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5 judgment in this matter will be the final and definitive record.
6 IN THE COMPETITION APPEAL TRIBUNAL Case No 1025/3/3/04

7
8 Tuesday, 3rd February 2004

9 New Court
10 48 Carey Street
11 London WC2A 2JT
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14 Before:

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16 The President
17 **SIR CHRISTOPHER BELLAMY QC**
18 (Chairman)

19
20 **MARION SIMMONS QC**
21 and
22 **ANNE KELLY**
23
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25 B E T W E E N:

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27 **BRITISH TELECOMMUNICATIONS PLC** **Appellant**
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31 - and -
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35 **THE OFFICE OF COMMUNICATIONS** **Respondent**
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40 MR GERALD BARLING QC and MS SARAH LEE appeared on behalf of
41 the Appellant.
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43 MS ELEANOR SHARPSTONE and MR JOHN O'FLAHERTY appeared on
44 behalf of the Respondent.
45

46 MR JOHN EDWARDS and MR NUSGART ZAR appeared
47 on behalf of the Intervener.
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49

50 **CASE MANAGEMENT CONFERENCE**

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1 THE CHAIRMAN: Good afternoon, ladies and gentlemen. Our
2 normal procedure at Case Management Conferences is to go
3 through the agenda, which has been circulated. However,
4 on this particular occasion we would like to mention a
5 point which we notified the parties of in a letter that
6 was sent out by fax this morning, which relates to the
7 precise scope of this appeal.

8 The point, in short terms is, as we understand it -
9 and we will be corrected if we are wrong, because our
10 understanding at this stage is very preliminary - that
11 the subject of the appeal is the notification. The
12 notification, which is given apparently under section 94
13 of the Act, is a document that states that the Director,
14 now Ofcom, has "reasonable grounds for believing" that
15 the contested state of affairs exists. It is a somewhat
16 curious procedural situation because it is apparently
17 envisaged that once that notification has been served BT
18 then has the possibility to make representations. A
19 period for representations was made in this case.

20 There have, as far as we can see, been no subsequent
21 decisions under sections 95 and 96 relating to the
22 service of an enforcement notice, still less to a
23 penalty, so the two questions that we have in our minds
24 are, first, is this notification, strictly speaking, an
25 appealable decision, or is it a step on the way to some
26 wider or further decision and, if it is an appealable
27 decision, what exactly is the scope of the appeal? Is
28 the appeal directed to the question whether the Director
29 had reasonable grounds for the view he took in his
30 notification, or is it directly to the question whether
31 BT is in contravention of the relevant general condition?

32 If the latter, where do we find a determination from
33 Ofcom to that effect?

34 That is the procedural conundrum and we have not got
35 very far into it, except a notice that it is a possible
36 conundrum.

37 Mr Barling, do you want to deal with that straight
38 away or later?

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MR BARLING: Sir, I am happy to. The conundrum certainly occurred to us when we first looked at this legislation as well.

THE CHAIRMAN: Are you taking us to the legislation?

MR BARLING: It is probably sensible to have it open. It is section 94 onwards.

THE CHAIRMAN: Yes. It is Tab 4 of your appeal bundle, I think.

MR BARLING: I am grateful. If we could keep that open for a moment while I tell you where we have got to.

First of all, this was to implement a provision of the Authorisations Directive, which is also in the bundle which I can show you as well. It might shed a bit of light on it.

THE CHAIRMAN: Which I do not think we have quite mastered yet.

MR BARLING: Perhaps it is sensible to show you where that is. It is at tab 6. This is effectively part of a package of new Directives governing telecoms and dealing specifically with the replacement of individual licences with a general authorisation.

If one turns to Article 10, under the heading "Compliance with the conditions of the general authorisation" - so it is going to be a general authorisation - one sees Article 10.2:

"Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation, ... it shall notify the undertaking of those findings ...". Note, Sir, where it finds that an undertaking does not comply "it shall notify the undertaking of those findings and give the undertaking a reasonable opportunity to state its views or remedy any breaches within - one month ... or a shorter period agreed ...". Then, over the page:

"(3) If the undertaking concerned does not remedy the breaches within the period as referred to in

1 paragraph 2, the relevant authority shall take
2 appropriate and proportionate measures aimed at
3 ensuring compliance. In this regard Member States
4 may empower the relevant authorities to impose
5 financial penalties where appropriate. ..."

6 THE CHAIRMAN: It is slightly back to front because it
7 suggests that you make a finding before you have had the
8 opportunity to state the views.

9 MR BARLING: I agree. You can see, therefore, that the
10 Member State had a bit of a decision to take. Sections
11 94 through to 96 is the result of the way they decided to
12 implement that provision and though no doubt conscious of
13 the problem that you have identified, we think their
14 thinking must have been 'well, we had better not make it
15 a final decision as it implies there; we had better say
16 it is something less than that', or couch it in different
17 terms. But what is surprising about the end result in
18 sections 94 onwards is that there is no provision there
19 for any final decision, or indeed requiring them to take
20 any decision following the representations except an
21 enforcement decision and you can only take an enforcement
22 decision if they have not actually complied.

