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IN THE COMPETITION

Case No. 1026/2/3/04

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

27 February, 2004

Before:
SIR CHRISTOPHER BELLAMY
(The President)

PROFESSOR JOHN PICKERING
MRS PATRICIA QUIGLEY

BETWEEN:

FREESERVE.COM PLC

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr Nicholas Green QC and Mr Keith Jones (instructed by Messrs Baker & Mckenzie) appeared for the Applicant

Mr Richard Fowler QC and Mr Clive Gordon (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the respondent.

Mr Gerald Barling QC and Mr Paulo Palmigiano (instructed by the Head of Competition and Public Law, BT Retail) appeared for the intervener.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. Unless there are any initial
2 applications or observations I suggest we take the agenda for this Case Management
3 Conference and work through it.

4 Item 1– the forum of the proceedings. We do not need to spend time on this, the
5 default forum is England and Wales unless otherwise ordered by the Tribunal.

6 Item 2 – interventions. As far as we know there are no further interventions
7 beyond the one from BT that we have already dealt with.

8 Item 3 – a preliminary discussion of the issues likely to arise does take us on to
9 one or two background points that the Tribunal would like to raise at this stage. The
10 first of these, which is primarily a question for Freeserve, though it is also I think a
11 question for OFCOM, is what is the situation now regarding the *Wanadoo* Decision,
12 and in particular the *Wanadoo* appeal? Both of those documents, that is to say the
13 Decision itself and the appeal from that Decision, seem to us to be of potential
14 relevance to this case. How does it fit in, Mr Green?

15 MR GREEN: So far as the decision is concerned, we are obviously conscious that you were
16 going to need a copy of it.

17 THE PRESIDENT: Yes.

18 MR GREEN: As we understand it, it is available in French and there is a non-confidential
19 version which has been agreed with Wanadoo. The English translation is either
20 complete, or near complete, and we were going to suggest that in order to obtain an
21 official translation we can contact the Commission, or perhaps the Tribunal or even
22 OFCOM can contact the Commission. We suspect the Commission would have no
23 problem in providing the official, or virtually official translation. Failing that, we have
24 our own informal translation in English. It naturally has infelicities of translation in it,
25 it is a working document that we have simply used for our own purposes. We think it
26 would be more sensible if an official translation could be provided for the purposes of
27 the Tribunal, but we obviously appreciate that everybody is going to need that.

28 THE PRESIDENT: Well, I would have thought that if there is at this stage an official
29 version in French we might as well have that anyway, and if there is an unofficial
30 version that is translated into English it is probably useful to have that without waiting
31 for some official version, as soon as those documents can conveniently be provided.

1 MR GREEN: Yes. The unofficial version is simply one which we have produced. It is very
2 unofficial.

3 THE PRESIDENT: Yes. I am sure we will be able to understand it.

4 MR GREEN: In terms of getting the official English translation we do understand it is
5 nearly complete. The French version is obviously the final version, but the confidential
6 version has been negotiated with Wanadoo and, as I understand it, agreed. We hope we
7 can provide that in short order. We were wondering whether the Tribunal might be able
8 to contact the Commission to get the English version if there was an official line of
9 communication?

10 THE PRESIDENT: Well although the modernisation regulation does not officially come
11 into force until 1st May it does occur to us that this is a possible case where, under
12 Article 15, we ought to be asking the Commission for information or background. I
13 think the way it should be left for the moment is, if you could kindly nonetheless
14 produce what you have by way of an official version and an unofficial version -
15 however unofficial that version may be - and we will also consider whether the
16 Registrar should contact the Commission direct and find out whether we can get an
17 official English version.

18 That deals with the Decision, however there is an appeal.

19 MR GREEN: The state of play is that it has been appealed.

20 THE PRESIDENT: Yes, we have seen the notice in the Official Journal setting out the
21 issues in the appeal, one of which seems to be about what is the relevant cost test to be
22 applying in these proceedings. I think it would be of some interest to us to know what
23 is the position that Freeserve's parent company is taking in the appeal?

