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

Case No. 1095/4/8/08

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

17<sup>th</sup> April 2008

Before:  
THE HON. MR JUSTICE GERALD BARLING  
(President)

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**BRITISH SKY BROADCASTING GROUP PLC**

Applicant

- v -

(1) **THE COMPETITION COMMISSION**  
(2) **THE SECRETARY OF STATE FOR BUSINESS,  
ENTERPRISE AND REGULATORY REFORM**

Respondents

- and -

**VIRGIN MEDIA, INC.**

Intervener

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. James Flynn QC (instructed by Allen & Overy) appeared for British Sky Broadcasting Group Plc.

Mr. Duncan Liddell (Partner, Ashurst LLP) appeared for Virgin Media, Inc.

Mr. Daniel Beard and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for The Competition Commission.

Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform.

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1 THE PRESIDENT: Good morning, welcome everybody. Thank you very much for coming. As  
2 far as I am aware we have only one issue – have we not – to deal with at this case  
3 management conference, which is the issue of Sky’s application for disclosure. That means  
4 that probably at some point quite soon we will have to go into camera if there are going to  
5 be any substantive submissions about it, which I assume there will be.  
6 Before that, it might just be appropriate to check that I have received everything I ought to  
7 have received. I have a skeleton argument from Sky, I have a skeleton argument from the  
8 Competition Commission. I have a letter from Virgin saying that they basically do not wish  
9 to put in any additional submissions, and I have a letter from ITV. I do not have anything,  
10 as far as I am aware from the Secretary of State.

11 MISS HOLMES: Sir, the Secretary, or the Treasury Solicitor did attempt to send to the Tribunal  
12 a letter just saying that it also did not propose to put any skeleton arguments in and that it  
13 would be represented, as it is, at this hearing.

14 THE PRESIDENT: Fine. Have you all seen the letter from Freshfields – yes. Right, therefore if  
15 we are going to start we had better go into camera as it would be rather difficult otherwise.  
16 Can any one identify anyone here who is not within the confidentiality ring? I am afraid I  
17 am going to have to ask them to leave court. The only person might be the person who is  
18 representing ITV, someone was going to come to ITV, but they are in a rather special  
19 position, it seems to me they should not have to leave as long as there is no specific  
20 objection.

21 MR. BEARD: As far as we can ascertain, Sir, everyone on this side is either from BERR or from  
22 the Competition Commission. I am happy to take responsibility for a lion here.

23 THE PRESIDENT: Can anyone take responsibility for the lion on this side?

24 MR.FLYNN: Without wishing to point a finger, Sir, everyone except the gentleman behind Mr.  
25 Wotton.

26 THE PRESIDENT: That is one of the Tribunal’s referendaires.

27 MR.FLYNN: Then no doubt he is welcome to stay.

28 THE PRESIDENT: Yes, we can trust him.

29 MR.FLYNN: I managed to do it without pointing a finger.

30 THE PRESIDENT: Good.

31 MR.FLYNN: Otherwise everyone is ----

32 THE PRESIDENT: I must remember to come out of camera at some point.

33 **(The Tribunal continued in camera)**

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**(The Tribunal adjourned to sit in open court)**

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3 THE PRESIDENT: I am very conscious of the importance of timing and the timetable, I think as  
4 Mr. Beard has rightly emphasised that is one of the factors one has to bear in mind. I am  
5 proposing to make an order for disclosure along the lines of Sky's application as set out in  
6 the skeleton argument of Sky – I think it is para.13 – but I am proposing to give my reasons  
7 in due course, I hope in the next day or three. I assume that it would be better if I made the  
8 order now so that it can be dealt with, although one normally hesitates before giving a  
9 decision without actually writing the judgment, I think in this case it is important that you  
10 have the order as soon as possible. I see you have nodded, so people see no objection to my  
11 doing it that way around.

12 MR. BEARD: I can confirm on the part of the Competition Commission that is fine, yes.

13 THE PRESIDENT: So the order will be made today, I hope, with the reasons to follow. As far  
14 as the schedule is concerned it occurred to me, although I will hear either of you – we will  
15 just have to be careful since we are not in camera in relation to what you say about the  
16 schedule to the skeleton argument.

17 It seemed to me that the bit in bold which is the definition, as it were, of what needs to be  
18 disclosed is sufficiently clear not to have to concern ourselves with the schedule, and I  
19 would therefore be inclined not to incorporate it in the order or anything of that kind, but I  
20 will hear you on that.

21 MR. BEARD: Mr. Flynn has kindly indicated that he has no difficulty with that. The  
22 Commission would much prefer the matter to be dealt with just by the bold paragraph. We  
23 think we have an understanding of what that means, we have some concerns – slightly  
24 technical concerns – about precisely what is being referred to in the schedule. We have  
25 raised them with Sky and, to be fair, Sky did come back and modify the bold bit but then  
26 left the schedule in. We were slightly confused about that but we have worked on the basis  
27 of the old passage and it might cause us some difficulties if indeed the schedule did get  
28 reincorporated, just by the logistics of checking whether or not those documents were  
29 included, and since I think we are all clear on what it is that Sky are asking for, the ITV  
30 submissions and evidence. In those circumstances I would ask that the schedule not be  
31 included.