23 THE CHAIRMAN: Quite. So there is a lacuna to cover the
24 case, which may well be this case.

25 MR BARLING: We would submit that this problem may be more
26 acute in some other examples one can think of. The
27 reason we say it is not so acute here, first of all we
28 say it clearly is a decision because it has a legal
29 effect. It means that you are vulnerable to fines as
30 soon as the notification is made if you do not comply by
31 the appointed date, so had we not complied with this
32 notification by 9 December we would then have been
33 vulnerable to fines under section 96.

34 THE CHAIRMAN: Following your argument provisionally, it is
35 true that the notification uses the word "determination"
36 and section 94(1) applies where Ofcom determines
37 something, so one could, I think perhaps not
38 unreasonably, infer a decision. But what is the nature

1 of the decision? Is the decision that there are
2 reasonable grounds for believing that there is a
3 contravention, or is the decision that there is a
4 contravention? Or has, by the passing of time, the
5 original notification that there was reasonable grounds
6 for believing that there was a contravention, in the mean
7 time matured by some somewhat mysterious process into an
8 actual decision that there is a contravention, or there
9 would be a contravention if you were to fail to comply
10 with the direction, because the question of whether the
11 Director had reasonable grounds is a quite different
12 question from whether there is a contravention.

13 MR BARLING: Certainly, I accept that. In many cases it
14 would be material. The reason why we say it may be
15 possible to cut across the problem in this case is
16 because the challenge here is really based on a question
17 of law, an interpretation of the general condition.
18 There will be many cases where issues of fact will
19 perhaps be in play and where it might really make a
20 difference. But because, in our submission, what is in
21 play here is purely a question of law, does general
22 condition 1.2 bite on the save activity and there is no
23 real dispute about what the save activity is, the two
24 points, whether there are reasonable grounds or whether
25 there is a contravention, are actually conflated because,
26 in our submission, you have got to decide the question of
27 law before you can determine whether there are reasonable
28 grounds and no-one is entitled, as it were, to misdirect
29 themselves on a question of law when deciding whether
30 they have reasonable grounds.

31 THE CHAIRMAN: I think what perhaps concerns us at this very
32 preliminary stage when we have not really got into the
33 case at all is that one can see that if this case is pure
34 questions of law, up to a point the point we are on at
35 the moment may not matter. But if we get into issues
36 like what exactly is meant by a competitive advantage or
37 what information are we actually talking about and we
38 slide into a factual area, it perhaps is less clear cut.

1 MR BARLING: There is obviously a factual background, the
2 matrix of it, but it is not in dispute and in our
3 submission it is not going to be central. The
4 information we are talking about is not in dispute. We
5 know that in question is the identification, post codes,
6 telephone numbers, and so on, of a switching customer.
7 That is the information that Ofcom argue is within the
8 scope of Condition 1.2. That is the information which BT
9 would wish to continue to use in order to carry out the
10 save activity. So, in a sense, we say it probably does
11 not matter in this case.

12 If we were wrong about that, it would still, we
13 submit, be appealable. It would have to be appealable.
14 It would be extraordinary if it was not, because clearly
15 the community regarded that step, namely the step at
16 which you issue a notification on threat of penalties,
17 has been something which has to be subject to an appeal.
18 You get that from the end, if you look at sub-paragraph 7
19 of Article 10:

20 "Undertakings shall have the right to appeal against
21 measures taken under this Article in accordance with
22 the procedure ...".

23 It is quite clear that there has got to be an appeal and
24 you have therefore got to construe section 192 as
25 covering this part of the decision-making process. The
26 right of appeal is, of course, dealt with in a different
27 Directive, which is also in the bundle at Tab 7. Article
28 4 at Tab 7 is the relevant provision.

29 Although I do not pretend it is not without
30 difficulty and it may be that there is an important
31 deficiency in this legislation, we believe and hope that
32 it does not actually affect this case. We would submit
33 that whether you are determining reasonable grounds to
34 believe there is a contravention, you will in effect have
35 to decide whether the save activity breaches condition
36 1.2 as a matter of law. That is why the relief that we
37 have sought is in those terms, which raise that question.

38 We put it in terms of both reasonable grounds and/or a

1 contravention. We find great difficulty in
2 distinguishing the two in the context of this particular
3 case.

4 THE CHAIRMAN: There may of course be other cases where the
5 point is more acute. Clearly for the benefit of all in
6 the industry it would be convenient if we could arrive
7 consensually at some sensible solution to the legislative
8 conundrum that is posed.

