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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1152/8/3/10 (IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd July 2014

Before:
THE HON. MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED

Applicant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC
VIRGIN MEDIA, INC
THE FOOTBALL ASSOCIATION PREMIER LEAGUE
TOP UP TV EUROPE LIMITED
EE LIMITED

Interveners

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HEARING

APPEARANCES

Mr. James Flynn QC, Mr. Meredith Pickford and Mr. David Scannell (instructed by Herbert Smith Freehills LLP) appeared for British Sky Broadcasting Limited.

Mr. Mark Howard QC, Mr. Gerry Facenna and Miss Sarah Ford (instructed by BT Legal appeared for British Telecommunications PLC.)

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

1 THE PRESIDENT: Good morning. There is quite a lot of confidential material scattered about in
2 submissions, witness statements and exhibits, and I am sure everyone will take care when
3 addressing the Tribunal in open session not to refer to those explicitly, but direct my
4 attention to any paragraph or sentence that needs reference to. If we need to go into closed
5 session, if counsel could try and keep that part of their submissions to the end and highlight
6 that there may be something you want to come back to, and we might need to go into closed
7 session at that point, if it proves necessary to do so.

8 In that regard, I have to say that sometimes the confidentiality claims seem a little bit broad.
9 In the BT application I was slightly puzzled, if one turns to the actual application itself, in
10 bundle 1, Mr. Howard, p.9, para.41, to see the second sentence there is marked confidential.
11 It is a fairly fundamental point, I think, to the case being advanced. In fact, if one looks in
12 that submission, I do wonder if the statement made there really is confidential in that way.
13 That is perhaps something you can consider and take instructions on.

14 I think, if one looks at other parts of what is said, that is said in rather more detail in an open
15 way.

16 MR. HOWARD: I think, my Lord, that sentence, *per se*, there is a question mark as to whether
17 that should be confidential. There is an element of the position which is confidential, which
18 is developed later on. I think that is really what it amounts to.

19 THE PRESIDENT: That may be, but that statement, as such, is, it seems to me, fundamental to
20 the way in which you put your case. If that is confidential that does cause some problems.

21 MR. HOWARD: My Lord, you will see that it says "Confidential Sky and BT" there.

22 THE PRESIDENT: It does not on mine, it says ----

23 MR. HOWARD: The point is that at the time that that was claimed it was confidential because of
24 relationships with third parties, namely the DTT capacity provider. That is essentially the
25 point. That may have moved on since.

26 THE PRESIDENT: Perhaps you can get instructions on that.

27 MR. HOWARD: I would suggest, in fact, when one looks at the claims on both sides of
28 confidentiality, they are, in all probability, far too broad. There is much in the Sky one
29 which apparently cannot properly be confidential. The problem is that we have only got a
30 relatively short time, and I am not sure that anybody wants to have an argument about it.
31 As somebody who is not, as it were, a frequent appearer before this Tribunal, I would
32 respectfully suggest that perhaps the way in which these things are being dealt with, with
33 these rather over-broad claims to confidentiality, may be problematic. If one were in the

1 High Court I am not sure that people could make these claims and cover things up in this
2 way.

3 THE PRESIDENT: They do sometimes, and one has the same problem.

4 MR. HOWARD: Yes, I think it is more rigorous.

5 THE PRESIDENT: I was just going to highlight that one, because I think that may feature very
6 specifically in what we are going to be hearing about.

7 MR. HOWARD: That one is not confidential any longer. Indeed, I am going to be making that
8 point in my submissions.

9 THE PRESIDENT: That is why I drew attention to it.

10 MR. HOWARD: In the course of my submissions, there is going to be very little difficulty
11 created by our claims to confidentiality. So far as there are points I want to draw your
12 attention to where things are confidential, I will refer you to the relevant paragraphs. The
13 main point is one which is not confidential.

14 THE PRESIDENT: Yes, thank you.

15 MR. HOWARD: I think, without further ado, I think you know who represents who, my Lord.
16 As you know, this is BT's application to amend the definition of "Qualifying Platform" in
17 para.2 of the schedule to the Tribunal's interim relief order dated 29th April 2010. Just to
18 set briefly the context ----

19 THE PRESIDENT: Before you do that, I know who is who. Mr. Holmes, can I just clarify, if I
20 may, Ofcom, as I understand it, are not seeking to advance any positive case - is that right?

21 MR. HOLMES: Yes, my Lord, that is correct. We are here to assist the Tribunal, as necessary.

22 THE PRESIDENT: I am grateful for that. Can I then ask you for such assistance at the outset in
23 something that will help me and may assist others. As I understand it, Ofcom is engaged in
24 two exercises at the moment. One is that there is BT's complaint on the competition
25 element, which was made in about May 2013, which Ofcom is investigating. I think I saw
26 in one of the witness statements the suggestion that Ofcom, I think it was that of
27 Mr. Conyers, would indicate its position by August. Is that right and, if not, what is the
28 current state of play of that?

29 MR. HOLMES: As you are aware, my Lord, there is an application for interim relief by BT in
30 those proceedings as well, which Ofcom considered and took a decision rejecting under s.35
31 of the Competition Act.

32 THE PRESIDENT: That was in July of last year?

1 MR. HOLMES: Yes, my Lord. Since then, Ofcom has been considering the complaint and is
2 anticipating that it will proceed to a decision about how to proceed with the case later
3 during the course of this year.

4 THE PRESIDENT: A decision about how to proceed with the case?

5 MR. HOLMES: Yes, my Lord, whether to proceed to a statement of objections or not.

6 THE PRESIDENT: That is by the end of December.

7 MR. HOLMES: In the autumn, my Lord, yes.

8 THE PRESIDENT: Then secondly and quite separately, there is a review of the WMO remedy?

9 MR. HOLMES: Yes.

10 THE PRESIDENT: Which I think you announced, “you” being Ofcom, obviously, in about April
11 of this year.

12 MR. HOLMES: Yes, April 16th, my Lord.

13 THE PRESIDENT: Yes, and what is the anticipated progress of that?

14 MR. HOLMES: My Lord, a team has been assembled within Ofcom which is looking at the
15 WMO remedy and considering market developments that have already taken place, or are
16 anticipated, to see what implications they might have. Ofcom is planning to publish a
17 consultation statement by the end of this year. It has already held initial meetings with key
18 industry parties, including those present here today to discuss the scope of the review.
19 Analysis is under way and that will be pulled together in a consultation statement to be
20 published before the end of the year.

21 THE PRESIDENT: So you are not saying the autumn, you are saying by end of December.

22 MR. HOLMES: Yes, my Lord.

23 THE PRESIDENT: And then it will proceed from that? So that won’t conclude until some time
24 in 2015. Is that correct?

25 MR. HOLMES: Yes, that’s correct, my Lord.

26 THE PRESIDENT: Well into the spring, at least?

27 MR. HOLMES: Yes, after the consultation the responses will need to be considered and Ofcom
28 will have to decide what to do next in the light of the responses that it has received.

29 THE PRESIDENT: And the purpose of that, is this right, as you explained it is to consider the
30 appropriateness or otherwise of the WMO remedy in the light of market developments since
31 2010 and anticipated going forward?

32 MR. HOLMES: Yes, both the appropriateness of it and, if it is deemed appropriate, how it might
33 be required to be appropriate in the light of developments.

1 THE PRESIDENT: That is very helpful, thank you very much. Sorry, Mr. Howard, but I think it
2 was helpful to clarify that.

3 MR. HOWARD: Yes, my Lord. Just while we are on that before I launch in, it would seem
4 tolerably clear that the WMO review will not reach any conclusion probably, one would
5 think, at least for a year from now. It would seem fairly optimistic to think much before this
6 time next year, and it may well be later. Similarly, the Competition Act complaint, which
7 we say is an entirely separate matter, in the event that that goes forward to a statement of
8 objection, which one can honestly see that that has a fairly ----

9 THE PRESIDENT: Yes, one can see that would take much longer.

10 MR. HOWARD: --elongated timetable, and I will explain when I get there why neither of these
11 matters actually should have any impact on the issue that you are dealing with today.
12 You, my Lord, are very familiar I am sure, having read the papers, with the context, that the
13 Court of Appeal noted in its Judgment that live television broadcasting of major sports
14 events, such as Premier League football – particularly Premier League football – is big
15 business. Sky has obtained the rights to broadcast live many of those events. Two of its
16 channels are basically the Premier League channels, as I understand it, Sky Sports 1 and
17 Sky Sports 2 are particularly important. Sky has market power in the wholesale and retail
18 market for packages, including those channels.
19 Ofcom considers, and considered at the time of its Pay TV statement, that in order to ensure
20 fair and effective competition it was necessary to require that Sky Sports 1 and Sky Sports 2
21 were offered to retailers on platforms other than Sky's and at prices determined by Ofcom.
22 That was achieved by Ofcom's 31st March 2010 Pay TV statement by incorporating in
23 Sky's licence what is called a 'Wholesale Must Offer Obligation' or, in the terminology that
24 one has now become familiar with, 'WMO', which it regarded as the most appropriate way
25 to ensure fair and effective competition.
26 That remedy was clearly intended to be pro-competitive, beneficial and industry-wide. Its
27 aim was to increase competition and to bring about greater choice and innovation for the
28 benefit of consumers.
29 An important point to note is that the WMO applies to all participants in the market. It does
30 not just apply to a sub-set of participants as reading Sky's current submissions one might
31 think.
32 My Lord, it might be useful – although it is not in the bundles for the hearing I think you
33 should have the Pay TV statement. If you do not, it does not matter.

1 THE PRESIDENT: I can have it brought in if you want, but I do not have it here.

2 MR. HOWARD: It does not matter, because I am sure you are familiar with what ----

3 THE PRESIDENT: I am not familiar, I have not read it.

4 MR. HOWARD: What I meant was familiar from the Court of Appeal's Judgment, and the
5 debate taking place here, because I do not think you actually need the statement at the
6 moment. The way the WMO was to work is an additional term was to be incorporated into
7 Sky's licence and that was the Wholesale Must Offer. The essential term was that Sky was
8 to offer the programme content to any person for retail by that person to residential
9 consumers on qualifying platforms, and for present purposes the definition of 'Qualifying
10 Platform' was any platform which was used for the distribution of programmes to
11 residential customers in the UK, other than Sky's platforms.

12 We have a copy here if that will assist. You can see the relevant part of it for these
13 purposes is at para 12.14. I am looking at the non-confidential version of it, that is what we
14 have been given. So you can see 14(a) is the WMO offer, and it is at the end you get a
15 definition of 'Qualifying Platform'.

16 THE PRESIDENT: Yes.

17 MR. HOWARD: Against that background, in April 2010, some weeks after the publication of the
18 Pay TV statement, Sky, having determined to appeal the Ofcom Decision, applied to the
19 Tribunal for interim relief pending the determination of the appeal. What Sky sought to do
20 was to suspend the WMO in its entirety. It claimed that it would be severely and
21 irreparably prejudiced if it was required to comply with the conditions prior to
22 determination of its appeal. Essentially, it claimed that it would suffer a far reaching
23 intervention into its business which would be difficult fully to reverse and causing it
24 damage for which it would not be compensated. If you take bundle 1 part A and you turn to
25 exhibit 1, you should have the application for interim relief.

26 THE PRESIDENT: Yes.

27 MR. HOWARD: But if you turn in that to para.11 there is a summary of the application and you
28 can see that in the body of the paragraph they make the point which I have just made in the
29 second sentence:

30 "The conditions represent a far reaching intervention into the business which by its
31 nature will be difficult fully to reverse, which is likely to cause damage which will be
32 unable to repair and which will ... not be compensated in the event it is successful in
33 the appeal".

1 And if you look at what they ran were six points, and without reading each of them out, the
2 first point was that once they have supplied a retailer their brand would subsequently be
3 damaged if they sought to withdraw supply to that retailer, so that is in other words just a
4 general point about “If I have to supply, am forced to supply, and then I want to renegotiate
5 later my bargaining position is altered”.

6 The second was if the competition is on the basis of the prices set by Ofcom it might lower
7 consumers’ perception of the value of their channels and make it difficult to return to
8 wholesale prices at the higher level that they would like.

9 Thirdly – and this is an important point – this was the point they were making about internet
10 as a means of distribution. And what they were concerned about, as they say here, was that
11 the extension of the WMO obligation to distribution of Sky’s channels via the open internet
12 carried risk. IPTV with which we are concerned, is something different, that is not the open
13 internet.

14 THE PRESIDENT: Yes, encrypted TV.

15 MR. HOWARD: Exactly, and so this is what they were concerned about was that there would be
16 security leaks via the open internet. So, that was their third point. The fourth point – so you
17 see the first two points are just generic points about having to supply people that they do not
18 want to supply to on the terms fixed by Ofcom as opposed to their negotiating them; third
19 point, the internet. The fourth point is another generic point which is simply saying, “If we
20 lose customers to these people it would be very difficult to win them back”. Again, that is
21 just a generic point.

22 Then the fifth and six points, the fifth point was that they would suffer loss from selling at
23 lower prices than they would otherwise like. Of course, that is plainly not something that is
24 'compensatable'. And the sixth was it made it difficult for them to prepare their appeal.

25 Now, the burden of showing that interim relief was necessary as a matter of urgency for the
26 purpose of preventing serious and irreparable harm, plainly lay on Sky, and I do not think
27 that is something that is controversial.

28 Now, what happened was, as you know, the application was ultimately dealt with by
29 consent and the consent order is in -----

30 THE PRESIDENT: I have got it.

31 MR. HOWARD: I am sorry?

32 THE PRESIDENT: I have got it.

1 MR. HOWARD: Yes, well, you have got it there, the consent order – what you can see, in the
2 preamble there are various undertakings including an undertaking by BT, Virgin and Top
3 Up TV essentially to pay the difference into an escrow account between the WMO rates and
4 the so called “rate card” prices. And then para.1, one can see Ofcom’s decision to insert the
5 conditions into the licenses is implemented in respect of BT, Top Up TV and Virgin,
6 “subject to the above undertakings in the attached schedule, but is otherwise
7 suspended until further order”.

8 So, so far as BT is concerned, the order implements it.

9 THE PRESIDENT: Well, in a limited way.

10 MR. HOWARD: Well, in the way provided, yes. Now, the effect of this was that despite what
11 Sky were saying in their application, ie the serious and irreparable harm they were putting
12 forward, the WMO applied as you say, on the terms of this order. Now, in the Real
13 judgment the Tribunal considered the effect of this, of what was going on there, and you
14 should have that, it is in various places, but it is in volume 1 of the authorities.

15 THE PRESIDENT: When you say “volume 1” of the authorities we have only got one volume.

16 MR. HOWARD: Well, I have two volumes. I do not understand why you only have one. (It is a
17 little large, it appears).

18 THE PRESIDENT: It has got 17, no, 19 -----

19 MR. HOWARD: Yes, it is exactly the same, it is just somebody has helpfully -----

20 THE PRESIDENT: It goes into two.

21 MR. HOWARD: – put mine into two. Right. The relevant authority that we are concerned with
22 at the moment is at tab.11.

23 THE PRESIDENT: Yes.

24 MR. HOWARD: And the relevant – this was an application by somebody who was not present at
25 the original application, that is David Henry Real Digital EPG Services.

26 THE PRESIDENT: Yes.

27 MR. HOWARD: And the application was what Mr. Justice Barling at para.22 described as an
28 “me too application”, so at 22 he says in the third sentence:

29 “ ... I do not need to deal with these allegations because, I have said, the real basis of
30 the application is “Me too!” In other words if BT [and the others] have been put in a
31 position where they can negotiate a wholesale supply agreement for the channels in
32 question from Sky within the framework of the WMO, why should REAL not have
33 the same opportunity?”

1 And then at 24, we actually need to see 23.

2 THE PRESIDENT: Which is Sky's submission.

3 MR. HOWARD: Sky's submission was that they were entitled to run a whole lot of arguments
4 about why this should not apply. And he then says at 24:

5 "This argument has little force in the light of the Interim Order itself. The effect of
6 that Order is that, pending final resolution of Sky's main appeal, a number of major
7 and well-established competitor companies have been given the opportunity to take
8 advantage of the WMO in order to obtain wholesale supply of the channels in question
9 from Sky, subject to certain monetary safeguards to protect Sky against loss of the
10 price differential should its appeal be successful. By agreeing to these terms Sky was
11 prepared to, and almost certainly will, suffer the very adverse effects which formed
12 the main foundation for its application for interim relief, should its appeal succeed and
13 supply of the channels to those companies be withdrawn. Given the size and nature of
14 the companies which are already beneficiaries of the Interim Order compared with the
15 status of REAL, and given the head start in launching Pay-TV services which these
16 undertakings now enjoy compared with any retail service REAL might ultimately be
17 in a position to offer within the" -----

18 THE PRESIDENT: No, no. We need that. That is about REAL, was it not?

19 MR. HOWARD: No, that is about REAL. No, but the point is what – there is an important point
20 there. What you are making is that, here, is that it would only be relevant to consider if Sky
21 were able to show some incremental damage which was serious and irreparable over and
22 above that which they suffered by reason of the WMO order.

23 THE PRESIDENT: Yes.

24 MR. HOWARD: Now, I will come back to that in a moment. Can we go back to the order.

25 THE PRESIDENT: Yes.

26 MR. HOWARD: Now, what the order did in schedule 2, two things, sorry, the schedule.

27 THE PRESIDENT: The schedule.

28 MR. HOWARD: Right, sorry. There were two things of course that the order was doing. One is
29 that WMO applied to any person whereas what the CAT had done was to suspend the
30 WMO for parties other than those who were immediately before it, BT, Virgin and Top Up
31 TV. That was one change from the WMO, and that is why Mr. Henry had to come, make
32 his application at which essentially the CAT was saying "subject to satisfying other criteria"
33 would be allowed.

1 THE PRESIDENT: Yes.

2 MR. HOWARD: In other words, other parties could come along and put themselves in the same
3 position. Now, the definition of “Qualifying Platform” was then in para.2 of the schedule
4 and one can see that it means via DTT in the case of BT, Virgin and Top Up TV and via its
5 existing cable platform in the case of Virgin with all parties having liberty to apply.
6 The way in which the buyer, DTT, in the case if those three companies, and via its existing
7 cable platform in the case of Virgin, those represented the means by which those
8 broadcasters or retailers were respectively broadcasting or retailing at the time, those were
9 the “current circumstances”. The important words which were added in with all parties
10 having liberty to apply, which I will come to, you will see in a moment that the rationale for
11 the definition was that it defined the current circumstances of delivery. The liberty to apply,
12 in our submission, was plainly there to cater for a change in the circumstances of delivery.
13 I will come back to the context of this in a bit more detail in a moment, but the context of
14 Sky’s application in April 2010 was the forthcoming Premier League season of 2010/11.
15 Sky’s essential position was that it should not have to supply Sky Sports 1 and Sky Sports 2,
16 with their important Premier League content, during that season under the terms of the
17 WMO.

18 The evidence on both sides was directed to the position over that period with an assumption
19 - indeed, beyond that Sky actually said this would happen - that matters would be resolved
20 in time for the 2011/12 season.

21 That anticipation or hope was not realised for a number of reasons. The first is that the
22 hearing before the CAT did not, in fact, take place until May to July 2011. At the time of
23 the application, the parties were clearly anticipating it coming on somewhat earlier in the
24 course of 2011. Secondly, the CAT did not give judgment for over another year. It did not
25 give judgment until August 2012. Thirdly, the judgment allowed Sky’s appeal, but that
26 judgment was, itself, subject to appeal, which appeal was subsequently successful in
27 February 2014.

28 If one looks at where we are now ----

29 THE PRESIDENT: Successful in part.

30 MR. HOWARD: The appeal was totally successful, but the appeal was only in respect of part of
31 the judgment.

32 THE PRESIDENT: I thought there was an appeal saying there was no jurisdiction.

1 MR. HOWARD: That was their appeal, that was Sky's appeal. Sorry, Sky's cross-appeal was
2 dismissed, but BT's appeal was completely and utterly successful. The cross-appeal was
3 dismissed, the jurisdiction point was dismissed.

4 My Lord, can we now try and focus on where we are in relation to the interim relief order.

5 We are now four years on ----

6 THE PRESIDENT: And it is not over.

7 MR. HOWARD: It is certainly not over, but one has also got to say, when are we going to get
8 finality in this matter? My Lord, there is an application by Sky for permission to appeal to
9 the Supreme Court from the Court of Appeal's judgment. As I understand it, that
10 application for permission will not be determined until the autumn. If permission is granted
11 it is unlikely, from experience of matters before the Supreme Court, that that appeal will be
12 resolved within 12 months. If permission is given, then the whole process of written cases,
13 etc, and getting a date, it is unlikely that you would get a hearing plus a judgment within 12
14 months.

15 If permission is not granted, then the matter will come back to the CAT for directions for a
16 further hearing, but plainly the earliest the matter is going to come back to the CAT is some
17 time in the late autumn, and then the CAT will have to direct how matters are going to be
18 dealt with. You may have seen, my Lord, at least from the submissions, that it is likely to
19 be a rather complicated hearing. It is not just a matter of coming back for a short hearing.
20 So it is difficult to see that matters could be resolved before the CAT for at least another 12
21 months from now.

22 Leaving aside the potential for further ----

23 THE PRESIDENT: It may not take that long.

24 MR. HOWARD: Looking at a final judgment ----

25 THE PRESIDENT: It is not of the scale of the previous case. I would very much hope that it
26 would be resolved by Easter. In any event, that does not perhaps matter to your point. We
27 are looking well into 2015.

28 MR. HOWARD: That is assuming permission is refused in the Supreme Court.

29 THE PRESIDENT: Sure, if permission is granted, it depends what the Supreme Court does.

30 MR. HOWARD: Exactly. Leaving aside potential for further appeals to the Court of Appeal - so
31 I am not going to take account of that - just looking at when will the CAT resolve things -
32 again I do not need to get bogged down in this - the earliest is some time in the late spring

1 of next year, and I would say that is rather optimistic. The latest could be a year or two later
2 than that. In other words, matters could be up in the air for some time.

