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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1156-1159/8/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 March 2011

Before:

THE HON. MR. JUSTICE GERALD BARLING
(President)

PROFESSOR JOHN BEATH
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

BETWEEN:

VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE
BRITISH SKY BROADCASTING LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants/ Intervenors

– v –

OFFICE OF COMMUNICATIONS

Respondent

– and –

RFL (GOVERNING BODY) LIMITED
TOP UP TV EUROPE LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Intervenors

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Gerard Rothschild (instructed by Ashurst LLP) appeared for Virgin Media Inc.

Miss Helen Davies QC and Miss Maya Lester and Mr. Richard Blakely (instructed by DLA Piper UK LLP) appeared for The Football Association Premier League.

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

Mr. Thomas Plewman, Mrs. Sarah Ford and Miss Sarah Love (instructed by BT Legal) appeared for British Telecommunications Plc.

Miss Dinah Rose QC and Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

Mr. Paul Harris (instructed by the Legal Department, RFL(Governing Body) Limited, the Legal Department, Rugby Football Union, SNR Denton UK LLP, Onside Law, Bird & Bird LLP) appeared respectively for RFL(Governing Body) Limited, Rugby Football Union, The Football League Limited, PGA European Tour, The Football Association Limited.

1 THE PRESIDENT: How nice to see you all and good afternoon. First of all, thank you very
2 much for all the documents you have been kind enough to send us - we still do not have
3 enough, I am sure we could do with some more!
4 We thought there was a handy document provided by Ofcom which just had a list of topics,
5 so we might work our way through that to see whether or not there are any sticking points,
6 and there may be one or two bits and pieces to add on to the end of that list.
7 Before we start on that, can I just tell you that Mr. Blair has a subscription to Virgin Media
8 which includes Sky channels Sports 1 and 2. I tell you that now so you can digest it and if
9 there are any comments on it you are not expected to react now but obviously as soon as
10 possible.
11 One of the extras I would like to raise at some point but not necessarily immediately is to
12 make sure we all have the same take on the sitting days so that we all know when in
13 principle we are likely to be sitting. Obviously there will be some changes to that from time
14 to time, plus there are one or two areas of doubt but I do not necessarily want to deal with
15 that now because it may be you have a different order in mind. Mr. Flynn, is it convenient
16 if I pick on you ----
17 MR. FLYNN: Pick on me, Sir.
18 THE PRESIDENT: Is it convenient to go through Ofcom's agenda in that way, will that pick up
19 most of the points?
20 MR. FLYNN: I think it will, Sir. I think we are all content with the agenda as far as I am aware.
21 I think there are one or two extra points, transcripts is one that has been brought to my
22 attention and possibly interventions in the CAMS appeal we might touch on, but other than
23 that I think the agenda picked up all the points.
24 THE PRESIDENT: I am afraid I do not have in front of me a list of counsel, and people
25 appearing. (After a pause) I have been given one now.
26 MR. FLYNN: I was wondering if introductions would be helpful.
27 THE PRESIDENT: It might be.
28 MR. FLYNN: You know us, as it were, sir, but Professor Beath almost certainly does not. What I
29 think I will do is go down this row if I may. The Sky team is Mr. Scannell and Mr. Pickford
30 and myself. For the Premier League you have Helen Davies QC, Maya Lester and Richard
31 Blakely. For BT: Mr. Plewman with Mrs. Ford, and behind him somewhere, Miss Love.
32 Today for Virgin: Mr. Rothschild sitting with Mr. Liddell. For Ofcom: Miss Rose QC and
33 Mr. Holmes. I do not think I am missing anyone else of counsel except Mr. Harris who was
34 a bit late in getting his towels down on the sun lounger!

1 THE PRESIDENT: So poor Mr. Harris is at the back.

2 MR. FLYNN: Bringing up the rear, so Mr. Harris is for the Sports Bodies. I think I have all
3 counsel.

4 THE PRESIDENT: I think congratulations are in order for Mr. Harris, I do not think we have
5 seen him since the happy news of his well deserved appointment to Silk. Many
6 congratulations.

7 MR. HARRIS: Thank you, I am looking forward to the “Silk Stocking” day, Sir.

8 MR. FLYNN: He might also be looking forward to getting on the front row! (Laughter)

9 THE PRESIDENT: I hope I have not missed out anybody else.

10 MR. FLYNN: I do not think we can promise that. Also not here and also in Silk then Mr. Beard
11 for Top Up TV and Mr. Ward for Freesat, but not represented today.

12 THE PRESIDENT: Thank you, Mr. Flynn.

13 MR. FLYNN: Issue 1 was whether Sky intended to amend the notice of application. I take it that
14 what Ofcom are referring to on the agenda is the fact that in our reply we indicated there
15 were certain points we were not pursuing which we have labelled the “future services
16 argument” under the s.316 point, and in relation to the ground of uncertainty or lack of
17 clarity in the licence conditions we have also said that provided we get the necessary
18 confirmation in correspondence we would not be pursuing those points. We now have that
19 confirmation so those I think are the points that are being referred to. We do not know if
20 the Tribunal would be assisted by formal amendment to the pleadings or whether it is just
21 sufficient that we say we are not pursuing the point and we are not pursuing the point, and
22 they are not referred to in the skeleton. We have given the references in the reply to the
23 arguments that we are not pursuing, and if you are content with that then obviously we are;
24 if you would like to go further no doubt you will let us.

25 THE PRESIDENT: We have had a chat about that. Subject to anyone’s strong objections we
26 think there is more than enough paper floating around already and we noted what you said
27 in your document, the points are not being pursued, and unless anyone thinks otherwise I
28 would have thought that was good enough, but Miss Rose may think otherwise.

29 MISS ROSE: Sir, it is simply that under s.195 the duty of the Tribunal is to decide the appeal in
30 accordance with the grounds of appeal, and so as a matter of good order under the Statute
31 we submit that it would be appropriate simply for Sky to indicate which paragraphs it is
32 deleting from its grounds of appeal. I do not think that needs to add to anybody’s paper
33 burden because if they simply indicate which passages should be deleted we can just delete
34 them on the current ----

1 THE PRESIDENT: It would certainly be handy to know which were being deleted.

2 MISS ROSE: In my submission given the complexity of the case in order to have clarity as to
3 precisely which paragraphs of the notice of appeal are no longer being pursued that would
4 be of assistance to everybody, and I do submit that it is the appropriate course under the
5 Statute.

6 MR. FLYNN: We will probably indicate in the necessary paragraphs in the reply but we are quite
7 happy to put that in a letter.

8 THE PRESIDENT: If you could, I think that would be acceptable.

9 MR. FLYNN: It will be on a single page.

10 THE PRESIDENT: I am not sure whether it affects the grounds or not, because the ground is ----

11 MR. FLYNN: The ground is whether it is pursued I would suggest, but nevertheless ----

12 THE PRESIDENT: You are still pursuing your s. 316 point, it is just there is an argument that
13 you are not ----

14 MR. FLYNN: There is an argument we are not pursuing because we now have the licence we say
15 they could not force on us, so that seemed a pragmatic approach. We will put it in a letter
16 and then it will all be on one page and there will be no doubt about it.

17 THE PRESIDENT: Thank you very much. That is point 1. Point 2 refers to applications by
18 Virgin and Ofcom to adduce evidence in response to replies. If there is an application by
19 either party we have not seen it.

20 MR FLYNN: We have obviously seen a witness statement – a sixth witness statement – from
21 Miss Burns which is attached to the Virgin skeleton but we have no idea what application
22 Ofcom has in mind, so we have had no notice of what is but that is where we are. We have
23 obviously indicated that we reserve our rights in relation to the Virgin application.

24 THE PRESIDENT: Perhaps we had better hear it.

25 MISS ROSE: Sir, I am surprised Mr. Flynn says he has had no notice of this because I raised it at
26 the meeting between counsel on 15th March and indicated at that meeting that we would be
27 seeking permission to adduce evidence in response to their reply. The position is simply
28 that we would like to put in a short witness statement from Dr. Teh and one from Mr.
29 Caines responding to new points raise by Sky and FAPL in their replies. We would
30 undertake to do that within seven days of today. We have the witness statements under
31 preparation but they are not quite final.

32 THE PRESIDENT: These are witnesses who are going to be giving evidence anyway, are they
33 not?

1 MISS ROSE: Yes, Sir, they are, so that in any event they would be giving evidence on these
2 topics and it is in everybody's interests in my submission that what they are going to say
3 should be clearly set out in writing in advance. Just to give you an example, in I think it is
4 the fourth witness statement of Dr. Caffarra it is suggested for the first time that Mr. Caines
5 and his team may have disingenuously concocted the estimate of future demand by working
6 backwards from the impact assessment in the pricing model. That is obviously a very
7 serious accusation and, in my submission, it is clearly an allegation that Mr. Caines is going
8 to have to respond to.

9 THE PRESIDENT: You will probably want to ask him about it when he is in the witness box?

10 MISS ROSE: Yes, Sir.

11 THE PRESIDENT: And what you are proposing is that he should put in a statement what he is
12 going to say in advance?

13 MISS ROSE: Yes.

14 MR. FLYNN: Sir, firstly in relation to counsel meeting, I am not sure you will be very interested
15 but it was simply indicated that Ofcom was thinking about the possibility of putting in
16 further evidence and, indeed, so were other parties and Virgin have now done so, but I
17 suspect you are not very interested in that. We think if there is an application to be made it
18 should be made; we should see the witness statement as Virgin have done, they should
19 explain what the points are and the Tribunal may think it has enough to be going on with, it
20 may think that there should be a guillotine on it.