9 MR BARLING: And the powers that the Tribunal has under
10 section 195 of the Act are, we would submit, wide enough
11 to give the Tribunal the opportunity to give such
12 directions as are appropriate. If one looks at section
13 195 of the Act:

14 "(1) The Tribunal shall dispose of an appeal under
15 section 92(2), in accordance with this section.

16 (2) The Tribunal shall decide the appeal on the
17 merits and by reference to the grounds of appeal ...

18 (3) The Tribunal's decision must include a decision
19 as to what (if any) is the appropriate action for
20 the decision-maker to take in relation to the
21 subject-matter of the decision under appeal."

22 Then "shall remit". In this case you decide what is the
23 appropriate action to be taken. Then you remit it with
24 such directions as you consider appropriate for giving
25 effect to that decision. It is very widely drawn in
26 terms of dealing with the subject-matter of an appeal.

27 Those, Sir, are our thoughts.

28 THE CHAIRMAN: Thank you very much, Mr Barling.

29 Let us see what Ms Sharpstone has to say. Good
30 afternoon, Ms Sharpstone. Is there a problem here or
31 not?

32 MS SHARPSTONE: Sir, I think Mr Barling has very correctly
33 identified that the wording of the Directive is not
34 without difficulty and the wording of the implementing
35 legislation is an attempt to give effect to what the
36 Community Legislator wanted but may not perhaps perfectly
37 do so.

38 Sir, we say that in the present circumstances the

1 issue arises because we made the notification. We did
2 that, of course, having asked for information and indeed
3 having heard representations and therefore to some extent
4 having heard BT's views on the subject.

5 THE CHAIRMAN: There were some representations.

6 MS SHARPSTONE: There were representations before we made
7 that notification, so to that extent the point that you
8 raised in discussion with Mr Barling is covered because
9 the Director does not make a decision without at least
10 having heard the position advanced by BT.

11 Where, as here, an addressee of a decision both
12 makes representations and however complies with the
13 notification, we say that in fact there is neither need
14 nor indeed a power for the Director to take a further
15 decision. You cannot take an enforcement for very
16 obvious reasons. You cannot make an enforcement
17 notification or a fine because there has been compliance.

18 In other circumstances, for example, where
19 representations are made and there was not compliance,
20 then one could indeed foresee that a separate subsequent
21 decision would be taken and at that stage, we say, one
22 would be moving across from "The Director has reasonable
23 grounds" to "there is a decision, there is a
24 contravention". That is the point at which one moves
25 across. But, Sir, against that background, we do indeed
26 accept that our notification is an appealable decision
27 because it quite clearly has a constraining effect upon
28 the addressee and therefore it should be subject to
29 control by this Tribunal.

30 THE CHAIRMAN: Is the *de facto* position that although the
31 notification is expressed in accordance with the Statute
32 wording, "The Director has reasonable grounds", the
33 impression that I have is that once BT has made its
34 further representations, the Director's actual position
35 is not just that he has reasonable grounds but that there
36 is a contravention, or there would be a contravention
37 were BT to act against --

38 MS SHARPSTONE: Sir, I think the position must be that if

1 the addressee, here BT, makes representations and says
2 'you were wrong in your interpretation of the Directive
3 and for that reason we are not going to comply', but at
4 that stage there is the power to issue the Enforcement
5 Notice and/or to fine, and that such a decision is indeed
6 a separate decision in which the Director would say 'I
7 have moved from the stage of having reasonable grounds to
8 the stage where I am prepared to say there is a
9 contravention, the nature of the decision changes at that
10 stage.

11 THE CHAIRMAN: But has that happened here? Our slight
12 concern is the risk - you may persuade us that it is not
13 a risk at all - that this case may go off at half cock on
14 the reasonable grounds point, as distinct from deciding
15 what everybody apparently wants us to decide, which is
16 whether there is a contravention.

17 MS SHARPSTONE: Sir, I wonder, because it is important that
18 I give the right answer to that question?

19 THE CHAIRMAN: We do not want to rush it. We just want to
20 play it at this stage.

21 MS SHARPSTONE: I understand. I would like to have the
22 opportunity, if I may, to address that properly.

23 THE CHAIRMAN: It may be that there is a way of doing it and
24 it may be that some letter could be written or something
25 to clarify the position. Even if there is no express
26 power in the Act we might be able to imply something.

27 MS SHARPSTONE: Sir, may I bear that helpful suggestion in
28 mind and perhaps we can find a way of dealing with it.
29 Of course, I see the force of the point. The issue needs
30 clarifying.

31 THE CHAIRMAN: Ms Simmons is drawing my attention also to
32 section 96(1)(b).

33 MS SIMMONS: My point is that what I understand is being
34 said is that you are exposed to penalties when section 94
35 comes into play. But 96(1)(b) says "OFCOM have allowed
36 the notified provider an opportunity of making
37 representations about the matters notified;" You have
38 made representations. If you interpret that widely they

1 have not given you an opportunity yet because they have
2 not considered them. Therefore on one reading of this it
3 might be said that section 96 is not yet effective.

