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

Case Nos. 1152/8/2/10(IR)

Royal Courts of Justice  
Strand  
London WC2A 2LL

29 October 2010

Before:  
**THE HONOURABLE MR JUSTICE BARLING**  
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N :

**BRITISH SKY BROADCASTING LIMITED**

Appellant

- supported by -

**THE FOOTBALL ASSOCIATION PREMIER LEAGUE**

Intervener

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

- supported by -

**BRITISH TELECOMMUNICATIONS PLC**  
**TOP UP TV EUROPE LIMITED**  
**VIRGIN MEDIA, INC.**  
**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED**

Interveners

- and -

**DAVID HENRY**  
**REAL DIGITAL EPG SERVICES LIMITED**

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**HEARING**

## **APPEARANCES**

Mr. James Flynn Q.C. and Mr. David Scannell (instructed by Herbert Smith LLP) appeared for the Appellant.

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

Mr David Henry appeared in person and on behalf of Real Digital EPG Services Ltd.

1 THE PRESIDENT: Good morning. Mr. Henry, good morning, you have travelled down safely?  
2 MR. HENRY: Yes.  
3 THE PRESIDENT: Can we just check what people have got. There is a very helpful bundle that  
4 Herbert Smith have prepared, which I confess I have found useful and I am going to work  
5 from, as long as it has got most of the stuff in, which I think it has. It has got all your  
6 submissions in it as far as I can see.  
7 MR. HENRY: There was a submission late yesterday.  
8 THE PRESIDENT: Was that the financial one?  
9 MR. HENRY: Yes.  
10 THE PRESIDENT: I have got that.  
11 MR. HENRY: As promised in that submission, I have been to the bank this morning to get clarity  
12 of the opening balance today and I have got that.  
13 MR. FLYNN: We have not seen this.  
14 THE PRESIDENT: Have you seen yesterday's document?  
15 MR. FLYNN: No.  
16 MR. HENRY: It was certainly faxed.  
17 THE PRESIDENT: I think we can leave it on one side for the moment. Is there a copy? You  
18 have not seen this at all. There is a document called "Financial Standing Evidence – to be  
19 treated as confidential under Rule 53". Presumably for the moment it would be within the  
20 confidentiality ring.  
21 MR. HENRY: Yes, it would. I believe I can help. I have one witness that I would like to call  
22 during the proceedings. It is to do with this one matter of financial standing.  
23 THE PRESIDENT: Let us take it in stages.  
24 MR. FLYNN: Sir, just to say, we have not seen any of that. Sir, there are a couple of  
25 housekeeping points. You are probably coming on to those. Can we clarify the  
26 confidentiality regime for the hearing. It is in open court. Obviously Mr. Henry has  
27 claimed confidentiality over some of the material. What we would suggest is that that  
28 material can be looked at so long as no disclosure is made of it. If Mr. Henry spots me  
29 doing that he can no doubt say.  
30 THE PRESIDENT: We will all have to be vigilant in case we blurt something out.  
31 MR. FLYNN: We will have to be vigilant on that, yes.  
32 THE PRESIDENT: That is probably the best way to go for the time being, Mr. Henry, to just try  
33 and be careful. I think all counsel are in the confidentiality ring?  
34 MR. HENRY: No.

1 THE PRESIDENT: Can people introduce themselves, so that we know who they represent.

2 MR. FLYNN: Shall I do that, Sir?

3 THE PRESIDENT: Yes, please.

4 MR. FLYNN: Mr. Henry is representing himself and Real Digital, as you know. Mr. Holmes is  
5 here for Ofcom. I am here with Mr. Scannell for Sky. Miss Love, who is invisible behind  
6 me, is here for BT. As far as I know, that is all the parties that are represented in court.

7 THE PRESIDENT: Mr. Scannell and Miss Love are not in the confidentiality ring?

8 MR. FLYNN: Mr. Scannell is and Miss Love is not, that is in the special ring for the  
9 confidentiality ring of Mr. Henry. Everyone in this row, as it were, is. Also there are  
10 members of the public and others who are clearly not in that ring.

11 THE PRESIDENT: That is very helpful. Mr. Henry, I have obviously read the submissions.  
12 This case is listed until lunchtime, so we are going to have to be very sensible about not  
13 repeating too much that is in the papers.

14 Would it be helpful if I sum up where I have got to. We got to July and the negotiations  
15 that have been going on. There was not at that stage a non-disclosure agreement. Then  
16 there was a scurry of activity and non-disclosure agreements were exchanged. I think over  
17 the course of the summer that was done satisfactorily between Sky and yourself and Real.

18 MR. HENRY: Yes.

19 THE PRESIDENT: There was question mark over Real's third party conditional access supplier.  
20 Just remind me what the current position is?

21 MR. HENRY: Sir, I finally signed one on 18<sup>th</sup> October.

22 THE PRESIDENT: It seems as though there is a non-disclosure arrangement?

23 MR. FLYNN: That is correct, Sir. There was some toing and froing and some mistake about the  
24 address, but that has now been signed. On the other hand, Mr. Henry has instructed that  
25 third party not to supply any information to Sky.

26 MR. HENRY: I have to raise an objection to that. I have not instructed them not to disclose any  
27 information. I simply, in the email that you are referring to, clearly it gives the third party,  
28 who is not here, an up to date that Sky has broken off negotiations commercially and that  
29 we have submitted in the confidentiality ring. I assured them that I had not leaked this  
30 information elsewhere. They are still free to exchange information with BSKyB. It is their  
31 decision.

32 There was a slight development last night. They phoned me to say, "We hope it all goes  
33 well". They sent over a list of documents that are available in the public domain, including  
34 certificates showing them passing international standards for security. I have handed the

1 original copies to Sky themselves. So this information is available to Sky's counsel. There  
2 is no reason why they could not have said, "We cannot tell you who it is, however they are  
3 available, they are internationally recognised". The issue of confidentiality has now been  
4 resolved. It is the most secure provider of conditional access. It is more secure, we  
5 understand, than B Sky B's own service. They have sent the list. I have handed the list to  
6 Sky for them to look at themselves.

7 THE PRESIDENT: As I understand it, we have only got the interim order, we have got three  
8 other suppliers operating under the interim order.

9 MR. HENRY: Yes.

10 THE PRESIDENT: Your application is designed to, as it were, slot Real into that?

11 MR. HENRY: Correct.

12 THE PRESIDENT: Just remind me, and it may be that Mr. Holmes is the best person to answer  
13 this, as to what happens. We know that as far as BT and the order are concerned they were  
14 deemed to satisfy certain of the NBCs, but not security?

15 MR. HOLMES: Yes, sir, that is correct.

16 THE PRESIDENT: That meant that there still had to be some negotiations about that. Is it  
17 confidential or are we allowed to know where these have got to in relation to those other  
18 providers? Presumably some of it is in the public domain, is it not?

19 MR. FLYNN: Agreements are in place with each of those three providers. I think it would be  
20 fair to say that Mr. Holmes might say that not all of them are satisfied. That is why you  
21 have that further appeal in relation to one aspect of the Top Up TV agreement. The  
22 agreements are in place.

23 THE PRESIDENT: As I understand it, if something as it were goes wrong in the negotiations  
24 which follow from the reference offer in relation to satisfying the criteria, then once it  
25 breaks down then Ofcom resolve it under the dispute resolution, as has happened in relation  
26 to Top Up TV. Then that can be challenged or not by whoever wishes to challenge it.

27 MR. HOLMES: Yes, Sir, that is the case where the negotiations have progressed to a stage where  
28 parties have supplied sufficient information to enable an assessment to be made of their  
29 financial standing and of their security arrangements in order to see whether they are within  
30 the ball park, if you like, whether they are candidates who would be likely to be able to  
31 receive a supply if the decision were fully operational and if there were published minimum  
32 security requirements and minimum qualifying criteria. Then any difficulty that arose at  
33 that stage of the negotiations would be something that Ofcom could consider and address.

1 For our part, we do not consider that the negotiations have reached that stage between Sky  
2 and Real Digital.

3 THE PRESIDENT: Ofcom do not?

4 MR. HOLMES: Yes, Sir.

5 THE PRESIDENT: That is something that is new to me. I do not think I received that in the  
6 form you are now submitting.

7 MR. HOLMES: Sir, I am so sorry. I was intending, perhaps inadequately, to summarise the  
8 content of our letter of 4<sup>th</sup> October, in which ----

9 THE PRESIDENT: That one page letter?

10 MR. HOLMES: Yes, Sir, which is at tab 19.

11 THE PRESIDENT: Do sit down, Mr. Henry. I think this is quite helpful. There you say that  
12 there has been a request for information by Sky, broadly reasonable, you understand that  
13 they have not yet complied with all of it, further information about financial standing is  
14 outstanding, there would have to be some information about that. You do not think you can  
15 usefully comment on the merits. You are worried about any requirement to reach a certain  
16 output, as it were, certain production levels.

17 MR. HOLMES: Sir, our concern was that we could not usefully engage at that stage because  
18 there was not information that had passed between the parties which was grist, if you like,  
19 for our mill. We could not, as was the case for the negotiations between certain of the other  
20 parties, comment on technical issues which had arisen because that stage simply had not  
21 been arrived at.

22 THE PRESIDENT: You have reached that stage now, have you?

23 MR. HOLMES: Sir, I have seen some further material this morning, a one page sheet, which  
24 appears to indicate, I believe, although I have not been able to take instructions on this, that  
25 certain international standards and British standards are met. That is the first I have seen in  
26 relation to the ----

27 THE PRESIDENT: Mr. Holmes, let us suppose that there had not been an interim relief  
28 application and the reference offers had to be made by 14<sup>th</sup> May, people then come along  
29 and say, "Please give us this under your reference offer", and Sky would then start, as it  
30 were, negotiating with them on the minimum qualifying criteria.

31 MR. HOLMES: Yes, Sir.

32 THE PRESIDENT: Then at some point, if those negotiations broke down, you would have to  
33 adjudicate.

1 MR. HOLMES: If the decision had come fully into operation there would have been published  
2 minimum qualifying criteria and minimum security requirements by Sky before any specific  
3 negotiations commenced between individual retailers wishing to obtain supply and Sky.  
4 They would have provided a set of objective criteria against which an assessment could be  
5 made.

6 In this case, as you noted, the minimum qualifying criteria were deemed to be met in the  
7 case of the three retailers that were the subject of the order. There was no publication of  
8 minimum qualifying criteria. In so far as there were outstanding issues in relation to  
9 security or technical matters, they were dealt with by negotiation between Sky and those  
10 parties and a supply agreement was concluded, subject to certain matters which remained in  
11 dispute which were the subject of a dispute determination and which are now before the  
12 Tribunal by way of appeal. That provided the context. In this case we do not have  
13 minimum qualifying criteria published by Sky or minimum security requirements.

14 THE PRESIDENT: You have to take a view. You have to take a view on anything that was not  
15 set out as to whether it was reasonable or not.

