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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1087/2/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14th August 2007

Before:
VIVIEN ROSE
(Chairman)

MICHAEL BLAIR QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT MEDIA SUPPORT LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

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Mr. Stephen Hornsby (Solicitor, Michael Simkins) appeared for the Appellant.

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

Mr. David Scannell (instructed by Travers Smith) appeared for the potential Intervener, Red Bee Media Limited.

Miss Lesley Farrell (Solicitor, S.J. Berwin LLP) appeared for the potential Intervener, British Broadcasting Corporation.

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good afternoon ladies and gentlemen. Thank you to everybody for their
2 submissions that we have received and considered including the BBC's letter which we
3 received today. We plan to work through the agenda, however, there are a few points that I
4 would like to raise at the outset.

5 First, how it is best to refer to the appellant, whether as "Red Bee" or as "BBC Broadcast"
6 bearing in mind that Red Bee is actually the party to the appeal but the Decision refers to
7 them as "BBC Broadcast" and, of course, at the time of entering into at least one of the
8 contracts that was their name. We have an open mind about this at the moment, if the
9 parties have something to say about that then we would like to hear it. I think it would best
10 if we refer to the contracts as the "Channel 4 contract" and the "BBC contract" rather than
11 using the term "SLA" that appeared in the notice of appeal.

12 I will make a few comments about the first two issues, about the intervention and the
13 preliminary issue. As far as the interveners are concerned our understanding (on the state of
14 the current correspondence) is that it is not contested that Red Bee have an interest
15 sufficient to entitle them to be interveners. We are not entirely clear what IMS's case is
16 with regard to the BBC's interest. The Tribunal wants to determine all issues relating to the
17 intervention today if possible. The question has been raised about whether one or both of
18 the interveners has a role in the determination of the preliminary issue – if we take the
19 course of hearing a preliminary issue. Generally, I should say, the Tribunal's practice is
20 not to place limits on the points which the interveners can contribute to, but to stress that the
21 interventions must not duplicate the arguments put forward by the party that the intervener
22 is supporting, and the timetable is usually structured so that they are in a position to
23 consider whether there is anything they can usefully add to what has already been said, so it
24 would be useful to hear from the parties whether or not they are agreeable in principle to
25 that course of action.

26 On the preliminary issue point, as we understand it – again though people will no doubt let
27 me know if we have misunderstood it – there seems to be general agreement that there
28 should be a preliminary hearing to determine the admissibility of the challenge to the BBC
29 contract and we understand that IMS's concern is that because this is not a case where,
30 whichever way it is decided, the preliminary issue may bring the case to a close that we
31 should therefore progress the appeal as it relates to the Channel 4 contract in tandem with
32 the hearing of the preliminary issue. The Tribunal is sympathetic to that approach and
33 envisages that it might be possible to have a timetable for the pleadings in relation to the
34 Channel 4 contract running in tandem with the timetable for the determination of the

1 preliminary issue. In that regard it would be useful to know from Ofcom what they plan to
2 deal with in the defence which they helpfully say they have been working on, and what they
3 are proposing to cover in that. Our view is that the defence should deal at least in full with
4 the Channel 4 decision challenge, and the admissibility of the BBC contract appeal – the
5 question is then whether it should also include a full defence on the points challenging the
6 BBC contract and those points will then be struck out if Red Bee wins the preliminary issue
7 point, or OFCOM wins the preliminary issue point – if it goes that way; or whether they
8 should not plead to the merits on the BBC contract limb of the appeal. If the appellant wins
9 on that the pleadings will then need to be amended to include the defence on the merits of
10 the BBC contract. Perhaps that takes us as far as we need to go by way of introduction, and
11 we will come to the subsequent points as we reach them.

12 MR. HORNSBY: Stephen Hornsby of Michael Simkins, solicitors for IMS, who are not present
13 today. Shall we take the agenda and just go through? I have a suggestion about the order in
14 which we take it as it might speed things up.

15 The first point is to consider the forum of the proceedings, and we agree with Ofcom on that
16 particular point. Both IMS and Ofcom's principal place of business is in Southern England
17 and therefore it is appropriate that it is here that these proceedings take place.

18 If that is accepted we go on to issue 2, and I was going to suggest that we look at issue 3
19 first, simply because I think we can probably agree that. In my letter of 8th August I raised a
20 number of concerns about delay in the submission of the defence by Ofcom, which actually
21 were overtaken by the skeleton that Ofcom produced on that very same day. There was
22 some ambiguity, I think, in the letter of 26th July in which Ofcom did not actually specify a
23 date when it was going to submit its defence.

24 Having read their letter of 8th August (which crossed with mine), I understand that Ofcom's
25 defence will cover all issues, so not only the BBC contract and the issue of admissibility but
26 also the merits in relation to that and also Channel 4. If my understanding of that is correct,
27 it is something that we would certainly agree with. As you say, we want the issues to run as
28 far as possible in parallel and we believe that is the most efficient way in which they can be
29 dealt with and we think that matters have not proceeded perhaps as fast as they should have
30 to date. That is all I really have to say on the preliminary issue.

31 That leads on, I think, logically to the question of the intervention. It has been suggested
32 that there is some ambiguity about IMS's position in relation to the intervention of the BBC.
33 We perfectly well understand the BBC's concern that it has a right to intervene in respect of
34 contracts to which it is party; on the other hand, that concern seems somewhat remote,

1 although we are not necessarily saying we are against their intervention in respect of the
2 Channel 4 contract, but it certainly seems rather more remote in respect of that particular
3 contract. They are no longer a party to the Channel 4 contract, that is a contract that was
4 part of the business that was sold to Red Bee 18 months ago now. So if there is some issue
5 in relation to their intervention, the propriety of their intervention and the usefulness of their
6 intervention in relation to Channel 4, I think we should at least hear it; I am not necessarily
7 saying that IMS would be opposed to it at the appropriate time.