24 MR GREEN: Wanadoo's position more generally is that there needs to be a test which is
25 applied consistently, so if it is subject, as per the Wanadoo Decision, to a stricter
26 regime in France, that there should be an equally strict regime elsewhere. It wants to
27 see a level playing field, but at the moment it is appealing the Wanadoo Decision. I
28 need to take instructions – we need to get instructions from the parent company as to
29 the disclosure of those documents.

30 THE PRESIDENT: We do not know at the moment how far the *Wanadoo* case is concerned
31 with the issue that may concern us in this case, which is how far you should be forward
32 looking and how far you should be looking at it entirely in terms of historical data that
33 you happen to have.

34 MR GREEN: Yes.

1 THE PRESIDENT: Does the *Wanadoo* case bear on that issue as far as you know.

2 MR GREEN: I really can't say in sufficient detail.

3 THE PRESIDENT: No.

4 MR GREEN: The *Wanadoo* Decision, which I have seen, the English translation and the
5 French version of it , raises a range of issues, some of which overlap with the OFTEL
6 Decision and some of which are different.

7 THE PRESIDENT: Well we could imagine, in theory at least, that not only the
8 Commission's Decision, but the position the Commission is taking in the appeal before
9 the CFI could be relevant information for our consideration of the matter depending on
10 whether there is an overlap between the two sets of proceedings and, if so, what that
11 overlap is. I think we are probably almost immediately into a kind of modernisation
12 regime where we have to think how European developments develop harmoniously.

13 MR GREEN: Well can I leave it this way, I am certainly not, this afternoon, in a position to
14 take instructions from Wanadoo, but if we can take instructions and write to the
15 Tribunal and the other parties, then at least we can bring the Tribunal and the other
16 parties up to date, and any further directions can perhaps follow that.

17 THE PRESIDENT: Yes, but do draw to Wanadoo's attention that we have now open to us,
18 as a national court, another direct channel of communication with the Commission if
19 necessary.

20 MR GREEN: Yes, we will do that.

21 THE PRESIDENT: Yes, thank you. The second issue in this area for information is to
22 understand the current status and progress of the investigation still continuing, that is to
23 say, the investigation that was going to look back after matters were apparently split off
24 last July. Mr Fowler, are you able to tell us where that is, and if it has any bearings on
25 the present proceedings, and how we should handle it all?

26 MR FOWLER: It plainly has a bearing on the present proceedings given the sense that it is
27 addressing some of the issues that the applicants are asking you, the Tribunal, to
28 require us to address.

29 THE PRESIDENT: Yes.

30 MR FOWLER: So in that sense it is plainly directly relevant. You have, I think, been
31 copied in on the letter that we sent to Baker & McKenzie, which set out what is
32 proposed, which is the continuation of the investigation into current pricing practices,
33 which was effectively shelved in July of last year in order to make good the timetable
34 that had been set by the Tribunal for the Decision on the original complaint, and that is

1 going to be addressed in the witness statement which we hope will be with you in the
2 middle of next week in accordance with the timetable. It will be able to tell you exactly
3 what is the state of play on that investigation at the moment.

4 THE PRESIDENT: And what is the state of play?

5 MR FOWLER: There has not been a new section 26 Notice to BT, but that is being
6 prepared and considered, and that will form the basis, in addition to the section 26
7 Notices, and the information supplied in response to them, which were issued last year
8 before July.

9 THE PRESIDENT: Do you have any idea as to why this parallel investigation is likely to
10 result in a decision of some kind? What is your timetable? To what timetable are you
11 working?

12 MR FOWLER: That is something that should be addressed in the witness statement,

13 THE PRESIDENT: Can you give us any brief glimpse of what the witness statement might
14 say?

15 MR FOWLER: The normal timetable would be something like six months for non-
16 infringement, and a year for infringement, although the investigation has already been
17 started and therefore that would be shorter, but it is of that order.

