and his boss.

Q Had you familiarised yourself at that point with the actual licence? A. No.

Q OK. When you started looking at gateways, did you ask your colleagues whether they were supplying SIMs to gateway operators? A. As I have said, we believed that the vast majority of SIMs in gateways were supplied by independent service providers. I spoke to Mr. Rigby who was responsible for managing the relationship of the independent service providers. To my knowledge, he was not aware that SIMs were being used in COMUGs.

Q In your previous answers you have given us to understand that public gateways were illegal and Vodafone had the licence and so gateway owners were not able to have licences. There was the overall licence which Vodafone had. Why did you understand that public gateways were illegal? How did you inform yourself in terms of that position? A. I took advice from the lawyers within Vodafone who had external advice and statements from the RA on the legality of gateways. I spoke to them and they told me that COMUGs were illegal.

Q Can you recall the advice given by Mr. Flynn? Do you want to turn it up. When this was obtained, did you give Mr. Flynn a copy of your agreement with Floe? A. No. I was not aware at the time that this advice was sought that we had an agreement with Floe.

Q You did not know that? A. No.

Q In terms of the sort of practicalities of the hardware relating to gateways, my understanding is that each piece of hardware contains in it an IMEI number of a mobile station. That is my understanding. If the provider or the owner of that hardware – and Floe is saying it was the owner of that hardware – had control of that, how is it that Vodafone were able to switch off the IMEI connection? Are you with me? A. I understand the question. I am not sure I know the answer. I believe the IMEI numbers are registered on a database somewhere that we have access to, and we are able to block those IMEIs but I am not sure of the technical details of that.

Q So if a GSM gateway operator had its own licence, would you have been able to block those IMEIs and with what authority? A. I do not know the answer to that question. If a GSM operator had had a licence and had its own numbers, then it is possible that we would not have had access to their IMEI numbers, but I cannot be sure.

MR. DAVEY: Do I understand you right, Mr. Rodman, that in blocking these IMEI numbers you do not actually know how it is done? A. Technically no. I am not responsible for blocking the IMEI numbers.

Q When you say "technically, no", I mean what do you know – in regard to this, I mean I am sure you know a whole lot of things? A. I know that IMEI numbers can be blocked and therefore you can prevent usage of those devices on your network. That is my understanding.
Q And that is it? A. Yes, that is as much as I know.
Q You do not know how it is done or the legalities, if you like, or the authority under which it is done? A. No, it is not something I have ever considered.
Q You said that you thought that most of the SIMs being used in Gateways were supplied by independent service providers. Were Vodafone providing any of their own? A. Any of their own what?
Q Were any of the SIMs used in these Gateways provided by Vodafone? Were they engaging in the traffic themselves? A. The data that we had available to us indicated that about I think between 85 and 90 per cent. of the calls that we thought were coming from COMUGS came from SIMS supplied by independent service providers, the remaining traffic came from SIMs supplied by Vodafone's own in-house service provider.
Q So Vodafone were supplying some of these things, but do you know if they were supplying just the cards or the equipment as well? A. I don't know. When you say "equipment" do you mean the devices or …
Q The device, yes? A. I am not aware.
Q (After a pause) There is a document, Mr. Rodman, at bundle 2(a) tab 30 which is an email from Cliff Mason. It is not specifically directed to or copied to you, but I am wondering if you ever saw it? A. Yes, I recall seeing this.
Q Did you ever see that? A. Yes.
Q You did. I am just wondering what you made of it? In relation to what it says about Gateways and the MNOs it seems to suggest that Gateways are covered by the MNO licences. Did you extract that from it? A. Yes, can I refer you to the deck of slides that I put together in early August.
Q Yes. A. If you go to the slide with the title "Recommendations" – it looks like it is number 6.
Q I have that. A. The third bullet down I say "Indications are that RA believe that when provided as a commercial it is unlicensed except by mobile operators." So I noted the comments from the RA. This was before we took our own legal advice. My recollection is that I had forwarded the document on to the internal Vodafone lawyer.
Q I am sorry, Mr. Rodman, I did not catch that last bit? A. I believe I forwarded this document on to the relevant lawyer within Vodafone.
Q Was that in relation to the taking of advice? A. Yes.

Q From counsel? A. I believe so, I can't be sure. I recall forwarding I believe this document on to our lawyer, and I believe either this paper or the earlier email from Mr. Mark which formed part of the instructions to counsel, but I can't guarantee that.

Q In relation to the suggestion that it may be licensable by the MNOs, what was your belief about how far the spectrum was covered by Vodafone's licence? How much of the spectrum did you believe the licence covered? A. I don't recall forming a view.

Q So when you said that on your slide there were indications that the RA believed that a commercial service was unlicensable except by mobile operators, what did you mean? A. I think what the RA were saying is that the mobile operators could provide COMUGS, but others could not.

Q I see that immediately after that statement – "unlicensable except by mobile operators – there is a reference "meeting in diary", what did that mean? A. I didn't have a meeting with the RA, I believe I am referring to a meeting that Mr. Borthwick had with the RA around about that time.

Q Did you know what was up for discussion at that meeting? A. I think GSM Gateways were on the agenda but I do not recall seeing a meeting note or any report on the meeting.

Q You do not recall seeing anything arising out of that? A. I recall Mr. Borthwick coming back from the meeting and saying something to the effect that the RA are very interested in our views on GSM Gateways.

Q Nothing more? A. Not that I recall.

MR. FLINT: I have no questions.

THE CHAIRMAN: Thank you very much, Mr. Rodman.

MR. FLINT: I call Mr. Young.

JONATHAN YOUNG, Sworn

Examined by Mr. FLINT

Q Your full names, please, Mr. Young. A. Jonathan Young.

Q And your address? A. Vodafone House, The Connection, Newbury.

Q Could you be shown bundle 1, the witness statement bundle, please, and would you go to tab 24. This is a statement made by you on 21st May 2004. Is that statement true? A. Yes, it is.

Q And the next tab is a second witness statement made by you on 21st October 2005. A. Yes, it is.

Cross-examined by Mr. MERCER

Q You conducted negotiations with, *inter alia*, Mr. Taylor leading to a contract that was signed on 12th August 2002? A. Yes.

Q What did you understand from those negotiations Floe would be providing? A. They would be providing a one bill for fixed and mobile telephony to SMB customers which we have known as small to medium businesses, be using a premicell type device which carried more than one SIM card in it which would enable the customer to actually pay less for the devices attached to their PABX rather than have many premicells attached to it as well as selling mobile handsets into that customer.

Q I want to be quite sure about this. You knew that they were going to be doing the billing? A. Yes.

Q Did you discuss the project with anyone else? A. In what terms?

Q With Mr. Overton, with any other departments? A. It was discussed with Mr. Overton, yes.

Q And any other departments in Vodafone? A. No.

Q None at all? A. None at all.

Q Do you recall asking Mr. Taylor and the directors of Floe to enter into some kind of financial guarantee or commitment? A. Yes.

Q And that was at the request of which department? A. That was through legal.

Q Through your legal department? A. Yes.

Q But you never discussed the project with them? A. I had one legal adviser which was either Chris Allen or Andrew Graham at the time who provided the contract in the first instance.

Q They provided the contract? A. Yes, a framework agreement.

Q And the contract -----

MR. DAVEY: A contract and?

MR. FLINT: Framework. A. It is a framework agreement.

MR. MERCER: It was the standard terms which were put in behind the form of contract. So how many forms of contract did you use at that time? A. There was one framework agreement which had different obligations and in different schedules at the end of it dependent on the customer.

Q And that standard form referred to handsets did it not? A. It was handsets and GPRS, yes.

Q So this agreement was not tailored – if you forgive the pun – for use with Floe? A. Yes, it was.

Q In what way? A. The obligations as far as handsets and SIMs, well SIMs spend, in this instance.

Q You read the business plan which was provided by Floe? A. I read the business plans provided to me by Floe, yes.

Q And did you discuss that with them? A. Yes, I did.

Q And, tell me, what did you think about the ARPUs, the average take per customer? A. I thought it was very high, but if you looked at the agreement (the framework agreement) that I put to them, it was not anywhere near the numbers that they were talking about.

Q Did in fact, at that time Vodafone have a requirement that if you took SIMs there was a minimum ARPU spend they were looking for? A. Could you just repeat the question, please?

Q Was there a minimum ARPU level that Vodafone was looking for before they would enter into this kind of contract? A. There was a minimum number of SIM cards and handsets per month and per year.

Q Was it made clear to you that handsets were not a significant part of this contract? A. No, it was not.

Q Are you quite sure about that? A. I am quite sure about that, yes.

Q Does the business plan that you were given make any reference to taking handsets? A. Not that I can recall.

Q I just want to make sure. The form of contract you used was meant to cover gateways? A. I did not know what the term "gateway" was at the time, Mr. Mercer, so no.

Q The services as described in the business plan? A. It was to cover services provided that – it was explained to me by Mr. Taylor that they would be attacking SMB market place with one bill so that was basically an opportunity for Vodafone corporate at the time to engage with customers that we did not have access to directly.

Q Were you aware that amongst the services to be offered by Floe was least cost routing? A. Yes.

MR. FLINT: No re-examination.

MR. DAVEY: I wonder could you have a look at the business plan which was produced to you. Perhaps before we look at that, you say that Floe seemed to be looking at an area of the market that Vodafone was not. How did you think Vodafone would get an opportunity to access fresh customers through this arrangement? A. At the time I was working for Vodafone Corporate which was the in-house service provider for Vodafone and we were very prevalent in corporate space. We had handsets with more than 250 employees and more than 250 handsets and national accounts. We were not very prevalent in what we called SMBs, small to medium businesses which we term sort of five handsets up to 250. We had a business division that was selling in there but were not doing an incredibly good job because of pricing competition. So the team that I was working in was tasked with working with other parties that actually had access to that market place.

Q So how would you gain access? Would it be second hand, as it were? A. It would be either through contacts with Vodafone Corporate who came across organizations that wanted to do their own billing or who wanted to work in this area, sort of third party side; or it would be through the Vodafone website or personal contact, of course.

Q So you were contacting people who wanted to work through the third party side? A. Once they had contacted us. There was no work that I did my side that was actively recruiting re-sellers.

Q So you did not have to do any cold calling? Everything you dealt with was people who had already been in touch? A. Yes, that is correct.

Q How did you see the Floe arrangement giving further opportunities to Vodafone?

A. Through conversations I had with Simon Taylor because I had known him from Telecom FM. It was basically targeting organizations that Vodafone did not have access to and also giving them one bill to cover for lease cost routing and other telephone systems.

Q Explain that last bit to me again. You would be targeting customers that Vodafone had not been in touch with? A. Or did not have direct access to.

Q Had no direct access to. What did you say after that? A. About Floe Telecom or about Vodafone?

Q I had asked you how you had envisaged the arrangement giving further opportunities to Vodafone and you said put them in touch that they did not have direct access to and then you went on? A. The opportunity that was shown to me by Floe was they were actually targeting customers that they did not have access to, and they were going to be selling not just mobile but fixed and LCR as well on to one bill.

Q Say that slower. They were going to sell? A. LCR and fixed line as well as mobile to customers on one bill.

Q LCR and fixed line as well as? A. As well as mobile on one bill to the customer.

Q On one bill to the customer. A. And that is something that Vodafone could not provide.

Q How was that going to work? A. By a call data record being forwarded to Floe Telecom for them to onward bill to their own customers.

Q And technically, Mr. Young, how did you see that being done? I mean, how were they going to achieve this? How was such a service going to be provided? A. I am not a technical person. I am a sales person and they were going to be using a sales team which was headed up by Charles Kirk, or something. So they had a sales team and personal contacts within their own business.