16 MR. HOLMES: That is right, the assessment that then needs to be performed is a consideration  
17 of whether the material submitted by a potential retailer shows to a sufficient standard that  
18 they would meet, on any view, the minimum baseline that one would expect for a  
19 commercial arrangement to be concluded. That requires a certain amount of material to be  
20 provided. The potential retailer has, we would submit, to come forward with certain  
21 material. I am happy to go into the correspondence, but that has been, I would submit, the  
22 consistent position that Ofcom has taken in its correspondence with the parties and with the  
23 Tribunal. Our position is as set out in the 4<sup>th</sup> October letter, that there is not material that  
24 we can usefully express a view upon.

25 I am sorry, I am paraphrasing again, Sir. You helpfully, for the record, set out the quotation  
26 from the third paragraph of the letter of 4<sup>th</sup> October, the statement:

27 "In these circumstances, we do not consider Ofcom can usefully comment on the  
28 merits of the respective positions of the parties."

29 That, Sir, remains our position. Since that letter was written on 4<sup>th</sup> October some further  
30 material has been provided. To update the Tribunal, we still have not seen material that  
31 would enable us usefully to express a view.

32 THE PRESIDENT: My concern is this: the system that you have set up basically requires you to  
33 be the adjudicator ultimately as to whether Sky is complying. There can be appeals

1 obviously and those appeals will go to the Tribunal in the ordinary way, you having reached  
2 a decision one way or the other either for or against Sky, in this case.

3 The situation we are in at the moment is that information has been exchanged in a linear  
4 fashion but not within the framework, I do not think. Therefore, the order not applying and  
5 Mr. Henry's company not benefiting from the order, as things stand, it is really being  
6 exchanged in a bit of a vacuum, is it not?

7 MR. HOLMES: Sir, the decision was of course partly suspended. It was suspended except and in  
8 so far as the order applies. Broadly, except within the terms of the order where the decision  
9 continues to apply, any party not within that order who wishes to come within the terms of  
10 the order and wishes the suspension effected by that order to be lifted should appropriately,  
11 we submit, come to the Tribunal. This is the right legal procedure that is being followed.

12 THE PRESIDENT: I entirely accept that that is right, but until someone comes within the order, I  
13 suppose what you are saying is that you are not really in a position to do anything.

14 MR. HOLMES: No, sir, subject to instructions, and I will be corrected if I misstate the position,  
15 Ofcom would, of course, see its role as facilitating discussions, assisting discussions,  
16 participating in helping to resolve problems which arise of a technical nature on which we  
17 can usefully make a contribution. Certainly, in so far as by that mechanism consent could  
18 be achieved to change the terms of the order without needing to trouble the Tribunal more  
19 than was necessary, or a solution could be found whereby the Tribunal could consider the  
20 matter on the papers, in relation to all of that Ofcom would certainly see itself as having a  
21 role to play.

22 There must be, we would submit, a trigger for that role. In other words, for a potential  
23 retailer to come forward and to launch a process of discussion that might lead to agreement  
24 by consent to amend the order, it would be necessary for that retailer to come forward with  
25 material to show that on any view they meet certain minimal standards as regards financial  
26 standing and as regards security, both of which are interests which Ofcom recognised in the  
27 decision document as legitimate, and which would therefore have played a role in  
28 determining whether a retailer was able to obtain supply under the Wholesale Must-Offer  
29 obligation, had it not been suspended.

30 THE PRESIDENT: Where do I find that set out? Someone in a position like Mr. Henry has got  
31 no legal reach, has he? He is not in the order. I do not see anything in the correspondence  
32 from Ofcom that really sets that out in any detail, or says what he needs to provide in your  
33 eyes to get into this first category of being worthy of being considered to be in an amended  
34 order. It is sort of shadow boxing, is it not?



1 MR. HOLMES: Sir, you will have seen in the correspondence what our initial suggestion was,  
2 and perhaps it might assist if I were to take you to the letter if that is convenient. It is tab 6.  
3 In a letter to Sky's solicitors of 25<sup>th</sup> May 2010, copied to the Tribunal's Référéndaire and to  
4 Mr. Henry of Real Digital, Ofcom explained that it would be happy to assist in finding a  
5 resolution which did not require an oral hearing:

6 "As the central purpose of application is the potential wholesale supply of the  
7 [premium content] we suggest that in the first instance Sky should contact  
8 Mr. Henry, for example to outline in broad terms the criteria that a retailer would  
9 be expected to meet in order to secure supply."

10 Sir, Sky's response to that suggestion ----

11 MR. HENRY: Can I just interject here, clearly not only did we receive that letter obviously, I  
12 then received no communication from BSkyB. That is already in my submissions.

13 THE PRESIDENT: Yes, it is.

14 MR. HENRY: I think I replied to Ofcom as well saying that it was not potential supply that we  
15 were in, it was the actual supply and that we would welcome ----

16 THE PRESIDENT: I do not think there is any great significance in the use of the word  
17 "potential". I think they just meant they were not supplying you at the moment.

18 MR. HENRY: I welcomed Ofcom's letter because it appeared to hold out hope that they were  
19 going to guide us through this shark-infested process. Nothing happened. Ofcom failed to  
20 respond to any of the communications that we had included them in, including to Sky, so  
21 we have been left effectively blindfolded trying to fire a dart at a moving target that Sky  
22 knows what the control criteria is and satisfies it, and perhaps Ofcom does as well, but  
23 certainly nobody outside that group of three knows what the minimum qualifying criteria  
24 means. I have used, I think, a common sense approach which is that we knew who our  
25 conditional access provider was, we know they are extremely secure, how do we get that  
26 information out without allowing the potential pitfalls of piracy and hacking to take off, and  
27 that was our number one concern, and I am covered by an NDA with them as well so I have  
28 to be careful what I explain to you.

29 We went down this process and we have received no support or help our guidance from  
30 Ofcom, and certainly nothing that was helpful from Sky. Here we are, hoping that the  
31 Tribunal will make that decision if the correct information is presented.

32 THE PRESIDENT: Shall we just let Mr. Holmes take us through it. We have not had a  
33 submission from Ofcom, so it is helpful to know what their position is.

1 MR. HOLMES: Sir, Sky, in its response to that letter, its submissions in response of 10<sup>th</sup> June  
2 2010 ----

3 THE PRESIDENT: What do you say about Mr. Henry's comments that you did not answer his  
4 calls, you did not really provide him with any help?

5 MR. HOLMES: Sir, with respect, we disagree with that description. Discussion passed between  
6 the parties. In correspondence, we made clear – correspondence that was seen by  
7 Mr. Henry of 23<sup>rd</sup> July – the material that we considered in general terms would be needed  
8 by Sky in order to assess the security and other technical arrangements.

9 THE PRESIDENT: That is your letter of 23<sup>rd</sup>?

10 MR. HOLMES: Yes, Sir, and in that letter we explained that as a prior step to any substantive  
11 consideration of a variation of the order it would be necessary for there to be an initial  
12 provision of information by any applicants to Sky identifying the scope and nature of the  
13 potential supply arrangement. We expressed the view that it is entirely legitimate for Sky to  
14 seek to satisfy itself over security and other technical arrangements. Sky supplied a set of  
15 questions to Mr. Henry in order to assist him in providing information to Sky.

16 MR. HENRY: Can I correct you there. I asked for questions. We asked if they had a list of  
17 questions that Sky could submit that would help us through this process, rather than just  
18 sending in a filing cabinet of material, and that is what led to the exchange and Sky  
19 eventually sending two documents to us.

20 MR. HOLMES: There were questions provided, and you will have seen from the subsequent  
21 correspondence that our view as of 4<sup>th</sup> October was that the replies received from Mr. Henry  
22 and from Real Digital did not go any way really to addressing those questions in providing  
23 some indication that the ----

24 THE PRESIDENT: You did not really say that, you know. You say, "We understand that  
25 Real Digital has not yet provided all the information requested". That rather sounds as  
26 though you are just repeating what you have been told by Sky. I do not see any analysis in  
27 this. You say, "We note that certain information about the financial standing appears to  
28 remain outstanding".

29 MR. HOLMES: Sir, with respect, in the second paragraph of the letter of 4<sup>th</sup> October we make  
30 clear that we have seen copies of certain correspondence exchanged between 30<sup>th</sup> July and  
31 26<sup>th</sup> September, "and in the correspondence Sky has requested information from  
32 Real Digital, which appears broadly reasonable" – in other words, we have seen nothing  
33 here which suggests that Sky is not engaging reasonably with Real Digital's requests. In the  
34 correspondence that we had seen Sky was not making onerous demands of Real Digital. It

1 was putting Real Digital to the kind of the proof that one would expect really in order to be  
2 satisfied that ----

3 THE PRESIDENT: What have they not supplied in your view? Give me an example of the type  
4 of information that has not been supplied?

5 MR. HOLMES: Sir, as of yesterday, and I will be corrected if I am wrong, I do not believe that  
6 there was any concrete information as to the financial standing of Real Digital. There was  
7 an indication that Real Digital rejected certain comments which had been made about  
8 previous business ventures in which Mr. Henry had been involved, in which there were, as  
9 Sky alleges, arrears of payment that not yet been covered. He dealt with, if you like, some  
10 of the points made, but he had not come forward with any indication about whether they  
11 had, even in general terms ----

12 THE PRESIDENT: Just pause a minute. Mr. Henry, you will have plenty of opportunity to have  
13 your say.

14 MR. HOLMES: -- the financial backing and support that would enable them to launch a service  
15 and to pay for the channels which they received supply of from Sky.

16 It is very clear from the statement, which of course is a public document, and which  
17 Mr. Henry has shown he is familiar with, that in Ofcom's view this remedy needs to be a  
18 flexible remedy in which considerations like financial standing are taken into account.  
19 Ofcom's consistent position has been that this is not a remedy that would allow anyone to  
20 come along and obtain supply.

21 THE PRESIDENT: It is intended that they should be able to come along and request it, there  
22 should then be some negotiations, and if they break down you would be the adjudicator.

23 MR. HOLMES: Sir, the decision, as my learned friend helpfully points out, is suspended. The  
24 mechanisms under the decision do not function in the way that they were intended to  
25 function.

26 THE PRESIDENT: There is an issue as to the way they should function in relation to Mr. Henry  
27 and Real.

28 MR. HOLMES: There is no possibility of making reference to minimum qualifying criteria or  
29 minimum security requirements *in concreto*, because they have not been published. The  
30 mechanism, Sir, as you will recall, under Ofcom's decision ----

31 THE PRESIDENT: The security ones were not published. The MQC in relation to security were  
32 not published. They had to be dealt with, as it were, as between yourself and others.

33 MR. HOLMES: Yes, Sir, and there was a great volume of material supplied, and the parameters  
34 of discussion between the parties about security were clearly defined. There was concrete

1 material in relation to which Ofcom could express a view when a dispute was taken to it for  
2 determination under the order. These were people for whom the decision was operative,  
3 albeit in adjusted form.

