

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1095/4/8/08
1096/4/8/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15th October 2008

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

PETER CLAYTON
PROFESSOR PETER GRINYER

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

Applicant

- v -

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

Respondents

ALSO APPEARING:

ITV PLC

HEARING

APPEARANCES

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

Mr. Richard Gordon and Miss Marie Demetriou (instructed by Ashurst LLP) appeared for Virgin Media, Inc.

Mr. John Swift QC 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.

Mr. Simon Priddis and Mr. Martin McElwee (Solicitors, of Freshfields Bruckhaus Deringer) appeared for ITV plc.

*Transcribed by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737*

1 THE PRESIDENT: Good morning ladies and gentlemen, thank you very much for coming. We
2 have two main issues to deal with and the first I think we ought to tackle is the question of
3 relief. Then, when everyone has had their say on that, we will turn to the confidentiality
4 matters, which I hope will not detain us very long and we can perhaps organise the
5 mechanisms for that, whether we have to be *in camera* – I imagine we will at some point in
6 due course – we can have a break perhaps after we have dealt with relief.

7 Thank you for your respective written submissions. I ought to say that we have *de bene*
8 read the ITV submission. ITV are not a party, notwithstanding a bit of prodding from us at
9 the outset they have chosen to remain not a party. It has to be said it has not made our job
10 any easier that they have not been parties, but as they are intimately involved at any rate in
11 the results of the case we thought it right, as I have said, *de bene* to read what they say. It
12 did not seem to add very much to what some of the other parties were saying, but there it is.
13 Who would like to crack off? Mr. Gordon.

14 MR. GORDON: Sir, just dealing first with representation and then with order of presentation. As
15 the Tribunal knows, I appear for Virgin with my learned friend, Miss Demetriou. The
16 Competition Commission is now represented by Mr. John Swift, who appeared last time,
17 together with Mr. Rob Williams. The Secretary of State I think is now represented solely
18 by Miss Elisa Holmes, Sky now solely by Mr. James Flynn.

19 Sir, in terms of presentation I have actually given you the order in terms of the
20 representation, that we will be speaking. We have agreed that Virgin should go first and
21 deal with everything relevant to relief and, if appropriate, costs.

22 THE PRESIDENT: On costs, I think we have only had representations from you so far.

23 MR. GORDON: Yes.

24 THE PRESIDENT: I suppose there is no harm, but is the feeling that people just want to make
25 some oral submissions and leave it at that?

26 MR. GORDON: I have not got the feeling actually ... (Laughter).

27 THE PRESIDENT: I did not think so.

28 MR. GORDON: Maybe they are agreed, I do not know.

29 THE PRESIDENT: We may want to shelve the costs matter, I do not know.

30 MR. GORDON: What I was going to say about costs is that it is in our written submissions and
31 you have those, so I was not going to take it any further in oral address. The order, as I
32 have indicated, will be the one that I have set out in the representation and then it was
33 proposed that we should reply at the end to anything raised in answer to our points.

1 Sir, as you have anticipated, the central issue is that of relief, and as far as relief is
2 concerned there appear to be two questions and those two questions are those raised by the
3 Tribunal in its judgment at para.332 which, on my copy at least, is p.98. The two questions
4 are (which I will deal with in turn) from Virgin's perspective at least, the first was the effect
5 (if any) of the judgment on the existing remedy imposed in order to deal with SLC; and
6 secondly, and separately, whether the plurality issue should be remitted to the Competition
7 Commission and/or the Secretary of State.

8 If I may take each of those questions in turn. First, the SLC remedy, we say, for reasons
9 which I will come to in a moment, that the Tribunal's judgment has no impact whatever on
10 the existing remedy imposed in order to deal with SLC and the resultant adverse effects on
11 the public interest. There is a very simple reason for that and that is because of the relief
12 that has already been granted, because what we are dealing with is further relief – not any
13 relief but further relief – because, if the Tribunal will go to para. 334(2)(i) of the Judgment
14 at p.99 what has already happened is that the Tribunal has quashed the report and the
15 decision only to the extent that they concern media plurality. That is the effect of the relief
16 granted thus far.

17 So what follows from the order already made is that the Tribunal has left intact the
18 respective determinations of the Secretary of State and the Competition Commission on
19 three things. First, on the SLC question, secondly, on the resultant adverse effect on the
20 public interest; and thirdly, on the appropriate remedy to address that adverse effect. So
21 what we submit is that those determinations, standing as they do – they are lawful
22 determinations they have not been quashed – cannot therefore be remitted. They remain in
23 force as lawful determinations and the Tribunal's power to remit lies only in respect of that
24 part of a decision that has been quashed.