4 MR BARLING: Well the trouble is it applies where you have
5 been given a notification. They have allowed you to do
6 that. If you look at (2) they "may impose a penalty on
7 the notified provider if he (a) has, in one or more of
8 the respects notified, been in contravention of a
9 condition specified in the notification ... and (b) has
10 not ... taken steps that OFCOM consider appropriate."

11 MS SIMMONS: Yes, but it only applies if subsection (1)
12 applies and you are still within the period when they are
13 considering the representations.

14 MR BARLING: That is certainly true, but equally those
15 conditions (a), (b) and (c) are all, as it were, complied
16 with.

17 MS SIMMONS: It depends on what "opportunity" means.

18 MR BARLING: Well we have been given an opportunity. We
19 have taken it up and the period has expired now.

20 MS SIMMONS: Can it be right that they do not have to look
21 at them?

22 MR BARLING: As we understand it, they will look at them
23 because they may only impose a penalty on people if they
24 find (this is subsection (2)(a)) that there has been a
25 contravention of a condition.

26 Assume a different case. In this case, of course,
27 we complied by the due date because we did not want the
28 risk of being fined 10 per cent of turnover or whatever,
29 so you are in a conundrum. You have to take a view. We
30 complied.

31 MS SIMMONS: Under protest.

32 MR BARLING: Yes, under protest. Without prejudice. Had we
33 not complied they would have then looked at our
34 representations and they could have then looked at
35 section 96 and said "we find under subsection (2)(a) that
36 there has been a contravention, notwithstanding those
37 representations and we are going to now impose the fine
38 because they did not comply by 9 December".

1 Madam, I see the point that you are making as to
2 whether section 96 is in play at all, pending them
3 reaching a view about the representations, but sadly we
4 have come to the conclusion that having looked at that
5 point, when you consider subsection (2), you must be at
6 risk.

7 THE CHAIRMAN: If I may say so, none of the parties, nor the
8 Tribunal, has yet had an opportunity to really get to the
9 bottom of this point. We have flagged up the point and
10 we would be extremely grateful if thought could be given
11 to it. If there are procedures that can be followed that
12 would in some way remove it as a problem if there is a
13 problem.

14 MS SHARPSTONE: Sir, I will be very happy to make sure that
15 that is examined as a matter of urgency.

16 MS SIMMONS: Can I make one other point about it. Section
17 96(1) begins:

18 "(1) This section applies (in addition to section
19 95) where".

20 So there is another construction point as to whether 96
21 applies in isolation of 95.

22 MR BARLING: Certainly, but in each case either of them will
23 only come into play if there is non-compliance in the
24 period allowed. It seems to us that you are either at
25 risk of both sections being operated or neither. Madam,
26 I think you are right in a sense.

27 THE CHAIRMAN: Well I suggest we park that point there for
28 the time being and return to it as necessary as this case
29 unfolds.

30 If we then revert to the agenda, the first item that
31 is traditionally in the agenda is the forum for the
32 proceedings. We are currently taking the view that it is
33 not strictly necessary to decide in which part of the
34 United Kingdom these proceedings are. It is only really
35 relevant in the unlikely event of an appeal, but at the
36 moment, insofar as it is necessary to decide it, our view
37 is that these are proceedings in England and Wales to be
38 heard in London on a date to be fixed which we shall

1 discuss shortly.

2 That I think takes us on to the request to
3 intervene. Since this agenda was prepared we have had
4 further requests from two other interveners, Broad System
5 Ventures Limited and THUS plc. I think we have probably
6 got Mr Edwards here on behalf of the Interveners. Good
7 afternoon, Mr Edwards.

8 MR EDWARDS: Indeed, Sir. Good afternoon.

9 THE CHAIRMAN: Are there objections to those interventions?

10 MR BARLING: Sir, subject obviously to the terms, no. They
11 are the complainants.

12 THE CHAIRMAN: We will consider in more detail in a moment
13 the scope of the intervention and what is the most useful
14 form.

15 MR BARLING: Sir, I do have a few comments to make about the
16 other applicant.

17 THE CHAIRMAN: Yes. Mr Jones, on behalf of NJ Associates, is
18 not here today, so I think all we can do, Mr Barling, is
19 hear what you say about it, and indeed hear what Ofcom
20 say about it if they have anything to say about it. From
21 our point of view the question at this stage is whether
22 NJ Associates has got a sufficient interest. It is a
23 quite different question as to what part in practice they
24 play in the proceedings once the proceedings have started
25 to unfold, as it were.

26 What is the position from BT about that application?

27 MR BARLING: Having read Mr Jones' attachment, it seemed to
28 us that the complaint seemed to be that they were
29 misleading. They were telling people things that were
30 not right, rather than directing himself actually. I
31 think everyone would agree that that is undesirable and
32 should not happen. But he did not actually engage at all
33 with the issue, which is the question of the
34 impermissibility or otherwise of using the identification
35 evidence. What we wondered was whether this would be
36 helpful.