4 Mr. Henry is outwith the order, but he needs of course, and Real Digital needs to be treated  
5 with appropriate respect, and they need to be given an opportunity to make a case to be  
6 brought within the order in order to ensure that the order does not in any way impede access  
7 inappropriately. That does require information regarding things like financial standing and  
8 technical requirements of a kind that Sky has consistently requested. With respect to  
9 Mr. Henry and Real Digital, the responses that we have seen do not appear to address those  
10 questions, do not appear to provide any clarification regarding the legitimate security  
11 concerns which Sky is entitled to raise about the security of content that is broadcast, or the  
12 legitimate financial concerns which Sky is entitled to raise about a potential counterparty to  
13 a contract under which payments will fall due to Sky.

14 THE PRESIDENT: On that last point, do take into account of the yesterday information or have  
15 you not seen it?

16 MR. HOLMES: Sir, yesterday's information we would submit still does not provide an adequate  
17 indication of financial standing for the purposes of today's application.

18 THE PRESIDENT: Mr. Henry, let me finish this line of discussion with Mr. Holmes.

19 What you are saying, Mr. Holmes, if I can summarise it, and tell me if I have got this  
20 wrong, is that if Mr. Henry and Real's application were brought within the scope of the  
21 order, the information they have provided up to now would mean that it would be virtually  
22 certain that if Sky's refused to supply them Ofcom would say they were entitled to do that  
23 and therefore I should not grant the interim relief because it, as it were, it would not help?

24 MR. HOLMES: Yes, sir. This has already been a significant burden on Sky's resources, as it  
25 appears to be, with legitimate attempts by Sky to obtain information regarding Mr. Henry's  
26 proposition. There have been repeated requests, and there have been many opportunities for  
27 Real Digital and Mr. Henry to provide information of a basic level in order to satisfy ----

28 THE PRESIDENT: You at Ofcom have taken the view – I think this is what you told me but I  
29 just want to be absolutely sure about this – Ofcom have seen the information, all the  
30 information provided by Real to Sky, and have taken the view that it is insufficient to give  
31 Sky the security and assurance to which they are entitled?

32 MR. HOLMES: Sir, the information was, of course, supplied after Ofcom's 4<sup>th</sup> October letter. I  
33 entirely appreciate that it is, therefore, helpful to you to have our position fully confirmed  
34 up to the present. I will just take instructions to make absolutely sure that you have

1 correctly stated the position. (After a pause) Sir, we have seen no response from Sky to the  
2 latest material. My instructing solicitor is, therefore, understandably cautious ----

3 THE PRESIDENT: What do you mean by “the latest material”?

4 MR. HOLMES: Sir, there was a one page sheet which was supplied at the door of the court today  
5 containing information about certain standards which were met, as I understand the  
6 position, by ----

7 THE PRESIDENT: Leave that on one side for the moment, but that apart?

8 MR. HOLMES: Sir, we do not think that the information that has so far been provided in relation  
9 to financial standing or, subject to that, the latest submission on conditional access provides  
10 a sufficient basis for Mr. Henry to be admitted to the order. It appears on the basis of what  
11 we have seen so far that he has had a long period in which to make clear what is being  
12 proposed. We do not think the material that has so far been provided would provide any  
13 likely basis on which a supply would be obtained.

14 THE PRESIDENT: This is the first time I have heard this, and it is probably the first time  
15 Mr. Henry has heard it, which is one of the problems. We did try to encourage Ofcom to be  
16 a little bit more helpful in relation to submissions. You declined to put in anything by way  
17 of submissions apart from those letters, which do not take the matter much further. Now we  
18 are all in this position where we are hearing this for the first time. It might be relevant.

19 MR. HOLMES: Sir, the letters are, of course, short and to the point. They do, I would submit,  
20 convey the position that I have put to you today.

21 THE PRESIDENT: No, they do not. What you are putting to me today is that if you had to do a  
22 dispute resolution on whether Sky are entitled to reject an agreement, given the information  
23 they have received up to now, you would decide in Sky’s favour, and therefore I should not  
24 grant interim relief because you say it would serve no purpose.

25 MR. HOLMES: Sir, by the time we reach the letter of 4<sup>th</sup> October 2010 in this bundle we already  
26 have the bundle, which is not the complete correspondence bundle, which fills two-thirds of  
27 a lever arch file. As at the date of 4<sup>th</sup> October there had been no real material supplied  
28 either in relation to the conditional access system or the financial standing arrangements,  
29 both matters on which repeated requests have been made by Sky and matters in relation to  
30 which Ofcom had made it plain that it regarded the requests for information ----

31 THE PRESIDENT: As reasonable, yes.

32 MR. HOLMES: As reasonable, yes. There was, as at 4<sup>th</sup> October 2010, no material really at all to  
33 consider. Since that time it is true that in a very recent period some material has been  
34 brought forward, after, I would say, the submissions of 18<sup>th</sup> and 19<sup>th</sup> October supplied by

1 Mr. Henry. I can now update the Tribunal on the basis of that material that we have seen  
2 nothing in that material which suggests to us that Real Digital would have a credible  
3 proposition to put forward to obtain supply in the event that the decision had not been  
4 suspended.

5 MR. HENRY: Can I just take issue with a number of things that Ofcom has just said?

6 THE PRESIDENT: Yes.

7 MR. HENRY: There has indeed been substantial correspondence, otherwise we have filled nearly  
8 a lever arch file, most of it before 4<sup>th</sup> October. Sky's internal lawyer, who I believe is here  
9 just now, spent some time toing and froing as to whether they were going to sign a NDA in  
10 the correct form or not. This was submitted to Ofcom, so they were fully aware that I was  
11 doing my best to get this pushed through because the conditional access provider is in  
12 another country. They are not the fastest at responding to requests for legal documents. I  
13 have gone through it myself. It took three months for my original NDA to be put in place.  
14 Sky decided it wanted to change some of the wording from the third parties' NDA without  
15 any real reason as far as I could tell. That delayed the whole process by many weeks.  
16 We have done everything we possibly could to rush through so that the conditional access  
17 provider could exchange the information with Sky. Sky, through their own errors, took  
18 until 18<sup>th</sup> October to deal with that, well after 4<sup>th</sup> October. This is not a delay caused by  
19 Real Digital or myself, it was a delay caused by BSkyB themselves.

20 I believe it highlights that BSkyB has no intention, unless the Tribunal orders it to, to supply  
21 these channels to any other provider.

22 This is the first I have certainly heard that Ofcom is not sitting on the fence and that there  
23 somehow is a decision somewhere that they know what minimum qualifying criteria means,  
24 because they certainly have not expressed to me and it is not in the public domain, which  
25 means as you, yourself, said, "shadow boxing". We have no idea what we are required to  
26 provide because they have not told us.

27 We have indeed provided through the confidentiality ring the full technical answers that  
28 were given us from the conditional access provider and our corporate diagrams and  
29 specifications for the boxes. There can be no question whatsoever that we would not pass  
30 the security tests.

31 We have now managed a way of finding publicly listed documents and certificates for  
32 international standards, which have been handed to Sky's lawyers this morning – because  
33 they are in the public domain, so it does not affect a non-disclosure agreement.

1 Herbert Smith, with their ten lawyers that they insisted on having inside the confidentiality  
2 ring, must have been able to find those just as easily as they were given to me. They are on  
3 the international web, they are easily downloadable.

4 We have now passed this point and we have passed the security test. The provider that we  
5 have is more secure than Sky themselves. We are not looking to do some half baked  
6 operation where we could get a lot of customers in a short period of time for very little  
7 money spent on investing in technology only to find that our system was hacked within  
8 months and effectively everybody was watching for free when would end with our  
9 commercial operation ending.

10 THE PRESIDENT: I have to say, I am a little sceptical about that, Mr. Henry. How would it be  
11 in Sky's interests to encourage or to turn blind eye to hacking of that sort? They are as keen  
12 on encryption security as ----

13 MR. HENRY: They are indeed. The way Sky originally started, some of the issues – I do not  
14 want to take up the court's time reiterating it all.

15 THE PRESIDENT: I do not think we should get into that.

16 MR. HENRY: No, they are legitimate concerns for any pay TV operator. Clearly, we totally  
17 accept that ----

18 THE PRESIDENT: It sounds as though you should all be singing from the same hymn sheet as  
19 regards security.

20 MR. HENRY: Absolutely, on that particular point we do. It is very important to have a secure  
21 system and boxes that cannot card share. We are aware of other platforms in the UK that  
22 are inside the order whose technology is not as secure as the one that we have contracted  
23 for. I do not want to name names, but these are well known facts, that you can buy a blank  
24 type box and plug it into a cable that comes into your home and watch everything for free.  
25 They do do electronic measures and they try and stop it from time to time. As fast as they  
26 stop that somebody else is trying to find a way round it. So clearly that is the game that pay  
27 TV has to take into account.

28 Ofcom has produced nothing, either today in its submission or in its documents, that says  
29 that we have not passed the security test. Their letter actually says ----

30 THE PRESIDENT: They have said it now.

31 MR. HENRY: They have said it now, but this is news to us.

32 THE PRESIDENT: We do not know on what grounds or what criteria they are operating on, but  
33 they have said it. What they have said is, "If we had to decide today on a dispute resolution  
34 we would say that Sky was entitled to refuse you".

1 MR. HENRY: However, I did speak to them before you came in, Sir, and the only thing I was  
2 told was that it was the financial standing question that was outstanding.

3 MR. HOLMES: Sir, with respect, I disagree with that description of the conversation which I had  
4 with Mr. Henry.

5 THE PRESIDENT: It is not going to affect me one way or the other.

6 MR. HOLMES: I appreciate that, Sir. Just to be clear, our position is that no information has  
7 been provided that would enable us to perform an assessment, and that is the situation that  
8 we have stated in the 4<sup>th</sup> October letter. We cannot usefully perform an assessment in the  
9 absence of information.

10 It is not as though we are saying that information has been provided, we have looked at that  
11 information and the information does not meet a security standard. The fact is that there has  
12 not been information about the security standard in relation to which Ofcom could perform  
13 an assessment.

14 THE PRESIDENT: It could, because you say it is just inadequate.

15 MR. HOLMES: Sir, even to assess the adequacy of information assumes that there is information  
16 there, the adequacy of which could be assessed. Mr. Henry will no doubt take us to the  
17 information which Ofcom should have performed this assessment in relation to, and we can  
18 then consider that.

19 THE PRESIDENT: I am trying to steer clear, if I can, of looking at too much. I think, in fairness,  
20 Mr. Holmes, you have made your position very clear, that you have seen nothing – I repeat  
21 what I said, what you are saying in effect is that if you had to resolve a dispute, at the  
22 moment, on what you have seen, you would have to resolve it in Sky’s favour?