21 THE PRESIDENT: It sounds as though it is going to be legitimate to ask him what he makes of
22 what is in Dr. Caffarra's statement when he gives evidence in which case ----

23 MR. FLYNN: I am not going to say that it might not be helpful, but when is this going to end?
24 There is plenty that we would like to reply to, for example, in the evidence of Mr. Harman,
25 served with BT's reply which, if you have got through it, you will see is quite a substantial
26 document.

27 THE PRESIDENT: I have not got through most of it.

28 MR. FLYNN: Lucky you. Well if the Tribunal is going to be assisted by it – it might help
29 actually to see it.

30 THE PRESIDENT: The best thing would be if it is sent as you said. If you send it to the other
31 parties and if they have any major points we will have to deal with it then.

32 MISS DAVIES: Yes, Sir. Can I raise one point about timing. The seven days is quite important
33 in that context because there are a lot of meetings planned between various experts in the
34 first week of April.

1 THE PRESIDENT: Seven days will be just in time.

2 MISS DAVIES: Just in time. There is a meeting due to take place tomorrow which Dr. Teh is
3 attending as I understand it, but that relates to the BT and the Virgin Media appeals. I do
4 not know if Dr. Teh is planning in this new evidence to address anything in relation not that
5 because obviously it would be helpful to have the evidence before the meetings take place.

6 THE PRESIDENT: You might get advance notice of it tomorrow.

7 MISS DAVIES: We may do, but our position is that it is difficult to judge this in a vacuum, until
8 we have seen the evidence we do not know if there are actually an bases to object, but we
9 would be very concerned about further disruption to the expert meetings which have already
10 been ----

11 THE PRESIDENT: You do not see any difficulty, Miss Rose, in getting it to the other parties
12 within seven days?

13 MISS ROSE: No, sir.

14 THE PRESIDENT: And sooner if you can.

15 MISS ROSE: We would hope to do it before that but seven days will be safe.

16 THE PRESIDENT: Right. Mr. Rothschild?

17 MR. ROTHSCHILD: In relation to Virgin Media, together with Virgin Media's skeleton
18 argument there was a very short witness statement, a sixth witness statement of Katharine
19 Burns which has just been referred to. My instructing solicitors wrote an accompanying
20 letter asking if any of the recipients objected to its admission. The Premier League required
21 Virgin to make an application to adduce it, and Sky supported that letter. If it is considered
22 necessary I wish to make that application. It is a very short witness statement, excluding the
23 introductory paragraphs it is only four pages of evidence. It responds to two very discrete
24 points raised in the extensive reply evidence of Mr. Darcey for Sky and Mr. Scudamore for
25 the Premier League, some of the material is confidential but the headings are not: one very
26 discrete point in relation to HD capacity and one very discrete point relating to a specific
27 meeting. No substantive objections have been raised in the letters from Sky or the Premier
28 League. I would suggest it would cause no prejudice – it is a short witness statement – in
29 fact, it may shorten the cross-examination of Miss Burns having explained her position.
30 Indeed, there may be prejudice caused to Virgin Media if the Tribunal is not aware of the
31 full position as is set out in that short witness statement. So if I may I wish to make the
32 application to rely on that further evidence and that it was provided promptly and at an early
33 opportunity.

34 THE PRESIDENT: Mr. Flynn, Miss Davies, the application has been made.

1 MR. FLYNN: Sir, it has and replies have been with the parties for some time now. Insofar as
2 Miss Burns addresses the evidence of Mr. Darcey our submission is that of the points she
3 makes – I can cut this short – there is only one which responds to a new point from Mr.
4 Darcey, everything else was in his first statement. I have references, I do not think you will
5 want to go through that now, we have them if you do, I can take you through it, but we have
6 a note which I can hand up.

7 THE PRESIDENT: Are you put in any difficulty by it?

8 MR. FLYNN: I will say candidly we are more put in difficulties if this is the thin end of the
9 wedge. We can respond to this because frankly it has already been done, except for one
10 small point which could have been put to Mr. Darcey in cross-examination and does not
11 really require evidence, so to be candid we are not immediately put in difficulties. It is
12 more the principle, that they turn up the day before a case management conference with a
13 witness statement and say: “Please let us know more or less immediately whether you have
14 any objections to it”, well it takes a bit of time to have a look through the evidence. If this
15 application had been made in the normal course we would have been able to put a reasoned
16 objection to you – let us say no more than that. I say, to be candid, we are not immediately
17 put in terrible difficulties by this because the point is it does not need to be there, rather than
18 we need to go and find a response to it.

19 THE PRESIDENT: This goes to Mr. Darcey rather ----

20 MR. FLYNN: That goes to Mr. Darcey rather than to Mr. Scudamore, yes, I am simply speaking
21 for Sky on this. Miss Davies may have her own points.

22 MISS DAVIES: Our position is similar, the evidence is unnecessary. It is not disputing anything
23 that Mr. Scudamore said. Mr. Scudamore in his statement gives an account of a meeting
24 and something that was said to him by Mr. Wall of Virgin. Miss Burns does not dispute
25 that was said and what she seeks to do is to put into evidence new material about what was
26 happening at Virgin at the time that meeting took place. It is not supported by any
27 documents, cannot be tested by the Tribunal or by us, but not is not necessary at all because
28 there is no dispute about what was actually said at the meeting was said and the only issue
29 that any of this is raised to is Mr. Scudamore’s understanding of Virgin’s position which is
30 a matter that Mr. Scudamore is the only person who can give evidence on and which he can
31 be cross-examined on, so we say it is unnecessary and like my learned friend, Mr. Flynn, we
32 are worried about the fact that more evidence keeps dripping out. There are various aspects
33 of Miss Burns’ fifth statement that were put in in support of Virgin’s reply which we would
34 have wished to have had an opportunity to respond to, similarly Mr. Harman’s expert report

1 on BT's reply – a very lengthy document which we have not had an opportunity to respond
2 to, but we took the view that the Tribunal's order required the parties to put the evidence in
3 with their respective pleadings and that was enough.

4 THE PRESIDENT: Mr. Flynn, we clearly do not want this happening more, we have a lot of
5 evidence now and I have some sympathy with the approach that you and Miss Davies have
6 taken, this is quite late. It is in now and we will leave it in, but I just put down a marker that
7 we are going to be most unreceptive now to anything else of this kind coming in, but it does
8 not sound, from what you say, as though this is going to be of earth shattering significance
9 one way or the other in which case I think *de bene esse* we are minded to say "Okay", but
10 obviously you can make what comments you like – is there anything particularly you
11 needed to answer in it, or would want to answer specifically?

12 MR. FLYNN: There is nothing that cannot be answered from the lips of Mr. Darcey if it is not
13 already in evidence. You have already indicated that Ofcom have seven days to make a
14 further application ----

15 THE PRESIDENT: Yes.

16 MR. FLYNN: -- I would suggest that that guillotine should apply to everyone and after that your
17 indication stands.

18 THE PRESIDENT: This has been the opportunity and we are less than two months away
19 from ----

20 MR. FLYNN: Substantially less than two months away.

21 THE PRESIDENT: So we do not want any more of this. Have we finished with the evidence
22 point?

23 MR. FLYNN: That is it on evidence - unless anyone else has an application to make that is
24 probably the end on evidence.

25 THE PRESIDENT: Can I just say what our fairly strong feeling is about the core bundle, having
26 had an opportunity to look at the index that was kindly provided to us having been prepared,
27 I think, by Ofcom? It is not what we had in mind as a core bundle when we put that in the
28 order. For a start, it has annexes – I am looking at item 1 in the core bundle index:
29 "Amended notice of appeal including annexes", well we do not want annexes in the core
30 bundle, we can look at the annexes in the ordinary bundles. The idea of the core bundle is
31 to have just the basic documents. Working our way down we see that there are annexes to
32 Mr. Van Reenan's statement including a CV, we do not want any annexes in the witness
33 statements. What we want in the core bundle are the pleadings. I think we are happy that it

1 be done in this way that we have the notices of appeal and supporting witness statements,
2 and then the defence and supporting witness statements.

3 If I may say so, a classic example of the way in which we would quite like it is on p.6 of the
4 index where we have the defence and we have the statements, it does not mention anything
5 about annexes and that is what we had in mind. It does not mean we are going to ignore the
6 annexes or other material, but if it is going to be any use to us at all it really does need to be
7 pared down in that way. That is our strong feeling otherwise I am not sure what the value
8 of this is going to be, frankly. That is just a shot across the bows on the core bundle.

9 Also I should have mentioned pleadings, witness statements and skeletons, those are the
10 things. Then it may be that there ought to be a bundle of documents which are going to be
11 frequently referred to, that might be helpful or it could be created as the hearing goes along,
12 if we find something being frequently referred to, if we have maybe blank bundles with tabs
13 so that we have all got the same tab numbers we can all decide as we are going through, let
14 that be the next tab and take it out of somewhere and put it in – on key documents.

15 Speaking for myself at any rate, I would find it quite helpful to have a separate bundle of
16 those core things but really pared down. So that is how we are feeling at the moment about
17 it, so it is over to you now, I think.

18 MR. FLYNN: Yes, I was just going to try to make a practical suggestion. I think Ofcom are
19 leading on the core bundles, I do not mean to drop them in it but perhaps to liaise with the
20 Registry and just make sure it is what you want.

21 THE PRESIDENT: I think what we want is just that, what we have said.

22 MR. FLYNN: For example, you probably want the latest version of notices of appeal ----

23 THE PRESIDENT: Yes, we want the latest version.

24 MR. FLYNN: Can I just make a small point? This does not go to Professor Van Reenan's CV
25 but other substantive parts of his report are in annexes and that is why it was suggested they
26 should be there, he could have called it 'Chapter 3' rather than 'Annex 3'.