3 The timescale for review by Ofcom, you have heard about from Ofcom. That is just the
4 review. That is clearly going to take some time. In relation to what we are talking about,
5 that should not have any impact on the issue before the Tribunal today. The question today
6 is implementation of the WMO and the IRO now. If the WMO is modified in the future,
7 there are three possibilities, I suppose. One is that Ofcom says we do not need the WMO
8 any more, in which case obviously Sky will be able to come back and the matter would be
9 discharged. Indeed, it would probably immediately fall away if Ofcom made that decision,
10 subject to, I suppose, appeals, and so on. Alternatively, they say, no, it should continue as
11 is, or they modify it. All of those eventualities would be dealt with under the liberty to
12 apply in the order.

13 In my submission, for today, other than knowing that that is in the background, and that
14 some time in the next, it sounds like, fairly extended period Ofcom will come to a view on
15 it.

16 THE PRESIDENT: You say “extended”, it is likely to be earlier than any appeal in the Supreme
17 Court, if it goes ahead, on your estimate that it would take 12 months from permission.
18 Ofcom will complete its review before then.

19 MR. HOWARD: Yes, but it is just another thing that may have an impact. The outcome of the
20 Ofcom review one cannot second-guess. It could everything stays as it is, or they change it.
21 What one is actually having to decide today is how should the WMO, as amended by the
22 IRO, apply for the period until that or other things happen, all of which are very uncertain
23 as to their end date.

24 THE PRESIDENT: It has an impact in this sense: like any interim relief application, or any
25 modification of interim relief, which is what you are seeking, one has to consider the risk of
26 injustice depending on what the final outcome might be. There are various issues pointed
27 out. One final outcome is what may happen on appeals. Another final outcome, which
28 could take away or modify the WMO, is what may happen on the review. There is a further
29 factor that might change the nature of the WMO remedy.

30 MR. HOWARD: Ultimately, it actually comes down to a simple point: as things stand today
31 there is a WMO remedy which has been determined by Ofcom. That stands unless and until
32 either the CAT overturns it as a result of an appeal, or Ofcom, itself, decides it no longer
33 needs to apply. Neither of those things is going to happen much within 12 months at best.

1 Of course, one is assuming an adverse view, whereas we say Ofcom or the CAT will
2 ultimately uphold ----

3 THE PRESIDENT: We do not know. We have to consider both possibilities.

4 MR. HOWARD: Yes, that is all I am saying, there are two possibilities.

5 My Lord, just to summarise our position, since 2010 when the IRO was made, the
6 technology has moved on. In very simple terms at the time of the IRO BT used digital
7 terrestrial transmission (“DTT”) as its distribution technology- that is transmission by an
8 aerial over the airways. That is to be contrasted with IPTV, which is distribution via the
9 internet, using broadband connections.

10 Whilst IPTV was something in prospect at the time of the IRO, first, it was not actually in
11 use by BT for this purpose. Secondly, it was not, in fact, anticipated that it would be, or
12 would need to be in use for transmission of Sky Sports 1 and Sky Sports 2 for a number of
13 years.

14 As things stand today, IPTV is the means by which BT, just standing here today, mainly
15 broadcasts and soon, in fact, it will be the only means; and, secondly, IPTV is the only
16 means by which it, in fact, currently broadcasts Sky Sports 1 and Sky Sports 2 on the
17 Cardinal platform.

18 THE PRESIDENT: Can you just pause there a moment? I think I saw in various places the
19 statement that BT Sport has five million subscribers or viewers?

20 MR. HOWARD: Yes.

21 THE PRESIDENT: Now, that is not IPTV, is it? That’s only a small part of the five million.

22 MR. HOWARD: BT Sports now is entirely IPTV.

23 THE PRESIDENT: Where do the five million come from, because I’ve seen figures for the
24 number of subscribers to Cardinal and YouView, it’s nothing like five million.

25 MR. HOWARD: Sorry, excuse me. (After a pause) Sorry, some of the customers who watch BT
26 Sport are on Virgin and some are on Sky itself. So if you have a Virgin box or a Sky Box –
27 say you have a Sky box, I do not know – if you scroll down the channels you will see BT
28 Sport there. The way it works at the moment is you can then access that if you are a BT
29 broadband customer, which they got by virtue of being a BT broadband customer, or, if you
30 are not a BT broadband customer you can contact BT and buy it.

31 THE PRESIDENT: So this is BT – I think it is called ‘self-retail’?

32 MR. HOWARD: It is BT self-retailing of their channel on Sky. They also sell their content to
33 Virgin and so the content is on Virgin cable. I misunderstood your question, my Lord, if

1 one says: "How do the five million people watch BT Sports?" They watch it via the digital
2 satellite of Sky. They watch it via the cable of Virgin, and they watch it via IPTV.

3 THE PRESIDENT: BT – that is on either Cardinal or YouView?

4 MR. HOWARD: To make the position absolutely clear, if you are a YouView customer you can
5 only see it on IPTV, because YouView does not allow conditional access with DTT.

6 THE PRESIDENT: That is your big problem, is it not?

7 MR. HOWARD: That is the problem. There are problems, if one likes, although if we go just to
8 see what the problems are for BT. The first is that the internet has spread rapidly so many
9 more homes have fast broadband, but, secondly, there has been another advance in
10 technology, which is you can multicast over copper wire, in other words, over the old
11 copper wire telephone lines you can now effectively achieve what previously you could
12 only achieve with fibre-optic. That is an advance in the technology. Secondly, the
13 YouView box, which is a far superior box to the Cardinal box, does not have a current
14 facility for conditional access, so although it is a hybrid box like Cardinal, they can both
15 take DTT, what the YouView box cannot do is have encrypted signals via DTT, because it
16 does not have the conditional access.

17 THE PRESIDENT: If it did, you would be able to get ----

18 MR. HOWARD: Exactly.

19 THE PRESIDENT: -- Sky Sports under the existing remedy?

20 MR. HOWARD: We would, exactly. This is one of our points, that the suggestion that somehow
21 it is YouView that is completely different, it is just a quirk that, in fact, You View was a
22 product of a consortium. People like the BBC did not prioritise conditional access and so it
23 does not currently have conditional access, and that is just a quirk which means that we
24 cannot use the IRO, if we wanted to broadcast via DTT to a YouView box.

25 The second point is that it is not, in fact, economically sensible for BT to continue to use
26 DTT, because to use DTT they have to purchase DTT capacity on the transmitter, which is
27 expensive, which is a completely pointless thing to do because they have a network; there is
28 a network now throughout the UK, as it were, both theirs and generally, of people now able
29 to take broadband, or IPTV. Indeed, that has been the whole point of spending a lot of
30 money on infrastructure to do that.

31 THE PRESIDENT: Can you just help me? At the time of the remedy in 2010, obviously DTT
32 was the means, as you pointed out, used by BT for distribution.

33 MR. HOWARD: Yes.

1 THE PRESIDENT: And you say it is not any more, you say, in fact, there is nothing by DTT
2 from BT at the moment, I think. If I have understood you correctly, you say IPTV is the
3 only means, I think.

4 MR. HOWARD: It is the only means for Sky Sports 1 and 2.

5 THE PRESIDENT: Well, if you did use DTT that would be a means of Sky Sport for BT under
6 the remedy as it stands.

7 MR. HOWARD: At the moment DTT is not used for Sky Sports 1 and 2 on the Cardinal
8 platform.

9 THE PRESIDENT: Or otherwise?

10 MR. HOWARD: Or otherwise.

11 THE PRESIDENT: Through a separate box.

12 MR. HOWARD: There is no separate box, there is only Cardinal and YouView.

13 THE PRESIDENT: What happened in 2010/11, what was BT doing then?

14 MR. HOWARD: Then BT was using DTT ---

15 THE PRESIDENT: With a separate box.

16 MR. HOWARD: No, with Cardinal.

17 THE PRESIDENT: With Cardinal. Cardinal existed already.

18 MR. HOWARD: Cardinal existed. Cardinal is a hybrid box as is YouView.

19 THE PRESIDENT: Yes.

20 MR. HOWARD: Has DTT in it and it has conditional access.

21 THE PRESIDENT: And so it used Cardinal in 2010, that was the benefit of the remedy.

22 MR. HOWARD: Yes.

23 THE PRESIDENT: But it was “the DTT-ing aspect”, if I can put it that way, of Cardinal that was
24 being used.

25 MR. HOWARD: Yes, well at that stage, in 2010, I will show you the evidence, it is quite
26 important.

27 THE PRESIDENT: Yes.

28 MR. HOWARD: You see exactly what was happening, at that stage they did not have, they could
29 not have done it by IPTV in April 2010 even if they had wanted to.

30 THE PRESIDENT: I thought you said it was a hybrid box.

31 MR. HOWARD: Yes. But the other bits of the infrastructure were not in place to allow you to
32 broadcast over the internet at that stage, and it was not anticipated that that would be up and
33 running until March 2011.

1 THE PRESIDENT: So, when it started it was all Cardinal using DTT.

2 MR. HOWARD: Yes, for Sky Sports 1 and 2.

3 THE PRESIDENT: Well, for everything that went on Cardinal if it was not -----

4 MR. HOWARD: Yes, it was video on demand which could be used, because the technology is

5 different. There is a difference between broadcasting to a number of people the same thing,

6 which is obviously more complicated.

7 THE PRESIDENT: Yes.

8 MR. HOWARD: Than a video on demand where somebody just says, "I want to watch that

9 film".

10 THE PRESIDENT: Yes.

11 MR. HOWARD: So, the Cardinal box could do that, but what it could not do at that stage, the

12 technology did not allow distribution of -----

13 THE PRESIDENT: When did BT cease using DTT on Cardinal? That is what I am trying to

14 understand.

15 MR. HOWARD: Can I check that in a moment?

16 THE PRESIDENT: Yes. Because you talked about this great difference. I am trying to

17 understand the transition.

18 MR. HOWARD: Yes. Well, we will look in a moment at the evidence and I will -----

19 THE PRESIDENT: Yes, well the evidence, you know, goes all over the place -----

20 MR. HOWARD: It does, that is why I am going to try and -----

21 THE PRESIDENT: That is why it is helpful to have a summary, a chronology of the changes BT

22 has made to the way it distributes

23 MR. HOWARD: The change in respect of Sky Sports 1 came in, and 2, came in after the CAT

24 judgment, so, in August 2012 the CAT gave judgment and later that year outside of the

25 WMO and the IRO, BT and Sky did a deal for Sky Sports 1 and Sky Sports 2 to be shown

26 via IPTV, on Cardinal. So, Sky Sports 1 and Sky Sports 2 have been shown via IPTV on

27 Cardinal, but that has been the subject of a separate commercial arrangement.

28 THE PRESIDENT: It had been shown on Cardinal all along -----

29 MR. HOWARD: Not via IPTV.

30 THE PRESIDENT: But what changed it, instead of coming via DTT as you were entitled to do

31 under the remedy, you then did a deal which enabled you to do it on the same box but via

32 IPTV.

33 MR. HOWARD: Yes, exactly.

1 THE PRESIDENT: Which is cheaper for, beneficial to BT because it is cheaper.

2 MR. HOWARD: Yes, it is cheaper and it meant that at the time it meant it also freed up DTT
3 capacity they had to use it at that stage for other things and I think particularly for BT Sport.

4 THE PRESIDENT: DTT.

5 MR. HOWARD: Yes.

6 THE PRESIDENT: But when did BT Sport stop being accessed on DTT because you told me it
7 is not now.

8 MR. HOWARD: Yes, the position is, so BT Sport – and I am just now looking at retailing on
9 BT's platforms.

10 THE PRESIDENT: Yes.

11 MR. HOWARD: In other words, leave aside the Virgin and the Sky platforms. There were then
12 two, as far as BT were concerned it had two platforms, YouView and Cardinal. Now
13 obviously, what BT wishes to do is to, the idea is for YouView, the YouView platform, the
14 YouView box, takes over from Cardinal.

15 THE PRESIDENT: But YouView is not DTT, DTT box.

16 MR. HOWARD: No. Sorry, when you say, we need to be careful, it is DTT but it is not -----

17 THE PRESIDENT: Not encrypted.

18 MR. HOWARD: Not encrypted. So, in other words, you can watch over YouView channels.
19 There are lots of channels which are on the YouView platform which are DTT, for instance
20 I think the BBC's channels, ITV's channels and so on. But those of course are free to air
21 channels. So, basically, YouView is part of what was originally Freeview, so there are a lot
22 of things, basically, the free to air stuff is over DTT.

23 THE PRESIDENT: And is BT Sport an encrypted?

24 MR. HOWARD: Yes.

25 THE PRESIDENT: It is.

26 MR. HOWARD: Yes.

27 THE PRESIDENT: So when you said the advantage of the Cardinal deal among other things was
28 it freed up DTT for BT Sport, how was BT Sport being shown?

29 MR. HOWARD: Because -----

30 THE PRESIDENT: Was it on Cardinal?

31 MR. HOWARD: BT Sport is available on Cardinal and on YouView.

32 THE PRESIDENT: Yes.

1 MR. HOWARD: And so it stopped broadcasting Sky Sports in fact via DTT back on 1st July
2 2013. And the reason it was keeping DTT going at that stage for BT Sport was at that
3 stage, this is looking at it in the summer of 2013, not all homes in the UK, or not enough
4 homes in the UK, had fast broadband for which, you could only have YouView if you had
5 fast broadband. So the Cardinal platform, in order to offer a national service, one had to
6 keep the Cardinal platform going for those homes that did not have internet essentially
7 capability. This was one of the points that Ofcom took into account last summer when they
8 refused BT's application for interim relief because they were under the impression that BT
9 was going to have to continue with its Cardinal box in any event and using DTT, because
10 part of what was being said was that they were being impeded in their ability to use
11 YouView. But the change that has occurred, the further change, was that in the autumn of
12 2013 multi-cast over copper capabilities were developed which allows the delivery of linear
13 channels over old copper lines – so that the effect of that is to render obsolete from BT's
14 perspective the need to continue to use DTT for customers who did not have fast broadband.
15 The simple point is that they – from the end of last year, the beginning of this, they became
16 in a position where they could simply offer to all customers their YouView box subject to
17 one qualification, and that is this – if the customers want Sky Sports 1 and 2, then because
18 the IRO does not apply to IPTV, which is necessary for YouView, they can only continue to
19 supply the customers with Sky Sports 1 and 2 if they keep the Cardinal box.

20 THE PRESIDENT: Can Sky itself supply to customers over the YouView box?

21 MR. HOWARD: They are using something called Now TV on the YouView box to do that.

22 THE PRESIDENT: So a customer, an end user, with a YouView box can contract with Sky?

23 MR. FLYNN: I do not mean to interrupt, my Lord, but that is not happening yet. That is not
24 happening yet.

25 MR. HOWARD: It is not happening yet, but that is what they are intending to do.

26 THE PRESIDENT: That is likely to happen. Is there evidence on that?

27 MR. FLYNN: There is some evidence. I will come back to that.

28 THE PRESIDENT: You will clarify that later. I am a bit confused about that.

29 MR. HOWARD: I think the position is that the technology on YouView is not yet capable of
30 allowing them to do that. That is something for the future.

31 Just to complete the survey, just to make sure I have not misled you, if you go to Petter 2,
32 which you will find in volume 5 at tab B, paras.96 and 97, that summarises the position.

33 DTT, I may have slightly mis-stated it, is only currently used in order to supply BT Sport to

1 those remaining Cardinal boxes, but in the light of the ability now to transmit across the
2 United Kingdom via broadband, what you can see is the policy to migrate everyone from
3 Cardinal to YouView and to cease, even in the limited respect, DTT as described there.
4 Again, I will need to come back to it in a moment, you may or may not have seen that there
5 is a third statement from Mr. Petter, and in that he explains, and we will need to look at how
6 this all worked in a moment, there that in 2010 it was, in fact, anticipated that Sky Sports 1
7 and 2 for the foreseeable future would be transmitted via DTT and that would be the case
8 whether it was to a Cardinal or YouView box, because the YouView box at that stage was
9 designed to have conditional access.

10 THE PRESIDENT: While we have got bundle 5, under tab A is your client's response, and if you
11 can clarify this, at para.44, p.13, I was trying to follow that. After the confidential sentence,
12 the second sentence:

13 "Sky has, however, been able to make offers directly matching BT's bundle
14 offering in giving the BT Sports channels away for free."

15 Never mind the "for free" bit, but is BT's ----

16 MR. HOWARD: Shall I just explain what that means?

17 THE PRESIDENT: Yes.

18 MR. HOWARD: In order to get BT Sports if you are a Sky subscriber there are two possibilities.

19 One is because you are a BT broadband person, you currently are entitled to it for free, so
20 you just ring up and that is part of your broadband deal. The other is you are not a BT
21 broadband customer, and so you pay £12 a month for the pleasure of watching ----

22 THE PRESIDENT: Which you pay to BT?

23 MR. HOWARD: You pay it to BT.

24 THE PRESIDENT: So this BT's sole supply?

25 MR. HOWARD: Then what Sky does is they reimburse you.

26 THE PRESIDENT: That is whatever deal they choose to make.

27 MR. HOWARD: That is what this is referring to. The way they advertise it, you can look at the
28 adverts, but what they are saying is that you can get this, including the BT channels,
29 because what they are essentially doing is putting the customer in the position as if they are
30 the retailer.

31 THE PRESIDENT: That BT Sport goes over the Sky - you do not need then a separate Cardinal
32 box?

1 MR. HOWARD: It is just a channel which is on the Sky platform, and instead of that being part
2 of your Sky package, you have to pay for it. I do not know whether your Lordship has these
3 things, but if you scroll down in the box you will see Manchester United Television
4 channel, if you try and turn it on you will not get it unless you pay. It is just like Pay TV, or
5 boxing, or something like that. It is just that you pay.

6 THE PRESIDENT: That will be BT Sports, which goes over then IPTV, is it?

7 MR. HOWARD: No. Sky is essentially a digital satellite broadcaster, so it is over their digital
8 satellite broadcast transmission.

9 Can I just remind you, there is digital satellite, that is BSkyB, who have the satellite from
10 which a lot of these things are broadcast. There is cable, there is DTT, which is digital
11 terrestrial television, which is via aerials which took over from the old analogue –
12 remember we had the switch off of analogue TV. Then there is IPTV, which is via the
13 internet.

14 THE PRESIDENT: And the IPTV is called “Now” is it, the new offering, is that right? Sky
15 lawyers are nodding.

16 MR. HOWARD: Yes, that is actually available over the internet as well.

17 THE PRESIDENT: And you can get BT Sport on that as well, can you?

18 MR. HOWARD: No, I do not think so, not on Now TV. We need to be careful that we come
19 back and be sure that we are focusing on what the issue is here. One has to remember the
20 purpose of the WMO is to encourage other platforms to ----

21 THE PRESIDENT: Yes, I appreciate that, I was just trying to get clear in my head something
22 which you may have been steeped in with your clients, but just how the different means of
23 access work in practice now.

24 MR. HOWARD: Can I just come back, just for a moment, I’ll develop the submission, to the
25 liberty to apply provision, which obviously is central. Liberty to apply regarding an order
26 generally, or a particular aspect of an order is a very common feature.

27 THE PRESIDENT: I think I can interrupt you, if I may, Mr. Howard. I have seen obviously
28 what the parties say, and I have not heard from Mr. Flynn – I do not have a problem at the
29 moment, subject to what he may say, about your case being that there is not just the general
30 liberty to apply but express liberty to apply in para. 2 of the schedule to deal with qualifying
31 platforms. Circumstances have changed from the way they were in 2010 and I think there
32 must be, in order to found an application, a change in circumstances; you cannot just come
33 back and say: “We’ve had second thoughts”. But the circumstances here, you say, have

1 changed (a) because no one at the time of the IRO anticipated that more than four years
2 later this case would still be going on so there is still a need for an interim remedy. We
3 have not reached the final stage and secondly, the technology has advanced, and therefore
4 you say there is a basis for making an application under the liberty to apply and I can now
5 fully appreciate that and I do not think one needs to look at the rules, or *Chanel v*
6 *Woolworths* and so on.

7 MR. HOWARD: There is a divide which I think is actually quite important though, which is the
8 *Chanel v Woolworths*' jurisprudence, and there is authority which says it has got nothing to
9 do with the situation where you have a liberty to apply, there is express authority which
10 says that. It is actually quite important, because you say there must be a change of
11 circumstance. What I will show is what happened here, and this is what Vice-Chancellor
12 Nicholls (as he then was) said, in interlocutory matters parties should be encouraged not to
13 fight about things they may not need to fight about, but to reserve the position if need be.
14 That is what a liberty to apply is very often doing, particularly in a consent order, and
15 particularly where you have it dealing with a specific matter. I am sure, as a Judge in the
16 Chancery Division, you have dealt with freezing orders where you might have, say, a liberty
17 to apply about somebody's living expenses. All that comes back to the court under the
18 liberty to apply is the question of how much do you need. In fact, the authorities show all
19 you have to show is on the material that you are now putting before the court, because the
20 court remains seised of the matter, that something different should be done. Of course, if
21 there is no change of circumstances at all, it may just be an abuse of the process to come
22 back to argue, and the court would say: "You haven't got anything new".

23 But, if you have something new, some new factor, new evidence, you are putting forward
24 then the court considers the point on the merit of that evidence. But there is no, as it were,
25 high hurdle which you have to cross. Sky really have two arguments, as you will have seen.
26 One is that they say: "You have to satisfy the *Chanel v Woolworths*' approach"; *Chanel v*
27 *Woolworths* does not apply. The second is they say: "You are making an application and
28 you have to bring yourself within s.61(2) and (3) of the Rules. Both of those are actually
29 wrong, we suggest, as a matter of principle and law.

30 THE PRESIDENT: You can show me the authority, but I was saying to you in any event it seems
31 to me there is a change of circumstances here in two respects, and this is many years later.
32 So that does not seem to me such a difficulty. Where I have more of a problem is, fine, one
33 can look at it again and decide what should be done in the way matters have changed. But,

1 in looking at what should be done, as things stand today as opposed to the way things were
2 in 2010, one has to look at all the circumstances that prevailed today and all the changes
3 that have taken place, and that includes the fact that BT has now acquired very valuable
4 rights to both a significant minority of Premier League matches and the UEFA rights, and
5 that cannot be put out of the picture. So, in deciding what is the balance of justice today
6 everything has to be taken into account, including that, and when you say in your skeleton
7 argument that if Sky wants to argue matters have moved on from the WMO remedy in those
8 respects, this is not the appropriate forum to do so.

