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IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal,
Victoria House,
Bloomsbury Place,
London WC1A 2EB

Tuesday, 6th April 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)
MS MARION SIMMONS, QC
and
MS ANN KELLY

B E T W E E N:

BRITISH TELECOMMUNICATIONS plc
Applicant

- and -

THE OFFICE OF COMMUNICATIONS
Respondent

MR GERALD BARLING, QC and **MS SARAH LEE** appeared on behalf of
British Telecommunications plc.

MS ELEANOR SHARPSTON, QC and **MR JOHN O'FLAHERTY** appeared
on behalf of the Office of Communications.

MR JOHN EDWARDS and **MS NUSRAT ZAR** appeared on behalf of the
Intervener.

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CASE MANAGEMENT CONFERENCE

Tuesday, 6th April 2004

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THE PRESIDENT: Good morning, Mr Barling.

MR BARLING: Good morning, sir. I hope you have seen our short letter commenting on the items in the agenda?

THE PRESIDENT: Yes. I think the useful thing to do is probably to take the agenda and just see where we are. When you refer to your short letter, you are speaking of the letter of which date?

MR BARLING: I think it came in under a covering letter of the 31st.

THE PRESIDENT: Yes, the 29th. Yes, we have, thank you very much.

MR BARLING: Sir, I think you know who the appearances are.

THE PRESIDENT: Right. If we just then take the issue of the strike out application so that we see where we are. That is the first item on our agenda. The parties seem agreed that this can go off to the main hearing.

We would like to raise one point about that and just make a couple of observations. It seemed to us, and we are very much in the parties' hands and not wishing to create problems where none exist, that one issue might be whether the notification did actually constitute a notification in relation to Win Back. I think that is touched on in the argument. We had just been reminding ourselves of section 94(3) of the Act. I have got the Queen's Printers' copy and it is at page 90 in the Queen's Printers' copy. 94(1) provides that where Ofcom determine there are reasonable grounds, et cetera, they may give a notification under the section. Then (2):

"A notification under the section is one which:

(a) sets out the determination;

(b) specifies the condition in contravention in respect of that damage that has been made; and

(c) specifies the period during which the person notified has an opportunity of doing the thing specified in subsection (3)."

(3):

1 "Those things are:
2 (a) making representations about the matters notified;
3 (b) complying with notified conditions; and
4 (c) remedying the consequences of notifying conditions."

5 The point that we were wondering to ourselves about is whether in relation to 94(3)
6 there had been the necessary specification in relation to Win Back, because the period for
7 making the representations complying with the notified conditions and remedying the
8 consequences appears, on the face of it, at least formally speaking, to relate to Save
9 rather than to Win Back, though I suppose there may be an argument that one was
10 implicitly talking about Win Back as well. But, at least formally speaking, 94(3)
11 appeared to be relating to Save. I am not at this stage suggesting whether that point is
12 right or wrong. It is just one needs to look at this structure rather carefully in order to
13 determine where one is on these various points.

14 MR BARLING: Sir, the point you make is, of course, a point we certainly would have
15 addressed in detail had this matter gone ahead today. One point we would have made
16 about that is that the document, if I can put it neutrally, specifically indicates that
17 representations by the specified date should be made about matters "set out in this
18 notification and the accompanying explanatory memoranda". The implication there is
19 that the matters in the memoranda, which is not headed as separate, are within the scope
20 of the duty to give us the opportunity to make representations by a specified date, as an
21 indication really that there is here effectively one notification encompassing both
22 documents, if I can put it that way.

23 THE PRESIDENT: Yes.

24 MR BARLING: It does seem to me an important point.

25 THE PRESIDENT: Anyway, that point is floating around.

26 MR BARLING: Yes.

27 THE PRESIDENT: That said, however, it seems to us convenient for Win Back in

1 general to go over to the main hearing. I suppose our primary consideration is that, even
2 if this case is predominantly about Save, we should be able to understand the full context
3 of the case and, so far as the full context of the case includes Win Back, then we ought to
4 be able to understand where the case is going on Save in order to have an idea what its
5 implications are for Win Back. Indeed, on that general issue I think there is a second part
6 of the decision in the summary and later in chapter 3 that also refers to "other transferable
7 products". At least I, for my part, am a bit hazy whether and to what extent that is
8 something that we need to know about or not.

9 MR BARLING: The obvious one, sir, is what is called in the jargon WLR, which is the
10 line rental. The actual access line can be the subject of a transfer, in a similar analogous
11 way to CPS.

12 THE PRESIDENT: Yes.

13 MR BARLING: I cannot remember for a moment whether -- yes, as you said, the
14 memorandum does refer to the other products. There are other ones as well, but that is
15 the main one.

16 THE PRESIDENT: Yes, it is section S11 and 338 I think have references.

17 MR BARLING: There are documents in the bundles which will give some further
18 chapter and verse about it. If it becomes necessary, we will certainly give consideration
19 to whether the Tribunal ought to be directed to those, or, indeed, to additional material on
20 that.

21 THE PRESIDENT: Like all things, we do not want to go haring off down channels that
22 are not directly relevant. On the other hand, it is always useful to have an idea of the full
23 background of where things are going.

24 MR BARLING: We will give a thought to whether you have enough material for the
25 purposes of the case about those other products.

