Neutral citation: [2007] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1074/2/3/06(IR)

Victoria House
Bloomsbury Place
London WC1A 2EB

28 February 2007

Before:
MARION SIMMONS QC (Chairman)
MICHAEL DAVEY
SHEILA HEWITT

BETWEEN:

VIP COMMUNICATIONS LIMITED
(in administration)

Applicant

-v.-

OFFICE OF COMMUNICATIONS

Respondent

supported by

T-MOBILE (UK) LIMITED

Intervener

Mr Edward Mercer (of Taylor Wessing) appeared for the Applicant.

Mr Rupert Anderson QC, Ms Anneli Howard and Mr Ben Lask (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

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

Heard at Victoria House on 16 January 2007.

JUDGMENT (INTERIM RELIEF)

I INTRODUCTION

1. This is an application by VIP Communications Limited (in administration) ("VIP") for an order under Rule 61 of the Tribunal Rules that, pending the determination of VIP's substantive appeal, T-Mobile (UK) Limited ("T-Mobile") reconnect the SIMs supplied by T-Mobile to VIP which were disconnected by T-Mobile on 31 January 2003.

2. In the substantive appeal, VIP has appealed against a decision of the Office of Communications ("OFCOM") dated 28 June 2005 ("the Decision") that T-Mobile had not infringed Section 18 ("the Chapter II prohibition") of the Competition Act 1998 (the "1998 Act") or Article 82 of the EC Treaty ("Article 82") by disconnecting the services it was providing to VIP for use in telecommunications equipment known as "GSM gateways", while allegedly continuing to supply the same GSM gateway services to other companies.

3. In *Floe Telecom Limited v. OFCOM* [2004] CAT 18 in a statement of facts agreed by the parties to that case, GSM gateways were characterised as follows:

> "GSM gateways are devices containing one or more SIMs for one or more mobile networks and which enable calls from fixed phones to mobile networks to be routed directly via a GSM link into the relevant mobile network.
>
> A call made via a GSM gateway appears to the mobile network to have originated from a mobile registered to that network and so attracts a cheaper call rate.
>
> A purpose of a GSM gateway is to take advantage of the lower "on-net" tariff for calls on a mobile network compared with the rate for fixed-to-mobile calls."

The use of GSM gateways can be categorised by type. One type is "Commercial Multi-User GSM Gateways" which are referred to as "COMUGs" in this judgment. This refers to the situation where a person uses GSM gateways to provide an electronic communications service by way of business to multiple end-users.

4. For the reasons set out below, we unanimously find that this application for interim relief is manifestly unfounded. Accordingly, we dismiss this application for interim relief.

II BACKGROUND

A THE PARTIES

VIP

5. VIP was founded by Mr Tom McCabe in 1998. When carrying on business, VIP was a provider of electronic communications equipment and services. VIP used GSM gateways to provide discounted mobile termination to UK companies. VIP entered into administration on 18 August 2005. Mr Jeremy Charles Frost was appointed administrator.

OFCOM

6. The Telecommunications Act 1984 established the Director General of Telecommunications ("the Director") as the regulator of the telecommunications industry in the United Kingdom. The office of the Director became known as "Oftel". The Director and Oftel were abolished by the Communications Act 2003 (the "2003 Act") and the Director's functions were transferred to OFCOM. We make no distinction for the purposes of our judgment between the Director and OFCOM.

7. By virtue of section 371(1) of the 2003 Act OFCOM was empowered with effect from 25 July 2003 to exercise the relevant functions of the Office of Fair Trading ("OFT") under the provisions of Part 1 of the Competition Act 1998 (see Communications Act 2003 (Commencement No. 1) Order 2003, SI 2003/1900, paragraph 2(1) and Schedule 1).

T-Mobile

8. T-Mobile is a mobile network operator. T-Mobile holds a licence under section 1 of the Wireless Telegraphy Act 1949 to establish, install and use

equipment comprising a mobile telecommunications network using the GSM radio spectrum. "GSM" stands for Global System for Mobile communications.

B OFCOM'S INVESTIGATIONS AND THE APPEAL

9. On 22 July 2003, the Appellant submitted a complaint to the Director alleging, amongst other things, that T-Mobile had infringed the Chapter II prohibition by periodically suspending VIP's GSM gateway services on the grounds of unlawful activity yet still permitting GSM gateway services by others, including its own service providers. OFCOM investigated the complaint and on 22 December 2003 issued a decision in which it concluded that T-Mobile had not infringed the Chapter II prohibition.

10. The further background and history to this application is set out in the Tribunal's judgment of 22 January 2007 *VIP Communications Limited v. Office of Communications* [2007] CAT 3, at [9] – [19].

C THE APPLICATION FOR INTERIM RELIEF - PROCEDURE

11. On 11 July 2006 Mr Tom McCabe, purporting to act on behalf of VIP, wrote to the Tribunal requesting that interim relief be granted to VIP in the form of a payment by T-Mobile of approximately £1.7 million and an Order of the Tribunal that T-Mobile supply up to 4,000 SIMs to VIP.

12. On 13 July 2006 the Registrar of the Tribunal replied to Mr McCabe as follows:

> "Dear Sir,
>
> I refer to your letter dated 11 July 2006 I which you indicate that you are making an application for interim measures. I enclose a copy of that letter for the benefit of the other parties.
>
> I note that by a letter dated 26 August 2005 the Tribunal was notified of the appointment of Mr Jeremy Charles Frost as administrator of VIP Communications Limited. In those circumstances, it would appear that any application on behalf of the appellant ought to be made by the administrator of the company.
>
> Assuming that the administrator wishes to adopt and pursue any such application, it presently appears to the Tribunal that it would be appropriate,

> in the circumstances, to defer consideration of such application until after the handing down of its judgment in case 1024/2/3/04 *Floe Telecom Limited (in administration) v Office of Communications*."

Mr McCabe did not respond to this letter and no application was made by the administrator at this time.

13. Judgment in *Floe Telecom Limited v Office of Communications* was handed down on 30 August 2006 (see [2006] CAT 17 ("*Floe II*")).

14. At a hearing on 13 September 2006 in relation to VIP's substantive appeal, the stay on proceedings was lifted and VIP was ordered to file and serve a document amplifying its notice of appeal by 11 October 2006, subsequently extended by further Order to 20 October 2006. A document described as a "Re-Amended Notice of Appeal" was lodged on 23 October 2006. At paragraph 61 of that document VIP requested interim relief in the form of an order that T-Mobile reconnect the SIMs disconnected on 31 January 2003 pending determination of its appeal. VIP gave the Tribunal no separate notice of this application and did not comply with Rule 61 of the Tribunal Rules.

15. A case management conference was held on 1 November 2006 at which (a) the document lodged on 23 October 2006 was rejected as being both out of time and flawed, (b) VIP was ordered to file and serve a proposed re-amended notice of appeal by 8 November 2006, and (c) the Tribunal indicated that any application which VIP may make for interim relief must be made in accordance with Rule 61.

16. On 9 November 2006, VIP applied under Rule 61 of the Tribunal's Rules for an order, pending the determination of VIP's appeal, that within seven days T-Mobile reconnect the SIMs supplied by T-Mobile to VIP and disconnected by T-Mobile on 31 January 2003 and continue to supply SIMs monthly as required, on the same terms as the 2002 agreement between VIP and T-Mobile. The application was accompanied by unsigned witness statements of Mr Jeremy Frost, Mr Tom McCabe and Mr Nick Browning.