32 THE PRESIDENT: Well there is always liberty to apply.

33 MR.FLYNN: I was simply going to say, if I might, we do not think it needs to be incorporated in  
34 the order but it might be that we would have a separate discussion with the Commission

1 about how the material might be organised, and maybe some of the bundling might follow  
2 that order.

3 THE PRESIDENT: Good, excellent. In that case we will proceed on that basis. When the  
4 reasons are produced, I envisage, in view of the issues, sending it under embargo to the  
5 parties within the ring so that they can make comments on whether there should be any  
6 excisions before it is published. So we will proceed on that basis. Is there anything else  
7 then at this stage?

8 MR.FLYNN: There is one matter, Sir, which is our letter crossed with the Tribunal's order  
9 setting up this case management conference, and in that letter we renewed an application for  
10 the time for our skeleton to be extended to I think it is from Friday, 2<sup>nd</sup> May to the next  
11 working day, which is the Tuesday after the May bank holiday. In light of the fact that we  
12 will now have a great deal of additional material to look at I am emboldened to renew that  
13 application while I am here.

14 THE PRESIDENT: Well you asked for it.

15 MR.FLYNN: We asked for that, we did not ask for the delay at the beginning of the period which  
16 I think has been resolved amicably, but the fact is that we were pushed back and now there  
17 will be more. You may not view that with sympathy, so it may depend how you were  
18 intending to spend your own May bank holiday, but our submission would be ----

19 THE PRESIDENT: Just remind me what the dates are again, Mr. Flynn.

20 MR.FLYNN: Well, if I have got it wrong I will be corrected, but we are supposed to lodge our  
21 skeleton on Friday, 2<sup>nd</sup> May. If we ask for effectively a working day's extension then it  
22 would be by close of play on the Tuesday.

23 THE PRESIDENT: I would have thought it would be better to get it done before the bank holiday  
24 and then you can sit in the garden.

25 MR.FLYNN: It would be lovely to think that it would work like that. We sat in the garden last  
26 time when we did not get the respondent's material.

27 MR. BEARD: I think, rather unsurprisingly, the Commission is very concerned that Mr. Flynn  
28 and all those associated with Sky should be enabled to have their gardening weekend  
29 uncluttered by the terrible burdens of finalising these documents. It is concerned about the  
30 timetable, it does not see any need for it to be further adrift in relation to these matters.

31 THE PRESIDENT: I am so sorry, because I do not have the order actually in front of me, I can  
32 easily look at it but you may have it **there**, what ties in with that? Your skeleton is due?

33 MR. BEARD: Yes, we have two weeks from 16<sup>th</sup>.

1 THE PRESIDENT: Yes, I have it now. What I think we were concerned about is that the  
2 timetable then starts to move forward and the all important hearing begins on the 3<sup>rd</sup>.  
3 MR. BEARD: Yes, which is only a week after the skeleton comes in on the present timetable.  
4 THE PRESIDENT: That your skeleton comes in?  
5 MR. BEARD: Yes.  
6 THE PRESIDENT: Because you will then say that you want to have until the 19<sup>th</sup>, presumably,  
7 or something?  
8 MR. BEARD: The difficulty is that we then get squeezed by the equivalent number of days. Sky  
9 wants this material, Sky applied for it. We say this material just goes to underline the  
10 report. Obviously Sky are going to digest it, but they still have plenty of time from today in  
11 order to deal with these matters, they have over a fortnight. As I say, we are going to ensure  
12 that they have the documentary material tomorrow. If the Tribunal makes an order in terms  
13 of the bold statement ----  
14 THE PRESIDENT: Well I hope you will operate on the basis that from now on that I am, for  
15 logistical purposes.  
16 MR. BEARD: And so they will have the documentary material, they will have a fortnight to deal  
17 with it.  
18 THE PRESIDENT: Well the whole thing is obviously quite tight; I appreciate that, and I am  
19 sympathetic, but I am afraid we will stick to it.  
20 MR. BEARD: I think I raised at the previous case management conference the issue to do with  
21 bundles.  
22 THE PRESIDENT: Yes, because normally we like to get the references.  
23 MR. BEARD: Yes, and the Tribunal indicated it wanted them then, but recognised that there  
24 might be some spare tabs that would be filled in due course. That was the basis on which  
25 we are proceeding and that makes sure that the Tribunal has all of the relevant material.  
26 THE PRESIDENT: Well we have it for an extra weekend, that is really what I had in mind there.  
27 So I think we will leave it as it is, I am sorry, Mr. Flynn.  
28 MR.FLYNN: I will not come back on that but we lost a working day because of a  
29 misunderstanding on the other side about the terms of the order, so we are already behind.  
30 THE PRESIDENT: And then we allowed interventions to be made.  
31 MR.FLYNN: I know we asked for this but nevertheless it is coming and it will be substantial.  
32 THE PRESIDENT: Well that is true, but that was not the original reason.  
33 MR.FLYNN: You have my points.

1 | THE PRESIDENT: Yes, I think we had better leave it as it is. Right, anything else? No, well  
2 |       thank you ladies and gentlemen.

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