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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No 1027/2/3/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

1 November 2006

Before:  
MARION SIMMONS QC  
(Chairman)

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**VIP COMMUNICATIONS LIMITED**  
(in administration)

Applicant

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

Supported by

**T-MOBILE (UK) LIMITED**

Intervener

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Mr. Brian Kennelly (instructed by Bankside Solicitors) appeared for the Applicant.

Miss Anneli Howard (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Intervener.

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**CASE MANAGEMENT CONFERENCE**

1 THE CHAIRMAN: Good morning. The Tribunal has called this CMC because of the various  
2 procedural difficulties that have been encountered since the last CMC. The first of these is in  
3 relation to the order made on 13<sup>th</sup> September concerning the filing of a document amplifying  
4 the notice of appeal.

5 What the Tribunal has received – out of time – is a document headed: “Re-amended Notice of  
6 Appeal”. That is not what the order gave permission to serve. There is no indication in the  
7 document which has been purportedly served as to the difference between that document and  
8 the document served on 30<sup>th</sup> August 2005. It is therefore entirely unclear as to what has  
9 changed. It appears from the skeletons of T-Mobile and Ofcom that they may also be equally  
10 confused as to the amendments. Both have identified a new issue as to proportionality.

11 T-Mobile seems also to have identified a complaint with regard to T-Mobile’s dealings with  
12 third parties which in the Floe case at least raised a discrimination issue.

13 The position is unsatisfactory because it is important that there is a continuum from the first  
14 notice of appeal so that any person looking at the file can clearly understand what the issues  
15 are when permission was given to make any amendments and what those amendments were.  
16 The rule is there not just because it is a rule but because it provides a proper structure for the  
17 proceedings.

18 Secondly, apparently there is an intention to make an application for interim relief. No  
19 indication of that application was given to the Tribunal and the only reference to it that we can  
20 find is at para.61 of this new document. That is not a professional way of making an  
21 application to a court or Tribunal, and it is not a professional way of making an application to  
22 this Tribunal. At the least the application should have been identified to the Tribunal in the  
23 covering letter.

24 Thirdly, the witness statements. It is quite inappropriate for a solicitor to serve a witness  
25 statement correcting other people’s witness statements. The proper course is for the author of  
26 a witness statement to correct the witness statement and to serve a new version which identifies  
27 the corrections.

28 Fourthly, the question of abiding to time limits. Ofcom are taking a pragmatic approach about  
29 that. Although that approach is, in one sense, sensible the time limits also assist in the  
30 structure of proceedings and should not be flagrantly disobeyed.

31 The question is where we go from here. Mr. Kennelly?

32 MR. KENNELLY: Madam, I am grateful for those indications and I will address them in turn. The  
33 first point in relation to the appropriateness of the nature of the document entitled  
34 “Re-amended Notice of Appeal”: I begin first of all by apologising without reservation in  
35 relation to the point, madam, you make about the fact that it is impossible to see on the face of

1 the document what changes have been made since the previous document. I can have no  
2 answer to that, that is a straightforward error that I will have to remedy.

3 THE CHAIRMAN: I have not compared the two documents to see where the differences are.

4 T-Mobile and Ofcom have, I suspect, spent a lot of time trying to do that; they should not have  
5 had to have done that.

6 MR. KENNELLY: Madam, indeed. T-Mobile, in its arguments, raise two allegedly new points,  
7 Ofcom raise one and I shall have to address those, because in my submission neither of them  
8 are new, but I shall address those. The first point is that it is not possible to see on the face of  
9 the document by way of standard track changes what changes have been made. By way of  
10 explanation I can only point to two things.

11 First, is that the existing further amended notice of appeal was structured and set out in such a  
12 way that after the Judgment of this Tribunal large parts of it were redundant and its structure  
13 was not at all compatible with the structure that was outlined by the Tribunal at the CMC on  
14 13<sup>th</sup> September.

15 THE CHAIRMAN: At the 13<sup>th</sup> September CMC – were you in attendance?

16 MR. KENNELLY: I was here at the beginning in relation to the Floe and Worldwide matters.

17 THE CHAIRMAN: But you did not stay?

18 MR. KENNELLY: No, regrettably, madam, I left, although I did read the transcript obviously in  
19 considering how to structure the amended notice of appeal. Since I was not here, and I was not  
20 familiar with the VIP case – I had no dealings with VIP previous to the instruction I received  
21 to represent VIP after the instruction of new solicitors in this matter – I considered the  
22 transcript of the hearing where the Tribunal discussed with the parties the outstanding factual  
23 and legal issues.

24 THE CHAIRMAN: But one of the things was that we specifically said that there was not going to be  
25 a new notice of appeal because one gets in to very great difficulties under the Rules about that.

26 MR. KENNELLY: Madam, indeed, and I read very carefully the warning from the Tribunal not to  
27 make any new points, and it was never my intention to make any new points and I will make  
28 my submissions in relation to those but obviously, if the Tribunal disagrees, I am absolutely  
29 willing to change – if I am permitted – any ambiguities in the document. It was never our  
30 intention to make new points. It was simply the intention of VIP on reading the transcript  
31 – and it was our misunderstanding if the Tribunal is not content with the format it presently  
32 has, and that is clear – to reflect what we understood (mistakenly perhaps) to have been the  
33 indication from the Tribunal as to the issues that had to be addressed in the amplified  
34 document. Those issues were, in my submission, very helpfully set out by the Tribunal in the  
35 transcript in relation both to the factual and the legal issues that were outstanding. It was my

1 understanding, on reading the transcript, that what the Tribunal did not want was the factual  
2 matters – because that was what the Tribunal was interested in discovering, at least in the first  
3 instance – to be simply inserted into the existing document, but that the amplified document  
4 had to address the factual and legal matters that the Tribunal itself outlined at 13<sup>th</sup> September  
5 hearing, because this re-amended notice of appeal was to serve as the notice of appeal that  
6 would see this case through to the end. So even though, in the first instance, we will be  
7 dealing only with the factual issues, it also had to deal with the legal implications of those  
8 factual matters.

9 Looking at the transcript it appeared to me that that was ----

10 THE CHAIRMAN: Well, shall we look at the transcript?

11 MR. KENNELLY: Yes. If you would turn first to p.24 of the transcript, and I refer to these  
12 passages in my submissions because what I was concerned to avoid was any impression on the  
13 part of the Tribunal, or the parties that they were using this opportunity to abuse the goodwill  
14 of the Tribunal in permitting VIP to amplify the notice of appeal and we sought loyally to act  
15 in accordance with the Tribunal's indications at the CMC.

16 THE CHAIRMAN: Well where do I say what?

17 MR. KENNELLY: Beginning at p.24, madam, this is after T-Mobile, my learned friend Mr.  
18 Pickford, has made an application which in part he replicates before you today to dismiss the  
19 appeal by VIP on a summary basis. Then, madam, you say:

20 “To do so we must assume that VIP can establish a factual scenario most favourable  
21 to them.”

22 Then you set out, madam, the factual scenario in four parts – four questions – which I  
23 understood to be the factual scenario which VIP had to satisfy at this stage, because now VIP  
24 has to set out its facts according to its evidence, and these are the facts that VIP must satisfy if  
25 it is to succeed at all in its legal case. That structure was set out at p.24 ----

26 THE CHAIRMAN: Yes, but this was in answer to the application.

27 MR. KENNELLY: Madam, yes. As I said at the beginning it may be that we misunderstood the  
28 Tribunal's indication, but reading the transcript it seemed to us the Tribunal was indicating  
29 what the outstanding legal and factual matters were which VIP had to satisfy if it were to  
30 succeed in the Appeal.

31 The factual matters are there outlined at p.24, but of course the re-amended notice of appeal  
32 was not supposed only to deal with the facts, it was clear from the transcript that it also had to  
33 address any legal implications, and my learned friend, Mr. Pickford, was anxious to stress in  
34 his submissions to the Tribunal that this was not just going to be a factual matter but would

1 deal with the implications in law as well. In relation to the outstanding legal question, if the  
2 Tribunal looks at p.24 ----

3 THE CHAIRMAN: 24 is where we were.

4 MR. KENNELLY: Yes, I am sorry, I refer to the re-amended notice of appeal, it is at p.24 at line 35.

5 THE CHAIRMAN: This is in the middle of my little Judgment.

6 MR. KENNELLY: Indeed. Madam, you say there: “The question is then ...” i.e. after the  
7 establishment of the factual matter, “... whether subject to that acceptance and supply  
8 Competition Law would permit a supplier then to disconnect.” That is what remains to be  
9 determined.

10 THE CHAIRMAN: Yes.

11 MR. KENNELLY: I think I have given myself a wrong reference. (After a pause) Page 25 line 3.

12 THE CHAIRMAN: Again, that is in the middle of my little Judgment.

13 MR. KENNELLY: Madam, yes.

14 THE CHAIRMAN: Yes, well I read the whole of my Judgment just now. Where do I deal with the  
15 order about what we did about the notice of appeal?

16 MR. KENNELLY: It is at the very end, madam, when you are discussing the directions.

17 THE CHAIRMAN: Do you want to show me anything before the very end?

18 MR. KENNELLY: That is what I rely on, the re-amended notice of appeal. In fact the reference  
19 was correct, I could not see it on the face of the document, where madam, you set out there the  
20 legal issue which will need to be decided:

21 “... if the facts are established, is whether and in what circumstances a supplier can  
22 disconnect notwithstanding an existing agreement ...”

23 and you raised a further issue as to whether a disconnection can be objectively justified.

24 THE CHAIRMAN: Yes.

25 MR. KENNELLY: That was stated as the remaining legal issue if the facts are established. That  
26 was the basis for us understanding that that was the legal issue which had to be addressed in  
27 the amplified notice of appeal.

28 THE CHAIRMAN: I am not sure – but anyway, yes?

29 MR. KENNELLY: I do not doubt that there was a misunderstanding ----

30 THE CHAIRMAN: Well the misunderstanding was as to what was supposed to happen.

31 MR. KENNELLY: Indeed madam, but since the penalties that are sought are so severe it is  
32 incumbent on me to point out the basis for the drafting. Then going to the end of that  
33 document, p.42.

34 THE CHAIRMAN: Is there nothing before 42 about it?

35 MR. KENNELLY: Not in a way that I understood to indicate that it was not ----

1 THE CHAIRMAN: Where did we first raise this new document? At the top of p.39 I can see an  
2 “amplified notice of appeal” reference by Mr. Anderson.

3 MR. KENNELLY: Yes, that is at the stage we were discussing what could go in or not into the  
4 amplified notice of appeal. I must confess, madam, on my reading of the transcript, the  
5 indication the Tribunal now gives – well, madam, what you said to us by way of indication this  
6 morning as to the fact that it was not to take the form in which it took, we did not understand  
7 that to be apparent on the face of the transcript, but again I could be ----

8 THE CHAIRMAN: Well if it is an amplified amended notice of appeal my experience is that you  
9 start with the previous document and you then either insert or delete so that you can see the  
10 route from which you came, and the route to which you want to go.

11 MR. KENNELLY : Indeed, madam. That is why I said at the very beginning that that I appreciate  
12 immediately is something that, even on our understanding for it to be done, based on the  
13 indications we have understood ----

14 THE CHAIRMAN: It cannot be right.

15 MR. KENNELLY: It cannot be right, no, except in this respect, madam, as you are familiar, it is  
16 possible in the High Court to amend by way of substitution.

17 THE CHAIRMAN: Yes, but that is not what you got permission to do.

18 MR. KENNELLY: No, madam, absolutely, we were given permission to amplify the notice of  
19 appeal. Looking at the further amended notice of appeal, and looking at the outstanding  
20 factual and legal questions outlined by the Tribunal to which we understood the parties to  
21 assent, in a sense those were the outstanding issues, and examining how that could be  
22 structured into the existing document which, madam, you will recall, has been criticised in  
23 trenchant terms by both T-Mobile and Ofcom, we amended effectively by way of substitution.

24 THE CHAIRMAN: But then you ought to have come back and asked me for permission.

25 MR. KENNELLY: Madam, “yes” is the short answer to that question. But unfortunately – and this  
26 is where I must plead the shortness of time that was available to us in the circumstances, and  
27 the difficulty of the task, we took it upon ourselves to amend in that way. I understand  
28 immediately, madam, that we ought to have contacted the Tribunal. But in the short time  
29 available to us, and there were a matter of days remaining between receiving the witness  
30 evidence which had to be examined and drafting the document ----

31 THE CHAIRMAN: But that makes it all the more important to come back to the Tribunal and say  
32 “Look, we have a problem”, rather than going off on a frolic come back and try and sort out  
33 the problem.

34 MR. KENNELLY: Madam, yes, indeed.

35 THE CHAIRMAN: A frolic including “missing the time limit”.

1 MR. KENNELLY: The time limit, I am afraid, I will have to deal with as a separate matter, because  
2 this ----

3 THE CHAIRMAN: Anyway, let us not get into the time limit, let us not get off the ----

4 MR. KENNELLY: I must take responsibility for the re-amended notice of appeal because that was a  
5 document I drafted and that is why I am dealing with the time limit as a separate issue. The  
6 re-amended notice of appeal, I must say in our defence at least this: that we understood, based  
7 on the indications given that although the Tribunal did not expressly state by way of  
8 substitution that there would be no objection to a document which dealt only with the issues  
9 that the Tribunal outlined, raised no new issues, and was drafted in order to reflect the situation  
10 after the Judgment, dropping the points that were redundant following the Judgment.

11 THE CHAIRMAN: One of the reasons that we do not think that the way we have gone is  
12 satisfactory is that this case is one which is very litigious. Floe has already been to the Court  
13 of Appeal once, and one has to proceed on the basis that this case might go to the Court of  
14 Appeal

15 – and it may go further If that is the situation the documents have to be in a form so that  
16 somebody who has not been here all the way through this understands how we got to where we  
17 got to. If they do not understand that everything falls at the first hurdle because they get into  
18 procedural hang ups. So it is very important that we sort this out.