18 THE PRESIDENT: In the then Director's letter to Baker & McKenzie of 23rd July, 2003,
19 which is now some nine months ago, it said: "The Director will aim to conclude on
20 whether BT is currently abusing a dominant position ...etc... in accordance with
21 OFTEL's general guidelines, Competition Act strategy dispute resolution"...etc. which
22 I think from memory, although I have not checked it, probably do reflect the time
23 periods you have just mentioned, that is to say six months and twelve months. So if the
24 Director was keeping to those guidelines, had there been a non-infringement position
25 we would have expected to know by now, and if there had been an infringement
26 decision it should not be too far away.

27 MR FOWLER: Well the position is, having shelved the investigation in July it was not
28 taken up again, and following the Decision, the subject of this appeal, the question of
29 reactivating that investigation was considered in December, and discussed in January, I
30 understand with Freeserve. That has been followed by the letter which you have seen,
31 Sir, in February. It is being reactivated, but we are not in a timetable running from the
32 date of this letter.

33 THE PRESIDENT: How do you see this interacting with the present proceedings, because
34 on one scenario, even if you started in December, in a non-infringement situation you

1 should be through by June. In an infringement situation you should be through later in
2 the year.

3 MR FOWLER: The starting point really is this letter in February.

4 THE PRESIDENT: These proceedings may overlap with that work that is going on, so
5 what, if any, relationship do you see between these two sets of activities.

6 MR FOWLER: There plainly is a relationship, but it is not a direct relationship in the sense
7 that the question that we were looking at in the Decision in November, was an ex ante
8 question in effect – was the business plan that BT announced, and the pricing strategy it
9 announced back at the beginning of 2002 abusive? That was an ex ante question. We
10 are now looking at more of an ex post question – has there since May, 2002 been
11 conduct which is margin squeezing or otherwise abusive.

12 THE PRESIDENT: That I see, but how far is it convenient or appropriate for us to decide
13 the first of those questions without knowing what the Director’s position is on the
14 second of those questions?

15 MR FOWLER: I think they are more or less discrete in a sense. There is not a difficulty, as
16 we see it at any rate, in deciding the one before the other, because it is asking a
17 different sort of question and therefore the methodology appropriate to that question is
18 not necessarily going to be the methodology appropriate to the question being asked in
19 the current investigation - taking the methodology that was used for the purposes of the
20 November Decision as being one of the principal issues on this appeal.

21 THE PRESIDENT: At what stage are we likely to know what methodology the Director
22 does think is appropriate in the new investigation?

23 MR FOWLER: The witness statement that we will be putting in next week does set out the
24 matters being considered in that regard and the various considerations that are relevant,
25 and so you will see from that the general approach.

26 THE PRESIDENT: Yes.

27 MR FOWLER: The issue that is raised squarely on the appeal itself is the question of
28 whether OFTEL ought to have used an historic approach, and a purely historical
29 approach in relation to the question that it asked itself which was effectively an ex ante
30 question. We don’t rule out the use of an historical approach in relation to the question
31 we are now asking ourselves, which is an ex post question.

32 THE PRESIDENT: That is why I had ventured to think in a preliminary way that the
33 approach that has been taken in the new investigation may form at least part of the
34 background and could be relevant to arguments emerging to the existing decision.

1 MR FOWLER: It will certainly be relevant to some extent, yes, Sir.

2 THE PRESIDENT: Perhaps for the moment we had better wait until we have the defence
3 and see where we are on this. Could I just, in that context and in the general context of
4 this discussion, pose one question which we have not completely had a chance to
5 check, but as far as we are presently aware I do not think the Tribunal ever got a copy
6 of the Director's letter to Baker & McKenzie of 23rd July, 2003 and, as far as we know,
7 subject to checking, it is news to us that the Director had decided at that point to split
8 the investigation in the way that is here explained.