23 MR. HOLMES: Yes, Sir.

24 THE PRESIDENT: That is your position. I am not in a position to second-guess the position,  
25 because I have no technical ability as regards the security arrangements.

26 MR. HOLMES: You can at least see whether there is material on the file which could be the  
27 subject of an assessment.

28 MR. FLYNN: I was merely going to say on that point, Sir, you do not have the technical ability,  
29 Mr. Holmes does not have and neither do I, Mr. Scannell or Herbert Smith. Of course, the  
30 rest of any information that has been provided recently, Mr. Henry has required not to be  
31 provided to Sky because he is worried about hacking.

32 THE PRESIDENT: Mr. Holmes is in a slightly different position, I think, is he not?

33 MR. FLYNN: He can see what ----



1 THE PRESIDENT: He can take the information back and show it to somebody who understands  
2 it.

3 MR. FLYNN: Sky is in no position to assess what has been provided. Of course, we entirely  
4 agree with what Mr. Holmes said, that basically nothing has been provided and nothing has  
5 been provided on the financial matters either.

6 THE PRESIDENT: Then the next thing, I refuse the application and next Mr. Henry will supply a  
7 whole new tranche of information and then on the basis of that they will make another  
8 application to the Tribunal.

9 MR. FLYNN: Yes, it is perhaps hard to know how that ----

10 THE PRESIDENT: And then Ofcom is not, as it were, seized of it because it is not within the  
11 WMO anyway. Does it not have to be brought to a head somehow?

12 MR. FLYNN: Our contention before you today, of course, is that it be brought to a head by  
13 dismissing this application.

14 THE PRESIDENT: It can all be renewed, can it not, on the basis of further information?

15 MR. FLYNN: Let me continue, Sir, if I may. Sky has been engaging in good faith in a process of  
16 trying to understand whether there was a possibility of doing a deal with Mr. Henry which  
17 would have avoided the need for the application. We are not in the business of laying out  
18 minimum qualifying criteria when the order has been suspended. We have tried to engage  
19 with Mr. Henry on a commercial basis, and if that had led to something for supply that  
20 might have been the end of it. He has played ducks and drakes with us. He is not prepared  
21 to disclose because he does not trust us. We can go through the documents, except we  
22 probably have not got time. Sky has very little go on.

23 Our bottom line, if you like, submission as to how these proceedings should be dealt with is  
24 that the application should be dismissed and that if it is to be renewed it cannot be renewed  
25 in this form. What must happen then is that Mr. Henry should compile whatever  
26 information he considers necessary and put it before Ofcom. If Ofcom consider at that  
27 point that the order should be varied in the public interest then they can make the  
28 application. That would be our submission as to an appropriate process. Sky has basically  
29 done what it can and we would suggest that it should not be under any obligation to do  
30 anything further without a dramatic change of attitude by Mr. Henry and Real Digital.

31 THE PRESIDENT: Basically, you will have to, in practice. Let us suppose for the sake of  
32 argument that the order was varied but without the deeming provision. On the information  
33 you have at the moment your decision would be pretty obvious, would it not?

1 MR. FLYNN: Sir, we think that is effectively where we have got to today and that we need to  
2 find another way. As you said a moment ago, there is probably not much point in varying  
3 the order if it is not going to lead supply.

4 THE PRESIDENT: I was actually trying to paraphrase what I was thinking Mr. Holmes was  
5 submitting.

6 MR. FLYNN: If Mr. Holmes was submitting that, we would like you to think it, if I may put it  
7 that way!

8 MR. HOLMES: Sir, just to respond on the specific point of case management which you have  
9 just raised. In our submission, this application has now been pending for a long period.

10 THE PRESIDENT: Yes, it has.

11 MR. HOLMES: Parties have had ample opportunity to supply the information on the basis of  
12 which this application falls to be determined.

13 It is of course the case that fresh information may be provided at some subsequent stage and  
14 that might form the basis for a renewed application under the liberty to apply. In so far  
15 as new information is provided, we would not seek to keep anyone out of making a proper  
16 application. We would, for our part, be content for such an application to be stayed while  
17 we considered the additional information and gave fuller submissions to you in relation to  
18 our position on that application, given the comments that we have heard from you today.  
19 That would be one way of dealing with the problem that might arise of repeated  
20 applications in the future.

21 If an application were brought forward containing no new information, or no apparent  
22 addition to what had already been decided upon, it would, in our submission, be an abuse of  
23 process and the Tribunal would not be required to consider such an application. It would  
24 only be if there were anything additional or novel that distinguished a further application,  
25 and a way of dealing with that would be to stay the application or else to set a long  
26 timetable for it while the information is considered and it could then be dealt with rapidly  
27 on the basis of the points of view that are put to the Tribunal by the parties, and the  
28 assessments provided by the parties.

29 THE PRESIDENT: Before I ask Mr. Henry to respond to some of these points, can I just throw  
30 out another question to Mr. Holmes and Mr. Flynn. The grounds for an application of this  
31 kind, there are various discussions in the submissions about what the grounds should be. It  
32 seems to me provisionally that we are in a different situation that we obviously were in  
33 April. We have now got an order, the world has changed. The order has not been  
34 suspended in its entirety. There are three or four parties who are beneficiaries of an

1 exemption, as it were, from the general suspension. That was done with the consent of both  
2 your clients and Mr. Flynn's clients. Are we not therefore, and I ask this rhetorically, in a  
3 situation where someone is entitled now – it does not have to get over any particular hurdle  
4 – to say, “I am interested in a reference offer too, please therefore extend it through to me”.  
5 In other words, dealing with damage and irreparable loss, and all the rest of it, has really  
6 gone by the board now because we are in an entirely different situation?

7 MR. HOLMES: Sir, there is a submission before you on that from Sky, so I should perhaps ----

8 THE PRESIDENT: There is. Perhaps this is for Mr. Flynn. You do not have to respond  
9 immediately, Mr. Flynn, unless you want to.

10 MR. FLYNN: You have seen the nature of our submission, and we do say, and we are perhaps  
11 beyond that, that there is no particularly good reason why Real's points could not have been  
12 put to you back in April. There is no good reason for that whatsoever, that could have been  
13 arranged.

14 THE PRESIDENT: That is the sort of delay that ----

15 MR. FLYNN: That is right, we would not be here if the interest had been manifest at the time in  
16 April. The whole point of suspending the WMO, as you will remember from the days of  
17 submission in front of you, is that it is precisely the all-comers point that Sky particularly  
18 objected to. The three parties who are included in the benefit of the order are obviously in a  
19 different position from other people. We are certainly not in a world, in our submission,  
20 where it is all right for someone to come along and say, “I would like to take the benefit of  
21 it”. It has now been suspended by consent and we would have to re-raise all the arguments  
22 that it was not necessary for you to determine because we were able to settle it by consent.

23 THE PRESIDENT: Is that an *in terrorem* point, Mr. Flynn?

24 MR. FLYNN: I am not making an *in terrorem* point.

25 THE PRESIDENT: I cannot see for my part at the moment how they would be damaged. If the  
26 damage was going to be done by allowing BT, Top Up TV and Virgin to start into this  
27 market and the risks associated with closing them down, I would have thought that  
28 Mr. Henry would pale into insignificance in terms of damage and loss.

29 MR. FLYNN: It is in effect to tear up the order, Sir. It is in effect to say that anyone can come  
30 along and say they would like the benefit of the offer, it is not suspended. We have an  
31 arrangement at the moment where existing pay TV retailers are covered by the benefit of  
32 the order. For a new operation to come along, and there could be many, many others. It is  
33 *in terrorem* of Sky really. It is really to tear up the order to take that approach. The balance  
34 has been struck and, in our submission, you do need to be persuaded that there is some

1 particularly good reason for that order to be varied, if it is not going to be done by consent.  
2 Plainly, on the basis of current information as regards Mr. Henry, Sky's consent to varying  
3 the order would not be forthcoming. You would have to be persuaded – and we submit that  
4 there is nothing before you that could do that – that the order requires to be varied.

5 THE PRESIDENT: Sky's original consent to the order, it seems to me, would be you just change  
6 the framework of the order. Please address me on anything else at some stage in relation to  
7 that.

8 MR. FLYNN: Yes.

9 THE PRESIDENT: Mr. Holmes, I do not know whether you want to say anything about that?

10 MR. HOLMES: I have nothing to add.

11 THE PRESIDENT: Mr. Henry, there we are, over to you again. I think you have understood the  
12 points that are being made by both Mr. Holmes and Mr. Flynn, which is really saying that it  
13 is pointless to vary the order because the result would be inevitable on the basis of the  
14 information that has been provided up to now.

15 MR. HENRY: I do not understand how Ofcom can have that stance, because they have not done,  
16 and they have had material exchanged throughout the process and have failed to engage or  
17 reply except for two letters that you have seen, Sir. That is all the communication that I  
18 have had as well. If this was a process that they were effectively "helping", as they  
19 originally indicated they were prepared to do, to prevent us having to come to London,  
20 where has been their help? There has been no information from Ofcom. We could well  
21 have fast forwarded our position, perhaps being able to pressurise Sky to push through an  
22 NDA to a third party or, as I originally requested, that become the intermediate, we  
23 exchange information and they decide, through their technical know how, whether or not  
24 we had got a secure system and they could pass that information on to Sky. They chose not  
25 to get involved. It appears that is what they are now claiming that they would do, but in  
26 reverse. We pass it all to them, then they go away and check it and they determine whether  
27 we have passed the bar at whatever level that bar is, or we have not.

28 THE PRESIDENT: I think, to be fair, what is envisaged by the general structure of the regulatory  
29 regime here, and into which this pay TV fits, is that if there is a dispute in the commercial  
30 negotiations at that stage they can resolve that dispute and then there is an appeal process.  
31 It is not, as it were, if you take the original, they do not deal with the other commercial  
32 counterparty.

33 MR. HENRY: Ideally, you would have an open door on the other side that was engaged in real  
34 negotiations.

1 THE PRESIDENT: For the purpose of the non-disclosure arrangements it is so that you can  
2 exchange confidential information.

3 MR. HENRY: My understanding from Sky – we received a letter on 27<sup>th</sup> September, which is in  
4 the submissions, basically ending commercial negotiations. We had very little indication  
5 from, I think, Mr. Winterbottom at Sky. Several weeks went past, there was no  
6 information. He sent some information. Immediately I sent a list of the basic  
7 specifications. Anybody technical would know what those specifications mean. We had  
8 nothing back from that except that they expected a much more elaborate document. Again,  
9 it is sort of stabbing in the dark.

10 The point that has just been raised by Sky’s counsel about this would be opening the  
11 floodgates or letting anybody get in, this is simply not a credible point to make. It is not  
12 open to anybody, as is quite clearly the case, and the technology that you need to ensure you  
13 pass security, there are only about three suppliers whose security systems are relevant, and  
14 we have a contract with one of them. So anybody else that could come along, who perhaps  
15 is not a proper undertaking, who thought, “Wouldn’t this be fun”, is going to have to do an  
16 awful lot of work to get past this first hurdle.