19 MR. KENNELLY: Indeed, but as a matter of drafting – simple drafting – I did consider originally  
20 how to deal with the outstanding factual and legal issues as I understood them to be from the  
21 transcript in the context of the existing further amended notice of appeal, by way of simple  
22 track changes and underlining of new passages also addressing the new factual matters. It  
23 produced a document, and I am sure the parties will not disagree with me, that was  
24 unintelligible. I understand I ought to have come back to the Tribunal and said “This  
25 document will assist no one because it is not easily read or understood”, particularly after the  
26 Judgment and so many of the matters raised in the further amended notice of appeal were  
27 redundant. So – wrongly, I accept – I expected there to be no opposition to a clarified,  
28 simplified document, which amplified the case in the way the Tribunal outlined by way of  
29 substitution, but I appreciate, madam, immediately that in a case like this I was naïve in  
30 assuming that there would be no opposition.

31 THE CHAIRMAN: The original notice of appeal was three or four pages, we have now got a notice  
32 of appeal of I do not know how many pages.

33 MR. KENNELLY: Madam, with respect, the re-amended notice of appeal nobody has criticised it  
34 for being too long.

1 THE CHAIRMAN: I am not criticising it for being too long, I am just saying that it is now 17 pages  
2 whereas, previously, it was three pages.

3 MR. KENNELLY: Indeed, madam, as I say, the first notice of appeal was drafted not by a  
4 lawyer and is in most summary terms.

5 THE CHAIRMAN: This is the one that is drafted by Taylor Wessing?

6 MR. KENNELLY: Yes, but it is the annex, madam. In that document, the further amended notice  
7 of appeal, although the notice itself is short, there is an annex which is very substantial, and  
8 where many substantial legal points are made which are then incorporated by reference into the  
9 notice of appeal itself. This is one of the reasons why it was so difficult to amend. If you turn  
10 to the further amended notice of appeal, which as we all understand is, in fact, the amended  
11 notice of appeal.

12 THE CHAIRMAN: That was why the order was drafted in the way it was drafted.

13 MR. KENNELLY: Because the annex was ....

14 THE CHAIRMAN: Because it was amending this annex to the notice of appeal.

15 MR. KENNELLY: Madam, I am afraid that was not clear.

16 THE CHAIRMAN: Where in the transcript do we refer to the order that I made?

17 MR. KENNELLY: I am afraid there is not a single place because a long discussion went on between  
18 the parties as to what form the order would take. Madam, while we are on the annex to the  
19 further amended notice of appeal, you see that the notice itself is three pages long and, as  
20 Ofcom have helpfully set out, the grounds of appeal are set out at para.11(i) to (iv) on p.3 of  
21 the notice of appeal – this is set out in Ofcom’s submissions as well.

22 An example of how this notice of appeal in fact is much longer than this three pages is that it  
23 refers at (iii) to even if the operation of the gateways was arguably unlawful, T-Mobile should  
24 not have refused supply, and that is picked up again in the appendix at p.8. This document  
25 requires very careful reading because arguments are contained within it which may not be  
26 immediately apparent. On p.8 there is a reference to abuse at the top of the page which is, of  
27 course, one of the grounds of appeal. There is a reference there to the fact that T-Mobile  
28 should not have acted as “judge, jury and executioner”, and reliance is placed on the *Hilti* case.  
29 That is why in seeking to reflect factually the grounds of appeal raised in this document I said  
30 in mind that T-Mobile ought not to have acted unilaterally in disconnecting the apparatus  
31 without consultation with anybody else. I was simply trying to reflect this plea in the further  
32 amended notice of appeal in my re-amended notice of appeal.

33 THE CHAIRMAN: It is always very difficult when you take over somebody else’s pleading

1 – I fully accept that. On the other hand for the reasons I have already outlined one has to know  
2 where one has come from, especially in a case like this and especially where it is very  
3 important that it is not a new ground of appeal.

4 MR. KENNELLY: Absolutely, I felt that straight away because that is one of the points that both  
5 Ofcom and T-Mobile think is a new point.

6 THE CHAIRMAN: But the new point is discrimination and proportionality?

7 MR. KENNELLY: I make no allegation of discrimination, and no such ground is pleaded.

8 THE CHAIRMAN: The third parties ----

9 MR. KENNELLY: Madam, there is one sentence in the re-amended notice of appeal at para.19. If  
10 you turn to the re-amended notice of appeal, and this line is not central to their case, and again  
11 I did not anticipate that it would cause so much difficulty ----

12 THE CHAIRMAN: “T-Mobile was familiar with the kind of service which VIP was providing  
13 having supplied SIMS to other COMUG operators.”

14 MR. KENNELLY: That is as far as that evidence goes. It is simply to say that T-Mobile was in the  
15 business of supplying SIMS to COMUG operators.

16 THE CHAIRMAN: You are going to produce evidence, are you, of these third parties?

17 MR. KENNELLY: They are two very short statements produced by these two people, which we rely  
18 upon for this single submission which we use in order to make good ----

19 THE CHAIRMAN: But they knew other people were doing it, why did they know you are doing it?

20 MR. KENNELLY: Well I said, madam, it is not central, but the factual issue that you, madam,  
21 raised was were VIP supplied SIMS by T-Mobile for COMUG. We are saying “yes, we were  
22 and, in addition T-Mobile were doing this for other people”, so it was not as if we were a  
23 particularly exceptional case. They were supplying SIMS for commercial multi-use ----

24 THE CHAIRMAN: So it is not put in there as a discrimination point?

25 MR. KENNELLY: Absolutely not, and I intended this to be clear. If I had wanted to plead  
26 discrimination I would have done so.

27 THE CHAIRMAN: Everybody is very sensitive because in *Floe* it was tried to plead it.

28 MR. KENNELLY: Indeed, but that argument was addressed by this Tribunal in the *Floe* Judgment.  
29 I can see the fact that things may be read into this that it was not intended to convey; but that  
30 was as far as it was supposed to go. That was the point relating to the factual issue.

31 THE CHAIRMAN: If it goes anywhere.

32 MR. KENNELLY: If it goes anywhere at all, indeed. It is that simple factual issue that the Tribunal  
33 raise that we sought to address, and that is as far as it went, and that is as far as the statements  
34 are intended to go and for that point alone.

1 The discrimination argument should not be raised lightly. I am very much aware of the  
2 jurisprudence, not just of this Tribunal but of other tribunals and the allegation is not made at  
3 this stage – I want to make that in the clearest possible terms.

4 THE CHAIRMAN: So how much of what you have now was in the previous ...

5 MR. KENNELLY : Madam, if you turn in the re-amended notice of appeal at para.60 where the  
6 relief that is sought originally is repeated verbatim.

7 THE CHAIRMAN: You are asking for the same relief.

8 MR. KENNELLY: Yes, we are asking for the same relief. The factual and legal grounds that we  
9 rely upon are limited entirely to those which the Tribunal outlined on 13<sup>th</sup> September. So the  
10 only factual matters we now allege are in relation to those factual matters the Tribunal outlined  
11 as being the ones that needed to be established, and the only legal questions that we now  
12 make ----

13 THE CHAIRMAN: But that could mean that you have got a completely new notice of appeal, new  
14 grounds.

15 MR. KENNELLY: We understood, madam, from the Tribunal’s judgment that those were factual  
16 matters which were open to T-Mobile to satisfy, because the Tribunal said ----

17 THE CHAIRMAN: But they have to be on the old grounds.

18 MR. KENNELLY: Yes, we say that they fit into the old grounds, because insofar as you have not  
19 dismissed arguments in principle, and the Judgment in *Floe* we have continued with them in  
20 this re-amended notice of appeal.

21 THE CHAIRMAN: We will see what everybody else says, but at the moment I am just totally  
22 confused. If somebody looked at this, it looks like a substitution. If it is a substitution it is  
23 really putting in a new notice of appeal. If it is putting in a new notice of appeal then you  
24 cannot do that unless you fulfil the criteria. I cannot give you permission today because that, I  
25 think, requires the whole Tribunal.

26 MR. KENNELLY: Indeed madam, but my submission, as you have heard, is that this was intended  
27 only to reflect the amendments the Tribunal gave us permission to make. It was made by way  
28 of substitution which the Tribunal did not give us express permission to make.

29 THE CHAIRMAN: But the Tribunal did not give you any permission to make any amendments  
30 which were new grounds.

31 MR. KENNELLY: Indeed, but I understood from the Tribunal’s Judgment that because the Tribunal  
32 said “These are the outstanding legal issues, and these are the outstanding factual issues in  
33 relation to the VIP case”, that was the indication, it was open to us to say in relation these  
34 issues: “This is what we say; in relation to the legal issues this is what we say.” That is the  
35 basis upon which we made the amendment.

1 THE CHAIRMAN: Would it not be better to stick to the old document and then to have put in  
2 effectively what used to be called voluntary particulars? All you are doing is saying “These  
3 are the facts that go to those matters”?

4 MR. KENNELLY: Yes, absolutely, but my view when I drafted the re-amended notice of appeal,  
5 and it is my submission today is that ----

6 THE CHAIRMAN: You cannot do it?

7 MR. KENNELLY: -- it is very difficult to do that with this existing further amended notice of  
8 appeal.

9 THE CHAIRMAN: Is there anything in the appendix that is left?

10 MR. KENNELLY: The basic allegation that there was an abuse of a dominant position, the  
11 allegation that T-Mobile should not have acted unilaterally in reliance on the *Hilti* Judgment,  
12 those are repeated. But, for example, the matters set out by the Tribunal at para.338 of the first  
13 Judgment, none of that is necessary now because the Tribunal has produced a new Judgment.

14 THE CHAIRMAN: No, so that can all be crossed out.

15 MR. KENNELLY: Indeed, and that is why I said in the re-amended notice of appeal that the old  
16 document was to be ignored; it was amendment by way of substitution.

17 THE CHAIRMAN: But you had not got leave, and if we do it by amendment by way of substitution  
18 we get into the whole problem of whether or not there are new grounds. So you have to give  
19 us a document that shows us that there are no new grounds. It is not for us to go on a fishing  
20 expedition.

21 MR. KENNELLY: I see, madam, what the Tribunal needs, and the parties need, is a document  
22 saying – if I had permission to amend by way of substitution – to amplify by way of  
23 substitution then I have to show how nothing has changed in terms of the legal grounds from  
24 the further amended notice of appeal to this new document, I see that straight away. If the  
25 Tribunal prefers I can, of course, try and work the amplification into the existing ---

26 THE CHAIRMAN: We will see what everybody else says; it may be somebody has a better idea as  
27 to how you are going to do this.

28 MR. KENNELLY: Shall I sit down at this stage and let the parties address that, because you set out  
29 a number of questions which I have to address in relation to the failure to comply?

30 THE CHAIRMAN: Shall we deal with this one first at least, because this is the basic point?

31 MR. KENNELLY: Exactly.

32 THE CHAIRMAN: So let us deal with this.

33 MR. KENNELLY: That may be sensible.

34 MISS HOWARD: Good morning, madam.

35 THE CHAIRMAN: Good morning.

1 MISS HOWARD: Ofcom, as you said, took a pragmatic approach about the deadline. That was  
2 about late and improper service. The actual change in the notice of appeal involves more  
3 substantive issues. We highlighted proportionality as one example, but there are other  
4 examples of new matters that have been raised. We have dealt with para.9 already but there is  
5 also para.43 of the revised notice of appeal, where VIP are alleging that a term of authorisation  
6 should be implied into the contract as a matter of business efficacy.

7 THE CHAIRMAN: That was not in the original.

8 MISS HOWARD: That was not in the original notice of appeal, or in the appendix.

9 THE CHAIRMAN: It was, you are saying?

10 MR. KENNELLY: No, I am agreeing with my learned friend.

11 MISS HOWARD: There is also para.50 where VIP raises a new argument that the State cannot rely  
12 on its own wrong as part of objective justification and new case law is cited there. Then there  
13 is also para.56 where VIP alleges that T-Mobile could have been obliged to sub-licence its  
14 licence, so it is quite clear that VIP is trying to move the case on and to put its case in the light  
15 of the *Floe* Judgment. Ofcom's concern with that approach is that it does not want to be  
16 criticised for matters which were not put forward in the original complaint and which formed  
17 no part of the second decision and really should these cases be put forward on appeal at this  
18 stage?

19 The Tribunal obviously has a choice either to reject the notice of appeal in its entirety or to  
20 keep the original documents and produce a black line, or to allow this new amended notice of  
21 appeal in. But regardless of the form of the documents the same issue is going to arise, but  
22 matters are going to be discussed which flow on from the *Floe* Judgment, and that raises the  
23 jurisdictional issue that my learned friend, Mr. Pickford, has raised in his submissions. Ofcom  
24 received those only late last night and have not had time to consider them in any depth and we  
25 would want to.

26 THE CHAIRMAN: Yes.

27 MISS HOWARD: But obviously we have to decide the parameters of the appeal going forward and  
28 if we are going to decide VIP in the light of the *Floe* Judgment that does raise very substantial  
29 issues and that will arise regardless of whether we keep the old documents modified to show  
30 the new particulars or whether we have a substituted notice of appeal.

31 THE CHAIRMAN: The VIP appeal was stayed on the basis that it raised the same issues as the *Floe*  
32 case, and that those issues would be decided in *Floe*. Then, any issues which arise separately  
33 would be decided in the VIP appeal. Of course, we decided *Floe* on the facts, and therefore the  
34 facts are different in VIP, and insofar as the facts are different we have not decided in the *Floe*

1 appeal and therefore we will have to decide it in the VIP appeal. So in that sense it does move  
2 on from the *Floe* Appeal.

3 My starting point would be: these are the grounds of the VIP Appeal, these are the points that  
4 are the same as *Floe*, if they are the same as *Floe*, this is what was decided. Are the facts the  
5 same – yes or no? If they are not the same we need to decide the following facts.

6 MISS HOWARD: That was clearly your intention at the last hearing. I have some more references  
7 to the transcript, if you like, but it was quite clear throughout the transcript that we were  
8 predominantly focused on the facts and then you were going to see, after the facts had been  
9 established, whether any issues of law arise.

10 THE CHAIRMAN: Yes, whether there were any other issues of law that we had not decided in *Floe*  
11 that needed to be decided which arose on the original grounds of appeal in the VIP case, or  
12 which arose because of the way we decided the facts.

