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IN THE COMPETITION

Case No. 1071/2/1/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

23 October 2006

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR PETER GRINYER
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYHOOK LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

supported by

**ALCATEL SUBMARINE NETWORKS LIMITED
BRITISH TELECOMMUNICATIONS PLC
CABLE & WIRELESS PLC
GC PAN EUROPEAN CROSSING UK LIMITED
GLOBAL CROSSING EUROPE LIMITED
GLOBAL MARINE SYSTEMS LIMITED
NTL GROUP LTD
TYCO TELECOMMUNICATIONS (US) INC.**

Interveners

Transcribed from the Shorthand notes of
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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Ben Rayment (instructed by Edwin Coe) appeared for the Applicant.

Mr. Mark Hoskins (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed by Blake Laphorne Linnell, Charles Russell, Bridgehouse Partners and Beachcroft Stanley) appeared for the Interveners: Alcatel Submarine Networks Limited, Cable & Wireless, Global Marine and Tyco Telecoms.

Mr. Fergus Randolph (instructed by Eversheds) appeared for the Intervener, NTL.

Mr. Gerald Barling (instructed by BT Legal) appeared for the Intervener, BT.

Miss Frances Murphy (of Mayer Brown Rowe & Maw) appeared for the Interveners, Global Crossing (Europe) Limited and GC Pan European Crossing (UK) Limited.

1 THE CHAIRMAN: Can I just set out what I think is on the agenda this morning? I am not going to
2 make any other comments, but it seemed to me useful if we had a list, namely:

3 (i) questions of permissions to intervene.

4 (ii) questions of service of papers on the Interveners who are given permission to
5 intervene.

6 (iii) the application for disclosure, which we have not had and which, as I understand it,
7 was ordered for tomorrow (the latest date), so perhaps we could have an up to date
8 position as to that.

9 (iv) submissions by the OFT on the disclosure application and the date for that.

10 (v) submissions by each of the Interveners (or the Interveners' group, however it is
11 done) on the disclosure application and the date for that.

12 In relation to those matters there is the question of avoidance of duplication and possibly the
13 question of confidentiality rings may arise. Next will come the timetable which was set out in
14 the previous order and we need to see whether or not we can comply with it, or if it needs
15 adjusting. That timetable led up to a disclosure hearing on 13th November. The only other
16 matter we would like to raise, which we raised on the last occasion but which does not seem to
17 have been addressed and we wonder whether or not any consideration was or has been given to
18 it, and that is the question of the transfer under the concurrency regulation to Ofcom.

19 Those are matters which came to our mind as matters which we needed to cover today.

20 MR. RAYMENT: Thank you very much, madam. Good morning. On the question of permission to
21 intervene, the Appellant's position is that it accepts that everybody who was either in the case
22 or following from that those who were proposing to intervene do have a sufficient interest, so
23 there is no issue on that. We do, nevertheless, say that there are issues remaining about the
24 exercise of the Tribunal's discretion as to how exactly those interventions are to actually
25 proceed from here – I will come back to that in a moment, if I may.

26 As far as service of the papers is concerned, we have already made available to Alcatel copies
27 of volumes 1 and 2 of the annexes to the Notice of Appeal and we will be in a position in the
28 next few days to serve the remainder of the papers.

29 THE CHAIRMAN: Shall we leave service of the papers until we have decided who is going to
30 intervene and how they are going to manage themselves?

31 MR. RAYMENT: That might be sensible, I am sorry, I was just following the order you had taken.

32 THE CHAIRMAN: One of the possibilities is if there is a lead Firm.

33 MR. RAYMENT: Yes, that is possible. On the issue of discretion concerning the people who are
34 proposing to conduct independent interventions, i.e. beyond the Alcatel Group, if I can put it

1 like that, our position is that their interests are sufficiently protected already by the Alcatel
2 Group and they do not need permission to pursue an active intervention at this stage.

3 THE CHAIRMAN: Are you objecting to BT, Level 3, Global Crossing and NTL?

4 MR. RAYMENT: We are objecting to them playing an active role. We think that their role should
5 be co-ordinated with Alcatel. We do not think they should be free-floating, as it were. We are
6 not objecting to them intervening and having the papers. It is simply an issue about the
7 Tribunal's discretion to control how their intervention goes forward in the light of the fact that
8 so far it has been possible to have a common group of Interveners and we say there is nothing
9 raised in the individual submissions of either BT, Global Crossing or NTL, which I think are
10 the Firms concerned, that would justify them playing an independent active role at this stage,
11 i.e. up to jurisdiction. I can go through the points that they make if necessary.

12 THE CHAIRMAN: Does that not depend somewhat upon your application for disclosure?

13 MR. RAYMENT: No, I do not think it does. The reason for that is that the key issues are going to
14 be what documents are relevant, so it is going to be the issue of relevancy that is debated at the
15 disclosure hearing and I do not see why they need to have separate representation on that
16 general issue. There maybe issues about specific documents and the commercial
17 confidentiality of those documents but they would, in any event, as part of the redaction
18 process be consulted about those sorts of points, but the general issue of whether what the
19 Tribunal needs in terms of relevant documents to determine the issues that it has to we say
20 those are the points of principle, if you like. BT, for example, says that one of the reasons it is
21 concerned about not being able to pursue an independent intervention is its concern that people
22 like Alcatel will not take what it calls the point of principle, i.e. basically these sorts of
23 documents underlying a decision of this nature should not be disclosed. But, of course, it is
24 not correct; Alcatel and the OFT are both taking that point. It is quite plain they are saying that
25 these documents should not be disclosed, so at that level their position is protected. Then we
26 come on to the s.58 type issues, and again that is an issue that Alcatel and the other joint
27 interveners are taking, so at the moment we do not see that there really is a great deal for BT to
28 do, or NTL.

29 I anticipate that Mr. Barling and Mr. Randolph may say "In that case give us permission to
30 intervene because it is very unlikely that we are going to be doing much that will upset the
31 timetable", but it is rather difficult from our perspective to be sure about that and, given the
32 rather limited time that we have to get ready for the disclosure hearing, we are very worried
33 that if they were allowed the discretion whether or not to put further material in, we think that
34 that would put us under an unacceptable pressure so far as the timetable is concerned.

1 THE CHAIRMAN: I thought you were basically saying that they should be given permission but
2 only on the basis that they are in the Group?

3 MR. RAYMENT: Yes, and I do not think I have said anything that is inconsistent with that. What
4 we do not want is them pursuing independent interventions.

5 THE CHAIRMAN: At this stage.

6 MR. RAYMENT: At this stage. We totally accept the very fair point made by the joint Interveners
7 that the position on representation will have to be reconsidered after the jurisdiction phase is
8 concluded.

9 THE CHAIRMAN: What about the distinction between the two different infringements and the
10 distinction between those who received a letter saying that at the moment the OFT were not
11 proceeding?

12 MR. RAYMENT: We say it is slightly unfortunate in considering the sufficiency of interest of
13 parties that that fact was perhaps not made as clear as it should have been at the outset.
14 However, having said that, our understanding is that the general issue that is being raised, for
15 example, about s.58 is that if there has been an investigation and there has been a finding in it
16 then that potentially affects anybody who is involved in the civil proceedings, whether or not
17 they were going to be a subject of the SO or not. I understand that is how it is put, so the fact
18 that they were not going to be addressees of the SO – as far as we know – that by itself
19 probably does not remove their interest in the proceedings as I understand it has been put.

20 THE CHAIRMAN: Does it make a difference to their interest for the purposes of the admissibility?

21 MR. RAYMENT: I am not sure, I think you may need to go to them on that issue. But as I say our
22 position is quite clearly that their interests are adequately protected.
23 I do not know whether, on this particular topic, you want me to deal with some of the specific
24 points made by NTL, because you may be aware that NTL say that of course the people
25 protecting their interests have to be principal parties, and that is how they interpret the Guide.
26 I do not know if you have seen that?

27 THE CHAIRMAN: Yes.

28 MR. RAYMENT: We say that that is not a good point because the Guide, of course, is dealing with
29 the situation where there are just two principal parties in the case and they are considering
30 whether to allow the first intervention. It does not deal with the situation here where you
31 already have an Intervener who is covering these areas.

32 THE CHAIRMAN: Well shall we start by hearing from each of the Interveners, or potential
33 Interveners, as to whether we give them permission? That might be the place to start.

34 MR. RAYMENT: I think that would. I want to say that if the Tribunal is minded to grant
35 permission in its discretion to these other parties to carry out an independent intervention, we

1 do, as I say, have concerns about the implications of that for the timetable, because although
2 they will say to you “Oh no, we are not going to duplicate”, and all the rest of it, the fact is
3 they may well do, and that will put the limited time that we have between the close of the
4 pleadings and the hearing.

5 THE CHAIRMAN: I am still not clear then what you are trying to achieve, because I thought you
6 said ----

7 MR. RAYMENT: We do not want further submissions, we want one set of submissions from
8 Alcatel & Co.

9 THE CHAIRMAN: And if they say “No, we want to be independent” - we must listen to them first
10 – but are you then saying that we should not give them permission to intervene?

11 MR. RAYMENT: We are saying you should not give them permission to file further submissions
12 because their interests are already protected by other people.

13 THE CHAIRMAN: That is a second stage, I think.

14 MR. RAYMENT: Well I think the first stage is: do they have a sufficient interest? Yes. Should
15 they be allowed to intervene? Yes. And have service of the papers on them? Yes. But
16 beyond that, what should they do? My submissions on that point have already been made.

17 THE CHAIRMAN: I understand that.

18 MR. RAYMENT: I hope that is clear now, and I am sorry if it was not.

19 THE CHAIRMAN: That is all right.

20 MR. RAYMENT: That has implications, we say, for the timetabling and although if the situation
21 remains that it is just a single set of documents from the Alcatel Group, we are prepared to try
22 and work to the existing timetable, although we are concerned that it may be quite tight, even
23 just with the one set of submissions because some of the issues that have been ----

24 THE CHAIRMAN: Well let us see where we get to before we get to timetable, because I think we
25 had better see exactly what is going on before we decide where we are going to on timetable.

26 MR. RAYMENT: Very good.

27 THE CHAIRMAN: We understand that you say that you might need more time.

28 MR. RAYMENT: We might, and there is also the OFT’s position has implications for that as well.

29 THE CHAIRMAN: Yes, so let us just see where we get to. Shall we go down the list in the order in
30 which they were served. So Alcatel was first but they have permission, so that is not a
31 problem. The next one is BT, so that is Mr. Barling.

32 MR. BARLING: Madam, Mr. Rayment appears to be really saying that he wants us all to be jointly
33 represented or basically not come in.

34 THE CHAIRMAN: I am not sure he is saying that, you see, that is what I was trying to find out. I
35 think he is saying you do have an interest to come in but ----

1 MR. BARLING: "Only on terms that ..."

2 THE CHAIRMAN: On terms, yes.

3 MR. BARLING: I am not sure, but that is how it seemed to be at the end of his submissions.

4 MR. RAYMENT: I can confirm for the record that is my position.

5 MR. BARLING: Which, I must say, was not the message that came through to us when we read
6 Edwin Coe's detailed submissions towards the end of last week; nevertheless, I am happy to
7 deal with those points.

8 Can I say first of all, on timetabling, as Mr. Rayment has anticipated we, BT, would seek no
9 extra time for anything. It seems to us that the existing time table is more than good enough
10 for the Interveners because it gives us effectively two weeks from when any application is
11 made tomorrow, to put in any submissions about it.