26 THE PRESIDENT: If I may ask, Mr Barling, you have been very anxious, as I
27 understand it, to deal with Win Back as well. If we were to deal with Save and you

1 were to, in theory, win on Save, that would probably or might put you in a strong position
2 in relation to Win Back. But if you were to lose on Save, I do not know whether there
3 would be other arguments on Win Back that might be relevant? In other words, what is
4 your interest in getting this all done together?

5 MR BARLING: It is not particularly that we wanted it all done together, it was more the
6 fact that the Director, as he then was, made some very unequivocal statements about the
7 application of the principle to Win Back. Therefore, it seemed to us that, rather than
8 leave it in the air, at least the Tribunal should be directed to that. Because they were not
9 sort of saying there might be knock-on effects on Win Back, he said that these principles
10 apply to Win Back.

11 THE PRESIDENT: Yes.

12 MR BARLING: So we were sort of slightly driven into bringing that---

13 THE PRESIDENT: Taking that on the chin, as it were.

14 MR BARLING: I think we all accept that, win or lose, there is likely to be a close
15 analogy for Win Back, although it is right to say that from a factual perspective, given the
16 lapse of time that occurs in relation to Win Back activity, it may be much more likely that
17 the information comes from a separate source and, therefore, the general conditions 1.2
18 problem may be less of a problem in respect of Win Back cases. That aside, there is a
19 close analogy.

20 THE PRESIDENT: Yes, Ms Sharpson.

21 MS SHARPSON: Sir, I wondered if I could just add one or two points on the matters
22 that you have been canvassing with my learned friend?

23 THE PRESIDENT: Yes, of course.

24 MS SHARPSON: They very much build on the points that in fact he has just been
25 making. The separate products are indeed separate products. The decision was a
26 decision, we say, on Save, and that is clear, as you, sir, just put to Mr Barling from what
27 is in the first part of the notification -- what we say is in fact the notification, full stop.

1 Ofcom accepts that one would need to look at the specific nature of other products. That
2 is something that was not done, and the notification is, for that reason, a notification.

3 THE PRESIDENT: When you say "the other products", you are talking about
4 transferable products now?

5 MS SHARPSON: Sir, indeed those, but also there is a separate investigation into Win
6 Back, precisely because Win back was not part of the original notification, and one
7 would indeed have to look at what Mr Barling called the separate factual perspective.

8 THE PRESIDENT: Although the Director, having chosen to make some fairly
9 disparaging remarks about Win back, can hardly complain if BT says: "Well, we want to
10 put that in issue as well."

11 MS SHARPSON: Sir, with all respect, I do express a concern on behalf the Ofcom that
12 where an explanatory statement is made so that the industry as a whole can see what may
13 be the implications of a conclusion in relation to one product, that that should be used as
14 a reason for including within the context of a section 94 appeal every product to which
15 the statement of principle might hypothetically apply. This is hardly unique to the
16 present situation, obviously.

17 THE PRESIDENT: No.

18 MS SHARPSON: But there is a concern because obviously one is very careful, as the
19 regulator, to investigate a specific product, to invite representations in relation to that to
20 reach a conclusion. Indeed, were we taking the opposite view and saying we notified in
21 respect of Save but that decision binds absolutely everything else, I am sure that it would
22 be said against us: "Wait a minute, you have not in fact investigated the other products in
23 any plausible way and you have not given us a chance to make representations about
24 those." I merely wish to put that on the record.

25 THE PRESIDENT: Part of this will depend on whether in construing the notification one
26 looks strictly at the form or one takes in the substance, and how far in taking in the
27 substance one looks at the conclusions the Director draws for other matters that have

1 not been the specific subject of investigation but are closely related. In some ways, at
2 least for myself, one can see both sides of this particular argument at this stage, which is
3 another reason why I think it should go off to the hearing.

4 MS SHARPSON: Sir, I think it was an appreciation of the way that you put the point at
5 the first case management conference which led us to be content that it should go off to
6 the hearing.

7 The concern is really that if material in relation to other products is put forward, in
8 one sense one can see the relevance of that. On the other hand, those other products have
9 not been analysed by Ofcom and it would be slightly unfortunate in the sense if one
10 reached a firm conclusion on the application of the principles to those products when
11 that investigation and analysis has not taken place.

12 THE PRESIDENT: Thank you.

13 MR BARLING: Sir, can I just say that we agree with that. It is very extraordinary that
14 the Director should have made such unequivocal statements to the effect that the
15 principles actually do apply to Win Back when he has not investigated it. But we cannot
16 help that; that is what he has done. It is not that we are quarrelling with that point, but
17 say that in fact he has done something else in the event and not actually followed the
18 logic of that approach.

19 THE PRESIDENT: I think at this stage all we can do is just leave that issue there.

20 We have a point next that we would like to raise ourselves which relates to the way
21 in which sections 94 to 97 of the Act are supposed to work, having, in particular, regard
22 to the terms of the Directive on which they are based, which is article 10(2) and article
23 10(3) of the authorisation directive. This, I think, is also related to the question of what
24 Ofcom has actually decided, which we considered last time, as being the subject of
25 further statements in the pleadings, namely whether it is Ofcom's position that it has
26 reasonable grounds for believing or whether it is Ofcom's position that BT has in fact
27 contravened general condition 1.2, and whether in practice there is any difference

1 between the two.