17. Signed copies of the witness statements were filed on 20 November 2006. The witness statement signed by Mr Jeremy Frost had been amended since the unsigned version was filed on 9 November 2006.

18. On 23 November 2006, OFCOM filed written submissions in response to VIP's application together with a witness statement of Mr Graham Louth, Director of Spectrum Markets at OFCOM.

19. On 30 November 2006, T-Mobile filed written submissions in response to VIP's application, accompanied by witness statements of Mr Timothy Spence, Mr Michael Hartley, Mr Anthony Wiener, Mr James Blendis and Ms Robyn Durie.

20. On 7 December 2006, solicitors for VIP wrote to the Tribunal asking for the hearing which had been fixed for 13 and 14 December 2006 to be adjourned. VIP filed written submissions in reply on 8 December 2006, together with a second witness statement of Mr Jeremy Frost.

21. On 13 December, a case management conference was held in respect of the substantive appeal. At that case management conference, two issues which were also relevant to the interim relief application were considered. The first of these was the admissibility of a second witness statement of Ms Robyn Durie of T-Mobile. The President of the Tribunal ruled that the witness statement was admissible in evidence (see [2006] CAT 34). The second matter concerned an agreement between VIP, VIP On Line Limited ("VIP On Line") and Mr Jeremy Frost concerning the assignment of a right of action ("the Assignment Agreement"). The Assignment Agreement, which was signed but not dated, was attached to the first witness statement of Mr Jeremy Frost as exhibit JF2. T-Mobile asserted that the existence of the Assignment Agreement raised a question as to whether the proceedings should be allowed to continue in the name of VIP, or whether VIP On Line should apply to be substituted for VIP.

22. At that hearing VIP was ordered to file and serve a witness statement and make disclosure of contemporaneous documents in relation to the issues concerning both the Assignment Agreement and the funding arrangements entered into between VIP, VIP On Line, Mr Frost and Mr McCabe (or any one or more of them); and file and serve a draft deed of rectification of the Assignment Agreement by 4pm on 20 December 2006. It was also ordered that the hearing of the interim relief application be adjourned until 16 January 2007 and any further written submissions by any of the parties or any interested party for the interim relief application be served by 5pm on 11 January 2007.

23. On 20 December 2006, VIP filed a third witness statement of Mr Jeremy Frost (to which was attached as an exhibit a deed of rectification in relation to the Assignment Agreement) and a first witness statement of Mr David Allen Taylor Green. On 11 January 2007, OFCOM and T-Mobile filed further written submissions and VIP filed a fourth witness statement of Mr Jeremy Frost and second witness statement of each of Mr David Allen Taylor Green and Mr Charlie Springall. On 12 January 2007, T-Mobile wrote to the Registrar of the Tribunal objecting to parts of the witness statement evidence filed by VIP on 11 January 2007. Later the same day, Taylor Wessing wrote to the Tribunal on behalf of VIP seeking to rebut T-Mobile's objections.

24. The application for interim relief was heard by the Tribunal on 16 January 2007. A number of documents were handed up at the hearing including a third witness statement of Ms Robyn Durie of T-Mobile.

III THE EVIDENCE

25. We summarise below the more relevant aspects of the evidence contained in the witness statements which are before us.

Witness evidence submitted by VIP

26. Mr Jeremy Frost's statements include that:

i. VIP was placed into administration on 18 August 2005, Mr Frost is the administrator.

ii. An agreement was reached between Mr Frost and Mr McCabe that Mr Frost would sell to Mr McCabe the fruits of the action for a consideration of £15,000 non-refundable deposit plus 5% of the results of the action by VIP On Line. Under the agreement VIP On Line will receive 95% of any sums awarded and the administrator will receive his fees. This agreement was entered into sometime between mid January and mid July 2006. A copy of the agreement (the Assignment Agreement referred to above) is attached to Mr Frost's first witness statement as an exhibit.

iii. The administrator was advised by his solicitor that any assignment would have to be only in respect of any actions as VIP were capable of assigning, especially a money claim against T-Mobile and a potential damages claim against OFCOM for non-implementation of European Union law, but that it could not include any right in respect of public law proceedings.

iv. The proceedings to date have been brought by the administrator of VIP supported and financed by VIP On Line.

v. VIP On Line is providing the funding for the costs of the proceedings before the Tribunal on an indemnity basis as and when legal costs arise and the sums to be paid are agreed in advance. There is no further or written agreement in place for this indemnity arrangement for legal costs in the proceedings before the Tribunal.

vi. That the lifting of the stay of proceedings in this case following judgment in *Floe II* had the effect of suddenly and dramatically increasing a cash burn as legal fees are incurred.

vii. If the application for interim relief is not successful then the administrator thinks that the future of VIP will be in imminent danger; it will mean the end of the appeal, and the loss of many thousands of pounds of legal fees.

viii. If these proceedings extend beyond the application for interim relief without VIP having an ability to generate funds, the administrator will have no funds to pursue the matter further and there is no guarantee that the funder will continue to provide monies. With no money the administrator would have no option but to attempt to bring this matter to a close as expeditiously as possible. Mindful of the potential for any adverse costs order, simply applying to remove VIP from the register of companies is the most effective method of finalising the affair.

ix. If the interim relief is granted then VIP may be able to trade out of administration. The administrator understands from Mr McCabe that, by T-Mobile simply providing the SIM cards which it originally contracted for, it would be possible for VIP to attempt to trade itself out of administration.

x. The administrator has worked with Mr McCabe as to how the interim relief, if granted, will practically allow VIP to trade itself out of administration and be able to afford the legal fees for continuing with the case. A draft business plan has been developed which the administrator states will be under a management agreement. The draft business plan was attached to Mr Frost's fourth witness statement as an exhibit.

xi. Administration is meant to be in place for a limited time. There is a requirement to apply to the Court to extend the administration after 18 months. In VIP's case, the Court needs to have ordered any extension by 17 February 2007 and creditors need to have agreed this course of action prior to the application being made.

27. Mr Thomas McCabe's statements include that:

i. In May 2002, Mr McCabe met with Mr David Powers of T-Mobile. Mr McCabe explained that he needed SIMs for GSM gateways and told Mr Powers that he initially wanted 200 SIMs at 2 pence per minute. Mr McCabe requested 3,000 minutes per month, which

amounts to £65 plus VAT per SIM. Mr McCabe and Mr Powers discussed the need to avoid congestion and to cooperate.

ii. About a week after that meeting Mr Powers telephoned Mr McCabe and said that VIP could have a contract at the rate they had asked for – that is at 2 pence per minute, but with a maximum of 3,000 minutes per SIM – on 200 SIMs.

iii. T-Mobile was to supply VIP with 200 SIM cards, on an 18-month contract. VIP would not receive any handsets.

iv. Mr McCabe met with Mr Powers again some time in late May or early June. At that meeting Mr McCabe signed a contract. Mr Powers told Mr McCabe that he would arrange for T-Mobile to sign the contract and would send Mr McCabe a copy. The signed copy of the contract was never provided to VIP.

v. T-Mobile supplied VIP with the contracted 200 SIMs. In June 2002, Mr Powers telephoned Mr McCabe and asked for a forecast of future use. Mr McCabe told Mr Powers that VIP would need 4,000 SIMs from him over the next 12-18 months.