8 THE CHAIRMAN: Mr. Hornsby, they have made an application to intervene and the Tribunal
9 does really need to know whether you oppose that, in which case we then have to make a
10 ruling, or whether you do not oppose it, or whether you consent to it but you want it to be
11 limited to some way?

12 MR. HORNSBY: I would like to hear what it is; it is supposed to be succinct, and it certainly was
13 succinct. I understand their concern to intervene in respect of contracts to which they are a
14 party. I do not understand so easily their concern in respect of contracts to which they are
15 not a party. However, I have to bear in mind that they did take part in the administrative
16 procedure in relation to the Channel 4 contract, and made certain submissions in relation to
17 the Channel 4 contract – in particular as far as its duration was concerned, which were
18 accepted by Ofcom. So logically, and in line with the Tribunal's previous practice, they
19 should be admitted. We, for our part, would just like to see what is their particular concern
20 in respect of Channel 4 and what is their particular interest, then having heard that from
21 them we will then indicate that our general position is no different to that in respect of Red
22 Bee, the only issue then is the modalities of that intervention and how it can be effectively
23 managed. I think that deals with the BBC and I expect to come back to that.

24 As far as Red Bee is concerned, we have no concerns. The notice of intervention does say
25 that IMS is a disappointed loser now seeking to put itself in the position it would have been
26 had it won the Channel 4 contract. That is actually, as the Tribunal probably appreciates,
27 not the relief that we seek. We seek simply that these contracts be re-tendered. We believe
28 that they currently constitute infringements to the relevant prohibitions. We expect simply
29 that there should be a fair contest which we may well lose. Subject to that observation,
30 there is nothing really on the Red Bee application to intervene.

31 As to the modalities, if you like, of the intervention of both these applicants, I do not want
32 to take the Tribunal through its Guide to the Proceedings; you are well aware of the past
33 findings that you have made on these particular issues. However, we would say that the
34 conduct of the proceedings really requires some degree of compression if there is to be a

1 proper and expeditious outcome to these proceedings, and we would just draw your
2 attention to those provisions in the proceedings which make it quite clear that where
3 interveners have nothing substantial to add to the points made by the defendant then they
4 should not be allowed to do so. We would invite you to implement the practice that you
5 applied in respect of this issue in the case referred to in 10.11 of the Guide to Proceedings,
6 namely, that on the issue of admissibility skeletons can satisfactorily deal with that
7 particular point as far as the interveners are concerned. The case law is quite mature now
8 and we would say the issues on admissibility have in effect been decided by the trio of
9 cases: *Freeserve*, *Claymore* and *Pernod*, and we do not think it would be productive in the
10 hearing on the issue of admissibility for Ofcom effectively to have three goes at it and to be
11 followed by Red Bee on these points, and then followed by the BBC on those points – that
12 would be not the best use of the Tribunal’s time – and we would request that as their
13 intervention will be accepted that it is confined to producing skeletons and, if possible,
14 those skeletons identify points that are new. We do not think it would be appropriate
15 simply for a reformulation in different terms of the arguments that are in a sense going to be
16 put forward by Ofcom. It is quite clear what sort of arguments they are going to be. There
17 will be an attempt to distinguish those cases that I have mentioned or to show that they were
18 wrong in some way. I do not think it would be an efficient way to go about things if we
19 were hear three lots of interventions on this point. That, I hope, deals with issue 3.

20 Is that an appropriate time to stop?

21 THE CHAIRMAN: Yes, thank you. Mr. Anderson?

22 MR. ANDERSON: Madam Chairman, we have no views on how to refer to the proposed
23 intervener Red Bee, as between Red Bee and BBC Broadcast; that must ultimately be a
24 matter for them and for the Tribunal. We will, of course, refer to the two contracts in the
25 way in which you have requested.
26 So far as intervention and the preliminary issue is concerned, for the reasons we have set
27 out in our written submissions we do believe it would be sensible for a preliminary issue to
28 be heard on the question of admissibility. It will have a very significant impact on the
29 future shape of the case. I have spoken to my friend, Mr. Hornsby and he is content with
30 this timetable: we intend to plead by Friday of next week in our defence on admissibility in
31 relation to the BBC contract and on all issues in relation to the Channel 4 contract. We do
32 not propose to address what might be referred to as the substance of the BBC contract –
33 principally for this reason, it is our view that we did not take a non-infringement decision
34 and we therefore have considerable difficulty in defending something that we say we did

1 not do. Ultimately, when the Tribunal has issued its Judgment on admissibility we may, at
2 that stage, need to address how we progress that aspect of the case. It may be that if the
3 Tribunal find that it was, in fact, a non-infringement Decision that the appropriate course is
4 for that appeal then to be allowed and the Decision to be set aside. Another possibility, of
5 course, is that the Tribunal itself may undertake some form of investigation, but we do think
6 that we cannot sensibly plead to that aspect of the case at this stage.

7 So far as the interventions are concerned, we do not at present see any real role for either of
8 the interveners in the preliminary issue. It is principally a matter of what and why did the
9 Regulator take the decision that it took, and we do not really see that the BBC or Red Bee
10 have much of a contribution to make to that. We are not objecting to them making some
11 observations if they persuade the Tribunal that is appropriate, but we are keen that the
12 matter be heard sooner rather than later and we would not want their involvement to delay
13 the progress of that aspect of the case. We had envisaged that when we serve our defence
14 and witness statement on Friday week IMS should have an opportunity to respond in
15 writing and we should then put in some brief skeleton argument shortly before the hearing.
16 Having spoken to my friends, subject of course to the convenience of the Tribunal,
17 somewhere towards the end of September would be an appropriate time for that hearing,
18 which we think could be done within a day.