9 MR. HOWARD: Our point is this: the issue that your Lordship should be considering is: does
10 amending the qualifying platform, does that amendment to allow BT to go from DTT to
11 IPTV, under the IRO, does that amendment make any difference? In our submission that is
12 the issue you are having to consider. Sky could make an application to vary the order under
13 the liberty to apply to say the IRO is no longer appropriate because of the change in
14 circumstances. Let us say they might come along and say: “We did not anticipate that BT
15 would acquire the 38 games that we’re not allowed to have”, that’s actually what they have
16 acquired, it is the package ----

17 THE PRESIDENT: I understand that, but ----

18 MR. HOWARD: But they would acquire that ----

19 THE PRESIDENT: They did not have them in 2010.

20 MR. HOWARD: No, because the ESPN had them. The reason they did not have them is because
21 the competition authorities had said, when the Premier League was selling these things, they
22 could not sell them all to Sky. The idea was to try and create competition. So they could
23 come along and say – I am not saying they cannot come along and say – on an appropriate
24 application that this has changed things, that it is no longer appropriate for there to be an
25 IRO at all. But they are not saying that. They are not saying that the IRO should be set
26 aside as regards BT. The debate is taking place within a very very narrow compass, which
27 is that – what they say is, “Ah, well, BT we don’t have any problem with your continuing to
28 use DTT to supply this”, so that if ----

29 THE PRESIDENT: Well, they do not have any problem because you have made clear you are not
30 going through DTT.

31 MR. HOWARD: But that is, at no stage ----

32 THE PRESIDENT: You cannot put aside the commercial reality of what is behind both the
33 application and the opposition to it by saying, “Well, ignore everything else, just focus on

1 this very narrow question”, because one has to consider what is the appropriate answer to
2 that question whether one defines it as narrow or broad.

3 MR. HOWARD: Yes.

4 THE PRESIDENT: In all the circumstances as they exist today.

5 MR. HOWARD: Well, my point is, even if one takes that as the right stance on it, I do not accept
6 it is, but let us come back to that. But, let us assume it is. What you have equally got to
7 look at is that the IRO actually provides for DTT. If the YouView box had allowed
8 conditional access, BT would be allowed to use the YouView box under the IRO. They
9 might be saying to the court, “I don’t want to do that because it’s too expensive to use DTT
10 and it’s more efficient for me to use IPTV”, which they may well be saying. And if one
11 imagines that context, the question then would simply be, would the court faced with that –
12 you say “Well, you’ve got to look at all the circumstances”, but one circumstance would be,
13 “I’m entitled to use my YouView box with DTT to transmit all this stuff. I want to use
14 IPTV only because that makes me more efficient and a better competitor”, whereas Sky’s,
15 they do not have a principled rejection of YouView as such, in that situation they would
16 simply be saying, “You should be stuck with the more expensive technology”. Now, as it
17 happens, I mean, really where one gets to, they do not want us to be able to use YouView,
18 but they cannot object, for instance, to Cardinal. They have accepted Cardinal for IPTV
19 under the commercial deal, but Cardinal could in fact have continued to be used for DTT if
20 it has that capability. It is just forcing BT because that is the net result. If you say, “No, no,
21 we’re not going to use this”, what one is saying, “Well, if you want to get the benefit of the
22 IRO BT, that is fine, you can still get the benefit because Sky have not sought to set it aside,
23 but to get the benefit you have got to use an outmoded box, which of course will make you
24 less attractive to the consumers, and you have got to bear additional costs.” Now, in our
25 submission, the WMO is designed to achieve competition, that is the whole point of it, and
26 the point is that to compete effectively in this market place, what Ofcom has recognised is
27 that sports channels are particularly important and particularly Sky Sports 1 and 2. If you
28 like, those are the hook upon which you get the customers. And so what, the battle we
29 would suggest is actually a slightly unreal one.

30 THE PRESIDENT: But why is it unreal? If you get what you are seeking you will have
31 YouView with the entire Premier League and UEFA. Sky’s customers will only get Sky 1
32 and 2.

1 MR. HOWARD: Well, 1, 2, 3, 4 and 5, one has got to remember that. They have five sports
2 channels which include Formula One.

3 THE PRESIDENT: Yes, but I thought you just said that the key, the Premier League, SS 1 and 2.

4 MR. HOWARD: Well they are the key in the sense that that is what Ofcom has determined, but
5 the time that Ofcom made the Pay TV statement for instance, Sky did not have Formula
6 One.

7 THE PRESIDENT: Yes.

8 MR. HOWARD: That is all a subsequent development. My Lord, we would respectfully suggest
9 that what one should be looking at here is what is the incremental harm, if you like, to Sky
10 as a result of BT being enabled to distribute via IPTV? Of course one sees the advantage to
11 them is that the IRO becomes a dead letter, and it has already become a dead letter so far as
12 BT is concerned, it becomes completely -----

13 THE PRESIDENT: That is why they need not make an application to vary.

14 MR. HOWARD: Yes, but, I mean, it has actually become, Sky is in the happy position where BT
15 does not enjoy the benefit any longer of the IRO. And, my Lord, if one just looks again,
16 perhaps so we come back and just remember this in the context, it seems to me I probably
17 do not need to spend any time on the *Chanel v Woolworth* cases.

18 THE PRESIDENT: No, just give me the reference to Lord Nicholls' judgment.

19 MR. HOWARD: The Nicholls judgment, perhaps we can just turn that up, it is at -----

20 THE PRESIDENT: Well, I do not want to, as you say, I do not think we need spend more time
21 on it. But, it is obviously in the authorities. Which one is it?

22 MR. HOWARD: It is in tab.19. It is called *Gantenbrink*.

23 THE PRESIDENT: Yes.

24 MR. HOWARD: And it actually shows the strength of the position because there the express
25 liberty to apply clause had been deleted. It is 19 in mine.

26 THE PRESIDENT: Yes, I have got it.

27 MR. HOWARD: And the relevant passage starts at the foot of p.164 and you can see at the foot
28 of 164 he refers to *Chanel v Woolworth* and then on 165 he refers to the Court of Appeal
29 decision in *Butt v Butt* and the dicta of Mustill LJ, and after the quote from that Court of
30 Appeal decision in 1987.

31 THE PRESIDENT: As I say, I do not want you to take up time, and I will read it over lunch.

32 MR. HOWARD: Yes. But the other passage I was referring you to is at 167.

33 THE PRESIDENT: Yes.

1 MR. HOWARD: Which is an important paragraph because this is actually, you will see what
2 happened here. With the first paragraph he says about -----

3 THE PRESIDENT: "General observation".

4 MR. HOWARD: "General observation", and that is encouraging people to reach consent orders
5 and not arguing unnecessary things, and at the foot of the page he says:

6 "You are at liberty to do so without the need to show changed circumstances".

7 THE PRESIDENT: Yes, I see. Thank you.

8 MR. HOWARD: So, some brief further points about where we are, firstly. The decision of
9 Ofcom remains, it stands. Now there are various submissions that Sky make about the
10 effect of what the Court of Appeal has had. I do not know whether your Lordship would be
11 assisted by my making submissions as to why that is really not for today, trying to
12 determine what will happen when the matter comes back before the CAT.

13 THE PRESIDENT: Well I agree, because that is only one of the possible outcomes but it comes,
14 as you pointed out, before the CAT.

15 MR. HOWARD: Yes.

16 THE PRESIDENT: The Supreme Court might give Sky permission to appeal in section 316,
17 Ofcom may review.

18 MR. HOWARD: Yes.

19 THE PRESIDENT: As I say, there are many possible scenarios where on the one hand the WMO
20 is fully upheld in Ofcom's 2010 form, or it is varied or set aside.

21 MR. HOWARD: Yes. What Sky appeared to be submitting is that even if their appeal fails
22 before the CAT, that the WMO remedy could not apply to BT, they seem to be saying.
23 That part of their submission is simply wrong as a matter of -----

24 THE PRESIDENT: I did not think they were submitting that.

25 MR. HOWARD: Actually I do not think they say it in terms but -----

26 THE PRESIDENT: Well, let Mr. Flynn -----

27 MR. HOWARD: Yes, I will let him develop that.

28 THE PRESIDENT: But I said to you, it seems to me the question for the Tribunal is, given that
29 those various possible outcomes and the fact that WMO might be fully upheld in the 2010
30 form or might be completely set aside or there might be something in between, where is the
31 least risk of injustice today in making the change and therefore if you like giving added
32 force.

33 MR. HOWARD: Yes.

1 THE PRESIDENT: An effective force to this interim remedy in all the circumstances as at July
2 2014.

3 MR. HOWARD: Yes.

4 THE PRESIDENT: And those circumstances include all the changes that have happened,
5 changes in technology, likely time till the case will be resolved, as you pointed out, and as
6 I said to you the fact that BT has now acquired the very valuable sporting rights itself.

7 MR. HOWARD: Yes. Well, our submission is that the approach you are putting forward is not
8 actually the right approach, and I need to come ----

9 THE PRESIDENT: Yes, well I need you to help me on that.

10 MR. HOWARD: Yes, but just before we come to that, because it is part of looking at the
11 background and how the court should approach this, it is quite important, I think, to
12 understand fully the context of what was happening at the IRO. What is being said by Sky
13 is that the question of IPTV, or use via IPTV, was expressly conceded.

14 THE PRESIDENT: I know there is quite a lot of evidence on what people were saying, and
15 drafts, and so on, is that relevant?

16 MR. HOWARD: What people were thinking - there is evidence from Mr. Conyers as to what he
17 intended, and equally there could be said to be evidence on BT's side, that is completely
18 inadmissible as to ----

19 THE PRESIDENT: It is irrelevant.

20 MR. HOWARD: It is irrelevant and inadmissible, what people thought. What is admissible is the
21 matrix of what was before the Tribunal. One has got to look at the order objectively. We
22 say, objectively, liberty to apply is there to cater for this type of situation. In so far as it is
23 being said, "No, no, actually at the time, this was deliberately carved out because Sky was
24 not prepared to allow IPTV", that is actually not the case at all.

25 THE PRESIDENT: Even if it were, and I am not saying it is, I am not sure that is relevant either.
26 You have liberty to apply, and there have been so many changes to whether it was
27 deliberately carved out. It is far more significant in 2014 on any view than it was in 2010.

28 MR. HOWARD: I am sorry, I did not catch the last bit.

29 THE PRESIDENT: IPTV is much more significant commercially today than it ever was in 2010,
30 and it was never envisaged, even if people thought that by 2014 it might be very significant,
31 that this order was going to be still in place in 2014.

32 MR. HOWARD: That is absolutely right.

1 THE PRESIDENT: What actually was going through people's exclusion or limitation, all the
2 evidence on that does not seem terribly important.

3 MR. HOWARD: Perhaps we can take it quite quickly. The position that Sky took at that stage,
4 in terms of timing - you will have seen that Sky is saying that nobody should be surprised
5 that this has taken as long as it has - was that the matter would be resolved in nine months.
6 The evidence was all directed to that nine months and the 2010/11 football season on both
7 sides.

8 THE PRESIDENT: Why do you not save that to your reply, because, as I say, whether people
9 thought it would be resolved in nine months or two years or three years, this is not two
10 years or three years, it is going to be five years.

11 MR. HOWARD: That is right, but really the point that I am making is that what actually comes
12 out of the evidence when you look at it properly, is that what the parties were talking about
13 is the forthcoming season. What BT was saying was, "We intend to broadcast via DTT for
14 the foreseeable future", and part of their problem was that they were saying, "If we do not
15 get the IRO now, we will not have DTT capacity and then we will have to undo what we
16 have to undo what we have done, and we will have started multi-casting", and so on.
17 Without looking at the detail perhaps it does not mean much. The essential point is that the
18 statements about IPTV was that that was something very much in the future. Although they
19 anticipated having the technology up and running by March 2011, they also said they
20 anticipated Sky Sports 1 and 2 would be broadcast via DTT for a number of years. That has
21 simply been overtaken both by the passage of time of the appeal and the rapid growth in the
22 technology and the fact that the YouView box is not capable.

23 THE PRESIDENT: I understand all that.

24 MR. HOWARD: My Lord, there is one other thing on the authorities. I gave you *Gantenbrink*,
25 but just on the general approach, there is a case at tab 13 of the bundle which Sky rely on
26 which is called *Tibbles*. As I understand it, Sky rely on para.39, p.2602, which is looking at
27 CPR Rule 3.1(7). Lord Justice Rix is considering the jurisprudence about that. That is
28 actually not relevant for today. The relevant bit of his judgment for today is actually at
29 2603A, and it just makes the obvious point:

30 "The revisiting of orders is commonplace where the judge includes a 'Liberty to
31 apply' in his order. That is no doubt an express recognition of the possible need
32 to revisit an order in an ongoing situation."

1 THE PRESIDENT: I do not have a problem with that. What I would like you to, please, address
2 me is why you say the approach that I suggested to you is the right approach, namely to
3 consider in the circumstances today where is the least risk of injustice, is not the appropriate
4 approach?

5 MR. HOWARD: My Lord, in my submission, the appropriate approach where there is a specific
6 liberty to apply is to consider the matter - because that is what you are being asked to do by
7 BT when it makes its application within the context of the issues that are relevant to the
8 liberty to apply, I would respectfully say that there is a difference between if one party, for
9 instance, Sky, seeks to bring back it back before the court and make an application more
10 generally, as opposed to something which is just an application concerning para.2 and the
11 definition of "Qualifying Platform". As matters stand, in my submission, the court has to
12 approach the case on the basis that this transmission supplied to BT via DTT, which
13 includes any box, any platform that they have that takes DTT, is allowed. What the court
14 for that purpose should be considering is whether that change is one, within the construct or
15 within the confines of the order that is being made, that should be allowed. Your Lordship
16 will remember the order recites that its purpose is to implement the WMO.

17 In our submission, the sort of question that one should be considering is whether BT is, in
18 fact, going to use IPTV, or is using it, whether its use safeguards Sky's interests in the
19 content, and so on, whether it is sufficiently secure, and one should not be going beyond
20 that. If one is going beyond that one should be looking at what is the incremental harm that
21 Sky suffers as a result of having IPTV instead of DTT.

22 In my submission, if you look at it in that way, they do not suffer any incremental harm by
23 reason of that fact. They suffer incremental harm on their case because "you, BT are not
24 actually able to avail yourselves of the IRO, or as things have developed you are not going
25 to, and so my incremental harm is not the difference between the order as it stands and as it
26 will stand, but it is between the order as you, BT, as things have worked out, are able to use
27 it, and as you would now be able to use it".

28 THE PRESIDENT: BT was able to use it in 2010.

29 MR. HOWARD: Would be able to use it in 2014 if they were prepared to continue with an
30 outdated technology and a less satisfactory box.

31 THE PRESIDENT: Or enable the YouView box to take encrypted DTT ----

32 MR. HOWARD: Yes, that is right.

1 THE PRESIDENT: If they redesigned it. I think at one point you thought you would do that, but
2 for some reason you have.

3 MR. HOWARD: It is Mr. Petter's third statement.

4 THE PRESIDENT: Yes.

5 MR. HOWARD: It is at paras. 9 to 11. At 10 explains that at the time the IRO was agreed it was
6 contemplated that YouView set top boxes would include CA capability, even as late as
7 April 2011 it was intended to do that. Then at para. 11 he explains how – I am just seeing if
8 it is confidential or not.

9 THE PRESIDENT: Yes, why do I not just read 11? I have read it before but one reads all these
10 things quite quickly. (After a pause) Yes, that is what I was referring to, it was originally
11 intended that it should have the conditional access technology.

12 MR. HOWARD: Yes. The ultimate architecture of the YouView box depends upon the input of
13 the consortium and priorities amongst the consortium, so it is not, as it were, within BT's
14 power to say that that is what should happen. So, ultimately the consortium has not
15 prioritised this so there have been delays. As things stand today, it does not have
16 conditional access technology and, as things stand today, DTT has become outdated
17 technology because of the roll-out of high speed broadband and multi-casting over copper.
18 So DTT is now an old technology and not one that is commercially suitable. But, as the
19 IRO stands, and this is absolutely clear, if the YouView box could be changed, and if one
20 could roll it out to the customers who have already got it, of course, that is all vastly
21 expensive, putting in conditional access to people who already have the box, as opposed to
22 the new boxes, but if one could do that and one was prepared to spend the additional money
23 on DTT, Sky could have no objection.

24 THE PRESIDENT: Well, it might then, of course, if that were the situation, have made an
25 application to vary the order. It did not have to because DTT was becoming outmoded.

26 MR. HOWARD: The point is they have not made any application and it is only as matters have
27 progressed in these proceedings that they will have learned more about BT's intentions.
28 They may well have spotted that YouView did not have conditional access and would have
29 also realised that DTT is not any longer the technology of choice or economically viable.
30 None of that has anything to do with the developments in the market. These are all things
31 simply that arise. The developments under the market, which are the subject of what Sky
32 says, all of that would have arisen in any event in respect of the IRO. Indeed, one could say

1 that is exactly what Ofcom must have hoped would happen that competitors would manage
2 to get hold of content which, together with Sky Sports 1, would make them attractive.

3 THE PRESIDENT: Presumably part of the subject of the WMO review.

4 MR. HOWARD: Yes, but I am saying if one says: "What was hoped to happen by the WMO?" it
5 is that competitors would be able to get a foothold in the market.

6 THE PRESIDENT: Yes.

7 MR. HOWARD: So, to say: "People have got some attractive channels" that is exactly what the
8 WMO is hoping will happen. Obviously, they are not just going to be broadcasting Sky
9 Sports 1 and 2, it is that you have to have those to attract consumers, but you will also have
10 your other content which will make you an attractive retailer.

11 THE PRESIDENT: I dare say, that is something clearly that will be looked at in the review,
12 whether, in the market changes, it is still appropriate.

13 MR. HOWARD: In our submission, that is really the point. I have made my submission as to
14 why, actually, you should be looking at this in a narrow way. But, let us assume one looks
15 at it in the slightly broader way that you, my Lord, are, which is saying: "I can just look at
16 the general, as it were, justice of the position as it stands today". You cannot, as it were,
17 start with a blank sheet. You have to start, first, with the WMO, and secondly, of course,
18 with the IRO. Those are important starting points.

19 You then have to come and look at the situation today. In our submission, in fact, the
20 simple point is really this, that you have, as it were, assertion and counter assertion in this
21 material, and I would respectfully suggest that it is very difficult for you to actually form a
22 view as to which of Miss Fyfield or Mr. Petter is right, as to whether this makes a
23 difference, or that makes a difference, and so on. That is all stuff for the WMO review
24 where Ofcom will have a full opportunity over a period of months to review all of this.
25 But, insofar as you go down this route of, essentially, what I understand you are really
26 saying is "I want to look at the respective positions of BT and Sky and see which is the least
27 unjust result". Let us just see where that takes one.

28 BT, prima facie, is entitled to the benefit of the WMO, and that is to enhance competition.

29 If the IRO is not amended BT, practically, will lose the benefit of the IRO and so the WMO.

30 THE PRESIDENT: Is BT migrating its subscribers from Cardinal to YouView?

31 MR. HOWARD: Yes. And the Cardinal boxes, this is in the evidence, are: first, there are no
32 more being manufactured and, secondly, they are no longer seeking actively to sell that and

1 they are trying to migrate people and that process is well under way of migrating people to
2 YouView.

3 So, the reality is, leaving aside the argument, “Oh well, BT, you could carry on with
4 Cardinal if you want, and you could use DTT if you want”. The reality is that BT will not
5 enjoy the important protection of the WMO and they will therefore be put in a position
6 where they will face losing customers who they would have otherwise been able to get and
7 enhance competition; or they are put in a position where they have no choice other than to
8 accept Sky’s terms both as to price and as to handing over their BT Sports channels to Sky.
9 Now, that, if one just stands back from all of this for a moment and thinks about it, the
10 purpose of the WMO was to enhance competition, but the competitors need SS1 and SS2 to
11 have fair and effective competition. One of the competitors has purchased some football
12 rights. Now, both sides have peppered their evidence with quotes from the other side as to
13 saying why the rights that the other person has acquired are useless, and so on. Now, your
14 Lordship no doubt will say, “I will have to take all of that with a pinch of salt” because no
15 doubt -----

16 THE PRESIDENT: ... obviously not ...

17 MR. HOWARD: You will have seen Sky have said that, their advertising is full of saying how,
18 for instance, the first picks do not make any difference, they have got the best games at the
19 beginning of the season and that is because of the way the first pick actually operates so
20 they get the first picks and so how they actually have the best matches, and so on. And
21 equally why the UEFA deal which does not come in until 2016, so it is some way off, it
22 does not actually affect the current situation, why they say that does not matter, but – and
23 equally you can find statements from BT about why they say this does matter.

24 THE PRESIDENT: Which season does it affect, the UEFA deal? Which football season?

25 MR. HOWARD: The UEFA?

26 THE PRESIDENT: Yes.

27 MR. HOWARD: It is 2015-16.

28 THE PRESIDENT: Fifteen.

29 MR. HOWARD: Yes. So we are just about to start 2014-15, so it is not for another year.

30 THE PRESIDENT: Yes, but on your scenario it may be in the currency of the -----

31 MR. HOWARD: Yes, I am saying it may be, but if one is asking – the position as we stand today
32 it does not actually affect the, I mean, the battle and the reason obviously we would like you
33 to deal with this reasonably expeditiously, the battle is to get in customers now. The peak

1 selling time, if you like, is the period running up to the start of the Premier League and
2 probably immediately thereafter, but the peak interest is just prior to the start of, in this
3 period, running up to the start of the Premier League which is this year, 16th August,
4 Saturday the 16th.

5 THE PRESIDENT: Yes, we will come back to timing later.

6 MR. HOWARD: So, my first point is the practical reality from BT's point of view is that they
7 will completely be deprived of the WMO remedy, or they are left with the choice of
8 retailing Sky Sports 1 and 2 only to a sub-set of their subscribers on an inferior Cardinal
9 platform, and so that those customers will not be able to get the more attractive and more
10 competitive YouView platform. In other words what happens now is if you have a
11 customer (or has been happening) who says when he speaks to the person at the call centre,
12 if they want Sky Sports 1 and 2 they have to be pushed towards, encouraged to take, the
13 Cardinal box rather than the YouView box which Cardinal box is inferior in terms of
14 technology and what the customer will get, in other words that is the only way BT can do
15 this.