Q They had a sales team? A. Yes.

Q And so far as the kind of equipment they were using is concerned, had you formed any views about what kind of equipment they would be using? A. Yes.

Q Were you concerned about that in any way? A. I was not concerned at the time. My view was – and has been expressed to me by Simon Taylor – that this was a device that would be attached to a small companies PABX. Rather than having one SIM card which was an issue with congestion on the line, it would have three or four SIM cards but it would always be at the premises of the customer. So, to me, it looked like it was a cost saving for the customer who did not have to buy five, six, seven or more premicells or Nokia 22s as they were, to attach to their own PABX.

Q So they would be going round selling these services and these articles? A. Yes.

Q So Vodafone was, in effect, benefiting from Floe's sales team? A. Yes, of course; that is what third party is all about.

Q You said that you envisaged three or four SIM cards in a device. That brings me back to the contract.; at least, not the contract, the business plan which was submitted to you. If you could look at that, and particularly at pages 976 where we come across a section called "Hardware details". Did you see this at the time? A. Yes, I did.

Q Perhaps you could assist me, because you say that you are not a technical person, but I suspect that you are marginally more technical than I am, does it make any difference, for example, some of these devices are specifically described as connecting to PABX or standard analogue phone set and so on. Some of these things specifically say that. Some of them do not. Does that make any difference? A. I don't know, sorry.

Q Then I see that some of them refer to an "ISDN basic rate solution", and then there is something called "ISDN primary rate solution". What does that mean to you? A. It means very little to me. At the time I was told by Floe that they were looking at other opportunities and I believe that only the analogue versions were ready at the time.

Q So the ISDN references meant not a lot to you? A. That's correct.

Q You said in your statement and again to us here that you thought there were three or four SIMs per device, but I see that one of them, at p.977 under the primary rate solution and under the technical specification it says "Modular architecture from 2 to 30 GSM channels per system ---- A. Could you point out where that is again, sorry?

Q 977, and we go to "ISDN primary rate solution" about half way down the page, and then it says "Technical specification" and the first item under "Technical specification" is "Modular architecture from 2 to 30 GSM channels per system". Does that mean SIMs? A. It didn't mean anything to me at the time, but to me now that means SIMs, yes. As I stated before I didn't think that this part of their proposition was ready at the time.

Q Going back to the previous page on the Analogue multi-line solution – the bottom one – that refers to a multi-SIM capability up to a maximum of 6? A. I see that. It had not been explained by Simon Taylor. The only number I recall here was either 3 or 4.

Q So in the discussions he was talking about 3 or 4? A. 3 or 4, yes.

Q He told you then that only the analogue systems were available at that time? A. I believe so, yes.

Q But I think you said that they were working on – they had other plans, greater ambitions? A. That is what I believe he said to me at the time, yes.

Q Was it envisaged that if those plans came to fruition that they would carry on under the agreement and that that would cover them? A. As part of the obligations in the agreements, a quarterly review which would be held by myself and perhaps John Overton, along with the heads at Floe, so it would have been discussed then.

Q So what had you in mind for those quarterly reviews? If they wanted to do anything new that they would raise them? A. A quarterly review was just there because the day to day management was managed by an account manager within Vodafone corporate. My review was basically if there were any changes in their business which should have been highlighted at that time, and also to look at the figures based on the connections they were doing and were committed to in the obligations of that agreement.

Q To see they were meeting their targets? A. Yes.

Q So could you have approached the use of, or the multiple use of SIMs in Gateways in those quarterly reviews, as they extended the business? A. I can't answer that, it wasn't a term that I had known about at the time of quarterly reviews. It wasn't something I knew about.

Q What was not something you knew about? A. GSM Gateways, and GSM devices.

Q You say you did not know about them at the time of the quarterly reviews or at the time of entering ---- A. At the time of signing the agreement, and the first I heard the term "GSM Gateway" was in January 2003.

Q What I am wondering, Mr. Young, is the business plan which you knew about at the time of the agreement is referring to the possibility of 20 to 30 GSM channels. You knew about that at the time of the agreement? A. From what I read in the business plan, yes.

Q And so if they had produced a device with 20 cards in it could you have done anything about that in a quarterly review? A. I don't know.

Q But you say that you did not know about Gateways. What did you know about what they were planning to do? There was what they told you was available now, how did you see their business going? A. They were signed up on the framework agreement to target customers that we didn't have access to so they were targeting customers for fixed line, the LCR and the

mobile on the one bill, which was attractive to Vodafone corporate at the time, and that is why they were signed up.

Q You knew that they might use at least some multiple cards. What was the feature that you did not know about, that you discovered subsequently? A. I didn't know that Premicells were illegal.

Q The business plan which was produced did look forward, did it not? A. Yes, it did.

Q They were talking about developing products and developing service concepts and so on. Is that right? A. I believe so, yes.

Q But at that stage you did not know what they were? A. No.

Q When you had had the discussions with Floe, and you were approaching agreement, did you have assistance from the legal people at that stage? A. When you talk about discussions with reference to the agreement, the agreement was in electronic format. It was a framework agreement which I forwarded to Simon Taylor in Floe for his legal team to review. Any changes that were made were track changes because it is Microsoft Word document. That would come back into me and then I would forward that back on to our legal team for their review.

Q Were there any changes do you know? A. I can't recall. I made changes as far as obligations, because that was part of the agreement, as well as the charges which were in schedule 5 of that framework agreement.

Q So it went to the lawyers and came back to you. You do not know what happened to it there/ A. They would have reviewed any changes that Floe may have put forward and if there were any then they would have reviewed them and got back to me to say a yes or a no. If there were not any changes they would have just bound the document ready for signature.

Q Do you know if they sent it to anybody for any kind of compliance check? A. I am not aware of that; I am sorry.

Q You knew that Floe would be providing or using (putting) SIMs in devices? A. In customer premises, yes.

Q Did you know or did you ask anything about whether they could do that, whether they had the authority to do that? A. No, I did not.

Q I am sorry. I asked you two questions there: did you know or did you ask? A. No to both.

MR. FLINT: I have one question arising out of that.

<u>Re-examined by Mr. FLINT</u>

Q The quarterly review meetings. Could you be shown bundle 2(b) tab 1. This is a note of a meeting on 16th October in which you are shown as being present and Mr. Taylor is shown as being present. A. Yes.

Q It is fair to note that at para.1 there is a reference to a planned meeting for November and a request that Vodafone would like to be brought up-to-date on Floe business developments. At the meeting of 18th October did Floe explain there had been any changes in their business model? A. Do you mean 16th October?

Q 16th October 2002? A. Not that I can recall, no.

Q Do you recall whether there was a subsequent meeting in November 2002? I do not believe we have a note. A. I cannot recall, no.

Q At this meeting of 16th October did Floe tell Vodafone that it was setting up SIM cards or gateways which were not connected directly to the customer's exchange and which were not located at the customer's premises? A. No, they did not.

(The witness withdrew)

MR. FLINT: That is the evidence that we are calling.

MR. ANDERSON: The last witness before the Tribunal is Mr. Cliff Mason.

Mr. JOHN CLIFFORD MASON, Sworn

Examined by Mr. ANDERSON

Q Could you tell the Tribunal your full name and address? A. John Clifford Mason. Ofcom, 2A Southwark Bridge Road, London.

Q Could you now be shown bundle 1, the witness statements, and turn to tab 2(a). Is that a copy of your witness statement? A. It is.

Q And in the version that you have, is there a signature on the last page? A. Yes, that is my signature.

Q And is that your evidence to the Tribunal? A. It is.

Cross-examined by Mr. MERCER

Q May I refer you to para.9 of your witness statement. A. Yes.

Q And to the second sentence:

> "The mobile operators are not operating illegally as the GSM spectrum has been licensed to them on a nationally exclusive basis and cannot therefore be licensed for commercial purposes to anyone else. The mobile operators are entitled to plan and manage the spectrum to meet their network needs and as such can act on the law as it stands."

A. Yes.

Q What did you mean by that? A. To put this in context, this was written with reference to the Wireless Telegraphy Act and the spectrum licensing regime. I intended to convey that Vodafone was entitled to use equipment within the spectrum licence to them and that in doing

so we would not have licensed anyone else to use equipment that we thought would interfere with that service.

Q Was it this wish to avoid licensing anybody else that leads to using the structure of the Exemption Regulations? Because then you do not have to licence anybody else; you just make it exempt. A. I do not think that was the original purpose of the Exemption Regulations. The licence to Vodafone was for its use of equipment on the spectrum assigned to it.

Q So what was the purpose of the Exemption Regulations? A. The purpose of the Exemption Regulations was to authorise the use of consumer equipment, i.e. handsets without need of either an extension to Vodafone's licence or individual licences as have happened in other countries.

Q So it was, in fact, to avoid the need for individual licensing of the handsets? A. To avoiding individual licensing of the handsets, yes.

Q Because there had been a reference to the same frequencies but in reverse to those? A. Yes.

Q Apart from that, the purpose of the licensing regime was to enable Vodafone to manage the spectrum which had been allocated to them in the way that they saw fit? A. Correct.

Q So did you at the time that you wrote that consider that it was possible for commercial gateways to be authorised pursuant to Vodafone's licence? A. I was not aware of gateway specifically as a technology. I believed that Vodafone had the authority under its licence to delegate parts of its network operation. I did not offer an opinion whether gateways would or would not qualify as equipment of the network.

Q When did you realize it was gateways we were talking about? A. I think the question was raised with me from industry of whether this type of equipment which became known to me as gateways was either covered by the exemption or could be authorised. That was the purpose of the consultation that I conducted.

Q Starting November 2002? A. November 2002.

Q Were you, at least in part, the author of that consultation document? A. Yes, in part.

Q The next reference – you have been in court this morning, I noticed – I made a reference to para.1.4 earlier and references to the grey area. A. Yes.

Q Could you just confirm to us, as one of the authors of that document, to what the grey area refers? A. The grey area, as I understood it, was that it was evident that this practice of using gateway equipment was happening. It was unclear to me, I think to RA at the time, on what basis that was, and whether it was desirable or undesirable.

Q So it was a new area? A. It was an unquantified area.

Q Unquantified area? A. Unknown.

Q Unknown. So you had not come to a view about it? A. No.
Q Was it the RA's policy at that time to prosecute people for running gateways? A. Not gateways specifically.
Q Had you had complaints about gateways from any of the mobile operators or the public? A. I do not recall specific complaints about gateways.
Q We can have it put in front of you if you wish, but are you familiar with the first decision of Ofcom in the Floe matter? A. I believe so, yes.
Q I thought you would be. And there is reference in there to gateways possibly being authorized under the scope of Vodafone's GSM frequency licence? A. Possibly.
MR. ANDERSON: I think it would be fairer if the witness was actually taken to these documents that Mr. Mercer is asking him about, on each occasion so that the witness can remember the context in which statements may have been made.
MR. MERCER: It is 5(1). Let us try para.46, shall we, and 49 and 50. That describes, *inter alia*, a mechanism whereby Floe's gateways could have been authorized under Vodafone's GSM licence, and then concludes that they were not. A. I would note from this it refers to the provision of services not use of spectrum.
Q Is that a material difference? A. To RA at the time it certainly was.
Q Where do we think Oftel got the idea there could be some form of authorization? A. Probably from discussions from RA, specifically with me. Again, I am grateful for the word "could"; it was a possibility to be explored.
Q It was a possibility to be explored? A. Yes.
Q But it was possible in your view? A. No, it was a possibility to be explored. I have not expressed a view as to whether it was or was not possible.
Q Then let us go to document C14. It is the last paragraph on the first page and there is a reference to you? A. Yes.
Q In the second sentence of that paragraph the "he" refers to you, does it not? A. It does.
Q "He thought that if there were a contractual relationship with the operator then effectively the Gateway Operators would be operating under the existing operators' WT licence." That is what you said? A. That is what is said here. Those were not my words. Had I drafted this I believe I should have put "could" rather than "would".
Q Okay. Then there is a reference to Miss Canter? A. Yes.
Q I could not believe for a moment Miss Canter would take that issue away without discussing it with you further, so what was the response back? A. I can't recall the response specifically. Certainly we would have discussed this. Presumably there was a response in the bundle?