27 THE PRESIDENT: We will not ignore them, it is just that we do not want them in the core
28 bundle.

29 MR. FLYNN: Well I just wished to make the point that parts of his substantive evidence is in that
30 form, and I entirely take the point that you do not want to be troubled with his CV.

31 THE PRESIDENT: We do not have to have the materials he has reviewed. I see there is in
32 Annex C for example 'A brief discussion of some technical issues on dynamic foreclosure'.
33 Well perhaps we could keep it out to begin with and if we think it is going to be important
34 we will just put it in.

1 MR. FLYNN: I just put the marker down, some of his expert evidence is actually to be found in
2 the annexes.

3 THE PRESIDENT: I am sure we will add things into it as time goes on.

4 MISS ROSE: Sir, we are happy to do that. There is certain amount of weariness behind me
5 because we originally suggested this and we were ordered by the other parties to include the
6 annexes, but nevertheless we are happy to ----

7 THE PRESIDENT: We said that in our letter, we do not want annexes.

8 MISS ROSE: That is what we originally did, but we are happy to take them out again, but I
9 would just like to put a note on the record in relation to costs.

10 THE PRESIDENT: Yes, it is noted on the record, I am sure.

11 MISS DAVIES: Sir, in terms of a bundle of other material, there have been discussions with
12 counsel about that and the only one that anyone has suggested might be referred to more
13 often than not is my clients who suggested that the various demand estimates that were
14 relied on by Ofcom in the decision which at the moment is scattered through bundles, and
15 could helpfully be put together in a bundle. We are happy to make up that bundle and
16 circulate it amongst the parties, and we hope that the Tribunal will find it of assistance. I
17 certainly would find it of assistance.

18 THE PRESIDENT: Let us have that bundle then – a lot of people are nodding so let us do that.
19 That is probably all we need on item 3 is it not, Mr. Flynn? Are we okay on item 3?

20 MR. FLYNN: I am okay, Sir.

21 THE PRESIDENT: Is somebody going to volunteer to provide us with empty tabbed bundles into
22 which we can insert currently unidentified key documents? I suppose we can do our own.
23 We will do our own, if you could all do yours, the main thing is that we end up having the
24 same set up.

25 Bundles of authorities: can we have them agreed as far as possible so that we do not have
26 the same case in different bundles? I know it is sometimes difficult. We have most of the
27 skeletons in now, so it ought to be possible to make a start on that.

28 MR. FLYNN: I am probably speaking out of turn, but I think it was agreed that the appellants
29 would liaise to provide an initial list and then the Ofcom list would follow and obviously
30 any duplication can be rooted out.

31 THE PRESIDENT: If we could that would be so helpful.

32 MISS ROSE: Yes, I think in the Tribunal’s original letter it was suggesting bundles of authorities
33 by 4th May. I would suggest that is rather too late.

34 THE PRESIDENT: If we could have them earlier that would be great.

1 MISS ROSE: I would suggest that given all the appellants' skeleton arguments are in, the
2 appellants could now liaise to produce, as it were, a bundle of the appellants' authorities and
3 that could be put together now and then Ofcom will simply provide a supplemental bundle
4 with its skeleton argument with additional authorities, so there will be no duplication.

5 MR. FLYNN: I think that is more or less what I just said, is it not? You would agree with that?

6 MISS ROSE: But I am just thinking about the timing because in fact the appellants' bundles of
7 authorities could be compiled now which I believe would assist everybody.

8 THE PRESIDENT: I think that sounds as though that is done. Experts' meetings: we have seen
9 some of the correspondence on this but it may be that you have ironed all this out now and
10 people are I hope working towards some more satisfactory arrangements than apparently
11 have been achieved hitherto. It is for everyone's benefit that experts meet up and narrow
12 the issues. It does not mean that people have to change position, it is just that in an ideal
13 world they will be able to pinpoint the real points on which the shoe pinches. Can I assume
14 that you are ploughing on with that? Is there anything that needs to be said about it?

15 MR. FLYNN: I hesitate ----

16 THE PRESIDENT: You are rather world weary.

17 MR. FLYNN: Yes, I feel extremely world weary about this. We have set out what we had to say
18 in our joint submissions for this hearing and one thing is not going to change, which is that
19 the Ofcom witnesses, Dr. Teh and Mr. Caines are not, as it were CPR experts, they are
20 Ofcom employees, they are no doubt good at what they do but they are Ofcom employees,
21 and it has been made clear that they go to those meetings subject to instructions and so they
22 cannot apparently – although Ofcom's position has changed a bit – they cannot go to a
23 meeting in the way that what I call a 'CPR expert' would, who is able there and then to
24 agree matters. They can discuss them, but they cannot, as it were, make any concessions -
25 they would have to go back to base to make it. That, I think, is the position in which they
26 have been put and it was obviously a difficult position and that may be why they pulled out
27 at the last minute of the meeting that had been arranged.

28 We are of course keen, and we really are keen, to have these meetings take place and get
29 what utility there can be out of them but first, they have to take place – I think one is now
30 scheduled for tomorrow and we will see how it goes – but we do have to put the marker
31 down that those meetings cannot be what the Tribunal would envisage, where you have an
32 experts' meeting and they discuss the issues as seems best to them in their expertise. They
33 draw up a list there and then of points which they agree and disagree. It seems that format I
34 think cannot be made to work for Ofcom – no doubt Miss Rose will be able to tell you more

1 but that is the problem we have with it. It depends on the instructions with which they go to
2 the meeting and if necessary how long is taken for any meeting follow-up to know what
3 their position might be to know what the utility will be ultimately for the Tribunal. I think
4 our approach has been so far we would like, as it were, “to suck it and see,” but the meeting
5 that was supposed to happen before this hearing was aborted – the Ofcom chaps did not turn
6 up.

7 THE PRESIDENT: We saw the correspondence on that. But there are other experts too, there are
8 other people involved who are up against you.

9 MR. FLYNN: Yes, there are and those meetings will, of course, take place, but what all the
10 experts are actually talking about in some sense or other is the Ofcom statement, the Ofcom
11 approach and the way that Ofcom has sought to defend it in the appeal so it might be a bit of
12 Polo mint, the experts themselves can discuss issues around the periphery - but if the Ofcom
13 representatives are as set out in Ofcom’s letter – I think it is the 14th March letter which you
14 will have seen – they are there to point to bits of the statement where things are said or bits
15 in their evidence where things are said; probably our experts know that already, because
16 that is the basis on which they prepared their report. The real difficulty is that they are not
17 there at those meetings ready to agree and discuss. If a point comes up which would, as it
18 were, require them to concede then they have to go back to base and take instructions as we
19 understand the position, so it makes the meetings difficult to handle. Sky’s approach has
20 been, as I said, a sort of ‘suck it and see’. We put out an agenda, we know what points they
21 are able to discuss.

22 THE PRESIDENT: Regardless of the difficulty, we would like you to do that, because you can
23 also isolate points on which you are disagreed, and that will be helpful if it does not emerge
24 necessarily as clearly from a reading of the witness statements that there is a point there
25 which is a real point of disagreement. That - in itself is of assistance.

26 MR. FLYNN: Maybe we need the experience, but I think the Tribunal needs to be aware that this
27 cannot be what you would normally regard under the Civil Procedures Rules as an experts’
28 meeting.

29 THE PRESIDENT: I say this, Miss Rose will obviously be interested to hear, but people coming
30 and giving evidence – in what capacity are they coming to give evidence other than as
31 experts, and if they are experts then I am not sure for the moment what the distinction is, but
32 that will be explained to me.

1 MR. FLYNN: I think they are probably giving evidence as to their opinion but even there you
2 might wish to know that it was their opinion rather than just what was said in the statement,
3 but that is I think the central problem we are grappling with.

4 THE PRESIDENT: All right, well perhaps Miss Rose will add to that?

5 MISS ROSE: The position in relation to Ofcom's witnesses in this appeal is the same as in every
6 other Ofcom appeal that has been heard by the CAT over the last seven years, which is that
7 Ofcom typically will produce experts who were involved in the drafting of the decision.

8 That means that they are different from the other experts because they are partly witnesses
9 of fact. These are people who are actually actively involved in the process that led to the
10 taking of the decision that is under appeal, and much of their evidence is an explanation to
11 the Tribunal of what was done by Ofcom and the reasons why Ofcom reached the decision
12 that it did. It is inevitable in the course of that that they also express their professional and
13 expert opinion because you cannot disentangle the facts of the decision making process
14 from the regulatory and economic judgments that were made by Ofcom in the course of
15 making that decision.

16 Equally, of course, they express their opinions in rebuttal of criticisms made of Ofcom's
17 decision by the experts mounted against them, so that is the capacity in which they give
18 evidence. There is a distinction between their role and the role of a purely external expert
19 who is simply instructed to give an opinion because their evidence is a mixture of fact and
20 of opinion.

21 THE PRESIDENT: Yes, but I do not think what we are aiming at with these meetings is to iron
22 out the facts so much – I do not know, I am just taking something out of the air – supposing
23 someone on the other side expresses a view, this would have been a very good way of
24 modelling something and supposing they have not yet taken a view on that. They might say
25 in a meeting: "Yes, we agree, it could have been like that".

26 MISS ROSE: Yes, and we have never suggested that they do not have authority to reach
27 agreement. We made this clear in one of our recent letters. What we said was that they do
28 not have authority to make concessions in relation to matters that are in the statement
29 because those would be regulatory decisions which are ultimately decisions for Ofcom.