16 The "reciprocity demand" as it is put would allow Sky to effectively appropriate BT's
17 investment in the new content because BT has invested in the 38 Premier League games
18 plus, in a year's time, the Champion's League and the UEFA. But in fact the reciprocity is
19 not in any event true reciprocity because Sky has a number of other sports channels which
20 show important sports content which Ofcom has not, subject to the current review, held it is
21 obliged to retail, and that is Sky Sports 3, 4 and 5, particularly the important Formula One,
22 plus Sky Sports News.

23 Finally, if BT went down this route, it is being forced to go down a route of using DTT
24 notwithstanding the fact that that just imposes more cost on it – costs that it does not need to
25 incur in the light of the advance in technology and its investment in the technology. So, it
26 will either be put in a position where it will not be entitled to SS1 and 2 at all, or in order to
27 get it, it has to maintain an old platform, Cardinal, which is not in its commercial interest
28 and has to use an outdated technology, which is expensive and not in its interest.

29 But finally, of course, one has to remember that WMO, not only does it secure your supply,
30 of course that is on the WMO terms, it also has other protections within it which is the price
31 protection as to how it tracks Sky's retail prices, you also have a provision which stops Sky
32 moving content off Sky Sports 1 and 2 and, finally, there is also Ofcom's dispute resolution

1 mechanism. So, if BT is not allowed to use IPTV, its ability to compete with Sky is
2 seriously undermined.

3 THE PRESIDENT: I do not know the terms of the deal, the commercial deal, on Cardinal
4 whereby you get IPTV.

5 MR. HOWARD: Yes.

6 THE PRESIDENT: But I would be surprised if it has not got some safeguard for what might be
7 included in what is being provided. You say they can still move all the content off SS1
8 and 2 under Cardinal the deal, that may be.

9 MR. HOWARD: My Lord, I was not in fact referring to the Cardinal deal. The protection ...
10 may be at cross purposes.

11 THE PRESIDENT: I thought you said that the WMO, it is not just supply, it is also these other
12 provisions and therefore it is relevant even for Cardinal, where you are getting IPTV
13 because you have made a commercial deal but you are not getting these other things. But
14 perhaps I misunderstood you.

15 MR. HOWARD: Let me just go back a stage.

16 THE PRESIDENT: Yes.

17 MR. HOWARD: The WMO undoubtedly provides those protections. Your Lordship is saying
18 under Cardinal, do you not get at least one of the protections, which is that they cannot
19 content shift. I do not know, but I can see that may be right. The only deal that one has at
20 the moment is IPTV over Cardinal. It shows that there is no, as it were, free-standing to
21 IPTV, or principled objection, it is simply that because Cardinal is now an outmoded box,
22 they have not made a deal YouView and they want to attach onerous conditions to
23 supplying the YouView box.

24 THE PRESIDENT: The deal over Cardinal was - was it December ----

25 MR. HOWARD: 2012.

26 THE PRESIDENT: When did BT get the Premier League rights through, I think, the acquisition
27 of ESPN?

28 MR. HOWARD: They got them before that, around May 2012. Again, if one is looking at all the
29 circumstances, when Sky agreed to supply Sky Sports 1 and 2 by IPTV, it was in the full
30 knowledge that BT had acquired the rights formerly by ESPN and I think before that by
31 Setanta. In fact, Mr. Petter's first statement at para.27 makes the point that, actually they do
32 not have the protections that your Lordship would have thought they would have got. He

1 actually makes that express point. Presumably that reflects the relative strengths of
2 bargaining positions that, because of the need to get Sky Sports 1 and 2 ----

3 THE PRESIDENT: I note the date you just gave me was said to be confidential, but I do not
4 think it can be.

5 MR. HOWARD: It certainly cannot be confidential to Sky. I think it says confidential to Sky and
6 BT. It really goes back to the point I made at the outset, this is setting out terms of a
7 contract between Sky and BT. I agree with you, my Lord, it is difficult to really see why
8 this is regarded as - I suppose the problem is, the two parties say the contract is confidential.

9 THE PRESIDENT: I suppose the details of it are, but not the date.

10 MR. HOWARD: The date certainly is not confidential, no. I am not sure about the detail either.

11 In fact, that is a useful and graphic example. The WMO terms, in fact, do contain certain
12 provisions.

13 You have that paragraph that I have shown you in Mr. Petter's first statement. If you go to
14 bundle 5, Mr. Petter's second statement, tab 5, para.101, he explains this problem with
15 shifting. The position was Sky were not prepared under the Cardinal IPTV contract not to
16 do that, and that is to be contrasted with the position under the WMO contract, the extract of
17 which is at tab 36 in the bundle.

18 THE PRESIDENT: I see that, thank you.

19 MR. HOWARD: I respectfully say, the point you have raised, my Lord, actually shows the
20 WMO, as it were, in action and the difference between the two scenarios.

21 In our submission, the starting point here is that the WMO is a remedy which is designed to
22 assist BT and other competitors - but we are just looking at BT - and the change that is
23 sought is one which ensures they get the benefit, and without it they are deprived of the
24 benefit.

25 If we turn to the other side of the coin to the way that you are looking at it, my Lord, what is
26 the impact on Sky, it is worth noting that quite a lot of what Sky is saying is a repackage of
27 what they said in 2010. The reason that is important - I know you are saying that they are
28 now saying the circumstances have changed from 2010 - their evidence as to the harm they
29 would suffer in 2010 has not, in fact, been borne out. They do not come forward today and
30 say, "This is what I said was going to happen in 2010 and I was right, this has happened,
31 and therefore now the market has changed and it is even more serious". Let me just show
32 you what I mean by that. Would you take bundle 1 and turn to Mr. Darcey's statement,
33 which is after exhibit 1. Do you have that?

1 THE PRESIDENT: Yes.

2 MR. HOWARD: For this purpose it might be quite helpful to have open from bundle 4, Fyfield
3 1, which is at tab B. If you look in Darcey 1, p.12:

4 "Implementation of the decision will lead to significant changes in Sky's
5 business which it will be difficult to unscramble and will lead to irretrievable
6 damage to Sky's negotiating position."

7 That has an uncanny resemblance to Fyfield, para.68, where you see exactly the same point
8 being made. If you go back to Darcey at para. 36, the point that it would be very difficult
9 for them to start self-retailing after they had given wholesale supply. It is the same point
10 which is made in para. 68 of Fyfield 1. I am just giving you some illustrations, no doubt
11 you will want to read this yourself. If you go to 51, where he deals with costs of winning
12 back customers. Again, you will find if you look at Fyfield 92 ----

13 THE PRESIDENT: In fact, they make the same point, which I thought was not particularly the
14 thrust of your argument. I thought you were saying: "Look what Sky said in 2010, it did not
15 happen".

16 MR. HOWARD: Yes.

17 THE PRESIDENT: So one needs to look at what they actually said and what did happen.

18 MR. HOWARD: What they were saying, for instance, "I have had to supply under the WMO. I
19 will then have difficulties in negotiating terms with these people". In fact, what has
20 happened is that they have done an overall commercial deal with Virgin outside of the
21 WMO, and they have not put forward any evidence to say: "I was hampered in my
22 discussions with Virgin". Equally, we know they did the Cardinal IPTV deal with BT. We
23 know that they took a tough line whereby not only did they get the rate card prices but also
24 other protections, particularly the one that you, my Lord, thought would be obvious, that
25 you would have to have in a commercial deal about not shifting content, they refused to
26 give.

27 All I am saying is that one needs to look at what they are saying rather carefully because a
28 lot of assertions were made back in 2010. Very often the same assertion is being made
29 today, and there has not been any attempt to show, in fact, that what I was saying in 2010
30 has ultimately been borne out.

31 If one actually asks what are the market changes they are referring to. Essentially, as you
32 have said, my Lord, BT has stepped into ESPN's shoes and is a broadcaster of Premier
33 League rights and perhaps is in a slightly better position than ESPN in that it has the first

1 Pick rights and it has, from 2015/16 the UEFA rights. It is said they now have five million
2 or so viewers.

3 Our primary point is that in order to consider all of these points as to whether this no longer
4 means that the WMO remedy is appropriate or whether it should be amended in any respect,
5 that is a matter that requires the detailed review that Ofcom is going to carry out and, in our
6 submission, it is not appropriate to try to do that today. But, in any event, the points that are
7 made, we suggest, are relatively superficial. We have explained that BT does not have any
8 more matches than ESPN had and in Mr. Petter's second statement we have explained that
9 the first Pick has not, unfortunately, made much difference, and the acquisition of the
10 UEFA rights was exceptional, and looks unlikely to be repeated.

11 THE PRESIDENT: For how long do you have the UEFA rights?

12 MR. HOWARD: Three years.

13 THE PRESIDENT: Well, even on the most pessimistic view I would hope this case is over by
14 then ---- (Laughter)

15 MR. HOWARD: One would hope so, but I am not sure ----

16 THE PRESIDENT: We need to look beyond that.

17 MR. HOWARD: That is a fair point. The subscriber numbers is something of an illusory point in
18 that it is said that BT Sports has grown very rapidly, but, of course, the majority of people
19 are not, in fact, subscribing for BT Sports as such, they are either getting it for free because
20 they are BT broadband customers. One knows that if something is for free it does not take
21 much of an incentive to take it up.

22 THE PRESIDENT: This idea of things being, quote, "for free", is a bit of a misnomer is it not?
23 Clearly, BT is marketing BT broadband on the basis there is a nice package and you get BT
24 Sport, so it is getting subscribers to BT broadband.

25 MR. HOWARD: But, of course, a lot of subscribers are people who have simply got – the point
26 is you may not be particularly interested in sport, not somebody who would ever actually
27 purchase a sports channel, but if BT simply say, well, "You've just got to ring this number
28 and it will come up on your Sky box" it is not a very onerous thing. So there is a difference
29 in quality on any sensible view between people who just have it because they have
30 broadband, and every home practically now will have broadband ----

31 THE PRESIDENT: But not necessarily BT broadband.

1 MR. HOWARD: No, not necessarily, but what I am saying is obviously BT, as part of their
2 marketing – a lot of the people who have it would just be people who had BT broadband
3 anyway. You might historically – I can speak from experience – you have BT
4 broadband ----

5 THE PRESIDENT: And you can add this on for extra cost, yes.

6 MR. HOWARD: I can just ring up and add to my Sky package – I confess I have a Sky package
7 – BT. All I am saying is it is a rather false analogy, or false position to say: “BT has
8 somehow now become enormous in this market, and so they are not worthy of protection.”
9 The truth is that BT, in the Pay TV market, is a relative minnow compared to Sky, and
10 ultimately what one is interested in is, well, actually because what one is talking about is not
11 how many people through, all the different platforms that it is available on, watch BT
12 Sports, how many customers has BT got on its own platform, because that is ultimately
13 what this is all about – is BT being able to get customers for its platform? That obviously is
14 confidential what the numbers of those are

15 THE PRESIDENT: Yes. I think I have seen, well, I have seen various numbers. I am not sure if
16 I have seen a total number or I have seen a Cardinal number as opposed to a BT number.
17 Can you just take me ----

18 MR. HOWARD: Yes, it is in Petter, so in volume 5, that is where the number is.

19 THE PRESIDENT: This is in para.24, is it?

20 MR. HOWARD: Yes, but in fact ----

21 THE PRESIDENT: Just let me check this.

22 THE PRESIDENT: Now, the number of subscribers there who pay for BT’s what they call
23 “standard definition channels” is that then YouView and Cardinal, or ----?

24 MR. HOWARD: Sorry, I am not following your Lordship’s ----

25 THE PRESIDENT: I am looking at para.24.

26 MR. HOWARD: Yes.

27 THE PRESIDENT: Where there is a number in the first sentence, there is a total and then it says
28 only a part of that total:
29 “... are in fact subscribers who pay for BT’s standard definition channels”.
30 I am just trying to relate that to YouView and ----

31 MR. HOWARD: Yes, that is only people who are watching on Sky.

32 THE PRESIDENT: This is retail BT Sports subscribers.

1 MR. HOWARD: Yes. The total number of BT subscribers on its platform is at para.26. All of
2 those people -----
3 THE PRESIDENT: That is Cardinal plus YouView, is it?
4 MR. HOWARD: Yes, and they now will all, by definition they will all be BT broadband
5 customers, so they all get BT Sports for free.
6 THE PRESIDENT: But these are pay TV platforms.
7 MR. HOWARD: It is pay TV platform, but the point is they are not paying anything additional
8 for BT Sports.
9 THE PRESIDENT: And the figure at para.24, subscribers who paid for BT's channels.
10 MR. HOWARD: Yes, they will be via Sky.
11 THE PRESIDENT: They are the people on Sky who you say get reimbursed by Sky.
12 MR. HOWARD: Well, if that is the deal that Sky at that stage are offering.
13 THE PRESIDENT: They would be people who will not have BT broadband.
14 MR. HOWARD: Exactly.
15 THE PRESIDENT: But are Sky subscribers and therefore can pay extra to get the BT Sport
16 channel.
17 MR. HOWARD: They are the Sky football fan who wants to also get BT Sports and does not
18 have broadband; and the others are people who get the channel for free, do not pay extra.
19 THE PRESIDENT: I am still trying to, forgive me, it is very important I understand this.
20 MR. HOWARD: Yes.
21 THE PRESIDENT: There is a figure in para.24 for customers that simply get channels for free
22 with BT broadband, several million.
23 MR. HOWARD: I am sorry, could you say that again?
24 THE PRESIDENT: The figure in para.24, in line 3, "customers that simply get the channels for
25 free with BT broadband", right?
26 MR. HOWARD: Yes.
27 THE PRESIDENT: Right. Then there is a figure in para.26. And that figure you said are people
28 who get BT broadband. I am just trying to -----
29 MR. HOWARD: Let me explain, I am sorry if I have confused it. Paragraph 24 is looking at the
30 figure, the population which is in the first line who are receiving via Sky.
31 THE PRESIDENT: They are all via Sky.
32 MR. HOWARD: Yes.
33 THE PRESIDENT: I tell you what, I do not want to, this is important we get it right.

1 MR. HOWARD: Yes.

2 THE PRESIDENT: It is a difficult matter. Why do you not just clarify it with your clients over
3 lunch, and if you could hand up on one sheet of paper, just a breakdown.

4 MR. HOWARD: Certainly.

5 THE PRESIDENT: You understand why I am a bit confused.

6 MR. HOWARD: Yes.

7 THE PRESIDENT: Just clarify.

8 MR. HOWARD: I believe the point I just made actually, on reflection, is wrong.

9 THE PRESIDENT: Yes, well do not try and do it on your feet with people whispering
10 instructions. Clarify it over lunch and come back at two o'clock ----

11 MR. HOWARD: Yes. I think the position is actually ----

12 THE PRESIDENT: With a copy to Mr. Flynn as well.

13 MR. HOWARD: I think the position is actually fairly clear, but the figure on the third line of 24,
14 that figure incorporates the people in the third line of para.26, it is as simple as that. So,
15 you have ----

16 THE PRESIDENT: Well ----

17 MR. HOWARD: What you have got is the figure in para.23 are those who see things on Virgin.

18 THE PRESIDENT: Paragraph 23.

19 MR. HOWARD: The penultimate line, that tells you how many can see it on Virgin.

20 THE PRESIDENT: Yes.

21 MR. HOWARD: And that is just part of a general Virgin package, not specifically BT.

22 THE PRESIDENT: Yes.

23 MR. HOWARD: Then in para.24, the people on the second ----

24 THE PRESIDENT: And then the first line, that is the balance that makes up ----

25 MR. HOWARD: That is the balance.

26 THE PRESIDENT: Makes you up to 5 million.

27 MR. HOWARD: Yes. Of that balance, you have got the people in para.26 who are on BT's own
28 platform. But of the people – whether they are on BT's own platform or on Sky's platform,
29 the people in the third line figure, they get it as part of a broadband package whether they
30 are on Sky or on BT's platform. But the people in the second line, who are actually paying,
31 the only source for that is in fact people who are doing it via Sky.

32 THE PRESIDENT: Yes.

1 MR. HOWARD: So, if one is saying, “Well, how many people” which, it is actually the more
2 important point, “How many people are actually on the current – how many customers does
3 BT have for its platform?” That is the figure at para.26.

4 THE PRESIDENT: And they will be YouView plus Cardinal.

5 MR. HOWARD: Yes. There is a danger of losing sight of the fact that WMO is not to encourage
6 competition in the provision of sports channels to consumers, it is to encourage competition
7 in the provision of television generally via these different platforms, ie the content was
8 relevant in that in order to get customers you need to have Sky Sports 1 and 2, but the
9 ultimate point was yet more people competing effectively in the market place as retailers via
10 these different platforms as opposed to having one giant dominating everybody with little
11 competition getting in there.

12 THE PRESIDENT: Yes.

13 MR. HOWARD: And so I would respectfully suggest that the debate which has taken place and
14 the evidence has to how many people, how many customers you have for BT Sports, how
15 many people watch BT Sports and how many people watch Sky Sports, it is interesting but
16 probably not really that relevant, I mean so far as one’s interest in it, those are the figures,
17 but ultimately it is what you see at para.26 which shows what BT’s position is in the
18 Pay TV market.

19 THE PRESIDENT: Yes.

20 MR. HOWARD: Well, my Lord

21 THE PRESIDENT: How much longer?

22 MR. HOWARD: Not very much longer but I mean I can -----

23 THE PRESIDENT: Is that a sensible time to break?

24 MR. HOWARD: Yes.

25 THE PRESIDENT: So, if we say at two o’clock.

26 (Adjourned for a short time)

27 THE PRESIDENT: Yes, Mr. Howard?

28 MR. HOWARD: We were looking at the relative positions of BT and Sky. The premise of the
29 WMO was that the competitors of Sky need Sky Sports 1 and Sky Sports 2 to compete
30 effectively. The way Ofcom put it was that access to that content has driven the historical
31 development of Pay TV.

32 In para.26 of Petter 2, which we were looking at before the adjournment, one can see the
33 total numbers of BT platform customers. That number is a relatively small paragraph. I do

1 not think it is secret that it is under 1 million, and that is a relatively small fraction of the
2 total number of Sky subscribers. Again, it is a public figure from their last quarter, so at
3 March 2014 the total number of Sky subscribers is 10.6 million. I think that figure includes
4 the Republic of Ireland, so the figure for the United Kingdom would be slightly lower. We
5 also know that they have [redacted] Sports, SS1 and SS2, customers. What one can deduce
6 from that and from what Ofcom have found is that the Sports content is very, very
7 important in terms of driving customer numbers. You can see both the relative positions in
8 terms of total numbers of the two platforms, and you can see also the importance of Sports
9 to Sky. Again, it is no great secret that, of course, the acquisition of the Premier League
10 rights and other sports rights is what has driven Sky over the last 20 or so years.

11 In so far as one is looking at things today, one has got to ask oneself, what is the relevance
12 of the fact that BT has acquired the package of rights that ESPN used to have, more or less,
13 together with something slightly more on the first pick, and from next year BT will have the
14 UEFA rights.

15 Sky seek to use this material in two ways. Essentially, they seem to be saying that BT now
16 is effectively a strong competitor, so it should not need to have Sky Sports 1 and 2. It
17 should not be worthy of protection, or, alternatively, that if BT has these channels plus Sky
18 Sports 1 and 2, that would be an unfair advantage compared to Sky.

19 If we take the position of BT first. The position is plain, in fact, and this is really what
20 comes out of Ofcom. Sky Sports 1 and 2 powerful position and the need to have those in
21 order to compete remain. It cannot be sensibly suggested that the Premier League content
22 that BT has acquired now, and the UEFA content for 2015/16 is sufficient to outweigh the
23 attraction of Sky Sports 1 and 2 as put. To put it another way, it is not sufficient to suggest
24 that you will be able to attract customers by virtue of having 38 Premier League games, as
25 opposed to the 116 that Sky has on Sky Sports 1 and 2. So that the simple point is what
26 Ofcom has found is that Sky Sports 1 and 2 are the drivers for at least a large number of
27 people who are potential customers for Pay TV. Sky, of course, has those, in fact, it
28 actually has five other offerings, there is Sky Sports 3, Sky Sports 4, Sky Sports Formula 1,
29 Sky Sports News, and their new channel, which is Sky Sports 5, a football channel which,
30 for next season is going to be showing Champions League, and other European games.

31 The fact that BT has 38 Premier League games is not sufficient to outweigh the importance
32 of what Ofcom had found about the importance of Sky Sports 1 and 2. Of course, it is
33 important to remember that when Ofcom was considering the matter, it was also

1 considering the importance of the package of Premier League rights that ESPN then
2 enjoyed, and considering whether those, that package, should itself also be regulated in the
3 way that Sky Sports 1 and 2 were. It concluded that that was not necessary. So Ofcom had
4 left those on one side and chose not to regulate.

5 That is dealt with in the evidence in Mr. Petter's second statement at para. 30.

6 "At the time of the Pay TV statement Sky did not hold all the Premier League
7 rights. ESPN had a small number. Ofcom did not consider that the Premier League
8 rights sold by ESPN made those channels must have, nor did it find that access to
9 the content carried on ESPN was essential to ensure fair and effective competition.
10 Rather, it concluded those channels did act as a constraint on Sky. Equally, Sky
11 did not argue that access to ESPN, or the content carried by ESPN was essential to
12 allow Sky to compete."

13 Then he explains how Sky's absolute and relative share of Premier League rights has
14 increased since Ofcom's evaluation because they now have 116 of 154, or 75 per cent of
15 live matches, whereas, previously, they had 92 out of 138 or 67 per cent of live matches. So
16 the attraction of Sky Sports 1 and 2 has grown stronger.

17 At para. 31 he explains why the first pick point makes little, if any, difference. So if one is
18 asking oneself does the fact that BT has the rights which Ofcom previously considered were
19 not ones which were 'must have' and it was not essential that Sky should have, that this
20 makes all the difference, in our submission it is essentially inconsistent with the whole
21 premise of the WMO. The fact that BT has acquired those rights rather than ESPN has not
22 displaced the original rationale of the WMO or, indeed, of the IRO.

23 So, from, BT's point of view the need for Sky Sports 1 and 2 remains as strong as it ever
24 was. Moreover, the fact that Sky was willing to supply BT via IPTV, but only on what has
25 now turned out to be its outmoded box, perhaps reveals the extent to which any of this
26 actually causes them any damage.