Q Well it appears, we will take you to the document if you like, it appears in Miss Hewitt's statement, there is a reference to the possibility of sorting these things out by contract, is there not? A. There is a possibility, yes.

Q We can judge by what the Minister has said in this note that that was something that was weighing on his mind, the possibility of being able to show an alternative route? A. That would be something the Minister would be considering.

Q So let me get this right, you let that go forward, the RA let that go forward into the Ministerial statement without ever having taken legal advice about it? A. I don't recall taking specific legal advice on that point.

Q Do you believe Civil Servants are a breed apart? A. No.

Q Do you think the man in the street gets the possible nuances of everything that you say? A. It is difficult for me to comment on that.

Q Let me put something to you. Paragraph 10 of your witness statement. Let me put para.10 in a different way, slightly. If you took it just a slightly different way, what you are saying is that the general public should have realised in this case, Mr. Stonehouse should have realised that because I made the statement in very general terms, because I did not actually refer to any particular technology or equipment, that you had not considered it in any great deal – it was only a "could" – and you had not taken any legal advice. Why do you not just say that to Mr. Stonehouse? A. In meetings I did say that to Mr. Stonehouse.

Q Which meetings? A. We had a number of meetings commencing with his approach to me which I believe was February 2003.

Q That is not the impression Mr. Stonehouse got, and there are none of those caveats expressed in that quotation or the rest of your letter, are there? A. (No audible response)

Q When did you recognise that there was a legal difficulty associated in the minds of your colleagues with using the licence to authorise Gateways? A. A difficulty with using the licence to authorise Gateways?

Q Yes. A. I think that was considered subsequently by Ofcom.

Q How much subsequently? A. Some time after the Minister's statement, July 2003.

Q Let us go to para.12 of your witness statement, the quotation in italics.

> "I believe therefore that the network operators have the authority under the WT Act, but not obligation, to accept by agreement to custom equipment that is not covered by the exemption regulations."

A. Correct.

Q And in what context was that discussion? A. I think in the context of the final sentence that the licensee will be responsible for compliance with the licence conditions of the equipment

used. I did not discuss whether Gateways qualified as equipment. I thought it a possibility, no more than that.

Q It does not say that, though, does it? A. I believe it does say that.

Q Really? A. Yes.

Q The mobile operators' licences allow them to use their assigned spectrum with any equipment that meets the technical specifications in the schedule to the licence? A. Correct.

Q So why were you telling Mr. Stonehouse this? A. Because it was possibly something that Vodafone might consider whether a certain type of equipment, I didn't say "Gateways", whether any equipment might meet the technical specifications of their licence. I told Mr. Stonehouse in meetings that that was not something I had considered at that time.

Q I hear what you say, Mr. Mason. Then you were still holding that view, the view that this was in your words a "could" or a "possibility"? A. Yes.

Q When you gave advice to Oftel considering the first round of the complaint? A. These were my opinions shared equally with Mr. Stonehouse and Oftel.

Q And it was still something you were promulgating in the autumn of that year? A. That was my view.

Q And had you considered how that might work out? We are talking about quite a lengthy period? A. Yes.

Q At the least from March to September 2003. Did you not at any time get out the Vodafone licence and see if your "could" was a probable? A. I looked at the Vodafone licence but it is a matter for the licensee whether equipment complies with a licence, and I was told by Vodafone that they had not authorised anyone, whether or not in principle that may or may not have been possible.

Q You like consensus, do you not, Mr. Mason? A. It helps.

Q And you, in the traditions of the RA, like to see yourself as a facilitator? A. Yes.

Q In March 2003 were you trying to facilitate a resolution to an industry problem? A. Yes, I think so.

Q And that is why you had those meetings with Mr. Stonehouse? A. Yes.

Q You were trying to suggest a means of resolution? A. No.

Q No? A. No, I was listening to someone who came to us with questions and a situation. I was trying to give straight advice as the RA saw it at the time.

Q What did you say to Vodafone in this period about the same issue? A. We spoke to all the mobile operators. I can't remember specific meetings, but we explained our view of Gateways – they of course had seen the consultation – and we encouraged them to express their views in the responses to the consultation.

Q Did any of them come to you asking you to take action against Gateway operators?
A. Enforcement action, no.
Q Were they acting together at this point – you say you spoke to all of them – or were they acting individually? A. We spoke to them both collectively and individually. We had regular technical meetings with them.
Q You have already said to us that you were one of the authors of the November 2002 consultation document, and the second proposal was that restrictions should be lifted?
A. Yes.
Q That is not what happened? A. That is correct.
Q Why was that? A. Because on the balance of responses put in, including some confidential, I understand redacted from this evidence, the Minister made a decision – that was not my decision obviously.
Q Did the advice of the RA change over the period? A. Advice to whom?
Q Advice to the Minister? A. The RA reported what it had learned from responses and there were, as with any Ministerial submission, a number of options. These were put to the Minister.
Q The confirmation of the regulations took place during the spring of 2003, and that was the period immediately before the coming into force of the Communications Act 2003 (or the major part of it)? A. Yes.
Q And therefore the implementation by the due date by the United Kingdom government of its obligations under the framework directives? A. I am sorry. Could you expand on the coming into force of the regulations?
Q The Communications Act was, that was all being done immediately before the UK had to – had to under European law – implement the framework directives. A. The Communications Act did come into force of 2003. The Exemption Regulations, however, tracks back to many years earlier. It was unchanged from 1997, I believe, was the first one.
Q You were essentially confirming it again. A. Confirmed in what way?
Q That you needed it going forward. A. It was unchanged.
Q Did anybody take any advice at that time about compliance with European law? A. I am unaware -----
MR. ANDERSON: The witness can only answer on behalf of himself, not whether anybody took legal advice; certainly, not so far as the Minister was concerned, for example.
MR. MERCER: Do you know if any advice was taken? A. I do not know.
MR. ANDERSON: I have no re-examination.
MR. DAVEY: Mr. Mason, you said that you believed that Vodafone had the authority to delegate under their licence. You just said that now? A. Correct, sir.

Q What did you mean by that precisely? A. There is a clause in Vodafone's licence that enables it to delegate parts of the management of its own network. In this way it might sub-contract some of the detailed engineering of the running of that network.

Q It allows them to delegate, to develop – what did you say? A. To run base stations, parts of the infrastructure, so they might sub-contract another company to do so.

Q So they could delegate parts of running the network to someone else? A. Yes, parts of the radio equipment as specified in the licence.

Q Radio equipment specified in the licence? A. Yes, sir.

Q Looking at this case, if Floe had come to you looking for a licence to run their operation, what would you have done with them? A. If they had come looking for a licence, I believe we would have had to consider – if it was an application to use GSM equipment generally – whether alternative spectrum was available, but spectrum for running a GSM service within the channels licensed to Vodafone was effectively already allocated.

Q So if they had looked for a licence for Vodafone's network or Vodafone's spectrum, you would have refused it? A. I believe so.

Q Because? A. Because the rights to use equipment within that defined spectrum was already licensed to another party, Vodafone.

Q So your view was that if the equipment was OK and Vodafone said it was OK – at least, if Vodafone thought the equipment was OK, they could have delegated that? A. Yes, I considered that was a possibility.

Q You had not applied your mind at that time, I think you said, to whether gateways themselves were appropriate? A. That is correct; I had not.

Q And would it in any event have been a matter for Vodafone? A. If it had been possible under Vodafone's licence, it would have been a matter for Vodafone to consider with their lawyers.

Q If it had been possible to delegate it? A. If the delegation had been possible.

Q In your statement you say in para.10 that it became clear in July 2003 – perhaps before we go on to that, Mr. Mason, you say you thought it was possible to delegate, for Vodafone to delegate. Do you mean that it was possible that they would or possible that they could? A. I knew that it was possible for Vodafone to sub-contract some of the running of its network. I was unaware at the time whether or not gateway equipment would or would not qualify as such equipment under the licence. In any case, I felt it was a matter for Vodafone to consider and perhaps ask RA for advice if they considered that necessary.

Q So do I gather from that that if gateways did not qualify, so to speak, then no-one could provide them? A. Not as a commercial business, no, sir.

Q On a commercial basis? A. On a commercial basis.
Q And, in fact, you say in para.10, if I can take you to that now, that it became clear that GSM gateways were not covered by the licence? A. That is correct, sir.
Q If I could take you to bundle 2(c), tab 27, this document, I think, is an email, is it, advice to Oftel? A. Yes, sir.
Q And that would be in September 2003? A. 2003, yes, sir.
Q Which is subsequent to July 2003? A. Yes.
Q Specifically, in the final paragraph on p.525, the first sentence suggests, at any rate, that gateways would be covered? A. I believe that point may be ambiguous, sir; I do not think it necessarily suggests that it would be.
Q It says that if they are used commercially to provide third party services without coordination with, or agreement of the MNO, it is not covered? A. That is correct, sir; that is what it says.
Q That suggests to me, you know –you can comment on that – that if it is used commercially to provide third party services with the agreement of the MNO, then it would be covered? A. I can see the ambiguity. It may be seen to imply that. I think my intention behind this – and this, of course, was an email between myself and Mr. McDougall (almost conversational) – I did not believe that agreement or coordination had taken place, so I was trying to state the position in the form as I understood it. I do not think that gave a clear consideration of whether coordination or agreement could be given. It certainly was not my intention to do so.
Q And you said that it was clear from July – and now it is going to tab 17 in the same bundle – and I think you say in that that it is clear that gateways are not covered by the MNO licences. After it says "…The government confirms:" MNOs can use their own equipment or third party equipment in accordance with their licences to provide services. In some circumstances they may be able to consider purchasing product or services from Gateway Operators for use under their licences. What do you mean by that really? A. I think the intention there was not to close the door on the question of whether Gateways could have been accommodated under the licence. I still think that point had not received full consideration at the time but again, sir, we felt that this was a matter for Vodafone to consider and perhaps refer to us as a question, should it wish to use its licence in this way.
Q So you think they would have had to come ----
MR. ANDERSON: Mr. Davey should be aware that this is a statement issued by the DTI not by the Radio Communications Agency, so it is not what Mr. Mason is saying.
MR. DAVEY: No, I see that, yes. (To the witness) So you are still referring to the possibility that the MNOs might have authorised such things under the licenses or would the MNOs have had

to get another licence? Would Vodafone have had to get another licence to provide Gateways? A. Within RA we considered the possibility that had Vodafone or any operator wished to do this, they might have applied to us, for example, for a variation to their licence.

Q This is if they had wished to subcontract? A. If they had wished to accommodate other uses. If they wished to subcontract running of equipment that already qualified as eligible equipment under their licence they could do so.

Q So you thought that they if they wished to subcontract eligible equipment they could do so? A. And if the equipment was deemed not to be eligible it would have been up to the licensee to approach the Government, to approach RA with a request whether its licence could be so varied.

Q They could have extended the licence? A. It was a possibility.

Q Well they could have asked? A. Yes.

Q But do you know whether Gateways qualified as eligible equipment under their licence? A. At that time I did not, I now know them not to qualify under the terms of the current licence.

Q So you now know they do not? A. Yes, sir.