13 MISS HOWARD: Yes, but necessarily because as the *Floe* case evolved and developed, and the  
14 Tribunal's Judgment reflects such developments, there will be issues that will need to be  
15 addressed in these proceedings that form no basis of the original notice of appeal, either in  
16 *Floe* or in VIP.

17 THE CHAIRMAN: But the question is that we need a document that deals with that, and how do we  
18 get that document? You have looked at that document very carefully ----

19 MISS HOWARD: In the time that we have had to look at it.

20 THE CHAIRMAN: Well you have had some time to look at it.

21 MISS HOWARD: Yes, we have but it is a preliminary assessment because we have been preparing  
22 submissions as well.

23 THE CHAIRMAN: But you have looked at it more carefully than I have looked at it. If there was  
24 an indication as to where the differences are, would that be satisfactory or do you think we  
25 need to go back to the drawing board?

26 MISS HOWARD: For example, there is confusion; the original grounds of appeal clearly raise an  
27 allegation of discrimination. Mr. Kennelly today has made it abundantly clear that they are no  
28 longer relying on discrimination, so it is very difficult to see what grounds have been  
29 abandoned, and what new grounds are being made, and we do need clarity on that situation.  
30 Even if we have a document which is marked up to show the differences and makes the scope  
31 of the case abundantly clear to everybody concerned, the Tribunal is still going to have to  
32 address the issue of jurisdiction as to whether it should analyse those issues in the context of an  
33 appeal and whether it has power to do so.

34 THE CHAIRMAN: One of the things going through my mind is if you stick to the original notice of  
35 appeal (the three pages) and the substituted the annex, would that solve the problem?

1 MISS HOWARD: Can I just take a moment to get instructions?  
2 THE CHAIRMAN: Yes, I am only thinking aloud as to whether that might be a way of doing it and  
3 then we are not substituting a new notice of appeal.  
4 MR. KENNELLY: Madam, in the meantime while my learned friend is taking instructions I would  
5 have no objection to that course of action at all. Already my learned friend made some points,  
6 she says there were new points raised, which were not new, and I could take the Tribunal to  
7 those, but of course the Tribunal would say to me that that only reflects the confusion ----  
8 THE CHAIRMAN: Actually we had better not go into this.  
9 MR. KENNELLY: I am not going to make that point, but I would have no objection to substituting  
10 the re-amended notice of appeal – the document given that title – with the appendix attached to  
11 the existing notice of appeal so that there will be no doubt that the legal ground set out in the  
12 notice of appeal remained though as ----  
13 THE CHAIRMAN: I am not sure what status the appendix had.  
14 MR. KENNELLY: I have to assume, madam, that it was part of the amended notice of appeal – it  
15 had been treated as such by the parties and that was my understanding when I was instructed.  
16 THE CHAIRMAN: Is it referred to in the amended notice of appeal.  
17 MR. KENNELLY: It is not referred to, no.  
18 THE CHAIRMAN: Mr. Pickford is very anxious to get up.  
19 MR. PICKFORD: Madam, thank you! In my submission it would not be a satisfactory course  
20 merely to substitute the appendix for the new notice of appeal because essentially one is faced  
21 with the same difficulty that one is currently faced with in terms of working out exactly how  
22 one has got from A to B and to what extent B differs from A. In our submission, the Tribunal  
23 is entirely correct, that what we need here is some certainty in terms of exactly how this case  
24 matches, and exactly how it differs from the previous case that was advanced by VIP.  
25 THE CHAIRMAN: I can understand that it is a bit difficult because of the way that we decided  
26 *Floe*.  
27 MR. PICKFORD: Certainly there is therefore a forensic challenge for Mr. Kennelly in terms of the  
28 way in which he puts his submissions together. But the discussion that we have been having  
29 this morning really illustrates the point that it has been very difficult for us in the week, or  
30 seven or eight days that we have had this document, to determine precisely the ways in which  
31 it differs from the old document. We manage to identify three points in particular that we put I  
32 our submissions for today; Ofcom have identified other points.  
33 THE CHAIRMAN: Mr. Kennelly now explains one of them.  
34 MR. PICKFORD: We are largely – as the Tribunal put it – “fishing” through the document trying to  
35 piece those points together, and we should not have to do that, and really we need to get the

1 issue of precisely how document B differs from document A settled, and we can then move on  
2 to deal with other things after that. It is premature, really, to get into all of the other issues, for  
3 example, whether particular amendments should be allowed pursuant to 11(3) before we really  
4 know exactly where we are in concrete terms.

5 THE CHAIRMAN: He says there are no 11(3) amendments.

6 MR. PICKFORD: Well we say there are and we say that it is impossible really to see clearly  
7 whether there are or there are not, on the basis of documents that we currently have.

8 MR. KENNELLY: Madam, if the Tribunal is interested I could explain that it is surprising that even  
9 without the helpful guidance of indication as to the changes made, I would dispute each of the  
10 changes, save for the ones I have agreed to ----

11 THE CHAIRMAN: No, but you can understand how the confusion has arisen, so I do not think it is  
12 worth going through it all because we are going to have to sort it out.

13 MR. KENNELLY: Indeed, but I have to say that I think it is actually clear, if one reads it, that the  
14 points my learned friends make about new points are not good – apart from the ones to which I  
15 have expressly agreed, as the Tribunal has seen. Just for the sake of completeness, the  
16 appendix to the further amended notice of appeal is referred to at p.3 in the notice of appeal. It  
17 says: “The heads of grounds are amplified in the appendix ----”

18 THE CHAIRMAN: Which paragraph?

19 MR. KENNELLY: This is at the end of para.11 of the further amended notice of appeal.

20 THE CHAIRMAN: “The heads of grounds are amplified in the appendix ----”

21 MR. KENNELLY: The appendix to this further amended notice of appeal.

22 THE CHAIRMAN: Those should be (1) to (5), when you look at it, it does not deal with (1) to (5).

23 MR. KENNELLY: No, madam, the appendix contains substantial amplification of the grounds set  
24 out at (1) to (v) and while Ofcom say you should stick to (1) to (5), the existing pleaded case  
25 included all of the points made in the appendix and those I sought to address in the re-amended  
26 notice of appeal, bearing in mind the indications given by the Tribunal as to what were the  
27 permitted outstanding factual and legal issues in light of the Judgment.

28 THE CHAIRMAN: I think it is a matter for you as to how you deal with this. On the other hand,  
29 how it has been dealt with is inappropriate.

30 MR. KENNELLY: Madam, I said at the very beginning that I appreciate there has to be an  
31 indication ----

32 THE CHAIRMAN: I am only saying that as a matter of fact, let us get on from there now. I think  
33 you have to decide how to deal with it and then we have to decide whether or not the way that  
34 you think how to deal with it is right.

1 MR. KENNELLY: I am interested, and I propose doing it in the way that assists the Tribunal and  
2 the parties as much as possible, and that is why I was interested to hear what the parties  
3 wanted, but it is not clear to me – I would be particularly interested in what Ofcom want, since  
4 they are the respondents in this appeal, and such clarity as they require we can provide. My  
5 interest was only in clarifying the case to assist the Tribunal.

6 THE CHAIRMAN: I think Miss Howard is going to tell us – something, anyway.

7 MISS HOWARD: Yes, madam. We do not think that a mere substitution of the appendix would be  
8 sufficient.

9 THE CHAIRMAN: No.

10 MISS HOWARD: The scope of this Appeal has to be against the second decision and it has to keep  
11 within the four corners of the original notice of appeal, as amended. Therefore, we would like  
12 a black line of the original, further amended notice of appeal of 30<sup>th</sup> August, showing exactly  
13 where the differences are, what has been abandoned, what is now asserted, and then we can  
14 take the matters forward and decide under 11(3) at a later stage.

15 THE CHAIRMAN: Miss Howard, I can understand though that when that is done, because it is a  
16 different drafter, different author with a different thought process, there is going to be a lot of  
17 black line and the document may become an extremely cumbersome document, and I think that  
18 was Mr. Kennelly's problem. It may still not be obvious because he is going to have to cross  
19 out the English and re-word it in his own words – or he feels that he needs to do that – and if  
20 he does that then it is going to look as if there is a new point there when there is not a new  
21 point there; I think that is his difficulty.

22 MISS HOWARD: The problem from Ofcom is that the current RNA now raises matters which we  
23 never investigated and potentially we are going to face criticism for failing to deal with matters  
24 that were never brought to our attention, either as part of the original complaint, or in the  
25 notice of appeal, and that is untenable for Ofcom going forward in an Appeal. It may be  
26 possible to have the black line and then overlay it with an executive summary that sets out the  
27 main grounds that are maintained at the moment, but we would like to have clarity on exactly  
28 what has been avowedly maintained.

29 THE CHAIRMAN: As I said, it is always very difficult when you take over somebody else's  
30 pleading and you often have to try to use their words in your document and it becomes very  
31 cumbersome.

32 MISS HOWARD: But that is a natural incident of litigation; it happens every day.

33 MR. PICKFORD: Madam, if I might make one suggestion – I do not know whether this is  
34 necessarily the right course in this particular case.

35 THE CHAIRMAN: I think we are trying to offer some help.

1 MR. PICKFORD: But a similar situation – or certainly a situation which had some parallels, arose  
2 in the *MasterCard* litigation.

3 THE CHAIRMAN: Oh yes.

4 MR. PICKFORD: And what the Tribunal ordered in that was a point by point analysis of the  
5 previous document that required the OFT (in that case) to say in reference effectively to each  
6 sentence whether or not the point was still maintained. That would certainly be one means of  
7 potentially addressing part of the problem. I am not sure whether it would necessarily address  
8 all of the problems, because I am not sure it would necessarily completely highlight all the  
9 points that are new, but that might be at least one means of dealing with some of the issues that  
10 arise in this case.

11 MISS HOWARD: Madam, if I could just interject on that point, having been on the receiving end of  
12 such a document in the *MasterCard* case, we received a table, a schedule comparing the  
13 difference between one paragraph and another which was virtually unworkable, as the Tribunal  
14 found, and it just developed into further satellite litigation. I would not recommend going  
15 down that course.

16 THE CHAIRMAN: I am looking at para.11 of the September 05 document, with the (1), (2), (3),  
17 (4), (5), now that is the ambit of the Appeal, is it not?

18 MR. KENNELLY: Madam, yes – save, of course, for the fact that we no longer make the  
19 discrimination argument that is set out ----

20 THE CHAIRMAN: Apart from the discrimination?

21 MR. KENNELLY: Yes.

22 THE CHAIRMAN: So it is (1) to (4) – (5) has gone.

23 MR. KENNELLY: Yes, madam, yes.

24 THE CHAIRMAN: I suppose it is possible to take the appendix, go paragraph by paragraph and  
25 identify to which of (1) to (4) the points go.

26 MR. KENNELLY: Madam, I will be happy to do that exercise.

27 THE CHAIRMAN: I assume that exercise is a possibility.

28 MR. KENNELLY: Well I had to do it anyway because I had to assure myself ----

29 THE CHAIRMAN: So it is possible to do that.

30 MR. KENNELLY: Yes, it is, yes.

31 THE CHAIRMAN: It is also possible to take your new document and go paragraph by paragraph  
32 and get to the (1) to (4) – I assume?

33 MR. KENNELLY: Yes it is.

34 THE CHAIRMAN: Does this para.11 appear in your new document?

35 MR. KENNELLY: No, not in that form, no.

1 THE CHAIRMAN: But I suspect – is this right, Miss Howard – that (1) to (4) is our starting point in  
2 para.11?

3 MISS HOWARD: Yes, we would agree with that.

4 MR. KENNELLY: Yes madam, and just to clarify – the Tribunal, of course, is still thinking about  
5 the potential solution ----

6 THE CHAIRMAN: Yes, I am not sure I have thought of a solution!

7 MR. KENNELLY: -- but the Tribunal will appreciate that part of the concern my learned friends  
8 have is not just the lack of clarity, the alleged lack of clarity, it is the fact that VIP has to  
9 address its case to the situation after the Judgment. That was always the intention, VIP will be  
10 stayed, and then you would have factual matters addressed in light of the Judgment, insofar as  
11 it was applicable to VIP and not specific to Floe’s facts. That is where the Tribunal set in its  
12 Judgment, in dismissing T-Mobile’s application, the outstanding factual and legal issues. So it  
13 is important, although we will obviously stick to the grounds as pleaded, that we must also  
14 reflect the situation after the Judgment, otherwise I will be having to plead to matters that have  
15 been resolved, or that have been changed.

16 THE CHAIRMAN: I appreciate that.

17 MR. KENNELLY: The whole point of the stay was that we would come back after Judgment and  
18 have our facts determined in light of the Judgment.

19 THE CHAIRMAN: Right, but if you start with (1) to (4) they depend on certain legal and factual  
20 principles – features - points of law and points of fact. In relation to points of law certain have  
21 been decided in *Floe*.

22 MR. KENNELLY: Yes.

23 THE CHAIRMAN: As to whether or not there are any outstanding I think we thought last time we  
24 might not be able to work out until we knew what the facts were.

25 MR. KENNELLY: Indeed.

26 THE CHAIRMAN: In relation to the facts, you are going to say that there are new facts, or different  
27 facts, from those that possibly were anticipated originally, because that is how the *Floe* case  
28 flowed?

29 MR. KENNELLY: Indeed.

30 THE CHAIRMAN: But they would not have normally been in a notice of appeal as such, they  
31 would have been in witness statements and that sort of thing.

32 MR. KENNELLY: Indeed, yes.

33 THE CHAIRMAN: And is one of the problems possibly that one has been too careful in expanding  
34 the notice of appeal to contain matters which possibly could have been in witness statements?  
35 That might be?

1 MR. KENNELLY: I could certainly be accused of that, but I was anxious to ----

2 THE CHAIRMAN: Because our rule is that it is all supposed to go in.

3 MR. KENNELLY: Indeed, and that is what I was anxious to effect.

4 THE CHAIRMAN: You are absolutely right, but we all have to take a pragmatic approach in this  
5 and try and do it within the rules. It would be possible, therefore, to take the headings (1) to  
6 (4) and to say what points of law have been decided, what points of law are now obvious, that  
7 may arise that have not been decided, and what facts need to be determined – yes?