30 THE PRESIDENT: I understand that.

31 MISS ROSE: That is all that we have said and that is what seems to have provoked the degree
32 with respect of angst that we have been getting from both Sky and FAPL.
33 So far as the aborted meeting is concerned you have read the correspondence and I do not
34 want to go back over it, but as you have seen what caused the problem was not any

1 difference between the function of Ofcom's experts and any other expert. What caused the
2 problem was the springing of a 45 point agenda at 5.30 pm for a 9.30 meeting.

3 THE PRESIDENT: We have read that correspondence.

4 MISS ROSE: So that is the issue. The one thing I do want to lay down a marker is that DLA in
5 one of its letters suggested that the explanation given by Ofcom for not attending that
6 meeting was entirely disingenuous. I accept there may be some solicitors who do not
7 actually know what the word "disingenuous" means, and that it may not have been intended
8 to be an allegation of dishonesty. But if it was intended as such then ----

9 THE PRESIDENT: You refute it.

10 MISS ROSE: We refute it and we also invite them to reconsider their approach. It is not helpful.

11 THE PRESIDENT: Well we are just not going to get into the blame game now.

12 MISS ROSE: I do not want to get into the blame game either, but our position remains that we
13 are very happy for the meetings to take place, we have indicated we are content for the
14 meeting to proceed tomorrow in relation to the Virgin appeal, that is not a problem.

15 THE PRESIDENT: Just see where you get to; I think that is all these things can ever be. If it can
16 lead to some joint statement: "We can reach agreement on these points. On these points,
17 however, we are ..." that in itself is helpful.

18 MISS ROSE: Of course it is, and we have always approached it in that way.

19 THE PRESIDENT: Well whatever has gone on in the past it sounds as though that is the way
20 forward. I think that deals with 5. "Timetable for the hearing", thank you very much for
21 the effort that you have made jointly and severally to set it all out, that is very helpful. Can
22 I just make one or two comments about sitting days. We have the 1st July as a sitting day at
23 the moment, although I noticed something I saw indicated that Sky, I think it was, might
24 think otherwise, but that could be out of date. Are we all content that at the moment 1st July
25 is a sitting day?

26 MR. FLYNN: Yes, we are. Without going to the colour chart – if that is the one you are referring
27 to – it says "break" on it simply because having come to the end, we think, of the evidence
28 we thought it was as well to provide as much of a gap as we could to allow parties to get to
29 closing submissions and so that, while a day the Tribunal is prepared to offer, if you agree
30 with the timetable would be a day on which rather than turning up people would be
31 beavering away on their closing submissions, so it is not a misunderstanding of the
32 Tribunal's availability.

33 THE PRESIDENT: Well shall we play that one by ear, because we may find there are things that
34 we have to do, that we have not gone as far as we wanted to and lots of things can change.

1 MR. FLYNN: Absolutely, the timetable is extremely tight and we hope there will not be
2 slippage, but that is where we are and things crop up.

3 THE PRESIDENT: We will simply note that if everything works according to plan ----

4 MR. FLYNN: I think we all understand it is a day on which the Tribunal is available, if we get a
5 break at the end of evidence before we go into closing ----

6 THE PRESIDENT: Nobody is strongly suggesting that if it works out according to plan you
7 should not then have a bit of time for reflection.

8 MR. FLYNN: As I understand it, I think everyone thinks we should have time for reflection.

9 THE PRESIDENT: Okay. Can I just flag up one other point? We are not entirely sure what the
10 position will be when it comes to it, we might be able to work through it but we might have
11 a problem for the Tribunal's availability on 15th July, which is the last day that we currently
12 have. We do have a problem on 12th but it is just possible – we are doing our best at the
13 moment to see if we can work around it, and we may be able to indicate before the start of
14 the hearing in fact as to whether we will be able to sit on the 15th, but I just thought I ought
15 to mention it.

16 The only other matter is that there is another floating possibility. There are two or three
17 Wednesdays which we all realise we are not proposing to sit, and it is very much hoped that
18 there will not be another Wednesday when we cannot, but there is just a possibility that
19 there might be, but we cannot really predict that. So if I can just mention that as well so you
20 are not taken by surprise. Those are I think the only points I wanted to mention about
21 sitting days. Over to you therefore on any points arising specifically about the timetable.

22 MR. FLYNN: Sir, it has been the happy task of someone at DLA to prepare this colour chart
23 which is mine and Miss Davies' best attempt at working out how things might pan out.

24 THE PRESIDENT: This does not have the status of an agreed document?

25 MR. FLYNN: No, I do not think it has. I think the extent of the agreement, as we said in our
26 written submissions was basically as to running order, and time allocated for each part of it.
27 I think that is more or less an accurate statement. What this timetable seeks to achieve is to
28 give effect to that subject to availability of witnesses which is proving quite complicated
29 and a bit of a moving feast, which is why it kept being updated.

30 We may be lucky but a clean start on day one at 10.30 may be a little ambitious which is
31 why we have programmed what is described as: "Housekeeping" or "Preliminaries"
32 because that I think will be the first time as it were we meet in full session and there may
33 well be things that need to be dealt with and explained. It may also be, anticipating the

1 point on transcript, it may be that time will be needed to set up the equipment if that is the
2 way we go.

3 THE PRESIDENT: I am rather hoping that we might be able to do that before.

4 MR. FLYNN: So much the better.

5 THE PRESIDENT: We will come on to that.

6 MR. FLYNN: I just point out by way of illustration depending on pressure on the courtroom, that
7 is something that might need to be taken.

8 THE PRESIDENT: Just while we are talking about the beginning, I cannot take any credit for
9 this, it was Mr. Blair who thought of it. The point on s.316 is a discrete point. The openings
10 will deal with some people's, there will be more submissions about s.316 in the traditional
11 way much later in the day. The question is, is there anything to be said for hearing all the
12 argument on it at one stage from everybody on the basis that we then get that out of the
13 way, not decided obviously, but get it out in terms of the argument? We just throw that out.

14 MR. FLYNN: I had envisaged that the openings, whilst they may be a general indication of the
15 case to come would be principally to set up the evidence and that legal points which would
16 include the s.316 argument and, in our case, also on the licence conditions would be a
17 matter for closing and that might indeed be a mixture of written and oral depending on how
18 much time we have at the end of the day so we certainly had not programmed, as it were, a
19 day or however long it would be for submissions on s.316. But obviously if the Tribunal
20 would find that helpful perhaps in the first week perhaps the Tribunal could ----

21 THE PRESIDENT: It is one discrete point which actually does not depend so much upon the rest
22 of the case – not so much – and therefore if we had all the argument together we would
23 have it all in mind and not in a linear fashion.

24 MR. FLYNN: I think, Sir, again speaking for myself and just off the cuff, the argument may be
25 better understood when the Tribunal has heard the evidence and understands the full scope
26 of the decision because it is not merely a textual point it is what has been done here and that
27 is why I think we have certainly planned and thought that that argument would better come
28 at the end.

29 THE PRESIDENT: Well we are in your hands basically on the batting order and the order of
30 events. It was just an idea, but I can see the force of the fact that it might be easier to deal
31 with it in the context ----

32 MR. FLYNN: Contextualised because otherwise we will have to point to things that, as it were,
33 we are all coming to and I can guarantee that anything that I say about it would not be the
34 way Miss Rose would put it.

1 THE PRESIDENT: All right, well we have given you the idea, if that is how it pans out then so
2 be it.

3 MR. FLYNN: I do not know otherwise if there is anything that I can usefully say about our
4 version of the timetable except that it rolls out and it tries to find a time at the end if we get
5 it, and maybe for sitting day reasons or slippage reasons we do not get it, we get a little time
6 to try to prepare something in writing for closing which might assist the Tribunal.

7 THE PRESIDENT: Yes I had a feeling you would leave it rather fuzzy at the end.

8 MR. FLYNN: We leave it fuzzy because it is bound to be driven by contingencies in the end, so
9 we are certainly not suggesting any firm dates. I think this should be regarded as the length
10 of time each witness is there. I think if it is to be changed it would be terrible if it impacts
11 on the whole timetable but that is really the best we can do.

12 THE PRESIDENT: I think we would quite like to end up - speaking for myself - with fairly well
13 thought out closing submissions from people.

14 MR. FLYNN: I do not think there is anything else I can usefully say on that.

15 THE PRESIDENT: Thank you very much. Does anybody else want to add anything on the
16 timetabling?

17 MISS ROSE: Sir, the only matter I really want to raise is the question of how we deal with
18 closing submissions written and oral. I understand the difficulty of anticipating how long
19 the evidence is going to take, and particularly if the Tribunal is not 100 per cent sure which
20 days it is able to sit, but I do have a concern about a situation in which we finish the
21 evidence and then written submissions are delivered at the same time that oral submissions
22 are commenced because there are real risks in following that course if parties simply put in
23 a written submissions and then given an oral submission which does not speak to the whole
24 of the written submissions which may be very lengthy, so there is a real risk that matters
25 will not have been read before the oral submission is heard, so that the Tribunal will not be
26 in a position to ask questions about matters that are in the written submission but not
27 addressed orally, and other parties may not pick up points that are in the written
28 submissions and are not addressed orally.

29 There is actually an authority on this for what it is worth, which is a decision of the
30 Employment Appeal Tribunal in a case called *Sinclair Roche & Temperley* which warns
31 against the risks of having a situation where a Tribunal after a lengthy hearing with a lot of
32 evidence has simultaneously a written submission produced and then an oral submission
33 which does not address all of the written submissions. It is a recipe for potential problems.
34 I do appreciate the logistical difficulties and I do not have any simple answer. One possible

1 solution, and I am only floating it, is if there were any possibility that the Tribunal could sit
2 the following week because there might be a lot to be gained by having a longer gap at the
3 end of the evidence, and then having the closing submissions commence a little later, but
4 that would be contingent on the Tribunal being available the following week.