Q And did not, I suppose. So if Vodafone had wanted to run Gateways themselves, could they have done? A. Under their licence they could not have provided commercial third party services, multiple users over a Gateway installed and used by Vodafone. What was, of course, legal for Vodafone, Floe, any equipment supplier was to sell equipment to an end user, for that end user's own premises at the end user's own ----

Q They could not have provided multiple user third party services over their own equipment, but they could have provided equipment to the ---- A. They could have provided equipment to an end user for that end user's own use, yes, sir.

Q Continuing with the Government statement – there was a statement made that people should seek pragmatic solutions ----

MR. ANDERSON: It is towards the end of the Government statement of 18th July, just before the notes for editors.

MR. DAVEY: It is in 4.

MR. ANDERSON: 2(c) tab 17, the statement of 18th July 2003, towards the bottom.

MR. DAVEY: It is in the fifth real paragraph, if you forget about the phrase "The Government confirms …" which I do not count as a paragraph at all, in the fifth paragraph it says: "The Government encourages the MNOs and Gateway Operators to consider ways to address pragmatically uses of equipment." What exactly was being suggested, what is the sort of sub-text is that? A. From the discussions at the time we were suggesting strongly to both sides

that they talked to each other. If equipment continued not to meet the requirement for exemption there would be the question of whether it either met, or could be made to meet the terms of the operator's licence, as I said before, sir, possibly by a network operator requesting RA to consider an extension or variation to its licence. If it became apparent that the equipment could not be entertained, RA's view was that it was not really an effective use of the spectrum management issues there, we felt there was still a question of what would happen to the customers and how those would be served by other technologies. So a pragmatic solution would be to get the two sides talking to each other about how to get themselves out of the situation given that there quite evidently were Gateway services operating.

Q Then if I could refer you, Mr. Mason, to bundle 5, tab 4, para.71, there is a statement from the RA set out there. A. Yes, sir.

Q What is meant by that exactly? A. I think this restates a similar proposition as I have just explained, that we did not rule whether or not Gateways were or were not capable of authorisation under the licence, whether or not that would have required a variation we simply suggested there that the matter will be open to discussion between the MNOs and the Gateway companies.

Q What does that say about the powers of the MNOs over their bit of the spectrum? A. I am not sure about powers. The licensees have a requirement to comply with the legal and technical conditions within the licence, so compliance of equipment whether it be their own, or those of subcontractors is still the responsibility of the licensee. I think that is all that is being said that the responsibility is on the network operator to fulfil the requirements, and if it then needs to seek further advice, or we entertain the possibility they might ask for a licence variation, if this was equipment they wished to use on their network that would be a matter for them to bring to us.

Q There is no concern there on the part of the RA about whether the MNO does not have control over the whole of the spectrum? A. I am sorry, sir, control over the spectrum?

Q It has been suggested that the MNOs have limited powers over the spectrum that has been assigned to them? A. They have the use of the spectrum within the technical constraints of their licences.

Q And there is both ways that is …. A. Sorry, both? Both parts of the channel?

Q Yes. A. Well consumer equipment, user stations would have to comply with performance standard in order to be able to put into service. The licensee has allocated spectrum to them, both the sending channel, but the counterpart receiving channel would be equally important to them – congestion on one would mean that the other would be effectively useless. It would be a one-way conversation.

Q Yes, but the operator would have control over both, within the terms of his licence? A. Yes.
Q "The MNOs be authorised under the auspices of their Wireless Telegraphy Act licences", what did you mean by that? I think that was the phrase. It is in para.71, what does that mean?
A. About half way through, I see it now. Again, we considered the possibility that third party equipment might either be capable of delegation in the way that base stations in the network may be delegated or, if not, that possibly by variation or extension of the licence this might be considered if it were put to us as a request.
Q I see. Have you been here all morning, Mr. Mason? A. Yes.
Q You will have heard us asking about the IMEI number, the number which equipment has?
A. Yes.
Q Mr. Rodman, I think it was, was asked how you went about cutting it off. A. Yes.
Q Can you offer any enlightenment, he did not know? A. I am afraid I cannot, sir. Again, the details of what goes on inside the equipment would be beyond RAs competence, merely the use of the radio spectrum which is between pieces of equipment.
Q Perhaps in more general terms then, the device has an IMEI number? A. That is correct.
Q The device does not necessarily belong to the operator, the MNO; in fact, it almost certainly will not. If it is a handset it will not belong to – unlikely at least – the company. A. Yes.
Q But it is not just the SIM card in it that is deactivated; the device itself is black-listed in some magic way? A. So I am told, sir, but this would not be a matter for RA.
Q I understand that, but I am just wondering whether the next bit would. So here is an operator who does not own this device but is going to make it inoperative. By what authority does he do that? A. I do not know, sir.
THE CHAIRMAN: Mr Anderson, those are all our questions. I do not know if you have anything following that?
MR. ANDERSON: Just two very short points.

<u>Re-examined by Mr. ANDERSON</u>

Q In para.10 of your witness statement you refer to a point at which the views on the scope of the licence crystallised. You say in the last sentence,

> "When the RA did subsequently consider this issue in more detail and obtained legal advice, it became clear that GSM gateways were not covered under the mobile operators' licences."

Can you recall when that was? A. I cannot recall specifically when. It was certainly after July 2003.
Q The second question was when you were issuing the statement of August 2003 that is referred to in para.71 of the defence, and you were also taken to a letter of 8th September 2003 that you

wrote to Oftel, were you aware that at stage Floe had lodged a complaint to Oftel in relation to the issue that is the subject of these proceedings? A. I was aware that Floe had lodged a complaint, yes.

(The witness withdrew)

MR. MERCER: If the tribunal would like to know about the functionality of IMEIs, I am quite happy to put Mr. Stonehouse back in the box to answer any questions it has about the operation of IMEIs from a technical – only if that would be of assistance to the tribunal.

THE CHAIRMAN: Mr. Mercer, I do not think that would of assistance. That is actually not what the questions were directed to. I think the technical part is not what we are really interested in. We were just wondering whether it would be more convenient to stop now and start again at quarter to two, or whether we should continue now. I assume there are no more witnesses.

MR. MERCER: For myself and Mr. Kennelly, I would say if you were to start now we would need five minutes because, in fact, Mr. Kennelly, having discussed this matter think it might be useful for the tribunal if I become the ham in the Kennelly sandwich and Mr. Kennelly starts off on the jurisdiction point, then followed by me, and then he finishes up because we have worked out the coordinated way of getting the entire story in one continuous flow, if you will forgive the pun again.

THE CHAIRMAN: So you would want five minutes break anyway?

MR. MERCER: We just have physically to move around, madam.

MR. FLINT: In terms of the digestibility of the sandwich, it would be very useful to know how long this multi-use performance is going to last.

MR. MERCER: We are not planning to take any longer than we have been allotted, madam; in fact, we might even be shorter. It is just the order in which it goes to make everything flow along.

THE CHAIRMAN: Then may be we should break for five minutes and start again at quarter to one and see where we get to by one'clock or five past one and then break again. Thank you very much. I hope it will not take you five minutes.

MR. MERCER: We will be as quick as we can.

(Adjourned for a short time)

MR. KENNELLY: Madam, as Mr. Mercer indicated, we have discussed how we propose to use our time in submissions, and I shall speak to you first on the issue of jurisdiction because it is a preliminary point. Mr. Mercer will then take over and deal with the points raised in the Floe skeleton, and then when he has finished, I shall finish by dealing with the issues of compatibility, the *CIF* case in particular, and the separate *Hilti* point which I make in the skeleton on behalf of Worldwide.

To begin then with the jurisdiction point, it is Worldwide's submission that this Tribunal has jurisdiction to examine the substance of the issues raised in this case including the compatibility issues as part of the Ofcom decision, and that the Tribunal is not confined to strict judicial review grounds or the grounds identified in para.34 of the judgment of the European Court of Justice in the *Upjohn* case. It will not be necessary to turn up the Competition Acts but we are all aware that we operate under s.47(1)(a) and the Tribunal must determine the issues raised in this appeal on the merits under paragraph 3(1) of schedule 8 to the Competition Act. If I could ask the Tribunal to turn up in the authorities' bundle 4(a) behind tab 11. the *Freeserve* judgment.

THE CHAIRMAN: Is that the *Inland Revenue Commissioner* case?

MR. ANDERSON: No, it is the *Freeserve* case. It is in the master index; the most recent index refers to a vol.4(a) which contains many of the authorities on which I am proposing to rely. It should be vol.4(a).

MR. MERCER: In the bundles that were originally served, it found itself behind tab 81 if that is of any help. I had to have all mine renumbered in accordance with the bundle.

THE CHAIRMAN: *Freeserve* case?

MR. KENNELLY: Madam, yes,.

THE CHAIRMAN: Perhaps somebody over lunch could change the tab numbers for us.

MR. KENNELLY: My vol.4(a) begins with the case of *Wyld v. Silver* [1963] 1 QB 169 and there are 15 tabs in 4(a).

THE CHAIRMAN: Yes. That one happened to be our tab 70. I am sure we will get over this over lunch though.

MR. KENNELLY: Very well. If we have the *Freeserve* case before us in some form or other, I would ask the Tribunal to turn to para.106 where this issue of appeal on the merits is addressed by the Competition Appeal Tribunal. It is at p.36 in my report, but it is para.106:

> "It seems to us that the reference to an appeal 'on the merits' in paragraph 3(1) of Schedule 8 means, first, that the Tribunal's function is not limited to the judicial review of administrative action according to the principles of judicial review applied in the civil courts of the United Kingdom: contrast, in this respect, sections 120 and 179 of the Enterprise Act 2002."

I shall come to those later in my submissions.

> "Nor is the Tribunal limited to the heads of review set out in Article 230 of the EC Treaty, which are applicable to the Court of First Instance."

It is not necessary to read the rest of that paragraph. Just to be complete, in the following paragraphs the Tribunal deals with the issue of whether the same principles apply depending

on whether a finding of infringement or non-infringement is considered and no difference. Therefore, as the Tribunal says in para.107, it applies in this case that the Tribunal has full jurisdiction to find facts, make its own appraisals of economic issues, apply the law to those facts and appraisals and determine the amounts of any penalty. For the sake of completeness, of course, and this is my submission, it does depend on the circumstances of the case, the intensity of the Tribunal's review. It is not Worldwide's submission that in every case that the Tribunal should address evidence such as that of Mr. Burns where compatibility between domestic and community law is raised.

At para.111 of that judgment in *Freeserve* the Tribunal states that the way in which the Tribunal exercises this broad discretion will be affected by the particular circumstances of the case. In this case, however, Vodafone, in particular, has assumed what, in my submission, is an extreme position, that the Tribunal should apply judicial review principles and it is compelled to confine itself to the application of those principles as will be applied by the Administrative Court in a claim for judicial review. Notwithstanding the change of tone, if there is such, in the skeleton, Vodafone has not resiled from the position set out in its statement of intervention and it would be useful to recall what that is because it is such a fundamental point. The statement of intervention is in the core bundle (I hope) behind tab 24. I would ask you to turn to para.58 of that statement of intervention which is at p.24. It is necessary only to look at the sentence about three quarters of the way down the paragraph which begins (having looked at the *Napp* case,

> "Rather the Tribunal must approach the matter with the same limited review remit as would a Court hearing a judicial review."

Vodafone suggest that would be consistent with the decision of the ECJ in *Upjohn*. It does not say there that it is compelled to apply this limited review because of the decision in *Upjohn.* The significance of what Vodafone submit there is seen further at para.13 of that same statement of intervention which is at p.4 of the statement. It states,

> "As a preliminary point, if the Tribunal is to examine the arguments on incompatibility it must be bound by the same jurisdiction limits as would apply to the High Court on an application for judicial review."