37 The alternative, of course, that now presents itself
38 is that now that THUS has come in and THUS, according to

1 the letter from Herbert Smith, have got quite a lot of
2 people behind them who are going to supply them with
3 information. They list them in their letter. They very
4 sensibly, if one may say, have got together and done it
5 in that way. What we were wondering was whether that is
6 not something that Mr Jones should be invited to do
7 rather than to become an intervener himself and any
8 evidence he wanted to put forward (it would obviously be
9 sifted by Herbert Smith) but, subject to that, it could
10 be put forward.

11 THE CHAIRMAN: Does Ofcom have a position on Mr Jones, Ms
12 Sharpstone?

13 MS SHARPSTONE: Sir, our general position is that in and
14 insofar as people are stakeholders and they are affected
15 clearly one way or the other by the validity of the
16 decision that the Director has taken, then actually they
17 should be let in. So far as Mr Jones is concerned, to
18 the extent that he clearly works in this industry, he
19 works in the business, he has an agency for a Telecom
20 reseller, for our part we are content that he should be
21 allowed to intervene. We would obviously be confident
22 that the Tribunal, should he be making submissions that
23 were completely tangential to the actual subject matter
24 of the dispute, one would imagine he would not make them
25 for all that long, but beyond those comments, Sir, we are
26 content to leave it to the Tribunal.

27 THE CHAIRMAN: I think our general feeling on the application
28 of NJ Associates to intervene is that we should permit
29 the intervention formally speaking, but that we should,
30 having given Mr Jones the opportunity to comment, make
31 further directions in due course as to exactly what the
32 scope of that intervention should be, in particular in
33 the light of other interventions and no doubt also in the
34 light of Ofcom's defence. It may be that Mr Jones will
35 not feel it necessary to address further the main issues
36 in the case. It does not, at least at this stage, seem to
37 us particularly desirable that we should be going into
38 the factual matters that Mr Jones is speaking of, so I

1 think at this stage the most we can do is to rule that in
2 principle the intervention be allowed but we will give
3 further directions as to the scope and role that that
4 intervener will play as the case unfolds.

5 That I think takes us on to questions of witnesses
6 and disclosure, as to which it does not appear there will
7 be any particular witness evidence. There may be a
8 statement - I do not know - attached to Ofcom's defence,
9 but it does not look as if we are going to have oral
10 evidence in this case.

11 MS SHARPSTONE: Sir, if I can help on that. Ofcom is at the
12 moment in the process of preparing both the defence and
13 indeed such a witness statement. As we see things at
14 present, we do not envisage that it is likely to be
15 necessary to be oral evidence, but we will not be quite
16 sure of that until we have finished preparing the
17 statement. Subject to that small caveat.

18 THE CHAIRMAN: We simply make no order on the question of
19 witnesses. At the moment, at least, nobody seems to be
20 seeking any further disclosure of documents.

21 As far as confidentiality is concerned, there would
22 seem, I think, from memory, to be three annexes that BT
23 regards as confidential, viz-a-viz intervening parties,
24 but it does not at present seem to us that that poses any
25 particular problem. The document is simply served
26 without those annexes being included. Is that
27 appropriate, Mr Barling?

28 MR BARLING: That would certainly be appropriate.

29 THE CHAIRMAN: I see heads nodding.

30 That takes us to the timetable for the conduct of
31 the case. I think there is the outline of a possible
32 timetable suggested in BT's submissions for this
33 conference. Shall I first indicate how we see matters
34 unfolding and then you can come back with further
35 suggestions.

36 We anticipate and hope that Ofcom's defence will be
37 served by 18 February in accordance with the rules.

38 MS SHARPSTONE: Sir, we would indeed expect to get it in.

1 Might I respond to the point that you, Sir, raised at the
2 outset of this hearing. It may be that we will need to
3 think about the timetable more generally in the light of
4 the need to try to sort out the point that you have
5 raised with both parties. Sir, perhaps we would need to
6 look at the timetable as a whole once we have gone
7 through it.

8 THE CHAIRMAN: Yes. Let us proceed on a provisional basis
9 for the moment.

10 That is 18 February for the defence.

11 The next issue would be the Statement of
12 Intervention on behalf of THUS and Broad System Ventures
13 Limited.

14 Mr Edwards, I think you are sufficiently familiar
15 with our procedures to know that we are not looking for a
16 repetition of what is said in the Defence.

17 MR EDWARDS: Indeed. That is quite accepted, Sir. But in
18 the circumstances I wondered whether I might have another
19 seven days beyond the 18th to the 25th?

20 THE CHAIRMAN: Yes, I think that is probably sensible. I do
21 not think myself that it is necessary for us to give any
22 formal directions, but in the interests of saving costs
23 generally the more pithy the intervention the better.