17 I believe we have done that and if Sky had signed the NDA prior to 14<sup>th</sup> October, they  
18 would have had that confidential document that had been sent to us from the vendor filled  
19 out. I had to apply, I had no choice. On 4<sup>th</sup> October there was still no NDA signed between  
20 Sky and the vendor and yet we wanted to get the material into the process, so we of course  
21 applied to the ----

22 THE PRESIDENT: Just remind me, it has slipped my mind, that has been signed now?

23 MR. HENRY: It was signed on 18<sup>th</sup> October, yes.

24 THE PRESIDENT: What information have the third parties ----

25 MR. HENRY: I am not aware that they have sent them any information. I emailed them to tell  
26 them we were coming here. I said that I had submitted it under confidentiality. Their  
27 counsel had it. Their counsel should clearly have been able to identify to Sky, without  
28 giving the identity away, that this is a legitimate conditional access company, their  
29 certificates are available. We know that Sky knew what their name was since they had been  
30 negotiating to sign the NDA. So clearly they knew which company it was. They have been  
31 sending emails backwards and forwards for the last two months. So Sky was clearly aware  
32 of the identity of the conditional access provider, and they cannot argue otherwise.

1 I am not at liberty to give those technical details. I was extremely worried that if that went  
2 into the wrong hands we could very well end up finding what was a secure system  
3 becoming insecure and no one knows how that happens.

4 THE PRESIDENT: What is envisaged? Nothing further will happen, as I understand it, because  
5 no more information is going to be provided by third parties.

6 MR. HENRY: I think with your help, Sir, a process can be put in place that allows the material  
7 that is in the confidentiality ring, now that Sky has finally signed the NDA, to be given to  
8 Sky. That was not able to be done before the 18<sup>th</sup> because they had not signed. So the  
9 problem that we are here is not created by ourselves, it has been created through their own  
10 delays. That material has been available to Ofcom's in-house lawyers, I believe, they are in  
11 the confidentiality ring, so they could have done whatever work was needed since the 14<sup>th</sup>,  
12 and we have heard nothing from them.

13 I originally had down some points that I wanted to raise, so I did not get dragged on  
14 tangents, which I am known for doing. Sir, I wonder if I could come back to those short  
15 points that I wanted to make?

16 THE PRESIDENT: Yes.

17 MR. HENRY: I believe this is a simple case. It does not look like it, but I think the fundamental  
18 question is very simple, and it is about two tests: tests qualifying the Wholesale Must-  
19 Offer. The first test, it appears to me, is the security of the encryption system that would be  
20 used for pay TV. A secondary test, probably not as important, but still important, is the  
21 process for the technology used for picture quality, etc.

22 The second major test, it appears to me, is financial standing, although that is not really as  
23 clearly defined as far as I can tell. Sky has submitted that they believe Real Digital has £55  
24 of capital according to Companies House applications. This is simply not true. In the  
25 confidentiality ring we have submitted what we believe is as up to date information as we  
26 can.

27 THE PRESIDENT: This was yesterday's document?

28 MR. HENRY: Yes.

29 THE PRESIDENT: Which I am afraid I have not studied in any detail. You said it was  
30 unredacted, but when I got it it still seemed to have redactions.

31 MR. HENRY: That may well have been an oversight. We were very pushed to try and get it, Sir.

32 THE PRESIDENT: It would have been helpful if we had had that a lot sooner.

33 MR. HENRY: It certainly would have.

1 THE PRESIDENT: Was it not possible to put that information in, because Sky actually raised the  
2 issue of financial standing and background with you, did they not?

3 MR. HENRY: However, they do not qualify what they mean by that. What exactly do they mean  
4 by “financial standing”? The first thing Sky raised in negotiations was they refused to  
5 accept that there was a WMO and that there was any legal process that they were obliged to  
6 comply with in our case.

7 THE PRESIDENT: They are right.

8 MR. HENRY: Technically they were right, but the point of coming to the Tribunal and getting in  
9 touch with Ofcom was, in fact, to see if we could come to an arrangement that meant that  
10 we did not all have to be here and spend all these months exchanging documents. It would  
11 appear that the answer to that was, “No, we do have to be here, and we do have to go  
12 through all these document exchanges”.

13 We are happy, if we are allowed by the security provider, to provide the information. We  
14 have done it inside the internal confidentiality ring. Herbert Smith and their legal advisers,  
15 they are aware of what is in it. Have they not got an expert that deals with this side? They  
16 have worked for Sky before, I understand, I found it on their website.

17 THE PRESIDENT: They will not have an expert on conditional access.

18 MR. HENRY: The only reason I raise it, and I raise it very quickly, is that according to a  
19 document published by Herbert Smith on graduate opportunities for trainees and their  
20 stories from around the world, it says that they spent four years – it gives you the partners’  
21 details and the trainee – they spent several years dealing with Sky and being intimately  
22 involved, and the technical experts, barristers and B Sky B found it very valuable.

23 THE PRESIDENT: What did this person do? Sky have got to decide whether the ----

24 MR. HENRY: Herbert Smith clearly have lots of experience with B Sky B. They have represented  
25 them in other fields. I would have thought that knowing the identity of the encryption  
26 system, Sky themselves know the identity of the encryption system.

27 THE PRESIDENT: Can I just clarify one thing. The information you are saying has gone into  
28 the confidentiality ring ----

29 MR. HENRY: Yes, it is now available to Sky because they signed the NDA.

30 THE PRESIDENT: Has gone to Ofcom and it is that information – and I am just saying this  
31 aloud so that Mr. Holmes can confirm or otherwise – that Ofcom regarded as being  
32 inadequate?

33 MR. HENRY: I believe they said they have not done any analysis on it.

1 THE PRESIDENT: I think they said they just have not seen the information. I assume they were  
2 included in that?

3 MR. HENRY: That was submitted on 21<sup>st</sup> October under Rule 53, that was after it had been  
4 agreed. So all that information is as of the 21<sup>st</sup>. Obviously there have been no questions of  
5 clarity asked by Ofcom.

6 THE PRESIDENT: You gave something else, as I understand it, this morning outside court.

7 MR. HENRY: Last night I spoke to the conditional access provider and said that we had  
8 submitted that and confirmed that the case was today. He volunteered that available on line,  
9 did I know that they had passed two international standards and the certificates are available  
10 on line, and there were two detailed documents from a UK consultancy which confirmed  
11 that if you looked at BSkyB's system and looked at their system, their system was  
12 consistently on the top as one of the most secure in the world, because its technology is  
13 smarter than the technology Sky uses.

14 Very briefly, the chip in the card goes into the set top box, and part of it is in the set top  
15 box, its central chip, those two need to be together for it to work. That is not the same  
16 system as Sky uses. There have been instances where Sky boxes where the card can be  
17 used to share. People connected to the internet can share the codes. You could hack one of  
18 the security cards that we would have, you could copy it, but it would only work in the  
19 original box that you took it from. So there would be no point. Clearly it is very secure.  
20 Ofcom has not said otherwise, until they have indicated today that they do not believe we  
21 would pass. I believe we do pass.

22 THE PRESIDENT: It is not a question of them saying you do not really pass, they say that  
23 information does not even get you off first base. That is all they seem to be saying.

24 MR. HENRY: I do not think they have actually read it. They claim not to have corresponded.

25 THE PRESIDENT: I am sure Mr. Holmes is saying that on instructions, and it would be odd if  
26 they had not looked at it.

27 MR. HENRY: There has been no answer on this. You would have thought if we had not passed  
28 or this is insufficient there would have been a communication.

29 THE PRESIDENT: I suppose it could be a question of timing, it was rather late, was it not?

30 MR. HENRY: On the financial standing, I have a witness with me today, who is our chairman,  
31 who has other business interests, who can testify to the court how much financial standing is  
32 on offer from their side. This is in addition to what has been submitted already. BSkyB do  
33 not seem to have any questions about his financial standing as they have had a long  
34 relationship for six channels.



1 THE PRESIDENT: May we know who this person is?  
2 MR. HENRY: Yes, it is Mr. Fred Perkins.  
3 THE PRESIDENT: His position?  
4 MR. HENRY: He is our chairman. He does not have a position in the company, but he is the  
5 chairman of our board.  
6 THE PRESIDENT: He is a shareholder?  
7 MR. HENRY: Yes, he is a shareholder.  
8 MR. PERKINS: Sir, I have been a customer of Sky for six years. We operate six channels from  
9 the Sky catalogue.  
10 THE PRESIDENT: You being?  
11 MR. PERKINS: Information TV Limited I was majority shareholder in Information TV Limited.  
12 I have also been a supporter and investor in Real Digital right from its inception. Of course,  
13 this is a new business, we stand very interested and excited about what Real Digital wants  
14 to do. That is why I have provided facilities in my office to house Real Digital. We are  
15 behind this proposal. Of course, we are not going to put cash into the business unless and  
16 until we see it can go ahead, which is the nature of any start-up business. The business is  
17 financially afloat. I put cash in as other shareholders put cash in. I am happy to give the  
18 court my own latest financial accounts which show the balance of cash in our bank as of  
19 today well into seven figures cash, free of debt.  
20 THE PRESIDENT: Mr. Henry, the reason that we set out a timetable where we gave Sky a date  
21 for submissions and you a date for submissions was that we do not get into this position.  
22 MR. HENRY: I do appreciate that.  
23 THE PRESIDENT: You have brought some very helpful and interesting evidence, but we are  
24 hearing it for the first time and we should have heard it before. How can Sky respond to  
25 this on the hoof?  
26 MR. HENRY: The problem has actually stemmed from prior to the original hearing of the 23<sup>rd</sup>,  
27 where we were effectively excluded from the process partly by travel problems and ----  
28 THE PRESIDENT: We have had the process going since July at the latest – since May, June,  
29 July.  
30 MR. HENRY: Yes, Sir, but Ofcom for the first time today tell us that we would not pass the  
31 minimum qualifying criteria.  
32 THE PRESIDENT: But Sky have been telling you this for some time, and obviously this may  
33 well be relevant to this.

1 MR. HENRY: I think everything we have presented inside the confidentiality ring was relevant.  
2 The problem was that up until the 18<sup>th</sup> Sky had not signed the NDA for the conditional  
3 access provide.