Half way down the paragraph it says that in particular, the Tribunal is not required to examine the evidence, for example, on harmful interference but only to consider whether there was material upon which the Secretary of State etc. could reasonably conclude that the Exemption Regulations were necessary.

In my submission, while it is true that the Tribunal's intensity of review may depend on the circumstances of the case, it is incorrect to say that you are bound to apply strict judicial

review principles as Vodafone submit. There are, in my submission, four main points arising out of that. The first is that parliament has made a clear distinction between appeals on the merits and cases in which the Tribunal must apply the same principles as would be applied by a court in a judicial review. That is clear from sections 124 and 179 of the Enterprise Act which expressly lends the Tribunal to that form of review. This intensity of review, the question of intensity of review is of particular importance in this case because, it is submitted, the Tribunal ought to consider whether Ofcom erred in deciding that it was harmful interference as a result of the COMUGs or a risk of harmful interference and therefore it would apply Regulation 4.2 compatibly with Community law. In view of the submissions made by Ofcom and the other interveners as to what had actually been challenged, it may be useful to turn up the actual decision at this stage to see where Ofcom has relied on these points because that is what is being challenged in this appeal. That is behind tab 4 in the core bundle. This is the second Decision. Paragraph 132 of that Decision is the first paragraph on which the compatibility of the UK legal position with EC law is considered. The Tribunal can see that from 132 to 171 that the regulator, Ofcom, has considered in detail compatibility of the UK position with Community law, and in particular the issue of harmful interference, and it would be useful to consider here how Ofcom approach this when we come later to examine whether it is an issue of pure law or mixed issue of law and fact.

At para.151 Ofcom refer to the definition of harmful interference in Article 2(2)(b) of the Authorisation Directive, and go on to consider factual material. At 153 Ofcom have evidence from the RA's consultation and has been provided with further evidence in response to Ofcom's recent statement that the use of commercials multi-user GSM gateways etc. is likely to lead to rapid and unpredictable increases in call traffic. At 154 there is further reference to evidence upon which Ofcom rely. At 155, interestingly, the mobile operators have provided Ofcom with a number of examples illustrating the change in traffic profile, in particular, cell sites. This is the evidence point on which Ofcom relies. 156: Ofcom notes the very restricted use and concludes at 158 that the restriction on the use of COMUGs stemming from Regulation 4.2 is objectively justified as a means of avoiding the risk of harmful interference and inappropriate use of the radio spectrum. It is that judgment, that regulatory judgment, which the Tribunal is asked to reconsider by use of the evidence provided by Mr. Burns, and the Tribunal has jurisdiction to do that under para.3(1) of schedule 8 of the Act.

Turning to the point I was about to make about why a merits review as opposed to judicial review must be applied and the content of such review, although the parties to my left are compelled to concede that this is not, in the most part indeed, not a judicial review but a merits review (because that is what the statute says), they seek to limit the scope of the

Tribunal's review in various ways, and one is to say that where the validity of legislation is challenged, there the Tribunal must apply judicial review principles. However, looking again at Parliament's intention, in making the distinction between judicial review and merits review in the Competition Act and the Enterprise Act itself, Parliament clearly decided that where it did want the Tribunal to apply judicial review principles, it says so expressly. In allowing merits appeals against regulators, Parliament must have been aware that it would be a regular occurrence that regulators such as Ofcom would apply secondary legislation implementing Community instruments. That may be most of what Ofcom apply. It would be inevitable that challenges to Ofcom's decisions would raise issues as to the compatibility of the legal instruments applied by Ofcom and the underlying Community legislation. But Parliament remained of the view that the Tribunal should consider those issues on the merits. Parliament did not state expressly, as it could have done in the Enterprise Act, for example, that where issues such as this were to be considered, the Tribunal should apply judicial review principles. It could have been said without difficulty that where the validity of legislation, or the compatibility of primary or secondary legislation with Community law instruments to which they may purport to give effect, in those circumstances JR principles should be applied. Parliament did not say that. That, in my submission, is a more significant fact than any consideration of the Communications Act, s.192, to which some of the parties have drawn the Tribunal's attention.

Applying the issues that I have discussed to the Burns evidence, contrary to the submission of Ofcom, it is our submission that the Tribunal is well-placed to consider that evidence in deciding whether Ofcom erred in finding that COMUG caused a risk of harmful interference. The issue of whether or not the Tribunal has the evidence before the Secretary of State, in my submission, does not preclude the Tribunal's examination. As Ofcom said themselves in para.95 of their skeleton, the issue of compatibility is an objective question; it is not confined to the evidence which existed at the time, but must take into consideration all relevant circumstances.

Turning then to the *Upjohn* case, because all of the parties rely on this case, and I see, madam that you look at the clock.

THE CHAIRMAN: I just wondered if we should turn to the *Upjohn* after lunch.

MR. KENNELLY: Very well.

THE CHAIRMAN: Thank you. Five past two.

(Adjourned for a short time)

MR. KENNELLY: Madam, I was about to turn to *Upjohn*. Before going to the Judgment itself I think it is useful to note that the parties take a slightly different approach to its significance.

Ofcom in its skeleton argument at para.75 – and I will be corrected by my learned friends if I make a mistake as to what they say – suggest that *Upjohn* serves as an indication or guidance to the Tribunal as to how you should approach this question. Vodafone similarly submit that it would be consistent with Community law to approach this question in the manner that the ECJ outlined at para.34 of *Upjohn*. T-Mobile go further – or they appear to go further at para.21.1 of their skeleton – to the effect that the Judgment in *Upjohn* precludes any more intense review by this Tribunal and, that if this Tribunal applied a level of review in any degree even more intensive than that outlined at para.34 of the Judgment in *Upjohn* this Tribunal would be acting contrary to EC law.

In my submission, *Upjohn* means no such thing. *Upjohn*, as we shall see, provides for the minimum level of review required by Community law in cases where regulatory decisions such as in the present case are examined. It does not set out mandatory requirements as the intensity of review to be applied by all courts in the Community examining such regulatory decisions. It does not prohibit a more intensive review. True it is that a discretion is left to the Member States as to how these matters should be resolved and there is a discretion left to Member States by the RTTE Directive and the Authorisation Directive, but once the discretion is conferred it is for the Member States to determine how review powers are divided between the regulatory authority and the courts – provided that the Member State in so determining does not breach Community Law or render ineffective or unequal in some way the procedures to be applied.

If you could turn up *Upjohn*, it is at vol.4(b)(i) of the authorities' bundle behind tab 23. This case concerned revocation of a medical product by the licensing authority, and the remedy that was available as a matter of English law was statutory application to the High Court, which was not exactly the same as a Judicial Review, the application under s.107 of the Medicines Act, but it was far less than the kind of merits review that this Tribunal has the power to undertake. Paragraph 14 of the Judgment sets out the domestic rule:

> "Under section 107 of the Medicines Act, any person concerned by, in particular, a decision revoking a marketing authorisation may, within three months of the date on which notice of the decision is served on him, make an application to the High Court contesting the validity of that decision on the grounds:
>
> (a) that it is not within the powers of that Act, or
>
> (b) that any of the requirements of that Act …" etc. "… have not been complied with."

The High Court declined to make a reference to the ECJ. The Court of Appeal did, and the question on the reference is at para. 24 of the Judgment. The Tribunal will see "1", the first

question referred under Article 234 EC to the ECJ was: "On the true construction …" of the particular Directive:

> "… is it the duty of a national court when ruling upon the compatibility with the aforesaid Community law of a decision of a licensing authority of a Member State to revoke a licence held by the manufacturer of a medicine product to decide whether or not the said decision was the correct decision as opposed to a decision which the licensing authority could reasonably have reached on the material before it?
>
> 2. If the answer to Question 1 is that the national court has to decide whether the decision of the competent authority was the correct decision does Community law require it to answer that question solely on the basis of the material before the competent authority or is it obliged to look at any relevant material coming to light after the decision?"

Upjohn was clearly submitting that an intensive review was appropriate and the UK submitting the opposite. The ECJ approached the question in the manner set out from para.27. By its first question, the ECJ says:

> "… the national court asks, in essence, whether Directive 65/65 and, more generally, Community law require …"

that is an important word in my submission:

> "… the Member States to establish a procedure for judicial review of national decisions revoking marketing authorisations …" etc "… whereby the national courts and tribunals having jurisdiction are empowered to substitute their assessment of the facts and, in particular, the scientific evidence relied on in support of the revocation decision, for the assessment made by the national authorities competent to revoke such authorisations."

Paragraph 29:

> "It is apparent, therefore, that Article 12 [of the Directive in issue here in this case] does not lay down detailed rules for the exercise of the right of recourse; it leaves the Member States the task of organising their own systems of judicial review of decisions refusing, suspending or revoking marketing authorisations …"

So there is a discretion left to the Member States as to the judicial review procedure. At para.32 the ECJ says:

> "It is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal systems of each Member State to designate the court and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law,

> provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law …"

and that is the well known principle of effectiveness. The Community court here is examining the minimum protection which Community law requires in such cases, and it notes [ECJ para.33] that as regards such decisions as we have here it does not appear that the only appropriate means of preventing the exercise of rights conferred by Community law from being rendered virtually impossible or excessively difficult would be a procedure for judicial review of national decisions revoking marketing authorisations which empower the competent national courts and tribunals to substitute their assessment of the facts for the assessment made by the national authorities.

The ECJ decides that the minimum requirement does not extend as far as *Upjohn* submit, and to make that good the ECJ refers to its own practice when examining decisions of the Commission, and I will not repeat para.34 because it is in the skeleton arguments and the Tribunal will certainly have read it by now. But of course the court here in referring to its powers of review of the Commission decisions is relying on Article 230 EC and is based on a judicial architecture and express powers which are different to those that the Tribunal has and that distinction was made express by the Tribunal in the *Freeserve* case.

The fundamental point is that here in *Upjohn* the Community court is setting out minimum requirements. The Member States are free to have more intense review of national regulatory decisions if that is in the proper exercise of the Member States' discretion. A critical paragraph I shall come to in a moment, para.36, the court does note, however:

> "Nevertheless, any national procedure for judicial review of decisions of national authorities revoking marketing authorisations must enable the court or tribunal seized of an application for annulment of such a decision effectively to apply the relevant principles and rules of Community law when reviewing its legality."

The ECJ is saying here minimum requirements do not extend as far as *Upjohn* say but as a matter of broad principle the principles of equivalence and effectiveness must be respected. That is an uncontroversial statement of Community law.

There is no basis in my submission for transporting this statement of minimum requirements as mandatory requirements binding this Tribunal either as a matter of Community law or in some way under s.60 of the Competition Act which, as the Tribunal is aware, require it to do what it probably is required to do anyway as a matter of EC law.

Once the discretion is conferred to the Member State the Member State is entitled to determine its own powers of review between the regulatory authorities and the courts. When the ECJ speaks of the Member State it does not speak only of the regulatory authority. The Member State includes the regulatory authority with the courts and tribunals according to the procedural rules as determined by that Member State. That is my primary submission on the *Upjohn* case.

Quite separately Worldwide submit that in this particular case effective protection could not be provided by the Administrative Court because the complex assessments required in examining the compatibility of Regulation 4.2 as applied to COMUG, because that is as far as we say, and the RTTE Directive and the Authorisation Directive. The kind of evidence the Tribunal has heard today, and has heard from Mr. Burns in my submission could not properly be considered by the Admin. Court and effective review requires a merits' consideration by this Tribunal – that is effective review as within the meaning of Community law as described in the *Upjohn* case, but that is a separate point. My first point is that the *Upjohn* case sets out minimum requirements and this Tribunal if it feels appropriate is entitled to apply the full merits review which includes a detailed examination of the substance of the complaint in relation to compatibility.