2 It seems to us that if you look at article 10(2) of the authorisation directive -- Mark,
3 have you got that handy? Can you just pass it up to me? (**Same handed**) It is at tab 6 in
4 binder 2A of the BT's Notice of Appeal. That provides that where a national regulatory
5 authority finds, et cetera, that an undertaking does not comply, it shall notify the
6 undertaking of those findings and give the undertaking a reasonable opportunity to state
7 its views or remedy any breaches within one month after notification, or a shorter period
8 or a longer period. That provision seems to have an alternative in it, that is to say it must
9 give the undertaking a reasonable opportunity to state its views or remedy any breaches
10 within one month after the notification. It would seem perhaps implicit that if the
11 regulatory authority gives the undertaking a reasonable opportunity to state its views, the
12 period in which it must remedy any breaches is not yet triggered; that is to say that the
13 opportunity to state the views takes place before you are under the obligation to remedy
14 the breaches. What we are wondering to ourselves is whether the way this section is
15 supposed to work is that, in effect, the regulatory authority should say to the undertaking,
16 effectively, either: "You are required to remedy your breach within one month, unless
17 you wish to state your views. If you wish to state your views, we will give a reasonable
18 opportunity to do so. And we will fix the period, if any, in which you must remedy your
19 breach once we have taken into account your views." That would involve, effectively,
20 fixing a longer period decided by the national regulatory authority under the powers
21 envisaged by article 10 and reproduced, I think, in article 94. Otherwise, unless you give
22 some sort of construction of that sort, the word "reasonable" in article 10(2) seems to sit
23 somewhat uneasily with the one month, et cetera, et cetera. It seems to envisage that there
24 is a reasonable opportunity first and then the sort of remedy stage becomes later. In other
25 words, you insert the opportunity to state your views before you get to the definitive
26 requirement to remedy the breaches, if you see what I mean. We touched on this point a
27 bit last time. In other words, does the one month period become effective to remedy

1 the breach before you have had a reasonable opportunity to state your views? If you take
2 an extreme case, could the Director say, "You must remedy the breach within a month".
3 And at the end of that month move to the enforcement penalty provisions, even though
4 within that framework BT had not had a reasonable opportunity to state its views, or the
5 opportunity was very short or inadequate? Or can the reasonable opportunity really fit
6 within the one month?

7 This point may not be directly relevant to the substantive issues in the appeal, but
8 we feel at the moment it might be of assistance to us to have some further reflection by
9 the parties on how this procedure is supposed to work, because it is obviously quite an
10 important procedure from the point of view not only of this case but other cases as well.

11 What we do notice is that if, having looked at the Directive, you then go back to
12 section 94, it may be implicit in 94. It is certainly not explicit that the undertaking
13 concerned has to have a reasonable opportunity; i.e. the word "reasonable" has not
14 surfaced in the way that these particular provisions are implemented.

15 That approach, if right, might help us a little bit on the question of whether what
16 we are dealing with is a decision in which Ofcom is satisfied of something or a decision
17 in which they have reasonable grounds to believe something. Because it might be that if
18 you insert implicitly a reasonable opportunity to make your views known and say that it
19 is only after that stage then they fix finally the time limit in which the breach is to be
20 remedied, that Ofcom would by then, implicitly or explicitly, have moved beyond
21 reasonable grounds for belief, but, having considered the representations, would actually
22 have reached the conclusion that -- to use you neutral word -- there has been a breach of
23 the general condition. In other words, you might get an implied decision, that implied
24 decision being strictly speaking the appealable decision rather than the reasonable
25 grounds to believe decision.

26 These provisions, either in the Directive or in the statute, are not particularly
27 felicitously drafted, but obviously our certain is, first of all, to make sure that we

1 have correctly understood what is said to be the Directive and the implementing
2 legislation; and, secondly, that it works, broadly speaking, in a way that is workable both
3 from the point of view of effective enforcement, which is Ofcom's principal interest, but
4 also from the point of view of general principles of natural justice, which are as part of
5 Community law as they are of English law and are not actually in conflict with the
6 efficient enforcement of these provisions. Because giving people the opportunity to be
7 heard very often does clarify the position and enables a better decision to be taken.

8 So on this part of the case I think, at this stage, when we get to the hearing, we are
9 at least provisionally of the mind that the way this procedure works ought to be explored
10 a bit further in the arguments that we hear, even though it may not be completely central
11 to the case for us in order to decide this particular case.

12 MR BARLING: Sir, I wonder whether I could just explore with you how we might do
13 that?

14 THE PRESIDENT: Have I made myself broadly clear, Mr Barling?

15 MR BARLING: No, you have made yourself, if I may say so, pellucidly clear and all
16 those questions that you have expressed very much chine in with questions we had asked
17 ourselves at various stages.

18 THE PRESIDENT: I am sure they have.

19 MR BARLING: I think they would have certainly come more into focus had this been a
20 case where interim relief had been sought, for example, or where BT had not been
21 prepared to effectively, pending the hearing of the appeal, stop doing the thing which BT
22 contends it is entitled to do.

23 But it does not help, of course, that where the Directive, on the face of it, envisages
24 more of a one stage procedure, that that been implemented in a two step, namely section
25 94 and then followed on by section 95. One can see, in a way, the dilemma that the
26 implementer had----

27 THE PRESIDENT: That the draftsman had, yes.

1 MR BARLING: ----saying: "We cannot make a final decision if we are still hearing
2 representations, so we had better make it a sort of provisional decision and call it
3 'reasonable grounds.'" That might have been behind that thinking. But you and your
4 colleagues obviously have raised other questions.