vi. On 11 July 2005, Mr McCabe wrote to the Tribunal seeking to make an application for interim relief on behalf of VIP. The Tribunal responded on 13 July 2005 that this application was premature, having been made before its judgment in Floe. (The Tribunal notes here that Mr McCabe's evidence as to this is incorrect, including that the exchange of correspondence was in fact in 2006. The true facts are set out in paragraphs [11] and [12] above.)

vii. Since VIP was put into administration, VIP has continued to maintain a skeleton company in the hope and expectation that these proceedings would be resolved with due regard to the need for expediency.

viii. The removal of the stay now requires a significant increase in and commitment to VIP's legal costs to actively pursue the appeal.

ix. If interim relief is not granted Mr McCabe would be unable to continue to finance this litigation and thus the company will be wound up.

x. Mr McCabe has had no salary from VIP for the last three years. He has recently re-mortgaged his house to keep everything going. Five out of the six employees of VIP have been laid off, although Mr McCabe continued to pay them until they were made redundant. Mr McCabe has continued to pay rent for three years for VIP's "City Lifeline" offices. Mr McCabe was originally given a discount on the rent for those offices but since 1 November 2006 the rent has returned to its full amount of £2,000 per month, plus electricity.

xi. Mr Browning, the last working member of staff, has been working at a reduced wage for the past year and has now been forced financially to work for someone else on a part-time basis. If Mr Browning's skills are lost Mr McCabe believes that it will be impossible to run the business. The switch-room will have to be given up and there will be no argument for reconstituting the business. Until now VIP has maintained a switch room, switch and electricity supply and service agreements with manufacturers in order to keep a skeleton company alive.

xii. The company would be saved if T-Mobile were ordered to supply VIP 4,000 SIMs over a six-month period, under a roll-out option at 2 pence per minute.

28. Mr Nicholas Browning's statement includes that:

i. Mr Browning is now the sole remaining employee of VIP. He has supported all operational aspects of the company, including the on-going support of the switch room facility in Moorgate, the maintenance of the BT wholesale connect and all of the internet resources as well as bookkeeping and banking.

ii. While Mr Browning remains with VIP he is in a position to assist with the handover to another individual. If and when he leaves VIP

there will be no one to carry out this task and it will be very difficult for another person to do his job after a long delay.

iii. If VIP were to be supplied with SIMs by T-Mobile even on a short term basis Mr Browning is confident that the business would be cash positive in the short term.

29. The first statement of David Allen Taylor Green (a solicitor at Taylor Wessing) includes that Mr McCabe told Mr Green that VIP On Line is a company registered in Jersey with two shares, issued to Mr McCabe's family trust, Richmond Jersey Settlement, of which Mr McCabe is the settlor. Mr McCabe told Mr Green that VIP On Line is funded through this trust. This first statement continues that the nominated directors of VIP On Line have authorised Mr McCabe to act on its behalf and that Mr McCabe is neither employed by or a director of VIP On Line. In the second statement of Mr David Allen Green it is stated that the position in respect of VIP On Line since 31 May 2006 is that there are 100 issued shares and that the shareholders (who hold these share under a declaration of trust in favour of Richmond Jersey Settlement) are:

i. Nautilus Corporate Services Limited: 97 shares

ii. Nautilus Fiduciary Services Limited: 2 shares

iii. Nautilus Nominee Services Limited: 1 share

30. The statement of Mr Charlie Springall (Technical officer of Mobile Gateway Operators Association ("MGOA")) includes that:

i. His belief is that the terms of arrangements between mobile network operators and gateway operators could include provisions leading to accurate planning and implementation, by both parties to:

a) allow the operators an opportunity to increase both transmission capacity and back haul interconnect from particular cells into the mobile network operator's network and for adequate testing prior to COMUGs going live; and

b) require the GSM gateway operators to locate the new GSM gateways in locations where the mobile network operators had spare cell site capacity, or the potential to increase the current capacity at a given location.

ii. The process of consultation, planning and staged implementation would protect mobile network operators against unplanned and undetermined growth by gateway operators, degradation of their service and cell site overload, and would give them immediate identification of technical problems and activities from those not authorised to provide gateway services.

iii. Calling line identity ("CLI") difficulties arise because the ability to send a "secondary" CLI is not currently supported by the UK's mobile networks, although mechanisms are available to achieve this.

iv. Mr Springall estimates that the maximum likely impact from VIP's activities on a 100 voice channel cell site's capacity would be less than 15%, based on the use of multiple antennae on a single GSM gateway; and he believes that Mr Louth of OFCOM and Mr Hartley of T-Mobile (we summarise their evidence below) have significantly under-estimated the number of available channels in any one T-Mobile cell site.

Witness evidence submitted by OFCOM

31. The statement of Mr Graham Louth (Director of Spectrum Markets at OFCOM) includes that:

i. The reconnection of VIP's SIMs by T-Mobile for use in COMUGs would cause congestion on T-Mobile's network as a result of which customers of T-Mobile would suffer a degradation in service, making it harder for them to make and receive calls in those areas in which VIP's COMUGs operate.

ii. T-Mobile is unable to increase capacity of its network without installing additional equipment (which is likely to take a minimum of a few weeks and could take a number of months).

iii. Mr Louth believes that the maximum capacity that T-Mobile is likely to be able to deploy in any given location is sufficient to cope with approximately 100 simultaneous voice calls. In some areas the installed capacity could be as little as that necessary to cope with 15 simultaneous voice calls (or even less).

iv. Mr Louth believes that T-Mobile is likely to be operating its network at or close to capacity in almost all locations.

v. A single COMUG could contain as many as 60 SIMs and hence be able to demand the capacity for 60 simultaneous voice calls from T-Mobile's network. A COMUG is capable of materially increasing demand in an area, by at least as much as 50% of the installed capacity and potentially by more.

Witness evidence submitted by T-Mobile

32. The statement of Mr Timothy Robert Spence (Head of Customer Finance, T-Mobile) includes that:

i. Prior to September 2002 T-Mobile initially calculated the loss which GSM gateways were thought to be causing to T-Mobile at as much as £500,000 per month. This calculation was subsequently refined, resulting in an estimation of loss to T-Mobile of between £1.35 million and £3.8 million per month.

ii. T-Mobile does not permit the use of any GSM gateway on its network, a policy adopted by its finance director in December 2004 (built on an earlier policy adopted in October 2002 that T-Mobile should remove all commercial GSM gateways from the network in a controlled and consistent manner).

iii. Since VIP's SIM cards were disconnected by T-Mobile, the type of tariffs and charging structure used by mobile operators has changed.

iv. T-Mobile does not make a profit on its existing business. If VIP connected 4,000 SIMs to T-Mobile's "Business 1 50,000" tariff, T-Mobile would be exposed to a potential loss of approximately £12

million per month or £150 million per year. This would cause extremely serious harm to T-Mobile's business and is not something that any commercial organisation could countenance.

v. All T-Mobile's tariffs now explicitly prohibit gateway use. If T-Mobile was required to reconnect VIP it would need to develop a new "gateway operators" tariff. If T-Mobile were required to reconnect VIP's SIM cards and for that purpose were to take steps to implement a new tariff which was calculated so that T-Mobile did not make a direct financial loss, Mr Spence has provisionally been informed by T-Mobile's senior pricing manager that for calls to T-Mobile's customers the rate would need to be just over 10 pence per minute (excluding VAT) and that for calls to other networks the rate would need to be just over 9 pence per minute (excluding VAT) for off-peak calls and 14.5 pence per minute for calls at peak times.