12 THE CHAIRMAN: Yes.

13 MR. BARLING: I would, however, if pushed concede that there is a slight problem from ----

14 THE CHAIRMAN: They may need some time to look at all ----

15 MR. BARLING: Yes.

16 THE CHAIRMAN: Yes, we need to look at that now that there are so many.

17 MR. BARLING: For our part we would not object if ours were pushed forward a little bit, because
18 whilst we do need to see the OFT's we perhaps can do without six days. That is just a thought,
19 madam, on that.

20 THE CHAIRMAN: That is very helpful.

21 MR. BARLING: Obviously we will be able to start work on whatever submissions might be
22 appropriate as soon as we see the application.

23 THE CHAIRMAN: I will tell you what concerned me when I was looking at it, Alcatel Group have
24 considered duplication between themselves. I understand that you are very adamant that you
25 do not want to go into the Alcatel Group.

26 MR. BARLING: We have thought about it carefully, but we feel we cannot.

27 THE CHAIRMAN: As you will appreciate, it is not very helpful to the Tribunal if we have
28 duplication.

29 MR. BARLING: On the contrary, I anticipate you would tell me it was forbidden almost and
30 extremely unhelpful.

31 THE CHAIRMAN: Very unhelpful, therefore there has to be some method in which there is not
32 going to be duplication between, at the moment, you and the Alcatel Group.

33 MR. BARLING: Yes.

34 THE CHAIRMAN: That means there needs to be some liaison ----

35 MR. BARLING: Yes.

1 THE CHAIRMAN: -- or one has to go first.

2 MR. BARLING: Yes.

3 THE CHAIRMAN: I surmise from what you are saying that you are intimating that you would be
4 happy to go first?

5 MR. BARLING: We would be happy to go first if it was thought appropriate and, equally, we would
6 be happy to go second. But certainly, yes, we would be happy to go first. I suppose in a sense
7 BT has been by Cityhook put in quite a prominent position in the round, if I can include the
8 High Court proceedings, the Judicial Review, quite prominently you will find us mentioned.

9 THE CHAIRMAN: We have not seen the Judicial Review papers.

10 MR. BARLING: No, well I think we are the only telecoms company actually identified. They refer
11 to others but we are the only one who is named in those proceedings, in the claim form.
12 Indeed, as it happens, we are the only company named in the Decision that the challenge is
13 related to in this court. Certainly, Cityhook anticipate that we would have been a recipient of
14 the Statement of Objections on both sides – that is the way Cityhook puts it. We have given
15 substantial information under s.26 – both documents and information – I think six substantial
16 requests over the years, and six substantial replies amounting to many, many pages. So we are
17 in that sense fully involved. Therefore, if the Tribunal were so minded, and there were to be a
18 lead Intervener, we could not object to being asked to be in that group.

19 THE CHAIRMAN: We will have to see what Alcatel says about it.

20 MR. BARLING: But not jointly represented; that is that position. Equally, we would be very happy
21 to come second.

22 THE CHAIRMAN: If one is going to avoid duplication then there is going to have to be some gap
23 between the two.

24 MR. BARLING: I accept that, and that might mean that one has only quite a short time, but one
25 might only need a short time in fact, because one would obviously have to prepare on the worst
26 case scenario ----

27 THE CHAIRMAN: Red pen.

28 MR. BARLING: Red pen, exactly. We fully understand that and we have no desire, whatsoever, to
29 do anything that is not absolutely strictly necessary in order to protect our legitimate interests.
30 At this stage our legitimate interests, we submit, madam, are quite extensive in relation not just
31 to any substantive matter that follows on (depending on which way you decide the preliminary
32 issue) but we are extremely interested, if I can put it that way, in the preliminary issue, and I do
33 not know whether you want me to expand on why we are? The final outcome of that
34 preliminary issue is obviously of very significant importance.

35 THE CHAIRMAN: The question of admissibility?

1 MR. BARLING: Yes. It is very important to BT. On that will obviously depend whether Cityhook
2 can embark on the substance of the case where they seek relief which amounts to asking the
3 OFT to serve their Statement of Objections on us. So just on that very broad approach we have
4 great interest.

5 THE CHAIRMAN: I can understand that you are very interested. On the other hand, it is a question
6 of what the OFT did and whether they made a decision which, of course, you cannot assist on.

7 MR. BARLING: Well no, nor can any Intervener.

8 THE CHAIRMAN: Absolutely.

9 MR. BARLING: All I am on at the moment, madam, is why BT has a specific interest in the
10 outcome, which cannot be protected by other Interveners, which is really I think where Mr.
11 Rayment ----

12 THE CHAIRMAN: Are you saying on admissibility you cannot be protected?

13 MR. BARLING: We cannot be, no.

14 THE CHAIRMAN: But I think what Mr. Rayment's submissions at the moment are going only to
15 the disclosure application, and on the disclosure application you are also saying that you want
16 to make separate submissions?

17 MR. BARLING: Well particularly on the disclosure application in one sense. One can see that there
18 may be interesting points of principle in relation to what is an appealable decision where – if I
19 can put it this way, neutrally – BT is a regular attender, on all sides not just in the dock!
20 (Laughter) On all sides as an Intervener ----

21 THE CHAIRMAN: You have wide experience.

22 MR. BARLING: We have one pending at the moment on appealability in an analogous context
23 under the Communications Act, as you may well know. Of course, we have been in one of the
24 two leading cases, the *Freeserve* case. So we have an interest in knowing and in putting
25 forward our views on that. But, of course, disclosure is a particularly important point here,
26 because, as I have said, under the statutory powers that the OFT has exercised we have
27 provided to the OFT for its statutory purposes, a very great amount of information and
28 documents – over six requests – and that information and documents may well be referred to
29 (if not included in) whatever documents Mr. Rayment's clients may be seeking disclosure of.
30 So BT needs to be involved at all stages in that disclosure application in order to protect its
31 interests. I may be just stating the obvious when I say that, but until we see exactly what it is
32 we can surmise that one of the documents might be a draft statement of objections – it may be,
33 we do not know. If it is, and if they are right in saying that BT was expected to be a recipient
34 of that Statement of Objections had it been completed and adopted and served, one would also
35 expect quite a lot of the information, if not the documents provided by BT to be referred to or

1 contained in it. In those circumstances it seems to us to be fundamentally right that BT must
2 have an opportunity at all stages of making submissions about that disclosure. That is just an
3 example, but ----

4 THE CHAIRMAN: Of course, you will not know what the position is until (a) we have the
5 application; and (b) the OFT have said what their ----

6 MR. BARLING: No, indeed, and we may find, of course, when we see the OFT submissions about
7 it, that they have covered everything that we wanted to say, in which case we shall fall silent
8 and put in a “nil response” as it were. We will be very scrupulous in doing that, as we will if
9 we go second on Interveners, we will be very scrupulous also in that regard to make sure that
10 we do not waste the time of the Tribunal or the other parties by making superfluous
11 submissions. What we do say is the irreducible minimum in a sense, that we do have that
12 opportunity to do so independently.

13 I am not sure really at this stage that there is a great deal more I can say about disclosure.

14 THE CHAIRMAN: I do not think so. Shall we hear from Mr. Turner is probably next.

15 MR. RANDOLPH: Is he madam?

16 THE CHAIRMAN: Sorry?

17 MR. RANDOLPH: I was wondering whether Mr. Turner was next, simply by virtue of the fact that
18 if we were going to have a line of potential Interveners ----

19 THE CHAIRMAN: You are next, are you?

20 MR. RANDOLPH: I am for NTL, madam.

21 THE CHAIRMAN: I have made a list **here** which was on date order of when people intervened, and
22 of course you come rather at the bottom of that order – you are penultimate.

23 MR. RANDOLPH: No, I do not think we come penultimate, madam – anti-penultimate, possibly.

24 THE CHAIRMAN: I think you are second from the end, are you not.

25 MR. RANDOLPH: Well, I think may be third from the end, but it does not really matter. (Laughter)
26 Madam, is it a problem if I ----

27 THE CHAIRMAN: All right, well you would like to go next.

28 MR. RANDOLPH: Just going down the row may be helpful. Madam, gentlemen, good morning. I
29 am grateful to my learned friend, Mr. Rayment, for setting out the position, because in the
30 letter that we received from Edwin Coe on 19th October, itself outside of the deadline set by the
31 Tribunal for observations – I am not going to make any point on that, apart from saying it – it
32 did appear they (Edwin Coe, Cityhook) were taking a point against us on delay. This does not
33 seem to have been made today and ----

34 THE CHAIRMAN: The point that is being taken against you is being taken against you possibly by
35 the Tribunal because we have our Rules.

1 MR. RANDOLPH: Yes.

2 THE CHAIRMAN: Like the court has rules.

3 MR. RANDOLPH: Yes.

4 THE CHAIRMAN: And the intervention has to be applied for by a certain time.

5 MR. RANDOLPH: Yes.

6 THE CHAIRMAN: And if it is not applied for by a certain time then that ostensibly means that
7 there is not an application and you have to apply for us to extend the time.

8 MR. RANDOLPH: Yes, madam.

9 THE CHAIRMAN: Now, I assume that is why you have got up?

10 MR. RANDOLPH: One of the reasons I got up, madam.

11 THE CHAIRMAN: And I think you were an hour and three minutes' late?

12 MR. RANDOLPH: Yes, madam ----

13 THE CHAIRMAN: Now, nobody else was late or nobody else except the one below you.

14 MR. RANDOLPH: Two below us, possibly, yes, anyway.

15 THE CHAIRMAN: Who is the second one below you?

16 MR. RANDOLPH: I thought there were Tyco and TNS

17 THE CHAIRMAN: Tyco have withdrawn.

18 MR. RANDOLPH: Have they withdrawn?

19 THE CHAIRMAN: Yes. So for whatever reason they are not here, so they have withdrawn any
20 application that they made out of time.

21 MR. RANDOLPH: Yes.

22 THE CHAIRMAN: So we are left with you and Global Marine?

23 MR. RANDOLPH: Yes, who were eight days out of time.

24 THE CHAIRMAN: Who were eight days out of time.

25 MR. RANDOLPH: If I can possibly short circuit this?

26 THE CHAIRMAN: I do not know why you were an hour and three minutes out of time, but
27 everybody else, apart from you and Global, did manage to do it within time in the same
28 circumstances.

29 MR. RANDOLPH: Yes. The reason is very straightforward. It was assumed (wrongly) that the
30 time for service of an application to intervene was actually 5 o'clock.

31 THE CHAIRMAN: You were still out of time.

32 MR. RANDOLPH: Yes, madam, but by three minutes.

33 THE CHAIRMAN: Why did you leave it until the last minute?

34 MR. RANDOLPH: Well, madam, can I just set out the position and then I think you will
35 understand? That week – I think the beginning of that week, or maybe at the end of the

1 previous week – there had been the first hearing. That was interesting timing in terms of the
2 timetabling, because of course only one Intervener put forward its application at that time.

3 THE CHAIRMAN: Two.

4 MR. RANDOLPH: Two Interveners put forward their application at that time. The transcript of the
5 hearing came out sometime I think in the following week ----

6 THE CHAIRMAN: 19th.

7 MR. RANDOLPH: Yes, and that had to be looked at. I think this is set out in our submissions,
8 madam.

9 THE CHAIRMAN: Did your clients come to that hearing?

10 MR. RANDOLPH: My solicitor was here my clients were not here.

11 THE CHAIRMAN: Yes, so they heard what was going on.

12 MR. RANDOLPH: Yes, they heard what was going on, and there were discussions on various
13 issues; and there was a very real debate, madam – I do not say this lightly – my client does not
14 particularly want to be here, but it feels it should be here.