5 The first question I have is would the Tribunal be content if the comments were
6 made in our skeleton arguments on these matters rather than in any separate earlier
7 written document?

8 THE PRESIDENT: I would have thought that sounds a very sensible way away of
9 dealing with that, Mr Barling.

10 MR BARLING: I am grateful for that.

11 THE PRESIDENT: Forgive me for just clarifying one matter I may have forgotten. In
12 this particular case, having got the notification, you had made some representations.

13 MR BARLING: We do not complain that we have not had an opportunity.

14 THE PRESIDENT: But those representations are sort of hanging in the air. Nothing is
15 sort of happening with them.

16 MR BARLING: We made representations in a sense -- yes, even before the notification
17 was made there was an ongoing process, and then, once the notification was made, we
18 were given a formal opportunity to make formal further representations. None of this
19 really, in a sense, helps on the real vice of the way this has been done, which is that you
20 are in a sense, even while you are putting your case or formulating your
21 representations----

22 THE PRESIDENT: You are under the----

23 MR BARLING: ----you are under the position that if you do not stop doing it by the
24 deadline, which is the same deadline as when you put in your representations, as it works
25 out, you are subject to penalty and enforcement. That is the real vice.

26 THE PRESIDENT: Yes.

27 MR BARLING: The way we had approached it in this case, and I am not

1 seeking to back-track on offering some help in the skeleton argument.

2 THE PRESIDENT: No.

3 MR BARLING: The way it has emerged is that this, thankfully, is a case, so far as we
4 can all see, where you do not strictly have to resolve the issue.

5 THE PRESIDENT: No. Though, if I may say so -- Ms Sharpson can comment in a
6 moment -- at least I am not entirely clear in my own head as to exactly what Ofcom's
7 position is, because they are still saying it is a reasonable grounds for belief case, but
8 nearly satisfied.

9 MR BARLING: I think they reach it by a slightly more long-winded conclusion. They
10 reach the same conclusion as we do, which is that the question for the Tribunal is,
11 nevertheless, the interpretation of general condition 1.2 and its application or not to the
12 particular activities in question. Therefore, reasonable grounds, they accept, do not
13 actually come into the question in this case.

14 THE PRESIDENT: I am sorry we are going over ground we did not touch on last time.
15 It is a funny situation where you are under the Sword of Damacles of the notification.
16 You are making the representations; you have made the representations. We do not quite
17 know to what extent Ofcom have actually considered or acted on the representations,
18 which takes us back to the exact meaning of "opportunity" which was raised by Ms
19 Simmons last time. But whether or not, by whatever route you get there, it would be
20 difficult to conceive of a situation in which you had the right to make representations but
21 they did not have the obligation to consider them and reach some further, more concluded
22 position having considered them. That stage is missing at the moment.

23 MR BARLING: It is missing entirely.

24 THE PRESIDENT: It is very curious.

25 MR BARLING: No, no, it is a dog's dinner, frankly. It is just a mess.

26 THE PRESIDENT: It is in a very important area of public law and it is not the sort of
27 situation we can leave untidy.

1 MR BARLING: All we can do is assume by saying nothing Ofcom stand by their
2 original reasons. But their original reasons do not, obviously, of necessity cannot, deal
3 with what is in our representations.

4 THE PRESIDENT: Supposing you have come up with some new point or further point.
5 We do not know what the answer is.

6 MR BARLING: So it is a mess and it may be that it does not comply with general
7 principles of Community law or with fundamental principles. But we do not have to
8 decide it.

9 THE PRESIDENT: I know you do not have to decide it and you probably do not want us
10 to decide it, or neither party may be too keen on spending money arguing this point.

11 MR BARLING: There will come a case, of course.

12 THE PRESIDENT: But the Tribunal, as a Tribunal, feels that it cannot leave this thing
13 as a dog's dinner, as you put it, without making some further effort to understand what
14 the statutory structure is and how it could be reconciled, as I think it probably can be
15 reconciled, without doing undue violence to the language of the Directive or the section,
16 with general principles of Community law and a proper procedure, which must be in
17 everybody's interest.

18 You may want to talk us out of saying anything about it in due course, but, at the
19 moment, we feel it is something we ought to explore a bit further.

20 MR BARLING: We are enormously in sympathy with the predicament the Tribunal is in
21 in that regard. Having looked at this for the first time, it obviously wants to take a view
22 on how it would operate for the future. That obviously would be enormously helpful to
23 everybody, not just the parties to this litigation. We will probably, therefore, be very
24 happy to put any assistance we can into the argument and then it is very much, one
25 suspects, a matter for the Tribunal as to how far it wants to deal with it.

26 THE PRESIDENT: Yes, thank you very much.

27 Ms Sharpson, we are not trying to make Ofcom's life more difficult by

1 inventing procedures where none are necessary, but it does seem to us it might, in the
2 end, be helpful to you to have a further exploration of how this is all supposed to work.

3 MS SHARPSON: Sir, I fully see the difficulty that the Tribunal is facing since this is the
4 first case that comes up. Although I think both parties say that in the present case
5 actually it does not matter to the central issue, one fully understands the Tribunal's
6 concern to understand how the Directive and the implementing sections fit together.