24 MR EDWARDS: I am particularly known for being 'pithy', Sir.

25 THE CHAIRMAN: I am very glad to hear it. We will say that
26 intervention by 25 February. On that basis I think
27 assuming in passing that Mr Jones won't need to serve a
28 statement in intervention beyond the letter that we have
29 already got, the question is how much time you need to
30 respond, Mr Barling. You asked for the 3rd.

31 MR BARLING: Perhaps a bit longer if we are still getting
32 material.

33 THE CHAIRMAN: Perhaps the 10th would be the right time for
34 you, but Ms Sharpstone is on her feet so let us see what
35 she says.

36 MS SHARPSTONE: Sir, forgive me for rising, but I wondered
37 whether we might have the opportunity to respond to that
38 statement in intervention. It may be that what is said

1 are points on which we have no need to make additional
2 comment but it might be otherwise and I was wondering
3 whether we might be given seven days (not more) from the
4 service of that statement of intervention to put in a
5 comment if we so chose. Then perhaps Mr Barling would
6 have the opportunity to comment on both the intervention
7 and anything that Ofcom had put in.

8 THE CHAIRMAN: Yes, I think so. It does not disturb the
9 timetable. You may have permission to do that, Ms
10 Sharpstone.

11 MS SHARPSTONE: I am grateful, Sir.

12 THE CHAIRMAN: We very much hope it won't be necessary to
13 open up a cross issue between parties that are supposed
14 to be supporting each other.

15 MS SHARPSTONE: I shall not avail myself of that if it is
16 not necessary.

17 MR BARLING: Was there a date for my learned friend?

18 THE CHAIRMAN: 3rd March for a response by Ofcom to the
19 statement in intervention and 10th March for a reply by
20 BT to the defence, if any, and any response to the
21 statements in intervention.

22 That takes us on to the question of the hearing. We
23 wanted to be a little bit cautious in light particularly
24 of the point I have just made, picking up the observation
25 Ms Sharpstone has just made. Our proposal at present is
26 to reserve the 26th March for a possible further Case
27 Management Conference before the hearing in case there
28 are points that we need to address in the light of the
29 documents which by then we will have seen. That is to
30 say, the defence and the statement in intervention and
31 any further pleadings from BT, rather than decide now to
32 plunge straight into the hearing.

33 There is then in the Tribunal's diary a certain
34 amount of traffic jam as regards hearing dates. We have
35 at the moment effectively two possibilities. One is 20th
36 and 21st April and the next one is the week beginning 3rd
37 May. The 3rd May is itself a Bank Holiday, so it could
38 be the 4th but I think preferably the 5th to give us a

1 chance to regroup a bit ourselves on the 4th.
2 MR BARLING: So that would be the 5th and 6th.
3 THE CHAIRMAN: That would be the 5th and 6th. We are working
4 on the assumption that it would be unwise to assume that
5 we could get this case done in the day, but it is
6 probably not a three day case. It is probably more of a
7 two day case. I do not know if either parties disagrees
8 with that provisional view?
9 MR BARLING: No.
10 THE CHAIRMAN: That is our thinking at the moment. I do not
11 know if that is helpful to the parties or not or whether
12 you have any observations on the timetable. From my
13 personal point of view there is perhaps a certain
14 preference for the May date. That is simply to avoid a
15 pile up with other cases.
16 MR BARLING: Sir, for our part we are fine with either of
17 those two sets of dates.
18 MS SHARPSTONE: Sir, we are content with either set of
19 dates.
20 THE CHAIRMAN: I think unless there are strong views to the
21 contrary we will go for the 5th and 6th May.
22 MR BARLING: Sir, the last time I fixed some dates I got
23 into terrible trouble when I got back to Chambers.
24 THE CHAIRMAN: Do you want to just check.
25 MR BARLING: Would that be something to do now, or shall we
26 let you know?
27 THE CHAIRMAN: It is better to do it while we are all here,
28 Mr Barling. Do you want us to rise for five minutes
29 while you check?
30 MR BARLING: Whichever you find the most convenient, Sir.
31 THE CHAIRMAN: I think it is probably more convenient if we
32 just rise for five minutes to give you a chance to make
33 that phone call.
34 (A short adjournment)
35 MR BARLING: Sir, thank you for giving me that opportunity.
36 The upshot of it is that Ms Lee has got a commitment on
37 the May dates and therefore we have a preference for the
38 April one. We are both free for April and I am free for

1 both. It depends therefore very much on how strong an
2 inclination the Tribunal has for the May ones.

3 THE CHAIRMAN: Speaking personally my own preference would be
4 for the May ones, to tell you the truth. I am sorry
5 about that. Is that another professional engagement you
6 have got on those days, Ms Lee?

7 MS LEE: My Lord, it is. It is in connection with an
8 arbitration, although it may be that I have to stay in
9 London as opposed to travelling to the arbitration, but
10 the time is booked out in my diary unfortunately for two
11 weeks but I am not sure at what stage I am going to be
12 called on. It may be that in practice they is not a
13 clash but it is a professional engagement.