19 PROFESSOR STONEMAN: You just referred to admissibility and substance, and the context of
20 the witness statement – I think the witness statement is going to be an important
21 contribution to the discussion of admissibility. I am at some loss to understand how that
22 witness statement can separate out admissibility and substance, and therefore the extent to
23 which one can separate those two issues.

24 MR. ANDERSON: Well the witness statement will be dealing with why we took the course of
25 action that we took, and it is then a matter for the Tribunal to decide whether that was in
26 fact a case closure decision or something else; that is what the witness statement will be
27 addressing. We can then debate whether that is a case closure decision or not at the hearing,
28 but that is what the witness statement will be addressing – it will not be dealing with the
29 substance of the issues that were under investigation.

30 PROFESSOR STONEMAN: So it will not be addressing, for example, the amount of work that
31 would be required to settle the case?

32 MR. ANDERSON: It will be addressing that, yes.

33 PROFESSOR STONEMAN: And therefore what work had been done ----

1 MR. ANDERSON: Oh yes, it will be describing the work that has been done and the work that
2 would need to be done to reach a view.

3 PROFESSOR STONEMAN: And therefore the substance of the work that was required ----

4 MR. ANDERSON: The substance of the work that would need to be done. It will not be
5 addressing the merits of the arguments is what I meant.

6 PROFESSOR STONEMAN: I am finding it difficult to separate the words “merit” and
7 “substance”.

8 MR. ANDERSON: What I mean by that is that we will not be addressing the arguments as to
9 whether or not the agreement infringed or did not infringe the prohibitions. We will be
10 addressing the work that was done, the work that would need to have been done to reach a
11 view and why we took the decision we took.

12 PROFESSOR STONEMAN: How can you decide which work is to be done unless you know
13 what the arguments are?

14 MR. ANDERSON: We know what the arguments are, it is simply we will not be addressing what
15 conclusions may or may not have been reached on the arguments because we did not reach
16 conclusions because we closed the file.

17 PROFESSOR STONEMAN: All right, but I think you can see what is worrying me.

18 MR. ANDERSON: Yes, yes.

19 (The Tribunal confer)

20 THE CHAIRMAN: Miss Farrell?

21 MISS FARRELL: I am here for the BBC. I think you want me to address you first on the scope
22 of the intervention of the BBC. It appeared to me from what was said by Mr. Hornsby that
23 he accepted that we had a role to intervene in relation to the BBC contract, and I am happy
24 for that indication.

25 The concern appears to be in relation to the Channel 4 agreement. Our position is very
26 clear; we feel that there is ample justification for the BBC to have sufficient interest in these
27 proceedings. Those contracts in relation to Channel 4 and the BBC were negotiated by
28 BBC Broadcast. BBC Broadcast was at that time a wholly owned subsidiary at the BBC.
29 Throughout the proceedings and before Ofcom the BBC took a further part and responded
30 to a number of requests for information, evidence relating directly to the BBC will be
31 important in the appeal and, indeed, the scope of the BBC’s conduct will be examined by
32 the scope of this appeal.

33 In addition, whilst it was very clear that if the relief sought by IMS in relation to the BBC
34 agreement is actually given there will be clear commercial consequences to the BBC, there

1 is also a possibility there will be commercial consequences in relation to the Channel 4
2 contract. It is difficult to predict at this stage what they might be, but they cannot be ruled
3 out. On that basis we would suggest that it is entirely appropriate for the BBC to be an
4 intervener.

5 I would of course stress, however, that we do not intend to duplicate any of the submissions
6 made by Ofcom or, indeed, by Red Bee and seek to minimise our involvement to only that
7 which protects the BBC's position, which assists the Tribunal.

8 In relation to the other matters, we agree with the other parties that the issue of whether or
9 not the Decision made in relation to the BBC contract is an appealable Decision should be
10 dealt with as a preliminary matter. The BBC would prefer to be permitted as a full
11 intervener in these proceedings without that role being circumscribed at present, but
12 mindful of the fact that they will not seek to duplicate any submissions made already, and
13 they will simply make submissions on those areas where they can be of assistance. Thank
14 you.

15 THE CHAIRMAN: Mr. Scannell?

16 MR. SCANNELL: Madam, I appear for Red Bee. Could I first clarify the nomenclature
17 uncertainty? I am instructed that we are quite happy for the applicant to intervene to be
18 referred to as "Red Bee"; we do not have any difficulty with that, so that can be used in
19 place of "BBC Broadcast". I have also been asked to point out that BBC Broadcast is for
20 all intents and purposes Red Bee and vice versa. There was no sale of BBC Broadcast to
21 Red Bee, and so that is a matter that should be clarified. Red Bee, of course, welcomes the
22 non-opposition – if I can put it that way – to its intervention, and before I go any further I
23 too would like to make it clear, as the BBC has made clear, that there is absolutely no
24 intention of duplicating work that Ofcom will be undertaking, no intention to duplication
25 submissions made by it, but of course it would be wholly negligent of me representing Red
26 Bee and for Red Bee's solicitors not to reserve its position to clarify matters where it is
27 necessary to clarify matters, or to correct errors. Ofcom (as with all litigators) occasionally
28 slips into error (if only inadvertently) and it is important that we reserve our right to correct
29 them if that unlikely event should occur.

30 Insofar as the preliminary issue is concerned, our position is unambiguous on the question
31 of whether there ought to be a preliminary issue – it is quite sensible that the admissibility
32 question be dealt with as a preliminary issue. Indeed it would, in our submission, be quite
33 contrary to the overriding objective to try to conflate the substance with the preliminary
34 issue. That, of course, has a real effect on the case management of the case going forward.