9 MR FOWLER: My understanding is that a copy of that letter of 23rd July, 2003 should
10 have been sent to the Tribunal, but the split was referred to in the progress report which
11 was given to the Tribunal in September.

12 THE PRESIDENT: Well it is probably not the time to go into it now, but we may need a
13 little bit of help in the defence on the background to all this, and the current state of
14 play so that we can be sure we were fully in the picture at the time we were making
15 original orders about timetable and so forth in the original proceedings.

16 I think we had better just leave that there for the moment. Slightly obscure in
17 my mind though it is, let us hope the defence will clarify it, unless there are any
18 observations on that particular exchange that anybody else wants to make at this stage?
19 No, apparently not.

20 MR GREEN: I think we are content to see what comes up in the defence.

21 THE PRESIDENT: Yes, yes. I think while we are on the defence, and this was from my
22 point of view the third of three points I wanted to make, this is the last point, I think it
23 would be helpful to have a little explanation, perhaps in the defence, as to what the
24 Director understood the Tribunal wanted the Director to re-examine, having regard in
25 particular to paragraphs 212 to 225 of our Judgment in the earlier case – paragraphs
26 226 to 243 so far are still relevant – in light in particular of the further discussion in
27 relation to the Judgment on costs of 16th April last year, and pages 3 to 5. What I have
28 in mind in saying that at this stage, in a very preliminary way, is that certainly at that
29 stage the Tribunal was reflecting on the relationship between predatory pricing and
30 margin squeeze, and cross-subsidy, and looking in particular for an analysis, or a
31 deeper analysis of the concept of predatory pricing in this particular context, and
32 perhaps how far the existing jurisprudence, which is basically *Axo*, *Tetrapak*, *Napp* and
33 *Aberdeen Journals*, is (or might be) relevant to those issues and whether the Director
34 has, in fact, addressed those issues and the conclusion that he reached. That, I think,

1 would be useful background for us to understand very clearly how the Director has
2 approached it.

3 MR FOWLER: We will bear that in mind, Sir.

4 THE PRESIDENT: Yes, thank you very much. Very well, I think perhaps for the moment
5 those are the main matters we want to raise. Just let me see whether my colleagues have
6 any other comment at this stage.

7 In relation, Mr Barling, to that last comment, that is perhaps an issue it would be useful
8 for BT to be thinking about in its defence as well – what is the relationship between
9 what one can loosely call the classic case law in this area and this particular case?

10 MR BARLING: Indeed, Sir. As you may have picked up from our letter to the Tribunal---

11 THE PRESIDENT: Yes.

12 MR BARLING: ---one of the points that we do feel that it is very important from our point
13 of view to ventilate with the Tribunal in this appeal is the relevance of those principles
14 to the so-called margin squeeze cases, and we very much have that in mind, and that is
15 something we will certainly want to deal with in our statement of intervention.

16 THE PRESIDENT: I am just glancing back – it is really your letter to us of 25th February,
17 isn't it? You do say “BT will add a number of comments on the relevant legal test
18 which should be applied”.

19 MR BARLING: Yes, it is really the last bullet point, the test for margin squeeze, and
20 whether in effect we are dealing with simply a question of predation, a particular
21 variety of predation.

22 THE PRESIDENT: Yes, that is helpful. In very broad terms, and probably inaccurate terms
23 because they are expressed so broadly, one could imagine a margin squeeze taking
24 place because there was too narrow a gap between the upstream and the downstream
25 prices even though both of those two prices were actually covering costs in some sense
26 or other. Whereas, with a predatory pricing case you might be looking at whether one
27 or other of those two costs, either the wholesale price or the retail price are covering
28 their costs and, if so, what costs you should be taking in to account. So they are not
29 exactly identical these two concepts, or they might not be.

30 MR BARLING: Question?

31 THE PRESIDENT: Well, question.

32 MR BARLING: Because that is an important issue as to whether you can have an abusive
33 margin squeeze.

34 THE PRESIDENT: Yes.

1 MR BARLING: In the first of the examples that you gave, Sir, where effectively you are
2 not predating at either level, you are not excessively pricing at either level, but people
3 find it hard. It may just be another indication that you are super-efficient, but that is the
4 issue, I think, or one of the issues.