33. The statement of Mr Michael Hartley (senior engineer in the network planning office at T-Mobile) includes that:

i. Cell capacity is tightly managed and although limited spare capacity may exist on a cell to cope with forecast growth it cannot be guaranteed to be available on all cells, and is very unlikely to be sufficient to support the significant increase in traffic caused by a gateway.

ii. The lead time in increasing the capacity of a cell can vary from, in very simple cases, a matter of days to at least eighteen months to obtain and install a new cell site – which could well be required to meet the type of traffic increases caused by commercial GSM gateway use.

iii. T-Mobile does not have excess capacity on its UK network and if VIP were able to connect groups of SIM cards in GSM gateways to the network Mr Hartley would expect congestion to result.

iv. Before it was disconnected, VIP was one of the largest GSM gateway operators on the T-Mobile network, with fewer than 400 SIMs. If

VIP were to connect 4,000 SIMs to the T-Mobile network it would be equivalent to approximately 7% of the fixed line in-bound interconnection capacity that T-Mobile has with BT and would make VIP the largest GSM gateway operator ever on the T-Mobile network.

v. Mr Hartley broadly agrees with the statements made by Mr Louth of OFCOM, but adds that T-Mobile's network is designed so that capacity on a cell with the maximum number of transmitters is 78 simultaneous calls on full rate, with 106 on half rate (with reduced call quality) subject to a 2% probability of a customer experiencing a 'network busy' or similar message to indicate that there is congestion under normal traffic conditions. Normal traffic conditions would not include the presence of GSM gateways.

34. The statement of Mr Anthony Wiener (Head of Technology Strategy T-Mobile) includes that:

i. GSM gateway use is liable to cause significant harm in terms of:

a) congestion which harms the operation of mobile networks, causing a reduction in service quality and roaming difficulties;

b) inherently inefficient use of the spectrum;

c) impedance to the provision of accurate information and services such as calling line identification and caller location information.

ii. Additional cell sites may be required to be built to overcome congestion, which is likely to take a substantial period of time in the region of 18 months or more.

35. The statements of Ms Robyn Durie (regulatory counsel of T-Mobile) include:

i. Reference to meetings in 2003 between the mobile network operators and members of the MGOA at which discussions took place as to the problems caused by GSM gateways to operators and consumers. As

far as Ms Durie is aware the gateway operators did not follow up the discussion at that meeting.

ii. That she has been told by Mr Hartley that the increase of transmission capacity and backhaul from cell sites would involve T-Mobile in additional capital and operating expenditure in planning, provisioning, testing and implementing such capacity. This planning would take some time, would be outside the normal planning undertaken by T-Mobile and would delay its already planned network rollout. This would be particularly difficult for T-Mobile this year as it is required to meet the coverage obligations in its 3G Wireless Telegraphy licence by the end of the year.

iii. That T-Mobile does not have any spare cell site capacity and does not have sufficient spare capacity to support a gateway operator taking 15% of a site's capacity.

iv. T-Mobile does not support the sending of a secondary CLI of the type referred to in Mr Springall's statement. If Mr Springall's suggested solution as to this was technically feasible at the very least it would require systems development and testing. T-Mobile has limited systems development capacity and its resources are currently fully committed on development work. If T-Mobile were compelled to undertake this work urgently and made an immediate start, it is unlikely to be able to complete the necessary technical development until November 2007. Software modifications would also be necessary and would require rigorous testing. It is unlikely that T-Mobile's software testing resource would be available for at least six months.

36. The statement of Mr James Alexander Blendis (Legal Director and Company Secretary of T-Mobile) includes that the outstanding balance on VIP's account with T-Mobile as at the end of March 2003 was £175,566.28, representing unpaid bills for the period 13 December 2002 to March 2003, including cancellation fees. This debt has not been settled by VIP and as a result VIPs

contract was formally terminated by written notice from T-Mobile corporate collections department on 3 April 2003.

IV SUBMISSIONS

VIP's submissions

37. VIP submits that the remedy sought is one which the Tribunal has power to grant in its final decision for the purposes of Rule 61(1)(c) of the Tribunal Rules.

38. VIP submits that the Appellant is correctly named as VIP notwithstanding the Assignment Agreement.

39. VIP submits that the relief is sought as a matter of urgency for the purposes of preventing serious, irreparable damage to VIP (Rule 61(2)(a) of the Tribunal Rules). VIP submits that there is an imminent risk that it will be put into liquidation at which point it will become virtually impossible to revive the business. VIP submits that the disconnection of its SIMs is the reason for its commercial decline until the point of liquidation. Without the use of the SIMs it cannot trade and cannot remain indefinitely in a state of suspended animation. VIP submits that Mr McCabe can no longer fund or is no longer prepared to fund or may no longer be prepared to fund both the commercial survival of VIP and the litigation.

40. VIP submits that the administrator has decided that, absent a grant of interim relief, he will or may be compelled to liquidate VIP's business. VIP submits that absent the grant of interim relief, it simply cannot, or may not, sustain this litigation beyond the application of interim relief.

41. VIP submits that when considering urgency the Tribunal should look at the urgency that pertains at the time the application for interim relief is made.

42. VIP submits that it cannot offer a cross-undertaking in damages since it is on the point of being wound-up.

43. VIP submits that the relief sought is necessary to prevent VIP suffering serious and irreparable damage, and that if interim relief is not granted the integrity and the continuance of the appeal will be jeopardised. VIP relies on the dicta in *Genzyme Limited v Office of Fair Trading* [2003] CAT 8 ("*Genzyme*") at [96] to [98] and *Albion Water Limited v. Director General of Water Services* [2005] CAT 19 ("*Albion*") at [8].

44. VIP submits that in making the interim relief request it is asking for what it thought it would get – the development of its business which was stopped in January 2003 when it was operating 400 SIMs and had given notice to T-Mobile that it was going to operate up to 4,000 SIMs. VIP submits that as it had always intended, the installation of those SIMs would be subject to a degree of consultation with T-Mobile to give it comfort about network planning and other technical issues. VIP submits it is asking for what T-Mobile once thought was perfectly acceptable: that T-Mobile had agreed in the past to give VIP what VIP is asking for now. VIP submits that the contract was a variable, call-off contract. VIP relies on the first witness statement of Mr McCabe (from paragraph 14 onwards) as to the existence and terms of the contract.

45. VIP relies on paragraph 224 of the Decision:

> "224. T-Mobile has confirmed that when it provided SIMs to VIP, it understood that these would be used by VIP in Commercial Multi-User Gateways[78]."

[78] T-Mobile's response of 14 April to question 4 of Ofcom's information request of 24 March 2005.

46. VIP submits that either there is enough evidence to show that a written authorisation form of contract did exist, or some appropriate form of authority was given.

47. VIP submits that it is sufficient for the purpose of rule 61(6)(c) for the Applicant to show that its appeal is not manifestly unfounded (*Napp Pharmaceutical Holdings Limited v. Director General of Fair Trading* [2001] CAT 1 ("*Napp*") at [45]). VIP submits that on 13 September 2006 the

Tribunal dismissed the application by T-Mobile for summary judgment and accordingly has held that there is a substantive issue to be decided in the case of VIP's appeal. VIP submits that there is no doubt that a prima facie case is established, that T-Mobile has effectively recognised that there is a prima facie case to answer by admitting in its submissions of 31 October 2006 that "there is no quick and easy means by which the appeal can be dismissed", and that OFCOM accepted that a prima facie case would be established if T-Mobile did not put in factual evidence to controvert the factual evidence produced by VIP. VIP submits that T-Mobile chose not to controvert the VIP evidence.