8 MR. KENNELLY: Yes.

9 THE CHAIRMAN: Now, having done that one could then go back to the appendix and cross out  
10 those things that are not in that list?

11 MR. KENNELLY: Indeed.

12 THE CHAIRMAN: One would then be left with something – are you left with anything when you  
13 do that exercise?

14 MR. KENNELLY: We will be left with bits of sentences, and bits of paragraphs, it will not be very  
15 coherent.

16 THE CHAIRMAN: But it would be obvious – would it – that the point was there in some form?

17 MR. KENNELLY: It will be, yes, but we return to the problem, madam, that you outlined. I am  
18 happy to do that, but it will be necessary then to address the legal points that arise out of the  
19 Judgment. Another option the Tribunal could take is simply to say – dealing with the facts and  
20 the bare legal points that are raised in the existing notice – having heard the facts to then have a  
21 separate issue as to points of law. That is not satisfactory because everybody is entitled to  
22 know what our legal case is at this stage.

23 THE CHAIRMAN: We are shelving the problem.

24 MR. KENNELLY: Indeed. I can certainly cross out the bits of the appendix that are now redundant  
25 in light of the Judgment, and that will not leave a satisfactory appendix, and it will not assist  
26 the parties either.

27 THE CHAIRMAN: But you will have this other document which will be your version of (1) to (4).

28 MR. KENNELLY: Yes, that is true, and if we are allowed to amplify (1) to (4) in that way and then  
29 attach the appendix with the parts that are deleted, that would indicate to the parties such parts  
30 as are dropped. The parties may then allege, or say, in the amplified part that there are new  
31 points made, but I am afraid, madam, that is going to arise in any event.

32 THE CHAIRMAN: Yes, I can see that.

33 MR. KENNELLY: I have to be very careful to be clear in pleading to that so the bodies are left in  
34 no doubt that no new point is raised and that I am addressing only the findings of law made by  
35 the Tribunal in the Judgment in Floe, such as they applied to VIP.

1 Before my learned friend steps up, certainly from VIP's point of view that is something we  
2 could do, and that is something that in my submission would be a clear way of indicating to  
3 everyone what was deleted and how the case was now put in light of the existing grounds of  
4 appeal and the Judgment in *Floe*.

5 THE CHAIRMAN: Is that possibly the most satisfactory basis that we can all think of in order to  
6 work out how to achieve some objective in this?

7 MR. KENNELLY: Madam, you have my answer – yes.

8 THE CHAIRMAN: You think it is.

9 MISS HOWARD: I think the clearest position is if Mr. Kennelly can put in a new document along  
10 the lines that we have discussed, which shows us where we are and what their new case is, and  
11 then if we can reserve our position to see if there are new grounds, entirely new legal  
12 arguments and new grounds that are being raised to assess them under 11(3).

13 THE CHAIRMAN: One can understand, the language is different, so we have to be a little bit  
14 tolerant in that respect, but it also needs to be transparent.

15 MISS HOWARD: Yes it needs to be transparent and this is an appeal against the second decision,  
16 and that is the basis for the Tribunal's jurisdiction in this matter. The scope of the appeal is  
17 going to be enlarged to include entirely new legal grounds that have nothing to do with the  
18 *Floe* Judgment, then Ofcom will want to take a position on that and it cannot be criticised  
19 for ----

20 THE CHAIRMAN: It can only rely on the grounds that are in para.11.

21 MISS HOWARD: On those four grounds, yes. You see they may try to bring in new arguments in  
22 support of those grounds, such as the 'implied term' argument, that has no connection with  
23 either the original notice of appeal or the Tribunal's conclusions in *Floe*, and we submit that it  
24 should not be permitted to raise those entirely new matters.

25 MR. PICKFORD: Madam, I have two points to make in relation to this. The first picks up on a  
26 submission that Mr. Kennelly made as to how one approaches the facts in this case post-the  
27 factual and legal analysis in *Floe*. It is important that all of the factual allegations that are now  
28 being made are still within the four corners of the Appeal document as it was originally put.

29 THE CHAIRMAN: One has to appreciate how it all arose in *Floe*, because VIP should have the  
30 same treatment as *Floe* had.

31 MR. PICKFORD: Indeed, and in *Floe*'s case it in essence had to establish a case within the  
32 parameters of the notice of appeal that it put in originally back in August 2005. The same goes  
33 for the legal grounds, the legal grounds that are now advanced, notwithstanding that we now  
34 have the benefit of the *Floe* Judgment, they still have to be within the four corners of the legal

1 grounds that were advanced in the original notice of appeal or we run into the application of  
2 Rule 11; that is the first point.

3 THE CHAIRMAN: Or we allow an amendment?

4 MR. PICKFORD: It needs to be considered pursuant to Rule 11, certainly. The second point in  
5 relation to the scope of the document that is now envisaged in terms of clarification,  
6 notwithstanding the concerns that have been articulated by Ofcom about some sort of  
7 comparison document, just to be clear about what would certainly help us, if Mr. Kennelly was  
8 able to say “In relation to paras. 1 to 3, etc. of my current notice of appeal this is to be found  
9 here, in the old notice of appeal”, that would at least assist to some degree ----

10 THE CHAIRMAN: I think we are going the other way around. “This is what we said in the old  
11 notice of appeal, this is where we found it in the appendix in the old notice of appeal, and this  
12 is where we are finding it in the revised appendix”, or whatever we are going to call it.

13 MR. PICKFORD: As long as that document is comprehensive, so that every allegation that is now  
14 being made in the new notice of appeal ----

15 THE CHAIRMAN: It is not intended to be a document of 200 pages, it is intended to be on one  
16 sheet of paper.

17 MR. PICKFORD: Or at least on a side or two. We entirely accept that there will be differences in  
18 language.

19 THE CHAIRMAN: There needs to be some sort of route back, yes. I think we all have to accept  
20 that there is going to be some differences in language, and therefore I think we have to give  
21 Mr. Kennelly to put it in his own language.

22 MR. PICKFORD: Indeed, and we would not take issue with that.

23 THE CHAIRMAN: Do you think you know what you could possibly do?

24 MR. KENNELLY: Madam, I am sticking, with respect, to the outline the Tribunal gave me.

25 THE CHAIRMAN: I hope it works!

26 MR. KENNELLY: Well I will try to ----

27 THE CHAIRMAN: If it does not work, come back.

28 MR. KENNELLY: Indeed and it may be necessary to make at that stage – or to certainly debate an  
29 application submission to amend – I mention that as an alternative in my submission. The first  
30 point is, my learned friend, Miss Howard, is concerned about new arguments in support of  
31 existing grounds of appeal and I just want to flag now that while I am very carefully tied by my  
32 grounds, it is open to me to make any submissions that are in my client’s interests in support of  
33 those grounds of appeal and on legal arguments I cannot be restrained so long as I am sticking  
34 to the existing grounds as pleaded, or permitted by the Tribunal.

1 Secondly, the route map that my learned friend, Mr. Pickford, proposes, that will be dealt with  
2 implicitly as the Tribunal says in the revised document.

3 THE CHAIRMAN: To be fair to Miss Howard, I think what she is saying is you need to go back to  
4 the decision that you are appealing against to make sure that you are within the corners of the  
5 decision and the grounds of appeal that have been drafted in accordance with that decision.

6 MR. KENNELLY: Indeed madam, except that the existing notice goes further than simply attacking  
7 the existing decision. This is the problem, as Miss Howard is saying – the existing notice,  
8 which is permitted and sits, invites the Tribunal to go further than simply striking out Ofcom’s  
9 Decision but to substitute its own decision for that of Ofcom.

10 THE CHAIRMAN: And are you asking for us to do that?

11 MR. KENNELLY: Well it remains the relief that I seek, and unless an application is made to strike  
12 that out, for which I would need proper notice and time to prepare ----

13 THE CHAIRMAN: We are not dealing with that today.

14 MR. KENNELLY: Then I must, in my client’s interests, retain that and argue to the best of my  
15 ability.

16 THE CHAIRMAN: You are entitled to do that because it is an appeal on the merits ----

17 MR. KENNELLY: Absolutely, madam, yes.

18 THE CHAIRMAN: -- and therefore you can say that “The decision was wrong in this respect, and it  
19 ought to have decided that, and you should decide it.”

20 MR. KENNELLY: Madam, indeed, and that is the Tribunal’s jurisdiction.

21 THE CHAIRMAN: Yes, that is within our jurisdiction. I am not sure that is what Miss Howard was  
22 saying.

23 MR. KENNELLY: Forgive me if I went further than Miss Howard said.

24 THE CHAIRMAN: I think they are completely separate points which are not in the Decision, points  
25 which they had not considered at all, which were not subject to the original complaint.

26 MR. KENNELLY: Yes, the difficulty is that if we invite the Tribunal to go further we will be  
27 saying, as we have said in our existing notice, Ofcom ought to have realised that this was, in  
28 fact, an abuse and decided it was an abuse for these reasons.

29 THE CHAIRMAN: Yes.

30 MR. KENNELLY: And Ofcom ought to have dismissed the purported objective justification that  
31 T-Mobile suggested. But, insofar as those matters are dealt with in the second Decision, that is  
32 what we will be addressing in our revised pleading.

33 THE CHAIRMAN: Take the discrimination point, which is apparently an uncontentious point now,  
34 if you were now suggesting that there was discrimination because of the way that a third party  
35 had been treated as against how you had been treated, and that was not something which was

1 the subject of the original complaint, so that Ofcom never investigated that complaint,  
2 therefore it cannot be part of the Decision, therefore it cannot be part of the Appeal against the  
3 Decision ----

4 MR. KENNELLY: Indeed.

5 THE CHAIRMAN: -- because it is a complaint which had nothing to do with what they  
6 investigated. I think that is what Miss Howard is saying.

7 MISS HOWARD: That is correct, we do need to keep the parameters, and jurisdiction is another  
8 issue, and dealing with the case post-*Floe*, which we will want to reserve our rights and deal  
9 with at a later stage.

10 MR. KENNELLY: I am grateful for that indication from Miss Howard.

11 THE CHAIRMAN: You understand the distinction?

12 MR. KENNELLY: Absolutely.

13 THE CHAIRMAN: I do not know if there is anything in here. It did look as if there may be some  
14 sort of discrimination point that somebody picked up which we identified and you said is not a  
15 discrimination point.

16 MR. KENNELLY: No, the word was never used. But insofar as I am allowed to make legal  
17 arguments in support of the grounds of appeal, those are strictly legal arguments.

18 THE CHAIRMAN: But having been in *Floe* one has to appreciate that these sorts of snippets of  
19 information might suddenly spark some sensitive point.

20 MR. KENNELLY: Madam, now I see there is no doubt that this revision is necessary. My original  
21 submission was that the route we took was still the best route absent all the breaches of the  
22 Tribunal's rules that I will have to address you on, but I am assisted by the Tribunal.

23 THE CHAIRMAN: Right, well let us move on and see where we get to. What is the next point that  
24 we need to deal with?

25 MR. KENNELLY: The next point was the application for interim relief, and the point the Tribunal  
26 made about the inappropriate nature of the insertion of the application ----

27 THE CHAIRMAN: Without telling us and then some phone call saying "What's happened with our  
28 application for interim relief?"

29 MR. KENNELLY: Madam, I can only say this: certainly it was our understanding that the revised  
30 notice could, in the content of the document, provided it satisfied the requirements of the  
31 relevant rule of the Tribunal, seek interim relief.

32 THE CHAIRMAN: But if you are trying to make an urgent application do you not tell the Tribunal  
33 that you are making an application?

34 MR. KENNELLY: Madam, I understand that the covering letter ought to have said "There is  
35 included in this an urgent application for interim relief".

1 THE CHAIRMAN: Yes, and “Can we have some directions”.

2 MR. KENNELLY: While that is not a strict requirement in the sense of the other requirements, there  
3 is no doubt that if we sought urgent consideration it would certainly assist us to flag it in the  
4 covering letter.

5 THE CHAIRMAN: But not telling the Tribunal anything about it ----

6 MR. KENNELLY: Indeed, madam, and that was, I think the purpose of the contact that was made to  
7 the Tribunal, it was to ----

8 THE CHAIRMAN: Well, I do not think applications are made by telephone?

9 MR. KENNELLY: Madam, no, it was simply to alert the Tribunal to the application for interim  
10 relief contained in the existing document.

11 THE CHAIRMAN: I am not sure that the phone call was: “We would like to make an application, if  
12 you turn to para.61 of the document that we have put in, you will see that there is an  
13 application. Is that sufficient, or should we do something else?”

14 MR. KENNELLY: Madam, I am not arguing that it was sufficient. The only person who suffers  
15 because of the failure to cite it in the covering letter is VIP, and no prejudice is caused to  
16 anybody else, VIP suffers because it does not ----

17 THE CHAIRMAN: All of this has cost everybody money and we are going to have to deal with the  
18 costs.

19 MR. KENNELLY: Absolutely, and I have submissions to make about that as well, because of the  
20 focus of the points that are taken. Certainly, there is no doubt, in my submission, that a valid  
21 application exists in the sense that grounds have been set out explicitly seeking to satisfy the  
22 requirements of the Tribunal’s rules, and if the Tribunal is minded to give directions for  
23 consideration ----

24 THE CHAIRMAN: Well, first of all I do not think it is appropriate to be in para.61 of this document  
25 which is being revised anyway.

26 MR. KENNELLY: There is no doubt that this document, if it has been revised, and in light of the  
27 Tribunal’s comments will not contain a reference to interim relief.

28 THE CHAIRMAN: It may be that you take out of this document from paragraph – is it 1?

29 MR. KENNELLY: Yes.

30 THE CHAIRMAN: -- that you need to make an application – if you are going to make an  
31 application.

32 MR. KENNELLY: Madam, the Tribunal refers to the costs that are incurred. VIP’s resources are  
33 also limited, and in relation to re-drafting, in my submission, the directions ought to be  
34 structured in a way that ----

1 THE CHAIRMAN: Hold on, the point is that if we have an application for interim relief that is a  
2 separate application. That application stands alone in one sense. It may stand with a notice of  
3 appeal, or whatever, but it stands alone.