5 THE PRESIDENT: I think at the last stage of the proceedings, which of course are history,
6 and Mrs Quigley was not on the Panel there last time anyway, and we have not,
7 certainly not at the moment, got them in the forefront of our minds, there was a certain
8 amount of confusion about what exactly was the difference between a cross-subsidy, a
9 margin squeeze, and a predatory pricing allegation. It may be that with the best will in
10 the world one will not be able to sort it out in any precise way. They may be different
11 ways of expressing a similar underlying idea. But there is a set of case law – or at least
12 some case law – on margin squeeze in relation to Decisions like *British Sugar* and
13 *Napier Brown*. There is another line of cases in relation to *Axa* and *Tetrapak* and so
14 forth. Whether there is any and, if so, what interrelationship between those two lines of
15 cases is one aspect that it would be useful to clarify so we would at least know where
16 everybody is coming from.

17 MR BARLING: With respect, Sir, we entirely agree, and that is one of our major concerns
18 in this case because of the suggestion that there may be something which is not abusive
19 pricing, which is not predatory, it is not excessive pricing at any level, but is somehow
20 abusive, and that is really the issue, and the relationship as you say between those two
21 different lines of cases.

22 THE PRESIDENT: Yes, there is *National Carbonising* as well, that is the other one.

23 MR BARLING: Yes, and of course in all those cases one will see that there was either
24 predation or excessive pricing at one level or other, or discriminatory pricing. So that is
25 the issue, it is probably not helpful to go into it any further now, but we are very
26 worried about it.

27 THE PRESIDENT: Well the more help we can get on that issue, because it may be that we
28 do need conceptually to collectively try to clarify all this.

29 MR BARLING: Well we have that very much in mind.

30 THE PRESIDENT: Good, thank you very much.

31 MR BARLING: Sir, while I am standing up, perhaps I could just sweep up, just to keep up
32 to date. As I understood it, my learned friend is very kindly going to provide the
33 Tribunal with the official Decision in French in *Wanadoo*, and with the unofficial
34 translation. I am sure it goes without saying we do not need the French one actually

1 because I think we have got that, but it would be very helpful to have the same
2 translation that is being supplied to the Tribunal.

3 THE PRESIDENT: Yes.

4 MR BARLING: I am sure that will happen anyway.

5 THE PRESIDENT: It has not been published yet, I think, the *Wanadoo* decision, we haven't
6 got it anyway, but it is coming.

7 MR BARLING: I think we do not need the French one.

8 THE PRESIDENT: OK, fine, well you have the French one.

9 MR BARLING: But we would like the unofficial translation.

10 THE PRESIDENT: BT can read all languages.

11 MR BARLING: Thank you very much.

12 THE PRESIDENT: Yes, thank you very much, Mr Barling. If then we go back to the
13 agenda. I am not sure that any issue arises regarding disclosure – I am not sure, I am
14 simply posing the question. We have not had a chance really to reflect on whether, if so
15 to what extent, we are likely to get into the question of expert evidence. We have
16 already got an expert report, but it may be that this case is going to develop more in
17 terms of the philosophy to be applied than in terms of particular questions about
18 whether particular methods have been correctly applied or not. Do you have any
19 observations, Mr Green, at this stage about either documents or experts?

20 MR GREEN: So far as documents are concerned, you will have seen that our application is
21 largely framed at a fairly high level of challenge. We are not expecting – certainly at
22 this stage – to make any application for disclosure. We assume that any relevant
23 documents will, in the ordinary course, be annexed to the defence, and we would have
24 to review the position then. We do not have any application for disclosure at this stage.

25 So far as experts are concerned, you have the report from Mr Harvard, but again
26 we do not know whether any of the other parties are going to be adducing expert
27 evidence. I understand from Mr Fowler that they are not contemplating an independent
28 expert but, of course, they have their own in-house experts and I don't know whether
29 their defence would incorporate that.