48. VIP submits that if the SIMs are not reconnected there is a substantial risk that VIP will be unable to revive commercially even if it succeeds in its appeal and that a determinative factor in granting the relief is the risk of insolvency overtaking VIP, relying on the Tribunal's dicta in *Albion*, cited above, at paragraph [10].

49. VIP submits that T-Mobile is unlikely to suffer any loss, irreparable or otherwise, if the SIMs are reconnected since VIP will pay for the provision of the service. VIP submits that T-Mobile and OFCOM's arguments as to the congestion and harmful interference allegedly caused by COMUG have been rejected by the Tribunal in *Floe II*. VIP submits that the order sought should not have an adverse financial impact on T-Mobile or any adverse impact is dwarfed by the adverse impact which VIP will suffer if the Order is not granted. VIP submits that the balance of convenience or interests favours VIP and refers to the dicta at paragraph [10] of *Albion*.

50. VIP submits that competition will not be harmed by the grant of interim relief, that on the contrary consumers benefit from COMUG as a least-cost routing solution and that the disappearance of VIP would remove a competitor or potential competitor from the market.

51. VIP submits that the granting of interim relief will not lead to congestion on T-Mobile's network, that there will be no adverse effect on any customer and that the concerns of Mr Louth are without foundation.

52. VIP submits that there is no countervailing harm which the public interest would suffer if the SIMs were reconnected pending the determination of the appeal. VIP submits that following the judgment in *Floe II* any argument that the provision of SIMs for COMUGs was a criminal offence is no longer sustainable.

53. VIP submits that with funds drawn from its revived business, it will be able to commit the resources necessary to conduct this appeal against much more powerful and well-resourced opponents.

54. VIP submits that T-Mobile is in a dominant position in the market in respect of the termination of calls on its network, and that its resistance of the application is to avoid facing competition from VIP. For this reason, VIP submits that the submissions of T-Mobile on the effects on competition and consumer interests of granting the relief requested should have little or no weight placed upon them. VIP submits that it is irrelevant that VIP would be in a unique business position if the application was granted and that it is not open to T-Mobile to rely on its own failure to authorise other gateway operators as a reason why VIP should not be granted interim relief.

OFCOM's submissions

55. OFCOM submits that this application for interim relief was misconceived and doomed to failure.

56. OFCOM submits that there are significant differences between this case and *Albion,* including that the relevant undertaking in *Albion* originally consented to interim relief being granted and interim relief was in place from the outset of the appeal. The present case can be distinguished in that the request for interim relief is after some four years. OFCOM submits that in this kind of case the Tribunal should only grant interim relief if there is a compelling case, and this is not such a case; this is a very weak case for interim relief.

57. OFCOM submits that the Tribunal should wait until it has seen the factual evidence on which T-Mobile relies before taking a view on the strength of VIP's case.

58. OFCOM submits that VIP's request for interim relief should be refused because VIP has failed to establish a case on urgency and serious and irreparable damage. OFCOM draws the Tribunal's attention to the following: on 9 November 2006 VIP served unsigned witness statements from Mr McCabe, Mr Frost, and Mr Browning under a covering letter that the signed versions would follow and that the unsigned versions had been approved by their respective makers. Signed versions were not supplied until 21 November 2006 which in respect of Mr Frost's witness statement introduced very significant amendments to the unsigned version including:

i. That Mr Frost has withdrawn the assertion that he will have to wind up the company if he does not perceive that a decision or any tangible result can be achieved within a reasonable timeframe and states instead that if he does not so perceive then the company has no viable future.

ii. That Mr Frost has withdrawn the assertion that it would not be possible to resurrect VIP commercially if interim relief was not granted. Mr Frost's signed witness statement is inconsistent in this regard with the assertions in the request for interim relief.

iii. Mr Frost has deleted the reference to Mr McCabe and VIP On Line being unable to afford the litigation and to maintain the staff and premises, undermining the statements in paragraph 6 and 7 of the request for interim relief.

iv. Mr Frost has diluted his assessment of the effect of a successful interim relief application from that it *would* enable VIP to avoid winding up to that it *may* enable VIP to trade out of administration.

v. Mr Frost has deleted the reference to Mr McCabe owning VIP On Line.

59. OFCOM also draws the Tribunal's attention to deficiencies in the financial information provided in respect of Mr McCabe, VIP and VIP On Line, and VIP's failure to comply with the Tribunal's order of 13 December 2006 ordering disclosure of financial information. OFCOM submits that the most sensible approach in the circumstances is for the Tribunal to proceed on the simple basis that VIP On Line is funding and continues to be in a position to fund VIP's appeal in its entirety, that the alleged drain on VIP's resources simply does not arise and that any claim that its very existence is under threat must be treated with extreme caution. OFCOM submits that since VIP is not paying the costs of the appeal it clearly does not require interim relief in order to continue with the appeal, its sole interest in interim relief is to enable it to "trade out of administration" which is neither a relevant nor a sufficient basis for interim relief.

60. OFCOM submits that the purpose of interim relief should be to preserve the integrity of the appeal by preventing the applicant's irreversible decline. It is not to improve its commercial position unjustifiably.

61. OFCOM submits that the effect of interim relief on the public interest is plainly a "relevant circumstance" for the purposes of Rule 61(3) and if interim relief is granted in the form requested, it will give rise to a substantial risk of harm to the wider public interest and to consumers, which has been ignored by VIP.

62. OFCOM submits that its principal concern is that the unplanned and unconstrained operation of COMUG services will give rise immediately on reconnection to significant congestion on T-Mobile's network with a consequent immediate degradation in service for T-Mobile customers.

63. OFCOM submits that the risk of harm to the wider public interest if interim relief is granted outweighs the risk of damage to VIP if it is not.

64. OFCOM submits that VIP should not be afforded the opportunity to provide COMUG services whilst there remains real uncertainty as to their lawfulness

having regard to the *Floe II* judgment itself and to Ofcom's application for permission to appeal against that judgment.

65. OFCOM submits that if interim relief was granted to VIP it would distort competition because it would give VIP special dispensation to enter the market.

66. OFCOM submits that the purpose of interim relief is to preserve the status quo and it is accordingly legitimate for the Tribunal to take into account the adverse effect on T-Mobile if the application was granted in circumstances where there is no cross-undertaking in damages.

67. OFCOM accepts that VIP remains the correct appellant for the purposes of this appeal.

T-Mobile's submissions

68. T-Mobile submits that the evidence adduced by VIP does not support VIP's submission that the contract which VIP alleges it had with T-Mobile was for 4,000 SIMs. T-Mobile submits that the evidence presently available supports the submission that T-Mobile's specific authorisation was required for each tranche of SIMs and there was no open ended entitlement to 4,000 SIMs.

69. T-Mobile submits that the relief sought is not in respect of an order or direction of OFCOM, it is without precedent, falls outside the scope of the circumstances contemplated for grant of relief in the Tribunal's guidance and should not be ordered.

70. T-Mobile submits that the application suffers from exceptional delay.

71. T-Mobile submits that the status quo is that there has been no supply of SIMs or services by T-Mobile to VIP for the best part of four years; during this time VIP has been entirely dormant and cannot genuinely be said to have any goodwill as a going concern. T-Mobile submits that the relief does not seek to preserve conditions of competition, but radically to alter them. T-Mobile

submits that the Tribunal should consider the status quo at the time the application for interim relief was made and cites *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130 at page 140.