14 THE CHAIRMAN: (After conferring with Ms Simmons and Ms
15 Kelly) I think we will go for the 5th and 6th May and I
16 hope Ms Lee will be able to sort the problem out one way
17 or another.

18 There is additionally the question of skeletons. I
19 think we can perhaps reserve that for the time being
20 until the conference on 26th March, but the suggestion is
21 that there is an exchange of skeletons five days before
22 the hearing which at the moment would seem to us quite a
23 reasonable suggestion, but perhaps we do not need to
24 address that finally until the next Case Management
25 Conference.

26 I think from our point of view we have two more
27 matters to consider. One is the question of win-back, in
28 which, if I may say so, Ms Sharpstone, somewhat boldly
29 Ofcom's letter of 27th January is asking for "an early
30 assurance from the Tribunal that a part of BT's notice of
31 appeal will be disregarded by the Tribunal". I am not
32 sure we are able to give any assurance on this point at
33 the moment.

34 MS SHARPSTONE: Sir, I take your point as to that particular
35 passage in the letter, but I wonder if I might
36 nevertheless have the opportunity to make some
37 submissions as to why we say that the Tribunal should
38 disregard that part of the appeal by BT.

1 THE CHAIRMAN: I will see what my colleagues think in a
2 moment. I am inclined to think that this is perhaps a
3 matter you should address in your defence rather than a
4 matter to be elaborated upon now. I must say, we are
5 slightly confused as to what exactly is being said here
6 by the Director, because if the notification is to be
7 read with the reasons it is beginning to look as if the
8 Director is beginning to purport to decide some issues
9 about win-back as well as deciding some issues about
10 save, which would raise various procedural questions in
11 one's mind if that were so. The situation does not seem
12 absolutely clear, at the moment, on a first reading.

13 MS SHARPSTONE: It may assist if I say that the Director's
14 position is that the notification says in several places
15 quite unequivocally that the investigation was a save
16 activity. The decision is concerned and the notification
17 was concerned with save activity. The passage to which I
18 anticipate you are alluding, which is the section at
19 paragraph 3.30 and following, is the passage which the
20 Director points out at Tab 3 in the first appeal bundle.
21 It may be convenient to turn it up. Perhaps I might take
22 it from a little earlier.

23 Sir, if you would look at paragraph S.9 on page 6,
24 that makes it clear that the Director's investigation is
25 concerned solely with save activity. The point is then
26 picked up in summary at paragraph S.11 that the
27 principles are not limited to CPS but there is no
28 suggestion there that this is a notification which
29 impacts on processes other than the save process. The
30 complaint that is identified at paragraph 1.1 was a
31 complaint in relation to save activity. The passages in
32 the notification under chapter 3, breach of general
33 condition 1.2 paragraph 3.1, confirms that what was
34 examined were the specific elements that constitute save
35 activity, that the investigation asked BT to set out in
36 detail the process that BT employs to enable it to
37 conduct CPS save activity and then there are two tables,
38 table 3.1 and 3.2 referring very expressly to the save

1 call procedure and the save letter procedure. Those are
2 the processes identified in paragraph 3.4 as having been
3 considered in order to reach a conclusion as to whether
4 BT is in breach of General Condition 1.2 and the analysis
5 that then follows is in relation to those. The Decision
6 itself, paragraph 3.26 is expressly stated to be in terms
7 of save activity, the second sentence of paragraph 3.26,
8 "BT's use of customer specific information provided to it
9 by other communications' providers in connection with CPS
10 for the purposes of carrying out save activity involves
11 the use of such information for a purpose other than that
12 for which it was provided.

13 That point is again picked up in the next following
14 paragraph, 3.27. Again tying the decision to save
15 activity and giving BT a time frame until 9th December to
16 comply with General Condition 1.2 by not using customer
17 specific information acquired from another communication
18 provider in connection with the provision of CPS for the
19 purpose of carrying out CPS save activity.

20 THE CHAIRMAN: All this is true, Ms Sharpstone, but why is
21 the Director dealing with win-back activity at all?

22 MS SHARPSTONE: Sir, we say that the next following passage,
23 "Implications of this Notification", identified
24 potentially other passages where the same principles may
25 be likely to imply. We say that this is not a decision,
26 this is rather a signal, if one likes, to the whole
27 industry that there is an important principle here at
28 issue. There is not a decision taken. There had been no
29 investigation of win-back and indeed, as BT has helpfully
30 indicated to the Tribunal, the letter was written to BT
31 some time after the notification, namely on 22nd January
32 indicating that win-back was something which now would be
33 looked at, which in itself we say lends force to the
34 argument that it had not been looked at before.