1 While Red Bee might have some inchoate understanding of the submission made by IMS
2 that there should be a common case management of the preliminary issue, and the
3 substantive questions that are left behind or outstanding, in my submission it is quite
4 important for the Tribunal to be mindful of the consequences of doing that. There is a real
5 danger of duplication of costs and increase of costs and effort in circumstances where the
6 preliminary issue and the substantive matters are rolled up in this way. The Tribunal has
7 already pointed out the very sensible remark to be made that the outcome of the preliminary
8 issue will have a real bearing on the shape of the proceedings going forward; it will have a
9 bearing on the disclosure of documents, for example, possibly on expert evidence and so on.
10 So far as Red Bee is concerned, what we really want to do is to dovetail with Ofcom to the
11 extent that we can, and supplement as I have already pointed out where it is necessary to do
12 that. Applying that then to a preliminary issue plus the substantive issues: on the
13 preliminary issue Red Bee would certainly want to be involved in the preliminary issue to
14 make submissions. We know already that there will be a witness statement on the
15 preliminary issue from Ofcom. The witness statement will refer to factual matters, and
16 presumably relevant documents will be exhibited to that witness statement. It may very
17 well be that Red Bee takes the view, having reviewed that witness statement, that some of
18 that factual material could be supplemented. It is unlikely, because the preliminary issue is,
19 par excellence, a legal question – a crisp legal question – and there is settled law on it. But
20 we cannot discount the possibility that we might wish to supplement the factual material put
21 before the Tribunal by Ofcom on the preliminary issue. Ideally, Red Bee would wish for a
22 date to be set down well before the hearing by which Red Bee could submit supplemental
23 evidence. Now, the date might arrive and pass, and we might not do anything about it, but
24 at least the liberty should be given to Red Bee to do that as appropriate and, of course, Red
25 Bee would wish to put in a skeleton argument – all of that being, of course, subject to the
26 remark that I made at the opening that we will not duplicate remarks made by Ofcom, and
27 we are quite mindful of the need not to do that. That is the preliminary issue; if we could
28 put that to one side, there are still of course the substantive issues.
29 Red Bee’s primary position would be that we would wish to respond on the primary issues
30 logically after the preliminary issue hearing. This is contrary to the position that IMS has
31 put forward where we roll all of this up.

32 THE CHAIRMAN: Are you talking about the substantive issues in relation to the BBC contract
33 only, or in relation to the Channel 4 contract as well?

1 MR. SCANNELL: Ideally, we say, whatever substantive issues there are, whether it is Channel 4
2 plus BBC, or just Channel 4, they should be dealt with at the same time. So the only time
3 when it will be clear what the substantive issues are is after the preliminary issue hearing.
4 So Red Bee's submission would be that it would be sensible to have the preliminary issue
5 and hearing on the question of admissibility of the BBC contract question, and then once
6 that is disposed of either way, Red Bee would make its submissions in relation to the
7 substantive issues generally. It would wish for the flexibility to supplement factual or
8 expert matters if it feels it necessary to do so; it may not wish to do so, but in any event to
9 have the liberty to put in a skeleton argument before the hearing of those substantive issues.
10 For the moment I believe that that covers all of the points. Thank you, madam.

11 (The Tribunal confer)

12 THE CHAIRMAN: Mr. Hornsby, having heard what everyone has said now, has that put your
13 mind at rest with regard to the proposed interveners, or not?

14 MR. HORNSBY: As far as the proposed interveners are concerned I would be content to agree
15 with my learned friend that ideally – and this would be our submission – they have no role
16 in the admissibility part of this proceeding.

17 I have one point in relation to the defence. My learned friend made a proposal in relation to
18 the defence that is proposed to be submitted in respect of the BBC contract.

19 THE CHAIRMAN: I think we will deal with pleadings subsequently. Mr. Anderson, did you
20 want to say something?

21 MR. ANDERSON: I just wanted to make a couple of points arising out of what my learned
22 friend had just said about the position of Red Bee, and the intervention. We would be a
23 little concerned if liberty to submit supplementary evidence and a skeleton argument – the
24 contents of which we would find difficult at this stage to envisage – were to delay a
25 timetable for the resolution of the preliminary issue, because if he puts in a skeleton
26 argument, no doubt others would want to respond to it and that will have the effect of
27 rolling matters out.

28 The other point is, just on the question of proceeding with the Channel 4 aspect of the case
29 in tandem with the preliminary issue, as I said, we intend to plead from Friday week to the
30 substance of the Channel 4 contract. We have no particular views on at what stage
31 subsequent pleadings to that are delivered and by whom, but we are a little concerned if the
32 case management of that side of the case covering issues such as disclosure, agreeing facts,
33 statements of issues, confidentiality – **that** side of the case – if that were to progress we
34 believe that could give rise to duplication and unnecessary wastage because that exercise

1 may have to simply be revisited after the preliminary issue has been determined. We would
2 not see that our proposed timetable of a hearing around 20th, 24th September (that sort of
3 time), subject of course to the position of the Tribunal, is going to delay matters
4 significantly. Those were the only two further points I wished to make.

5 (The Tribunal confer)

6 THE CHAIRMAN: We will rise for 10 minutes because I think it would be useful for the
7 Tribunal to give a determination straight away on this and everyone knows where they stand
8 for the rest of the hearing.

9 (The hearing adjourned at 2.38 p.m and resumed at 2.46 p.m.)

10 THE CHAIRMAN: The Tribunal has determined that we will give leave to intervene to Red Bee
11 and the BBC, and we will grant that leave now. We are not minded to impose any limits on
12 their intervention, but that is on the basis of the submissions that have been made to us
13 today about avoiding duplication.

14 We do propose that their role in relation to the question of admissibility of the challenge to
15 the BBC contract be limited to the submission of skeletons and oral argument at the hearing.
16 We regard it as very unlikely that further evidence will need to be submitted by them, so we
17 propose that if the interveners wish to adduce further evidence, having seen Ofcom's
18 witness statement, then they will need to apply to the Tribunal with an explanation as to
19 what they propose to adduce, and why it is necessary.

20 So far as the timetable for the hearing of the preliminary issue is concerned, because of
21 various other commitments of the Tribunal panel members, we propose that the hearing will
22 take place on 8th October and therefore we do not see that the interventions will disrupt that
23 timetable.