4 MR. KENNELLY: Yes.

5 THE CHAIRMAN: If it goes further there needs to be, somebody needs to see what the application  
6 is, and they do not want to turn up a document which is not going to exist any more anyway in  
7 order to find this application.

8 MR. KENNELLY: Madam, I do not suggest for a moment that ----

9 THE CHAIRMAN: So I think whatever the costs are you are going to have to use your word  
10 processor and your copy software and put in a proper application – it is only going to take 10  
11 minutes.

12 MR. KENNELLY: That is exactly what I was trying to say.

13 MISS HOWARD: Madam, could I interject at that point because we agree that we do need a formal  
14 application but it may not just take 10 minutes. We would argue that the application that is  
15 currently made is deficient. VIP has not set out a clear case on urgency, nor have they set out  
16 any evidence on serious and irreparable damage, and a bare assertion that the company is going  
17 into liquidation is not sufficient, we need more evidence on that and Ofcom cannot respond to  
18 the application as currently stated because there is not enough on the substance for them to  
19 reply.

20 THE CHAIRMAN: What about the matters that have been set out in the witness statements, because  
21 I assume the witness statements ----

22 MISS HOWARD: They do not go into the issues of liquidation.

23 MR. KENNELLY: The witness statement of Mr. McCabe refers to the dire financial circumstances  
24 faced but – and my learned friend is absolutely right – they do not say in terms that VIP is  
25 about to go from administration into liquidation which is the key factor, the new factor, which  
26 makes this urgent.

27 THE CHAIRMAN: Well you must go away and you must work out what evidence a court needs in  
28 order to look favourably on your application and you must provide the court with that  
29 evidence.

30 MR. KENNELLY: Absolutely.

31 THE CHAIRMAN: If you look at the *LME* Decision, it is the same thing.

32 MR. KENNELLY: It is madam, except here VIP is a struggling undertaking with instructions ----

33 THE CHAIRMAN: But they still have to provide the information to the Tribunal in order for the  
34 Tribunal to consider whether it ought to make the direction, because it is a very serious  
35 direction.

1 MR. KENNELLY: It is, madam, I am not asking the Tribunal to make that direction today. Clearly  
2 evidence needs to be produced which says what I have submitted.

3 THE CHAIRMAN: But that is all supposed to be in your application.

4 MR. KENNELLY: Yes, madam, and I will seek a direction that we make that evidence. The reason  
5 why it is phrased in that way is because this is a very recent event, and there was no time to get  
6 the evidence together and it was flagged in the notice of appeal in that way.

7 THE CHAIRMAN: The “recent event” is that you are going into insolvency, so do you not need  
8 some evidence from the administrator?

9 MR. KENNELLY: Yes.

10 THE CHAIRMAN: So at the moment you do not have an application. You do not have any  
11 sufficient evidence in order to bring an application.

12 MR. KENNELLY: Madam, we have some evidence, but I need more in order to make good my  
13 application, and I will have a separate application when I get the notice.

14 THE CHAIRMAN: I suggest that if you want to make an application you make a proper application  
15 supported by evidence which you consider is sufficient for a Tribunal to grant you the relief  
16 that you want, and that is not a matter for us, that is a matter for you, and we await the  
17 application.

18 MR. KENNELLY: Indeed, madam. I simply wanted to say, so the Tribunal would not believe the  
19 discourtesy that it felt was as great as it may originally have thought, the reason why it was  
20 phrased in that way was because it is such an immediate occurrence that it was not possible to  
21 get the necessary evidence together in that time.

22 THE CHAIRMAN: But hang on, if it is not possible to get the evidence together the Tribunal has no  
23 evidence on which it can make ----

24 MR. KENNELLY: Absolutely, madam, I appreciate that, but it would have been worse if the  
25 evidence could have been achieved and it was not put in. I am simply explaining since the  
26 Tribunal was concerned.

27 THE CHAIRMAN: Right, well there is no application before us at the moment – I want to make that  
28 clear.

29 MR. KENNELLY: That is my understanding, yes.

30 THE CHAIRMAN: There is no application before us at the moment; you will make an application  
31 supported by evidence. I do not need to make any directions in relation to that because it is up  
32 to you to make the application supported by the evidence. We will then see what happens.

33 MR. KENNELLY: Yes, we will do that.

34 MISS HOWARD: Could I just make it clear, I know you do not have an application and you do not  
35 want to consider directions, but just for the record, should they make an application, at the

1 moment the allegations of public interest are rather vague and amorphous, Ofcom will need  
2 time to consult with third parties as to the public interest. If that could be taken into account in  
3 any timetabling issues after the receipt of the application Ofcom would be very grateful.

4 THE CHAIRMAN: But are they going on protecting the public interest, or are they going on  
5 protecting themselves?

6 MISS HOWARD: They are going on both at the moment.

7 THE CHAIRMAN: Well maybe they ought to consider whether or not they want to do that.

8 MR. KENNELLY: The reference to the public interest, madam, is simply a reference to the  
9 competition in the market would be assisted by the active participation of VIP if it were to re-  
10 commence its business.

11 THE CHAIRMAN: I think that is the point Miss Howard is making. If we have to consider public  
12 interest ----

13 MR. KENNELLY: Miss Howard's point I saw for the first time in the most recent submissions of  
14 Ofcom, and in our application we may want to revisit whether or not we make that point if we  
15 are to invite the opposition of Ofcom on that point. If delay is a concern of ours and Ofcom  
16 need to consult the Home Office then we will need to take that into consideration as well, but  
17 none of these things we understood until we saw the submissions of Ofcom – it is something  
18 we have to bear in mind in making our new application.

19 THE CHAIRMAN: Yes, I am not sure what the reference to the Home Office was about. I had  
20 rather assumed it was something to do with the same problem we had in *Floe*?

21 MISS HOWARD: Yes, it would be, but in the light of the *Floe* Judgment that has been given as well.  
22 Ofcom does need to consider the wider public interest, which does go beyond the  
23 considerations that VIP has raised in their application at present.

24 THE CHAIRMAN: You are saying that even if it is irreparable damage ----

25 MISS HOWARD: There are wider public interests and considerations.

26 THE CHAIRMAN: And that may involve the Home Office?

27 MISS HOWARD: Yes.

28 THE CHAIRMAN: Well you have heard, we may not be able to get out of the public interest  
29 problem.

30 MR. KENNELLY: And I am necessarily, I imagine, in the dark as to that situation.

31 THE CHAIRMAN: Were you involved in *Floe*? Were you here at the ----

32 MR. KENNELLY: No, my involvement in *Floe* was strictly limited to the legal points that  
33 Worldwide made.

34 THE CHAIRMAN: So you were not here.

35 MR. KENNELLY: I attended when those points were raised and I understand ----

1 THE CHAIRMAN: You understand what the points are.

2 MR. KENNELLY: Well I understand what the points are and I will not say any more, and we will  
3 just have to see what Ofcom produce. But in relation to that there is nothing that VIP can say,  
4 since we are necessarily in the dark as to what the reasons might be.

5 THE CHAIRMAN: Well we will wait for your application and see where it takes us. You say it is  
6 urgent, but time is running and I do not know when this problem about going into liquidation  
7 occurred?

8 MR. KENNELLY: Madam, we will get it to the Tribunal as quickly as possible.

9 THE CHAIRMAN: It is up to you.

10 MR. KENNELLY: It is up to me, indeed, but if the Tribunal is concerned that we are sitting around,  
11 the Tribunal has my submissions about the way this case has been run by VIP in view of its  
12 resources in para.3 of my submissions in that respect.

13 THE CHAIRMAN: I am not trying to be difficult, I am just trying to get this matter sorted out.

14 MR. KENNELLY: No, madam, I appreciate that and our apologies were meant sincerely when we  
15 set them out in the submissions. Turning to the third point the Tribunal makes about witness  
16 statements, and the fact that it was inappropriate for my instructing solicitor to put in a  
17 correction ----

18 THE CHAIRMAN: Of somebody else's witness statement.

19 MR. KENNELLY: Of somebody else's witness statement. Again, I return to the fact that in the  
20 haste with which my clients tried to comply with directions, and on instructions from the client  
21 my solicitors put that evidence in to the best of their knowledge and belief, on instructions  
22 because it would have assisted all the parties, and it is important, when looking at that  
23 statement to notice and note that those are typographical errors – spelling mistakes.

24 THE CHAIRMAN: Even so they are witness statements of witnesses and if they are to be corrected,  
25 they are to be corrected by the witnesses.

26 MR. KENNELLY: Madam, yes. But in terms of the seriousness of the breach, and the costs'  
27 implications that may be alleged to have flowed later I simply wish to make the point that they  
28 were typographical errors and not of substance, but I take the Tribunal's point that they should  
29 have been corrected by the witnesses. In the circumstances it was not possible to do that in the  
30 time but that will be corrected as soon as possible.

31 THE CHAIRMAN: If they were only typographical errors it probably did not have a time limit  
32 problem on it.

33 MR. KENNELLY: Indeed. That brings us to the fourth point which was the time limits' issue. The  
34 Tribunal has my written submissions on that.

1 THE CHAIRMAN: We are in a new ball park now because whatever you have done did not comply  
2 with the order.

3 MR. KENNELLY: If that is the Tribunal's finding, yes, I have to accept that.

4 THE CHAIRMAN: It is not satisfactory because we are all confused as to where we are going. I  
5 know you may have tried to do the best you can ----

6 MR. KENNELLY: No, there is no doubt, madam, we were producing the new document ---

7 THE CHAIRMAN: A new document has to be produced, and the question of whether there is  
8 permission for that new document must depend on looking at the new document.

9 MR. KENNELLY: Madam, yes. I understand that is the Tribunal's concern, but we will work on  
10 the basis that ----

11 THE CHAIRMAN: When are you going to produce the new document?

12 MR. KENNELLY: We can produce it within seven days.

13 THE CHAIRMAN: So that is 8<sup>th</sup> November?

14 MR. KENNELLY: Yes.

15 THE CHAIRMAN: What are we going to call this new document?

16 MR. KENNELLY: I am afraid to give it a title, madam. It will have to be "Proposed Re-amended  
17 Notice of Appeal", and subject to the Tribunal giving me permission that is what it will be  
18 called.

19 THE CHAIRMAN: All right, so 8<sup>th</sup> November "Proposed Re-amended Notice of Appeal"?

20 MR. KENNELLY: Yes.

21 THE CHAIRMAN: The time limit that you missed is only the order that this court made, it is not a  
22 part of the Rules – that is right, is it not?

23 MR. KENNELLY: That is correct, yes.

24 THE CHAIRMAN: So all I need to do is to make another order which says that on 8<sup>th</sup> November  
25 you are going to put in a proposed re-amended notice of appeal?

26 MR. KENNELLY : Indeed – on time.

27 THE CHAIRMAN: On time this time, yes. Do we need to do anything else? We have this  
28 timetable from last time.

29 MISS HOWARD: Madam, our deadline at the moment is 20<sup>th</sup> November to put in a defence, and  
30 that is going to be untenable in relation to a provisional document the scope of which is  
31 uncertain.

32 MR. KENNELLY: Madam, I have to accept that because of the nature of the document the parties  
33 have to have time to reply, I cannot dispute that.

34 THE CHAIRMAN: But you have to have leave, as well.

1 MR. KENNELLY: Indeed, because as my learned friend, Miss Howard, said it will not be a final,  
2 but a provisional document. I would hope that leave could be given on the papers, once the  
3 document is submitted.

4 THE CHAIRMAN: Yes, what we want is the proposed re-amended notice of appeal together with  
5 all evidence of witness statements, so that gives you the opportunity to amend your proposed  
6 witness statements.

7 MR. KENNELLY: Yes.

8 THE CHAIRMAN: "... together with all evidence and witness statements upon which it wishes to  
9 rely." Now, shall we proceed on the basis that that document is going to get permission for the  
10 timetable?

11 MISS HOWARD: I think we will need to allow a period of time for both parties, T-Mobile and  
12 Ofcom to put in submissions on that proposed document, both under Rule 11 to see whether  
13 permission should be given, or whether it is enlarging the scope implicitly.

14 THE CHAIRMAN: So by when?

15 MISS HOWARD: It also depends whether or not we are going to deal with jurisdiction at this stage  
16 as well. We could deal with jurisdiction and Rule 11 together, and put in submissions within,  
17 say, 14 days of receipt.

18 THE CHAIRMAN: Well we have T-Mobile's submissions on jurisdiction.

19 MISS HOWARD: My learned friend had indicated that they were provisional and had been drafted  
20 rather hurriedly, and it may make sense to have combined submissions.

21 THE CHAIRMAN: We are not going to have a red lined submissions' document, are we?

22 MR. PICKFORD: The only issue in relation to those submissions, is, of course, that they were  
23 drafted on the basis of our understanding of VIP's case, as set out in its re-amended notice of  
24 appeal. We are now going to have a new document and clearly it is important that whatever  
25 submissions we make are made in relation to the case as being put by VIP. Hopefully they  
26 should be extremely similar, because obviously we are not expecting that this document is  
27 going to differ, but it is clearly a matter of practicality. In the way that we put together our  
28 submissions we need to address them to a particular document, and we can address them to the  
29 document once we have seen what it is.

30 MR. KENNELLY: Madam, it is apparent from Mr. Pickford's submission, in relation to jurisdiction  
31 that that would be made in any event. It is not accurate to say that it was addressed to the  
32 particular points I make. His concern is much more profound than the allegedly new small  
33 grounds of appeal that we make. That submission is an application to strike out, or  
34 determination of a preliminary issue, and if he wants to make the application he ought to make  
35 it, but I would again stress the effect that would have on our timetable, and the interest of VIP

1 in this case. That application will be made in any event and so he ought to get on with it in the  
2 same way that we have to, if he wants to make the application.

3 THE CHAIRMAN: Is it appropriate for the Intervener to make an application to strike out ----

4 MR. KENNELLY: Well I would submit not, madam.

5 MISS HOWARD: I think it was done in the *MasterCard* case, Visa applied to strike out the OFT's  
6 defence in that case, even though it was only an Intervener – and I acted for Visa in that.