25 THE PRESIDENT: Well hang on, Mr. Gordon. One of the points that we left open was further
26 relief and so one of the questions we want to know is whether we ought to quash the
27 remedies, because Virgin, in its notice of application asked for the remedies bit to be
28 quashed as well and we deliberately did not quash it because we wanted to hear people on it
29 – we could still quash it.

30 MR. GORDON: Sir, all I am doing is looking at what has been quashed ----

31 THE PRESIDENT: No, I agree it has not been quashed, we have left it open.

32 MR. GORDON: But as we understand the judgment, and it may be that we have misunderstood
33 what the Tribunal had intended, so I certainly do not want to ----

1 THE PRESIDENT: You might have done, because what we said in 332 was intended to indicate
2 that we had not decided what should happen to the existing remedy. You may well be right
3 that nothing should happen to the existing remedy but that is one of the issues we wanted to
4 hear from you on.

5 MR. GORDON: I certainly do not want to rely upon formal points. The point that we make
6 really, substantively – but also it is a formal point – is that the thrust of the Tribunal’s
7 reasoning, and therefore the quashing order that it has already made is to the effect – and the
8 clear effect in our submission – of invalidating one part of the Commission’s reasoning and
9 the contingent reasoning of the Secretary of State and leaving intact the other. Now, I do
10 not for the moment want to confine my argument to formality in the sense you have
11 quashed X but not Y, but the reason, in my respectful submission, that the Tribunal has not
12 quashed Y – that is to say the three aspects of SLC that I have identified, is because the
13 Tribunal was holding them to be lawful determinations; they were not unlawful, they were
14 not invalidated by any defect of reasoning or law. So what we submit, having regard to the
15 way in which remitting goes – or normally goes – is that when one looks at the Tribunal’s
16 power to remit, and can I just show you, Sir, that in the handbook at p.224, and it is s.120(5)

17 “The Competition Appeal Tribunal may –

18 (a) dismiss the application or quash the whole or part of the decision to
19 which it relates ..”

20 Now, why would the Tribunal only quash part of a decision? We find the answer to that in:

21 “(b) where it quashes the whole or part of that decision, refer the matter
22 back to the original decision maker with a direction to reconsider and
23 make a new decision in accordance with the ruling of the Competition
24 Appeal Tribunal.”

25 So the purpose of remitting under the statutory provision at least is that the Tribunal remits
26 that which requires to be reconsidered as a matter of law. That being the case it is our
27 submission that, as a result of the Tribunal’s reasoning, the only matter which requires to be
28 reconsidered as a matter of law, subject obviously to the separate arguments on whether you
29 should remit that part, is the question of media plurality. There is nothing to reconsider in
30 the context of SLC. What the opposing argument appears to come to and I should say – I
31 will give the Tribunal the references for this – as we understand it both the Secretary of
32 State (para.19 of Secretary of State’s submissions) and the Competition Commission (see
33 para.3 of the Competition Commission’s submissions) agree with our analysis. The only
34 opposition to the submission we make on the existing remedy comes from Sky, which

1 appears to argue, though respectfully we would submit it has not pushed that argument very
2 strongly in its written submissions (see para.19 of Sky's submissions). The only argument
3 against us comes from Sky which is that the entire decision on remedies must be remitted,
4 and the reason why Sky submits that to be the resulting position is because of an asserted
5 incompleteness to the remedies question. But there is no incompleteness in any sensible use
6 of that term, in our submission, because Sky's challenge to the remedy has, as a matter not
7 of form but of substantive reasoning, been rejected by the Tribunal and the remedy
8 therefore stands as a matter of substance as well as a matter of form in our submission.
9 If there is to be any change in remedy as a result of remitting it can only result in an
10 additional remedy to address the adverse effects on the public interest resulting from the
11 media plurality issue.

12 So we respectfully agree, for those reasons, with the words that the Competition
13 Commission uses at para.3 of its submissions, and the Commission says – I will just remind
14 the Tribunal – that any remittal of the plurality issue “cannot act as some form of stay over
15 his powers to give effect to the existing remedy.” That is the way we put that argument and
16 I simply remind, without reciting it again, what we say at para.8 of our written submissions
17 in relation to the time that has already elapsed in this case. That is not an analytical reason
18 for asking the Tribunal not to remit. It simply follows in our submission as a result of the
19 Tribunal's judgment.