24 Coming now to the next issue, which is the discussion with the parties of the main issues
25 arising in the appeal in the light of the notice of appeal, there are two matters that we wish
26 to raise with the parties at this point. The first is the need to clarify the notice of appeal as
27 currently drafted. The Tribunal would welcome some clarification as to which points raised
28 in the notice of appeal are relied on as areas of law: which as procedural irregularities and
29 which as errors of fact or appraisal. In the case of arguments which are relied on as
30 showing an error of law in the Decision it should indicate more clearly what the point of
31 law is. We envisaged that this could be done by adding a clarificatory sentence to any
32 paragraph in the notice of appeal which the appellant asserts incorporates a ground of
33 appeal. We do not have any firm view as to how this could be done, but we do believe that
34 this further clarification of the notice of appeal is necessary at this stage.

1 The second point is a rather different point, namely the timing (or the time period) at which
2 the question of dominance needs to be assessed. According to the decision in relation to the
3 Channel 4 contract, Ofcom's decision in relation to whether dominance existed or not
4 appears to be limited to the period in 2004 just before the Channel 4 contract was entered
5 into. However, we note that the relief sought in the notice of appeal refers to a declaration
6 that Red Bee did (and does) benefit from a dominant position in the relevant market, and
7 also that Ofcom, in their pre-CMC observations, identify as a relevant issue whether, at the
8 date of the decision – 30th May 2007 – Red Bee has been, and/or was dominant in the
9 relevant market. The Tribunal at the moment is not clear what jurisdiction it has to
10 consider, whether Red Bee was dominant at any time other than the time which is referred
11 to in the Decision, namely, July 2004 – this is in relation to the Chapter 2 prohibition and
12 Article 82. Certainly as far the application of the vertical agreements block exemption is
13 concerned the question of market share over the whole period may be relevant, but we
14 would be grateful if the parties could consider this point; we are not pressing people to say
15 anything further particularly about it today unless they wish to, but it is something that
16 people should consider.

17 Before I turn to confidentiality I will pause there to see if anybody wishes to make any
18 submissions about those points?

19 MR. ANDERSON: One of the points – you referred to what we said in our observations – our
20 position, just to be clear, is that the relevant time at which dominance is to be determined is
21 that identified in the Decision, namely, during the period leading up to and at the latest the
22 conclusion of the Channel 4 contract, and we will be submitting – and this will be apparent
23 from our defence – that the applicants are not entitled to the relief they are seeking in the
24 form of a general declaration that Red Bee is now dominant, or has been at any time since
25 that date and would be further submitting that the Tribunal has no jurisdiction to grant that
26 relief.

27 THE CHAIRMAN: Mr. Hornsby, as far as the point about the clarification of the notice of appeal
28 is concerned, do you understand what it is that we are asking you for in that regard?

29 MR. HORNSBY: I understand you would like some more detail about what it is are areas of law,
30 and what it is are areas of fact. Yes, I will certainly provide that; I think it is apparent from
31 the main body of the application but I will certainly move some of those across to the notice
32 of appeal if it would be helpful.

33 MR. ANDERSON: On that matter – I am sorry, I should have mentioned it – could I inquire, if
34 this is going to take the form of some sort of amendment to the notice of application we

1 would really need to see it by the end of this week if we are going to stick to the timetable
2 of being able to respond by the following Friday. If there is further delay beyond the end of
3 this week, then that may jeopardise the time period in which we were envisaging serving
4 our defence.

5 THE CHAIRMAN: Yes, I appreciate that, Mr. Anderson, and we would think that the kind of
6 clarification of the notice of application that we are envisaging should be possible for the
7 appellants to produce within a week, and we would therefore envisage giving you slightly
8 longer to serve your defence and your witness statement, particularly assuming that those
9 two documents should go together, rather than having one before the other.

10 MR. ANDERSON: We certainly envisage them coming together and in view of the date of the
11 preliminary hearing now being a couple of weeks later than we anticipated a little more time
12 to serve the defence and the witness statement would be welcome, yes.

13 MR. HORNSBY: Madam, you will by necessity have these amendments by close of business on
14 Friday, we prefer the timetable not to slip.

15 MR. SCANNELL: Madam, is the Tribunal prepared to hear submissions as to the date of the
16 preliminary issue hearing? The 8th October is well nigh impossible both for me and for my
17 learned leader. Is there any flexibility at all as to the date of the hearing?

18 THE CHAIRMAN: Well, we could do the 9th, if that was any better for you and your learned
19 leader.

20 MR. SCANNELL: I am afraid that insofar as October is concerned, the 23rd is the first date, and I
21 can see that that may very well present a problem. The 12th October is also a possibility. Is
22 September absolutely precluded? Yes? Nothing can be done then.

23 THE CHAIRMAN: Well let us leave timetabling perhaps to the end and see what we can come
24 up with.

25 MR. SCANNELL: I am grateful, thank you.

26 (The Tribunal confer)

27 THE CHAIRMAN: Turning then to the disclosure of documents and confidentiality issues, so far
28 as the case closure document is concerned, we understand from Ofcom's pre-CMC
29 submissions that all the confidential material in this relates to the parties who are present
30 today, and so we would welcome an indication from those present as to their views on
31 whether or not confidentiality is still an issue with regard to the material in that document.
32 So far as the Channel 4 Decision is concerned, the Tribunal does need to see, of course, the
33 unredacted version of that and we would propose that Ofcom should write to those whose
34 confidential material is included, who are not parties to these proceedings, to ask if they

1 object to the disclosure of that material now and we will deal with the question of what to
2 do if they do object when we know what the answer to those letters is.

3 So far as the draft decisions are concerned, I think the same applies to those as to the final
4 versions of the decisions. At present the Tribunal thinks it is worth proceeding with this
5 process of determining the confidentiality or not of the material in those documents, whilst
6 we are moving towards the determination of the preliminary issue.