7 MR. PICKFORD: We would submit there is certainly the ability for us to do so, whether of course  
8 Ofcom wishes to make the submission itself, and then if it does so we could then support it, but  
9 if it does not make it then we would propose to make it.

10 Responding to Mr. Kennelly's point, he is entirely right that there is a serious issue of principle  
11 here that we would wish to raise in any event. My point is that the way in which it is put still  
12 does have to have some reference to the relevant document and, in this case, the document in  
13 question is the proposed re-amended notice of appeal.

14 THE CHAIRMAN: Anyway, it would be sensible to have the document first, unless you are saying  
15 that you would strike it out in any event?

16 MR. PICKFORD: We would, but the basis for the application does depend on the way in which the  
17 case is put.

18 MISS HOWARD: Madam, if I might make a suggestion. It might be sensible if Ofcom were to  
19 reply to the proposed notice of appeal, both on Rule 11 and on jurisdiction together, say, within  
20 14 days of receipt, and then to give T-Mobile and VIP an opportunity to comment on Ofcom's  
21 submissions and then if necessary hold a CMC to determine the issue.

22 THE CHAIRMAN: Well hopefully it will not be necessary, but if we have the jurisdiction point  
23 then I suppose we will have to. I think in order to do that I have to have a full Tribunal.

24 MR. KENNELLY: Madam, forgive me for standing up again on this point ----

25 THE CHAIRMAN: Yes, I am just looking in the Rules to see what an Intervener to do. (After a  
26 pause) Well it is the relief sought by the Intervener and the relief is to strike out the  
27 application, I suppose.

28 MR. PICKFORD: Madam, I am not able to see any bar on the Intervener raising the point and,  
29 indeed, as it goes to jurisdiction in my submission it is clearly one that an Intervener is entitled  
30 to make, because if the Tribunal does not have jurisdiction to do what it is being invited to do  
31 then it should not do it.

32 MISS HOWARD: Madam, if we were to make our submissions by the 22<sup>nd</sup>, the question of whether  
33 or not an Intervener is allowed to make the application does not arise, Ofcom would make the  
34 application.

35 THE CHAIRMAN: If you decide that you are going to make it.

1 MISS HOWARD: If we decided we were going to go down that route, but I think we would want to  
2 consider it.

3 THE CHAIRMAN: And I was just wondering if you do not go down that route whether an  
4 Intervener can do it on his own, but I cannot see any bar to that and, as you said, they did it in  
5 *MasterCard*?

6 MISS HOWARD: In *MasterCard* Visa was allowed to do it because its interests were directly  
7 affected. In this case, although the Appeal is against Ofcom's Decision it is T-Mobile's  
8 interests that are directly engaged, especially by the jurisdiction issue, when potentially the  
9 proceedings could go further.

10 THE CHAIRMAN: "22<sup>nd</sup> November – Ofcom's submissions on the proposed re-amended notice of  
11 appeal". That is all we need to say. You may want to withdraw the skeleton you prepared for  
12 today and put in a new skeleton?

13 MR. PICKFORD: We may wish to, as I said the substance of our position I am sure will remain the  
14 same.

15 THE CHAIRMAN: If so advised – but I do not want two conflicting documents. You have already  
16 put one in and then I get something else, and have to try and read between them.

17 MR. PICKFORD: Well certainly it would not be our intention to cause confusion in that manner.  
18 Clearly, what we need to do depends on the stance that Ofcom takes, and we cannot decide that  
19 ahead of having seen what Ofcom is proposing.

20 THE CHAIRMAN: All I am saying is you put in some submissions today.

21 MR. PICKFORD: We did.

22 THE CHAIRMAN: And you very transparently said that you did that so that everybody is alert to  
23 the point?

24 MR. PICKFORD: Yes, we certainly did not expect it to be resolved today.

25 THE CHAIRMAN: I do not want you to have to duplicate that, but if you are putting in some more  
26 submissions ----

27 MR. PICKFORD: It is likely that the only thing that we would probably need to do is go back to the  
28 proposed re-amended notice of appeal and check that the basis on which the case is being put  
29 there is the same as the basis on which the case was being put in the re-amended notice of  
30 appeal and potentially change the paragraph references, it may be as easy as that.

31 THE CHAIRMAN: So you would be giving us back the same one with the amendments on it.

32 MR. PICKFORD: We could certainly do that, yes. We could send back a marked-up version which,  
33 in the present case would be very unlikely to carry the same difficulties as marking up would  
34 have done in relation to those re-amended notices of appeal.

35 THE CHAIRMAN: So what do you want permission to do?

1 MR. PICKFORD: I would like permission to respond to Ofcom's ----  
2 THE CHAIRMAN: Respond to Ofcom's or to ----  
3 MR. PICKFORD: I would seek permission for T-Mobile to put in submissions following on from  
4 Ofcom's submissions on ----  
5 THE CHAIRMAN: "If so advised to serve submissions in addition ..." is that all right?  
6 MR. PICKFORD: Yes.  
7 THE CHAIRMAN: "... to the skeleton dated 31<sup>st</sup> October." Does that do it? We all understand, it is  
8 on the transcript, that it is not to be duplicated.  
9 MR. PICKFORD: Indeed, and that is in relation to two points: the application of Rule 11 and the  
10 jurisdiction issue.  
11 THE CHAIRMAN: Yes, well all I am doing is I am saying you can put in the skeleton and we know  
12 that it has already got the jurisdiction issue in and what I have said is "in addition to", so you  
13 have got that?  
14 MR. PICKFORD: Yes, sorry madam, my point was simply to make clear that those are the only two  
15 issues which we will be proposing to address at that point.  
16 THE CHAIRMAN: At the same time as Ofcom puts it in, on 22<sup>nd</sup>?  
17 MR. PICKFORD: No, I think it would be sensible if I responded to Ofcom.  
18 THE CHAIRMAN: So you want how many days?  
19 MR. PICKFORD: Seven days would be sufficient?  
20 THE CHAIRMAN: So that is 29<sup>th</sup> November. The next point is that that jurisdiction issue is going  
21 to have to be decided and we have a date of 13<sup>th</sup> December. So if the jurisdiction issue has to  
22 be decided we can deal with that on 13<sup>th</sup> December.  
23 MISS HOWARD: It may be appropriate to deal with any interim measures application – should  
24 there be one – at that time as well.  
25 THE CHAIRMAN: Should there be one?  
26 MR. PICKFORD: Madam, that is of course subject to the interim measures application being made  
27 in sufficient time for it to be appropriate ----  
28 THE CHAIRMAN: That is why I said "if there was".  
29 MR. PICKFORD: Subject to it being made in sufficient time for it to be appropriate to deal with it at  
30 that point, because ----  
31 THE CHAIRMAN: Well we have not allowed Mr. Kennelly to answer this new point.  
32 MR. KENNELLY: In relation to jurisdiction, madam?  
33 THE CHAIRMAN: Yes.  
34 MR. KENNELLY: Well we cannot stop Ofcom making application for the jurisdiction ----  
35 THE CHAIRMAN: It sounds as if they are making the application.

1 MR. KENNELLY: Indeed it does. Well Ofcom actually say they are considering it, they may not  
2 make it.

3 THE CHAIRMAN: No, but T-Mobile is making it.

4 MR. KENNELLY: Indeed, and I will make submissions in due course about the appropriateness of  
5 that. The point is, madam, our concern in relation to the jurisdiction application is that it  
6 should not unduly delay the determination of the Appeal, but we are less concerned about that,  
7 because we will be making our interim relief application. We must at least consider the  
8 possibility that if interim relief is refused the urgency in this case, which the Tribunal accepted  
9 on 13<sup>th</sup> September may be greater and we are concerned by the amount of time ----

10 THE CHAIRMAN: It does not lie in your mouth – it is because of the way that you have dealt with  
11 this that it has taken so long.

12 MR. KENNELLY: Madam, I will have to make submissions about how we behaved if costs’  
13 applications are made by the other side, but it is important to look at how much of this is VIP’s  
14 fault, and how much of it is as a result of a late decision by T-Mobile and potentially by Ofcom  
15 to raise a jurisdiction point, because the jurisdiction point does not go to the allegedly new  
16 grounds of appeal, it goes to the whole issue of whether VIP can ask the Tribunal to do things  
17 which Ofcom did not consider in the second decision and that was already in the existing fully  
18 amended notice of appeal. This is an application they could have made a long time ago –  
19 certainly after the Judgment came out it could have been made then.

20 THE CHAIRMAN: Does this go further than *Floe*?

21 MR. KENNELLY: I beg your pardon, madam?

22 THE CHAIRMAN: In *Floe* – well, we will see when the jurisdiction point ----

23 MR. KENNELLY: Exactly the same relief was sought in *Floe* ----

24 THE CHAIRMAN: That is what I thought.

25 MR. KENNELLY: -- as in VIP. Now, Ofcom have always raised concerns about the extent of the  
26 relief sought. This is an application in relation to jurisdiction they could have made at any  
27 time in terms of preliminary issue, but they certainly could have made it as soon as they saw  
28 the Judgment, because at that stage it was clear that VIP’s facts were going to be tailored to the  
29 Judgment – that was the Decision – and the relief sought by VIP on the existing notice of  
30 appeal carried all the vices that T-Mobile certainly say, and Ofcom may say, ought to be  
31 resolved by way of this strike out application or preliminary issue of law. So my concern is  
32 that this is raised very late. It was never flagged on 13<sup>th</sup> September when the Tribunal set out  
33 what the outstanding factual and legal issues were, and now it comes late and potentially  
34 delays – well it certainly will delay – by a significant extent VIP’s appeal.

1 THE CHAIRMAN: Well I do not think it will because of the fact that you have been delaying. Had  
2 you got on with it properly then it may have delayed, but now there is no way that the 13<sup>th</sup>  
3 December could have dealt with this action because you have not put in a proper notice of  
4 appeal yet.

5 MR. KENNELLY: Madam, I said it is a question of the extent of the delay. My concern is the  
6 amount of time they seek. I cannot resist them seeking extra time to reply and I cannot stop a  
7 jurisdiction application being made. It is important they are confined to the proper amount of  
8 time.

9 THE CHAIRMAN: Well let us just see where we get to. You want to reply to this jurisdiction point?

10 MR. KENNELLY: Yes, of course.

11 THE CHAIRMAN: How long do you want after T-Mobile put in theirs on 29<sup>th</sup> November?

12 MR. KENNELLY: Again we can deal with it in seven days.

13 THE CHAIRMAN: So seven days from 29<sup>th</sup> November takes us to 6<sup>th</sup> December, VIP submissions.  
14 So 13<sup>th</sup> December hearing can deal with jurisdiction, it can deal with permission if we have not  
15 given it on paper.

16 MR. KENNELLY: Indeed.

17 THE CHAIRMAN: Right, now your point is that that is delaying them putting in a defence?

18 MR. KENNELLY: Yes madam, but I appreciate that I am in some difficulty on that point in view of  
19 what the Tribunal has said. My concern is more in relation ----

20 THE CHAIRMAN: But they would have time to put in a defence – you are not putting in this  
21 document until 8<sup>th</sup> November, so they would want at least 21 days to do it.

22 MR. KENNELLY: I would suggest there is no need for 21 days, this document ----

23 THE CHAIRMAN: 14 days, well you see 14 days would take you to 22<sup>nd</sup> November.

24 MISS HOWARD: Madam, if I could explain, when the document is put in on 8<sup>th</sup> November it is  
25 provisional, so we are not going to know what the scope of that document is.

26 THE CHAIRMAN: I appreciate that.

27 MISS HOWARD: It may be that we have 14 days to deal with jurisdiction and Rule 11. It may be  
28 that at the same time we are also dealing with an interim measures application, and I think to  
29 expect us to prepare a defence in that timetable is unreasonable. We also have the jurisdiction  
30 issue which may make the issue of defence redundant at that stage and it would simply be a  
31 waste of resources and cost to advance the preparation of a defence when we do not know what  
32 the parameters of the Appeal are.

33 MR. KENNELLY: It will not surprise you, madam, to know what my answer is to that, because of  
34 course the primary interest of VIP is to resolve this as quickly as possible. We delayed by one

1 working day and we caused delay, as the Tribunal has found, by not submitting the documents  
2 in correct form.

3 THE CHAIRMAN: Well it is not one working day now, it is not having done it properly at all.

4 MR. KENNELLY: Indeed, but our concern is that this matter must be resolved by 13<sup>th</sup> December.

5 THE CHAIRMAN: What, the whole case must be resolved by 13<sup>th</sup> December?

6 MR. KENNELLY: No, no, madam, the jurisdiction application and if it still remains outstanding  
7 this issue of permission to amend. If we have not been given permission in the papers that  
8 should be resolved at the same time, and our interim relief application, which we will be  
9 making as quickly as we possibly can, that is the most urgent thing in my submission that  
10 needs to be resolved. I was going to submit to the Tribunal that that could be resolved earlier  
11 than 13<sup>th</sup> December, but I understand the potential delay is because of the special issues that  
12 Ofcom have to raise. But at the very least ----

13 THE CHAIRMAN: Well if you can get your application in – you have not yet got an application in.

14 MR. KENNELLY: No.

15 THE CHAIRMAN: You apparently do not have the evidence yet, because otherwise we would have  
16 seen it, I assume?

17 MR. KENNELLY: Yes.

18 THE CHAIRMAN: So you have to go off and get your evidence; we are already on 1<sup>st</sup> November,  
19 where is the urgency?

20 MR. KENNELLY: The urgency is part of the reason why it is in such poor shape, that is part of the  
21 problem, madam. It is the urgency that has meant me appearing before you without a proper  
22 application and without proper evidence. Now, we can get that together and my submission is  
23 that it should be heard on 13<sup>th</sup> December as well.