On the effectiveness point I make the submission by the by that the Tribunal can see the unfairness of not engaging in such a review and leaving it to the Admin. Court where Ofcom make a decision based on harmful interference which may then, subject to the Tribunal's view, be contradicted by Mr. Burns who was, of course, the agreed joint expert on the issue – his name was one of three suggested by Ofcom, the parties to my left, Vodafone and T-Mobile concurred. The expert chosen by Floe was not. There can be no question as to Mr. Burns's independence and impartiality and he gave a very clear answer in his report as to harmful interference. In my submission, the unfairness in disregarding that evidence is manifest and that is the natural conclusion of submissions made in relation to the jurisdiction of this Tribunal. Ofcom (and the intervener supporting it) require Mr. Burns's evidence to be disregarded.

Moving on to the second last point which relates to the suggestion made by Ofcom that some assistance may be gleaned from the case law relating to references to the ECJ under Article 234. It is a novel submission made in a skeleton argument that some guidance can be gleaned from the approach of the ECJ to considering references to preliminary rulings. That is at para. 65 of Ofcom's skeleton argument. The point is made there that the Tribunal should decline to examine questions or appeals if it is purely hypothetical or has no relevance to the issue it has to determine. Of course, that must be correct that the Tribunal should not consider

issues that are entirely irrelevant or purely hypothetical, we cannot contradict that and we would not want to. But the characterisation of how the ECJ approaches the question of necessity, in my submission, is not quite how it is presented by Ofcom in para.65 of its skeleton, and this is of relevance elsewhere because T-Mobile and Ofcom both say that if it is determinative of the issues which the Tribunal must consider, this issue of compatibility then the Tribunal should consider it. Both T-Mobile and Ofcom say that (para.18.1(e) of T-Mobile) I will get the Ofcom reference later. That word "determinative" appears to link in to how the ECJ approaches references in para.65 of Ofcom skeleton – the point being there that if it is not determinative you should not consider it at all.

Turning then to the Article of the Treaty dealing with references (Article 234 EC) it is useful to recall that there, as is well know, the question is whether the Tribunal considers that a decision on the question of Community Law is necessary to enable it to give Judgment. The ECJ takes a flexible approach to the issue of necessity and the word "necessary" in that Article of the Treaty. It does not say in the voluminous case law under that provision that only if a question is determinative or strictly necessary or a core issue, should the ECJ consider the reference. In fact, in the *Cilfit* case which is in bundle 4(b)(iii) tab 70 – if I can ask the Tribunal to turn that up? I shall not go to the facts of this case, but the relevant paragraph is tab 70 and para.10 of that case, because this goes to the ECJ's consideration of necessity and relevance. Paragraph 10 of the judgment, if I could turn the Tribunal's attention to the second sentence beginning:

> "Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community Law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it might be, can in no way affect the outcome of the case".

I appreciate that this is talking about relevance and not necessity, but the approach taken by Ofcom and by the Interveners is certainly that if it is not strictly determinative then it is irrelevant. I appreciate that the whole issue of the ECJ's treatment of references may be irrelevant because the ECJ shows deference to the national court as part of its dialogue under Article 234. So it is not our primary submission that these cases are irrelevant, but if the Tribunal adopts Ofcom's suggestion that it is useful to consider the approach of the ECJ on Article 234 references then it is my submission that the test is more flexible than they suggest, and that *Cilfit* is part of that fact.

Finally, I must address a point made specifically by T-Mobile in relation to jurisdiction and that is para.18.2 of the skeleton. Here T-Mobile submit that the second reason

why the Tribunal should not in the present case enter into consideration of the issue of compatibility arises purely as a matter of Community law.

> "The issues of compatibility raised in this appeal have never been ruled on and are not *acte clair*. The Tribunal cannot therefore, rule upon them, but must refer to the ECJ …"

Now, in picking that, because in my submission it gives rise to a series of errors, first it is incorrect to say the Tribunal "must refer to the ECJ" simply because the issues have not been ruled upon and are not *acte clair*. The Tribunal is not a court of final appeal. It has a broad discretion as to whether or not to refer a question applying the well know dicta of Sir Thomas Bingham when he was Master of the Rolls in *ex parte Else*, it is not necessary in my submission to turn to that authority. The Tribunal is not bound to refer, simply because there is no ruling from ECJ even if these are matters of pure Community law.

Secondly, the doctrine of *acte clair* strictly speaking has no application in any court other than one of final appeal – it may be a handy label, but it is not correct to speak of it in this context. The final point made is that because the matters are not determinative the Tribunal could not refer. In my submission were the Tribunal minded to refer, and I make no application for a Reference, but it is not necessary for this to be the central core issue determinative of the entire appeal to justify a reference properly made under Article 234 EC.

Those are my submissions on the jurisdiction of the Tribunal. I shall hand over to Mr. Mercer.

MR. MERCER: There are two basic routes that we have, one of which I am going to leave to Mr. Kennelly – I call that the 3H's route – harmful interference, *Hilti* and *Hoffman La Roche* – I call it that because I do not have Mr. Kennelly's finesse with the fine points of the argument, but that is basically what that is about.

That leaves me with what I describe as the "authorised by the contract and the licence" route. There are two main variations in respect of each route. For the record can I just say that we adopt Mr. Kennelly's skeleton from Worldwide.

So, the meaning of the agreement. I cannot see the word "Agreement" with a capital "A" these days but I believe it was something that was entered into on 12th August 2002. If we were able to go to De Lorean and go back into the future, back to the spring of 2002, when that agreement was being first negotiated, what would we find? We find Mr. Taylor and Mr. Young negotiating, and there would be the business plan presented to Mr. Young, and at that first juncture, which is spring 2002, nobody has yet coined the phrase "Gateways" as such. People have known about Premicell devices for a very long time before that – nothing came out of the first main hearing. We have heard from Mr. Greenstreet that he had all the building

blocks of information at least, i.e. that they could be connected to routers, and they could be some distance from the actual customer premise, and to know that the building blocks are what we now know as a COMUG could exist; that we heard quite clearly yesterday.

We have Mr. Taylor who, as he says, was first contacted by Vodafone when he was working for Telecom FM, about more sophisticated Premicells. We have him seeing a business opportunity and he presents a business plan that says "We are into least cost routing". What he is also looking at is different types of usage for Gateways, different types of Gateways; and he rules nothing out. Vodafone only have basically one type of standard form contract, and though Mr. Taylor, so far as we can ascertain, does not rule out that they will take some handsets, really he and Mr. Young know that the principal use is for Gateways, because that is what the business plan refers to. The business plan does not refer, as came out in evidence, to handsets, or it does only in passing. The business it really looks at, what Vodafone wanted to know about in the business plan, was what we now know as gateway use, and at the same time we look at what corporate Vodafone knew. By a serious of chance encounters at marriages – the *Four Weddings and a Funeral* approach to evidence gathering about market conditions – Mr. Rodman has an idea that there is something out there which he does not like. And the RA, to Mr. Borthwick, begins to suggest what that might be and they deem that more than a full month before the agreement is entered into. The subject matter of the agreement, the gateways, becomes so alarming to Mr. Rodman that he feels a necessity to consult the legal department who, in turn, consult counsel. So Vodafone Corporate may not have had the results of counsel's opinion by 12th August but certainly they knew what the problem was. And when did they tell Mr. Overton? They told him about five or six months later.

Mr. Overton was the gentleman who signed the contract on behalf of Vodafone. He could not remember reading the business plan but he did understand from what Mr.Young told him (he gathered) that it involved what we now know as gateways. But he, like colleagues at Vodafone, has a mantra that he did not know what COMUGs were then. It is a bit of a theme throughout the Vodafone evidence that we did not know what COMUGs were then. Now let us put some of that back into the structure of what the agreement means. It is a standard form agreement really based on something that the contract really was not for, but it was a standard form and that is what they had to use. Essentially, it relates to Vodafone supplying SIM cards to Floe and Floe putting them in devices. The devices that they are put into, or may be put into, are anything that the RTTE permits; that which, by European law, really Vodafone should not have prevented from access to its network. They have got the CE symbol not otherwise knocked out, and that is what they are attached to. More than that, Vodafone as they

do come into a realisation of gateways clearly make a fundamental error because I want to try to find the simplest explanation of what is, if you were to accept that 4.2 is not incompatible EU law, if you were to accept it was valid, what would it stop? That is established, as far as I can understand, madam. It is established in practical terms that if anybody other than the MNO is bidding, then there is a problem because they may be taken to be providing a service.

I am going to come on in a little while to look at that further, but let us just take that for a moment. If you take that as being the orthodoxy, then Vodafone would have got it wrong, because what they were looking at was single premise. If you look at what, for example, they would or would not have permitted from what we can gather at that time that they realised was or was not lawful, they would have permitted some things that were unlawful and possibly stopped some that were not. That is something which is interesting perhaps in considering *Hilti*. To get back to what they did stop, they did not stop anything by that agreement. They agreed to supply SIMs for use in lawful boxes. Even if they got it wrong, they could have made it right. What I mean by that is let us suppose that they had put some kind of restriction into the agreement and said you can only use the "lawful" gateways. In fact that would include some unlawful gateways. So the only way they could have made the whole system work, the only way they could have made everything whole would have been taken to have authorised it under their licence. Was the contract in writing? Yes. It was a written authorisation.

So, even if you were to take a view that despite its resources, despite its industry knowledge, despite it having a dedicated regulatory department and close liaison with the RA at the time, even if you were to form the opinion that it knew nothing about commercial use gateways, there is a way through to show that Floe was authorised to do what it was doing. If it corporately feels it did not know what was going on, then that is to do with its systems. It is very strange (to me) that a contract of the nature of that with Floe attracts so little internal intention. It is seen by one executive despite, frankly, what Floe were told, it would appear that there was a guarantee provided that its directors were expected to enter into which was provided by the legal department without thought as to why nobody sought assistance for the regulatory department, and none was volunteered, and they entered into the contract.

As you heard from Mr. Stonehouse, business plans, business plans, and they are just that – a plan. And the business went in a slightly different direction. It went in one of the directions envisaged but not all of them. So it does not look quite the same as the business plan, but then few businesses when they are developed look quite like their business plan. Even my practice doesn't.

In paras.9-10 of his skeleton, Mr. Flint for Vodafone, sets out a pattern of events in bullet point form, events at Vodafone. Let me suggest an alternative. Vodafone begins by being interested with the possibilities of multi-use, multi-SIM gateways. They are looking to make sure they stay in this corporate part of the market. It is why executives like Mr. Young are doing the job they are doing. They are looking to try and keep part of that, so they have an interest in them, and also in terms of sales, the average revenue per user is pretty high. We actually established that at the first hearing, madam. And it therefore interests people in terms of sales because the ARPUs are higher, and ARPU means more sales, more commission, whatever. But then somebody cottons on to the fact that these are likely to lead to a loss of revenue and let us not be shy about this (Mr. Rodman was not); it is about revenue – loss of. If you look – you do not need to look now, madam – but if you were to look at the footnote, I think it is 149 of the Ofcom Second Decision you see there a quote from a letter that says we kind of look to people to switch off on the basis of the amount of loss of revenue. Vodafone are very concerned so they take advice: what can we do about this? We do not know all the arguments; we just know that they took advice, and they were told to be careful. It is not difficult to know what would lie behind such advice. It would be, in part, certainly to a degree *Hilti* and *Hoffman La Roche*. Because very probably – I think it is borne out by looking at the redacted advice obtained – counsel was thinking that they would have to adopt a contractual route to stopping these things. And, indeed, that is how, I think, most people, would expect things to go. It is the way, to a degree the industry has gone with fair use policies and rates being inserted in the contracts: so many minutes per month. But it does not go that way. As the autumn goes on the losses mount. Then the RA sticks its oar in and in November 2002 it turns round and it puts up proposal two. Proposal two is that regulation 4.2, which if taken away would at least make it easier to provide commercial gateway services, disappears.