7 Perhaps we may do the same as Mr Barling has suggested and seek to address it in
8 the skeleton argument rather than in a separate document?

9 THE PRESIDENT: Yes.

10 MS SHARPSON: By way of clarification, at this stage, I would merely say that
11 obviously the representations were considered. The way that we approach it is, had the
12 representations convinced us that in fact there were not any longer reasonable grounds,
13 had they undermined the reasonable grounds, then the appropriate response would have
14 been to have withdrawn the notification. Perhaps I can explore it in greater deal in the
15 written observations.

16 THE PRESIDENT: From a procedural point of view, and obviously we have no reason
17 to suppose that the Director would not consider the representations -- he would not just
18 put them in a drawer, he would read them and no doubt the team would reflect and so
19 forth. But, from the point of view of judicial review, as it were, we do not quite know
20 what he made of them, if you see what I mean.

21 MS SHARPSON: Because there is no separate document that says: "We have looked at
22 the further representations. However, we take the views, because...that..." Just to clarify
23 in the mind of yourself and your colleagues, the problem is that document, if I can
24 describe it loosely, that document is not there?

25 THE PRESIDENT: Yes, that document is not there. If there was such a document, or
26 by way of procedure we established that it would be helpful that there was such a
27 document, that would also in some ways help us on the question of what exactly is

1 the appealable decision and what sort of state of mind the Director is in.

2 MS SHARPSON: A reasonable ground state of mind or a conclusion state of mind.

3 THE PRESIDENT: Exactly. So I think you have very much got the point, Ms Sharpson.

4 We are obviously as anxious as you are to arrive at a sensible solution that makes this a
5 workable procedure, from your point of view in particular.

6 MS SHARPSON: Of course.

7 THE PRESIDENT: So can we just leave that there?

8 MR BARLING: Yes, sir, I think we can. But I think I ought just to comment on one
9 thing. Ms Sharpson said that they just have to still be in a state of mind of reasonable
10 grounds after they have received and examined the representations. That seems to us to
11 be probably not the case. They then move on, as one sees from section 95, to a state of
12 mind of being satisfied. That is the condition for operating section 95.

13 MS SIMMONS: And section 96.

14 MR BARLING: And section 96, madam, as you say. So that highlights the
15 unsatisfactory nature of this, that they are then applying a new test once they have
16 received and examined the representations, but one does not know what their reasons are
17 for finding that.

18 THE PRESIDENT: But one is not clear, and it is not a criticism of Ofcom, but the
19 structure does not envisage, except conceivably in the context of a further enforcement
20 decision, them setting out the basis upon which they are satisfied. We could say that they
21 were implicitly satisfied and that that was a sort of implicitly appealable decision or
22 further appealable decision, but we would not know, because there is no document, on
23 what grounds they were so satisfied.

24 MR BARLING: It may be that they would read section 95 and apply section 95 where it
25 is as relevant as obliging them in what is described as an enforcement notification to set
26 out that they were satisfied now and the reasons in a separate... That may well be how
27 that will operate.

1 That does not deal with the kind of situation we are in here, where we have
2 actually felt it was worth -- where the decision was not to take the risk or penalty but
3 rather to test the matter.

4 THE PRESIDENT: Yes, you do not want to be in a position of having to risk a penalty
5 in order to get Ofcom's final reasons on the table.

6 MR BARLING: Precisely.

7 THE PRESIDENT: That is basically your difficulty.

8 MS SIMMONS: They do have to give their reasons if they issue an enforcement
9 notification under 95. That is 95(4)(a).

10 THE PRESIDENT: Yes.

11 MR BARLING: Yes.

12 MS SIMMONS: They do not need to do that if all they do is impose a penalty.

13 MR BARLING: There is no express provision for it, is there?

14 MS SIMMONS: Not in 96, but there is in 95(4)(a).

15 MR BARLING: Yes.

16 MS SIMMONS: And 96 is not dependent on an enforcement notification. You see that,
17 I think, from 96(5), or that is my reading of it.

18 MR BARLING: On the face of it, that appears to be the case. So had this not been
19 essentially a matter of interpretation and admitted fact, and so on, we would have been in
20 an enormous quandary had we taken the same approach, because then we might have
21 genuinely been faced with an argument from Ofcom, "We only have to satisfy a threshold
22 of reasonable grounds, and we felt that we had reasonable grounds." That is the lacuna
23 here.

24 MS SIMMONS: They cannot do that, because 96(2)(a) goes further than reasonable
25 grounds. They cannot impose a penalty unless they are satisfied----

26 MR BARLING: Yes, that there has been a contravention.

27 MS SIMMONS: Yes. So that is further than reasonable grounds.

1 MR BARLING: That is perfectly right, yes. But, as you point out----

2 MS SIMMONS: But they do not have to give their reasons.

3 MR BARLING: Yes.

4 MS SIMMONS: Under the Act, anyway, they do not need to give their reasons.

5 Whether there are other requirements that make them give their reasons, that is another
6 matter.

7 MR BARLING: Precisely, yes. That, no doubt, one suspects, is what the Tribunal has in
8 mind.

9 THE PRESIDENT: Yes. It is a curious state of affairs that on the face of the statute you
10 have to give reasons for an enforcement notification but not for a penalty.