7 As far as IMS's notice of appeal is concerned, clearly this will now have to be served on the
8 interveners now that we have given them permission to intervene. You have referred to the
9 confidential annex to your notice of application and, of course, without going into the
10 substance of what is in there, if you could give an indication as to whether that material is
11 still confidential and suggest ways of handling that, that would be welcome.

12 So far as other material is concerned, maybe it is premature for us to consider further
13 material at this stage. Mr. Hornsby?

14 MR. HORNSBY: Madam, I have no real observations on what you have just said. We will
15 certainly consider the issue of the confidentiality of the appendix. I think it is likely to
16 remain confidential, it contains business secrets on any view. The costs of the production of
17 these particular services are clearly highly confidential and now that the interveners have
18 been granted permission to intervene I do not think that they would dissent from the view
19 that it would not be appropriate for IMS to reveal that information – they would not reveal it
20 to us for the same reasons I am sure.

21 THE CHAIRMAN: Are we then in the territory of needing to establish a confidentiality ring of
22 advisers for the disclosure of that information?

23 MR. HORNSBY: With respect to you I do not think we are there yet. I think it is an issue that
24 can be dealt with later. We need first of all to get over the barrier of showing that we have a
25 decision which can be appealed, and then we have to actually look at the issue of
26 dominance, and you have made various remarks about that which all of us are going to have
27 to consider – possibly with Ofcom. At that point I think we should perhaps have another
28 case management conference, and decide whether pricing information is something that this
29 appeal will go into. I rather suspect it will not, but that is for another time, perhaps.

30 MR. ANDERSON: On the question of confidentiality, could I just confirm that we are in a
31 position to supply to the Tribunal the confidential versions of the documents to which you
32 have referred – the decisions and the draft decisions.

33 So far as disclosure to the other parties is concerned, that is a very different matter, and in
34 our submission that should be dealt with, if any party were to make an application for

1 disclosure of the confidential versions, that would need to be dealt with on its merits at the
2 time, because that does involve the positions and views of a large number of third parties
3 who provided evidence supporting those investigations – other broadcasters, for example.
4 We are not therefore in a position to deal with that today. As I say, the appropriate course
5 there would be for the Tribunal to consider an application and make an appropriate order,
6 hearing if necessary from those claiming confidentiality. But, so far as the Tribunal is
7 concerned, we are able to provide the confidential versions to the Tribunal straight away.

8 (The Tribunal confer)

9 THE CHAIRMAN: Mr. Anderson, the Tribunal is unwilling to receive documents which are not
10 going to be disclosed to the parties, therefore in our view the best way to proceed would be
11 as we suggested, that Ofcom write to those whose confidential information may need
12 protecting and ascertain whether or not they still maintain the confidentiality of that
13 material, and let the Tribunal know what the results of those inquiries are. Then we will be
14 able to determine what we need to do about any remaining confidential aspects of the
15 decisions, and the draft decisions. But for the Tribunal to be able to see the unredacted
16 versions but those not to be available to the parties seems to us an undesirable situation for
17 us to be in.

18 MR. ANDERSON: In my experience it is quite a common occurrence, but if I could just take
19 instructions on that last point for a moment? (After a pause) We have written to the parties
20 concerned originally to ask whether they maintain confidentiality and the responses were
21 that they will, we are perfectly prepared to write to those parties again asking the same
22 question and if we get the same response we will be in exactly the same position we are at
23 the moment. We are not in a position to disclose that information to the other parties, we
24 can only do so if we are ordered to do so, but since nobody has made an application for such
25 disclosure it is not a matter that can really be progressed today. But, as I say, the best we
26 could do if the Tribunal is reluctant to receive the confidential versions – and I do not know
27 whether any of these parties are going to object to that or not, but we have not to date
28 received any such objections – we will write the letters. It will, of course, delay the
29 Tribunal receiving the unredacted versions, but there we are.

30 (The Tribunal confer)

31 THE CHAIRMAN: Perhaps as a first step, Mr. Anderson, Ofcom could send us the
32 correspondence that has been exchanged with the people whose confidential information is
33 included, and we can then see the extent to which the information in there needs to be
34 protected.

1 MR. ANDERSON: Of course, yes. (After a pause) We will, of course, need to review the
2 correspondence, because disclosing the correspondence may have the effect of disclosing
3 the information, but we understand your request and we will review that correspondence
4 and see if the matter can be taken forward in that way, rather than agreeing or accepting that
5 that is a sensible way forward, we will review that correspondence and see if that is a way
6 forward that does not involve the disclosure of confidential information.

7 THE CHAIRMAN: Thank you, Mr. Anderson, and in the meantime it would clearly be useful for
8 the other parties to consider the extent to which they need to see the unredacted versions of
9 the decisions in order to progress the case. I appreciate that it may be difficult for you to
10 come to a view on that, not being able to see what the information is but there is at least an
11 indication in the Decisions as to the kind of material that has been excluded, and if you wish
12 to apply for disclosure of that information at this time then clearly we will consider any
13 such applications as made.

14 MR. HORNSBY: Was that an invitation to make an application now, madam, in respect of
15 confidentiality – matters that IMS, for example, would wish to see – or is it subsequent to
16 this hearing?

17 THE CHAIRMAN: Well, it is up to you, Mr. Hornsby, whether you wish to apply now or later?

18 MR. HORNSBY: Yes, we wish to apply now to see the details of the Channel 4 contracts, in
19 particular the loan. That is a material issue that goes to the duration of the contract and we
20 are not in a position really to make any comments on the conclusions reached by Ofcom,
21 that this is not a loan that has the effect of extending the duration of the contract without
22 actually seeing that contract.