15 THE CHAIRMAN: I suspect nobody wants to be here.

16 MR. RANDOLPH: Well I do not know about the Appellant, I am sure it is looking forward to what
17 it is seeking in terms of remedies. We do not particularly want to be here, and it is an
18 important decision to take – a lot of time, a lot of management time and legal fees, etc. So it
19 did take some discussion and debate, and then it was agreed that we should intervene. The
20 application to intervene, as I said, was a misapprehension. It was thought that following on
21 from the early part of the Guide to Proceedings, that as the Registry is open until 5 p.m. it
22 would accept service until 5 p.m. and, indeed, in terms of the Notice of Appeals, they give a
23 rather useful example in here as to when Notice of Appeals might or might not be in time to
24 avoid any problems, and it made it clear that certainly if something were received by 4.30 p.m.
25 – and one would imagine at any time up to 5 p.m. – it would be admissible and acceptable as a
26 correct receipt of service. However, and this is where the problem arose, later on in the Guide
27 there is a specific rule dealing with service by fax. Our application was made by fax. Maybe
28 in the future those behind me will not serve by fax and will serve personally. But it was served
29 by fax and the fax service rules are different – it is 4 p.m. rather than 5 p.m. For whatever
30 reason those are the rules. I agree that on that basis we were an hour and three minutes late.
31 But equally, there is an important discretion in this Tribunal – a very important discretion –
32 that we set out in our submissions and it is in the Competition Appeal Tribunal Rules which
33 are effectively very clear on this point. Rule 19(2)(i) makes it clear that the Tribunal may give
34 directions – “as to the abridgement or extension of any time limits; whether or not expired.”

1 So, madam and gentlemen, you have a very large discretion, which is contrary to discretion in
2 other courts, and particularly in a Tribunal such as the Court of First Instance where there
3 really would not be that much of a discretion, certainly in terms of a notice of appeal.
4 Edwin Coe's letter of 19th October sought to make the point that this delay could only be
5 resolved if there were exceptional circumstances, and they were relying on the relevant rule,
6 Rule 8(2) – I say the “relevant rule”, it is the relevant rule to notices of appeals, which are very
7 different to those relating to interventions ----

8 THE CHAIRMAN: Yes.

9 MR. RANDOLPH: -- and one can see that in 8.2 there is a specific time set down for the notice of
10 appeal, and it says “The Tribunal may not extend the time limit ... unless it is satisfied that the
11 circumstances are exceptional”.

12 THE CHAIRMAN: Yes.

13 MR. RANDOLPH: Now, if you just turn on, madam, to ----

14 THE CHAIRMAN: I think we have that point.

15 MR. RANDOLPH: You have the point. Therefore, two things, we say, flow from that. First, Edwin
16 Coe's reliance on exceptional circumstances is misconceived; and secondly, the fact that the
17 exceptional circumstances do not appear in rule 16 and, indeed, 15, would imply that that is
18 obviously not the relevant test.

19 THE CHAIRMAN: Well what principle do you think we ought to apply?

20 MR. RANDOLPH: I think you ought to apply the ordinary test of reasonableness and prejudice, and
21 in this instance I think it is now clear from Mr. Rayment, and indeed I think even from the
22 Edwin Coe letter of 20th, that Cityhook have not suffered any prejudice by our application
23 being served one hour and three minutes late. On that basis they also agree that we have a
24 sufficiency of interest, where the divide comes is whether we are adequately protected by
25 others. So we have a sufficiency of interest and they have not been prejudiced by our delay. It
26 was an inadvertent mistake, it was not done deliberately and although a mistake ----

27 THE CHAIRMAN: It is quite a serious mistake because it could have meant that your clients – or it
28 could mean still ----

29 MR. RANDOLPH: Absolutely, from the point of consequences to my client, yes, but in terms of
30 consequences prejudicial to the Appellant, that is really where it seemed to me the Tribunal
31 would be interested in looking at, in terms of those consequences there are none – they admit
32 there are none.

33 THE CHAIRMAN: It may be that the Tribunal feels that in those circumstances “we have a
34 discretion, we can extend the time because there has been no prejudice.” If, on the other hand,
35 let us take another example, where an Intervener did not intervene for months and then, all of a

1 sudden, just before trial of the hearing, suddenly decided “Oh yes, I am going to intervene” and
2 saying “I have some really important evidence, I want some new witnesses in here”, throwing
3 out the whole timetable. Obviously this Tribunal has its own rules of procedure, it is not like
4 the High Court, where under CPR, of course, parties can seek to intervene and/or be joined but
5 obviously if they seek to intervene at a late stage, having shown a sufficiency of interest then
6 they will be liable to pay certain costs. Indeed, they may not be allowed to intervene if it
7 causes serious prejudice to the running of the case or indeed to the parties. In this case there is
8 no prejudice, at least from the Appellant’s point of view, and I do not think anybody else is
9 taking the prejudice point against us.

10 THE CHAIRMAN: There may be some prejudice, because there may be the costs of today. It may
11 not have had to have happened today if we had not had the late Interveners – it may have been
12 resolved with correspondence.

13 MR. RANDOLPH: Well, madam, with respect, I do not know if that is completely right, because as
14 Mr. Barling made clear, until Mr. Rayment made clear his position this morning, it was
15 thought that there may have been some objection to even BT intervening, and then there is the
16 joint Interveners – that arose after the time – so I do not think that it could be said that NTL has
17 caused this hearing to happen and, indeed, there would have been potentially other issues
18 arising that needed to be determined before the next hearing date. But equally, if you, madam,
19 were only going to allow us to intervene on the basis of some form of a costs’ order then I
20 would wish to debate that with the Tribunal and would suggest ----

21 THE CHAIRMAN: I think we will deal with costs at the end. It was not anticipated on the last
22 order that this hearing would be necessary.

23 MR. RANDOLPH: No, madam, but then there were a number of applications amongst which ours
24 was one, and as far I understand it – I did not see the other applications obviously – my learned
25 friend, Mr. Turner made his applications on behalf of his other Interveners, Mr. Barling, on
26 behalf of BT, made their application, in the light of the Registry receiving all those
27 interventions a letter was sent out saying “Let us have an additional, a newly scheduled CMC
28 to discuss this issue”. With respect, I do not think that can all be laid – if at all – at NTL’s
29 door. We are here as part of – not just the sole reason – the rationale for this hearing.

30 THE CHAIRMAN: Anyway, let us try and get on.

31 MR. RANDOLPH: Yes, indeed.

32 THE CHAIRMAN: You are saying that you should be allowed to intervene?

33 MR. RANDOLPH: Yes.

34 THE CHAIRMAN: That we should extend the time for your notice of intervention?

35 MR. RANDOLPH: Yes, madam.

1 THE CHAIRMAN: That is because there is no prejudice to the Appellant.

2 MR. RANDOLPH: And we have a sufficiency of interest.

3 THE CHAIRMAN: And you have a sufficiency of interest, well that is admitted by them.

4 MR. RANDOLPH: Yes.

5 THE CHAIRMAN: And they say there is no prejudice to them?

6 MR. RANDOLPH: Yes.

7 THE CHAIRMAN: Now, what is your position on disclosure? Are you going to go into the group?

8 MR. RANDOLPH: No. We entirely adopt Mr. Barling's submissions. We pointed out in our
9 submissions why we feel it would not be possible, with the best will in the world, for Mr.
10 Turner to represent my client's interest. We simply do not think that can work. However, we
11 did listen with interest to your suggestion, madam, about some form of liaison. We are happy
12 to go last, if that is helpful, because that would mean probably we would have to say very little,
13 if anything. Equally, it could cause difficulties if you are having a cascade – BT first, then
14 Alcatel, and the others next – there would be a knock-on effect by definition on the timetable.

15 THE CHAIRMAN: There may not be.

16 MR. RANDOLPH: There might not be, but it might be. What I was picking up on, madam, was
17 your suggestion, which I thought was, if I may say so, of interest, the question about liaison. I
18 do not know quite how that might work, but there could be some form of agreed liaison
19 timetabling as between the various interveners.

20 THE CHAIRMAN: That would mean you would have to see a draft?

21 MR. RANDOLPH: Yes, it would. You raised the suggestion and certainly we are not against that,
22 neither are we against any form of sequential submissions. The main aim, obviously, is to
23 avoid duplication and as we have said clearly in our submissions – and I will say again today –
24 we do not want to burden the Tribunal with any duplicated material, but we do find it not only
25 important but essential that we are here to protect NTL's interests, because we feel that if we
26 are not then they will not be protected.

27 Madam, unless you have any further questions?

28 THE CHAIRMAN: No, thank you.

29 MR. RANDOLPH: Those are my submissions.

30 THE CHAIRMAN: Who wants to go next now? Is it you Mr. Turner? I am aware that Miss
31 Murphy is sitting at the back of the court ----

32 MISS MURPHY: Yes, I am here. I am happy to make representations now or to wait?

33 THE CHAIRMAN: Do you really want to be sitting at the back there?

34 MISS MURPHY: I am quite happy, I can see everybody. Would you like me to proceed?

1 THE CHAIRMAN: Yes, because we do not have any rule here that you should not be sitting in the
2 same row as everybody else.

3 MISS MURPHY: Indeed. Are you happy for me to proceed from where I am?

4 THE CHAIRMAN: Yes, I am happy for you to proceed if you are comfortable doing so from the
5 back there.

6 MISS MURPHY: I am perfectly comfortable.

7 THE CHAIRMAN: Right.

8 MISS MURPHY: I think it is probably useful to clarify from the outset that I am representing both
9 GC Pan European Crossing (UK) Limited and Global Crossing (Europe) Limited which, for
10 the purpose of my submissions I am going to refer to collectively as Global Crossing. Global
11 Crossing applied for permission to intervene on 21st September, within the date of ----

12 THE CHAIRMAN: It is very difficult, because I cannot see you.

13 MISS MURPHY: Shall I stand, although with my height I do not know that it makes much
14 difference.

15 THE CHAIRMAN: There is a seat **here**, would you mind?

16 MISS MURPHY: I do not mind.

17 THE CHAIRMAN: Is it a nuisance if you move? (After a pause) That is much better. You can sit
18 down now, if you are happy?

19 MISS MURPHY: I do not mind, I am perfectly happy to remain standing, but as I say, with my
20 height I am not sure it makes much difference! (Laughter)

21 As I was saying I am representing both GC Pan European Crossing (UK) Limited, and Global
22 Crossing (Europe) Limited, together I am going to refer to them simply as Global Crossing.
23 Global Crossing applied to intervene on 21st September within the deadline for doing so, and
24 we continue to pursue that application.

25 On 22nd September the Tribunal said it was minded to grant Global Crossing permission to
26 intervene subject to any observations it receives. The Tribunal said it thought Global
27 Crossing's intervention should take the form discussed at the case management conference on
28 14th September 2006 in respect of Alcatel Submarine Networks Ltd. Duly on 11th October we
29 responded to the Tribunal saying that we would be happy for Global Crossing's intervention to
30 take such form. It seems therefore to be common ground on the part of Cityhook and the OFT
31 that our intervention ought to be permitted; there seems to be no objection to that.

32 That then takes me to the issue of how the intervention ought to be handled. So as to avoid
33 duplication we would echo in this context the submissions that have been made at the hearing
34 by BT and in fact by NTL. We have thought very carefully about the Alcatel Group and the

1 pros and cons of being part of such group. However, we do not feel that Global Crossing's
2 interests can be properly protected by such common representation.