11 MR BARLING: Yes. The real problem is the dilemma it puts the recipient of the
12 notification in as to whether they will have no alternative but to comply with the
13 conditions and cease the activities or do whatever is required of them to comply before,
14 effectively, the procedure has run its course.

15 THE PRESIDENT: Yes.

16 MS SIMMONS: But it appears from the Directive that that was not what was intended.

17 MR BARLING: The Directive itself has a different vice which purports to mean that the
18 regulatory authority can reach a final decision prior to having received any
19 representations, which is presumably why it has been interpreted in the UK statute as
20 being a provisional decision on reasonable grounds, because they wish to avoid what, on
21 the face of it, the Directive required, which was that there was a finding of a
22 contravention prior to any opportunity to put in representations. So each has got their
23 own vice but with similar results for the punter.

24 THE PRESIDENT: Yes.

25 MR BARLING: Anyway, we will certainly be very happy to try and put forward
26 some----

27 THE PRESIDENT: If you have any further reflections on these issues, I think

1 we would be grateful.

2 So far as the various issues in the case itself are concerned -- I think we are now
3 on item 2 of the agenda -- there are obviously quite a large number of issues, but one in
4 particular we would like to signal as a possible issue is this question of confidential
5 information and whether, in particular, and whether on the true construction of the
6 Directive and the relevant condition, one is talking about confidential information or
7 whether one is talking about information that has given in confidence, which are perhaps
8 two slightly different ideas. We have in mind some of the springboard cases that have
9 arisen in a different context in breach of confidence cases, where one is talking not so
10 much of information that is confidential, in the sense that it may be well information that
11 is available on open shelves or publicly available, it may not be confidential but it is still
12 protected as information given in confidence because it gives, as it were, a springboard to
13 the possessor of the information that he would not otherwise have benefited from.

14 In that connection, if you look at article 4(3) of the access directive, which is at tab
15 5 of BT's binder 2A. Can you just hand me up the decision a moment, please? (**Same**
16 **handed**) If we compare article 4(3) with general condition 1.2, general condition 1.2
17 does not quite track article 4(3). Article 4(3) 3 provides that:

18 "Member states shall require that undertakings which acquire information from
19 another undertaking before, during or after the process of negotiating access for
20 information agreements, use that information solely for the purpose for which it was
21 supplied and respect at all times the confidentiality of information transmitted or stored."

22 The terms of general condition 1.2 insert some words. It starts:

23 "Where a communication is provided that requires information from another
24 communications provider before, during or after the process of negotiating network
25 access...", and then goes on, "and where such information is acquired in confidence in
26 connection with and solely for the purpose of such negotiation or arrangements, the
27 communications provider shall use that information solely," et cetera, "in respect

1 of, at all times, the confidentiality."

2 In other words, the idea of acquired in confidence may be arguably or not implicit
3 in article 4(3) but does not actually appear in the exact wording of that provision.

4 So what we were wondering to ourselves at this stage, at this very early and
5 provisional state of our reflection where we do not have any views on anything, and what
6 we would like the parties' help on, is what, in the context in this case, are we talking
7 about? Are we talking about information that is confidential in the sense that it is a
8 business secret, at least as between the parties, which it is probably not? Or are we
9 talking about information that is acquired in confidence, which is a slightly different
10 idea? If the latter idea, what is the relationship between that idea and article 4(3) of the
11 access directive?

12 I sincerely trust we have not thrown a hand grenade into the case by making those
13 observations.

14 MR BARLING: No, not at all. Of course, if there is a mismatch between the general
15 condition 1.2 and article 4(3), that raises other interesting questions which we touched on
16 in our reply as to whether you can impose greater obligations of a penal nature or have
17 penal results on persons by reference to a Directive. I am not sure----

18 THE PRESIDENT: At this stage we do not know if there is a mismatch or not.

19 MR BARLING: No, but the wording is different.

20 THE PRESIDENT: We simply notice the wording and wonder about it in the backs of
21 our minds.

22 MR BARLING: Yes. Sir, we will obviously deal with that in our skeletons.

23 THE PRESIDENT: I think that is the point.

24 MS SIMMONS: I notice that in the agreed facts you have agreed the information but
25 you have not agreed whether it is confidential. Do you see what I mean? So that raises
26 this question of whether you are actually talking about confidential information at all or
27 whether you are talking about in confidence.

1 MR BARLING: I think we steered away from it after initial explorations because we
2 realised that it was going to be a very difficult area to try and agree things.

3 MS SIMMONS: So it is going to be an important issue in the construction of the general
4 condition.

5 MR BARLING: Yes, although the facts will not be at all in dispute.

6 THE PRESIDENT: The underlying facts are not in dispute. How we characterise the
7 facts is obviously at the heart of the case.

8 MS SIMMONS: What is the information that is in confidence?

9 MR BARLING: Yes. We say there are, in fact, other, as you have seen, easier ways
10 through this case.

11 THE PRESIDENT: Yes.

12 MR BARLING: Because the information, whatever it was, does not come actually from
13 but only via, and it is only an opportunistic, only an accident, a chance that it comes via
14 the other operator. If that is right, then, in a sense, one does not necessarily need to
15 resolve that question either as to the nature of the information. We say that what is really
16 at the root of this case, that this is information about BT's customer, which BT is entitled
17 to and which BT, except for the incidental change of process carried out for expedience,
18 which no one every dreamt would lead to anything of this kind, would still be provided
19 directly to BT by the customer.