So by the Christmas of 2002 Vodafone's management is looking at a situation where, if it goes on a contractual route to try to stop these things, there is a distinct possibility that somebody is going to cry "competition foul" and say it is a competition issue, and therefore it would be an issue in respect of fair usage to be resolved by Ofcom or this Tribunal or the courts. But there is another route open: a route which stops the nascent gateway industry in its tracks, provides fewer chances for straight forward appeal, and has a greater degree of "definacy" and that is simply to say it is unlawful. The moment we move into the territory of Regulation 4.2 this thing starts to get mired down. The reason why, like an onion skin, 4.2 has issue after issue after issue, is because fundamentally it is being used to do something it was not supposed to do.

I just want to deal with one point which arose yesterday with questions which arose from the Tribunal in relation to Floe's position on what it was lobbying for, etc. It has always been Floe's position – in fact, the very first thing that Floe's shareholders, Mr. Happy, ever said to me was, "We had a contract. How could they do this to us?" But they also recognise their position would be made a lot easier if Regulation 4.2 disappeared. What I just want to comment on is the fact that they did not believe that 4.2 had to go to make what they did legal. By that time it would have been clear, of course, that the RA were not going to use their powers to stop anybody. I will not rehearse what those powers are madam, but you merely have to look in the Wireless Telegraphy Act as now amended to see the powers of search and seizure on equipment, the significant powers the RA have and used in respect of pirate radio stations and the like. Why didn't they use them? Well, because they had not received any complaints according to Mr. Mason. No complaints, no action, and they made that quite clear from before then actually – then, in that instance, being around the end of 2002. Then at around that period with all those facts being established and the possibility that 4.2 might be abolished, at least two MNOs (because we had the material introduced in relation to T-Mobile) start to switch people off: T-Mobile in January and Vodafone a little later. Funnily enough, I think the RA might have been in some difficulties if Vodafone had asked them to take action because I do not think that the RA's powers were put there in relation to preserving people's costs margins or profit margins; and there would have had to have been significant and definite evidence of such severe congestion that it required action. So there is my alternative picture in relation to the contract and what went on; alternative, that is, to Vodafone and Ofcom's.

I now want to turn to an issue about the relationship between Floe, Vodafone and the end user which we say has been mischaracterised. I fully recognise that the next couple of minutes are likely to put Mr. Anderson and Mr. Flint into paroxysms of issue estoppel, but it kind of goes like this. Floe believes it has the right to appeal the decision Ofcom came to and in particular that is set out in ss.90-94 of the Second Decision. Our point here, in general terms, is we do not quite understand how we, Floe, get caught by Regulation 4.2 when others who do the same thing do not seem to get caught in the same way. What we say – and what we do not understand – stems from para.144 of the first judgment. I know I am talking to the authors. Perhaps you do not mind me quoting you back to put it in people's minds for a moment. You probably know it off by heart, madam.

THE CHAIRMAN: Tab 3?

MR. MERCER: I think it is, yes.

THE CHAIRMAN: Volume 5, tab 3. 144, p.67.

MR. MERCER: Yes.

> "We also accept the submission of Vodafone and OFCOM that mobile handset users do not fall within the scope of Regulation 4(2) because the requirement that the commercial service be provided 'to another person ' properly construed means that the service is provided to a person other than the subscriber."

Subscriber in the context, we contend must mean the person has a relationship with the MNO and the MVNOs. Customers do not have that. Now, what I mean by that is this. A mobile virtual network operator has a lot of similarities in terms of the structure they do with an MNO as Floe. You can look at it an characterise it in a number of ways, but basically the two that I find the most helpful is they either buy SIMs and with it a host of other services, like billing from the MNO, or they merely get data sent to them from the MNO about usage etc. and they just in essence buy air time. They buy air time by buying the SIMs and they resell it. Anyway, we sell it to the likes of you and me. Now, I and Floe find it very difficult to differentiate situation from the Floe situation because Floe can categorise it in two ways: it is either buying air time or it is reselling or it is buying SIMs which it puts into its devices. In either case, the person to whom the service is provided, the end user, does not have a direct contract relationship with the MNO. That is a similarity in both cases. When you look at the contractual matrix model for both, you see it is the same: end user, Floe, Vodafone. I do not know whether Vodafone has any MNOs but if you look at those who do, you have got end user, MVNO, MNO. The handset in either case is not used or provided by the MNO. In contractual terms, the end user is not in a contract with the MNO, and the MVNO is not running a network, a network that provides the service, and it has provided the handset from its stock. So, on my analysis, exactly the same: I cannot see any daylight between the two. This has appeared before my skeleton, and I have seen what responses there have been, and I still do not see any daylight between the two examples.

The first judgment found Floe to be a distributor or reseller and that is what the MVNO is doing. All really Floe would like is the same logic that is applied to MVNOs applied to it. The way to prevent there being a problem with the MVNOs and with Floe is to say that MVNO or Floe is really reselling the service of the MNO so that the service is actually being provided by the MNO to the end user. I always have some trouble with reselling things. The concept of reselling telecom services is, unfortunately, all too common. If I am reselling it, am I providing it anew or am I merely getting somebody else to provide it? My suggestion is that the only way you can analyse that situation and for the MVNOs not to fall foul is to say that the service is being provided by the MNO to the end user. If you apply the same logic to gateways, then they would not have a problem. Of course, there may be another reason, of course, which is that the MNOs are authorising the MVNOs pursuant to their licence to

provide the services. Of course, that opens another can of worms, or it would do in this case. It is Ofcom's case, certainly, that they cannot do that because whether it be handset or premicell device or sophisticated gateway, they could not possibly be based around transceiver stations. One presumes that Ofcom does not accept that rationale in respect of MVNOs. As I say, the answers that we seem to have seen so far on this subject have been very much along the lines of I am categorised as grumbling into beards, but it is just not so; it is just not the same without an analysis to say why not.

Now I would like to move on to Vodafone's Wireless Telegraphy Act licence. It is quite often not a career-enhancing move for a lawyer to disregard a clear steer from the bench, but, madam, you will have seen the skeleton. I regret to be still continuing with a disagreement over what "base transceiver station" may mean. That is not to say that I think base transceiver station as it is defined in the licence, Vodafone's GSM licence, excludes anything that is defined as such in the ETSI standards, but I still do not see how that licence restricts that meaning to only a base transceiver station as referred to in the ETSI standards.

Surprisingly, it would appear that the RA never actually gave any consideration to this – certainly not before they gave advice to Oftel prior to the first Decision. But, it is almost inconceivable that the RA would have said what it said to all of the parties if it had seen or been aware at the relevant time of a tag trap in the definition of base receiver station. You have to remember that these are the people in the RA who drafted that licence, who drafted it, nurtured it and made it what it was – but they did not see a problem, and they were still telling Oftel in September 2003 about the problems as they saw it of using Condition 8 (which is the relevant condition relating to authorisation)

So though, ma'am I can see immediate force of a suggestion that I should give up hitting my head against a large concrete block in respect of this definition, a small part of me keeps on saying 'but the RA designed this thing, drafted this thing, made this thing work and they obviously did not put their hand up and say there was a problem'. The problem with the definition of base transceiver station arose a few short weeks before the first main hearing. [*Interruption – mobile phone*]

THE CHAIRMAN: Continue, Mr. Mercer, I am sorry, you have lost your train of thought now.

MR. MERCER: Not necessarily – the sudden burst of electromagnetic energy may have been just enough to set things going!

So I am not going to give up hitting my head against a concrete wall, after a time it becomes reasonably enjoyable, and I think there is actually a point in it. But, as you will have seen from the skeleton, to the incomprehension of Mr. Anderson and Mr. Flint I went on to address another way of looking at the licence.

Before I talk about that I just want to talk for a moment, because it does fit in – I do not want to give a lecture on spectrum trading – I just want to mention one element of spectrum trading, whilst acknowledging that everybody else thinks that this is totally irrelevant of course – or maybe not. Where Ofcom has spoken about spectrum trading it speaks about three types of trading – two types of which are not relevant for our discussion today. That is where you give out all of it or you give long term a large chunk of it. Then they talk about a third type, and that is hiring – and hiring out short term. I am not the architect of spectrum trading, Ofcom is, but as I understand the situation although the regulations made to incorporate the necessary rules have been made, and those facilitate types 1 and 2, type 3 does not require any form of extra spectrum trading regulation. The licensee of a licence can give out at the least a short term hire, or a small scale hire of the right to use some of the frequencies without bothering the regulations in respect of spectrum trading.

Working back from that a moment, it would therefore follow that it is possible to authorise somebody else to use your right to use frequencies pursuant to a licence. If we then say notwithstanding the black letter words of a licence under s.1 of the Wireless Telegraphy Act is it possible that what this document takes effect as can be no more and no less than a licence pursuant to Article 5 – 5(2). Notwithstanding what it says in it that licence would have to comply with the Authorisation Directive and also therefore, for example, only contain the condition set out in section B of the annex to that Directive, which includes, for example, conditions relating to transfer of rights at the initiative of the rights' holder pursuant to the Framework Directive. When you have such a licence (and that is what we must take Vodafone's GSM licence to be) Ofcom certainly thinks you can hire bits out or give authority to other people to use bits of it which if you as the licensee maintain regulatory control and it is not a long term let, or division of power, it may be done simply, one presumes, by contract – a contract like the agreement of 12th August..

Mr. Flint calls that argument "hopelessly illogical" – I suspect I did not get an alpha minus for my homework! He implies that the argument is unintelligible. If that remains the case and the Tribunal has any questions please do ask. The situation from which that situation might arise is because of the fundamental difficulty that we all have with the wireless telegraphy regime. Article 5 talks about the rights to use frequencies, but the Wireless Telegraphy Act 1949, even as heavily amended, talks about the right to use "equipment" and "stations"; it goes back to another era, certainly not to one envisaged by the draftsman of the Framework Directives.

It was the case in respect of both telecommunications law and wireless telegraphy law until 2003 that we did not licence in any case any services. We now have a regime whereby,

pursuant to the general authorisation, both electronic communications networks and services are licensed. You will have seen, ma'am, that the regimes in respect of the right to use the frequencies and the general authorisations in respect of telecommunications networks and services have been to elect – so that, for example in Article 5(2), where it is necessary to grant individual rights for the use of radio frequencies Member States shall grant such rights on request to any undertaking providing or using networks or services under the General Authorisation. So it clear from that document that the Directive envisages that the authority for running the network or services is the General Authorisation; and the right to use those frequencies is in a separate document.

In essence, the equipment forming part of any network is double licensed. That is why, when you are looking at the Wireless Telegraphy Act licence you maybe merely have to look at what it stands for and what it could be, rather than necessarily looking at its black letter words. Let us just look at the point I have just made in relation to para.29 of Ofcom's skeleton. The last sentence in para.29 completely misses the point unless Ofcom and Vodafone are going to argue that Vodafone's GSM licence is in fact part of the General Authorisation, which it is not. I do not think anybody is going to argue that. But the restrictions on equipment etc. that Vodafone can use actually seem to be contained somewhere else. The right of use document, authorisation, licence, under Article 5 can specify the technology, the type of network, exclusive use of transmission for specific content, etc, as is set out in para. Annex B1 of the Authorisation Directive.

However, it would appear to be contrary to the Directive for it to specify more than the technology, designation of service or type of network. If you want to place restrictions on bits of kit you put that in the General Authorisation which also must cover the Vodafone network – both authorisations. So condition 8 just should not be there. So which ever way you look at it, ma'am, there are a number of routes through this maze for Floe. But one way or another it would seem possible for Vodafone to agree that the service end or user frequencies and/or equipment could be used by Floe for what it did, and such an agreement exists.