4 THE PRESIDENT: No, but this has just been said in open court, so you are not claiming  
5 confidentiality for this gentleman's ----

6 MR. HENRY: No, it is not the financial standing that is the sole commercial thing. The problem  
7 is there is the conditional access, which is effectively the heart of this business. If you want  
8 to run a safe pay TV business and safeguard BSkyB's assets and investment, you have to  
9 ensure that the security system is secure. This was what we believed would be the number  
10 one hook that Sky would use to not supply, which is to the point the finger and say, "Your  
11 encryption system is not up to whatever standard, because we have found a loophole".  
12 Therefore, we did our utmost to make sure that that information was going to be made  
13 available. I started the process well in advance and sent document. As soon as Sky sent me  
14 their questionnaire, I sent it to the vendor and said, "Listen, I need answer for this, how are  
15 we going to cope with this". They eventually came back and said, "We need an NDA with  
16 a third party, it is no good your NDA". So we sent the NDA, the draft NDA, to Evan  
17 Cormack at Sky, and then started the delaying process of sending it back saying that they  
18 wanted to have this changed, they wanted the country of origin changed and jurisdiction  
19 changed, which frankly slowed the process down. As a result, we ended up where we got  
20 one signed on the 18<sup>th</sup> October. It was not anything to do with our delay. If I had not  
21 submitted on the confidentiality, we would not have been able to put any of this in at all.  
22 I believe that the best process forward is this: I believe that the information we now have,  
23 although we have had no support from Ofcom – despite their initial letter saying they  
24 wanted to help find a solution, they have not engaged at all – and perhaps the counsel for  
25 Ofcom can point to some communications that I have missed, but I do not believe they ever  
26 submitted any to us. If they had come along and said, "We believe you need more of this or  
27 more of that", would have been helpful for us to know what are we trying to answer.  
28 What are these two questions? Minimum qualifying criteria does not mean anything.  
29 Technology I understand, security I understand, and we have answered those.  
30 If the Tribunal wishes to support our application, which I hope they will, on two conditions.  
31 Now we have put an NDA in place that material can be provided to Sky.  
32 My concern here is that if it is not granted – and indeed we may get more information, a  
33 new shareholder could attach themselves to our company any day, and therefore we submit  
34 more information – we come back to this process over again wasting everybody's time, our

1 time, the court's time, all these lawyers' time. This does not benefit anyone and at the end  
2 of the day competition is meant to be protected.

3 This brings me to one of the points that I wanted to bring up about Ofcom. Ofcom's  
4 principal duty under the Communications Act is to support competition if it furthers the  
5 interests of the consumer. That is not their stance at the moment from what I can gather.  
6 We will bring competition. We will never be a huge competitor to Sky. We are always  
7 going to be a small player.

8 Sir, I think you have already raised an interesting point which was that BT is a much bigger  
9 threat to Sky, and potential damage that Sky has argued in its previous arguments. Quite  
10 clearly the big three are established players, not a little minnow that is just starting out.  
11 That is not ever going to damage Sky.

12 What we were asked for by Mr. Winterbottom at Sky was rather vague. We had to ask  
13 them for the questions, "What do you want us to submit?" We sent an overview, which was  
14 our internal document, which is in the submissions. I do not think it was vague. It gave a  
15 very clear indication of how we wanted to market our brand, what we are looking to  
16 achieve, what prices we want to charge. There is nothing vague about that.

17 I believe that the most efficient way is to grant the amendment on the basis that sufficient  
18 information is exchanged and perhaps direct Ofcom to run its analysis and to come back  
19 with a report that tells us if we are deficient, in what area and why, how they think we can  
20 pass this bar that we do not know where it is.

21 THE PRESIDENT: I do not think I have got the power to direct them to do that in the context of  
22 this application.

23 MR. HENRY: In which case we would hope that we have supplied sufficient information. There  
24 are other remedies for Sky if we were to somehow damage their brand, which is certainly  
25 not our intention.

26 THE PRESIDENT: If I granted your application, as far as I can see it what would happen is that  
27 Sky would have to take a view on whether to continue negotiations with you and, if not,  
28 Ofcom would then presumably have to take a view on whether that represented a breach of  
29 the WMO as it applied to you.

30 MR. HENRY: We would be in the Top Up TV position.

31 THE PRESIDENT: Depending on the result of that they would decide either in your favour or in  
32 Sky's favour and one of you would then have an avenue of appeal on that point, whatever  
33 the point was.

1 MR. HENRY: Clearly, in which case this appears to be a two step decision. There is the decision  
2 that the Tribunal comes to grant us the same standing as Top Up TV, BT and Virgin Media.

3 THE PRESIDENT: That is another point, because they would look at deemed provision, that  
4 they would need to satisfy whatever the criteria are, apart from certain things. That was a  
5 concession made in their specific case by Sky. Why should they make that concession in  
6 respect of you?

7 MR. HENRY: Sky's submission, I think their stance at the outset was that they had agreed in  
8 principle to let these three in.

9 THE PRESIDENT: Save in respect of ----

10 MR. HENRY: Technology, yes, absolutely. There is no difference with ourselves. In other  
11 words, the test that Sky runs comes after the Wholesale Must-Offer exemptions. Then there  
12 is another test quite clearly, except for technology and financial standing. So the Tribunal  
13 can grant us the same. It does not stop Sky going through the process that has been going  
14 until now and for us having to go back to Ofcom and saying, "They are not playing the  
15 game and they have refused, and we believe we do qualify". Therefore, that does not bring  
16 it back to the Tribunal. The Tribunal has adjudicated that we should be treated the same as  
17 BT Vision, Top Up TV, except in the technology, etc.

18 Can I go through the rest of my points very briefly?

19 THE PRESIDENT: Yes, but could you tell me roughly what heads they come under when you  
20 start?

21 MR. HENRY: Yes, on innovation, because Sky has argued that if we were granted this we would  
22 not be innovating. That is one of the arguments they have used in the correspondence.

23 THE PRESIDENT: You would not be innovating?

24 MR. HENRY: We bring no innovation to the market, is I think the term they used.

25 THE PRESIDENT: I do not think you have to worry about that.

26 MR. HENRY: We think we do, we already have, and our EPG is more technically efficiently  
27 delivered than Sky or Freesat, and therefore we have already proved that we are innovating.  
28 BSkyB has claimed that they have been to fully respond to real submissions. I say this lies  
29 truly at their doorstep for not executing the NDA before 18<sup>th</sup> October. If that had happened  
30 before that we would not have needed to go down the confidentiality ring.

31 THE PRESIDENT: I think what they say about that is that they put forward some changes to the  
32 NDA which were proved to be completely innocuous and were accepted but it took an  
33 awfully long time to deal with that.

1 MR. HENRY: Yes, and I pushed and pushed and contacted them with emails, and so on.

2 Unfortunately, my contact at that vendor ended up having surgery in hospital.

3 THE PRESIDENT: It does not sound as though it is Sky's fault either.

4 MR. HENRY: No, it is not totally Sky's fault, but it certainly was not Real Digital's fault. We  
5 were not involved in that process.

6 I have now pointed out that we have handed in two certificates, which are internationally  
7 recognised, claiming that the vendor has passed both of them. They are totally secure and  
8 Sky's lawyers now have them. That material is publicly available and was available to  
9 them before. So I disagree that they were not able to respond. I think they were.

10 BSkyB is meant to, under this process, originally before it was suspended, publish what the  
11 minimum qualifying criteria would be so that we do not play blind man's buff and try and  
12 guess what the standard is. That has not happened for whatever reason, which leaves every  
13 third party at a distinct disadvantage. It appear to me that BSkyB at the moment, without  
14 having it published, can move the MQC, the minimum qualifying criteria, to whatever level  
15 it deems appropriate at the time depending on who the third party is.

16 THE PRESIDENT: Subject to Ofcom's approval.

17 MR. HENRY: From what I can understand, Ofcom has not yet accepted what the minimum  
18 qualifying criteria is and has not published it.

19 THE PRESIDENT: Presumably they have to look at it on a case by case basis at the moment.

20 MR. HENRY: Which appear to mean that there is no minimum qualifying criteria if it is on a  
21 case by case basis.

22 THE PRESIDENT: You may be right about that.

23 MR. HENRY: Therefore, I believe there is not one, and I believe we should be treated with the  
24 view that we are a responsible company, we are properly incorporated, we have financial  
25 standing. We are happy to display that financial standing. The technology has already  
26 passed international certificates. It is not us saying this. This material can now be handed  
27 to Sky and they can now accept that the conditional access vendor that we have chosen is  
28 one of the best in the world and has so far, as far as I am aware and I am happy to be  
29 corrected, never been hacked or pirated because it is almost impossible to do so.

30 THE PRESIDENT: I have got that point now.

31 MR. HENRY: I believe BSkyB and, to a certain extent, Ofcom have refused to accept the  
32 Tribunal's previous directions. It was fairly clear that one of your letters was ordering the  
33 three of us to communicate and try and avoid this very process. Ofcom wrote that letter  
34 which they have highlighted which said they would like to help avoid that too, and that was

1 the last communication we got from Ofcom although I did include them in communications.  
2 So that has not helped the process.

3 Ofcom until now had not submitted anything to the Tribunal to the detriment of Real, either  
4 supporting us or being against us. I understand the Tribunal asked the other three vendors  
5 or retailers for comments on our proposed amendment, and from what I understand there  
6 have been no objections.

7 THE PRESIDENT: We have not had any comments at all, as far as I know.

8 MR. HENRY: I am in touch with at least one of their lawyers now and again and they have no  
9 view on it at all.

10 THE PRESIDENT: Very wise!

11 MR. HENRY: I think BSkyB has failed to submit any substantive reasons why Real should not  
12 be granted the WMO. It appears that we have not given them enough information to  
13 correspond. I still believe we have enough information. Our marketing messages that we  
14 gave them in our overview were enough for them to understand what we are trying to  
15 achieve and they now know who the conditional access provider is, so they know how  
16 professional they are. These are not trade secrets. They know who they are. They have  
17 now signed the NDA. They can now get access to the final document.

18 I believe that there was an issue that was raised by a third party that said that the Tribunal  
19 does not normally amend orders, and it is unusual, very unusual. I have raised in my  
20 submissions the *Young v. Aeroplane Company Limited* [1944] which set down the case law  
21 that shows that a court can revisit a ruling if there was material available to one of the  
22 parties that was not brought to the court's attention that could have changed the outcome.  
23 I understand from the transcript – and I cannot remember the whole seven days of the  
24 transcript – that my name was mentioned, although redacted, and so was Real. I understand  
25 our application was stayed at the down.

26 THE PRESIDENT: I think for some reason you did not come to the hearing.

27 MR. HENRY: Yes, I could not get to London. There were no flights, the trains were all full and I  
28 was just not able to get there. I communicated that to the Tribunal's administration staff  
29 and I contacted Ofcom several time to inform them that I was not physically able to get  
30 there. If we had been informed that it had been carried over or that negotiations were going  
31 on ----

32 THE PRESIDENT: You could have found that out pretty easily actually, a phone call would have  
33 confirmed that.

34 MR. HENRY: I phoned the Tribunal and they said that ----

1 THE PRESIDENT: Let us not get into this.

2 MR. HENRY: All right, but if we had known about it I would have been here for the second  
3 week.

4 THE PRESIDENT: I think you could have easily found that out. The Tribunal has a lot of  
5 information available. People answer the phones. They are very accessible as a Tribunal.