5 THE PRESIDENT: I think unfortunately the answer is we have a problem with the next two
6 weeks.

7 MISS ROSE: Well in that case it is going to be impossible because we ----

8 THE PRESIDENT: I am not sure we are going to be able to resolve this at the present. We will
9 probably have a better idea when we are half way through the hearing as to how best to do
10 this.

11 MISS ROSE: Can I just perhaps hand this case up ----

12 THE PRESIDENT: Yes. (Same handed)

13 MISS ROSE: -- because it does show what the pitfalls are.

14 THE PRESIDENT: I think I understand them. I know that ----

15 MISS ROSE: It is just an interesting example of what happened when matters went awry
16 basically. You will see it is the first two or three pages of that judgment which address the
17 procedural problems that arose when there was not a proper gap between exchange of
18 written submissions and the delivery of the award.

19 THE PRESIDENT: Let us just put it on one side for a moment; we have it and we will have a
20 look at it.

21 MISS ROSE: The other disagreements between us and Sky are very minor, and really relate only
22 to the timing of particular matters. We do not think it is necessary to timetable half a day
23 for housekeeping at the outset. We would hope that we could get a clean start and it may be
24 that we could start at 10 o'clock, and the first three days when the opening submissions are
25 dealt with may need to be slightly longer sitting days. What we envisage is that we would
26 not want to sit abnormally long days when witnesses are giving evidence, but when parties
27 are giving their opening submissions it might be possible just to sit slightly longer so that
28 we can get them done within the time, and I would hope that one could do that the first three
29 days and deal with all of the opening submissions. If we factor in a half day then the whole
30 of the timetable starts to slip back quite seriously.

31 I do not know if the Tribunal has seen our proposal, it is at tab 1.1, and I commend it for
32 one reason really which is that I do think our format is easier to read than the rather
33 confusing chart which has been produced by FAPL and Sky.

1 MISS DAVIES: Sir, in relation to that the difficulty with Miss Rose's timetable is it does not take
2 account of availability. The reason that this has become so multi-coloured is that DLA have
3 done their best, and it has been a difficult exercise and I would say that they have done an
4 extremely good job to try and sort this all out, it does take account of availability and that is
5 why this timetable is actually more useful because, for example, Miss Rose's timetable has
6 people appearing on days when it is clear they are not available.

7 THE PRESIDENT: Well there we are. I am sure you will be able to work out some common
8 basis for it.

9 MR. BLAIR: It is plain that this case is going to change as it goes along, and it seems to me a
10 good idea to pencil in that we will have another sort of case management conference before
11 we have the week break for the spring vacation, that would be on 3rd June, and if we were
12 mentally to pencil in 30 minutes or so at the end of that day to do what we have been doing
13 now that could make the last four or five weeks more easily managed. I do not know what
14 counsel think about that?

15 MR. FLYNN: Just for clarification did you mean 27th May, I think 3rd June is a non-sitting day.

16 MR. BLAIR: I got confused by the colours! The last day before the week off.

17 THE PRESIDENT: I am sure that will be useful if we take stock then at a natural break.

18 MR. PLEWMAN: May I raise one other issue about the timetable. It seems to me substantially it
19 is a best efforts aspirational timetable that we will do our best to meet. My learned friend,
20 Mr. Flynn said that at least so far as duration and sequence he understands it broadly
21 agreed. He is not right in one respect which is that he has provided for BT and Virgin to
22 share half a day in opening and to share a day in closing. We have communicated to the
23 parties that the presentation of BT's case will require a minimum of two hours in opening
24 and four hours in closing and we would seek to have that accommodated. I do not think
25 anything has to be decided about that, I simply do not want to be understood to have waived
26 that point at this stage.

27 MR. FLYNN: I am sorry, I did not mean to deny my learned friend that. I think one reason for
28 our suggestion that the openings might take up most of the first week is precisely because
29 we are not sure if the Tribunal would be able to sit late or whether the Ofcom opening might
30 be pushed a bit later on the 11th because my friend wishes to take more than half of half a
31 day which I fully understand.

32 THE PRESIDENT: I think finishing the openings within a week would obviously be highly
33 desirable, and if we have to sit a bit longer or start at 10 we can do that in that week
34 anyway, so that gives a bit of extra time.

1 MR. ROTHSCHILD: Just for the record, as Mr. Plewman has mentioned time is being shared
2 between BT and Virgin on this draft, Virgin Media would ask for at least a quarter of a day
3 for opening and at least half a day for closing. We suggest that is very reasonable, and it
4 may be necessary perhaps for the Tribunal if it is possible to sit later to accommodate that.
5 We would not want to be squeezed out by Mr. Plewman taking up more than ----

6 THE PRESIDENT: It sounds highly reasonable to me in the scale of an eight or nine week
7 hearing. I can see in my mind that things at the end may need to be different from that
8 which they appear now. I do think there is something to be said for having, especially in a
9 case of this complexity, some well thought out closing submissions in writing followed by
10 probably a shorter time to reflect on them and then a shorter oral hearing. How we will
11 manage that and whether you will need to come back, as it were, and we will need to find
12 another day or two late in July I do not know - that is a possibility, I suppose. It is not
13 desirable particularly but it depends how much you are going to be able to do in writing
14 while other things are happening.

15 Right, well I think we have just got to trust you at the moment to thrash these things out
16 between you and get as close as you can to at least a plan that may have to be very
17 adaptable.

18 "Cross-examination extent and order" again my feeling is that it is going to be affected by
19 what happens at the meetings to some extent and probably cannot be decided upon at this
20 stage, nor similarly the order, it is very much for you to try and agree if you can. Does
21 anybody want to say anything specifically about cross-examination at this stage? I am not
22 referring at the moment to the applications by I think it is Top Up TV and the sports bodies,
23 we will come to that.

24 MR. FLYNN: Sir, we have made submissions in our paper which you have. On order it seems to
25 us that as far as each appeal goes Ofcom should cross-examine first and then be followed by
26 the interveners in support as necessary and if they wish to carve up issues between them that
27 of course makes sense, but that should be the order and those should be the people who, as
28 it were, do the cross-examination. So that is what we had to say about that.

29 THE PRESIDENT: The logic of that is that your appeals are going, your opening as it were - I
30 did not see any great dispute about that.

31 MISS ROSE: Sir, in terms of the order of cross-examination there are some witnesses where it
32 would make logical sense for the other interveners to cross-examine before Ofcom, for
33 example in relation to Professor Van Reenan it may make more sense for BT to cross-
34 examine him first because ----

1 THE PRESIDENT: You will presumably be able to arrange that.

2 MISS ROSE: Yes, we will arrange that between ourselves and we will let Sky and FAPL know
3 the order we are proposing.

4 The other matter is I believe Mr. Plewman had a point about the question of dealing with
5 disputes of fact, if I can let him deal with that.

6 MR. PLEWMAN It is a small point which has been shared with everybody, sir, which is the
7 letter from the Tribunal of 14th February sets out the Tribunal's view about the necessity for
8 cross-examination and the fact that ordinarily factual evidence not challenged will be
9 regarded as no longer challengeable if it is not attacked in cross-examination.

10 THE PRESIDENT: Unless it is absurd - we reserve the right not to treat everything as gospel just
11 because it is in writing.

12 MR. PLEWMAN: Of course, and leaving on one side issues where the evidence is more in the
13 nature of inference or submission and the like. We did want to suggest, and this has been
14 shared amongst all the parties, that it might be appropriate to leave that slightly open in this
15 sense: there are for some of the witnesses extremely voluminous witness statements, so in
16 the case of Mr. Darcey, I have not done the count but it is somewhere upwards of 500 pages
17 of evidence, and he has to be cross-examined by all parties in two and a half days,
18 inevitably it is not going to be possible for the cross-examiners on any side, on any witness
19 to take on every single, small, issue of fact, a question of judgment will be called for. We
20 would suggest that the right approach at the end is not that there is a sort of cut-off rule:
21 "You did not attack it in cross-examination, therefore you are foreclosed from argument
22 about its acceptability." It is an issue of weigh and an issue which will lie in the Tribunal's
23 discretion. We would suggest that would perhaps be an approach which might commend
24 itself, so the absence of cross-examination we would say should be a matter going to the
25 weight of a particular piece of evidence and not a bar to calling it into question.

26 THE PRESIDENT: If a witness is being cross-examined and there is something that proves to be
27 important ----

28 MR. PLEWMAN: Yes.

29 THE PRESIDENT: -- and he is not cross-examined about it, one takes a risk obviously if you
30 have not put something to him if it is important.

31 MR. PLEWMAN: Absolutely, which is why counsel's judgment will be called for.

32 THE PRESIDENT: Yes.

33 MR. PLEWMAN: Yes, that is the only point I wished to make.

1 THE PRESIDENT: Thank you very much, Mr. Plewman. Item 8, is there anything in that? We
2 have seen the correspondence about the annexes to Professor Unger's statement. It is in at
3 the moment. Some people say he does not refer to it, other people want to refer to it, I think
4 we have to leave that to come out in the wash.

5 MISS ROSE: Sir, my suggestion generally was this: as you will have seen the notices of appeal,
6 replies and defence, all raise objections to various items of evidence. My suggestion would
7 be that given the complexity of the case the right approach is for the Tribunal to hear the lot
8 and then there can be closing submissions at the end and the Tribunal will make such
9 rulings as it thinks fit.