20 THE PRESIDENT: Yes. Obviously, what the exact scope of article 4(3) is or what it is
21 really driving at, what is the mischief it is addressing is relevant on that issue.

22 MR BARLING: I do not know, sir, whether you had finished with issues or not?

23 THE PRESIDENT: I was just going to give Ms Sharpson a chance to react. I am not
24 inviting you necessarily to react in any particular way, Ms Sharpson, save to put us right
25 if we have missed something fundamental.

26 MS SHARPSON: No, sir, I think the way Mr Barling has put it in relation to the agreed
27 facts is very fair; that the core of the agreed facts, a rather short list, could readily be

1 | agreed. What could be not be agreed, and therefore what was steered clear of, for good
2 | reason, by both sides, was how those facts should be characterised. I do not think it is
3 | sensible for me to try to develop that further at a case management conference. We
4 | obviously take that position that where the information comes from is not incidental, it is
5 | actually central, and that the plain wording of article 4(3) does lend support to the
6 | position that information should not be used for a purpose other than for that which it was
7 | provided, and the direct route of communication is from the chosen service provider to
8 | BT, not from the customer. Indeed, we say in terms that if the information had come
9 | directly from the customer, that is not the same thing.

10 | THE PRESIDENT: Is it your case that if the information is being in some sense used for
11 | a purpose other than that for which it was provided, one does not really need to go on to
12 | worry about whether it was confidential or in confidence or anything; there is just one
13 | purpose for which you can use it.

14 | MS SHARPSON: There is the purpose for which it was provided. That is the purpose
15 | for which it can be used. Having been communicated in this context, it acquires
16 | confidentiality, which is certainly one way that one could put it, which makes sense of
17 | the second part of article 4(3), "preserve the confidentiality of information transmitted".

18 | THE PRESIDENT: Yes.

19 | MS SHARPSON: So that, irrespective of its original status, if it comes to BT in this
20 | context, then it is protected and may be used for the purposes, but only the purpose for
21 | which it was transmitted.

22 | MS SIMMONS: I think what you are saying is it is the relationship which makes the
23 | information confidential rather than the nature of the information.

24 | MS SHARPSON: Indeed.

25 | THE PRESIDENT: Which is not very far from some of those springboard cases where it
26 | is particular circumstances in which you have got the information that you could have got
27 | from some other source that makes it protected.

1 MS SHARPSON: Indeed.

2 MS SIMMONS: Then the issue between you is, if this information which you are giving
3 as an agent, whether that takes it out or not?

4 THE PRESIDENT: Yes, well, I think that, from our side, at the moment, at least into
5 broad outline, is probably what we would like to raise at this point.

6 MR BARLING: Sir, all I was going to do was just to clarify one point on the issues. In
7 our covering letter dealing with agenda we sought, as it were, to put the issue in a
8 nutshell and did it terms of the issue in the appeal is does the condition apply in those
9 circumstances? Does general condition 1.2 apply in circumstances where... That was
10 not, as it were, our intention there to limit in any way the arguments we put in our Notice
11 of Appeal.

12 THE PRESIDENT: No, I mean, that is the overall question in the case, but it breaks
13 down into a large number of subjects.

14 MR BARLING: And it covers as well the point that we make in our pleadings. We
15 make it in a sense in two ways: that it supports our interpretation of general condition 1.2
16 if to interpret it as my learned friend's clients do would raise proportionality issues and
17 discrimination issues and other issues of general principle. Sir, that, as it were, is an
18 interpretive argument.

19 THE PRESIDENT: Yes.

20 MR BARLING: There is underlying that, of course, the point that if it would do too
21 much violence to the language to interpret it in the way that we submit it should be
22 interpreted, what effect that has then if it is offensive to proportionality, discrimination,
23 and so on, which is very much a subsidiary point.

24 THE PRESIDENT: You mean if on the true construction it has only got one meaning
25 and that meaning is a disproportionate meaning, what do we do then?

26 MR BARLING: Yes. By putting it in terms of does the condition apply we do not,
27 obviously, abandon that point.

1 THE PRESIDENT: No.

2 MR BARLING: Obviously our primary submission is that you do not need to worry
3 about that because our interpretation is the right one.

4 THE PRESIDENT: Yes. I think that takes us on through our agenda. I think we have
5 dealt in passing with the agreed facts. We are grateful to the efforts that have been made.
6 I understand why the agreed facts stop where they do.

7 As far as number 4 is concerned, we have the impression that nobody wants to
8 have any evidence from witnesses.

9 That I think then takes us on to the role of the Interveners. Do we have the
10 Interveners here?

11 MR EDWARDS: Indeed, sir.

12 THE PRESIDENT: I am sorry, forgive me. You are Mr Edwards, are you?

13 MR EDWARDS: Indeed, sir. The Appellants were kind enough to indicate in their short
14 letter to you, sir, that they were quite happy that we should submit a skeleton and make
15 short oral submissions. Indeed, that is what we would wish to do, if we may?

16 THE PRESIDENT: Yes.

17 MR EDWARDS: In our Statement of Intervention we make essentially two points: one
18 on the very point of confidentiality and springboard, which we think is central; and
19 another point on the meaning of general condition 1.2, as elaborated by the definition of
20 "network access" in point 1.4, which is another point we would want also to address.