35 Sir, I have gone thus far so that you should see the
36 way in which we put it because it may be helpful to have
37 that indication now. If the Tribunal would prefer to
38 have it set out more fully in the Defence we would be

1 most happy to do so, but we say that it is part of the
2 function of the Regulator and in the interests of perhaps
3 over-stressed or transparency that one should explain
4 what the potential implications are of a construction of
5 passing information to another person for a purpose other
6 than that for which it was provided, and indeed that it
7 is part of the Regulator's responsibility to seek to
8 explain to the industry as a whole what the potential
9 implications are of a decision that has been taken.

10 Those are the reasons why that information was included.

11 It is, of course, not only win-back activity that would
12 be potentially affected by this application of principle.
13 In a sense, if BT were right, they would be right not
14 only in respect of win-back but indeed in respect of a
15 number of other products which equally well were not the
16 subject of investigation nor the subject of notification.

17 THE CHAIRMAN: Do you want to say anything at this point, Mr
18 Barling, or to reserve your position?

19 MR BARLING: Sir, unless you say you are bound to strike us
20 out or anything. We have put it in our written
21 submission. The problem for my friend really in trying
22 to ring fence this save is, as they say themselves, as
23 you, Sir, pointed out, the implications obviously are
24 wider. It does have implications of win-back, as they
25 say it does, and therefore, depending on which way the
26 Tribunal ultimately decides the case that, too, will have
27 implications whether one likes it or not. We must both
28 accept that and therefore it seems to me rather
29 unrealistic to cavil.

30 THE CHAIRMAN: I see. I think this issue needs to be more
31 fully argued at a later stage. One would not want to
32 express any views about it now, but it may be a question
33 of whether in a notification under section 94(1) of the
34 Communications Act 2003 the circumstances in which one
35 takes "side swipes" at other kinds of activity is a
36 matter that may or may not become relevant as the case
37 develops. We will have to see and say no more about it
38 at this stage.

1 The other matter that we would like to mention - it
2 is basically for you, Ms Sharpstone, when you are coming
3 to do your Defence - is first of all, in view of the
4 debate we have just had about reasonable belief, the
5 extent to which either in the Defence or by some other
6 means you can set out the facts that are actually agreed,
7 so that we are not in a position of going into disputed
8 facts. I am sure that would be of help. That is the
9 first point.

10 The second point is, the more you can be precise in
11 your defence about what the information is that you
12 regard as confidential, the better. That is to say, we
13 notice at 2.17 of the explanatory note you express the
14 view that "Ofitel's view is that by definition all
15 information to which General Condition 1.2 applies is
16 confidential to a greater or lesser degree." There is a
17 general and rather wide statement there. There may be
18 other references, but the other one I picked up was that
19 at 3.16 - "certain information is provided to BT in
20 confidence".

21 The more specific you can be about the information
22 you are concerned with the better. Is it the telephone
23 number? Is it the post code? Is it the fact that the
24 customer wishes to change? Is it the extent that he
25 wishes to change? What is it exactly that you say is
26 always confidential or should be regarded as
27 confidential? Is it everything or just some part of it
28 or what? That would help us very much as clarity on that
29 issue.

30 MS SHARPSTONE: Sir, I have noted that.

31 THE CHAIRMAN: Thank you very much.

32 (After consultation with Ms Simmons) The question
33 Ms Simmons is raising, and this in fact goes back to the
34 win-back point, is what exactly is the notification? Is
35 it the first two pages of this document, or is it the
36 document as a whole and if it is the document as a whole
37 could one construe the remarks about win-back in the
38 document as a whole as indicating that the Director had

1 reasonable grounds for believing that BT was contravening
2 General Condition 1.2 in respect of win-back as well as
3 in respect of save, even accepting that save was the
4 subject of investigation? Is that entirely conclusive of
5 the issue if you look at the Notification as a whole?
6 That is the question. Like all questions of the Tribunal
7 it is provisional at this stage, but that is the
8 question.

9 MS SHARPSTONE: Sir, I have written it down as a provisional
10 question. I wonder if, since I am on my feet, I might be
11 so bold as to ask the Tribunal - I am thinking of the
12 point that was raised at the beginning of the Case
13 Management Conference - and I wondered if it would assist
14 if the Tribunal formulated a question for us to address
15 in written submissions or you would like it to be
16 addressed more generally?

17 THE CHAIRMAN: I think we would just like you to address it
18 generally at this stage, having given you some
19 indications of possible considerations to address.

20 MS SHARPSTONE: Very well.

21 THE CHAIRMAN: I think that is more or less it, from our
22 point of view. Do you have other matters that you would
23 like to raise?

24 MR BARLING: No, thank you, Sir.

25 THE CHAIRMAN: Ms Sharpstone?

26 MS SHARPSTONE: None, Sir. Thank you.

27 THE CHAIRMAN: Mr Edwards?

28 MR EDWARDS: No, Sir.

29 THE CHAIRMAN: Thank you very much indeed.
30 (The hearing concluded)