10 THE PRESIDENT: That is what we would prefer to do, not to try and resolve it now in
11 ignorance.

12 MR. FLYNN: Could I just explain our point on this? Three quarters of the exhibits to Dr.
13 Unger's witness statement are simply not referred to by anyone. Some of them are by other
14 parties, and there is a schedule. We have said that because they have not been referred to
15 then obviously we do not know what, if anything, is being made of them, we assume
16 nothing, and we have prepared our pleadings and evidence on that basis. So our suggestion
17 should be that those documents should not be referred to. I do not wish on anyone the
18 tedious task of taking them out of the files but they are just, as it were, hanging, nobody has
19 made anything of them.

20 THE PRESIDENT: Someone at Virgin wants to ----

21 MR. FLYNN: Yes, I exclude from what I am saying that I think various parties do refer to some
22 of them, but the great bulk of them are not referred to in Dr. Unger's witness statement, and
23 so from our perspective they are serving no purpose in these proceedings and that is the way
24 we submit that it should be. If they stay in the file, as it were, sterilised - fine, but we do not
25 think that anyone should be referring to them because they simply have not been, as it were,
26 elevated to the status of true evidence. Nobody has sought to rely on them for any purpose,
27 and that is our position on that. There is nothing to respond to because they have not, as it
28 were been ----

29 THE PRESIDENT: Been adopted.

30 MR. FLYNN: Been adopted, that is our point.

31 MISS ROSE: Sir, in our submission that is a bad point for at least two reasons. The first reason
32 is set out in Sky's own notice of appeal. I do not know if you have the Sky notice of appeal
33 there. Can I just read you para. 4.29?

34 THE PRESIDENT: Yes.

1 MISS ROSE: Paragraph 4.29 of Sky's appeal says:

2 "The description in the statement of the discussions that Sky has had with operators or
3 potential operators of other platforms is very sketchy and selective. They need to be seen as
4 a whole and as they happened."

5 Therefore it was Sky which put in issue the question of the whole of the contemporaneous
6 material dealing with the negotiations and it was in that context that Mr. Unger has annexed
7 to his witness statement all of the documentary material which was before Ofcom when it
8 made its decision in relation to these negotiations and which was considered and taken into
9 account by Ofcom for the purpose of that decision. We would submit that in light of the
10 way that Sky itself has framed its notice of appeal it is, with respect, untenable for Sky ----

11 THE PRESIDENT: You are saying it is Sky ----

12 MISS ROSE: Sky has put them in issue, yes, Sir. Sky put them in issue in the first place.

13 THE PRESIDENT: Sky is the only one that wants to refer to them?

14 MISS ROSE: Sky itself said that you need to look at the negotiations as a whole, so we have
15 said: "Here are the negotiations as a whole, please look at them", and Sky now objects.

16 That is the first objection.

17 The second objection is that of course it is nonsense for Mr. Flynn to suggest that these
18 documents could not be referred to because whether or not they were in evidence they could
19 always be put to a witness for the purposes of cross-examination in any event, so the
20 suggestion that they should be sterilised in the file and not referred to we suggest is
21 untenable on any basis.

22 Sir, you have seen the dispute on the correspondence that we simply told Sky that two
23 illegible documents had not been taken into account. For reasons we do not understand they
24 chose to assume that that statement about two documents referred to all of the documents.

25 That was never the position and was never stated by Ofcom ----

26 THE PRESIDENT: I saw the correspondence.

27 MISS ROSE: Yes, Sir.

28 THE PRESIDENT: It sounds to me, Mr. Flynn, as though we leave it where it is for now and see
29 where it goes in terms of people's submissions and if we have to take a decision at some
30 point then we will obviously have to.

31 MR. FLYNN: Yes. Just to say very briefly, of course, those documents do not just cover the
32 negotiations, they cover a whole lot of things. What we actually say in our notice of appeal
33 is that if you want to see the full account you look at Mr. Darcey. You do not find in Dr.

1 Unger's witness statement: "If you want to see the full account read all my exhibits and I
2 will tell you about them", so they are not adopted.

3 THE PRESIDENT: We are not going to look at anything unless we really feel that we have to.
4 We are not looking for new things to look at.

5 MR. FLYNN: The second point just to make is that as we have not been called upon to respond
6 to those, likewise we prepared our evidence on the basis that they are not there, and we have
7 not, as it were, been given any notice; if Ofcom has a point on any of these documents we
8 do not know what it is. I just put the marker down.

9 THE PRESIDENT: It seems inconceivable that if you did want to say anything about it would
10 not already be somewhere in Mr. Darcey or somewhere else.

11 MR. FLYNN: Yes, we shall not be pointing to that, that is quite true.

12 THE PRESIDENT: That takes us to confidentiality. It seems we should almost have a list of
13 people who are not in the confidentiality ring! (Laughter) There are over 100 people in it,
14 are there not? There may be times when we have to go into camera, that we are perfectly
15 content to do as and when it crops up. Perhaps more significantly, there may be a logistical
16 issue about what bundles witnesses can see and have put to them. I have not worked out
17 how many versions - presumably there will have to be four or possibly five, depending on
18 what documents people wish to put to that witness in cross-examination or re-examination.
19 So we will have to leave that to you, I am afraid, to work out between you. Is there
20 anything else that we can assist with on confidentiality at this stage?

21 Now we have some applications by Top Up TV and the Sports bodies, they may want to
22 cross-examine. I think certainly as far as the Sports bodies are concerned, Mr. Harris, you
23 represent them, do you not?

24 MR. HARRIS: Yes. Sir, if I could just take this briefly, we have put in an application in the form
25 of our note for today's hearing ----

26 THE PRESIDENT: We have seen that.

27 MR. HARRIS: -- for limited permission to appear orally at the final hearing. You will recall that
28 the order made at the earlier CMC was that we had permission to appear in writing. Just
29 briefly the three reasons that we mention in that note for wishing to have permission to
30 appear on a limited basis at the final trial, and they are that Ofcom has confirmed in a letter
31 to us that we exhibited to our note that they do wish to challenge "aspects" of the evidence
32 that we have put forward. It seems to us to follow that if they are going to challenge at the
33 final hearing aspects of our evidence, in particular, by cross-examining some or all of my
34 witnesses then I ought to have the ability to be here to defend those witnesses and have

1 rights of audience in connection there with. It may be that, given Ofcom's stance, I am in
2 effect going to have to be at the hearing in any event, hopefully somewhere a little nearer
3 the front.

4 Secondly, and I can show you this if you would like, there is Mr. Caines, who gives
5 evidence on behalf of Ofcom, and he has expressly and in terms in a number of places taken
6 issue with evidence and points that are made specifically by my clients in contra-distinction
7 to, for example, points made by the Premier League. I would like the ability to attend on
8 those days to cross-examine Mr. Caines should that need remain after Mr. Caines has been
9 cross-examined no doubt by Mr. Flynn and Miss Davies. It may be no longer necessary
10 thereafter for me to cross-examine, but it would be only fair in light of the way Mr. Caines'
11 evidence is framed that I at least be permitted to attend for that purpose. That is the second
12 reason.

13 The third reason is that as regards a limited appearance at the closing stage of the trial I
14 respectfully contend that that will actually assist the Tribunal because, as with all the other
15 parties, the principal aim of oral closings will be to seek to focus the attention of the
16 Tribunal on those parts of that party's submissions that are the most germane given where
17 we are at the end of the trial. I would anticipate that any oral submissions that I am given
18 permission to make at that stage will be very limited indeed, after all my written
19 intervention is already limited. So although I cannot give a precise time estimate for that
20 sort of oral closing if I am given permission, I am content to live with broadly speaking the
21 indication in Miss Davies' coloured chart timetable here that other interveners - and here I
22 am looking at 11th July - be given up to half a day to make their oral closings if so
23 permitted. I do understand, and I will be corrected if I am wrong, that the only other
24 intervener who wishes permission to attend orally in closings is Top Up TV. I have no
25 doubt that if there is a half a day set aside for the two of us, assuming you let either or both
26 of us in, that that will be sufficient. Those are the three reasons I would like to have that
27 limited permission as per my note.

28 Moving on, I should just note that I am not aware that this application is opposed by any of
29 the main parties, certainly it is actively supported by the Premier League. Mr. Flynn's
30 position - again I will be corrected if I am wrong - is that the application is supported
31 provided it does not cut down on his time in this timetable but, as one can see from the
32 timetable there is no reason for that to be the case because a slot is set aside for us as it is.

33 **THE PRESIDENT:** Shall we find out if it is opposed? I have not seen any indication that it is. Is
34 there anyone here from Top Up TV?

1 MR. HARRIS: No, they made a written application.

2 THE PRESIDENT: Mr. Harris, shall we just see what is said?

3 MR. HARRIS: By all means.

4 THE PRESIDENT: There is nothing that I have seen that indicates ----

5 MISS ROSE: We do not oppose it in principle but we make the following observation which is
6 that the interest of the Sports bodies would appear to be aligned with that of the Premier
7 League.

8 THE PRESIDENT: To some extent, yes.

9 MISS ROSE: My submission would be that if they want time that is something they should
10 discuss with Miss Davies because it should be her time and not anybody else's that they
11 have.

12 MISS DAVIES: Sir, as you pointed out their interests are to some extent aligned in that we
13 challenge the same parts of the decision, but the evidence that is put in by the Sports bodies
14 is specific to their sport. The evidence that I put before the Tribunal is specific to the
15 Premier League. The timings that we have given in this timetable, which are already very
16 tight from the Premier League's perspective, relate solely to our appeal and there is scope
17 for intervention that Mr. Harris is seeking permission to make without having to eat into my
18 time, and if it is to be suggested that my time is to be eaten into that will cause us real
19 problems.