3 Global Crossing is a principal party in Cityhook's action in the High Court. Global Crossing
4 was informed that it could be a recipient of a Statement of Objections. In this context the
5 questions and issues relative to admissibility and disclosure are not matters that we think could
6 be adequately protected by the Alcatel Group. Indeed, in this context we would remark that
7 actually not all members of the Alcatel Group were potential recipients of any Statement of
8 Objections. Conversely, similar to BT we have been put prominently in the round of matters
9 by Cityhook.

10 That takes me to the question of timetable. It is certainly not the intention of Global Crossing
11 to do anything that would extend the timetable or cause duplication. As to the issue of
12 duplication, again, like BT, we would not mind where in the order we come. We fully
13 understand the time constraints and, like BT, we would be scrupulous in our conduct. We
14 would not seek extra time. The timetable gives us, we think, sufficient time, but we recognise
15 that any intervention on Global Crossing's part may have a knock-on effect on both the Office
16 of Fair Trading and Cityhook, and we would not seek to object to any extensions that they
17 would require in that respect.

18 Madam, that completes the observations that we would like to make.

19 THE CHAIRMAN: You do not mind where we get to, but you want to be either at the beginning or
20 the end?

21 MISS MURPHY: We mind where we get to in terms of status of intervention being granted, but
22 thereafter as to how it is managed we do not want to be part of the Alcatel Group.

23 THE CHAIRMAN: And so you are either before or after.

24 MISS MURPHY: Absolutely.

25 THE CHAIRMAN: And you will fit into a strict timetable?

26 MISS MURPHY: Absolutely.

27 THE CHAIRMAN: Mr. Turner, I think it is your turn.

28 MR. TURNER: May it please the Tribunal, I appear with Mr. Pickford today not for Alcatel alone,
29 but for a group of joint Interveners comprising: Alcatel, which has been granted permission,
30 Tyco Telecoms, Cable & Wireless and GMS (Global Marine Systems).

31 THE CHAIRMAN: And of course Global Marine Systems has a different interest from the others
32 because you have to address us on why we should allow you to intervene?

33 MR. TURNER: I do indeed, madam. The issue of sufficiency of interest does not arise for any of
34 the parties but, as you point out, GMS presents an issue owing to the late service of its request
35 to intervene.

1 The way I propose to address these submissions very briefly is, first of all, to look at the
2 principle that the Tribunal should apply, secondly, at the issue of separate representation for
3 any of the parties; and thirdly to address the position of GMS, if that is convenient to the
4 Tribunal?

5 THE CHAIRMAN: Yes.

6 MR. TURNER: The principle to be applied by the Tribunal which dates back to the *Bettercare* case
7 – Mr. Summers will remember well – is broadly to allow those with a sufficient interest in the
8 outcome formerly to intervene, subject to their compliance with the procedural rules,
9 particularly if a point is taken, but to control tightly the scope and manner of intervention as
10 part of case management. That was the position adopted in the very first case, *Bettercare*,
11 where one of the Interveners (the Bedfordshire Care Group) had a very tenuous interest on the
12 facts, but it came in as an Intervener, was allowed formerly to intervene, and it was represented
13 through the same counsel as the other Intervener, so joint representation was the order in that
14 case. The reason for that principle is that it prevents the “oyster” problem – referring to Lewis
15 Carroll’s poem, “The Walrus and the Carpenter”:

16 “And thick and fast they came at last,
17 And more, and more, and more.”

18 The purpose of joint intervention is to avoid wasting court time and costs, and any separate
19 representation therefore needs to be closely justified. The position of the joint Interveners is
20 that we are content for each of the others who have addressed the Tribunal today to come in
21 under our umbrella if that were thought to be convenient. We do not perceive the same
22 problems in relation to separate representation as have been adumbrated to the Tribunal in
23 argument today. The interests of Cable & Wireless, Alcatel, Tyco Telecoms may diverge if it
24 came to a question of considering detailed documents containing confidential information
25 specific to each of those parties, but we are a long way away from that at the moment, and until
26 such a point is reached nobody has yet articulated any reason why separate representation is
27 needed.

28 THE CHAIRMAN: Can I just ask you, Mr. Turner, if the application, for example, may ask for
29 disclosure of a document, and the document has information which Cable & Wireless and
30 Alcatel have given to the OFT, are you submitting that in relation to that that no conflict can
31 arise between those two parties in relation to the information, that your submissions are going
32 to be the same?

33 MR. TURNER: The submission on the principle certainly will be the same, and to make it quite
34 clear we will be making submissions jointly on the principle. Beyond the principle the parties
35 did separately provide information to the Office of Fair Trading which was confidential to

1 them. If it came to it there may be a need for the parties to make separate points in relation to
2 information specific to themselves within the Group. Our position is that we are, at the
3 moment, far from reaching any such a point.

4 THE CHAIRMAN: Are you suggesting on the principle there can be no difference between any of
5 you? In other words, you are going to appreciate all the letters of principle that anybody could
6 appreciate and therefore there is no reason for anybody else to intervene?

7 MR. TURNER: First, in general, because they will be matters of principle there will not be any
8 question of separate confidentiality to take into account. Secondly, because we are representing
9 the group the way this is going to operate is that people will contribute to the document to
10 ensure that all relevant points on the question of principle are drawn to the Tribunal's attention.
11 So there will not be any scope there for anything to be missed. By reason of belonging to the
12 Group all points of principle can be addressed.

13 THE CHAIRMAN: So are you suggesting that in fact all seven could put in their points of principle
14 so that there is one document drafted, and one set of submissions?

15 MR. TURNER: Yes. We do not see – the ambit of the question is really quite limited first of all. So
16 far as the question of disclosure is concerned, one is addressing the question of whether there is
17 an issue ----

18 THE CHAIRMAN: I think we are only dealing with the question of disclosure at the moment, are
19 we not?

20 MR. TURNER: Yes. There is an issue which can only be decided by reference to specific
21 confidential information of individual parties. Mr. Rayment is going to make his application
22 by tomorrow. As at present advised we cannot see how any such a point is going to form part
23 of his application. It may be that on the question that, madam, you have raised, it would be
24 appropriate for Mr. Rayment to make clear what the ambit of his application for disclosure is
25 likely to be and what, if any, is the issue of fact, which he will say needs to be investigated by
26 reference to documents from individual parties, because if Mr. Rayment says we are going to
27 be addressing this on a matter of principle then it makes the Tribunal's decision easier; it
28 makes it very unlikely that there will be a conflict as between parties represented jointly on
29 behalf of the Interveners.

30 THE CHAIRMAN: What is going through my head is this: the way that you are suggesting would
31 come over the idea that there was a draft effectively.

32 MR. TURNER: Yes.

33 THE CHAIRMAN: That the other Interveners – all the Interveners – could then have a look at the
34 draft and say “I would like this point put in”, “I would like that point put in”, and it would all
35 be put into the same draft, and therefore the final version would have all the matters of

1 principle in. I am not sure that that is very much different from providing the document that
2 you will be providing and the other Interveners putting in additional paragraphs effectively by
3 a separate document, and I am not sure that time-wise it would not be more expeditious to do it
4 the second way rather than the first because you get the question of “I do not want that”, or “I
5 think that could be worded slightly differently” and so actually it may be more expeditious for
6 them to just put in their extra paragraphs, if they are just extra paragraphs.

7 MR. TURNER: That is a fair point, madam. I have to say that in preparation of the submissions for
8 this hearing, for example, there was no problem whatsoever.

9 THE CHAIRMAN: I am not suggesting your group should not do what you are saying, but those
10 who do not want to join your group I am not sure it would be more expeditious for them to see
11 a draft first and try and negotiate with you. If they want to be alone it might be just quicker for
12 them to put in ----

13 MR. TURNER: -- their separate additions.

14 THE CHAIRMAN: They say they are going to be scrupulous, and if they are not scrupulous the
15 wrath of the Tribunal may come ----

16 MR. TURNER: Madam, that is a fair point. The only qualification I would make to that is that the
17 course you are canvassing would also involve separate representation orally at the hearing.

18 THE CHAIRMAN: But again, they have to be scrupulous about that.

19 MR. TURNER: Yes, and it may well be that not much turns on it.

20 THE CHAIRMAN: I am not sure that there is very much difference, and I am not sure that it would
21 not cause more waste of time by trying to agree something – I am just thinking aloud.

22 MR. TURNER: Madam, it is a fair point; it is not a large point, and particularly if the Tribunal is
23 going to exercise the discipline that you have mentioned it may be that that is a fair way to
24 proceed, so we would not die in a ditch over that point.

25 THE CHAIRMAN: The Tribunal will not be favoured or assisted by the same principle being put in
26 a different way and it being said “That that is not duplication”. I think we might look very
27 unfavourably on that sort of submission.

28 MR. TURNER: Yes. Madam, that is perhaps as far as we can take it on separate representation.

29 So far as the joint Intervener group is concerned, either of those two courses is available and
30 we would be happy, as I say, for them to come under our umbrella. If the Tribunal felt it was
31 preferable to deal with it the other way then again, we have no strong objection to that.

32 THE CHAIRMAN: That raises the question, if we did it the way my mind was working just now
33 then who goes first? Do you go first, or does BT go first? BT say they do not mind which way
34 it is. That may be a matter that you ought to discuss with them.

1 MR. TURNER: I can certainly discuss that with my learned friend. We would say that, quite apart
2 from the fact that we have already intervened on the part of Alcatel in the case, we represent a
3 wider Group and the point that was made by my friend that because my friend has intervened
4 in other cases, and may intervene in other cases in the future, it should be accorded preferred
5 status is without precedent in my experience. We have the same right and opportunity to make
6 our submissions on behalf of a greater group.

7 THE CHAIRMAN: Because you are a group it might be easier for you to go first, because it might
8 be more complicated ----

9 MR. BARLING: I can say we are perfectly happy with that.

10 THE CHAIRMAN: You are happy to go second?

11 MR. BARLING: Yes.

12 MR. TURNER: We will, in any event, on the basis, madam, you have outlined, be liaising with
13 other separately represented Interveners.

14 THE CHAIRMAN: If a draft were provided it would be helpful rather than seeing it the last
15 opportunity.

16 MR. TURNER: Yes, we cannot, for the reasons indicated by Mr. Hoskins in his skeleton, liaise with
17 the Office of Fair Trading, for obvious reasons, but as between the Interveners we can and will
18 do so.

19 THE CHAIRMAN: I think that is right. Right, so that is your matter of principle.

20 MR. TURNER: That is the principle and the issue of separate representation.

21 THE CHAIRMAN: So we are now on Global Marine?

22 MR. TURNER: Global Marine did serve its request late. The main reason for its late service, which
23 was on 29th September, was that the issue which has arisen, of disclosure of confidential
24 documents, came into sharp focus only at the hearing on 14th September. GMS was not present
25 at that hearing, either by a solicitor representative or otherwise, and it became aware of the
26 detail ----

27 THE CHAIRMAN: Did they know about the hearing?

28 MR. TURNER: (After a pause) Yes, madam, they were aware of the hearing, but until that time
29 they rather took the view that the Office of Fair Trading as a public authority which had
30 communicated its decision and its reasons for closing its file might well be treated the way that
31 public authorities are generally treated in public law, that is to say you go behind its witness
32 statement or explanation only where that explanation is materially incomplete or some reason
33 is offered to suggest that in some way it might be misleading. What became clear on the
34 transcript was that the Tribunal's practice may be different – may be different - and it is also
35 fair to say, madam, that the Tribunal's growing jurisprudence is still at an early stage on this

1 point, that is why we are going to have a hearing, if there is a contentious issue, to decide it.
2 So that is frankly the reason for late service. They became aware of the transcript when it was
3 published on the website on 26th September. The application to the Tribunal was then made
4 two working days later on 29th.