6 MR. HENRY: I am not blaming the Tribunal. When I did phone them they were not sure what  
7 the situation was, so I contacted other parties involved in the process and got no response.  
8 So I was in the dark that they had been continued.

9 THE PRESIDENT: People have to look after themselves to some extent. We say what the date  
10 the thing is starting and after that it is up to the people concerned.

11 MR. HENRY: It brings me to my last point, which is that if we do not get the amended order and  
12 we are not treated the same as the other three parties who clearly do have a bigger market  
13 share, ready made, so they may well be in a slightly different position to ourselves. Not  
14 technology wise, they are not. Financial standing, they may be a bigger organisation.  
15 Effectively, as far as I can tell, this would mean that it is not open to other parties, it is  
16 closed and restricted to just the first three. It cannot ever be open to other parties if the  
17 minimum qualifying criteria is not put into the public domain.  
18 It may well be that if the minimum qualifying criteria is set so low Sky's worst nightmare  
19 would appear and there would be a queue standing outside with every person with three  
20 aunts that want to launch a pay TV service. However, I do not believe that, in practice, that  
21 is actually what will happen. There is an awful lot of work that goes into getting to even  
22 where we are.

23 THE PRESIDENT: Where are you at the moment, in so far as it is not confidential?

24 MR. HENRY: We believe that if we are granted this we will be on air transmitting Sky Sports 1  
25 and 2 along with some other channels before the end of January.

26 THE PRESIDENT: So it is all dependent on Sky.

27 MR. VAN RUTH: We are technically ready to launch. We have got a viable proposition and we  
28 have got the cash flow to help launch and to facilitate a launch of the platform. We are here  
29 because we were excluded from the original process to become part of the group of people  
30 from Wholesale Must-Offer. We are ready to launch.

31 THE PRESIDENT: Are your set top boxes available?

32 MR. VAN RUTH: Yes, they are ready.

33 MR. HENRY: As with everything to do with conditional access, the conditional access provider  
34 has very stringent tests that every box manufacturer to get the licence to include their

1 system have to pass. It is not as simple as you just buy the box and it is on the shelf. Each  
2 manufacturer has its own chip codes that are issued by the vendor. They have to be added  
3 in to our system that transmits the signals to those boxes and the cards are locked together.  
4 It is not a simple case that you just turn the key and it is on immediately, because there are  
5 all these processes that you have to go through first.

6 We believe that a realistic time for applying for Sky between now and getting Sky Sports 1  
7 and 2 on line is about the middle of January. We would probably delay the official launch  
8 until the end of January because we have missed Christmas and sales are not really going to  
9 pick up in the middle of January. So that is the basic time line that we have now focused  
10 on. We have to get a circuit to connect ourselves to Sky's transmission facility. That can  
11 take up to 90 days to get it to other premises. So taking all these processes into  
12 consideration, we believe we will be bang on target and be able to launch in January.

13 We have already indicated to Sky that we are not looking to sell or retail Sky Sports 1 and 2  
14 at a loss. So, unlike marketing from another provider who highlights a very cheap offer far  
15 below the wholesale offer, we are not looking to do that because we cannot afford to do it.  
16 So it has to be at retail plus or wholesale plus a margin. We have indicated to Sky in our  
17 correspondence what we believe that price would be. It makes us slight more competitive  
18 to them, but not if you take into account how many other services Sky has. It is a slightly  
19 different market we believe we are aiming at.

20 I believe that competition – and I have put it in my submission, including the last one – and  
21 innovation is very, very important. It affects all of us. Since I do not believe you have seen  
22 the last submissions, the one sentence ----

23 THE PRESIDENT: Which one is that, Mr. Henry?

24 MR. HENRY: It was the last one submitted yesterday.

25 THE PRESIDENT: The financial one?

26 MR. HENRY: Yes.

27 THE PRESIDENT: I have seen it. I have read it so far as I could.

28 MR. HENRY: I have avoided trying to elaborate on the main points but BSkyB has argued that  
29 in any case Real Digital would not bring innovation to the market as far as they can tell,  
30 which I completely disagree with. They have said something similar about Top Up TV and  
31 Ofcom found against them. So I think Ofcom basically agree with our point that all  
32 providers would bring some form of innovation.

33 So it is basically the first page, which is my p.4, and I have highlighted how many of the  
34 most important inventions have been invented by either individuals or very small



1 enterprises. I believe that needs to be kept in mind when making this decision. Is this a  
2 country where we foster innovation and development? If, for instance, Mr. Alexander  
3 Graham Bell had not discovered penicillin then perhaps Herbert Smith's lawyers would not  
4 be here now. Perhaps none of us would. The bottom line is that we have benefited from  
5 these inventions, even though we do not believe they are anything to do with us. So I  
6 believe that it is important that competition and innovation go hand to hand, and to exclude  
7 us means that you are excluding competition and the innovation we hope to bring to this  
8 market will effectively be ended.

9 I think that covers my main points.

10 THE PRESIDENT: Thank you very much, Mr. Henry. Mr. Flynn, do you want to say anything?

11 MR. FLYNN: Sir, yes, briefly, I think. We heard finally from Mr. Henry today that any delay in  
12 the process for that part of NDA that is to do with a third party supplier and delays on the  
13 other side. That really is not down to Sky prevaricating.

14 We have had handed in today some certificates. We do not know what those are.

15 Mr. Henry's essential position seems to be that Sky or indeed Herbert Smith should do all  
16 the research and should be able to infer from his marketing messages and his overview slide  
17 pack what the commercial proposal is. The bottom line is, as is clear from the  
18 correspondence, that he has not been prepared to answer the technical questionnaires that  
19 Sky had put to him, and he has also not been upfront and has not been prepared to go into  
20 the issue of his financial standing, as to which the last word until again this morning as far  
21 as we were concerned, is on p.8 of one of his submissions, the one to be found at tab 25,  
22 where he says a few things, that it is not just £55 for the share capital. He says that there are  
23 resources available to the company without in any way attempting to specify them, and  
24 concluding that Sky has nothing to worry about. In our submission, that is just a wholly  
25 inadequate way to have approached this process.

26 This morning we have heard from Mr. Henry with this document that I cannot refer to  
27 because the information is redacted, which says that a certain amount of money is said to be  
28 in a bank account, and a couple of other items, one of which would not appear to be money  
29 that is actually available to Real. Mr. Perkins made it clear that he would not be putting  
30 money in unless it took off.

31 As far as what goes to what resources are available to Real, we are not very much further  
32 forward even today, even assuming that that was an appropriate way of dealing with it. As  
33 you said, the purpose of getting a timetable was so that all the facts could be available to be  
34 properly considered.

1 This way of dealing with it has characterised the entire process, we say, from the beginning  
2 of this application. That is why Sky has taken the position, as you have seen in that letter,  
3 that at the moment they are not prepared to supply. That really has to be the strike point for  
4 today, as it were. If there is going to be a change, there is going to have to be a different  
5 approach. As to the submissions that came after 24<sup>th</sup> September when Sky wrote that letter,  
6 much of it has not been available to Sky at all because of the redaction approach, the  
7 confidentiality ring that has been set up. It is clearly not for Herbert Smith to make an  
8 assessment on that material, as I think you would readily accept.

9 For the rest, there have been a lot of – Mr. Henry generously today has not referred to them  
10 – allegations about inappropriate behaviour by Sky which, as you can imagine, make it even  
11 less likely that this is a party with which Sky would wish to do business. Something is  
12 going to have change. If that would ever change, there is going to have a dramatic  
13 difference. You know that in previous dealings with companies associated with Mr. Henry  
14 Sky was left with a debt. He seems to be saying in his submissions that he still has a legal  
15 defence to that, despite the Tribunal having ruled against him and refusing permission to  
16 appeal.

17 It seems entirely appropriate that Sky should draw stumps at this stage.

18 In terms of whether he can then come to this court and make an application for the order to  
19 be varied, and we did make some submissions in our written document as to why that was  
20 additional inappropriate – leaving aside delay, that has already been canvassed – he does  
21 not really advance a positive case as to why he should be included within the order, except  
22 simply that he would like to get his hands on Sky's channels. He is not an existing  
23 customer, as Virgin was, he is not an existing pay TV retailer, as BT and Top Up were. He  
24 can give no explanation to the Tribunal as to why, had the WMO not been suspended, he  
25 would have been entitled to take supply because the information simply is not there.

26 He does not say how they would be harmed by the operation of the order. The business  
27 proposal which you will have seen from April did not suggest that they would be a channel  
28 retailer, still less a retailer of Sky Sports ----

29 THE PRESIDENT: That seems to be just the EPG service.

30 MR. FLYNN: Yes, precisely. Clearly hopes have been got up by the WMO and by this entire  
31 process, but even today it is not clear as to whether it is being said that the entire  
32 proposition is dependent on Sky. We just do not know what the position is said to be there.  
33 In our submission, he does make no relevant argument as to why the additional hurdle,  
34 which we say is there because the order is in place, should be varied. Because of the way

1 the application has been handled and the allegations that have been made, at least in writing,  
2 one may understand that not only is Sky concerned about what would happen if the WMO  
3 were to be overturned on the success of the appeal, but also about its brand and how it  
4 would be handed and the reputation which would be attached to it. That is why we say that  
5 the appropriate for the Tribunal to proceed today is for the application to be dismissed. If  
6 Mr. Henry wishes to renew it then I think, as Mr. Holmes has suggested, any further  
7 application should be stayed while the matter is considered by Ofcom is the appropriate way  
8 forward. We cannot be possibly be in this position of the Dance of the Seven Veils and  
9 information leaking out very slowly and reluctantly, and frankly it all being everyone's fault  
10 except Mr. Henry's. In our submission, it should be for Ofcom to come forward to the  
11 Tribunal if that were to be the case and suggest that on an interim basis the order needs to  
12 be varied so as to include Mr. Henry's platform.

13 That is our submission as to how the Tribunal should deal with this as a matter of discretion  
14 and case management, given the way that this application has rumbled on since May.

15 THE PRESIDENT: The difficulty with this is that Mr. Henry has not got much to shoot at, has  
16 he. He has got these letters from Ofcom and the statement that was made today. He has not  
17 got a decision to challenge. If he gets an order then, as it were, there has got to be a  
18 decision at some point on something that he has done wrong. I just wonder procedurally  
19 this is the wrong way of looking at it. At the moment we are stuck with it because there is  
20 an application that we have got to deal with.

21 MR. FLYNN: We are where we are because the WMO has been suspended. Had he been here in  
22 April he might have said, "I want to be included in this". He might have been included on  
23 the same terms as Virgin and Top Up.

24 THE PRESIDENT: He might have been included on different terms.

25 MR. FLYNN: He might have been included on different terms. We are not in that position.

26 THE PRESIDENT: You say we are where we are. There are no concessions that have been made  
27 to him as there were to the others.