20 THE PRESIDENT: Mr. Harris to make an order that in principle you be allowed to cross-
21 examine and make some oral closing submissions but that we will obviously reserve the
22 right to see as it were on the day as to how long that should take and whether it is
23 appropriate, but I think in principle we are minded to say that you should, and the same
24 applies to Top Up TV.

25 MR. HARRIS: I am grateful, Sir. Do I take it that that also extends to being present on any
26 occasion when witnesses of mine are being challenged by Ofcom, or for that matter
27 anybody else.

28 THE PRESIDENT: Of course.

29 MR. HARRIS: I am very grateful. I am content with that, Sir, thank you.

30 THE PRESIDENT: There is also an application by Freesat - they are not represented here either -
31 to put in short written submissions at the closing stage. As far as I know that was the extent
32 of their written application which we are minded also to allow, subject to any objections.

1 MR. FLYNN: Sir, perhaps I can just indicate that Herbert Smith wrote to Freesat's solicitors
2 yesterday in relation to examining their witness, Miss Scott, and I think we have an
3 agreement, as it were, that we do not need to do that.

4 THE PRESIDENT: Yes, that was the other issue, was it not?

5 MR. FLYNN: That is the other point, and obviously we do not oppose their application to put in
6 such closing submissions as they are allowed to by the Tribunal and consider appropriate.
7 So that is where we are on that.

8 MISS DAVIES: Sir, if I can just say that our position in relation to Miss Scott is identical to
9 Sky's so if an agreement has been reached with Sky I am sure a similar agreement has been
10 reached with us.

11 THE PRESIDENT: Good, thank you very much. Then we come to the other appeals. The battle
12 lines seem to be drawn, Sky and Premier League, not as a matter of principle, but simply as
13 a matter of - as I think they put it - timing being very tight, suggest that both those appeals
14 be heard separately, and presumably therefore on a later occasion. There is an order that we
15 did order originally that the first of the two be heard along with this, but of course that was
16 at a time when it was not clear what the scale of these appeals would be, and that has
17 become a little clearer now. Everybody else I think positively wants these two appeals to be
18 heard or at least the set top box appeal to be heard at the same time, and at least one person
19 thinks that some of the evidence there is material to one of the issues in the main appeals.
20 Who would like to start on this one?

21 MR. FLYNN: I think you have probably stated our position accurately there, Sir. There is
22 currently an order that the linear only set top box appeal be heard concurrently with this
23 one. The point we make is that the CAMS appeal, which is well behind in timetable terms,
24 the defence is not in yet and you are yet to rule on interventions, the point we make is that
25 the only sensible thing to do is to have those cases heard together because they raise similar
26 issues, and CAMS probably will not be ready - that is one point. Also, accommodating it in
27 the timetable we say is going to be difficult. I think those opposed to our suggestion in this
28 respect are probably thinking it can just be buried or swept up. There are issues, they are
29 going to have to be explained to you and I note that Top Up, in their application to be heard
30 in this hearing, think that the STBs hearing will take a day and there is not a day in this
31 timetable for that to take place. We do not know, for example, whether or not they would
32 want to challenge any of the evidence in the CAMS appeal; they have not seen it yet. So
33 essentially we are asking for trouble if we try and pack that in as well. The primordial
34 concern, as it were, should be that those two cases go together because they do raise the

1 same issues in relation to the meaning of one of the licence conditions. As you said, it is
2 not an objection in principle, because we do say that of course if one had all the time in the
3 world they should be heard together with the main appeals for two reasons, namely, we are
4 running out of hearing days and the CAMS appeal is behind in pleading terms, so that is
5 why we say we think that should be put off.

6 THE PRESIDENT: We have not made any orders at all in CAMS?

7 MR. FLYNN: No, so I assume the defence would come in under the normal time and the rules,
8 unless there has been any application for extension.

9 THE PRESIDENT: Does anyone happen to know when that is, or not?

10 MR. FLYNN: Miss Rose may know, we think it is any day now, 28th March I think, but no doubt
11 they will be able to tell you.

12 MISS ROSE: We think it is due on 29th March and in fact we were going to ask for it to be
13 shortly extended to 7th April. Can I just make clear what our position is on these appeals.

14 THE PRESIDENT: Can we just make sure - is that all you want to say - at this stage anyway, you
15 can come back?

16 MR. FLYNN: Yes, Sir.

17 THE PRESIDENT: Miss Rose, over to you.

18 MISS ROSE: We do appreciate the logistical problem. The other side of it is that the issues in
19 the set top box and CAMS appeals are relevant to this appeal because it is going to be
20 submitted that what Sky has done in relation to those issues demonstrates precisely the sort
21 of attempt to manage the retail market which was one of the concerns that Ofcom had in the
22 first place.

23 THE PRESIDENT: So is that in the evidence that would be relevant? It is a factual matter as to
24 what has happened in relation to those.

25 MISS ROSE: Exactly. Can I make two suggestions? One suggestion is that the evidence should
26 be mutually admissible, in other words that the evidence in the STB and CAMS appeal
27 should be admissible in this appeal and vice-versa, that is one suggestion. The second is
28 that if they cannot be accommodated in this timetable that they should, most certainly, be
29 heard by the same Tribunal and, as soon as possible, because I do submit that it is important
30 that both appeals are considered together so that when the Tribunal comes to make its
31 decision it makes its decision on all three appeals at the same time.

32 THE PRESIDENT: All six appeals?

33 MISS ROSE: I am sorry, I mean this appeal and the set top boxes and CAMS appeal. There
34 needs to be consistent treatment of the issues by the same Tribunal and at the same time,

1 because otherwise there is a risk of inconsistencies. I do not know whether this Tribunal
2 would be able to accommodate the STB and CAMS appeals before the end of July or
3 alternatively in early September, I do not know what the position is on that. There would be
4 a concern if this Tribunal was not able to sit as a unit and consider those appeals in the near
5 future so that they could be considered together with its consideration of this appeal.

6 THE PRESIDENT: How long, in Ofcom's view, would these two appeals take to hear?

7 MISS ROSE: We think between a day and two days in totality for both appeals.

8 THE PRESIDENT: What would be the difficulty in, for example, assuming you had the same
9 Tribunal panel, giving judgment in the four main appeals and then proceeding to hear those
10 appeals?

11 MISS ROSE: We submit that would be of concern because the Tribunal would not have heard
12 argument on the reasonableness of Sky's conduct in relation to the set top boxes and CAMS
13 appeals.

14 THE PRESIDENT: Why could that evidence not be fed in anyway?

15 MISS ROSE: Sir, then you can see the problem, you could not pre-empt the decision in ----

16 THE PRESIDENT: It is the same evidence, if the evidence was admitted into the four appeals.

17 MISS ROSE: Well that is the reason why the appeals ought to be heard together, because if you
18 are going to have to consider the evidence and consider the issue the essential issue is
19 whether the term that Sky was seeking to impose was reasonable or not. If that is the issue
20 and it has got to be considered in this appeal then the primary position, the original order
21 that you made is obviously the correct one. So one does go 'round and 'round on this a bit.

22 THE PRESIDENT: Well except these decisions, and this may be wrong because I am not yet
23 completely on top of this, the set top boxes decisions and the CAM decisions, as I
24 understand it, are decisions taken in the context of operating a WMO to the extent that it is
25 capable of being operated now.

26 MISS ROSE: That is correct.

27 THE PRESIDENT: Why would that necessarily indicate whether the WMO itself is lawful?

28 MISS ROSE: Because, Sir, one of the questions is whether Sky's conduct indicates that Sky was
29 acting so as to restrict competition in the retail market.

30 THE PRESIDENT: What, you mean its conduct in relation to working out the WMO ----

31 MISS ROSE: Yes.

32 THE PRESIDENT: -- would be taken to be symptomatic ----

33 MISS ROSE: Corroborative.

34 THE PRESIDENT: -- of what it would have done absent the WMO?

1 MISS ROSE: Sir, simply that it corroborates the conclusions that Ofcom reached as to Sky's
2 incentives and Sky's conduct.

3 THE PRESIDENT: I am still struggling to see how if the same Panel were dealing with it, why it
4 would be ----

5 MISS ROSE: Because you would be pre-empting the very decision that is up for decision in the
6 appeal. It does become very problematic if you do not decide the two cases together in my
7 submission. You may find it easiest if you look at what Top Up have said in their skeleton
8 argument on this topic; obviously our skeleton argument is not in yet, but you can see what
9 they say.

10 THE PRESIDENT: I think I did glance at that. I think what they said was they would like to rely
11 upon some of the evidence.

12 MISS ROSE: But they explain why it is relevant in their skeleton argument. I do not know
13 whether there is any possibility of accommodating it in that way before a decision were
14 taken on this appeal, that is a matter for you, Sir. We do appreciate the logistical problem; I
15 do not want to understate that.

16 THE PRESIDENT: Yes. Anyone else? Mr. Plewman, yes?

17 MR. PLEWMAN: Can I add a slightly smaller point - smaller or bigger depending which way
18 you look at it? In the set top box appeal all of the parties have said they rely on all of the
19 evidence in this appeal. That presumably will also affect then cross-examination. It means
20 one then has a stark choice: either, come the set top box appeal at some other time, you have
21 to recall the same witnesses insofar as the parties so desire for fresh cross-examination in
22 support of the set top box appeal, or you deal with it all as the evidence is called in this case,
23 which is what we suggest you ought to do, which would leave the problem only as one of
24 when one makes submissions on the set top box appeal, and we understand the difficulty in
25 that regard, but we live with whatever the Tribunal can accommodate.