5 Secondly, GMS is aware of the need not to add to the Tribunal's burden, and it has taken the
6 course of merging into the joint intervening group so that its submissions will be joined with
7 ours and it will add no additional costs or time burden on the Tribunal. I commend that to the
8 Tribunal as in its case a responsible and appropriate course of action.

9 The final point to address on GMS is that the OFT has pointed out that on 13th December 2004
10 in a letter it told GMS that it was unlikely to feature in a Statement of Objections if issued
11 (para.3(a) Mr. Hoskins' skeleton). As to that I think it is necessary to look at the letter – I do
12 not know if the Tribunal has that letter, it was attached as exhibit A to the OFT's skeleton.

13 THE CHAIRMAN: (After a pause) Yes.

14 MR. TURNER: The point is this, that although in the body of the skeleton the OFT says that GMS
15 was advised that if the OFT issued a Statement of Objections they were not going to be
16 addressees ----

17 THE CHAIRMAN: Can I just ask you, at that point Mayer Brown were representing Global Marine
18 Systems, were they?

19 MR. TURNER: Yes.

20 THE CHAIRMAN: I just wanted to make sure I had the right letter?

21 MR. TURNER: That is right, at that time they were part of the same group.

22 MISS MURPHY: That is right, they were part of the same group and then went through insolvency
23 proceedings and then came into different ownership.

24 MR. TURNER: Now, the point that I desire to make is that when you look at the letter – you have to
25 look at the bottom of the first page and the top of the second page – you will see that it is
26 expressed in far more diluted terms. “However, at this stage, we are minded not to address this
27 SO to your company”, and then over the page: “This approach has taken account of the OFT's
28 present priorities and the resources available to it at this point in time.” So first of all, time
29 specific; and secondly, not saying that you do not bear responsibility on the substance, but it is
30 a question of our current appreciation of priorities.

31 THE CHAIRMAN: Well taken account of, not necessarily fully. It is not the only reason?

32 MR. TURNER: It is not the only reason. It goes on:

33 “Please note however, that whilst we are currently drafting the SO on this basis the
34 OFT has absolute discretion prior to the issuance of the SO, to alter its approach and
35 proceed to issue an SO to those members of the UKCPC who are not currently

1 identified as intended addressees in relation to either or both of the suspected
2 infringements.”

3 Then: “In addition you may expect to receive further information requests.” GMS in short
4 was a target of the investigation. It was in the frame, it would be wrong to say that that letter
5 took it out of the scope of the investigation. It has a sufficiency of interest nonetheless, and
6 that is the point I desire to make.

7 THE CHAIRMAN: May there not be another point on the letter? There is the same point that you
8 are making but in reverse in other words, that your client may be in a different position as to
9 whether it can be submitted that there is a non-infringement decision because of the letter.

10 MR. TURNER: As against itself?

11 THE CHAIRMAN: As against other people who did not get the letter?

12 MR. TURNER: There may be a point as to that.

13 THE CHAIRMAN: It is not a point that appears yet to be taken.

14 MR. TURNER: It is not a point that has been articulated or cemented, and I say no more about it,
15 but for present purposes, for the purposes of considering intervention, the point is that GMS is
16 not out of the frame of the investigation. On the substance it was very much potentially still in
17 the frame.

18 So for those reasons, madam, we do beg the Tribunal’s permission to intervene out of time.

19 There has been no prejudice and, importantly, no point is taken by Mr. Rayment to oppose the
20 intervention on the basis that GMS forms part of the joint Intervener Group.

21 THE CHAIRMAN: But of course as the thing goes on they may not be part of the Intervener Group,
22 because depending on whether you can have an Intervener’s Group.

23 MR. TURNER: If an issue of confidentiality arises ----

24 THE CHAIRMAN: Or on admissibility they may have a different – for possibly the reason that I
25 alluded to just now, they may have a different point to other people?

26 MR. TURNER: Madam, if such a point is made, it will be fed through me as part of the joint
27 intervention, it will not therefore involve additional work or time for anybody.

28 So far as the specific position is concerned, if a confidential document arises of some kind,
29 again all I can say is that that is far in the future and, in my submission, it is unlikely to arise
30 sufficient unto the day.

31 Madam, I believe that is all. The only additional point I wish to make is that it was indicated
32 that papers had been made available to Alcatel by Cityhook. In fact, files were made available
33 to ourselves as counsel this morning – we found them on our chairs when we came into work.

34 THE CHAIRMAN: Has everything been made available to you, or only part?

1 MR. TURNER: Only part of the 12 volume notice of appeal plus exhibits has been made available
2 to us at this stage. We have the notice of appeal itself and one other volume, which I believe
3 accounts for volumes 1 and 2 of the attached exhibits. We do not have anything else at
4 present.

5 Madam, unless there is anything further, those are my submissions.

6 THE CHAIRMAN: No. Thank you. Mr. Hoskins?

7 MR. HOSKINS: I am slightly nervous stepping into a tough war between Interveners, but I do not
8 have very much to say.

9 THE CHAIRMAN: I was wondering if you had anything to say.

10 MR. HOSKINS: You have seen from our skeleton we think sufficient interest is made out. I think
11 what I can hopefully usefully add is that it does seem to us that the best way to avoid
12 duplication is to permit gaps in the timetable, some sort of sequential steps for the Interveners.
13 It may be helpful to point out that in our submissions for today we had said that we did not
14 think that the timetable needed to be altered, but having seen ----

15 THE CHAIRMAN: It is going to have to have some ----

16 MR. HOSKINS: I think without going to the Intervener's position you can already see a need for
17 some alteration because the joint Interveners' submissions have suggested a difference in
18 timing because under the old timetable we had Alcatel's response on disclosure was to go in on
19 Wednesday, 8th November and Cityhook's skeleton was on the same day, and the point very
20 fairly made by the joint Interveners' skeleton is that it would be sensible to have Cityhook
21 going after the joint Interveners. Cityhook have made the point that if we are going to take
22 into account what all the Interveners have to say then we might need a bit more time –
23 obviously more time in the same day, and perhaps a bit more time than one day. Treating it as
24 if it were a specific disclosure application, say, in the High Court it seemed to us sensible that
25 we should also put in a skeleton which currently is not in the timetable.

26 THE CHAIRMAN: You want to put in a skeleton – do you think you should go before or after the
27 Interveners, or it does not matter?

28 MR. HOSKINS: I was trying to work out all the steps that were needed in the timetable, and I think
29 there are probably eight steps. I do not know if it is helpful what I think they are now?

30 THE CHAIRMAN: Possibly.

31 MR. HOSKINS: First, there will be the application by Cityhook for specific disclosure. Then there
32 would be the response by the Office. Then there would be the response by, query, the joint
33 Interveners.

34 THE CHAIRMAN: Then the individual Interveners. This is my concern, that the individual
35 Interveners, we do not want duplication between the individual Interveners.

1 MR. HOSKINS: That is why I say the next step – the fourth step – is response by the Interveners,
2 and I have already submitted it seems to us that some sequential step is sensible. So if you
3 have the joint Interveners and then very shortly afterwards – it does not take particularly long
4 – the individual Interveners, because then they can take account of both the Office and the joint
5 Interveners.

6 The fifth step we say would be a skeleton argument from Cityhook. In its written submissions
7 Cityhook suggest that they should have a chance to reply to the responses, but it seems to us
8 that it is probably unnecessary, a skeleton will be that reply, and then set up the hearing.

9 THE CHAIRMAN: Substance, not form?

10 MR. HOSKINS: Substance not form. The next step would be the skeleton argument from the
11 Office, and I think it has to go before the Interveners again to avoid duplication, because if we
12 then have a skeleton argument (if so advised) from the joint Interveners they will have seen
13 what the Office has said.

14 THE CHAIRMAN: Do we need skeleton arguments from the Interveners?

15 MR. HOSKINS: That is why I say “if so advised”, I am not sure if that is something that is
16 envisaged. If they have something to add it is just a question of what is the mechanism by
17 which they are going to do it. They can do it simply orally at the hearing ----

18 THE CHAIRMAN: We have their submissions, we do not need those repeated again.

19 MR. HOSKINS: It depends what form their submissions take. I was thinking of the model of a
20 specific disclosure application in the High Court and what would happen is that you would
21 have the application by Cityhook ----

22 THE CHAIRMAN: You do not have all these Interveners in the High Court.

23 MR. HOSKINS: No, precisely, but you would have an application plus a supporting witness
24 statement – if it was the High Court – for a specific disclosure, and the responses would tend to
25 be of that sort of nature rather than going into legal debate at that stage. That is why it may
26 well be that the actual legal debates are not concretised or even put in any great detail until you
27 get to skeleton arguments.

28 THE CHAIRMAN: As I understand it the Interveners are thinking of doing this as a matter of
29 principle, so it is legal debate.

30 MR. HOSKINS: Madam, the application may raise issues both of legal principle, i.e. it is not
31 necessary to order disclosure in this case because they may want to raise issues about their
32 particular documents, because that will go into one of the points, madam, you raised on the
33 agenda as to ----

34 THE CHAIRMAN: But do they need to do it twice? Why do they need to do it twice?

1 MR. HOSKINS: Well, maybe they do not, I am just trying to identify the things that might have to
2 happen, I think there are eight of them, and if anyone does not need one of those steps then that
3 makes it easier.

4 THE CHAIRMAN: That was seven, so what is your eighth?

5 MR. HOSKINS: Seven would be whether the other Interveners had any submissions they wished to
6 make.

7 THE CHAIRMAN: That is seven, so what is your eighth?

8 MR. HOSKINS: I had: application by Cityhook, response by the office, response by the joint
9 Interveners, responses by other Interveners, skeleton argument from Cityhook, skeleton
10 argument from the OFT, and skeleton argument/submissions from the joint Interveners, and
11 skeleton argument/submissions by other Interveners which, I think, comes to eight.

12 THE CHAIRMAN: Right.

13 MR. BARLING: Madam, if it helps you, we three, whom I think are the other Interveners, take the
14 view at this stage, we do not anticipate we will need to have a separate opportunity to put in a
15 skeleton. We will be here at the hearing and if we thought we needed to I suppose we could
16 apply.

17 THE CHAIRMAN: If it becomes apparent that it is necessary then ----

18 MR. BARLING: We could apply.

19 THE CHAIRMAN: Yes.

20 MR. HOSKINS: If that is the case then – that is obviously very helpful – the timetable will have to
21 have a sufficient ----

22 THE CHAIRMAN: I think we ought to ask Mr. Turner if he has something, because he did get up.

23 MR. HOSKINS: I am sorry.

24 MR. TURNER: It was only to say I concur with Mr. Barling, we are in exactly the same boat. The
25 only point we would add is that we also do not entirely see why the OFT needs to put in a
26 skeleton argument at that stage. It is a matter for the Tribunal.

27 THE CHAIRMAN: Yes.

28 MR. HOSKINS: I have entered into a tough war obviously, madam. Two points come out of that:
29 that is fine, if it is not presently envisaged that there are going to be any further written
30 submissions from the Interveners then that is not a problem. But if, as Mr. Barling suggests, the
31 possibility might arise then the timetable will need to allow for that possibility, albeit it might
32 have to be short.

33 THE CHAIRMAN: Is the reason why you might want to put in a skeleton not that you might want
34 to take account of matters that have been dealt with by the Interveners, which you had not
35 appreciated because there is no liaison between you?