28 MR. FLYNN: Frankly, Sir, a concession has been made because Sky has been willing to engage  
29 with him. That is undoubtedly the case, because we were before the Tribunal and the  
30 Tribunal suggested that this matter could possibly be dealt with without a hearing and Sky  
31 has over a period of some three months, at considerable cost and time of its employees,  
32 sought to find out from him what the process is, and you have seen how that has been  
33 handled – an unwillingness to trust Sky, frankly, and a lack of information provided leading  
34 to this hearing being necessary. Sky is not, as I say, in the business of defining the MQC in

1 the abstract. It is prepared to explore with Mr. Henry whether there was a commercial  
2 proposition and whether Real Digital is someone with which it could contract. So far, for  
3 many reasons of lack of knowledge about the commercial proposition, the security  
4 standards to be applied, the financial status of the company, to take three very obvious ones,  
5 to say nothing of the denigration of Sky, that is the position that we have reached.

6 In our submission, if that is to be changed there has to be some additional reason and we  
7 would say that he does need to enlist the support of Ofcom and it should not be left to Sky  
8 to try to develop this any further. Sky, in our submission, has done everything that can  
9 reasonably be expected of it in this. Admittedly, there is a form of vacuum, or at least we  
10 are where we were before the WMO, which is that anyone who had a commercial  
11 proposition and wanted to supply Sky channels, not just the sports channels but any  
12 channels, clearly had to engage with Sky. That is where we are. Sky has engaged with  
13 Mr. Henry, and I think the correspondence shows it, in an entirely proper way, and you have  
14 seen how that has been appreciated.

15 Unless I can help further, Sir, that is probably all I can say at this stage.

16 THE PRESIDENT: Thank you very much. Normally I would let Mr. Holmes go now and then  
17 hear you after him, Mr. Henry. Is there some reason you should go now?

18 MR. HENRY: While it is fresh in my memory.

19 THE PRESIDENT: All right, yes.

20 MR. HENRY: Sky appears to have followed the idea, and it appears to me that there are two  
21 tests, and I think I may have touched on this before. Adding Real Digital into the  
22 application of the order does not guarantee that we are going to be able to get Sky Sports 1  
23 and 2, just like it did not guarantee the other three. Therefore, I do not really see that there  
24 is a huge barrier to this being granted. Clearly we are in a different position because we are  
25 a start up business. It was always in our business plan to develop a whole pay TV offering,  
26 but we did not make announcements to it because we tend to find things become more  
27 difficult once you do.

28 So it would appear to me that this is really very simple. The application for the amendment,  
29 even on the original terms rather than the draft that I submitted which had slightly different  
30 wording, to include Real Digital resolves the issue that we have today and allows us to have  
31 a framework officially framed by the Tribunal to engage with Sky.

32 Obviously I have a different opinion as to what has gone between Sky and Real Digital in  
33 the course of negotiations. I do not believe they were meaningful, I do not believe they  
34 were ever going to come out with an answer, so much so, and it is supported by Ofcom's

1 pay TV statement on 31<sup>st</sup> March, where, and I think I have highlighted it in my submission,  
2 they do not believe a third party could agree terms and price with BSKyB so they were  
3 going to set a price. That was their thinking. I believe this is very much required for us to  
4 get to the next step to allow us to engage properly with Sky and to effectively offer the  
5 services on a new platform.

6 THE PRESIDENT: Mr. Henry, you are aware of course that the other three gave an undertaking  
7 about payment of the difference.

8 MR. HENRY: I am perfectly happy for that. I believe there would be minimum qualifying  
9 criteria. I do not think it should be open to ----

10 THE PRESIDENT: It was not to do with that, it was to do with paying any difference between  
11 the price ----

12 MR. HENRY: Yes, and I saw that, and I have not said that we do not accept exactly what has  
13 happened with the others. We believe eventually this will all resolve itself through the  
14 appeals process and we hope that Ofcom will prevail and that the price will be set at what  
15 they believe is the proper wholesale price and not the current one that Sky is charging. We  
16 can still offer a commercially viable service without making a loss on it, which means Sky  
17 has no risk for their business at all, because we are not going to undercut them, we cannot.  
18 Therefore, Real Digital simply makes its service more attractive. Without it we are  
19 effectively not on a level playing field with others. It is anti-competitive, I believe.  
20 The escrow account, I totally understand, whatever the difference is is paid into the escrow  
21 account. We have not said we do not agree with that. We do agree with it.  
22 I think this is really quite simple. Sky seems to have changed their stance slightly, which is  
23 that if it is granted we still have to exchange information. It is unfortunate that it has taken  
24 so long to get NDAs exchanged. We were doing our best to provide information, not  
25 knowing what the information they were looking for actually was.

26 THE PRESIDENT: Mr. Holmes?

27 MR. HOLMES: Sir, I can be very brief. I think I have very short points. First, we agree with  
28 Mr. Henry that the Tribunal has the power to amend the order as requested. There was a  
29 suggestion that the Tribunal's jurisdiction do so had been challenged in correspondence.  
30 We, for our part, fully accept the Tribunal can do so.  
31 Secondly, it is also common ground between the parties, I think, that the key considerations  
32 as regards this application relate to financial standing and the security arrangements. Both  
33 of these are reasonable concerns for Sky to explore as part of its negotiations with  
34 Real Digital, and each would provide a reasonable basis in the absence of comfort for no

1 supply being made. That would be the case if the decision were operative, both these  
2 matters being recognised as within the sphere of matters that would be covered by minimum  
3 qualifying criteria and by the minimum security requirements.

4 We gratefully adopt, Sir, your description of the appropriate role for Ofcom, which is not to  
5 step in at the first instance and to broker an arrangement on a potential retailer's behalf, but  
6 to allow commercial negotiations to commence and to provide such assistance as it can.

7 Our position remains as set out in our letter of 4<sup>th</sup> October 2010, which is that there is  
8 further information that remains to be provided. That is subject to some recent information  
9 which was provided today, which I think none of us have really been in a position to  
10 consider properly. That information should properly have been brought forward at an  
11 earlier stage. It is very difficult now for the Tribunal to form a view on it at this hearing.

12 You raised a concern that Real Digital should have the opportunity to have a decision which  
13 could then be subject to appeal, and therefore would have something to shoot at, if you like.

14 In relation to that, we say that the current process is subject to the control and oversight of  
15 the Tribunal through the present hearings and the correspondence and submissions that have  
16 led up to it. It is true that that is an *ad hoc* process, we do not have the published set of  
17 minimum security requirements and the minimum qualifying criteria that we would have if  
18 the decision had not been partly suspended as a result of the order. As this hearing has  
19 demonstrated, the broad terrain within which the debate would take place as part of the  
20 commercial negotiations, as regards, for example, financial standing and as regards security  
21 requirements, the characteristics of the conditional access system are not really in dispute  
22 between the parties. When material is brought forward in relation to those two heads, there  
23 is scope for Sky to respond and for Ofcom to give its view. Our concern is that the  
24 information that has been brought forward so far, taken together, does not really allow the  
25 Tribunal or Sky or Ofcom, for that matter, to deal properly with the questions of financial  
26 standing or the technical considerations.

27 The alternative proposal in the event that the application is rejected that Mr. Henry or  
28 Real Digital renews its application, that the matter might be stayed, is one that, as you have  
29 heard, Ofcom would be content with. Obviously there are considerations of access to  
30 justice. We do not think that it would be appropriate either for Ofcom to have the last word  
31 as to whether the proceedings were to be unstayed or ----

32 THE PRESIDENT: This is where this application is refused, more information is provided, and  
33 another application is made along the same lines on the basis of fuller information.

34 MR. HOLMES: But with fuller information, yes, Sir.

1 THE PRESIDENT: Then it is stayed while that is being considered.

2 MR. HOLMES: Yes, Sir. Ofcom would of course engage as fully as it could with the material  
3 that was provided in support of such an application and would give its views to the Tribunal  
4 as to whether it would be appropriate for the stay to be lifted, or as to whether the  
5 application should continue, and the Tribunal could then deal with that on the papers in  
6 short order, but the application would still be for Real Digital to bring and it would be for  
7 the Tribunal to control its own procedure. We would not wish to attempt to usurp that role.  
8 Unless I can be of any further assistance to you, Sir, those are my submissions.

9 THE PRESIDENT: Thank you very much, Mr. Holmes.

10 MR. HENRY: Can I make one last point?

11 THE PRESIDENT: Yes, of course you can, you can say anything you want in reply.

12 MR. HENRY: I want to keep it as succinct as possible. I think this is very much about enterprise  
13 and helping to build a market from competition and the benefits that flow from that to the  
14 consumer. We believe that Ofcom's statutory duty is to support that. So far the process has  
15 not been clear as to what exactly was expected of us as an applicant, and clearly we are  
16 having to learn as we travel. Sky has not been very clear as to what information they  
17 wanted. When it came to financial standing there was not a single clear question as to what  
18 they are looking as far as I can tell.

19 The technology side has, I think, been clearly drafted and the answers are available to Sky.  
20 Perhaps the order could be granted because it does not automatically mean that Sky will be  
21 providing us with Sky Sports 1 and 2. We would still be subject to the same requirements  
22 as the other three were, which is technically passing it and financial standing.

23 It would do us no good as a new company to enter into something where somehow we were  
24 not going to survive for very long. It would, in fact, be a complete waste of energy and  
25 resources to do that. I believe Mr. Perkins has shown that there is a lot more support here  
26 than we have put on paper. We hope that will be taken into account.

27 We say that the most efficient way of dealing with this is not to refuse it and then for  
28 another application to come along, which takes everybody's time up again, but to grant it in  
29 whatever you believe, Sir, is the most efficient way of drafting it. It does have to be the  
30 same way as I have submitted, that was a draft amendment, and the rest have not really  
31 commented that much on it. It could well be that we are simply an extra party in with the  
32 other three, who then, of course, went along, negotiated and have now launched the  
33 services. Top Up TV and BT, as far as I understand it, did not have Sky sports channels at  
34 that point, and never had, and that is why they went through this process.

1 Ofcom, in its pay TV review that took three years, highlights that Sky was not prepared to  
2 even give a price to BT. That is why the pay TV review came out with the ruling that it did.  
3 It is why we now have the Wholesale Must-Offer partly suspended.

4 I believe it is not a case of this is not important to us, it clearly is very important. It was  
5 very important to BT and very important to Top Up TV to have access. They now finally  
6 have it. It looks as if they would not have it if it was not for the order that was granted.

7 I think that is all I have to say except to say thank you very much for your time.

8 **THE PRESIDENT:** Thank you, Mr. Henry. Unless there is anything else, I will rise. I am not  
9 going to give judgment today. Obviously I have got food for that about what you are all  
10 saying, but I will hand it down as soon as I can.

11 Thank you very much.  
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