26 THE PRESIDENT: Supposing we had submissions in October on these two appeals?

27 MISS ROSE: Sir, that would be acceptable provided there was not, in the meantime, a judgment
28 on these appeals.

29 THE PRESIDENT: What you want is judgment ----

30 MISS ROSE: One judgment, that all the appeals should be heard by the same composition and
31 then it may not be one judgment, but judgments given at the same time.

32 THE PRESIDENT: Thank you, Mr. Plewman.

33 MR. ROTHSCHILD: Virgin Media support Ofcom in this regard.

34 (The Tribunal confer)

1 MR. FLYNN: Perhaps I should just point out I think there is already an agreement that, for
2 example, we do not need to put in reply evidence in the STBs appeal because the evidence
3 in this case will be taken as relevant to it. It is, of course, open to people to put questions to
4 Mr. Darcey when he is here. I entirely take the point and I think we would like that too, if
5 they come on later that it should be the same panel and speaking for myself, and no doubt
6 for Ofcom's counsel, it would be of course quite good if it could be fresh in all our minds
7 when we get to that, but it is probably going to stay with us for a while, is it not? So a
8 hearing later in the autumn, if it comes to that, is not actually going to prejudice anyone.

9 THE PRESIDENT: Because there would not need to be any evidence. The evidence would have
10 been done, all that would be left would be ----

11 MR. FLYNN: The evidence would have been done. Nobody in the STBs has indicated any need
12 to cross-examine Sky's evidence specifically submitted with that appeal, so I think that is
13 right ----

14 THE PRESIDENT: They could still theoretically on that basis be heard together. They could be
15 being heard together but the timetabling ----

16 MR. FLYNN: The timetabling different. As we have already said, it is not an objection in
17 principle to hearing them together; we see the logic, so it could be a later hearing within the
18 same appeal.

19 THE PRESIDENT: One aspect of this, maybe the subtext is just hear what is humanly possible.
20 We are only human, as it were, and we have quite a lot to decide in these four appeals and
21 look at at one time, and think about. The same applies to you as the advocates and the
22 solicitors, you have to deal with the submissions on these, although I know they are all
23 related. It is doing things in bite-size bits really. It sounds as though you are not
24 necessarily disagreeing with Miss Rose ----

25 MR. FLYNN: I think Miss Rose, to be fair to everyone, has moved quite a bit. The possibility
26 that it might be heard later is of course not what she was coming in here today before to say,
27 so I am encouraged by that and, as I say, we can quite see that it may need to be either
28 technically part of the same appeal or it is done while everything is fresh in one's mind. So
29 we are not suggesting a long delay.

30 THE PRESIDENT: It might be the length of, say, the long vacation.

31 MR. FLYNN: That I do not think would cause any problem.

32 THE PRESIDENT: You are not going to get a judgment overnight on this one quite frankly.

33 (Laughter)

34 MR. FLYNN: That will not surprise anyone.

1 THE PRESIDENT: So it would not make much difference.

2 MR. FLYNN: I think that is right, and perhaps I can just make the point that both these decisions
3 went against Sky, there has been no application for interim relief, so it is hard to see what
4 the market prejudices are.

5 MISS DAVIES: Sir, may I raise just one point? We do not have any objection to this proposal at
6 all, in fact, welcome the idea of it coming out of this hearing because of the timing. The
7 only concern we would have is if the renewal of the hearing was delayed unduly and that
8 led to any delay in the judgment ultimately, because you may recall from submissions many
9 months ago my clients have a particular issue in terms of timing, in terms of the next
10 auction round coming up for next year. It is simply to mention that when one looks at this
11 room and the availability of counsel issues that might arise ----

12 THE PRESIDENT: I frankly doubt if it would make any difference to timing - it will make some
13 difference obviously but I doubt it would make a significance difference because of the
14 sheer scale of what is the work that is going to be involved in writing the judgment.

15 MISS DAVIES: Sir, I am absolutely certain if we came back in September/October that would
16 not be an issue. I simply put down a marker that if people are going to start saying their
17 counsel are not available until December or January that could have an impact on the
18 judgment date and that would be a matter of grave concern to my clients.

19 THE PRESIDENT: Everyone is assuming one judgment, of course there might have to be three
20 judgments. The main thing is we do not give the first one until we have had the
21 submissions on the second one, and the third one. It sounds as though that is possibly the
22 way forward.

23 (The Tribunal confer)

24 THE PRESIDENT: Fixing the dates, of course, a lot of you are involved in another case, are you
25 not, which is starting in September and running through to the end of November?

26 MISS DAVIES: Sir, that is what prompted my marker.

27 MISS ROSE: From our perspective, I am involved in that other case but we would not see that as
28 an insuperable barrier to the early listing of this case.

29 THE PRESIDENT: We will probably rise for a minute or two and just have a chat about that
30 aspect of it, so we will park that at the moment. Transcripts - Livenote - you are all agreed
31 apparently that you want to have "Live", whatever this version of Livenote is, and that is
32 right, is it? As you are paying we cannot very well quibble with that. There is some
33 suggestion that there are three laptops for the Tribunal, but we will need four because there
34 will be hopefully one on the front bench as well. So with that proviso, so be it.

1 The other point about that is touching on what was mentioned earlier, it would be important
2 that someone comes along in good time from the technician's point of view and sees the
3 courtroom and sets it up so that we do not get a lot of delays with technological problems
4 arising on day one. I do not know how they work, or how you commission them to do this,
5 but clearly we need to have it all up and running and ready to go without problems on day
6 one. Frankly, I have not used it before so presumably someone will come and teach us how
7 to do it.

8 MISS ROSE: They will provide free training, I am told. One point that may have got slightly
9 lost in the welter was our application for a short extension for our defence on the CAMS
10 appeal to 7th April. I did not understand anybody to be opposing that.

11 THE PRESIDENT: It did not sound as though anyone opposed it, no.

12 MISS DAVIES: Sir, on the CAMS appeal there is also the question of the various applications to
13 intervene in those appeals which again, as I understand it, no objections have been raised to
14 any of the applications, including my own, but we do need the Tribunal to make a formal
15 ruling.

16 MR. FLYNN: On Miss Rose's application for an extension we would not oppose it on the basis
17 that we were not hearing the case on 9th May.

18 THE PRESIDENT: Yes, we are not hearing all the case on 9th May. The discussion was that so
19 far as evidence was relevant we would be hearing the case, or cross-examination and,
20 indeed, the CAM case for that matter. I think the understanding is that all that would take
21 place - if this is the route we go down - all that would take place later in the year would be
22 submissions which would be able to be based on whatever evidence had come forth, but
23 yes. So, no objection then to the application to extend to 7th April in the CAM matter.
24 Interventions: there are no objections - I do not have who has applied to intervene I am
25 afraid, but there are no objections to whoever has applied, so we will bear that in mind and
26 deal with it in the appropriate order.

27 That is all I have on my list. Mr. Rothschild?

28 MR. ROTHSCHILD: Sir, there is one other short matter. You indicated that one of the members
29 of the Tribunal is to some extent familiar with the channels in issue in this case. We have
30 no idea how familiar the other members of the Tribunal are. If the Tribunal members would
31 find it useful we propose it might save some time explaining at the hearing and perhaps
32 minimise misunderstanding if these channels were made available to members of the
33 Tribunal in advance of the hearing, or perhaps a third party could be commissioned to give
34 some sort of demonstration. It is entirely a decision for the Tribunal and obviously detailed

1 arrangements would need to be made relating to the mechanism for it. It has been mooted
2 by those instructing me with the other appellants, I understand there is no strong objection
3 from the parties.

4 THE PRESIDENT: I think Mr. Blair will probably be able to fill us in. I am not sure we have
5 time to watch the TV much at the moment!

6 MR. ROTHSCHILD: My suggestion related to the content as well as some of the more
7 complicated features that are referred to: "red buttons" and the like, but of course the
8 decision is for the Tribunal.

9 THE PRESIDENT: We will bear that offer in mind and if we feel we need to take you up on it
10 then we will let you know, thank you very much for the offer. We will just retire for a
11 moment and see what needs to be done about the other appeals.

12 (Short break)

13 THE PRESIDENT: Subject to any final comments that you have, we think the solution to the set
14 top box and CAMS appeals is that we should add that we hear also the CAMS case; we hear
15 STB and CAMS together with these four appeals, and so far as the evidence is concerned -
16 or any evidence is concerned - but that the submissions in those two appeals would be heard
17 later in the autumn on dates to be fixed with a time estimate of I think you said one to two
18 days. That then can be fixed in due course. It is probably important to have the availability
19 of counsel and everything else for that because of the cross-over with the other appeals
20 going on from September through to the end of November. That I think will serve the
21 purpose will it not?

22 Can I just raise quickly two other thoughts: as far as the transcripts are concerned, the
23 Livenote, it is important for us eventually to put so much of the transcripts on our website as
24 are not confidential, and so could you make sure that that is built into whatever agreement
25 you make with the providers of Livenote.

26 The other thought is that one hopes that you will be able to build sufficient flexibility into
27 the timetable, and I know it is not easy, so that if things happen earlier, or take less time,
28 that we do not simply lose that time gained, that if at all possible there is something else that
29 we can fill it with. I know that is not easy when you have interlocking witnesses and so on,
30 and availabilities, but I think if we could try and bear in mind and have some back up, part
31 of the case that we can deal with so that we can bank whatever gains we make in terms of
32 shorter times.

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We will draft up orders reflecting what has largely been agreed; I suspect we will probably send it through to the parties in draft to make sure that it is right, but it will reflect what we have discussed. So thank you all very much for your help.