1 MR. HOSKINS: That is certainly one of the reasons.

2 THE CHAIRMAN: So if we say – if this is the way that we are going to do it – that your skeleton
3 argument should not duplicate your original submissions ----

4 MR. HOSKINS: Certainly, but as I say ----

5 THE CHAIRMAN: -- anything in addition from what has happened.

6 MR. HOSKINS: Madam, yes, I keep bringing it back to this is a specific disclosure application and
7 it depends what sort of form it is made in. It may well be that we do not put out in detail our
8 legal arguments until we see how it has crystallised.

9 THE CHAIRMAN: Well then it will not duplicate it.

10 MR. HOSKINS: Precisely, but I just wanted to make that clear to everyone, that our legal position
11 may well not be crystallised until our skeleton argument, but it seems to me that is sensible.
12 We will respond as we think is helpful and appropriate at the earlier stage, but it seems to me
13 we should draw it altogether in the skeleton argument, and that is the purpose of it.
14 I think that is a six stage plan – query: whether we need to leave a small gap in case there is
15 anything that any of the Interveners want to add having seen the skeleton arguments. I am
16 sorry to trespass into timetable, but it seemed to me that was appropriate because that is the
17 way the debate has gone this morning.

18 THE CHAIRMAN: Yes.

19 MR. HOSKINS: Madam, I think that is all I have to say, unless you have any other questions?
20 Thank you.

21 (The Tribunal confer)

22 THE CHAIRMAN: We are going to rise for a moment to decide what we are going to do about the
23 two Interveners.

24 (The hearing adjourned at 11.55 a.m. and resumed at 12.30 p.m.)

25 (For Ruling see separate transcript)

26 THE CHAIRMAN: We will now turn to the timetable to ensure that that happens in this case on
27 disclosure.

28 Before we turn to the timetable, one matter which I think I did not identify is the Notice of
29 Appeal, because there is the question of whether that needs to be amended.

30 MR. RAYMENT: Well, you have just raised that with me ----

31 THE CHAIRMAN: I know, I am sorry.

32 MR. RAYMENT: No, that is fine.

33 THE CHAIRMAN: It just came to my mind.

34 MR. RAYMENT: It is rather difficult for me to respond on that. I think at first sight the issue is
35 whether issues are sufficiently set out for the Tribunal to deal with the issue of jurisdiction.

1 THE CHAIRMAN: If this case goes on it can cause a problem if the Notice of Appeal does not
2 actually set out the grounds of appeal.

3 MR. RAYMENT: I understand.

4 THE CHAIRMAN: We would need to hear whether in fact the Notice of Appeal as it stands, with
5 the clarification, actually sets out the grounds of appeal. My concern is that that may cause
6 some confusion and difficulty in the future if it is not amended.

7 MR. RAYMENT: I understand that, madam, and I wonder if I could just take it in two points?
8 There has been some speculation already about what the application for disclosure will look
9 like, and from our side it will need to set out in some detail what the Appellant's case is on the
10 law in order to assist the Tribunal in identifying the issues that it has to determine on the
11 jurisdiction point, and most immediately what disclosure, if any, is going to be necessary for it
12 to resolve those issues. We are proposing to set out in some detail what our case on the law on
13 jurisdiction is in the application ----

14 THE CHAIRMAN: And I assume that has been done because it is only for tomorrow is it not?

15 MR. RAYMENT: That is right, it is at an advanced stage.

16 THE CHAIRMAN: So it is not going to be very difficult at the same time to look at the Notice of
17 Appeal, and to put in such amendments as necessary?

18 MR. RAYMENT: I was wondering what sort of time frame you were envisaging, because
19 obviously from our point of view the priority is to comply with the Tribunal's deadline
20 tomorrow, so any amendment of the Notice would need to follow thereafter. I have a small
21 personal difficulty which is that I am away from Wednesday for the rest of the week.

22 THE CHAIRMAN: So it really has to be done before Wednesday?

23 MR. RAYMENT: Well I am hoping you will not require it to be done before Wednesday – the
24 Notice of Appeal that is.

25 THE CHAIRMAN: Are you of a mind that it really needs to be done?

26 MR. RAYMENT: What I am hoping is that the application for disclosure will make our position
27 clear for the purposes of the jurisdiction issue, but I can see that it may be desirable that that
28 case should find its way into the Notice of Appeal as well, but I am simply saying that
29 logistically at the moment ----

30 THE CHAIRMAN: You cannot do it before Wednesday?

31 MR. RAYMENT: That is right. Certainly, having only recently been instructed I am not in a
32 position to know what amendments need to be made vis-à-vis the second stage of any validity
33 of any appealable Decision that might be found, but it seems to me that that is something that
34 could be put off for the time being, if the Tribunal was minded.

35 THE CHAIRMAN: Put off until next week you mean, not put off ----

1 MR. RAYMENT: Well I was just thinking that if there was no jurisdiction there is no issue, and if
2 the Tribunal finds jurisdiction there is, of course, an issue on what basis the Tribunal ----

3 THE CHAIRMAN: Yes, but the jurisdiction is in relation to whether there is an admissible
4 Decision, and my recollection of the Notice of Appeal is that it does not address that point
5 squarely?

6 MR. RAYMENT: No, I accept that, and that is why I do accept that it would be desirable if the
7 Notice of Appeal was amended in the same terms as the application for disclosure. I am
8 simply debating when that should take place.

9 THE CHAIRMAN: Even if it was held to be inadmissible it still should be amended because if you
10 were minded to appeal that the Court of Appeal would be rather confused by what had been
11 going on, having regard to the Notice of Appeal.

12 MR. RAYMENT: I am so sorry. I am not suggesting that the Notice of Appeal should not be
13 amended as soon as possible in relation to the jurisdiction issue. I am simply saying that if you
14 required more than that at this stage that would take much longer. But as I say the substantive
15 issue is some way away and would depend on whether or not the Tribunal finds jurisdiction.

16 THE CHAIRMAN: Sorry, you are suggesting that the Notice of Appeal ought to be amended more
17 widely than just in relation to ----

18 MR. RAYMENT: Well I am saying it may be, but I am not in a position at the moment, having only
19 recently been instructed, to opine on anything other than the jurisdiction aspect, which we
20 accept.

21 THE CHAIRMAN: Which you accept needs to be amended on that basis?

22 MR. RAYMENT: Yes.

23 THE CHAIRMAN: And you cannot do that before Wednesday?

24 MR. RAYMENT: I am afraid not, no.

25 THE CHAIRMAN: Mr. Hoskins – I do not think there is anything else for you to say?

26 MR. HOSKINS: This is the part we debated last time, I appreciate Mr. Rayment was not there.

27 THE CHAIRMAN: We left it rather vague last time. I do not think it is in the transcript that there
28 should be an amendment, and of course now that there are legal advisers it ought to be put
29 forward in a way that is supported by the legal advisers.

30 MR. HOSKINS: Madam, yes, that is why we pushed for the clarification last time because we
31 thought it was important. But there is a procedural issue that arises, because what would be
32 unfortunate is if every time someone comes to this case they change the case slightly. There is
33 not a huge amount of water under the bridge, but there is more than a trickle under the bridge
34 already, and I think it is important to point out that the Tribunal Rules do specifically deal with
35 amendments and Notice of Appeal; it is Rule 11 of the Tribunal Rules. Permission is required

1 of the Tribunal, obviously there may not be a problem given that it is the Tribunal that is
2 suggesting it should happen, but there are limitations as to when amendment can take place.

3 THE CHAIRMAN: Well I think it was suggested last time so we had rather got round that, had we
4 not, because he was asked to clarify it.

5 MR. HOSKINS: Madam, that is right because I think the ground that would come in in terms of the
6 clarification was seen as an amendment, although not formally would probably be 11(3)(b) –
7 “it was not practicable to include such a ground in the notice of appeal”, and you might say
8 that because there were no lawyers on board and now there are ----

9 THE CHAIRMAN: Yes.

10 MR. HOSKINS: My concern is that if Mr. Rayment is now going to come to it and put forward
11 other points that are not in the clarification one has to draw a line under this some time, and it
12 will have to be justified under Rule 11.

13 THE CHAIRMAN: It should be what has been put into the clarification.

14 MR. HOSKINS: Precisely.

15 THE CHAIRMAN: I think at the moment all he is saying is that that is all he wants to do.

16 MR. HOSKINS: That is why I would just like to put down a marker that as long as it does not go
17 beyond the clarification I do not think there is a problem. If it goes beyond the clarification
18 then it might impact on the timetable, Rule 11 will have to be considered, it is not completely
19 straight forward.

20 THE CHAIRMAN: For my part at the moment I do not see why you cannot do that before you go
21 away, because it seems to go hand in hand with your disclosure.

22 MR. RAYMENT: I agree it goes hand in hand, madam, and I am sorry, I am not trying to be
23 uncooperative by not being able to do it by Tuesday, but there is still a certain amount of work
24 that needs to be done on the application for disclosure ----

25 THE CHAIRMAN: And you do not have the hours in the day?

26 MR. RAYMENT: -- I will not be able to do the Notice as well.

27 THE CHAIRMAN: You are going away Tuesday night, you are not here Wednesday?

28 MR. RAYMENT: No, that is right.

29 THE CHAIRMAN: And you are back?

30 MR. RAYMENT: On Sunday.

31 THE CHAIRMAN: Right. (After a pause) I have not asked all the Intervenors whether they want
32 to say anything about this, but I do not think they have really got ----

33 MR. BARLING: We cannot really say anything, we have not seen the document.

34 THE CHAIRMAN: No.

35 MR. TURNER: We have only seen it this morning.

1 THE CHAIRMAN: Mr. Hoskins, is there any prejudice suffered by you if we give Mr. Rayment
2 until next Tuesday to do this document, because you know what is going to be in it?

3 MR. HOSKINS: Certainly, as long as it does not go beyond the clarification, it is not a problem at
4 all.

5 THE CHAIRMAN: So permission to amend Notice of Appeal to incorporate clarification contained
6 in the letter from Edwin Coe, dated 29th September 2006. The amended Notice of Appeal to be
7 filed and served by 5 p.m. on 31st October 2006. That has not taken us out of our timetable,
8 why I raised it is in case it did, but it has not, it does not hold us up.
9 Your application is going to be filed by 5 p.m. tomorrow?

10 MR. RAYMENT: Correct.

11 THE CHAIRMAN: So the next thing is the OFT, when do you want to put your response in?

12 MR. HOSKINS: I am quite happy with the number of days we had last time. It is probably
13 important that I should make clear what we are intending to do – we are slightly in the dark
14 because we have not seen the application. First, what I would envisage is primarily a witness
15 statement that would deal with any factual issues that arise that need to be before the Tribunal
16 out of the application and the legal argument will come later in the skeleton ----

17 THE CHAIRMAN: Why do you want to do it that way?

18 MR. HOSKINS: Because that is the way it is done in the High Court.

19 THE CHAIRMAN: Why can you not just put the legal arguments in as well?

20 MR. HOSKINS: If that is what the Tribunal would like then we will need longer to do it.

21 THE CHAIRMAN: I see.

22 MR. HOSKINS: That is why I thought it was important that I clarified what we were intending to
23 do, because that is the basis that we suggested the timetable last time.

24 THE CHAIRMAN: By putting the factual stuff in that is the springboard to the Interveners?

25 MR. HOSKINS: That is right, yes. We certainly could, madam, if you prefer to have a composite
26 document law and facts, it is just that we would need longer to do it.

27 THE CHAIRMAN: No, I understand why you are doing that. It makes no difference, it is the
28 chicken and egg principle.