72. T-Mobile submits that the reality is that the request is now made after all this time on the basis that it is necessary to finance the present litigation, which is not a legitimate basis for grant of relief. T-Mobile submits that there is no precedent in English law or European jurisprudence to compel an intervening party to arrange its affairs in such a way as to provide funds to enable a litigant to pursue litigation, and refers the Tribunal to what the President said in *Albion* at the hearing held on 2 June 2004 (at pages 10 and 11 of the transcript of the hearing) and to *R. (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] I WLR 2600, CA. T-Mobile further submits that given that the right to pursue the proceedings has purportedly been transferred to the exclusive control of VIP On Line, it is not apparent that VIP should be incurring any legal expenses in connection with the litigation since the costs arising from the litigation have been indemnified by VIP On Line. T-Mobile further submits that the Assignment Agreement provides an indemnity in respect of VIP's costs in connection with the present case or was intended to do so and in such circumstances VIP's application cannot succeed.

73. On the question of who should be party to the proceedings, having regard to the Assignment Agreement and deed of rectification of that agreement, T-Mobile submits that there is no objection in principle for one party such as VIP On Line being substituted for another party such as VIP in appeal proceedings before the Tribunal in circumstances such as the present, pursuant to an agreement between them that such substitution should take place. T-Mobile submits that substitution is to be determined by the principles applying to standing – in particular whether the appellant has a sufficient interest in the appealed decision – and substitution of one appellant for another.

74. T-Mobile submits that VIP has assigned its right to continue the litigation to another party and cannot therefore make any application for interim relief.

75. T-Mobile submits that the relevant assignment agreement is the unrectified assignment agreement and that the deed of rectification dated 20 December 2006 is void *ab initio*.

76. T-Mobile submits that VIP has provided inadequate financial evidence as to how it has met other costs of its business over the past four years or as to any change in its or Mr McCabe's financial circumstances or of the financial circumstances of any other entity funding VIP. T-Mobile submits that any recent change in the financial position of VIP is a function of Mr McCabe's personal decision to invest less resources in VIP, which is a personal choice for him, but is not a basis on which interim relief should be granted against T-Mobile.

77. T-Mobile submits that there is no adequate evidence as to why Mr Browning is not being kept on. T-Mobile also submits that the evidence as to Mr Browning is inadequate in that there is no evidence that his skills are unique and wholly irreplaceable or that he could not be re-recruited if the business was resurrected in the future or as to how much time he has devoted to VIP over the past four years or as to his other employment and that given that VIP is not utilising GSM gateways it is implausible that the activities required of Mr Browning are currently extensive.

78. T-Mobile further submits that it is not a function of interim relief to provide a revenue opportunity for VIP. T-Mobile submits that the relief sought seeks to promote VIP into the only operating GSM gateway company with ten times the number of SIMs it previously had connected four years ago and with the potential for vastly greater profits.

79. T-Mobile distinguishes *Albion* since in that case the order giving rise to the relief in the first place was made with the consent of Dŵr Cymru, whereas T-Mobile has given no consent.

80. T-Mobile submits that the Tribunal's approach should broadly follow that articulated in *Genzyme* at [79] but that since VIP's application directly engages the intervener's private interests and seeks no relief against OFCOM, the relief that VIP seeks is no different to the relief that VIP could potentially seek in the civil courts. T-Mobile refers to *Genzyme* at [37] and submits that in this case the approach set out in *Genzyme* must be adapted to ensure that sufficient emphasis is placed on the effect of the relief on the party being asked to comply with the order, namely T-Mobile, and that it is therefore relevant to have regard to the principles established in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396.

81. T-Mobile submits that because the relief sought takes the form and has the effect of a mandatory injunction, the Tribunal must demand a high degree of assurance that the injunction would be granted at trial: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd* [1971] Ch 233*; Shepherd Homes Ltd v. Sandham* [1971] Ch 340. T-Mobile submits that it is only in the most exceptional circumstances that a mandatory order can be made on an interim application: see *Parker v. Camden London Borough Council* [1986] 1 Ch 162. This case is not such an exceptional case.

82. T-Mobile submits that the absence of an undertaking in damages is a factor which itself weighs heavily against the grant of relief.

83. T-Mobile submits that a relevant factor to take into account in considering whether interim relief is to be granted is that VIP's case is inherently extremely weak in that T-Mobile had an objective justification to refuse supply.

84. T-Mobile submits that the effect of the relief, if granted, on T-Mobile would be extremely serious financial loss which could amount to £12 million per month or £150 million per year and would cause serious damage to T-Mobile's business. T-Mobile submits that there is no obligation even on a dominant undertaking to supply at a loss and refers to Case T-5/97 *Industrie*

des Poudres Sphériques SA v. European Commission [2000] ECR II-3755 at [179].

85. T-Mobile submits that the effect of the relief, if granted, would include congestion on T-Mobile's network, and the obvious but unquantifiable damage to its commercial reputation that would result. T-Mobile submits that the grant of the relief would harm T-Mobile's customers who would suffer the effects of congestion – more dropped calls and inability to call. T-Mobile submits that the operation of GSM gateways by VIP would impact disproportionately on T-Mobile's legitimate customers because the way in which GSM gateways work is that they effectively latch onto and hog the spectrum.

86. T-Mobile submits that the relief sought by VIP would grossly distort competition, as, if it was confined to VIP, it would promote VIP to the privileged status of being the only operator of GSM gateway services in the United Kingdom so that it would be unfettered by competition from rivals until final judgment in the appeal.

87. T-Mobile submits that VIP could have objected to and/or appealed the imposition of the stay in this case; its failure to do so cannot support an application for interim relief at this stage.

88. T-Mobile submits that the relief would undermine national security and crime prevention, since GSM gateways interfere with the proper functioning of caller location information and calling line identification.

89. T-Mobile submits that it would be inappropriate for the Tribunal to order interim relief where there is even a small risk that T-Mobile may be put in a position of committing a criminal act and T-Mobile believes that an order for interim relief would have the effect of requiring it to commit a criminal act.

90. T-Mobile submits that VIP has not come to the Tribunal "with clean hands" and that its failing in this regard is a feature which should be taken into

account in assessing VIP's application. The particular factors referred to by T-Mobile in this regard are VIP's failure to disclose the assignment; VIP's reliance on unsigned witness evidence in respect of which an express assurance was provided that the statements had been approved by the respective witnesses, when one key witness statement was significantly altered in its signed form and does not support the application which is predicated on the unsigned witness statement; and the failure of Mr McCabe to make full and frank disclosure of his financial position and other business interests when the application for interim relief squarely puts these in issue.

91. T-Mobile submits that it is inappropriate to grant interim relief on the basis of VIP's business plan which provides for Mr McCabe to receive payments.

92. T-Mobile submits that VIP must establish that at substantive trial it would be entitled to a final injunction of the sort that it now seeks on an interim basis. T-Mobile submits that VIP cannot establish this, since on VIP's best case the contract was for only 18 months and at the end of that period T-Mobile would have been objectively justified in not renewing the contract having regard to the financial implications suffered by T-Mobile if it renewed the contract and its business focus including the roll-out of 3G.