Can I turn now to legitimate expectation? I want to start by categorising that as legitimate expectation arising from a prolonged course of dealing. It starts, you will be unsurprised to know, with the Davies/Tarrant interview and continues forward indeed to the first Decision letter. Entrepreneurs like Stonehouse and Taylor, and Floe generally, have to rely on the goodwill and sometimes the assistance of Regulators and Government. Sometimes, if you are trying to take an idea and make it run forward it does not matter who you are and how big your legal department is, you need to know what the DTI and/or Ofcom think. Indeed, myself and other clients – very, very large multi-national clients – have plodded the same

corridor to Mr. Davies's room to ask questions about a new service before he was unfortunately dispatched to Iraq to build a new telecoms infrastructure there; and you depend on that. Experienced Civil Servants know that you depend on that, and they will usually either immediately see a problem, or they will think about it and get in touch with you once they have discussed it with their colleagues.

My understanding is that on behalf of Floe I gave its consent to papers being seen in this matter by DTI, and nothing has come back – we have not seen letters we have not seen before coming back. It is our understanding that there was no response to that meeting. Then in and around the beginning of the troubles over switching off we have the statements from Mr. Mason. With his cross-examination so fresh in all of our minds I am not going to go over that again. I simply ask the Tribunal to see what sense they get from the paragraphs of his emails and letters, and set that also in the context of what Mr. Mason himself said he was, which is a facilitator – somebody who wanted to try and get the problem solved, get everybody back to work, move on. He knew what the route was, and he tried to persuade people to adopt it. In the end he persuaded the Minister that it was real enough. He persuaded Oftel that it was real enough for it to appear in the first Decision letter.

Floe agrees with Vodafone – this is a rare occurrence, I make the most of it – that the essence underpinning legitimate expectation is the concept of fairness until Ofcom changed its mind. Floe knowing what it did had a right to assume that on the full facts being put before any Tribunal it would decide with authority in respect of Gateways to be given pursuant to its licence by GSM operator to someone who had the correct contractual agreement, and Floe – as I have said – believed it had such an agreement.

Ofcom changed its mind on this issue I contend because it was slightly more worried about the primary argument made at the first hearing by Floe than in reality it needed to have been given the outcome. But it was quite clear that without that element the primary argument actually might have been successful, and then it started to gain difficulty without being able to actually move forward and say that authority could be given under the licence. It was therefore very fortuitous that the argument became available to Ofcom. What that constituted was a complete and total reversal in policy – not the law, but policy. It was not a change in the interpretation of the law, nobody had challenged them on it, they decided they were just not going to let that happen any more. More than that, of course, they could have said – quite easily – "Actually, we got that wrong, but we are going to correct it by using s.1E of the Wireless Telegraphy Act, and we must amend Vodafone's licence." They have a duty to consult with Vodafone, but Vodafone had already told me that they were consulting about the situation that Vodafone had already thought existed.

As much as Floe is the person to whom these representations were made, so is Vodafone, so it really cannot categorise itself as a third party in all this. Clearly it was relying upon this type of representation, or something similar to it when it entered into negotiations with Floe.

The last element in respect of legitimate expectation is whether Ofcom acted unconscionably, and we contend that it did because the sole purpose was to win the first Appeal and to have affected Floe's chances of redress.

MR. ANDERSON: No doubt Mr. Mercer will be pointing the Tribunal to the evidence on which he makes that submission?

MR. MERCER: Well doubtless Mr. Anderson will be denying it was anything to do with this Appeal at all.

So we have a commitment, what was said reasonably caused Floe to believe that things could be made to happen in a certain way and frankly, it rather beggars belief that Ofcom did not this damascene conversion as part of a strategy in respect of the first hearing.

I want to deal next with legal certainty. I think I have said this before that complainants have rights as well as the complained of, and Floe contends that it has the right for the law to be addressed, it ought to be compatible with European law, and this is met by an equal and opposite force of legal certainty being a right that Vodafone says it is entitled to. It is difficult to reconcile those rights. The only answer that I can give is that you have to look for what other rights, duties or obligations attach to the parties and, in this case, that will be explained to you by Mr. Kennelly in respect of *Hilti*. I just want to add one point which I am sure will be alluded to perhaps by Mr. Kennelly, but I just want to make absolutely sure that it is at the forefront of the Tribunal's mind: when Vodafone assessed the legal position of Gateways effectively they got it wrong. They thought it was to do with single premise. If the customer equipment was on the same premises as the customer, that is fine. If it was remote there was a problem and they did not relate their decision to what has transpired in the circumstances to be the proper test, which is essentially is probably the best test at the moment and alluded to earlier as "who bills whom?" That shows the danger of the situation. It also actually shows that they must have thought they could authorise that in some way. It shows the absolute danger of the person with the finger on the button of SIM cards or IMEIs to start taking that kind of decision because they are going to be wrong.

I will now move on, if I may, to crime – aiding and abetting and proceeds thereof. I am not going to deal at length with the question of the Proceeds of Crime Act because I think unless, ma'am, you say otherwise and want to know more about it, we have dealt with that in written form and the answer is pretty straight forward. As regards aiding and abetting I have

grave difficulty in moving beyond the position in *R v Borthwick*. You have no duty – in the words of the vernacular – to shop your neighbour, or indeed prevent him committing the offence. Indeed, it is difficult to comprehend that Vodafone had the *mens rea*, the mental element, in relation to aiding and abetting particularly if they had reported the matter to Ofcom, let it do its duty. And, in any event, it is impossible for Vodafone to have been 100 per cent sure that the traffic was unlawful. It did not know; because the electrical impulses do not carry a little flag that says, "I am illegal; I come from a multi-use gateway. Stop me." It is impossible to tell the difference. They are the same noughts and ones as any other person creates. As far as I understand it, nobody has gainsaid the point that you can have a lawful gateway that can create just as many minutes permanent as a multi-use gateway. I think this is a point that Mr. Stonehouse hammered home when talking during the investigation to Ofcom. So you just cannot tell what they are. You can guess, you can ask questions, but you don't know.

We have heard enough to be able to guess what Mr. Flint is going to say about any allegations of discrimination which is that there is no real evidence; that it is done by service providers; it is nothing to do with us and when we see it we stop it. It is going on, and Recall is an example of that. During the period since March 2003 people have been running gateways, and it surprises me greatly that, for example, Vodafone – it came out during a CMC – never look at the Arbornet website, in which case gateway minutes are advertised on a commercial multi-use level. And that is not surprising because you have a dichotomy in an organisation which, on the one hand, is trying to maximise its sale of minutes and, on the other, trying to stop those where it feels its revenue is not being maximised. Whether deliberately or recklessly, people like Recall have been able after Floe was stopped, to get into business, not just to keep going.

If I start to draw a few things together now with the aim of finishing at about 4.30: the essence of the case against Floe is it was acting unlawfully. If you kick that prop away the whole edifice built up against Floe disappears. I will leave the niceties to Mr. Kennelly but, in essence, the way that Floe comprehends the matter – as I said, if you kick the prop away, what is against it collapses, and it collapses because there was no foundation because that foundation was harmful interference. Floe would contend that you would need to be the barking side of perverse to believe that congestion is harmful interference. Mr. Burns, Mr. Kennelly said, certainly was not my choice as I stood here and argued, but he wrote a report that, let us face it, I would be hard pressed to actually better if I had written it myself. The rules simply should not have been applied. It is funny. If Ofcom picked up, as they say they did, the meaning of base transceiver station and ETSI relationship the first time, it is funny they never picked this

one up. And before anybody runs out and goes, "Ah, inappropriate and ineffective use of the spectrum", well, that has kind of been dropped as we understood it, by Ofcom -----

MR. ANDERSON: It certainly has not.

MR. MERCER: Resurrected by Ofcom. It is my understanding – to finish the sentence I had started actually – that they had linked harmful interference to ineffective and inappropriate use of the spectrum. And even if that were not the case, then it is my contention that to say that gateways is an inappropriate and ineffective use of the spectrum is to say all GSM services are because, as Mr. Burns made so plain, the problems relating to congestion are a network difficulty, not a Wireless Telegraphy difficulty.

As for the legal interpretation of "harmful interference", you will recall that in the Notice of Appeal I referred to a definition from the ITU – in the definition section Mr. Burns actually added a few more to that (I just took the base one).

So, Floe, as I started by saying, has multiple routes to success. First and strongest is that Regulation 4(2) is incompatible and people like Vodafone should never act as they did because of their duties. Even if that were totally wrong – I cannot actually see that it is, but if it were – then Floe has a contract with Vodafone for the provision of the relevant services which can be authorised pursuant to Vodafone's licence.

Lastly, just in case the others are not as strong as we all believe, there is the good old-fashioned simple point that under the terms of 4(2) Floe was not actually using irrelevant apparatus to provide the service. All of the service, in fact, was being provided by Vodafone. I have actually finished six minutes earlier than I intended to. I am sure that is not a sin that will be repeated elsewhere. Is there anything I can help you with, madam, otherwise might I suggest as we started early this morning we might finish early this evening and Mr. Kennelly start in the morning.

THE CHAIRMAN: Mr. Kennelly, how long are you going to be?

MR. KENNELLY: Madam, I expect to be finished by lunch-time tomorrow.

THE CHAIRMAN: By lunch-time tomorrow?

MR. KENNELLY: Yes; we were given a day between the two of us starting at lunch-time today and finishing by lunch-time tomorrow because I have to deal with the incompatibility issues; the actual legal issues going to the RTTE Directive and the Authorisation Directive.

THE CHAIRMAN: Yes.

MR. KENNELLY: And I have to deal with *Hilti*.

THE CHAIRMAN: So you think that is going to take you all morning?

MR. KENNELLY: I do, yes. At least I have answered safely. I may finish earlier.

THE CHAIRMAN: So do you think there is any advantage in starting now?

MR. KENNELLY: I need to discuss with Mr. Mercer some of the legal points raised by him in his submissions where they overlap with mine, and I would definitely prefer to have the time just to do that without going straight into my own submissions.

MR. FLINT: I wonder if I could just raise a point which might assist Mr. Kennelly to go slightly shorter. I am not at the moment clear on what basis Worldwide is making any submissions on the *Hilti* principle which relates to the reasonableness of Vodafone's action in terminating the services of Floe. I quite follow that is an argument for Floe but Mr. Kennelly is here, of course, simply representing Worldwide and simply representing Worldwide's interests in having clarification of law for the future. His clients are not concerned with the rights and wrongs as between Floe and Vodafone.

MR. KENNELLY: Madam, the Tribunal will recall that had this very debate when I applied for permission to intervene and I explained that I had a narrow point to make in relation to *Hilti*, a strict legal point which had a broader application because my client, Worldwide, is concerned with any guidance the Tribunal may give as to the application of *Hilti* in cases such as this, and the Tribunal gave me permission to retain the *Hilti* point within my statement of intervention. The Tribunal directed that my submissions go in as the statement of intervention and it included the *Hilti* points. I do not propose for a moment to go into the substance of Floe's complaint under the *Hilti* case; I simply wish to address the strict legal point of which the Tribunal has already given me permission.

THE CHAIRMAN: Mr. Flint, that is the answer.

MR. FLINT: Well, it is a matter for the Tribunal. I have made my point.

THE CHAIRMAN: The tribunal will be sympathetic with you not to continue now until five, but we think we ought to start at 10. So 10 o'clock tomorrow morning.

MR. KENNELLY: Thank you very much.

(Adjourned until Wednesday 1st February 2006 at 10.00 a.m)