29 MR. HOSKINS: Madam, there is another point in terms of what people are envisaging happening,
30 because again certainly what we were envisaging not happening – if I can put it inelegantly – is
31 we do to anticipate there will be any process relating to confidentiality between us and the
32 Interveners prior to the hearing. The reason why I say that is unless and until it is decided as a
33 matter of principle there is no point in engaging in that exercise because it may be actually a
34 pretty onerous exercise depending on what comes out of it. It is just to make clear ----

35 THE CHAIRMAN: And it ought to be decided without being tainted by confidentiality issues.

1 MR. HOSKINS: There may be general issues of confidentiality. It could go into the mixing pot that
2 BT might say “There is something particularly confidential in this document ...”

3 THE CHAIRMAN: I think we will have to see how it turns out.

4 MR. HOSKINS: Exactly, but that is certainly not an exercise we anticipate doing before the hearing.

5 THE CHAIRMAN: All right, so you want until 2nd November, which gives you ----

6 MR. HOSKINS: It slightly depends, we are working back – if we are keeping 13th November.

7 THE CHAIRMAN: I think we have just got to work out whether or not we can keep it. Could you
8 do it before 2nd November?

9 MR. HOSKINS: That was certainly our intention. As I say, we are slightly in the dark because we
10 do not know what is coming, but if the hearing is 13th November, yes we will do it by then.

11 THE CHAIRMAN: But could you do it before 2nd November?

12 MR. HOSKINS: I doubt it, no, madam.

13 THE CHAIRMAN: All right, so 2nd November is the ----

14 MR. HOSKINS: Is the “best offer”, if I can put it like that.

15 THE CHAIRMAN: Is the “best offer”. All right. There was an offer before, but I do not think it
16 was from Mr. Turner, to bring back the date of 8th November. Mr. Turner, is it possible for
17 you to bring back the date of 8th November?

18 MR. TURNER: Madam, it is. We understand that there will not be detailed issues of confidentiality
19 that need to be covered and that it will be addressed in the first instance on a question of
20 principle, and on that basis we would anticipate putting in submissions that are fairly brief, and
21 could do so by Monday, if that would assist the Tribunal. The intention is to try to keep the
22 date of 13th November for the hearing.

23 THE CHAIRMAN: That is the idea, or not to go off very much after that – in other words, possibly
24 on the 14th?

25 MR. TURNER: Madam, the only point I would ask in order to ----

26 THE CHAIRMAN: Monday is the 6th?

27 MR. TURNER: Yes, that leaves us a very short time indeed, and therefore I would appreciate it – I
28 mentioned this before – if we could have at least some clarification before I sign up to that
29 today, from Cityhook as to what issue of fact their application for disclosure is going to be
30 directed, because that may help me in being able to say whether or not I can fit it in within a
31 very short time frame or not.

32 THE CHAIRMAN: Before we do that, can we just see whether it is a possibility that we can keep
33 the date or not if you did it on the 6th, because it may be putting Mr. Rayment into a slightly
34 difficult position, asking him that?

35 MR. TURNER: Yes.

1 THE CHAIRMAN: If the group put their submissions in on the 6th, it is unlikely that you are going
2 to see anything very much earlier than that because they have only got four or five days to do
3 it, so you may get it in the morning, but that is about it, is it not? So on that basis – I assume it
4 is BT that goes next? How long do you want?

5 MR. BARLING: Well I think when we had our discussion, when you retired, we said – probably
6 rashly – that we would try and do it by the 8th, which is then moving towards the same time
7 table. Mr. Randolph's client, and Miss Murphy's would do it at the same time I think is the
8 aim.

9 THE CHAIRMAN: But you would liaise with them? How is that going to work because I do not
10 want duplication between you and Mr. Randolph.

11 MR. BARLING: So we would endeavour to liaise.

12 THE CHAIRMAN: You would endeavour to liaise?

13 MR. BARLING: Yes.

14 THE CHAIRMAN: So you would all do it by the 8th?

15 MR. BARLING: That is our offer, I think.

16 THE CHAIRMAN: Oh, right.

17 MR. RANDOLPH: Absolutely, we are very happy to do that, and I think it is do-able on the basis
18 that it will be the Oft, then Mr. Turner's submissions and ----

19 THE CHAIRMAN: And the three of you will liaise?

20 MR. RANDOLPH: We will liaise, as you suggested right at the start.

21 THE CHAIRMAN: Excellent. Is that all right?

22 MR. HOSKINS: Yes, madam.

23 THE CHAIRMAN: Right, so BT, NTL, and Global Crossing are doing it by the 8th. Then we are
24 back into our timetable; that is very good.

25 MR. HOSKINS: Madam, there are some more ----

26 THE CHAIRMAN: Yes, I know we have to put some more stuff in, but we are back to the
27 timetable. Cityhook, after the 8th, will want to put in a skeleton?

28 MR. RAYMENT: Yes, madam.

29 THE CHAIRMAN: How long do you want for that?

30 MR. RAYMENT: We would have Alcatel on 6th ----

31 THE CHAIRMAN: You would have Alcatel on the 6th, BT, etc., on the 8th. 8th is a Wednesday, can
32 you do it by the Friday?

33 MR. RAYMENT: I am worried about doing it by the Friday. Is there any flexibility in the following
34 week. I am conscious that Mr. Hoskins as well wants to file a further document.

35 THE CHAIRMAN: I cannot do it the following week, I have a case here the following week.

1 (The Tribunal confer)

2 MR. RANDOLPH: When you said you could not do the following week, does that mean the week
3 of 20th?

4 THE CHAIRMAN: 20th.

5 MR. RANDOLPH: If one were looking for some flexibility, slightly later in the week of 13th?

6 THE CHAIRMAN: There is no flexibility except on the 14th. I might be able to do the 17th, but at
7 the moment I am doing a Tribunal elsewhere.

8 MR. RANDOLPH: I shall be winging my way to the Falklands on that day.

9 MR. HOSKINS: I have a High Court hearing on 17th as well.

10 THE CHAIRMAN: So I do not have to inquire whether my Tribunal hearing has been adjourned.

11 The next time we could do it is week beginning 27th, but I cannot do 27th.

12 MR. TURNER: I have a problem that week. Once we get beyond 27th then I have insuperable
13 difficulties.

14 THE CHAIRMAN: Just that week, or the following week as well?

15 MR. TURNER: I have a substantial matter which is floating for two weeks beginning on 27th.

16 THE CHAIRMAN: That sounds as if we must try and do it on 13th or 14th?

17 MR. TURNER: Certainly that would help us.

18 THE CHAIRMAN: Do you think you could have the skeleton in on the morning of the 13th, so you
19 had the weekend?

20 MR. RAYMENT: Yes, I think that would be possible, and then the hearing moved to the 14th?

21 MR. HOSKINS: That does not leave any time for the Office's skeleton.

22 THE CHAIRMAN: Do you need to see, because it is their application so they should go last, so do
23 you need to see their skeleton to do yours, or can you do your skeleton and have it in on the
24 morning of 13th as well.

25 MR. HOSKINS: Madam, we can always do it that way, it is just a question of having sequential
26 skeletons is usually beneficial. If we do not have the luxury we do not have that luxury.

27 THE CHAIRMAN: Unless they all came in at lunch time.

28 MR. HOSKINS: I think having it cleared through the Office is a problem on that because obviously
29 it is fine for me to put pen to paper, but obviously it has to be cleared through the Office, and I
30 think that is going to be difficult.

31 THE CHAIRMAN: We could not hold the 14th and do that, I think we cannot have the luxury of
32 sequential skeletons.

33 MR. HOSKINS: That may well be the pay-off.

1 MR. RAYMENT: Hopefully the contours of the case will be reasonably apparent from the Notice of
2 Application and the response because, as I say, from our side we do intend to refer to legal
3 issues and the test for disclosure, so there will be ----

4 THE CHAIRMAN: I was just going to say having regard to this it may be beneficial if you put some
5 of what you would normally put in the skeleton in the Notice of Application.

6 MR. RAYMENT: As far as possible we intend to do that.

7 THE CHAIRMAN: So you will be able to answer what they say legally, so you will know what
8 their legal case is?

9 MR. HOSKINS: Certainly the more up front they can be that will help to capture the case.

10 THE CHAIRMAN: We will move the hearing to 10.30 on Tuesday and what time could you have
11 the submissions in? It would be helpful if it was the morning?

12 MR. RAYMENT: 9.30.

13 THE CHAIRMAN: I will give you until 10 o'clock.

14 MR. RAYMENT: I am grateful.

15 THE CHAIRMAN: If you can get them in earlier then that would be better. Is that all right, Mr.
16 Hoskins?

17 MR. HOSKINS: The only hesitation is on this timetable I will be drafting over the weekend, which
18 means the Office will not have a chance to look at it until the Monday morning and that is why
19 I can see 10 perhaps being a bit tight for me to get clearance for what I have said.

20 THE CHAIRMAN: Can you do it by ----

21 MR. HOSKINS: Well I will obviously be working on it the week before, and hopefully we can
22 agree the bright lines.

23 THE CHAIRMAN: If there is a problem there is a problem, and we will have to think about whether
24 we give you some indulgence on the day.

25 MR. HOSKINS: I think that is probably the way to do it.

26 THE CHAIRMAN: But if you can do it by 10?

27 MR. HOSKINS: Certainly.

28 THE CHAIRMAN: It may be that the Office could look at them on Sunday, somebody – whoever it
29 is – could look at it on Sunday.

30 MR. HOSKINS: Madam, I can take that up with them.

31 THE CHAIRMAN: They are all smiling behind you.

32 MR. HOSKINS: I am glad it was not my suggestion! (Laughter)

33 THE CHAIRMAN: I have only put it tentatively. So the skeletons of the Appellants and the
34 Respondents will be 10 a.m. on the 13th November and then the hearing is 14th November, and
35 I gave you until Tuesday, 5 o'clock, to do the amended Notice of Appeal?

1 MR. RAYMENT: Yes, as per the original order.

2 THE CHAIRMAN: No, the amended Notice of Appeal?

3 MR. RAYMENT: I am so sorry, yes, on 31st?

4 THE CHAIRMAN: Yes. What does that leave us?

5 MR. RANDOLPH: Service of papers, madam.

6 THE CHAIRMAN: Service.

7 MR. RANDOLPH: Service of documents. Obviously, speaking for myself we would obviously
8 want all relevant papers including, I would think, the skeleton arguments for the first CMC
9 insofar as they may throw any light on the matters discussed, there were some quite interesting
10 matters of principle.

11 THE CHAIRMAN: Well you have the transcript.

12 MR. RANDOLPH: I know we have the transcript, yes.

13 THE CHAIRMAN: Do you need any more than the transcript?

14 MR. RANDOLPH: Well, we may well do. I do not know what else, by definition I do not know
15 what else was in the skeletons that was not discussed at the CMC, and it would give a fuller
16 picture. It would probably enable us, bearing in mind that the primary obligation on us not to
17 duplicate, if we can see that something has already been picked up somewhere, but maybe was
18 not discussed at the CMC, it may be we can just cross refer to it rather than set it all out all
19 over again.

20 THE CHAIRMAN: I am just wondering about the logistics of serving all the parties. Now, in
21 relation to the group, is the idea that there is one firm who is to be served?

22 MR. TURNER: Madam, that will make things easier. I have not discussed that detail yet.

23 THE CHAIRMAN: But that would be much easier for all concerned, so that only one copy needs to
24 be served?

25 MR. TURNER: That would make it much easier. We will need to decide between us which that
26 person is.

27 MR. BARLING: Madam, if it will help logistically – I have just had a quick word – if one of us
28 were served we would then undertake to copy it to the others.