24 THE CHAIRMAN: That is what we are trying to do.

25 MR. KENNELLY: The interim relief application?

26 THE CHAIRMAN: Yes, that was the idea. We cannot timetable that now because we do not have  
27 an application.

28 MR. KENNELLY: Yes.

29 THE CHAIRMAN: But if you get your interim application in then that will be heard on 13<sup>th</sup>  
30 December.

31 MR. KENNELLY: My concern was that Ofcom did not know whether that date would be suitable as  
32 well.

33 MISS HOWARD: Sorry, I did submit that the hearing might be an appropriate time to deal with  
34 interim measures as well.

35 THE CHAIRMAN: That is what Miss Howard said.

1 MISS HOWARD: If you were to get your application in within seven days we can see no reason  
2 why the same timetable should not apply to the interim measures application.

3 MR. PICKFORD: Absolutely, we would endorse that. The application can be in within the next  
4 seven days, that would obviously be highly sensible.

5 MR. KENNELLY: Madam, yes, if that is the parties' position then ----

6 THE CHAIRMAN: I am not making an order in relation to the interim application today because  
7 there is not an application before me on which to make an order.

8 MR. KENNELLY: I am not seeking that, I am simply asking the Tribunal to bear that in mind when  
9 making directions.

10 THE CHAIRMAN: What I will say is that if we get an application then we will make directions  
11 which will be similar to the directions that have been made, i.e. that Ofcom will put in its  
12 submissions on 22<sup>nd</sup> November, or at a date around that which is convenient, depending on the  
13 date of the application. T-Mobile will put them in on the 29<sup>th</sup>, and you will put your  
14 submissions in on 6<sup>th</sup> December and that will be ready for 13<sup>th</sup>.

15 MR. KENNELLY: Indeed. I am grateful for that indication.

16 THE CHAIRMAN: But that is not going in the order.

17 MR. KENNELLY: No, of course not. I did not seek that, madam. I simply wanted to flag, for the  
18 parties and the Tribunal, that that is what we intended to do.

19 THE CHAIRMAN: You say this interim relief application is really the high point.

20 MR. KENNELLY: Well naturally it is the most urgent matter because there may be no Appellant to  
21 continue if what happens is ----

22 THE CHAIRMAN: You have still got a liquidator.

23 MR. KENNELLY: Indeed, madam, but it is much more difficult, even if we succeed then, for the  
24 Judgment in our favour to be effective if we were to succeed ultimately and that is the concern.  
25 That is why it is our most urgent and pressing consideration, but obviously if we fail interim  
26 matter the matter remains urgent and the delay – which is not entirely our own fault – because  
27 of this jurisdiction application has pressed things forward. So I think time for the defence –  
28 considering the fact that the defence can be considered from the moment they receive our  
29 application, even if it is provisional, they can certainly start thinking of the points they make,  
30 certainly when – as I have submitted – it will not raise anything that is not in the existing or re-  
31 amended notice of appeal, it will simply be a more effective route map along the lines that the  
32 Tribunal has indicated. They already have notice of what is likely to come, and so a time for  
33 the defence should be abridged in order to deal with that.

34 THE CHAIRMAN: What is going through my mind is the public interest problem, and how we are  
35 going to deal with that. (After a pause) Do you want me to rise for a few moments?

1 MR. KENNELLY: Madam, in relation to public interest, that is a matter for Ofcom.

2 THE CHAIRMAN: I know.

3 MISS HOWARD: (After a pause) Thank you madam. Now that we have notice that VIP is going  
4 to make a formal application we will start the ball rolling in liaising with any third parties that  
5 we need to and discuss how pragmatically things should be resolved for the hearing.

6 THE CHAIRMAN: What was concerning me was that that might delay 13<sup>th</sup> December, and that  
7 would be inappropriate, I think.

8 MISS HOWARD: That is why we would start it moving now in advance of the application actually  
9 being made, so we are in a position and we should come back to the Tribunal if we need to  
10 make interventions, if there are necessary mechanics ----

11 THE CHAIRMAN: You will come back before, so it will not delay. The interim relief application  
12 is only made in circumstances where there is tremendous urgency, and if there is tremendous  
13 urgency it cannot go off too far.

14 MISS HOWARD: We will try, as reasonably as we can, to make sure that that hearing is not  
15 delayed and we will liaise with the Tribunal as to the mechanics to make sure it can go ahead  
16 on that date.

17 THE CHAIRMAN: Right, thank you. Now, you were going to say something about this.

18 MR. PICKFORD: Thank you, madam. In terms of the point that has been raised by Mr. Kennelly  
19 about the timing of the defence and implicitly the statement of intervention, we would very  
20 much endorse Ofcom's position. It is wholly premature to be trying to set down timetables in  
21 relation to a defence ahead of the jurisdictional issue and the Rule 11 issues being dealt with.  
22 In relation to the jurisdictional issue, if we are right on that then it would be a wholesale waste  
23 of costs. But even in relation to the Rule 11 point, as simply one example, we say that the case  
24 that is being advanced by VIP now goes further in terms of its reliance on [*West Manor*] and  
25 [*Re Call*]

26 THE CHAIRMAN: Well I think they are saying it does not go further, so they are going to make  
27 that clear now.

28 MR. PICKFORD: They may make that clear but we maintain it does. We do not suggest it goes  
29 further because they are making a discrimination allegation, we say it goes further in a  
30 different sense, and clearly the Tribunal needs to determine whether or not it is going to allow  
31 those allegations to be made before we can determine whether we need to expend a  
32 considerable effort in dealing with them and, as the Tribunal said it really does not lie in Mr.  
33 Kennelly's mouth now to make complaints about the delay that would be caused by that.

1 Responding to the point that he has raised about the lateness of the application in relation to  
2 jurisdiction, we would robustly contest that. It was not possible to make that application in the  
3 abstract, it needed to be made by reference to the notice of appeal.

4 THE CHAIRMAN: Could you not do it by reference to the original notice of appeal?

5 MR. PICKFORD: We could have done, but Mr. Kennedy presumably would have said then that it  
6 was somewhat premature, given that he was going to be putting his case in an amended way.

7 THE CHAIRMAN: Well, I am not sure how far you get.

8 MR. PICKFORD: It is only a case that one could have made an application in relation to the  
9 previous document but as a matter of practicability we all knew that we were expecting a new  
10 document and the finer points, the particular way in which the application is put does depend  
11 on the nature of the case that is being advanced, and therefore the only sensible and practical  
12 thing to do was to wait and see what the notice of appeal actually said and to make the  
13 application in relation to that.

14 THE CHAIRMAN: It seems to me that there are two matters that have delayed this: first, the  
15 problem with the notice of application; and secondly, the interim relief application, because if  
16 they were not making the interim relief application and had the notice of application been done  
17 properly then the 13<sup>th</sup> and 14<sup>th</sup> December could have been used in the way it was envisaged  
18 and there would not have been any delay.

19 MR. PICKFORD: We would wholeheartedly agree with that, and we say therefore that it would be  
20 entirely inappropriate to try and set down now a timetable for dealing with defence and  
21 statement of intervention.

22 THE CHAIRMAN: I do not see how we can set down a timetable.

23 MR. PICKFORD: A further point that I would just like to clarify is that VIP has suggested that if the  
24 jurisdictional point is to be raised we should make a proper application. As we made clear in  
25 our submissions, as soon as there was an appropriate juncture to do it we raised the point but  
26 we did not expect people to deal with it today. If the Tribunal wishes us to do so, we can make  
27 it as a proper application, but clearly it is sensible to wait and see what Ofcom is going to do.

28 THE CHAIRMAN: I think you need to discuss it between you and decide how to deal with it.

29 MR. PICKFORD: As long as the Tribunal is content for us not to make it in the form of an  
30 application until we have seen what Ofcom is doing, then we are happy. But certainly we do  
31 not want it to be said against us is that on 29<sup>th</sup> November if, for instance, Ofcom has not made  
32 it, to be told you did not make the application.

33 MISS HOWARD: We will liaise, and if we decide not to make it we will give T-Mobile advance  
34 warning.

1 THE CHAIRMAN: Yes, and then you will notify us that you are making it and Ofcom are not  
2 making it.

3 MR. PICKFORD: I am grateful.

4 THE CHAIRMAN: We ought to know that before 22<sup>nd</sup> November.

5 MR. PICKFORD: Indeed.

6 THE CHAIRMAN: It sounds as if you will – but you will decide whether or not you are going to  
7 make it – and if you are going to make it then you would make an application so that we know  
8 that is so. We will reserve 13<sup>th</sup> and 14<sup>th</sup> December for permission, jurisdiction and interim  
9 relief.

10 MR. PICKFORD: I am grateful.

11 MISS HOWARD: Madam, I think that just leaves us with costs for today. In our submissions we  
12 have submitted that VIP should bear the costs both of preparing the submissions in response to  
13 the Tribunal's letters and for the cost of preparation of attending today's hearing. We consider  
14 that is just when they have breached several of the Tribunal's Rules, as well as the Tribunal's  
15 Orders. They have been given two extensions already – they have now been given a third  
16 extension, and we have had to expend considerable resources on responding to and attending  
17 this hearing because of those breaches and therefore we think it is entirely reasonable that VIP  
18 should bear the costs. We know that they are a company in administration and you may feel  
19 some reluctance of bearing costs on them. We are not making a formal application for wasted  
20 costs or anything like that, although that may be a factor that you may wish to consider. We  
21 would bear that in mind in future if similar breaches occurred. Thank you.

22 MR. PICKFORD: Madam, we would wish also to make an application for costs today. Clearly the  
23 issue of an Intervener's costs is very much in the discretion of the Tribunal but the relief that is  
24 being sought by VIP in this case goes very much to affecting T-Mobile, both in terms of the  
25 substantive relief that it is asking the Tribunal to take an infringement decision against it, and  
26 in relation to the interim relief, which also affects T-Mobile in quite a profound manner.  
27 Therefore, it is clearly incumbent on us to be here – we need to deal with these points, we need  
28 to respond, and in that sense we would say we are as much entitled to our costs as Ofcom is.  
29 One other point I would make in relation to the issue of costs is that we have heard much about  
30 the impecunious nature of VIP but we have not seen any evidence in relation to it, and there is  
31 an important issue that I should draw to the Tribunal's attention in terms of the question of the  
32 real beneficiary of this litigation and how it is being funded. The Tribunal will be aware that  
33 T-Mobile has, over the course of the last two months, written a number of letters to Mr. Tom  
34 McCabe, to VIP – to the administrator of VIP – and also the solicitors acting on behalf of VIP  
35 trying to find out the funding arrangements of this particular litigation because there is prima

1 facie evidence that certain aspects of it had been funded by someone other than VIP  
2 Communications Ltd., in particular VIP On-Line Limited was apparently responsible for  
3 having commissioned a report from [Reeves & Naylan] that was provided to T-Mobile when it  
4 was suggested previously that there might be an application for interim relief. First, it is not  
5 satisfactory that here has not been any response but, secondly, it does call into question ----

6 THE CHAIRMAN: Are you entitled to the information?

7 MR. PICKFORD: Well we have not been told we are not entitled to it, there simply has not been a  
8 response.

9 THE CHAIRMAN: Well they do not have to respond if you are not entitled.

10 MR. PICKFORD: We believe that we are entitled to the information in circumstances where there is  
11 a company in effect litigating against us, albeit that it is through the vehicle of an appeal  
12 against Ofcom which is in administration. Clearly that has a significant effect on the  
13 likelihood of T-Mobile being able to recover its costs, and there is precedent, certainly in the  
14 High Court, for costs orders being made against third parties, in particular where the litigation  
15 is in effect being funded by someone else ----

16 THE CHAIRMAN: If you are asking me to make some special order you are going to have to show  
17 me the jurisdiction that I have to do that. If you are just highlighting this well I have read the  
18 correspondence and there it is.

19 MR. PICKFORD: We are not making that application today, we are just highlighting the point, but  
20 we see it as a relevant one, and it is also relevant, but notwithstanding its claims of a lack of  
21 funds, VIP still is managing to instruct specialist counsel and solicitors unlike a number of the  
22 companies that do appear before this Tribunal.

23 THE CHAIRMAN: Insolvency litigation is often funded by – or companies who are insolvent and  
24 their litigation is often funded by the creditors or the directors or shareholders of the company  
25 without any problem.

26 MR. PICKFORD: That may well be the case, but the issue is we have seen no hard evidence of the  
27 lack of funds, we simply may have submissions on it and what evidence we do have suggests  
28 that the situation may not be quite as bad as it is made out.

29 THE CHAIRMAN: That is going to be part of the evidence in the interim relief.

30 MR. PICKFORD: Indeed.

31 MR. KENNELLY: Madam, dealing with the submissions in turn; an Ofcom application first. In my  
32 submission the failings of VIP need to be divided up into the categories which are relevant for  
33 the purposes of Ofcom, and in my submission – and I shall not repeat what was set out at  
34 para.3 of my submissions – in relation to the late service of the re-amended notice of appeal  
35 and the fact that it was not served in the correct form ----

1 THE CHAIRMAN: It is not late service, it is non-service actually because it has not been allowed.

2 MR. KENNELLY: Indeed, I am dividing it into two parts, because what I have to accept is what the  
3 Tribunal has found to be an inappropriate form certainly did mean that Ofcom had had to  
4 attend. My learned friend referred to several breaches of the rules and in my submission the  
5 only one that is relevant for the purposes of Ofcom is what the Tribunal has found to be the  
6 inappropriate form of the draft re-amended notice of appeal. In relation to that document it is  
7 important to examine why it took the form it did. The Tribunal has made its findings, but it is  
8 instructive, and I would pray in aid in my submission the transcript which VIP had to have  
9 regard to in deciding what the Tribunal wanted it to do and the fact is that, looking at the  
10 transcript, it is not clear what the amplified notice of appeal ----

11 THE CHAIRMAN: Then you should have come back.

12 MR. KENNELLY : It is true, with hindsight, we ought to have come back but in the time that was  
13 allowed to us and my instructing solicitor ----

14 THE CHAIRMAN: It was nothing to do with the time, there was plenty of time; you should have  
15 come back and said “We have now taken over this case. We were not here when you made  
16 this order and we do not understand what the order means, can we please have clarification?  
17 This is what we want to do.”