V TRIBUNAL ANALYSIS

The Tribunal's power to grant interim relief

93. The power of the Tribunal to make interim orders and to take interim measures is contained in Rule 61 of the Tribunal Rules. Rule 61(1) to (6) provides as follows:

> **61.** - (1) The Tribunal may make an order on an interim basis -
>
> (a) suspending in whole or part the effect of any decision which is the subject matter of proceedings before it;
>
> (b) in the case of an appeal under section 46 or 47 of the 1998 Act, varying the conditions or obligations attached to an exemption;
>
> (c) granting any remedy which the Tribunal would have the power to grant in its final decision.
>
> (2) Without prejudice to the generality of the foregoing, if the Tribunal considers that it is necessary as a matter of urgency for the purpose of -

(a) preventing serious, irreparable damage to a particular person or category of person, or

(b) protecting the public interest,

the Tribunal may give such directions as it considers appropriate for that purpose.

(3) The Tribunal shall exercise its power under this rule taking into account all the relevant circumstances, including -

(a) the urgency of the matter;

(b) the effect on the party making the request if the relief sought is not granted; and

(c) the effect on competition if the relief is granted.

(4) Any order or direction under this rule is subject to the Tribunal's further order, direction or final decision.

(5) A party shall apply for an order or a direction under paragraphs (1) and (2) by sending a request for interim relief in the form required by paragraph (6) to the Registrar.

(6) The request for interim relief shall state -

(a) the subject matter of the proceedings;

(b) in the case of a request for a direction pursuant to paragraph (2), the circumstances giving rise to the urgency;

(c) the factual and legal grounds establishing a prima facie case for the granting of interim relief by the Tribunal;

(d) the relief sought;

(e) if no appeal or application has been made in accordance with rule 8, in respect of a decision which is the subject of the request for interim relief, an outline of the information required by rule 8(4).

94. The power of the Tribunal to make interim orders and to take interim measures is wide and is not restricted to cases where the regulator has made a decision which has an effect on an undertaking as distinct from a non-infringement decision which does not have such a consequence. However the Tribunal's detailed consideration of the principles has to date been confined, first, to cases where there has been an infringement decision by the regulator followed by a direction given by the regulator which is being appealed by the affected undertaking and the affected undertaking applies to the Tribunal for a suspension of the direction (*Napp* and *Genzyme*); and second, to a case where an interim order is sought pending the hearing of an appeal against a refusal by the regulator to grant interim measures and the application for the interim order is initially disposed of by the undertaking who would be affected by the interim measure if it was made consenting to the interim order being made

against it (*Albion*). In the latter case subsequent to the consent order being made, the factual position altered and the Tribunal substituted replacement interim orders for the consent order it had initially made.

95. It is important to contrast the circumstances of the present application by VIP with the circumstances of *Napp, Genzyme* and *Albion*. First, in the present case the decision the subject matter of the appeal is a non-infringement decision. Second, VIP, which is applying for interim measures, is the complainant: VIP is not the undertaking against whom OFCOM would have made any direction had it found there to be an infringement. Third T-Mobile, which is the undertaking against whom any direction would be made, has not consented to any interim measure being made against it and as an intervenor supports OFCOM in its non-infringement decision.

96. In *Napp* at [45] - [46] the Tribunal indicated, subject to further argument, that in a case where the Director makes mandatory directions of the kind made in that case, a test along the lines that the applicant, being the undertaking affected by those directions, has to show that its appeal is not manifestly unfounded, may well be the appropriate test to apply. However the Tribunal, emphasised that "[c]ircumstances, however, alter cases and there is no hard and fast rule". In *Genzyme* the Director had in its decision found that Genzyme had abused a dominant position in the market for the supply of drugs for the treatment of Gaucher disease in the United Kingdom. Genzyme appealed to the Tribunal against this finding and submitted that the operation of the direction pending the outcome of the appeal would cause Genzyme serious and irreparable damage but that its suspension would not cause any material damage to competition in the United Kingdom. In its application to suspend the directions it offered to continue to supply Healthcare at Home Limited ("HH") under the present arrangements (as existed at that time), and to put the NHS in the same position it would have been in if the Directions had not been suspended in the event that Genzyme's appeal was ultimately unsuccessful.

97. The Tribunal considered that the evidence that Genzyme would have needed substantially to modify its business policy was a relevant factor when considering whether the direction should be suspended. The Tribunal considered that whether it should suspend the directions depended on a balancing of interests, taking into account all relevant circumstances including the effect on Genzyme if no suspension was ordered, and the effect on competition if a suspension was ordered. In considering the effect on competition it focused on the effect on HH, on the patients currently served by HH, and on the hospitals, if a suspension was granted. In respect of HH the Tribunal was satisfied that there was a serious risk of HH exiting the market if nothing was done to protect the position in the meantime pending the outcome of the appeal.

98. It has been urged upon us by T-Mobile that the appropriate test in this case is not whether the appeal is manifestly unfounded but that the Tribunal must be satisfied that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried." (*American Cyanamid*, cited above, per Lord Diplock at 407G). We are satisfied that whichever is the correct test (which we do not have to decide for the purposes of this application) the issues in the VIP appeal are such that the appeal itself is not manifestly unfounded and there is a serious question to be tried in the sense meant by Lord Diplock.

99. But in the context of the present application it is not only the appeal itself that must be considered, but also the interim relief which is now being sought. The interim relief here sought is to order T-Mobile now to provide 4,000 SIMs to VIP at a call tariff of 2 pence per minute. This application is being made over four years after the arrangements were initially made between T-Mobile and VIP. VIP alleges a contract exists but has not been able to produce any written document and the witness evidence it has produced as to the terms of the contract is confused. VIP's evidence at its best is that the contract had an eighteen-month duration. There is contradictory evidence before us as to whether the contract was for 200 SIMs and for the supply of such further SIMs as T-Mobile authorised or was a contract pursuant to which VIP was entitled to call for further supplies of SIMs (a call-off contract). VIP asserts that it is

entitled now to 4,000 SIMs at 2 pence per minute but has provided no evidence to support this assertion.

100. It seems to us that the relevant question we have to consider is, if the appeal was now being heard and if VIP was successful in that appeal, on the evidence now available to the Tribunal would the relief now being claimed on an interim basis be one of the options which the Tribunal could properly consider as an appropriate order to make on the disposal of this appeal. In that sense, does the present application rest on a sound foundation or is it manifestly unfounded? We refer to this below as the threshold test.

101. We do not consider that VIP has provided any sufficient evidence to support its application. In order to bring this application VIP would need to provide at least prima facie evidence that it had a contractual right to the delivery up of 4,000 SIMs at 2 pence per minute at the date the application is made. VIP has not produced any evidence as to a contractual right to 4,000 SIMs at any time, or as to the terms as to price per minute for such a supply of SIMs and moreover has not produced any evidence that the contract would have still been in existence in 2007, irrespective of competition law issues. In these circumstances we consider that this application is manifestly unfounded. If the *American Cyanamid* test is the correct threshold test then the application would equally fail to meet that test.

102. In its submissions for showing that the application is not manifestly unfounded, VIP has relied on paragraph 224 of the Decision where it is stated that "T-Mobile has confirmed that when it provided SIMs to VIP, it understood that these would be used by VIP in Commercial Multi-User Gateways". However this can at best only be a starting point and it does not meet the need for VIP also to establish the other features to which we refer above in order to succeed in obtaining at the final hearing the relief it now seeks on an interim basis. For this interim application VIP needs at the least to provide evidence which would support such an outcome and it has not done so.

103. We accept the submission of OFCOM that this application was doomed to fail. VIP relied on the Tribunal's previous indication that the substantive appeal was not manifestly unfounded. It should be appreciated from what we have said above that there is a significant difference between the appeal itself not being manifestly unfounded and this application not being manifestly unfounded.