29 THE CHAIRMAN: That is what is going through my mind, that otherwise it is such a ----

30 MR. BARLING: So that only one of us, as it were ...

31 THE CHAIRMAN: (After a pause) Mr. Rayment, there has been an offer here that service will
32 only need to be one copy on one of the firms of solicitors in the group and one of the firms of
33 the solicitors out of the group and that they will then distribute

34 MR. RAYMENT: That is an extremely helpful offer. We were also wondering on this side whether
35 we might have our copy for the Intervener back from the Tribunal, out of our 10 copies?

1 THE CHAIRMAN: Yes.

2 MR. RAYMENT: I am grateful.

3 THE CHAIRMAN: So perhaps you could let the Tribunal know before we draw up the order the
4 identity of the solicitor who is to be served so that the order can say that service will be on
5 which ever the solicitor is.

6 MR. TURNER: Madam, I am in a position to say now it is Beachcroft Stanley for the joint
7 Interveners.

8 MISS MURPHY: Madam, I can say for us it will be Mayer Brown.

9 MR. RAYMENT: And that should be marked “For the attention of Mr. Wilkes”, should it, at
10 Beachcroft Stanley?

11 MR. TURNER: Yes.

12 THE CHAIRMAN: (To Miss Murphy) And your attention at Mayer Brown?

13 MISS MURPHY: Indeed.

14 THE CHAIRMAN: That is very helpful. Now the question is what are you going to serve?

15 MR. RAYMENT: We can serve what we have already served on Alcatel.

16 THE CHAIRMAN: What I was thinking was this, that there are these 10 files and everybody is
17 going to wonder what is in the 10 files.

18 MR. RAYMENT: 12, I think.

19 THE CHAIRMAN: 12 files – 10 files plus the two, yes, 12 files. I think your position is that the
20 two files that you supplied to Mr. Turner have the relevant material for the present purposes
21 and the 10 files do not. Is that ----

22 MR. RAYMENT: They were the most immediately relevant to the disclosure application but in fact
23 there will be some matters referred to in the third file as well.

24 THE CHAIRMAN: But not in the fourth to twelfth?

25 MR. RAYMENT: No.

26 THE CHAIRMAN: Would it be a sensible course – everybody may want all 12 files but would it be
27 a sensible course if there was inspection of the files to see if it is only the three, and if it is only
28 the three then that is all you need to copy?

29 MR. TURNER: Madam, we can look at the three files that come, without knowing what is in the
30 rest of the files ----

31 THE CHAIRMAN: No, that is why I am saying “inspection of”.

32 MR. TURNER: Inspection of the remainder?

33 THE CHAIRMAN: Yes, to see whether you do need them, and you could try and sort this out
34 between you?

35 MR. TURNER: Yes, I may be speaking also for my learned friends.

1 THE CHAIRMAN: I am just concerned about the cost of copying 12 files when they are just going
2 to sit in files, locked up in a cabinet.

3 MR. TURNER: I may be speaking also for my learned friends but I would be very happy to sit
4 down and look at the files together with them and form a common view.

5 THE CHAIRMAN: If we are giving the Interveners' file back to you, then that could be open for
6 inspection and then they could, in the normal way, say what they wanted; or take them away
7 and copy them.

8 MR. RAYMENT: Yes.

9 MISS MURPHY: We would happily meet the cost of them being taken away and copied.

10 THE CHAIRMAN: You would?

11 MISS MURPHY: Yes.

12 MR. RANDOLPH: Yes, because it may actually turn out to be more time consuming to inspect,
13 given the fact that we have a very short timetable between now and the next hearing.

14 THE CHAIRMAN: Yes.

15 MR. RANDOLPH: And given the fact that the three of us, so to speak, are happy to bear the cost we
16 would like to go on that basis.

17 THE CHAIRMAN: Mr. Rayment, are you happy with that, that Mayer Brown will collect the 12
18 files and they will then copy them and return the set to you?

19 MR. RAYMENT: We would be delighted. We are very thankful to them for doing that.

20 THE CHAIRMAN: Have we got the same offer from your side?

21 MR. TURNER: Yes, madam.

22 THE CHAIRMAN: Maybe between the two sets of firms you might do the copies for the other firm
23 and therefore that would save some time as well, because it is the same thing pressing a button
24 for however many, it is not more time consuming. Can you liaise about that?

25 MISS MURPHY: We will.

26 THE CHAIRMAN: That is very kind, we appreciate that. What order should we make in relation to
27 those files then? (After a pause) The 12 files be provided to Mayer Brown who will copy for
28 such Interveners who request copies and be returned to – to you or to us? You would like it
29 back, would you?

30 MR. RAYMENT: Yes, please.

31 THE CHAIRMAN: To the Appellant. Now, there cannot be any confidentiality in those 12 files, can
32 there, because you have got them? There cannot be any questions of confidentiality in the
33 material in those 12 files?

34 MR. RAYMENT: We did initially think there might be some Cityhook material, but on reflection
35 no, there is nothing confidential.

1 MR. BARLING: Madam, was that a “forthwith” as it were?
2 THE CHAIRMAN: Yes.
3 MISS MURPHY: That is understood.
4 MR. RAYMENT: It is understood, yes.
5 THE CHAIRMAN: The question is whether I put in the order that it is to the cost of the Interveners?
6 MR. BARLING: We will pay for it and it is on the transcript. Madam, speaking for my part,
7 reading the transcript of the last hearing, there were from time to time references to Mr.
8 Hoskins’ skeleton relating to disclosure. I understood there was a substantive skeleton in
9 relation to disclosure. Is that something which you have taken a view on yet?
10 THE CHAIRMAN: No.
11 MR. BARLING: It would be helpful obviously to see how the OFT are putting their case in relation
12 to that because we are going to have to take a view as to ----
13 THE CHAIRMAN: I am just looking to see what you are referring to?
14 MR. BARLING: I do not know to what extent it covers the kind of arguments that he is likely to be
15 making in his forthcoming skeleton.
16 MR. HOSKINS: Madam, I am hurt that is not one of my most memorable documents submitted to
17 the Tribunal, but I do not think there is any problem with any of the Interveners seeing it, there
18 was nothing – they can see it to satisfy themselves it was not particularly exciting.
19 THE CHAIRMAN: It is the skeleton of 13th September?
20 MR. HOSKINS: That would be right, just prior to the last hearing.
21 THE CHAIRMAN: Do you have any objection?
22 MR. RAYMENT: No, madam. Indeed, the more interesting document is the 13th October Statement
23 of Position by the OFT, I would have thought.
24 THE CHAIRMAN: Yes, that Mr. Vincent Smith’s – is that what you are referring to?
25 MR. BARLING: No, I was referring to the skeleton, but I was just assuming that was by way of
26 being a pleading, was it not? I would assume we would get that as well.
27 THE CHAIRMAN: I do not need to make an order in relation to this, do I?
28 MR. HOSKINS: No, we will provide the skeleton argument for the CMC, outline submissions on
29 admissibility and Mr. Smith’s witness statement plus exhibits.
30 THE CHAIRMAN: Is that all right?
31 MR. HOSKINS: That is everything we have done.
32 THE CHAIRMAN: So the OFT will provide that, I do not need to make that an order. Is there
33 anything else that you would like the Interveners to see?
34 MR. RAYMENT: No, thank you, madam. One thing I would like to clarify, we have just asked
35 effectively for the Intervener copy held by the Tribunal back?

1 THE CHAIRMAN: Mayer Brown said they would collect it from here.

2 MR. RAYMENT: Sorry, we may have just have had a misunderstanding. I thought we were going
3 to give it to you.

4 THE CHAIRMAN: No, they are going to collect it from here; they are going to copy it and they are
5 going to give it back to you because you want it back.

6 MR. RAYMENT: Yes, that is correct. I am sorry, it was a misunderstanding.

7 THE CHAIRMAN: That is all right, no, it was not very clear. So going down my list: at this stage
8 we do not have to worry about confidentiality rings because it is only principle, is that right?

9 MR. TURNER: Yes.

10 THE CHAIRMAN: I think that only leaves the question I raised about Ofcom which I assume you
11 do not want to address us on at 10 past 1?

12 MR. HOSKINS: I can do so very quickly. The Tribunal raised the point at the very beginning of the
13 last CMC, and I must admit I am sorry if I have the wrong end of the stick, presumably
14 because we then decided to have a preliminary issue of admissibility that that was going to be
15 relevant to admissibility, but if it is something the Tribunal does think is relevant to
16 admissibility then it is obviously something we can deal with.

17 THE CHAIRMAN: It is relevant to admissibility, so you are going to deal with it at that stage, are
18 you?

19 MR. HOSKINS: As I say, we had taken the view it was not, and it had not been flagged up in that
20 way, but if we put in a written document, get another short witness statement – whatever the
21 Tribunal would prefer?

22 THE CHAIRMAN: There is nothing in Mr. Vincent Smith's statement.

23 MR. HOSKINS: For the reason I have just described, yes, because there are a number of matters
24 raised at the start of the first CMC, that it was not apparent to us that they were all relevant to
25 admissibility.

26 THE CHAIRMAN: It may or may not be relevant to admissibility but having regard to Mr. Smith
27 having set out the considerations which he took, he does not say that he had any regard to that.

28 MR. HOSKINS: He does not, that is right.

29 THE CHAIRMAN: No, so one assumes he had not regard to it.

30 MR. HOSKINS: I think that is a fair reflection.

31 THE CHAIRMAN: That may be right.

32 MR. HOSKINS: Yes, absolutely. If the Tribunal wants more chapter and verse about any role
33 Ofcom has played we could look into that.

34 THE CHAIRMAN: Well I do not want to cause any further expense that is unnecessary, so maybe
35 we should leave it to Cityhook to see whether or not they want to take the point further.

1 MR. HOSKINS: Obviously we have heard the Tribunal ----
2 THE CHAIRMAN: Mr. Rayment was not here last time so he may not have appreciated this.
3 MR. RAYMENT: I will study the transcript and be better informed.
4 THE CHAIRMAN: It is on the transcript.
5 MR. RAYMENT: Thank you.
6 MR. HOSKINS: Madam, if there is anything we can add then we will think of an appropriate way to
7 do it if we have permission to do that.
8 THE CHAIRMAN: Let us leave it to Cityhook. I have raised it again because Mr. Rayment was not
9 here last time, and it is a point for them to take or not to take, I suppose.
10 MR. RAYMENT: Is there any particular point on this issue that the Tribunal would be assisted by?
11 I am so sorry, you are just talking about the concurrency point, but I do not know what it is.
12 (Laughter)
13 THE CHAIRMAN: This is a case where there was some consideration at the outset as to whether or
14 not it should be an investigation by Ofcom, or an investigation by the Oft, and there is I think a
15 reference in the Guidelines that that consideration can occur not just at the beginning but
16 during an investigation.
17 MR. RAYMENT: I see.
18 THE CHAIRMAN: So we just raised the point (in the way that sometimes this Tribunal does) and
19 we have not had any response to it. I think it probably now is a matter for you, but I thought
20 we ought to raise it again because you were not here.
21 MR. RAYMENT: Thank you.
22 THE CHAIRMAN: You will find it on the transcript and the reference to the paragraph in the
23 Guideline is in the transcript. Is that everything? Thank you all very much, and thank you for
24 your co-operation in relation to the documents; that is very, very helpful and appreciated I am
25 sure by everyone including the Tribunal.
26 (The hearing concluded at 1.15 p.m.)