27 Well, as to the UEFA rights, I have already made the point that those are not actually going
28 to kick in until next year, until the 2015/16 season, and so, bearing in mind that Ofcom is
29 going to be reviewing matters and can consider the extent to which that makes any
30 difference, it is not going to bite for another 15 months, during that period of time the
31 Ofcom review will be able to decide whether that fact makes any difference. Now, in our
32 submission, it is actually plain as a pikestaff that it does not make any difference and this is
33 all dealt with in the evidence. The net position is the right to broadcast a certain amount of

1 Champions' League games – of course, there is only a limited number of English teams that
2 participate in the Champions' League, it is only the top four of the Premier League and, of
3 course, how many games they are going to be in depends as some of them have to come
4 through knock-out rounds and so on, and in the UEFA League there are two or three more
5 teams, I think. Again, it depends how many get through. It is plain that that which is shown
6 with much less frequency is not going to be a sufficient hook, compared to Sky Sports 1 and
7 2, which, of course, are shown over critical weekends when the Premier League is on.

8 Insofar as there is an attack on BT's position – there are two attacks which are made within
9 all of this. One is just part of a general attack, that BT is a very big company and they paid
10 a lot of money for these rights. None of that is relevant to what one is actually talking about
11 here, which is the ability within the Pay TV market to compete. Bearing in mind Sky hold,
12 as it were, the key to get in with a lot of the customers, and that is what it is about. What
13 Ofcom was not concerned for this purpose whether or not one party could subsidise things
14 and bear large losses or anything of that sort, or looking at whether BT was big in the
15 broadband market. That was not the question. It is looking at the Pay TV market, and how
16 do you get competition effectively in that, and because of this being a driver, Sports
17 channels, it is how do you ensure that the sports channels are available to other retailers, to
18 allow them to compete?

19 In our submission, if I was just looking at it from the position of BT, the fact that BT has
20 been prepared to spend a lot of money in buying up some Premier League rights and some
21 UEFA rights, does not mean that it does not need the protection of the WMO. It plainly
22 does if it is going to succeed and not go the way of people like Setanta who have tried to get
23 in and have not succeeded.

24 Secondly, if we turn it round and say, well, which is the other point that Sky makes, "What
25 is the Sky position?" Now, their concern comes down to saying "BT now can compete
26 more effectively than we would like".

27 Now, let us just see, first, what they are saying. In so far as they are saying that BT will
28 have BT Sports plus Sky Sports 1 and 2 if the WMO, the IRO is amended, and they will not
29 have that, that is actually – one has got to see precisely what one is comparing firstly. Sky
30 as part of its offering to its customers undoubtedly has Sky Sports 1, 2, 3, 4, Sky Sports
31 News and the new one, Sky Sports 5. So they have got lots of football, lots of cricket and
32 other things plus Formula One plus Sky Sports News which attracts people. So, to say, in
33 my submission, your Lordship would find it invidious to try and assess simply on assertion

1 and counter assertion, really what difference it makes beyond the fact that you have as a
2 given that Sky Sports 1 and 2 are the critical channels.

3 The next point is it is in fact not the case that they do not have available to their viewers the
4 BT Sports. What they cannot do at the moment is they cannot retail BT Sports, but it is
5 available to their customers because it is on their platform. So, as things stand, it is not the
6 case that they are, as it were, their customers are deprived of content; and indeed as your
7 Lordship has seen in the evidence, they market themselves as having the entirety of the
8 Premier League games because with some clever language that they use, although they
9 cannot as it were sell to the customer BT Sports, they can say to the customer, “You have
10 all the Premier League games”, because that is true, because they can if they are a BT
11 broadband person they can get it, and if they are not Sky have done various marketing
12 things whereby they will indemnify people if they have to pay.

13 THE PRESIDENT: Just to understand how that works, the Sky customer has to get on the phone
14 to BT or send an email to BT to say “I am a broadband subscriber, would you make BT
15 Sport available on my Sky box”, or if it is not a broadband customer has to contract with BT
16 and then tell Sky and Sky will reimburse.

17 MR. HOWARD: You do not have to do anything, well, if you want to get a reimbursement, yes,
18 you would have to tell Sky. The way it works is if you are a broadband, I mean, BT will
19 advertise that BT Sport is available free to broadband customers, just ring this number, if
20 you are not it is £12 a month. So, the critical difference is the customer has to ring up BT
21 and all he does is, whichever one he is he just tells BT what I think his Sky box number is,
22 (I think that is what you are asked for) and or whatever the thing is, the magic number that
23 allows them to then turn it on. I imagine what happens is that it must be someone at BT
24 speak to Sky to do that, but that is all the customer has to do whether he is broadband or not.
25 If he is not, he just has to pay, by giving his credit card, to the person in order to -----

26 THE PRESIDENT: At BT?

27 MR. HOWARD: At BT. It is all a question of who you deal with.

28 THE PRESIDENT: Yes, so the Sky customer, BT gets the name and the details of the Sky
29 customer, which is quite valuable for BT, there is this BT customer who we know likes BT
30 Sport.

31 MR. HOWARD: Yes, that is right. And you say, what is the retailing —

32 THE PRESIDENT: Which has got to be of commercial benefit to BT, because they can then
33 approach the customer later.

1 MR. HOWARD: Yes, exactly. No running away from that on either side, and on the Sky side
2 they want to retail to BT's customers because they want to have the complete access to
3 anybody who is interested in the BT content. But if one is asking, "Are they able on Sky",
4 because that is actually what we are looking at, "Are they able to show the entirety of the,
5 are they able to show what BT is able to show".

6 THE PRESIDENT: Yes.

7 MR. HOWARD: The fact is their customer is seeing more and that is part of what they say in
8 their advertising. On Sky they can advertise, "This is the home of the Premier League".
9 And they can say that because they have on their platform the entirety of the Premier
10 League and BT does not have, and so BT could not say that because not all of the Premier
11 League games are in fact shown on Sky Sports 1 and 2. Some are not. And so it would be a
12 misrepresentation for BT to say, even if they have Sky Sports 1 and 2, that "We have the
13 entirety of the Premier League, you can see all televised games on our platform", because
14 the answer is they cannot because some games are shown on, for instance, I think Sky
15 Sports 3.

16 So, it is not a lot. It arises, for instance, I think at the end of the season when there may be a
17 number of critical matches going on, so then they have a number being shown
18 simultaneously. But the point is, it is in terms of a marketing position there is a key
19 differential, and the differential is whatever happens BT cannot market itself as being the
20 home to all Premier League, whereas Sky does. Not only does Sky do that, in relation to
21 what your Lordship has to consider it is important to note that they have in fact given Virgin
22 the entirety of their channels and Virgin also has BT Sports, so that Virgin is in a position to
23 market itself as the home of the Premier League.

24 THE PRESIDENT: That is because they have done a commercial deal.

25 MR. HOWARD: That is right. But if one is looking at the -----

26 THE PRESIDENT: I mean, that is the irony of all this, everyone else is, I think TalkTalk has
27 done a commercial deal with Sky.

28 MR. HOWARD: Yes, that has been announced today. But of course TalkTalk, the commercial
29 deal, firstly, that is on offer, so far as there is one on offer, is one that requires BT to hand
30 over to Sky its rights, and we say that that is not something under the WMO —

31 THE PRESIDENT: The Virgin deal is not under the WMO, is it?

32 MR. HOWARD: No, the -----

1 THE PRESIDENT: Everyone else has done a deal. It is the failure, which may not be your fault,
2 it may be because Sky is being unreasonable, but it is the failure of you and Sky to come to
3 a commercial deal that everyone else has achieved which is why you are here.

4 MR. HOWARD: The point is I am not sure your Lordship can read anything into this one way or
5 the other, the point I was making though, which is important, is what is being said ... that
6 Sky would be in a disadvantageous position and that would be jolly unfair, the
7 disadvantageous position being that our competitor will be able to show BT Sports and Sky
8 Sports 1 and 2 when I mean as a matter of fact Virgin is in a position as a result of a deal it
9 has done not only to show BT Sports and Sky Sports 1 and 2 but all the other Sky Sports
10 channels, and one would have thought if it was so critical, that this should not happen.

11 We do not know the circumstances of the Virgin Media deal, what one does know, though,
12 is that maybe they have done a commercial deal and are not relying simply on the WMO,
13 but the WMO is part of the context in which they may have made that deal, because it is a
14 fall-back position for Virgin. The same is true for TalkTalk TV. What you have got to
15 remember is that neither of those parties has acquired the rights that BT has, or anything
16 analogous. They do not have, as it were, their own sports channel. What you have is that
17 Sky was prepared to hand over to each of them the full panoply of channels. It has done so.
18 In other words, the concern about competition cannot have been so acute when they knew
19 that Virgin had BT Sports as well.

20 We say that the simple position is that the allegation or claim that having to supply BT on
21 the terms of the WMO for IPTV would put them in an unfair or different position is simply
22 not borne out. The truth is, yes, what Sky are trying to do is to access BT's sports channel,
23 but if one asks oneself, why is it they are trying to do that, the real position is, we would
24 suggest, pretty clear: that that of course undermines any ability of BT to compete with them
25 on the basis of having some offering which may be more attractive than what they have got.
26 What they want - although a competitor has gone into the market place and bought 38
27 Premier League games and for next season UEFA rights - is to be in a position where they,
28 themselves, can have that content, so that that, together with the content they have already
29 got, particularly Sky Sports 1 and 2, the other channels, means that the would be competitor
30 is put in a position where it will not be able to attract the customers because there is no
31 advantage to the customer in going to BT. Indeed, the customer will be at a disadvantage
32 because he will not have all of the channels, or the sports channels, that are actually
33 available on Sky.

1 THE PRESIDENT: He will not have all the channels, but he will have the two that you say are
2 the key, and BT will be able to compete with other benefits it can offer, like price.

3 MR. HOWARD: What one has got to remember is that WMO was not intended to put everybody
4 in an equal position. It is intended to ensure that the competitors can get a foot in the door
5 with Sky Sports 1 and 2, because that is the hook. Then, of course, they will have the other
6 content by which they will try and attract their customers to say, "Well, you should come to
7 us". It could be, "We have got some comedy show and you like comedy". It just so
8 happens that BT is offering here, "We have got our sports channel", which is of course
9 intended to be a competitor with all the other Sky Sports channels. None of this undermines
10 the principal function of the WMO which, as I say, is to get your foot in the door and
11 having this important hook which is the Premier League games of which Sky has the vast
12 majority.

13 In conclusion, we do actually respectfully suggest to you that this ought to be a relatively
14 simple exercise, the issue before you, in that the IRO provided for DTT because that was
15 the current technology, certainly for BT. The express liberty to apply was to cater for the
16 situation where the technology. As we have discussed this morning, the technology has
17 changed, and from BT's perspective rendering the order obsolete. Sky is obliged to supply
18 SS1 and SS2 to Cardinal and YouView for transmission via DTT. In our submission, it
19 should not be entitled to take advantage of the fact that, firstly, DTT has become more
20 expensive and is not economically worthwhile in the light of the spread of broadband; and
21 secondly, that YouView does not currently have conditional access technology.

22 As I have already told you, my Lord, in our submission, there is a false dichotomy between
23 DTT and YouView. The real issue is should Sky be entitled to avoid the WMO and IRO
24 and prevent a potential or actual competitor competing effectively by forcing it to live with
25 older, more expensive and less efficient technology, and using a less effective system,
26 Cardinal against YouView, because the latter does not yet DTT.

27 In our submission, the answers to that are relatively obvious, and the position that Sky is
28 taking is, in reality, a disguised attack on the IRO or indeed on the WMO, and all of those
29 points that it makes are ones which should be investigated in the course of the review by
30 Ofcom and the appeal in due course ----

31 THE PRESIDENT: You have made that point, yes. I have got that point.

1 MR. HOWARD: My Lord, those are our submissions. We, therefore, invite you to amend the
2 schedule to the IRO in para.2. In fact, one can delete so far as BT is concerned DTT and
3 provide for via IPTV.

4 THE PRESIDENT: Yes, thank you. Mr. Flynn, I asked Mr. Howard right at the beginning about
5 confidentiality claims, and I think some of the same points can be made as regards some of
6 the Sky evidence and assertions. Again, going into the fairly central area to your case, if
7 you look at Miss Fyfield's first witness statement, which is in bundle 4, p.15, para.77, all of
8 which is said to be confidential, even at the top of the next page, certain quotations from
9 BT's marketing of the BT Sports channel, which are public documents, which cannot
10 possibly be confidential.

11 MR. FLYNN: No, Sir, plainly those cannot.

12 THE PRESIDENT: And I do not see frankly how the rest of that paragraph can be either, it is just
13 supposition about what opportunities BT might have to market. It seems to me that is just
14 the sort of thing one might need to discuss, the part of this submission is being made, and I
15 do not see how it can be cloaked with confidentiality.

16 MR. FLYNN: Sir, I do not have to go to those specifically but I am happy to take a sensible view
17 insofar as one can on confidentiality and obviously ----

18 THE PRESIDENT: Do you agree that paragraph cannot be confidential?

19 MR. FLYNN: I would not agree the whole paragraph, but certainly anything that has been in the
20 Press cannot be, save and insofar as it illustrates what I think might properly be confidential
21 there, which is ----

22 THE PRESIDENT: You say what has been in the Press, but the beginning of it is just Miss
23 Fyfield's suggestion of how BT might be able to promote its channel.

24 MR. FLYNN: It could be useful information for BT to know that, and there are ----

25 THE PRESIDENT: The first bit is said to be confidential between Sky and BT.

26 MR. FLYNN: I was really talking about the second part, which is marked "Sky only,
27 confidential". Let me say this, insofar as there are things, and I shall continue to extend the
28 courtesy of calling you your Lordship, despite what I think it provides in the Tribunal's
29 Guide, since others have. What we have done, having had discussions between the parties
30 on putting back on confidentiality, we have got to a certain version which I hope is reflected
31 in your Lordship's bundles, and we have prepared a note to be handed up which has some
32 of the party only confidential material so that that can be pointed to in a context in the
33 course of submissions, and we have prepared a confidentiality ring version of that, which is

1 obviously for you and for the front row, and party only confidential versions of that so that
2 the respective clients can see them. So if that is acceptable to your Lordship then we will
3 distribute that now and we will see how we go.

4 THE PRESIDENT: It is just not helpful when exaggerated claims are made by both sides to
5 confidentiality.

6 MR. FLYNN: One understands, my Lord. I am not going to do any ‘pot calling the kettle black’,
7 it is probably six of one and half a dozen of the other and the important thing is we are able
8 to discuss the issues which actually arise in an appropriate forum, and you have indicated
9 that if necessary we would go into a closed session. I will endeavour to be careful about
10 confidentiality and keep it on an open level for the moment. If we get into an area where
11 you really want a discussion then we will ----

12 THE PRESIDENT: Well, you see the numbers of subscribers and so on, one can deal with that in
13 the way that Mr. Howard did. It is when there are excursions like this ----

14 MR. FLYNN: Indeed. Before starting, I wondered if it would be helpful just to indicate the
15 current state of play on what is available on what platform, because you have asked a few
16 questions about that. Your Lordship seems well aware of the distinction between self-retail
17 and wholesale distribution.

18 THE PRESIDENT: Yes.

19 MR. FLYNN: So I will use that shorthand. In terms of Sky and Sky Sports 1 and 2, where is it
20 available? Obviously, it is retailed by Sky on the Sky direct to home (“DTH”) satellite
21 platform. It is wholesaled to TalkTalk’s YouView platform. It is wholesaled to the cable
22 platforms of Virgin Media, and a number of small cable companies, and they have always
23 been supplied, long before the Pay TV statement was adopted. It is wholesaled to BT’s
24 Cardinal platform over IPTV since December 2012 – I think you have heard that date
25 earlier, it having previously been via DTT under an agreement negotiated under the IRO, in
26 the framework of the IRO, I will come back to that. It is available on line over the internet,
27 retailed on Sky’s Now TV platform. It is also self-retailed on TalkTalk’s YouView
28 platform via Now TV. In other words, Sky has a self-retail outlet for Now TV on the
29 TalkTalk YouView platform.

30 THE PRESIDENT: That is very helpful. The first one that you mentioned, which is it is
31 available wholesale to TalkTalk, that is distinct from what you have just mentioned.

32 MR. FLYNN: That is distinct from what I have just mentioned, yes.

33 THE PRESIDENT: TalkTalk has a wholesale arrangement.

1 MR. FLYNN: TalkTalk has a ----
2 THE PRESIDENT: That is put in for IPTV.
3 MR. FLYNN: Yes, I believe so.
4 THE PRESIDENT: If it is YouView.
5 MR. FLYNN: I think it was just said, and it has to be. That is correct.
6 THE PRESIDENT: TalkTalk are getting on their YouView platform under this wholesale
7 arrangement what BT are effectively seeking by this application? Is that right?
8 MR. FLYNN: In a sense, but we will come back to that, but, yes, they are. Put it the other way
9 that you did a moment ago, other people have been prepared to do commercial deals and BT
10 has not.
11 In terms of the self-retail on the Now TV, that was something I think you raised earlier, that
12 would be a possibility by what is called 'Unicast', so Sky could have its own sort of corner
13 of the YouView platform, but Unicast functionality has not yet been enabled on the
14 YouView platform, and that is what I was saying earlier, that that has not happened. So far
15 there is no deal between BT and Sky for a multicast service, which is what the TalkTalk
16 arrangement is.
17 The state of play, at least I think it is probably up to date, in relation to Now TV on
18 YouView is set out in the first witness statement of Miss Fyfield at paras. 53 to 57, if you
19 are interested in taking that any further.
20 None of those arrangements are under the WMO or the interim relief order. The two other
21 beneficiaries of the interim relief, Top Up TV is no longer operating a TV service, and Real
22 has not got to the point where it has a functioning service or would qualify for the benefit of
23 the WMO. So that is the position in relation to Sky Sports 1 and 2.
24 As regards BT Sport, obviously, that did not exist at the time of the interim relief order, or
25 the hearing in front of the Tribunal. It was launched following the acquisition of the live
26 Premier League rights. And then the ESPN channel was also added, as you know, February
27 2013 and the three channels I think launched in August 2013 and the Champions League
28 rights were acquired in November 2013 to kick in from the 2015 season.
29 I think it is important also to remember that at the time of the statement ESPN was
30 wholesaled to Sky, so there was no problem of cross-supply at that time.
31 BT Sport is available on BT YouView, it is not available on TalkTalk YouView. It has
32 been wholesaled to Virgin Media but not to Sky, obviously, that is why we are here. It is
33 also available on line via some form of BT player and lastly under the regulated access

1 provisions it is self-retailed to customers on the Sky satellite DTH platform. I think you
2 have had these details but, just to have them in one place, it is free, as you have said, it is at
3 no additional cost to subscribers to BT broadband, otherwise it is £12 a month for the
4 standard definition, and I think £15 a month for the high definition version of the channels.
5 More generally I do not think I will need to go into a lot of those details, but obviously
6 Miss Fyfield sets out, we say, fairly clearly and fairly the development of BT's platform and
7 BT Sport and agreements and negotiations with Sky starting at para.17 onwards.
8 That is where we are today, which is not obviously where we were in 2010. The order
9 I intend to follow roughly is to put our case in a bit of context again that factual
10 background, to deal with a few legal issues and then come to the evidence which will go to
11 balancing the effects or the justice of the case.

12 THE PRESIDENT: Yes.

13 MR. FLYNN: We have heard a lot from Mr. Howard about BT's entitlements under the WMO
14 obligation. In our submission that is not the right approach. The WMO is suspended,
15 wholly suspended subject to the terms of the interim relief order, and that is really where we
16 need to start. The WMO is suspended in that certain limited respects, and in my submission
17 the basis on which Sky applied for interim relief before the consent order was entered into is
18 not substantively relevant to this application.

19 Not all, I would say, not all on any view, not all of what Mr. Conyers has to say about that
20 is subjective, quite a bit of it is factual matrix, if you like, as to what actually happened and
21 who said what, but I will accept that the starting point for the Tribunal is to construe the
22 IRO according to its terms and I think it is the IRO one has to look at and not, for example,
23 as Mr. Howard did, the shorthand description of it in Mr. Justice Barling's judgment on the
24 application to extend the IRO for the benefit of REAL Digital; and in any event that
25 judgment itself, and we will come back to that, will have to be seen in the light of the
26 Tribunal's final judgment at the end of the day. Now, you have seen the IRO and I am not
27 going to spend much time on it, you have it.

28 THE PRESIDENT: Yes.

29 MR. FLYNN: It is in tab.2 of the authorities, and probably various other places. The operative
30 paragraph, as you have seen, is that the decision to insert the conditions into Sky's various
31 licences is implemented in respect of BT, Top Up and Virgin subject to above undertakings
32 and the attached schedule, but is otherwise suspended.

33 THE PRESIDENT: Yes.

1 MR. FLYNN: So, it is suspended subject to the terms of the Schedule and let me just say if one
2 turns to the schedule one notes, first of all, there is a deeming provision in relation to the
3 minimum qualifying criteria which, save in respect of technical standards and standards of
4 security and encryption which Sky was entitled to satisfy itself about. Then qualifying
5 platform means DTT in the case of BT, Virgin and Top Up, and via its existing cable
6 platform in the case of Virgin, with all parties having liberty to apply, you have seen that.
7 Just to point out that Virgin had no DTT platform at the time, so, that it is not the case that
8 there were not provisions in the IRO that might kick in in the light of subsequent
9 technological development or a party changing its distribution technology. And, secondly,
10 we have made the point in the submissions, and just to see them now while we are here, we
11 have made the point in relation to paras.4 and 5 that that provides specifically for possible
12 future events, in fact those did not happen, but the IRO itself had a forward looking element
13 to it, that is really the point we make.

14 Now, your Lordship has given an indication, but it is our case that court orders are not to be
15 disturbed on a whim, lightly done, or because of parties having second thoughts, regretting
16 the deal they signed up to just want another go, and it cannot be by way of disguised appeal;
17 and the change will not be made, in our submission, by something which was considered at
18 the time or could reasonably have been foreseen at the time of making the order, and we say
19 that however much BT portrays this as a simple matter of updating, or an easy case for your
20 Lordship, that it was foreseen by BT at the time of entering into the IRO and by all others
21 that BT was likely to want supply over IPTV while these proceedings were on foot, and that
22 it took the risk on that. And we say, and I will go over it slightly, that there has been no
23 unforeseen change of circumstances.