30 THE PRESIDENT: Yours is a challenge of principle to the whole approach, as we
31 understand it.

32 MR GREEN: It is primarily a challenge of principle. It is primarily an attack upon the
33 underlying approach.

34 THE PRESIDENT: Yes.

1 MR GREEN: I think we would really reserve our position at this stage. I don't think we are
2 really in a position to know what is going to be said against us.

3 THE PRESIDENT: Yes. Do you have any observations on that, Mr Fowler?

4 MR FOWLER: Certainly at this stage it appears to us to be very much a question of
5 principle, and we are approaching it in that light The witness statement will be one of
6 our Directors of Economics, but it will be addressing the facts and those issues of
7 principle.

8 THE PRESIDENT: Yes, yes. I think that is probably as far as we can take those two issues
9 at the moment. Did you want to add something, Mr Barling?

10 MR BARLING: Sir, only to say obviously the same remark, we will want to see the
11 defence before taking a view on whether any evidence is needed, and similarly, I
12 imagine in relation to any application for disclosure, although we are not anticipating
13 any.

14 THE PRESIDENT: Yes, thank you. That, I think, enables us to move on to the timetable.
15 The defence is due on 3rd March. I infer from what Mr Fowler has helpfully been
16 telling us that that looks like a deadline that you are hoping to meet, Mr Fowler?

17 MR FOWLER: Certainly we are hoping to do so at the moment, Sir.

18 THE PRESIDENT: Yes, that is extremely helpful. It is then, I think, a question of sorting
19 out a timetable for the Statement of Intervention. Do you have any reflections on that,
20 Mr Barling?

21 MR BARLING: Sir, yes. We took the liberty of speaking to both Mr Green and Mr Fowler
22 before the hearing to see what their views were. We have, of course, only recently seen
23 the Notice of Appeal and the expert evidence, we have only had them a few days.

24 THE PRESIDENT: Yes.

25 MR BARLING: There is obviously quite complex material there.

26 THE PRESIDENT: Yes.

27 MR BARLING: The other slight difficulty is that a crucial member of the team is away fro
28 the next two weeks. What we are proposing, if it would meet with the Tribunal's
29 proposed timetable, and my friends have got no objection, is that we would either have
30 until the 26th March to put in our statement, which would be giving us three weeks from
31 the date of the defence, which obviously has a big bearing on how much we need to go
32 into any detail.

33 THE PRESIDENT: Yes.

34 MR BARLING: Or, and I have not put this to them, but if they are feeling in a generous

1 mood and the Tribunal endorses it, possibly giving us the weekend as well, which
2 would take us to Monday 29th, which is often a great help. So bearing in mind where
3 Easter falls and everything, we had not anticipated that that would affect the overall
4 timetable at all.

5 THE PRESIDENT: Well perhaps before we take a decision on that, can I just sketch in a
6 little bit for everybody's benefit, the Tribunal's position regarding the later timetable
7 for this case because as various of you will appreciate the Tribunal's list is getting
8 rather crowded at the moment. What we would like to do when we have these
9 documents - the defence, the Statement of Intervention and so forth - is have a chance
10 to reflect, and probably to organise a further CMC before a main hearing to discuss
11 with the parties what the issues in this case really are, or what we want everybody to
12 really concentrate on in terms of skeleton arguments and submissions, so that we are
13 clear what the issues of principle are - if it turns out to be one of principle - and how
14 they should be addressed and we should not get into unnecessary detail, and so forth.
15 Because of Easter, the Argos and Littlewoods case, the Spring Bank Holiday, and
16 various other commitments, it would be difficult for the Tribunal to organise that sort
17 of preliminary Case Management Conference until towards the end of the week that
18 begins on 31st May, and we had provisionally in mind a date around Friday, 4th June for
19 a possible issues CMC. On that basis to give, as it were, sufficient time for reflection,
20 preparation and exchange of arguments, we were thinking in terms of the hearing in
21 this case for 5th July, possibly going into the 6th depending on how wide ranging the
22 issues were. That was our sketch plan. It may turn out that is wholly inconvenient for
23 everybody else in the room except ourselves, but that is what we were thinking of.
24 If we worked back from that, Mr Barling, and I will go around the table in a moment to
25 see how everybody is placed, that gives BT at least, I would have thought, subject to
26 my colleagues' observations, a certain amount of latitude in getting the Statement of
27 Intervention in that might avoid you having to sacrifice weekends and matters of that
28 sort.