23 THE CHAIRMAN: Well we shall progress in the way that we have suggested and see where we
24 arrive at.

25 MR. ANDERSON: Certainly, madam.

26 (The Tribunal confer)

27 MR. BLAIR: Just one point, Mr. Anderson, arising out of the possible confidentiality side of
28 things. You told us that there were some cases where the letters that had already passed
29 might themselves contain confidential information and might therefore need to be redacted.
30 In that case, in order to keep the progress going, would it be an alternative for you to write
31 afresh to that party on the simple question of do they wish to maintain confidentiality and, if
32 so, why?

33 MR. ANDERSON: That is certainly a way forward. I understand that it is true of virtually all the
34 correspondence that it will have the effect of disclosing the confidential information, so it

1 really means that the sensible way forward may be for us simply to write to the parties now
2 asking them if they maintain confidentiality in respect of information in respect of which
3 they have claimed confidentiality without identifying that information and asking them to
4 reply in such a way that does not disclose that information, and then inform the Tribunal.

5 MR. BLAIR: And mentioning, of course, that the case is now before the Tribunal and the
6 Tribunal has asked you to do this.

7 MR. ANDERSON: Yes, of course.

8 MR. BLAIR: Thank you.

9 THE CHAIRMAN: As far as the case closure document is concerned though, you still stand by
10 the position in your submissions that only contains confidential information for people who
11 are now the parties to this appeal?

12 MR. ANDERSON: That is what I am told, yes, madam.

13 THE CHAIRMAN: Perhaps it would be useful then to hear from the interveners what their
14 position is in relation to confidentiality particularly having heard what Mr. Hornsby has said
15 in relation to what the appellant would like to see?

16 MR. SCANNELL: Insofar as concerns the BBC case closure document, both in its final and in its
17 draft form, there is really only one paragraph in respect of which Red Bee has today
18 claimed confidentiality. Red Bee, through its solicitors (Travers Smith) is in contact with
19 Ofcom and has made its position clear to Ofcom in the past on that, but the matter will be
20 progressed and it is hoped that an agreement will be reached on that particular paragraph of
21 the case closure decision shortly. We will then be in a position to let the parties and the
22 Tribunal know that an agreement has been reached.

23 THE CHAIRMAN: Thank you, that is very helpful.

24 MISS FARRELL: Insofar as the BBC is concerned, madam, we are reviewing the position, and
25 we will get back to Ofcom as soon as possible, but in principle we would be happy to
26 disclose information insofar as we are able to do so subject to the normal safeguards.
27 Confidentiality rings may be necessary, is what I am suggesting.

28 THE CHAIRMAN: Well, can we leave it to the parties then to make as much progress on this
29 issue in relation to the case closure document as they can, and of course make any
30 applications to the Tribunal that are necessary?

31 (The Tribunal confer)

32 THE CHAIRMAN: As far as the timetable is concerned, as we indicated, we think that we should
33 progress the Channel 4 contract limb of the appeal as far as we can in tandem with the
34 hearing of the preliminary issue. Mr. Hornsby has said that he will be able to provide the

1 clarification of the notice of appeal that we have sought by close of play this Friday, which
2 is 17th August. Mr. Anderson does that mean that the Ofcom defence and witness statement
3 can still be delivered by the 24th, or would you prefer some additional time for that?

4 MR. ANDERSON: Without actually having seen the form in which the clarification takes place, I
5 cannot be certain, but I think to be on the safe side it might be sensible to extend that into
6 the middle of the following week.

7 THE CHAIRMAN: (After a pause) Why do we not say defence and witness statement by no
8 later than 31st August?

9 MR. ANDERSON: That would be helpful.

10 THE CHAIRMAN: Then statements of intervention in relation to the Channel 4 contract by 18th
11 September. As far as the hearing of the preliminary issue is concerned, it is the same date,
12 which is now 31st August for the defence and the witness statement, we then envisage that
13 skeleton arguments will be delivered in sequence with the appellant delivering their
14 skeleton by no later than 18th September; Ofcom then by 25th September, and the
15 interveners (if so advised) by 2nd October – that was assuming that the hearing would take
16 place on 8th October. Mr. Scannell, what was the date that you were asking for?

17 MR. SCANNELL: 12th October is possible for Red Bee as it is presently represented; 23rd and
18 24th October are also suitable dates.

19 THE CHAIRMAN: If we were to lose 8th October date that would mean, I am afraid, putting it
20 off until 24th October. I would like to hear what the other parties have to say about that
21 before we make a decision.

22 MR. HORNSBY: IMS would naturally oppose it being put off that long, and I do not know
23 whether now is the opportunity but we have some observations about the scope of the
24 defence in light of the slippage of time which has resulted. Mr. Anderson said they would
25 not be pleading in any detail in their defence on the issue of whether the BBC contract
26 infringed the prohibitions, and that is something that we would like to make submissions on.

27 THE CHAIRMAN: Mr. Anderson?

28 MR. ANDERSON: We too would be unhappy with the preliminary issue going off as late as 24th
29 October, particularly since the Tribunal seems currently to be minded to run the second part
30 of the case in tandem. The risk of them getting out of sync. at some later stage is enhanced
31 the longer the preliminary issue is put off. With the greatest respect to my learned friend, as
32 an intervener his interests are less direct than those of the applicant and the respondent and
33 we would urge the Tribunal to stick to 8th for the preliminary hearing.