24 THE PRESIDENT: Well, is not one of the change in circumstances that this case is still not over,
25 and what is supposed to be an interim order pending final decision no-one, I suggest, in
26 2010 however they might think proceedings are slow in the English courts would have
27 thought that in 2014, and it is clear that it will be some time into 2015 at the earliest, that we
28 will get a final result.

29 MR. FLYNN: My Lord, all I can say about that is that in a subject of this complexity when it
30 was known at the time that there would be appeals going both ways against the order, sorry,
31 against the decision contained in the statement, “a major piece of economic regulation” as
32 BT has described it – entirely foreseeable that the main proceedings would take a
33 considerable amount of time because they would involve a lot of factual and economic

1 evidence, entirely foreseeable that there would be appeals from it, entirely foreseeable that
2 the matter might involve a remittal, and therefore the position could be lasting. It could go
3 on for a considerable time. I cannot say more than that, but I would say that this was not
4 beyond the range of foreseeable possibilities.

5 Just for your Lordship's note, I contrast that with the *Albion Water* one pager that we put in
6 the authorities where your predecessor, Sir Christopher Bellamy, effectively said that the
7 Tribunal had given an indication in that case as to when it might be able to complete the
8 proceedings, and that has been utterly falsified by the events. On duration, that is all I
9 would say about that.

10 In any event, my Lord, there are many other reasons why
11 we say, however this application is analysed and approached by the Tribunal, you should
12 refuse it, either as a matter of law or as a matter of discretion. Just dealing with a few of
13 those shortly, of course BT does already have supply over IPTV to Cardinal, and, crucially,
14 it could have the additional supply that it is seeking, IPTV for YouView, without the
15 Tribunal's intervention. There is no dispute as to Sky's willingness to provide that. The
16 reason that a deal has not been struck is that BT is unwilling to engage in what we call, and
17 fairly call, reciprocity. We say there is no suggestion in these proceedings that if BT did
18 enter such a deal with Sky that it would suffer serious harm. Ultimately, what this case is
19 about is lack of reciprocity. If the relief is given, despite the imbalance in investment in
20 Premier League rights, the harms that we will come to for Sky would eventuate. We say
21 that is uncommercial, it is not competition on the merits and it is absolutely nothing to do
22 with any of the objectives of the Pay TV statement.

23 Conversely, it is our case that if, for the interim period, through its own choice, BT wishes
24 not to engage in reciprocity it can continue to have supply to its Cardinal platform and that,
25 despite some statements today that is not financially viable, those, we suggest respectfully,
26 are highly overstated, and I will come back to that.

27 Likewise, Ofcom examined a similar application just last year and it came to the view that
28 BT could manage without supply on YouView, if it so chose, and that would be mitigated
29 by continuing supply to Cardinal. There is no appeal against that decision and no attempt to
30 renew it. In our submission, our suggestion is that BT had a go at it with Ofcom, and is
31 now having a go at it with the Tribunal.

32 A factor which the Tribunal must take into account, and we have documented this, is BT's
33 serious delay in bringing this application. In our submission, that is a powerful factor which

1 should suggest to the Tribunal that BT has no pressing need for the relief that it seeks, and if
2 you want references we have put those in in our response at para.2.12 and 6.2, and
3 Mr. Conyers deals with it at para.50 and following. This application was first intimated in
4 January of last year.

5 Then we say that the very issue which is dividing the parties, which is effectively whether
6 Sky is entitled to insist on reciprocity, is the matter that Ofcom is looking at. We heard
7 from Mr. Holmes today that Ofcom anticipates being able in the autumn - I think I am not
8 misquoting him - to take a decision as to how to proceed, as to whether there will be a
9 statement of objections or not. On any view, that investigation is well advanced, and is
10 being conducted on the basis of an extensive review of the documents. In its nature,
11 because it is a full investigation, it is much more thorough than this Tribunal can be on an
12 application of this kind. Of course, if BT succeeds in that then it will have the supply of the
13 channels for its YouView platform.

14 THE PRESIDENT: But not for a long time.

15 MR. FLYNN: No, it will not be for a long time, but that is a factor for you to take into account.
16 It is being investigated. It is being investigated more thoroughly than you can, in my
17 respectful submission.

18 THE PRESIDENT: Yes, but I am only concerned with interim relief. In every case where you
19 are looking at interim relief, in the usual case of interim relief, it is the court, itself, that is
20 going to look at it in great detail in the future, but it has got to try and see how best to hold
21 the ring until then.

22 MR. FLYNN: I entirely take that point, my Lord. There it is. In relation to how long might the
23 interim period be, that is one of the factors you should take into account.

24 Now we are told in Mr. Petter's second and indeed his third witness statement - I should say
25 we do not object to that being admitted although I do not think it has specifically been
26 applied for - that Mr. Petter says that actually they are willing to supply. Apparently they
27 could have of their own volition the relief that they seek under the application - in other
28 words, the availability of the channels on IPTV for YouView if they were prepared to do
29 something, which Mr. Petter says that they are. The implication of that ----

30 THE PRESIDENT: Where does he say that?

31 MR. FLYNN: It para.50 of his second witness statement. It is right at the end and it is not
32 confidential.

1 THE PRESIDENT: Yes, “BT remains open to agreeing genuine commercial terms for wholesale
2 supply of its channels to Sky”. Yes, you cannot agree on terms.

3 MR. FLYNN: Yes, and a similar point is made in his third witness statement at para.8, there with
4 a confidentiality marking that is perhaps inconsistent with the previous one, but so be it.
5 In our submission, it looks as though a commercial deal would be possible if BT does not
6 get the relief that it is seeking through this, effectively, application for a regulatory leg-up.
7 When you come to look at the circumstances in which this application has to be determined,
8 in our submission, you will have to look at all the relevant circumstances and take the
9 circumstances as they are today, not as they were in 2010 or envisaged in the statement.
10 You will have to look at all the relevant circumstances, and that is what your Rules say, not
11 just the things that BT say are relevant to their application. Some of those we will come to
12 in the evidence but there are also two very important contextual matters which, in our
13 submission, the Tribunal cannot ignore. The first is that, of course, for the reason your
14 Lordship has already given, that this has gone on a while, unusually, there has already been
15 a first instance and an appeal Judgment in the proceedings for which the IRO was designed.
16 The Tribunal has given a Judgment on the merits of the appeal and also made some
17 observations in a costs’ Judgment. We are not making these observations or submissions
18 about this Judgment, as was suggested by my learned friend, to say what might happen in
19 the future, it is really as to the context in which the Tribunal has to determine this present
20 application, because we say there is a disconnect between the relief that is sought in this
21 application and the scope of the proceedings as they now are, pending before the Tribunal.
22 Insofar as the WMO obligation, or the decision to impose it was premised on an
23 unwillingness by Sky to wholesale, the Tribunal found that to be baseless, and there was no
24 appeal against that part of the Judgment. The Tribunal found as a fact that BT bore
25 significant responsibility for the fact that no wholesale deal had been done before the
26 statement was issued. One is tempted to say: “Here we go again”. There is no dispute in
27 these proceedings, Sky is willing to supply BT over IPTV and for its YouView platform,
28 on what it suggests are fair commercial terms. The issue that is remitted to the Tribunal is
29 about price, and without attempting to formulate it comprehensively, it is essentially is the
30 WMO obligation justified, because there is a need to regulate or control Sky’s wholesale
31 prices to hypothetical new entrants in the interests of fair and effective competition. BT
32 accepted in front of the Court of Appeal and the Court of Appeal recorded, at least in the
33 Judgment of Lord Justice Vos, that that did not apply to BT. We say it is fairly obvious,

1 given the size and scale of BT, and there is evidence about that from both sides, it is fairly
2 implausible that BT would be any less able than Virgin Media to compete at Sky's
3 wholesale prices, as opposed to the regulated prices.

4 I think at this point, if we have not already given up the hand up note, I would like that to be
5 done now, please. (Same handed) As I said, this note is really just a place to put some
6 matters to which single party confidentiality is necessarily or has been claimed. As you will
7 see, there is a colour code which is fairly straightforward, and we set out there some of the
8 references in the evidence to the relationship between Sky's price to BT and the WMO
9 price. I do not really need to read any of this. If you go to the end of para. 4(c) you will see
10 the position which is still in discussion between Ofcom and Sky as to what the notional
11 WMO price will be from September compared with the wholesale price that BT pays under
12 its current agreement, and that will be increased. I understand two things: one is that BT
13 has indicated that it is content with the price that is proposed there right at the end of the
14 sentence. I think I can indicate that the WMO price on Ofcom's calculations will be 4p
15 lower than that because of a subsequent change in the RPI index.

16 MR. HOWARD: My Lord, this appears to be a further skeleton argument from Sky which we
17 have only just been handed. It seems to be not in accordance with what your Lordship
18 indicated as putting in a five page skeleton argument.

19 THE PRESIDENT: I do not know, but it is being used, as it were, as a speaking note.

20 MR. FLYNN: My Lord, precisely. It is being used as a speaking note and to avoid forced
21 reference to confidential material, and just to collate some references in one place.

22 THE PRESIDENT: Yes.

23 MR. HOWARD: My Lord, my only point is - obviously I am not objecting to such a document
24 going in - we would reserve, we have not ----

25 THE PRESIDENT: You have not had chance to read it yet?

26 MR. HOWARD: Exactly.

27 MR. FLYNN: Of course, it has no further evidence.

28 THE PRESIDENT: Well, a skeleton would not have further evidence, would it?

29 MR. FLYNN: No, but I mean in terms of a response.

30 THE PRESIDENT: We will see where we go, particularly where a case is only listed for a day
31 generally ... can be provided to the other side at least the evening before, because of getting
32 instructions on anything.

33 MR. FLYNN: A speaking note, in fact, would not have been.

1 THE PRESIDENT: Let us just proceed.

2 MR. FLYNN: I was saying really that the supply concern under the WMO is not relevant to these
3 proceedings, the price concern is not, and the appeal itself is not and never was concerned
4 with constraining Sky's market power – third point. We give references in para. 8 of our
5 skeleton to make good that point that, despite Mr. Petter referring regularly to the WMO
6 being aimed at controlling Sky's market power it simply is not.
7 Just, lastly, on the WMO and current conditions there, again you heard from Mr. Holmes
8 this morning with an indication of the timing of the consultation on the WMO review, and
9 as your Lordship indicated at the time there is plainly some room for interaction between
10 the further appeal possibilities in this case and that review.

11 THE PRESIDENT: So, the WMO is not concerned with Sky's market power. I mean it was, was
12 it not, to enable other entrants to come into the market and therefore to have the effect of
13 inducing or promoting more competition in the market which would therefore reduce
14 market.

15 MR. FLYNN: It was to allow the, Ofcom disclaimed taking measures to reduce by, you know,
16 controlling the rights to which Sky might have access or anything of the sort. And clearly,
17 yes, it is intended – to promote fair and effective competition was the ----

18 THE PRESIDENT: And new entry.

19 MR. FLYNN: And assist new entrants, yes.

20 THE PRESIDENT: Well, that would undoubtedly ...

21 MR. FLYNN: In that sense ----

22 THE PRESIDENT: ... market power, some more dramatic, some more drastic than others and do
23 not have to order divestment trying to reduce market power.

24 MR. FLYNN: The drastic ones were eschewed.

25 THE PRESIDENT: Yes.

26 MR. FLYNN: The concerns then were supply and price and, as I say, the concern over supply has
27 gone, the concern over price, whatever may be the position for other operators, and we may
28 have to argue about this in due course, irrelevant to BT.

29 THE PRESIDENT: ... to be made by the WMO in the circumstances at the time to enable, I have
30 not read the Pay TV statement, but as I understand it, to enable new entrants or smaller
31 competitors to get access to what were regarded as the key content to be a more effective
32 competitor. Is that not right?

1 MR. FLYNN: Yes, that I think is right, but it does expressly say we are not intervening to
2 remove Sky's market power, so that is – the references are in our note and I entirely take
3 your Lordship's point, yes, it is intended to give potential new entrants a leg up, as I said.
4 But, in any event, we say in relation to the pending proceedings before the Tribunal which
5 are now about the pricing concern, it is to say the least implausible that even if the WMO
6 obligation survives in some form, that it would go so far as to be found to be needed to
7 constrain Sky's prices to BT.

8 The other general contextual point that we say is relevant is of course the acquisition by BT
9 of, or in the making of very substantial investment in live rights, its acquisition of the ESPN
10 channel making it appear in its own right a major supplier of Core Premium Sports
11 Channels as those are defined in the statement. The idea repeated again today that BT is a
12 minnow that needs the Tribunal's help to compete we say is simply incredible. We have
13 made references in the handed up note, we give you the references again, in para.5 to the
14 comparison between subscribers and obviously there are some very confidential numbers
15 there and I am not going to read them out, but we say BT has made a very impressive start
16 and has a large number of subscribers, quite a large number of subscribers, in a short time,
17 and obviously it is a very substantial player in, not just in its Pay TV business but in all its
18 businesses for which it has been well known for years, line rental, voice telephony, and of
19 course broadband, and that that is using the Pay TV business to advance the interests of
20 those aspects of its operations.

21 THE PRESIDENT: And in the way it has acquired all those subscribers is through the offering to
22 BT broadband subscribers, so a lot of them are existing, is that right, BT broadband
23 subscribers, who can then, sign up for ...

24 MR. FLYNN: What obviously, some of them will be and I do not know what the numbers are,
25 but the business plan plainly is to increase the take up of its broadband by using Pay TV as
26 a hook, and -----

27 THE PRESIDENT: Yes, I mean, it is not actually.

28 MR. FLYNN: I beg your pardon.

29 THE PRESIDENT: It is not literally Pay TV is it, in that sense? They are not paying for the -----

30 MR. FLYNN: Well, you are if you are not a BT broadband subscriber, you are paying cash
31 money to BT, and that is a substantial number of the -----

32 THE PRESIDENT: Yes, but that is not the, when you make that comparison that is a very small
33 part of the total.

1 MR. FLYNN: Well, that is why we say that is not the right way of looking at it. It has a large
2 number of subscribers because of the investment it has made in sports rights and we say it is
3 fair to compare, it is more apples and apples, to see how many subscribers it has to its sports
4 channels and how it gets there, and as you have said, calling it “free” is only one way of
5 looking at it, as it were. And there we simply say that is a dimension of competition that the
6 Tribunal has got to take into account. The big issue, the big issue in this case, is that it has
7 those rights and those channels and the development, the development with which the
8 Tribunal is concerned here is this unwillingness to be reciprocal, and I will not say more
9 than, you know, the way those rights are being played down in the evidence here is quite
10 inconsistent with the public record, even making such necessary adjustments as you have to
11 for the way people state things, state things in public to make the best of their commercial
12 position.

13 Now, in relation to the legal test and how the Tribunal is going to approach this, let me say
14 first of all, we have set out the law in our submissions and I understand from your Lordship
15 that you do not want a detailed disquisition on that. But let me say, firstly, that the fact that
16 there is a liberty to apply in the schedule does not in our submission dispense BT from
17 showing, the need to show, the change of circumstances. The case law does not say that. In
18 cases like *Chanel v Woolworth* where the order was until further order of the court were
19 held effectively to have an implied liberty to apply, so that the fact that there is or is not a
20 liberty to apply in the court’s order is not the determinative thing. The fact that, as
21 Mr. Howard points to the *Gantenbrink* case this morning which itself was just a first
22 instance application of the Court of Appeal’s judgment in *Butt* which is a wholly different
23 circumstance from the present one, which is where a party has given an undertaking to the
24 court on one day because at that point he knows that he has not got and it will take him
25 some time to get the evidence to show why he should not, or why the other party was
26 making material non-disclosure or something of the sort; and that that position was known
27 to all, was communicated, was evident from the record, whether or not there is a liberty to
28 apply.

29 It is entirely different from this case where there was no suggestion that, at the time of the
30 entering into the consent order, BT could not deal with the IPTV issues, would need to
31 come back, was reserving, nothing of that sort at all. You have seen the record, the fact is
32 that it was raised and it was not included in the final order.

1 In any event, the liberty to apply simply cannot determine the outcome. The fact that you
2 can ask does not mean you get it. There is a large bootstraps element in what BT has to say
3 here.

4 On that basis, as I say, I will not go into a detailed exposition on the case law, not least
5 because on a one day hearing we are already at 3.30.

6 THE PRESIDENT: I read the other case over lunch.

7 MR. FLYNN: As I have said, is there a change of circumstance? Your Lordship has pointed to
8 the length of the appeal and we have debated that.

9 If you look at para.6 onwards of our hand-up note, which refers to the evidence, we say, and
10 this seemed to be what Mr. Howard was saying earlier, BT's case must be that it expected,
11 and I am looking at para.7 in particular ----

12 THE PRESIDENT: Why do say in para.7 that BT's case must be that it would not expect to
13 distribute at all for several years?

14 MR. FLYNN: That is how we understand their case based on the matters set out in para.6.

15 Taking those together, we understand BT's case to be - we do not mean "must be" in the
16 sense of "is required to be"- as far as we can see what they must be saying is ----

17 THE PRESIDENT: "It appears to be".

18 MR. FLYNN: "It appears to be", if you like, it did not expect to distribute the CPSCs over IPTV
19 for several years. That is inconsistent with the confidential evidence to which we refer over
20 the page.

21 THE PRESIDENT: All that they are really saying is, yes, we saw it as coming but it did not
22 appear to be particularly important or likely to be important for several years, and therefore,
23 as a sort of compromise you make to get an agreed order, they are ready to exclude it.
24 Whether that expectation was right or not, it is more than a couple of years, and by the time
25 four years has elapsed it really has become important.

26 MR. FLYNN: As I say, the idea that it would be several years down the line is not what was
27 foreseen at the time and that is the force of the evidence there. There is plenty of discussion
28 in the Pay TV statement and at the hearing about Project Canvas, which is what has now
29 become YouView. Everyone was looking to the possibility of IPTV distribution in, let us
30 just say, the foreseeable future, without giving any confidential details away. The idea that
31 it has come up rather lately is, in our submission, just not sustainable.

32 I think the other point that has been majored on in front of you today is that, as it were, there
33 are changes in respect of DTT, either that it, itself, has become outdated and unviable, I

1 think was the phrase used, which we will come to. That, in our submission, simply cannot
2 be right. Likewise, the fact that YouView would not be supporting conditional access
3 technology on DTT is something that has been known for some time.

4 Our submission overall is that ----

5 THE PRESIDENT: When you say it has been known for some time, it was at one point
6 anticipated that it would have conditional access.

7 MR. FLYNN: If one looks at, I think, the third witness statement of Mr. Petter, and looks at
8 para.9 and particularly 10, which may be what you are thinking of, you will notice that ----

9 THE PRESIDENT: That is exactly what I was thinking of.

10 MR. FLYNN: Paragraph 11 is completely unspecific as to timing. Paragraph 10 refers to ----

11 THE PRESIDENT: What he says is that at the time of the IRO it was anticipated that Canvas, or
12 whatever it was then, or the future form of IPTV box would allow encrypted DTT.

13 MR. FLYNN: Yes, but that is to be read alongside the point we have just been on about when
14 you are also expecting to be on IPTV. I am only on the slightly different point that it has
15 subsequently turned out that DTT or YouView would not have conditional access
16 capability, and I say that did not happen yesterday.

17 THE PRESIDENT: It has happened since the IRO.

18 MR. FLYNN: It has happened since the IRO, but I think I need to draw your Lordship's specific
19 attention then - sorry, I should have done this before, if you go back to the hand-up note and
20 one looks at the confidential evidence in para.7(a), the bit that is there highlighted indicates
21 envisaged mode of distribution of premium channels.

22 THE PRESIDENT: Yes.

23 MR. HOWARD: Just to be clear, what one will actually is Sky Sports 1 and 2 were always
24 intended to be distributed by DTT at the time of IRO and for the foreseeable future. Hence
25 he refers to the contract that was about to be entered into in order to get the capacity over
26 DTT, this is para.25, for a five year term. The problem was if Sky were granted the relief
27 they were seeking then they would not be able to purchase that capacity and if they
28 succeeded in the appeal then they may have lost that capacity was the response being made.
29 But the intention at that stage was DTT for Sky Sports 1 and 2, it was never suggested
30 otherwise.

31 THE PRESIDENT: Right, thank you.

1 MR. FLYNN: It was inevitably the original intention because it was all that was available.
2 Anyway, all those points to say, in our submission, these developments are not really
3 changes, and they are certainly not significant or unforeseen in the meaning of the case law.
4 Mr. Pickford is pointing out that the short quotation we make in our hand up note is part of
5 a broader para. 22 of Mr. Watson's statement which, perhaps, your Lordship will read
6 afterwards. The point that has just been made to you is not in our submission consistent
7 with that.

8 THE PRESIDENT: Yes.

9 MR. FLYNN: We maintain that the threshold for succeeding on this application has not been
10 attained but, in any event, we say we have developed this in the skeleton that obviously the
11 Tribunal has to make an appraisal under the factors there to be found today. Whether this is
12 to be treated therefore as an application for relief and the Tribunal has to follow the rules
13 which are binding on it, Rule 61, nobody is suggesting that BT's application fulfils the
14 criteria for avoiding significant and irreparable harm to BT, and I do not think I need to
15 dwell on that, that is not ----

16 THE PRESIDENT: I do not think it is, I think it is under the liberty to apply.

17 MR. FLYNN: My Lord, our suggestion is once you have a liberty to apply it is an application for
18 relief and it is an application for the Tribunal to exercise its powers under Rule 61, such as
19 those are, to be found. We are not making the application so we have nothing to say here
20 unless we can show ----

21 THE PRESIDENT: Well, I do not see that it is an application, Mr. Flynn, for relief. You made
22 an application for relief, you got it, albeit by consent under certain terms, BT saying maybe
23 by reason of change of circumstances, though they say they do not even need to show that,
24 but that the terms on which your client was able to get relief as matters develop and now
25 operate, do not operate in the way intended, or operate in a way that is unjust and therefore
26 should be varied. That is the reality of the application. I do not think they need to
27 satisfy ----

28 MR. FLYNN: We say they do not put their application that way and they do not say that they
29 could satisfy Rule 61(2), that is what is said. They have said, I think, that we would need to
30 if we are effectively to oppose the relief that they are seeking, perhaps I do not need to deal
31 with that on your Lordship's view, but we certainly say that we do not need to do that.
32 Insofar as BT has said in these proceedings that there was no possibility of Sky suffering
33 irreparable harm at the time of the application, we say that is just simply a suggestion that

1 they cannot make, that was not determined. The fact is parties were willing to enter into the
2 consent order which suggests that some, at least, thought there might be a risk that Sky
3 would satisfy that provision. The risk of limiting the relief, because this is what this
4 application is in substance, it is to limit the relief that Sky obtained pursuant to the interim
5 relief order, that cannot be assessed by the test which I think is in the BT submissions, and
6 was made again by Mr. Howard today, that you do not have to worry because Sky has not
7 suffered any serious or irreparable harm by virtue of the supply that was required under the
8 IRO. As I think I have already said, the limited supply that Sky agreed to, pursuant to the
9 interim relief order, was effectively what it was already prepared to do before the statement
10 was issued. It was already supplying Virgin and so the only question in relation to Virgin
11 was the price arrangements, which were dealt with by the escrow account, and in relation to
12 BT negotiations were advanced for a wholesale deal, as the Tribunal later found Sky was
13 offering that in good faith and BT bore significant responsibility for the fact that it had not
14 been completed before the WMO was imposed.