29 MR BARLING: Sir, maybe on that basis I could crave even another week.

30 THE PRESIDENT: Well, it is Friday afternoon and we are feeling quite generous!

31 MR BARLING: I am encouraged by Freeserve to "go for it", so I will therefore go for
32 Friday, 2nd April.

33 THE PRESIDENT: As far as we are concerned in terms of getting the document in that is, I
34 think, in principle acceptable to the Tribunal, that is just before the run up to Easter as

1 it were. It may well be that having got both the defence, and the Statement of
2 Intervention, I don't know what Mr Green thinks, but you may at least want to have
3 permission at this stage to file a reply because these documents may well clarify things
4 considerably.

5 MR GREEN: I think that would be very helpful. If there is going to be a prolonged debate
6 about the relationship between margin squeeze and cross-subsidy predation, which is
7 not in the Decision, we may very well need to address that.

8 THE PRESIDENT: Yes, there is a bit about it in the Decision but it is not quite clear where
9 it all finishes up. Yes, Mr Fowler?

10 MR FOWLER: We would like at least to have the option of having a response to the
11 intervention, if that were possible, Sir.

12 THE PRESIDENT: You might need a response to the intervention?

13 MR FOWLER: Yes.

14 THE PRESIDENT: Yes, well I think that would be reasonable. Let us just see how that all
15 works. If we have BT's intervention by Friday, 2nd April, I would have thought it is
16 reasonable for us to take into account there is then two weeks around Easter when
17 Easter is occurring, so if we invited either or both of Freeserve's reply and OFCOM's
18 response to the Statement of Intervention to be in by, say, Friday, 30th April, that
19 would then leave the Tribunal with a month or so to see where we are before we
20 consider it and possibly communicate with the parties before we arrive at the CMC on
21 4th June.

22 In that connection - let us see what you all think - it may not be possible to
23 make an order today, but I was thinking it might be useful to invite the parties, in
24 writing, before 4th June, to give us really quite shortly their respective views on how
25 they do see the issues. I do not mean another whole set of pleadings, I mean just a
26 couple of pages written signal - perhaps it might even be possible to agree between you
27 the issues that can usefully be addressed at the main hearing. If we said that any
28 observations from the parties on what are the issues to be addressed at the hearing
29 should be with the Tribunal by Friday, 28th May, that will give us time to consider
30 those documents and be fully prepared by the time we get to the Case Management
31 Conference on the following Friday, 4th June. Does that sound a practical, helpful way
32 of doing things?

33 MR GREEN: Yes, I would have thought some attempt to draw up a list of common issues
34 should be possible. It is always done in an ordinary trial, and it may be possible to

1 agree or disagree as to what the issues are and at least you then have a road map.
2 THE PRESIDENT: If you as the appellant, Mr Green, could perhaps take a lead on seeing
3 how far agreement can be reached, I think that would be very helpful.
4 MR GREEN: We will do that.
5 THE PRESIDENT: Thank you very much. Does that give us a framework for the appeal
6 with which people feel reasonably comfortable, or at least not uncomfortable? Are
7 there any other issues or directions or matters people would like to raise, or draw to our
8 attention? [pause] It looks as though matters are relatively uncontroversial at this stage.
9 One never knows how long that is likely to last.
10 Very well, thank you all very much indeed.

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