34 (The Tribunal confer)

1 THE CHAIRMAN: Miss Farrell, have you anything you want to say?

2 MISS FARRELL: No, I have nothing to add.

3 THE CHAIRMAN: I think the Tribunal will stick with the 8th October date, I am afraid,
4 Mr. Scannell. Do you still wish to make submissions about the contents of the defence in
5 that ----

6 MR. HORNSBY: Yes, these relate really to the issue that was first mentioned in the letter that we
7 wrote on actual duration of the proceedings to date. We believe they have really taken far
8 too long to get to this point. Ofcom publishes on its website the Guidelines for the
9 disposition of complaints in competition matters, and they refer to periods of time which
10 have been well exceeded in this case. There have been a couple of hiatuses in the course of
11 the administrative procedure – there was a gap of one month between the time when the
12 Office of Fair Trading decided that the restraints were not ancillary, before Ofcom decided
13 that it would add the BBC contract to the considerations that it was organising in relation to
14 the Channel 4 contract. There was a period of two months where actually the Decision in
15 Channel 4 makes it clear that no work was being carried out. The final decision on the
16 Channel 4 case took place in July of last year, roughly two years after the complaint was
17 initially made.

18 The complaint basically relates to the duration of certain infringements as we perceive
19 them. Time marches on and while time marches on, the time where any effective relief
20 might have some beneficial impact on the market structure diminishes. My learned friend's
21 proposal that there should be no pleading in relation to the substance of the BBC contract to
22 a certain extent I understand where he is coming from on that, but if you turn to the case
23 closure document itself and bear in mind that in putting forward a defence to the Channel 4
24 contract, he is going to be dealing with the structure of the market, you will see that there is
25 actually no real difficulty in him actually doing a response to both by the date.

26 If you go to the BBC case closure document, para. 1.7 – if you want me to read it out I will,
27 the guts of it is just over the page:

28 “In light of that amendment ... in effect the reduction of the contract's duration
29 from ten and a half years to seven and a half years and based on Ofcom's finding
30 on the structure of competition in the relevant market as set out in the Channel 4
31 decision, Ofcom considers that it is no longer an appropriate use of Ofcom's
32 resources to engage in further investigation into this matter.”

33 We say the defence in relation to the Channel 4 contract must necessarily deal with
34 questions of the relevant market, and the structure of competition within the relevant

1 market. In the Channel 4 decision it is quite clear that there are two key elements on which
2 Ofcom relies for its fundamentally permissive attitude to contracts of long duration in this
3 market. They are: first, the existence of what they perceive to be a bidding market; and
4 secondly, the existence of buyer power. IMS disagrees profoundly with both of these
5 rationale for the decisions that are reached, but in submitting the defence on the Channel 4
6 contract, Ofcom will necessarily be taking a position on those particular matters – what is
7 sauce for the goose will be sauce for the gander – they will not have any particular ability to
8 change their position, but IMS believes that a position they should take if this decision to
9 close the file is properly held (as we say it is) to be a non-infringement decision, they are
10 then going to come back here and ask for more time to produce a defence on the substance
11 of that. That will have the inevitable consequence of lengthening the proceedings still
12 further. We have been going nearly three years now on this and it is really time for Ofcom
13 to nail its colours to the mast and actually get a defence out on the BBC contract. It relates
14 – as it must do – to the nature of the bidding market, and the buyer power as they perceive
15 it, and IMS would therefore ask the Tribunal that the pleading covers all elements of what is
16 one picture, one story only, namely the effect of these particular contracts on the relevant
17 market.

18 MR. ANDERSON: If I could just make three short points. It seems from what Mr. Hornsby is
19 saying is that what is contained in the Channel 4 decision is material to the substance of the
20 BBC contract, and therefore we should be pleading to that. We will be, we will be pleading
21 to the substance of the Channel 4 contract, and the Channel 4 decision and to the extent that
22 he says there is read across to the BBC position then he will have our pleaded case.
23 The second point is the whole point of a preliminary issue is to avoid the cost and expense
24 of the substance of the case. Therefore, it would be inappropriate for us to involve debate
25 on that substance in advance of the preliminary issue.
26 The third point is, of course, that the result of the preliminary issue, whichever way it goes,
27 does not necessarily mean that the Tribunal will be getting into the substance of the BBC
28 contract. If we win the BBC contract side of the case goes. If we lose it does not at all
29 follow that there will then be a pleading to the substance of the BBC aspect of the case
30 which we will be seeking to defend. There are a number of options. One may be, because
31 as I said at the outset, our view is that we took no position on infringement or non-
32 infringement, and we therefore are not in a position to defend a decision which the Tribunal
33 will then have characterised as a non-infringement decision and it may be that the matter
34 then has to be dealt with, either by way of remittal or the Tribunal itself. So it does not at al

1 follow that the path that Mr. Hornsby envisages the case taking if he wins on this will be
2 simply a pleading and the substance of a non-infringement decision being defended.
3 We therefore submit that the appropriate course for pleading at this stage is the course that I
4 outlined at the outset, namely, admissibility on the BBC contract, substance on the Channel
5 4 contract.

6 (The Tribunal confer)

7 THE CHAIRMAN: Yes, Mr. Hornsby, I am afraid we are not convinced by your arguments and
8 we do not think it is appropriate to require Ofcom to plead on the substance of the BBC
9 contract at this stage, and we will review the position when we have decided the preliminary
10 issue, bearing in mind that we agreed that this case needs to be moved along swiftly to come
11 to a resolution of all the substantive issues that remain to be determined after the hearing of
12 the preliminary issue.

13 (The Tribunal confer)

14 THE CHAIRMAN: Just one further point, and then I think we will conclude subject to anything
15 anybody wants to say, is that with regard to the pleadings that we will order to be lodged,
16 the parties should not annex to those pleadings any documents which have already been
17 annexed to the notice of appeal or to any pleadings or witness statements that precede them.
18 So will the parties please make a note of what is already annexed to the pleadings and not
19 duplicate that material – cross references to other bundles is perfectly adequate.

20 (The tribunal confer)

21 THE CHAIRMAN: That relates to what is appended to the pleadings that are lodged. We will, in
22 due course, need a bundle of documents for the preliminary hearing date and the parties
23 should liaise to agree what the content of that should be.

24 Unless anyone has any further points that they wish to raise with the Tribunal? Thank you
25 very much.

26 (The hearing concluded at 3.35 p.m)