15 THE PRESIDENT: So you say look at the CAT Judgment and what it found about the
16 negotiations?

17 MR. FLYNN: Yes. There is clearly no harm to Sky from the limited relief scope of the interim
18 relief order but if the relief were to be further limited by your acceding to BT's application
19 then we say there would be serious durable impact to Sky, and again I will come to the
20 evidence on that.

21 In any exercise of your powers under the Rules we say Rule 61(3) applies. You have to
22 consider the factors that are set out there. I think in a sense you have already indicated that
23 that balancing all the relevant circumstances is what you would be doing. I have already
24 said that insofar as the urgency of the matter, it is not; then there has been delay. The fact
25 that the new football season might be starting soon is something that happens every year
26 and this has been hanging about a bit. Really, you will be balancing, in our submission, the
27 respective effects on BT if they do not get what they are asking for, and on competition if
28 they do, which we view substantially through the prism of the effects on Sky, we set out in
29 the evidence, which, in our submission you will have to consider. You will have to take a
30 view on the balance of the evidence, obviously as I think your letter indicated last week,
31 you will not be deciding every point of fact, but nevertheless, the review will have to be by
32 reference to the evidence before you.

1 Turning then to the impact on BT, first, we have already said that a similar request was
2 made to Ofcom and Ofcom concluded that BT could perfectly well survive in the interim
3 period. We have made a reference to the size and strength of BT and its investment in
4 sports rights, its commercial goal. It is absolutely crucial to note, to weigh in the balance,
5 the fact that BT already has a supply over IPTV to their Cardinal platform, and that it could
6 have a supply on its YouView platform. There has been some suggestion that Sky is not
7 offering full reciprocity. I will not go through the evidence, but if you look at Miss
8 Fyfield's second witness statement, paras. 14 to 19, you will see all the permutations that
9 have been offered to balance each other out. Full reciprocity is sought and available from
10 Sky in various permutations.

11 It is worth noting, possibly also, that as far as Sky was prepared to offer comfort on content
12 shifting again subject to reciprocity on that. I doubt you are going to go so far as to look at
13 the term sheets but in tab 12 of bundle 6, you will find a term sheet with a reference to
14 programming commitments, which will show you the position there.

15 We have referred to the statement now that BT is apparently willing to consider supply to
16 Sky. We say that BT would not be harmed, and it does not make a case that it would be
17 harmed by reciprocal supply, and that this is actually consistent with BT's general strategy
18 for its channels. That is dealt with again in our hand up note, references to confidential
19 parts of the BT evidence in paras. 13 to 16.

20 While you are in the hand up note, the point immediately above it is in relation to the
21 evidence of the impact on BT if, rather than do a reciprocal deal, it prefers to stick with
22 supply of the Sky Sports 1 and 2 for the Cardinal platform, and our submission there is that
23 there is no insuperable difficulty. A particular point that I would like to make, if one looks
24 at para. 10 of the hand up note you will see some confidential information from BT
25 including a figure, although that is the only figure that is given, there is no detailed analysis.
26 We say if that is the basis on which it is said that DTT is no longer viable then the Tribunal
27 really cannot take that into account.

28 The point has also been made that under the existing Cardinal supply arrangements, BT is
29 not subject to what it calls the safeguards contained in the WMO obligation, because that
30 deal is made outside the interim relief order.

31 There are really three points in that. We have already spoken about pricing. The next one, I
32 think, is content shifting where, as was explained, there are occasionally once or twice,
33 possibly three times a season, clashing of scheduling such that not all live PL matches that

1 are available to Sky can be shown on Sky Sports 1, or Sky Sports 2. Then in exceptional
2 circumstances it may be shown on another of Sky's channels, and that is all that is behind
3 the point that Mr. Howard was making that BT cannot claim to have the entirety of the
4 Premier League, even if it is able to self-retail, if it is able to have Sky Sports.

5 The particular point here is that nothing Mr. Petter says suggests that there has been any
6 content shifting that would not have been allowed under the WMO obligation. It seems to
7 be just entirely a theoretical complaint, there is no specific allegation that Sky has done
8 anything that would not have been allowed in respect of these matches if the WMO had
9 been in force. The last point on that is the dispute ----

10 THE PRESIDENT: I would think if you reached a commercial agreement to provide Sky Sports
11 1 and 2, and really sought materially to shift content away while you are dominant, you
12 might have Competition Act problems.

13 MR. FLYNN: There might well be all sorts of problems, and it has not been suggested that it is
14 not happening to any great extent or for any reasons other than perfectly legitimate ones.
15 But, in particular it is certainly going no further than would be allowed under the WMO
16 obligation. So the idea that they are in some way losing out because this is a commercial
17 deal is, we say, baseless.

18 THE PRESIDENT: The WMO permits limited shifting?

19 MR. FLYNN: I do not have the details, yes, it does, and it is pretty vague about it, basically.
20 (After a pause) I am told that actually it is not a requirement under the WMO obligation. It
21 is true that there was some protection given under the agreement which BT and Sky entered
22 into, the original DTT distribution agreement.

23 MR. HOWARD: The difference is, of course, the terms under the WMO have to be approved, if
24 there is any dispute, by Ofcom.

25 MR. FLYNN: And the point we make is that no dispute as to that, or anything else, has arisen
26 under the commercial agreement that could have been submitted to Ofcom under the WMO
27 obligation. So, all in all, apart from the assertion that BT's Pay TV has fewer subscribers,
28 we say that BT does not substantiate the claim to harm that it would suffer if the IRO were
29 not to be amended. There is no basis for saying that it would not have the resources to
30 continue to invest in its Pay TV business.

31 In short, based on our submissions, the evidence and the hand up note, as far as the BT
32 point is concerned, we say there is no reason for the Tribunal to come to a different

1 conclusion from that that Ofcom came to, which is in the interim period, given the
2 availability of supply over Cardinal and so forth, BT will not suffer harm.

3 Conversely - and this is the last section of what I need to cover - we say that there would be
4 a substantial impact on Sky. The points are, to a great extent, Sky confidential. The one
5 paragraph summary of the case is in para.19 of our skeleton argument, which perhaps your
6 Lordship might like to turn up to see the summary of what the evidence is. All of those
7 points are important. The particular one that we would say would be a permanent, as it
8 were, structural change to the market and not appropriate for an interim order is that which
9 you see in the first yellow bit of that paragraph.

10 THE PRESIDENT: In yellow?

11 MR. FLYNN: Perhaps you do not have yellow?

12 THE PRESIDENT: I do. Are you looking at 18(b)?

13 MR. FLYNN: No, I was looking at our five page skeleton.

14 THE PRESIDENT: I am looking at that, but it has got paragraph numbers. Is it para.18?

15 MR. FLYNN: It is 19 in mine. I hope you do not have different paragraph number of. It starts
16 "Sky has invested".

17 THE PRESIDENT: Are you in the hand-up note?

18 MR. FLYNN: No, I am in our five page outline submissions.

19 THE PRESIDENT: We are at cross-purposes. You are on para.19 of that?

20 MR. FLYNN: Yes, perhaps your Lordship would like to read that. Although short, those are
21 crucial points.

22 THE PRESIDENT: (After a pause) Sky would still be able to offer its subscribers all the Premier
23 League games, would it not, because on the Sky platform BT Sport is included?

24 MR. FLYNN: We should look at the hand-up note on that. Your Lordship is right, the BT
25 channels are, by self-retail by BT, available on the Sky satellite platform.

26 THE PRESIDENT: So Sky can say presumably, "You do not need a separate box, you do not
27 need a YouView box, you can stick with Sky, you can get all the Premier League", and
28 from the consumer's point of view whether it is self-supply or not does not really matter. It
29 is a question of whether they have got to fork out more money and they have not.

30 MR. FLYNN: I think it would be important now to look at the hand-up note where the point is
31 expanded. I am pointing you to this really as a kind of route map and summary of the
32 points that are made in the evidence, some of which are set out in more detail. The point

1 you have just put to me is, I think, the Sky response. I think you can see that in 18(c)(i) in
2 particular.

3 THE PRESIDENT: (After a pause) Yes.

4 MR. FLYNN: That is in relation to the present situation. That is how it is now.

5 THE PRESIDENT: That is because, you say, if BT has all the rights that it can offer through
6 broadband, and I do not want to stray into confidential territory, Sky's market will suffer
7 basically. That is because of the way that the respective companies can market themselves
8 on their offerings. That is what is being said.

9 MR. FLYNN: That is what is being said, and you are saying, "Oh, it is not all right, because
10 people who are on the Sky platform can get BT Sport?" and the answer is, no, for that
11 reason already, and in (ii) it will be worse if BT succeeds in its present application.
12 The heading to that paragraph is "Harm to Sky from inability to retail packages comparable
13 with those of BT".

14 THE PRESIDENT: What I am finding puzzling, and you have relied on Ofcom's interim
15 measures in terms of not having a deleterious effect on BT, the decision of July last year. If
16 you look at that decision which Miss Fyfield, I think, or is it Mr. Conyers ----

17 MR. FLYNN: It is Mr. Conyers' exhibit. It is at the end of bundle 4, tab 16.

18 THE PRESIDENT: On p.90 at para.5.10 Ofcom record Sky's submissions.

19 "Sky submits significant numbers of Sky Sports subscribers are unlikely to BT
20 in the short term, even if interim measures were granted. All the available
21 evidence is to the contrary."

22 Then they set out quotations or a summary of the submission Sky made to Ofcom, including
23 the last one:

24 "If BT subscribers demand BT Sport, they are likely to subscribe whilst
25 remaining on ... either paying for channels or receiving them for free as BT
26 broadband subscribers."

27 It is hard to reconcile that with the way Sky is putting its submissions now.

28 MR. FLYNN: (After a pause) I would have to go back and I would have to take instructions, but
29 it may be that it is relating to the short term position rather than ----

30 THE PRESIDENT: It was interim measures pending a Competition Act investigation which is
31 likely, from what we know from Mr. Holmes, to take longer even than the resolution of this
32 case.

33 MR. FLYNN: That was not the indication at the time.

1 THE PRESIDENT: The interim measures that BT was applying for until its complaint was
2 investigated and resolved. That was the application from BT. So the short term would
3 be ----

4 MR. HOLMES: If it would assist, the period that Ofcom was considering in relation to interim
5 relief is set out at 4.3 of the interim relief decision on p.14.

6 THE PRESIDENT: Thank you very much. 4.3. Yes, well I thought that is what I said.

7 MR. FLYNN: At least one year, I think was the ----

8 THE PRESIDENT: Yes, "at least".

9 MR. FLYNN: I think I need to go back to Miss Fyfield just for a minute and see what the timing
10 is being referred to. The points made in 18(c)(i) relate to actual experience, that is what has
11 happened and how it has impacted on Sky, and then it is said in (c)(ii) that, of course, it is
12 impossible to predict how many subscribers BT would attract to a package of the sports
13 channels on its YouView platform, but again there are risks to Sky, if I can summarise it
14 that way. (After a pause) If I may say this, I think one has to give preference to Sky's actual
15 experience since the launch of the channels, rather than its possibly optimistic predictions
16 before the launch of the channels, which is the date of the Ofcom interim measures
17 decision. These are the facts, this is how it has been. Then you see the best guess as to how
18 it might be after that.

19 As I say, this is in the light of experience of now knowing how BT positions its channels,
20 the marketing it makes to ----

21 THE PRESIDENT: When was BT Sport launched, can you just remind me?

22 MR. FLYNN: August 2013, I believe.

23 THE PRESIDENT: It was launched after BT got the Premier League rights, I think. Is that right?

24 MR. HOWARD: It was launched May 2013 and then went live in August 2013 when the Premier
25 League 13/14 season kicked off.

26 THE PRESIDENT: Thank you.

27 MR. FLYNN: I am also told, for what it is worth, this is going back to the paragraph you were
28 pointing to in the interim measures decision that it says BT's YouView service currently
29 lacks features that Sky Sports subscribers are likely to value, including a range of linear
30 channels and PVR functionality. I am told that that position has now changed, improved
31 from the BT perspective. I think the short submission, my Lord, is that you should in the
32 light of actual experience rather than prediction.

1 You see the four points that are made in para. 18 of the hand up note, which I would invite
2 you to read at leisure and to stress again the point made in (d) that the impacts of forced
3 asymmetric supply would be enduring for the reasons that we give there.

4 Just to pick up a point my learned friend, Mr. Howard, made earlier, the arguments that are
5 made here are not, as it were, a repackaging of what was said in 2010, the impact that Miss
6 Fyfield points to are flowing from the lack of reciprocity or what she calls “mandated
7 unilateral supply” – what we have called “asymmetry”. Mr. Darcey was talking about
8 forced wholesale, remembering that the entire purpose of the WMO was that Sky would be
9 forced ,under the WMO obligation, and the Pay TV Statement was Sky would be obliged to
10 wholesale, effectively, to all comers, and was being deprived of its preferred business model
11 of self-retail. That has been characterised by the Tribunal, by Mr. Justice Barling, as
12 undeniably intrusive on Sky’s business. So, these are different situations and I repeat the
13 point which I think I have already made, that whereas what Mr. Darcey was talking about
14 was of course precisely what the WMO obligation was about, which was requiring Sky to
15 wholesale to everyone, there is nothing in the WMO obligation of the Pay TV statement that
16 suggests that Ofcom’s intention is to cause a competitive imbalance between suppliers of
17 Core Premium Sports Channels. As I said, that did not apply at the time because Sky had
18 access to the ESPN channel. If you grant the relief that BT seeks, then that is the situation
19 that is likely to ensure for some time, and we have debated some of the scenarios that might
20 be covered by “some time”, that that imbalance structural imbalance is likely to be an
21 enduring one and certainly the idea that we can forget about the Champion League rights
22 because they are next year I think is wrong, fanciful in that hypothesis.

23 And that is Sky’s objection to the relief that is being sought, it is the lack of reciprocity, it
24 has no objection to competition from BT for sports rights or for customers for bundle
25 packages of broadband, telephony and television, it has no objection to supplying over
26 IPTV, it has no objection to YouView as right at the beginning of my remarks, I pointed out
27 we have the deals with Talk Talk.

28 The fact that, as has been said many times by BT, that if BT were able to make DTT work
29 for it on YouView, that would be covered by the interim relief order is entirely beside the
30 point, I mean, it is not the situation we are in today, and as you indicated, well, if that were
31 the situation then Sky would have to consider its position.

32 THE PRESIDENT: But you were prepared to supply IPTV on Cardinal.

33 MR. FLYNN: Yes. So, we have no -----

1 THE PRESIDENT: Without reciprocity.

2 MR. FLYNN: In the circumstances which have been identified, which is that BT was moving to
3 YouView, that is, we have entered into that deal and it stands.

4 THE PRESIDENT: That was December 2012, was it not?

5 MR. FLYNN: I think that is right, remembering that subscribers to BT's Cardinal platform who
6 had BT Sport – Sky Sports, would originally have taken them over DTT, so if BT wants to
7 move it to IPTV then if Sky were not prepared to ensure distribution by IPTV, that would
8 have involved cutting off existing customers, which is not something that Sky wants to do.
9 So, it was prepared to enter into that agreement in the circumstances prevailing. And as you
10 have said, that is a commercial agreement. The situation in relation to YouView is, it is an
11 entirely different one for all the reasons we have given in the evidence.

12 THE PRESIDENT: But that is December 2012, so that is before BT Sport was launched then.

13 MR. FLYNN: Yes, before BT Sport was launched, yes I think actually that is correct, yes. This
14 is ...

15 THE PRESIDENT: Yes, that is what I thought.

16 MR. FLYNN: You might look on the point that you are asking about, my Lord, you might look
17 at Miss Fyfield's second witness statement, paras.20-22 which has some confidential
18 material but explains the position.

19 THE PRESIDENT: Yes, I see, that addresses that point directly.

20 MR. FLYNN: Yes. I think so, my Lord. So, in summary then, on -----

21 THE PRESIDENT: ... the Legacy platform.

22 MR. FLYNN: Yes. Inevitably so – and in summary the concern that Sky has here is a lack of
23 reciprocal supply of channels which between them carry Premier League live matches,
24 which no-one is disputing is the most important sports content and the most important
25 content probably on Pay Television full stop. Mr. Howard has made that point and we have
26 explained as best we can in the confines of this hearing and subject to the confidentiality the
27 extreme and durable harm that we say Sky would suffer if the relief they sought were to be
28 granted.

29 And we say there is a sense check that you can apply in relation to the balance of
30 investment in these rights, where Sky has invested, I think, and without the numbers it is
31 about three time what BT has, and the idea that reciprocal supply would be an appropriation
32 of BT's investment, in our submission, is absurd when one considers that if there were
33 reciprocal supply BT would be being paid for that content. It would actually be being paid

1 for stuff that it is otherwise prepared to give away free, so one has made that point. The
2 reality is that granting the relief would be allowing BT to appropriate or to diminish Sky's
3 investments in these rights, and to do so on a lasting and structural basis.

4 We say, firstly, there is nothing to suggest that that is the WMO was intended to achieve,
5 even ignoring the fact that the principal justification for the WMO has subsequently been
6 demolished by the Tribunal, and no part of the remitted proceedings go back to that. This
7 kind of imbalance between purveyors of Core Premium Sports Channel is certainly not an
8 objective of the WMO that can be prayed in aid for wanting relief of the nature that BT is
9 seeking.

10 My Lord, I think probably, especially given the time, those are my submissions. Obviously
11 we rely for its full effect on the evidence that we have put in as well as the legal
12 submissions.

13 THE PRESIDENT: Thank you very much. Mr. Howard?

14 MR. HOWARD: I would like to just knock on the head, firstly, what is a totally false point in
15 relation to what we are dealing with. It is one of the last points that Mr. Flynn made, that
16 Sky has invested more than BT so somehow it would be unfair if BT gets Sky Sports 1 and
17 2, and they do not get the BT channels. Just think about that for moment. At the time of the
18 WMO, BT had not invested anything, Virgin had not invested anything, Top Up TV had not
19 invested anything, nor had Real invested anything. So the argument appears to be the more
20 somebody has tried to compete by acquiring rights for itself, the less they should get the
21 benefit of the IRO.

22 The fact that BT has invested in sports channels has got absolutely nothing to do with the
23 principle of the IRO unless one can say that somehow the market has shifted so that Sky
24 Sports 1 and 2 are no longer the key drivers in Pay TV, and indeed that is not said.

25 My Lord, we will just go back to the beginning. What is perfectly clear from Sky's
26 submissions is that they are not suggesting that there is anything wrong with IPTV, as such.
27 They are not saying I should not have to deliver SS1 and SS2 because IPTV is
28 inappropriate, or YouView is inappropriate - in other words, there is no principled reason
29 why they say, "I am prepared to, or I have to continue to supply over DTT to Cardinal or to
30 YouView". All of these arguments have arisen in the context where, because BT is no
31 longer able to access the benefit of the IRO in the light of the fact that Cardinal has largely
32 now fallen by the wayside and DTT has fallen by the wayside, they are simply seeking to
33 prevent BT getting the benefit of the IRO. There is actually nothing in principle that they

1 are seeking to say. When they agreed in 2012 to supply to Cardinal via IPTV, at that stage
2 they knew that BT had acquired Premier League rights. What they did not know was when,
3 over what period of time, BT would actually seek to transition away from Cardinal to
4 YouView. They knew that was a plan, but they did not have any idea, not least because BT
5 had not made the decision, of the timescale.

6 The fact there is no principled objection to IPTV is evident from the fact that are
7 wholesaling TalkTalk TV for IPTV.

8 Some point is made of the fact that other parties have entered into a commercial
9 arrangement and it is sought to be said that somehow BT is undeserving of any relief of the
10 type it seeks, because it should have entered into a commercial arrangement. It is perfectly
11 obvious that the position of Virgin of TalkTalk TV is entirely different, because, in relation
12 to those parties, Sky is not seeking to impose a condition whereby they will, having
13 invested in particular channels, hand those over to Sky. This is a unique problem for BT.
14 Although the commercial arrangements have been made with those parties, patently the
15 backdrop to those commercial arrangements is the WMO. It is not, as it were, these are
16 commercial arrangements just in a vacuum.

17 THE PRESIDENT: Is TalkTalk TV a beneficiary of the WMO?

18 MR. HOWARD: No, they are not. One has seen already the position of Real. Anybody who
19 wanted to come along can essentially get the benefit of it. The thing that disciplines, we
20 would suggest, Sky - and the WMO, Mr. Flynn is entirely wrong about what he says
21 remains in issue. The whole purpose of the WMO is to secure supply. It is not just about
22 price, it is also ----

23 THE PRESIDENT: Yes, I understand that.

24 MR. HOWARD: What he says about what the Court of Appeal has decided, I do not want to
25 spend a lot of time, just literally two minutes, you only have to read the judgments to see
26 that what the Court of Appeal has said the CAT misunderstood was that there were two
27 independent, free-standing complaints that Ofcom had. One was the way in which Sky had
28 behaved and refusing to properly negotiate. The CAT said that was not justified. What the
29 Court of Appeal said was that they failed to recognise that there was an independent and
30 important point which was that Sky was prepared to deal on rote card terms and on its what
31 are called penetration discounts, and, absent that, it would not be supplying. The Court of
32 Appeal thought that that was a very important point, and if you look at the pithy judgment
33 of Lord Justice Vos ----

1 THE PRESIDENT: It may be that this remedy would not survive.

2 MR. HOWARD: No, he says exactly the opposite, that the remedy will survive.

3 THE PRESIDENT: Sorry, the quashing of the remedy would not survive, the quashing of the
4 decision.

5 MR. HOWARD: He says it is a theoretical one, but highly unlikely. The point is that the WMO
6 remedy, BT is a new entrant but all the passage that is quoted of Mr. Turner, what
7 Mr. Turner was saying was that the WMO remedy is not specific to BT or Virgin. That is
8 the point, it applies across the market. If the logic of WMO is upheld, which we suggest it
9 will be, then it applies to everybody, and it does not matter whether you are, BT, Virgin,
10 Real or somebody else coming in.