104. We were referred to *Hounslow LBC v. Twickenham* and *Shepherd Homes v. Sandham*, both cited above, and it was submitted that the principles set out in those cases concerning the granting of mandatory injunctions at an interim stage equally applied to making an order under Rule 61 of the Tribunal Rules. It is not necessary for the purposes of this decision for us to come to a conclusion as to the merits of those submissions. However it seems to us that there may be significant differences between the circumstances of those cases and a competition case where the public interest including the position of consumers is of paramount importance.

The appropriateness of granting relief

105. Although, having concluded the threshold test for interim relief is not met, it is not necessary for the Tribunal to turn to the other matters which have been presented to us, since this application has been argued fully we address below the question of whether it would have been appropriate to grant interim relief in the circumstances of this case in the event that the threshold test had been met.

106. Underpinning any application for interim relief is the urgency of the matter. We have been addressed at length about this factor.

107. The application was not made until 9 November 2006 although the supply was disconnected on 31 January 2003, VIP having had notice of T-Mobile's intention to cease supply since 14 January 2003. VIP subsequently ceased trading and since 18 August 2005 has been in administration. It has in the interim made all but one of its staff redundant and the final member of staff is about to leave. According to the evidence of Mr McCabe it is a skeleton

company but it has continued to lease premises, and has retained the equipment needed to recommence its business, and Mr Browning remains employed on a part-time basis. However it does not itself have the finance to restart its business and is reliant on either Mr McCabe or VIP On-Line for this finance. According to VIP's submissions this appeal is being funded by VIP On Line. The evidence is confused as to whether if this application is unsuccessful the administrator will continue the present appeal, or whether VIP will be put into liquidation (the liquidator would then have to decide whether or not to continue the appeal) or whether VIP will be removed from the register at Companies House with the consequence that the appeal would come to an end. However what is clear from the evidence is that the administrator has serious concerns about the continued funding of this appeal and that such funding might be dependent on VIP's business being revived.

108. The evidence and submissions on behalf of VIP as to why this application meets the test of urgency was somewhat confused and inconsistent. It was submitted by VIP that the springboard for this application was the judgment in *Floe II* on 31 August 2006 and the lifting of the stay of the VIP proceedings which meant that legal costs were now being incurred. However it must always have been anticipated that if the VIP appeal was to proceed to a hearing those costs would be incurred. It does not seem to us that the incurring of legal costs can be a proper basis for making an application of the present kind for interim relief, since the purpose of an application under Rule 61 of the Tribunal Rules is to maintain the status quo as far as competition is concerned in the market – to preserve the conditions of competition: its purpose is not to provide funds for legal actions or to give encouragement or comfort to potential funders (although a successful application may have this effect).

109. Moreover VIP exited the market in January 2003 and all the other competitors had been disconnected during the following few months. So there has been no competition in this market since 2003 and accordingly there is now nothing to maintain or preserve and there is no urgency which needs to be dealt with in that respect by an order for interim relief. The position may well have been

very different had VIP made the application in January 2003. Although VIP may have had legitimate commercial reasons why it decided to stop trading instead of applying for interim relief in January 2003, VIP cannot use these reasons as an excuse for not being able to make out a case of urgency now. Nor can it properly use the excuse of the stay as a reason for not applying for interim relief, as such an application could have been made notwithstanding the stay.

110. In exercising our power under the rule we must take account of all the relevant circumstances. T-Mobile is the party affected by the proposed interim relief. When considering the interim relief application the Tribunal considers that it is relevant in the balancing of interests to consider the effect on T-Mobile if the application is granted and the effect on competition if the relief is not granted. The position of VIP is, of course, one of the factors to be taken into account when considering the effect on competition.

111. T-Mobile has submitted evidence that it would be substantially prejudiced if the interim relief sought was granted to VIP. It submits that to reinstate a supply to VIP would involve development of its systems and a transfer of its resources from its present business objectives. It further submits that it is a loss making company and also that if compelled to supply VIP on the terms requested (i.e. at a price of 2 pence per minute) those terms of supply would result in a significant financial loss for T-Mobile.

112. T-Mobile and OFCOM also refer us to the uncertainty of the lawfulness of COMUG services which was not resolved by the judgment in *Floe II*. In any event they are seeking permission to appeal from that judgment. They submit that this question of lawfulness is a significant factor against granting the interim relief sought.

113. There is also evidence before us from OFCOM and T-Mobile that the commercial use of GSM gateways causes congestion and degradation of service to other customers of T-Mobile and that there are other public interest considerations which should be taken into account in the balancing of

interests. VIP does not accept that these considerations are obstacles to the granting of the interim relief which it seeks and submits that they either do not exist or their effect is being grossly exaggerated. However VIP's evidence is of a general and unspecific nature and does not meet head on or rebut the concerns set out in OFCOM's and T-Mobile's evidence. VIP accepts that some of OFCOM's and T-Mobile's concerns would need to be addressed before a supply could be reinstated and that if the Tribunal were to make an order it could not be put into effect until these concerns had been satisfactorily resolved. It seems to the Tribunal that it would be inappropriate for the Tribunal on that basis to make an interim order in the terms sought particularly since in so doing the Tribunal would not be fully considering the public interest aspects of the application.

114. It is relevant in this regard to note that notwithstanding the time period which has elapsed since January 2003 when the supply was disconnected, or more recently the time period since the judgment in *Floe II* in August 2006, or since the making of this application in November 2006, there is no evidence before the Tribunal to suggest that VIP has taken active steps to seek to resolve these concerns with the other relevant parties including T-Mobile and OFCOM. It seems to the Tribunal that in the circumstances of this application, and having regard to the necessity for urgency and the factors which must be taken into account in balancing the opposing interests, VIP should have sought to resolve these issues before or in conjunction with making the application, or otherwise should have provided evidence as to why these concerns are unfounded and can be ignored by the Tribunal rather than adducing evidence of a nebulous and general nature as to these important matters.

115. Turning to the position of VIP, if the order is not made there will be no immediate effect on the market since VIP has not been in the market for four years. If the order was made then VIP would be provided with a unique business opportunity, being the only GSM gateway provider which would then be legitimately providing a service to customers. In that sense the granting of this application might distort competition.

116. It seems to us, taking all the circumstances into account, that it is clear that it would not be appropriate to make the order sought by VIP even if the threshold test for the granting of such relief had been met.

Ancillary matters

117. There are two further points on which we have been addressed.

118. First, OFCOM and T-Mobile referred us to the equitable principle of "clean hands". Having regard to our decision we need not consider that aspect further.

119. Second, T-Mobile submitted that having regard to the Assignment Agreement VIP did not have a sufficient interest to make the application. T-Mobile submitted that VIP On Line should be joined as a party to the appeal or should be substituted for VIP as the appellant. However, there is no application before us to achieve this. As we have explained above we find the evidence in relation to the financing of this appeal confusing and the evidence in relation to the Assignment Agreement is unsatisfactory. At an earlier hearing it transpired that the wording of the Assignment Agreement did not reflect the intentions of the parties and following that hearing a deed of rectification was entered into, but the true construction of the Assignment Agreement remains unclear, as does the effect of the deed of rectification. We also note that the evidence of Mr David Green is unclear and incomplete in particular having regard to the changes in evidence between his first and second witness statements. On the material presently available to us we have concluded that VIP has a sufficient interest to bring the appeal.

Marion Simmons QC Michael Davey Sheila Hewitt

Charles Dhanowa 28 February 2007
Registrar