21 THE PRESIDENT: There seems to be no objection to that.

22 MS SHARPSON: No objection, no.

23 THE PRESIDENT: So we need to build into the timetable and the hearing an
24 opportunity for you to put in a short skeleton and make a short submission to us.

25 MR EDWARDS: Thank you, sir.

26 THE PRESIDENT: Does that then take us on to question of timetable? I think it does.
27 That is principally the exchange of skeletons. BT has made a suggestion. Is

1 that satisfactory to you, Ms Sharpson?

2 MS SHARPSON: Sir, that suggestion is satisfactory. I am sorry because you may
3 have----

4 THE PRESIDENT: I may have missed a counter suggestion on your part, forgive me.

5 MS SHARPSON: No, sir, it is not in relation to that. It is though in relation to the way
6 in which, within the context actually of the timing of the hearing, one would deal with the
7 intervention. But you may intend to be moving to that under the heading of "The Main
8 Hearing" and I may be a bit premature in what I was going to say.

9 THE PRESIDENT: What was going through your mind, so we can be thinking about it?

10 MS SHARPSON: Sir, it is merely it may help to flag it up at this point. The suggestion
11 which BT have made is BT opening, Ofcom response to that, then intervention, and then
12 BT obviously having the final word. The only gloss on that that I would seek to suggest
13 is that obviously it is not fully clear to Ofcom at this stage quite what the Interveners will
14 be saying. It may be that Ofcom would wish to have the opportunity to make a very brief
15 comment about what has been said by way of intervention. Obviously, that opportunity
16 is not one that one would take up automatically. It would be should there be a need to
17 clarify, whereas the Interveners had put particular matters a particular way and perhaps
18 Ofcom did not see it in exactly the same light. I mention that merely because it may be
19 helpful to bear that in mind at this stage.

20 THE PRESIDENT: I did not press Mr Edwards on exactly how much time he would
21 want at the main hearing. But we have already got your Statement in Intervention, we
22 will have a short skeleton from you and I would not have thought you needed perhaps
23 more than about fifteen minutes to make an oral presentation to us.

24 MR EDWARDS: In the light of your previous exhortation, sir, indeed I would not expect
25 to take very long at all. Both those points are quite short. There may be, and you would
26 see it in the skeleton argument, one or two additional points in response to some other
27 statement made by BT in its reply that I would want to draw attention to, but I do

1 not anticipate speaking at great length on these points.

2 The point that might take most time would be the springboard point, because there
3 one is involved in looking at some common law decisions and seeking to apply those to
4 this situation, which may take a little bit longer than one might otherwise expect.

5 THE PRESIDENT: Our preferred approach is to have as much as possible written down
6 for us.

7 MR EDWARDS: Sure.

8 THE PRESIDENT: Rather than, as it were, taking us through authorities and things like
9 that. So I would have thought, unless you had a strong objection, sort of fifteen minutes
10 is about the time frame you should work within for your oral presentation. Put as much
11 down in writing as possible.

12 MR EDWARDS: I will bear that in mind, sir.

13 THE PRESIDENT: That is very kind. Thank you very much.

14 In which case I would have thought, Ms Sharpson, the intervention of the
15 Intervener should not throw any fundamental spanner in the works as far as the timing of
16 the hearing is concerned. You will have their skeleton in advance and their submissions
17 will be merely emphasising, I think, what is in the skeleton. So we need to build in the
18 possibility that you may want to reply to that and I would not have thought you were
19 going to need more than a comparable time to deal with the intervention.

20 MS SHARPSON: Sir, I am most grateful. I would certainly not anticipate that I would
21 need longer than a comparable time because I am not seeking the opportunity to make
22 two speeches. It might very well be that I either needed no time at all or I needed five
23 minutes. But I would be grateful just to have that opportunity, should I need to make any
24 comments.

25 THE PRESIDENT: We need to build in any comments of Ofcom on the Intervener
26 before BT kicks off with its final submissions.

27 MS SHARPSON: Sir, yes, I would be grateful.

1 THE PRESIDENT: On the actual exchanges of the skeletons is that timetable indicated
2 by BT satisfactory to everybody? That is basically exchange at 1 o'clock on 28th April
3 and BVL thus by 1 o'clock on 30th. Can everybody work to that?

4 MR EDWARDS: That is fine, sir, yes.

5 THE PRESIDENT: We will take that as the timetable for skeletons. Subject to any
6 comments, we will structure the main hearing around the suggestion made by BT,
7 inserting a brief period for Ofcom to reply to anything the Intervener says, if so advised.

8 Just give me a moment while we have a little discussion. **(Pause whilst Panel**
9 **confer)** I do not think there is anything else we particularly wanted to raise. We see the
10 case largely as a point of principle. As I think more than one party has observed, we are
11 not sure that particular evidence about particular alleged incidents is likely to be of much
12 help to us; nor are we particularly clear that what other regulatory authorities may or may
13 not think is also likely to be of much help to us in this field where there is, as yet, no
14 authoritative decision, though what other regulatory authorities think is perhaps part of
15 the background, but not necessarily decisive.

16 From our point of view, I think we probably have, therefore, covered the main
17 issues. Are there any other points anybody would like to raise today while we are here?

18 MR BARLING: No, sir.

19 THE PRESIDENT: Good. Thank you very much. We will, therefore, see you again on
20 10.30 on 5th May.

21 MR BARLING: Thank you very much.

22