11 The way in which the price was worked out, we do not perhaps need to go into, that is
12 relating to allowing people to come in and look at what is the appropriate economy, and so
13 on.

14 Mr. Flynn at one point said he was not trying to argue what the outcome but then went on
15 precisely to do that, to argue that somehow BT will not get the benefit of this. It is quite an
16 odd argument when one thinks about it. BT was the appellant, obviously supported by
17 Ofcom, but BT was the appellant before the Court of Appeal. If the whole thing was arid
18 from BT's point of view it would have been an obvious point for the Court of Appeal to
19 make that, "BT, you have got nothing you can get out of this", whereas, of course, the point
20 is entirely the opposite.

21 In relation to the position at the IRO, I do not know whether your Lordship needs me to
22 address you, but what the evidence shows as to what actually happened in front of this
23 Tribunal was that Sky came forward with a draft of what ultimately became the order, and
24 at the hearing in front of Mr. Justice Barling, Sky said "This is to deal with current
25 circumstances". In the course of that hearing there was a discussion about something else,
26 but where Mr. Justice Barling said that the liberty to apply can deal with any change. If
27 your Lordship looks at the transcript you will see that. It was in an exchange with Mr.
28 Holmes. The parties then went off and the express liberty to apply was included. The
29 whole point was there was no point having an argument about the definition at that stage,
30 because the definition was perfectly apt to cover the situation as it was likely to apply
31 during the normal currency of the appeal. As regards the currency of the appeal that was
32 looked at Herbert Smith, for Sky, were saying: "This will be over in nine months", and that

1 is what Sky's evidence was saying. That may have been over optimistic, but that to me, if
2 your Lordship ----

3 THE PRESIDENT: Well, "may have been" – we know it was.

4 MR. HOWARD: No, but the point is when one is looking at matters now four years on, for Sky
5 to say: "This is totally ridiculous, everybody knew we would be here for ever" ----

6 THE PRESIDENT: Well, you need not pursue that point.

7 MR. HOWARD: One of the points I take exception to is the whole way in which they put the
8 matter before the Tribunal at that stage is we are only really dealing with one season, and
9 we do not need to have to have supply, because it is only one season of football. As I say,
10 that might have been over optimistic, but nobody could have ever envisaged we would be
11 four years on at the stage that we are at.

12 A lot of times it has been said to your Lordship, if BT wants we can all do a deal and we
13 can then go away and the Tribunal does not need to worry about it. The problem with that
14 is the reason the parties are before the court is they have not been able to do a commercial
15 deal and, as things stand, if the court does not amend the IRO then BT is put in a position
16 where it was, as it were, entirely at the mercy of Sky because it is then in a position where it
17 cannot get Sky Sports 1 and 2 for YouView, its current platform, and it can only then get it
18 if either it goes backwards and goes back to use Cardinal, outdated technology, and DTT
19 expensive and outdated, or it agrees to whatever Sky demands about it handing over the
20 value of its investment in BT sports.

21 It is not just a question of Mr. Flynn saying: "Don't worry, we are going to pay". The
22 whole reason that obviously BT has invested large sums of money in those channels is to
23 get a competitive position in the market, whereas once it has to hand it over for its platform
24 it will not have any competitive position.

25 THE PRESIDENT: For a limited period.

26 MR. HOWARD: Your Lordship says for a limited period – I am not sure I follow what you
27 mean?

28 THE PRESIDENT: It would be for the duration of the contract that you make, presumably.

29 MR. HOWARD: Yes, but the period obviously one is concerned about is the period whilst the
30 Ofcom review and this appeal is being determined, but, of course, what one is then
31 concerned about is losing the opportunity to acquire customers, and what one has to
32 remember is that is what all of this was about, that one should be able to secure a

1 competitive position. Of course, it is perfectly natural, somebody in Sky's position wants to
2 prevent you getting into that position.

3 THE PRESIDENT: Well, does not want to lose its own customers, yes.

4 MR. HOWARD: Exactly. Or, it is not a question simply of losing its own customers, it is also
5 the new customers out there.

6 In terms of losing its own customers, your Lordship correctly pointed to what Sky was
7 saying in front of Ofcom, which was the entire opposite of what they were saying here last
8 year, where they were saying to Ofcom "Actually, customers will not leave us to go to BT".
9 So one has to take account of that

10 Mr. Flynn says in answer to that: "Let's look at the current experience", but they do not
11 actually point to experience of saying they have lost Pay TV customers. What they are
12 actually referring to is something different. Their concern about BT being able to retail BT
13 Sport is not that they are going to lose Pay TV customers, i.e. customers on their platform.
14 Their concern, they are talking in that paragraph he referred you to, 18(c)(i), about
15 broadband customers, it is not about the Pay TV customers. It is a point your Lordship
16 asked me about earlier this morning. If BT is retailing on the Sky platform the customer has
17 to ring BT, so BT then gets a relationship which may extend to sell other things, and that is
18 what they are concerned about on both sides.

19 But, your Lordship, with respect, should be focusing on the question at hand, which is the
20 effect on the Pay TV market, and on the Pay TV market it is that they are not suggesting,
21 because there is no evidence whatsoever, that the result of any of this will cause them to
22 lose customers as Pay TV customers.

23 THE PRESIDENT: I am just trying to understand. If a customer finds that through BT
24 broadband they can get with YouView all Premier League games, why would they want to
25 continue? They might, because of other offerings on the Sky platform, Sky movies, or
26 whatever, or Sky Sports 3, 4 and 5. But if they are really interested in Premier League and
27 Sky Sports 1 and 2 are the key drivers for Pay TV, why is there not a real risk or likelihood
28 that they will say: "I will not renew my Sky subscription"?

29 MR. HOWARD: The reason that Sky themselves made, which is their customers, they say, are
30 very happy with Sky and they do not believe any of them will ----

31 THE PRESIDENT: That is going back to the passage ----

32 MR. HOWARD: There is no experience to show anything different. That is Mr. Flynn's
33 difficulty. The paragraph that he referred you to, to say this is different, what the paragraph

1 was talking about was something completely different which was that they are concerned
2 about losing broadband customers. In fact, the paragraph that is addressing the point your
3 Lordship was asking about is 18(c)(ii), but his is just, as it were, argument, it is not anything
4 to do with experience, as Mr. Flynn says. This is the argument that they want to put
5 forward today, when it suits them, before this Tribunal, to be contrasted with the argument
6 that they want to put forward in a different context, to Ofcom. So it just depends on what
7 suits on the day.

8 Just while we are on Ofcom, it is very important to understand that an important part of the
9 rationale for Ofcom not granting interim relief was that at the time they understood that BT
10 would be continuing and would need to continue with Cardinal, because a significant
11 number of customers would need to continue with Cardinal in order to access BT Sports;
12 and therefore the damage done to BT, Ofcom thought, through being disabled on its
13 YouView plan was mitigated by the fact that they would be continuing with Cardinal in any
14 event. But that was overtaken by events because, as I explained to you this morning,
15 subsequent to that decision BT has been able to multi-cast over copper, which means that
16 they no longer, in order to supply BT Sports, they no longer need to use DTT and therefore
17 no longer need to maintain Cardinal; and so it is for that reason that for the future DTT will
18 cease and Cardinal is – they are migrating people away from Cardinal to YouView because
19 it has become obsolete, as has DTT. And so we are in a different situation to the situation
20 before Ofcom.

21 THE PRESIDENT: Can you just tell me, when did the discovery or appreciation that it is
22 possible to multi-cast over copper?

23 MR. HOWARD: That came I think towards the end of last year. I will give you the reference.
24 Yes, it was in autumn -----

25 THE PRESIDENT: If you just give me the reference, that is fine.

26 MR. HOWARD: It is in Mr. Petter 2 I think, the reference.

27 THE PRESIDENT (After a pause): There is reference to the fact, indeed it is said to be
28 confidential although you have been emphasising it to me, so I assume it is not, in para.97,
29 but it does not say when that development took place.

30 MR. HOWARD: Yes. I think we may not -----

31 THE PRESIDENT: May not have it here. Is the first sentence:

32 “Miss Fyfield highlights Ofcom’s previously expressed view”.

33 That is a reference to the July 3rd interim measures decision, is it not?

1 MR. HOWARD: Yes.

2 THE PRESIDENT: So this does make clear that what Mr. Petter is talking about is since July
3 2013.

4 MR. HOWARD: Yes.

5 THE PRESIDENT: Even though he does not say quite when.

6 MR. HOWARD: Well, there is certainly a reference to it being in the autumn 2013.

7 THE PRESIDENT: Yes, well that is enough. That is good enough.

8 MR. HOWARD: But the precise date ...

9 THE PRESIDENT: No, well, that is fine.

10 MR. HOWARD: So (looking where we have got to) just very shortly on the ----

11 THE PRESIDENT: Can I just ask you, while we have that page open.

12 MR. HOWARD: Yes. Sorry, my Lord.

13 THE PRESIDENT: Just to clarify para.97 of Mr. Petter's second statement, I have not compared
14 - maybe that is the answer if one compares the two versions. I see, yes. The bit in bold at
15 the end, that is not confidential, I understand, that is what is meant by that.

16 MR. HOWARD: Sir, I am not sure ----

17 THE PRESIDENT: Well, I am just looking at the end of 96, the end of 95 and so on. There is a
18 phrase in bold but not marked confidential, that is an alternative way of describing it.

19 MR. HOWARD: Yes.

20 THE PRESIDENT: Yes, that is what it is, yes, what is meant. Yes, I have got it.

21 MR. HOWARD: It is just meant to be a way ----

22 THE PRESIDENT: A shorthand, that they are non-confidential shorthand.

23 MR. HOWARD: Yes, exactly. We see that in a number of places.

24 THE PRESIDENT: Yes.

25 MR. HOWARD: Your Lordship will have seen, there are a number of points made as to why it is
26 not practical to maintain the two platforms.

27 THE PRESIDENT: Yes.

28 MR. HOWARD: My Lord, on the question of the legal test, the whole point about *Chanel v*
29 *Woolworth* is that that is not a case concerned with a liberty to apply. That is the whole
30 point of that line of jurisprudence, and that is what is being said in *Gantenbrink* and *Butt* is
31 the distinction if you enter into a consent order, even if it is any order is until trial or further
32 order, but that of itself is not a liberty to apply. So if you enter into a consent order like in
33 *Chanel v Woolworth* then you can only seek to vary it if you can show some significant

1 change of circumstances or some fact of which you were not aware when you made it. But
2 that has got nothing to do with the situation where you have a liberty to apply, because the
3 point of liberty to apply is, the matter has not finally been disposed of, the court remains
4 seized of the matter so that the parties can come back. Now here, we are not under a
5 general liberty to apply, we are under specific liberty to apply in relation to para.2 of the
6 schedule, and so on any objective reading of the order, what the parties intended was if
7 there was some change of circumstances relating to the manner of distribution of the
8 channels, then either party would be entitled to come back.

9 THE PRESIDENT: Yes.

10 MR. HOWARD: Now, on Sky's side, for instance, they would be entitled to come back if there
11 was something wrong, they thought, with the way in which the platforms were operating.
12 Let us say there was some security leak or something like that, and equally on our side
13 entitled to come back if the manner of distribution changes. And we do make the essential
14 point which is that the court in essence in looking at this, even if your Lordship says I am
15 not confined to that, but in essence the starting point should be what difference does this
16 change to the order make? Because the starting point is there is a consent order whereby
17 they are required to supply, as it were unconditionally for transmission by DTT. So you are
18 then having to ask yourself, "If it is IPTV, should I be allowing them to impose a condition,
19 or should I be refusing it and allowing them in the market place to impose a condition or
20 otherwise refuse supply?" In my submission, once one asks the appropriate ----

21 THE PRESIDENT: I understand that is how you put the case.

22 MR. HOWARD: My Lord, even if what one is doing is then looking at the balance of
23 convenience of where we stand now and saying, "I am going to take account of all the
24 circumstances", and I understand that is where your Lordship appears to be, but even doing
25 that you still have to look at the lead up to this. You are not starting from scratch. It still is
26 a situation where, for instance, they accept that if BT continues with Cardinal it can have
27 supply, whereas DTT or as IPTV. So it is simply they are saying, "I do not want to let you
28 have YouView", and the whole point is that it is their concern that YouView is a better
29 platform - that must be concerned about, because if they do not have a concern about
30 Cardinal, they must feel you will not be a very good competitor with me while you are stuck
31 on Cardinal. So what they are saying is, "If you get YouView up and running with these
32 important channels, I want to ensure that you do not get the benefit of your investment in
33 BT Sports.

1 My Lord, in relation to the argument about Rule 61, and so on ----

2 THE PRESIDENT: I do not think you need deal with that.

3 MR. HOWARD: I am grateful. Just before I come on finally to the points on the evidence, there
4 are two points. One is the suggestion that somehow the order that was made in 2010 was
5 very limited - I think this is really the point that Mr. Flynn has made on a number of
6 occasions - and somehow if it has now IPTV that is making it very broad. That is actually
7 completely nonsensical. In 2010 Sky essentially gave up its objection, all the points it was
8 raising, and agreed that it would supply. The only limitation that it put was that it was only
9 agreeing at that stage to the supply that certainly BT was doing, Virgin was doing over
10 cable. If it looked to anything in the future, it allowed Virgin to be put in the same position
11 as the other parties for DTT. That is if Virgin was not doing it. There is not some
12 enormous change.

13 Mr. Flynn makes an important concession, that there is no harm to Sky in allowing the IRO
14 on its terms to be implemented. One has got to ask, what is the additional or incremental
15 harm?

16 The other point I ought to address is this question of the timing. It is said that we have
17 delayed, and so that is a reason why the court should not now amend the order.

18 THE PRESIDENT: The impression I get is that there were commercial negotiations going on and
19 there was an attempt to avoid them.

20 MR. HOWARD: It is more nuanced than that. Of course, what you have to remember is that the
21 Tribunal in August 2012 set aside Ofcom's decision, but that was then stayed pending the
22 Court of Appeal. BT, from the point of view of coming back and saying, "Amend the IRO
23 in some respect", it was not exactly in the best of positions where the CAT had said that the
24 WMO and therefore the IRO were not justified, albeit it stayed that. It is a perfectly
25 understandable thing not to seek to litigate these matters whilst the Court of Appeal hearing
26 was pending.

27 The effect of the CAT decision was, if there had not been an appeal, then that was going to
28 be the end of the WMO. That was the direction to Ofcom to quash their decision. It was
29 just that that got stayed. So naturally, if BT had come before the Tribunal whilst the matter
30 was going up to the Court of Appeal, Sky would have been saying to the CAT, "This is
31 completely ridiculous, you have decided that this case should be dismissed, on what basis
32 should you now be updating this order?" There would have been some force in that. They
33 might have said, "Well, leave it as it is, but certainly we should not update anything when

1 we have now upset the order, albeit you are not letting us actually put that into effect
2 pending” ----

3 THE PRESIDENT: I thought you applied in March 2013 to the Court of Appeal to amend the
4 order?

5 MR. HOWARD: We did not actually get at any stage to a hearing.

6 THE PRESIDENT: But you issued an application?

7 MR. HOWARD: The matter was never proceeded with.

8 THE PRESIDENT: But that was your decision? (After a pause) The impression I got was that
9 you issued the application, you did not proceed with it, you then had second thoughts and
10 made a Competition Act complaint to Ofcom and sought interim measures. That seems to
11 me to be the chronology.

12 MR. HOWARD: My Lord, that is not quite a fair summary. The decision not to make an interim
13 application ----

14 THE PRESIDENT: You did.

15 MR. HOWARD: Not to proceed with it, I was not involved with it. All I am saying is that it is a
16 perfectly understandable thing to await the outcome of the Court of Appeal. The
17 application to Ofcom, if I can perhaps address that, was an independent point. The
18 application to Ofcom is not dependent upon the WMO, it is an entirely independent
19 Competition Act complaint.

20 THE PRESIDENT: It will get you same result, but it is quite different grounds.

21 MR. HOWARD: It is quite different. All I am saying, my Lord, the two things about the delay,
22 in our submission, it was a perfectly understandable thing to actually make this application
23 once the Court of Appeal had determined the position that the WMO remained alive.

24 THE PRESIDENT: I have not made my mind up, Mr. Howard, but I do not think this is going to
25 turn on delay, so I can give you that comfort. You, personally, were not involved, but BT
26 did decide that it would be appropriate to make an application to the Court of Appeal and
27 then they had second thoughts.

28 MR. HOWARD: Be that as it may, the other point there, and I think I will move off this since
29 your Lordship is saying that delay is not going to be the issue, is that the delay here, it is not
30 being said that it has caused prejudice to anybody except to BT. If BT should have applied
31 earlier then they would have got a great competitive ----

1 THE PRESIDENT: Anyway, a number of things have happened since, such as the one we were
2 just discussing. You explained it to me, about the ability to multi-cast over copper, and so
3 on.

4 MR. HOWARD: My Lord, just turning very quickly - I am aware of the time - to the impact on
5 the parties, I have already dealt with the point about Ofcom and why Ofcom, in relation to
6 the Competition Act considered BT did not need relief ----

7 THE PRESIDENT: The Cardinal point.

8 MR. HOWARD: The Cardinal point. The suggestion that you got supply to Cardinal and you
9 have got supply to YouView, your Lordship already knows our point about the problem
10 with Cardinal, and the problem with YouView is because we can only get it for YouView if
11 we accept Sky's conditions, which we say we should not have to do. The suggestion that
12 BT is not hampered by reciprocal supply - it is fairly obvious how it is hampered, and how
13 it suffers damage. The WMO, which we say should be enforced through the IRO by this
14 amendment provides substantial safeguards, the main one, of course, is that it will ensure
15 that BT does get supply for its YouView platform at the WMO price, which is guaranteed,
16 and it also has the protection against content shifting. The content shifting is actually
17 something that was a concern of Ofcom, and was something which we understand was and
18 is dealt with by the WMO.

19 Mr. Flynn is not right to say that we might take off the odd Premier League game. Sky
20 Sports 1 and 2 show Premier League but they have also shown other things. It is not only
21 the football they might shift off, it is other things. The whole point about the WMO, and
22 your Lordship will know, as somebody experienced in competition law, that it operates
23 where you have this, as something which effectively disciplines the parties where you have
24 this in the background. So ultimately people may reach commercial negotiations, as Virgin
25 have, but the background is that Sky is constrained by the WMO.

26 I think all of the other points which are made are ones that we have largely addressed in our
27 evidence and submissions, but ultimately do not shrink from the point, which is an
28 important submission, that what Ofcom wanted to do and wants to do is to promote
29 competition in this market, and the surest way to ensure that Ofcom's objective is achieved
30 is to ensure that BT is enabled to get Sky Sports 1 and 2 for its YouView platform, so that
31 that platform can properly compete with Sky, and if it cannot get the channels for that
32 platform, that platform, which is clearly viewed by Sky as a potential competitor, will be at
33 a considerable disadvantage, and that is something that the court, in my submission, should

1 not contemplate and ultimately that is really what all this comes down to, namely ensuring
2 that a party, who should be entitled to compete, and put in the same position effectively as
3 Virgin, for instance, who have got access to all of this, on an unconditional basis, that they
4 should be entitled to do the same.

5 What is appropriate for separate commercial negotiations is the terms on which, for
6 instance, BT is prepared to wholesale its sports channels, in the same way the terms on
7 which ESPN would wholesale them. That is something which does not have a competition
8 concern and, insofar as Sky has any legitimate complaints or says that the WMO should not
9 apply, as I said earlier, that should be a matter for Ofcom in due course.

10 My Lord, I am grateful for the time, and those are our submissions in reply.

11 THE PRESIDENT: Thank you all very much. I will obviously need time to consider this; it is
12 not an easy case. I know it has been said once or twice that the concern is the current
13 football season starts in August, well, I have indicated I do not think there is delay such as
14 to deny, on that ground, relief. Certainly, the case has not been brought on in a time that
15 makes it easy with other commitments and other obligations to get a Judgment out before
16 the end of term next week. So it is possible but, I have to say, I think unlikely, and I think it
17 is more likely that there will be a Judgment in September.

18 MR. HOWARD: Yes. I suppose the only thing I wonder whether – obviously, it depends on how
19 the Judgment writing process goes – if your Lordship, for instance, came to the conclusion
20 that we were right, and that they should supply via IPTV, the process that we need to start to
21 initiate whereby the WMO can apply, or the IRO can apply, if your Lordship were willing
22 just to indicate the answer even if the full Judgment was not available then that would allow
23 that process to get underway, because otherwise, if your Lordship is with us, the process
24 would not start until September, and that may take some weeks, and it means that BT's
25 ability to compete in this important market will be delayed in a way that would be
26 inappropriate.

27 THE PRESIDENT: Yes, well, I know what you say, Mr. Howard, I shall think about that.

28 MR. HOWARD: I am grateful.

29 THE PRESIDENT: I cannot promise.

30 MR. HOWARD: I was not seeking to put your Lordship under pressure.

31 THE PRESIDENT: As I say, whether that will be feasible or not, or appropriate, I will have to
32 see. If it had been so important to get a decision by the end of term the case should have
33 been brought on earlier.

1 MR. HOWARD: I think the actual timing of this hearing – we can obviously be criticised for not
2 starting the process until the date we did, but I think then it was out of our hands the date of
3 the hearing.

4 THE PRESIDENT: Well, it depends how urgently it is put before us. I could not have heard it –
5 possibly someone else could have. We can hear cases quickly here. I just mention----

6 MR. HOWARD: I was not intending, as it were, to try and put your Lordship under pressure, it
7 was merely if your Lordship ----

8 THE PRESIDENT: I clearly have a lot to think about. Thank you all very much.

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