18 MR. KENNELLY: But, madam, we understood it to be clear that the Tribunal wanted us to address  
19 the factual and legal matters ----

20 THE CHAIRMAN: It is absolutely clear from the order – I am sorry – it is absolutely clear from the  
21 order that you were not to serve a new notice of appeal. You were to serve a document  
22 amplifying its notice of appeal.

23 MR. KENNELLY: Madam, I accepted before the Tribunal and I say this with due humility that all  
24 we sought to do was a substituted notice of appeal. It was not supposed to be new.

25 THE CHAIRMAN: A substituted notice of appeal is a new notice of appeal. You are substituting a  
26 different document; that is not what it said. It said “Amplify its notice of appeal”, and it is  
27 absolutely clear from the transcript and from the extracts you showed me that it was not being  
28 suggested – as everybody understood at the hearing – that it was not a new notice of appeal,  
29 and the reason was that we then get into the problems ----

30 MR. KENNELLY: Madam, I accept that. But I would submit that it is a question of form over  
31 substance. I simply say, madam, in assessing the culpability of VIP in this, the fact that we  
32 sought to follow the Tribunal’s guidance, and produce something clearer than the existing  
33 further amended notice of appeal ----

34 THE CHAIRMAN: It is not clearer because we cannot tell – it was absolutely clear from the  
35 transcript that you were not supposed to put in any new grounds.

1 MR. KENNELLY: Yes.

2 THE CHAIRMAN: It is not clear from the document that you have put in whether you have put in  
3 new grounds or you have not, and there is clearly a dispute about it; I could not understand it  
4 and Ofcom and T-Mobile individually have had similar problems.

5 MR. KENNELLY: But, madam, again because VIP is being asked to pay costs it is important to  
6 identify exactly what they said was new, and it really just boils down to ----

7 THE CHAIRMAN: It is the form of what you have done.

8 MR. KENNELLY: In terms of what they thought was new, it really boils down to the two points  
9 that they identified in their written submissions, and not the further points they have made  
10 today. The Tribunal does not want to hear me about those, but it is not as bad as my learned  
11 friends have made out, because the fact is the real problem was it did not flag how it changed  
12 the existing notice of appeal.

13 In relation to that lack of clarity, Ofcom produced submissions with three counsel. There is an  
14 argument that for a matter really which boiled down to the fact that we had not served the  
15 notice in the correct form, and the added concern Ofcom had that would have raised one  
16 further ground of appeal – that is what Ofcom referred to – one further ground of appeal that  
17 they felt was new, which I have identified as three now; I have already shown that one was  
18 supposed to refer to *Hilti*, that was the one they refer to in the submissions, it was not serious  
19 enough to justify that level of expense.

20 THE CHAIRMAN: Sorry, what level of expense?

21 MR. KENNELLY: The expense incurred in submissions produced by the full legal team for the  
22 submissions that were put into the Tribunal on behalf of Ofcom.

23 THE CHAIRMAN: Rupert Anderson, Anneli Howard and [Ben Blass].

24 MR. KENNELLY: Yes, and we have not seen any schedule of costs, madam, we have no idea what  
25 costs are likely to have been incurred.

26 THE CHAIRMAN: I do not know if they have brought a schedule of costs today.

27 MR. KENNELLY: I am asked to make submissions, madam, and the Tribunal is asked to make an  
28 order and it could be in respect of any amount of money.

29 THE CHAIRMAN: No, you are quite right.

30 MR. KENNELLY: I think I really ought to just finish with my Ofcom submissions before Ofcom  
31 replies, because I am nearly finished.

32 THE CHAIRMAN: Yes.

33 MR. KENNELLY: The point remains that where Ofcom have served no schedule of costs it is very  
34 difficult for us to address those submissions and I may have submissions to make as to the  
35 extent of the costs expended, because I would submit that if a cost order was made against VIP

1 – and I would submit that it should not, it should be limited only to addressing the particular  
2 issue that the Tribunal has identified, that the form lacked clarity in failing to identify how the  
3 document which I produced differed from the existing further amended notice of appeal, and  
4 we will need to see exactly what costs are expended in addressing that issue, quite separate  
5 from all the other issues which the parties have raised in relation to jurisdiction, for example,  
6 which were not caused by our delay.

7 THE CHAIRMAN: Well of course Ofcom did not deal with jurisdiction.

8 MR. KENNELLY: No, but they have clearly had to address that in their preparation. They have  
9 read T-Mobile's submissions, they have come here and made submissions about it. That is  
10 time expended for the purpose of this hearing which had nothing to do with VIP's failing to  
11 comply with the Tribunal's order. That is in relation to Ofcom.

12 THE CHAIRMAN: Well I could deal with that by saying that Ofcom were entitled to their costs  
13 thrown away by that document.

14 MR. KENNELLY: Strictly in relation to dealing with ----

15 THE CHAIRMAN: "Thrown away by".

16 MR. KENNELLY: Madam, you can see my concern that I do not know what Ofcom are claiming  
17 with their costs thrown away by that document.

18 THE CHAIRMAN: No, well, we will go into that. That would be the way of doing it, if it is  
19 unreasonable then they would not get it, would they? They would not get three counsel, that is  
20 something you could deal with on detailed assessment.

21 MR. KENNELLY: At the moment it would have to be on detailed assessment because it is  
22 impossible to make a summary assessment with no schedule.

23 MISS HOWARD: It is standard practice, madam, not to submit a schedule with your application,  
24 but to let the parties try and agree it between themselves.

25 THE CHAIRMAN: Yes, so it will have to be detailed assessment and that is a point that can be  
26 made on detailed assessment, and if the order was costs thrown away by, then that would not  
27 be the jurisdiction point and it would only be the costs thrown away.

28 MISS HOWARD: If I might just quickly come back?

29 THE CHAIRMAN: Yes.

30 MISS HOWARD: We would be content to have an order for the costs thrown away. First of all, on  
31 late service, we sent in a very short letter saying we did not make any submissions so we  
32 would not be trying to recover costs for that.

33 THE CHAIRMAN: The only reason you are here today is because of that document?

1 MISS HOWARD: Exactly, and it is purely the form of the document, it is also the form of the  
2 interim measures application that we had to respond to, and that is also why we have attended  
3 today, it forms part of the costs thrown away.

4 THE CHAIRMAN: That would be dealt with on correspondence.

5 MISS HOWARD: And shortly on the point of three counsel, although there are three names on the  
6 documents, Ofcom has tried to minimise its costs. I actually drafted the submissions. We had  
7 a final review with the whole team to keep the perspective on things going forward and the  
8 reason they have sent me along today, rather than Mr. Anderson, was as a cost reduction  
9 exercise, so we feel we have complied fully with our duty to mitigate costs and taking account  
10 of VIP's impecunious situation.

11 THE CHAIRMAN: It probably did not need three counsel to deal with this though. I am sure you  
12 could have dealt with it just as well as Mr. Anderson.

13 MISS HOWARD: Well that may be a matter that comes up on the detailed assessment.

14 THE CHAIRMAN: I do not know what his input was.

15 MR. KENNELLY: Now, to address the points against T-Mobile's application. First, madam, as we  
16 all know, because we had these arguments before you, madam, in relation to the conclusion of  
17 the *Floe* Appeal, as a general rule Interveners do not get their costs and that is particularly  
18 relevant here where the costs incurred by T-Mobile in relation to this, and the very substantial  
19 amount of work they have done, and the detailed submissions that they have made, first of all  
20 go largely to issues unrelated to the points that the Tribunal has made in relation to the failings  
21 in the draft re-amended notice of appeal. In particular, madam, in my submission the  
22 submissions which T-Mobile made – quite separate from issues of jurisdiction – sought to  
23 re-open matters which the Tribunal determined on 13<sup>th</sup> September hearing. T-Mobile made  
24 again the argument that there was no urgency, which the Tribunal had dismissed when  
25 rejecting T-Mobile's application for extended deadlines, and T-Mobile invites the Tribunal to  
26 dismiss the entire Appeal – although not today – but the work was done to produce the  
27 submission inviting the Tribunal to dismiss the Appeal. T-Mobile went further than they  
28 needed to for the purpose of this hearing. In doing so, although they said it was not to be  
29 addressed by the Tribunal today, T-Mobile forced VIP to incur the costs of dealing with the  
30 jurisdictional issues that they raise, and while VIP may well be liable, as the Tribunal said, for  
31 Ofcom's costs on the notice of appeal, a great deal of costs have been incurred in relation to  
32 the jurisdiction issue which has come extremely late and has caused VIP to incur ----

33 THE CHAIRMAN: I do not think the jurisdiction issue is within any costs' order because the  
34 jurisdiction issue is a matter that is still ongoing. So any costs' order is not going to deal with

1 the jurisdiction issue, it is only going to deal with your attempts at substituting, or whatever, a  
2 notice of appeal.

3 MR. KENNELLY: Indeed, but the problem with VIP, of course, in looking at the condition in the  
4 round VIP have been prejudiced by T-Mobile's raising of this point late in the day and at a  
5 hearing where it was not to be raised. When issues are raised, we have to prepare and make  
6 submissions about them. In any event, this is not the kind of exceptional case where an  
7 Intervener should have its costs. Ofcom are the respondent, Ofcom dealt with this matter in  
8 full, and Ofcom put in measured submissions in dealing with it, as opposed to the  
9 "exaggerated" – and I use that word advisedly, in the sense of "ambitious" – submissions made  
10 by T-Mobile for the purpose of this hearing and so it is not the kind of exceptional case where  
11 T-Mobile should have its costs.

12 MR. PICKFORD: Madam, if I might just respond to those points. T-Mobile would be quite content  
13 with the same order, that is costs thrown away, that would deal with Mr. Kennelly's point.

14 THE CHAIRMAN: You did not need to come at all, Ofcom could have dealt with it.

15 MR. PICKFORD: In our submission we certainly did need to come, our interests are very much  
16 affected.

17 THE CHAIRMAN: What have you said in addition to Ofcom that has made a difference in this  
18 court?

19 MR. PICKFORD: It was impossible for us to ascertain, given in particular that there was supposed  
20 to be simultaneous submissions on this point, what Ofcom might or might not say. Clearly,  
21 T-Mobile has a position to protect and it needed to make submissions and to appear today to  
22 protect that position.

23 THE CHAIRMAN: Yes, but you do that at your own cost, that is the status of an Intervener.

24 MR. PICKFORD: Madam, the principles that the Tribunal has applied in relation to costs of  
25 Interveners have varied considerably from case to case and, of course, the overriding principle,  
26 as it were is that there are no rules. But certainly there is precedent for awarding costs to an  
27 Intervener, particularly where the Intervener's interests are as acutely affected as T-Mobile's  
28 interests are affected in this case. We are, I might suggest, somewhat more affected by the  
29 application for interim relief, if anything, than Ofcom is.

30 THE CHAIRMAN: Yes, but we are not dealing with the cost of the interim relief. We are dealing  
31 with the costs of this notice of appeal.

32 MR. PICKFORD: We have today had to deal with the point about whether ----

33 THE CHAIRMAN: But that is ongoing, the Tribunal does not normally make orders as to costs in  
34 relation to that, we are not even half way through, we have not started yet. It is just because  
35 we are here that we are doing that.

1 MR. PICKFORD: In relation to the substantive matter, as I said before, T-Mobile is far more acutely  
2 affected in this case than it may be in others, because of the nature of the relief that has been  
3 sought, which is that the Tribunal is being asked to make an infringement decision against it.  
4 Had VIP's Appeal merely been one to set aside Ofcom's decision, clearly it would be very  
5 different, and clearly T-Mobile would need to take a view on the appropriateness of its  
6 continued involvement, but that is not the nature of the relief that is sought, and as the Tribunal  
7 has identified, this issue is one that has been very litigious, and it has been one and it is one  
8 that has been necessary for us to be keenly involved in so far at every turn, and it would be  
9 very unusual for an Intervener not to attend a hearing such as this. Indeed, in relation to the  
10 written submissions that were made, given that, as I said, that they were simultaneous, it was  
11 impossible for us to take a view on whether our interests were to be adequately protected by  
12 the position that Ofcom was proposing to take.

13 In response to Mr. Kennelly's point about being prejudiced by the allegedly late submission of  
14 the application for jurisdiction, in my submission they have not been prejudiced at all because  
15 the costs that are concerned with jurisdiction should be dealt with on the hearing of that  
16 particular matter.

17 THE CHAIRMAN: Absolutely.

18 MR. PICKFORD: And they have not been prejudiced in any way. They would have to deal with  
19 these points and in our submission for the reasons that I have already alluded to earlier, we  
20 strongly contest that it is late, but I do not propose to go into those points again.

21 We would say that in all the circumstances an award of costs that have been thrown away by  
22 us in dealing with VIP's re-amended notice of appeal would also be just.

23 Those are my submissions.

24 THE CHAIRMAN: Thank you.

25 MR. KENNELLY: Just to repeat the point that it is not that kind of exceptional case, Ofcom either  
26 respond to the Appeal and they are going to deal with the issue. T-Mobile ought to have  
27 consulted with Ofcom to see what the position was, if they were concerned about their interest  
28 not being adequately protected, if they were concerned about the fact that submissions were  
29 submitted simultaneously they could have come back to the Tribunal and asked them for some  
30 time to consider that. It is not just the exceptional case where they would normally be entitled  
31 to their costs.

32 THE CHAIRMAN: I order that the reasonable costs thrown away by the provision of the document  
33 which was headed "Re-amended Notice of Appeal" and dated 23<sup>rd</sup> October 2006 be paid by the  
34 Appellant to Ofcom, and that can be dealt with either by agreement or detailed assessment.  
35

1 I do not order that the Appellant pay any of T-Mobile's costs. T-Mobile is an Intervener. It  
2 decided that it was in its interests to come here today. It has not added anything to Ofcom,  
3 who could quite appropriately have dealt with it today, and in fact did deal with it  
4 appropriately. In those circumstances there is nothing exceptional in this case which requires  
5 the Appellant to pay the Intervener's costs.

6 Is there anything else?

7 MR. KENNELLY: I have nothing further.

8 THE CHAIRMAN: All right. Now if you have a problem please come back.

9 MR. KENNELLY: There is no doubt about that.

10 THE CHAIRMAN: Thank you.

11 (The hearing concluded at 1.25 p.m.)