20 May I turn now to the plurality issue? Again, a similar question as to whether there should
21 be a remission of that issue for reconsideration by the Commission and the Secretary of
22 State. Here, I hope that I can rely not only on substance but also on form, in other words on
23 what the Tribunal has already done, because here, as a result of the relief already granted,
24 the determinations contained in the report and the decision on plurality, have been quashed
25 – that is clear. Unlike SLC there is absolutely no determination standing on plurality,
26 because that must be the result of a quashing order, the respective recommendations and
27 decisions have gone. Yet it is, or should be, in our submission, uncontroversial that the
28 legislation requires a determination to be made; there has to be one. This is where Mr.
29 Flynn's word “incomplete” actually finds its true focus. The legislation, I am not going to
30 take the Tribunal to it unless, Sir, you wish me to, but we have flagged it up in para . 17 of
31 our written submissions and I will give the Handbook references as well, the legislative
32 provisions that require a determination to be made in the context of plurality lie in the
33 Enterprise Act s.47(2)(b) and s.47(7)(b), that is at p.174 of the Handbook.

34 THE PRESIDENT: I think it might be useful just to glance at it, if we may.

1 MR. GORDON: Certainly, Sir. First of all at p.174, and 47(2)(b): “If the Commission decides
2 that such a situation ...” and I emphasise these words for later argument, “... has been
3 created, it shall, on a reference under s.45(2), decide the following additional questions.”
4 Well question (a) has been decided and substantively has been decided lawfully. Question
5 (b):

6 “ (b) Whether, taking account only of any [SLC] and the admissible public
7 interest consideration or considerations concerned, the creation of that
8 situation operates or may be expected to operate against the public
9 interest.”

10 Then 47(7):

11 “The Commission shall, if it has decided on a reference under s.45 that the creation
12 of a relevant merger situation operates or may be expected to operate against the
13 public interest, decide the following additional questions.”

14 Then (b):

15 “(b) Whether the Commission should recommend the taking of other
16 action by the Secretary of State of action by persons other than itself and
17 the Secretary of State for the purpose of remedying, mitigating or
18 preventing any of the effects adverse to the public interest which have
19 resulted from, or may be expected to result from the creation of the relevant
20 merger situation.”

21 Then if one goes to s.54 (2) at p.179, this is where the Secretary of State enters the picture:

22 “The Secretary of State shall decide whether to make an adverse public interest
23 finding in relation to the relevant merger situation and whether to make no finding
24 at all in the matter.”

25 Then if we go to the next page, 55(1) to (3) “Enforcement action by the Secretary of State.”

26 “(1) Subsection (2) applies where the Secretary of State has decided under
27 subsection (2) of section 54 within the period required ... to make an adverse
28 public interest finding in relation to a relevant merger situation and has
29 published his decision within the period so required.

30 (2) The Secretary of State may take such action under paragraph 9 or 11 of
31 Schedule 7 as he considers to be reasonable and practicable to remedy,
32 mitigate or prevent any of the effects adverse to the public interest which
33 have resulted from, or may be expected to result from the creation of the
34 relevant merger situation concerned.”

1 And then the link with the Commission in (3):

2 “In making a decision under subsection (2) the Secretary of State shall, in
3 particular, have regard to the report of the Commission under section 50.”

4 So we submit that there has to be a decision on the adverse effects flowing from media
5 plurality, and in our submission it follows from the Tribunal’s judgment that the appropriate
6 course is to remit the plurality question, again going back to s.120(5)(b), and that is at p.224
7 again if the Tribunal needs to look at it. On this question we note that, unusually perhaps,
8 we are in agreement with Sky.

9 THE PRESIDENT: We noted that too!

10 MR. GORDON: Can I now deal with the opposing arguments? The single argument against us,
11 as we understand it, advanced by the Secretary of State and the Commission, is that remittal
12 would be otiose, and it would be otiose on the ground – it comes to one proposition – that
13 the existing remedy would suffice to address any adverse effects on media plurality that may
14 be identified.

15 The first point, and perhaps the easiest point to articulate, is that neither the Commission or
16 the Secretary of State have gone as far as to submit that remittal would inevitably be otiose.

17 THE PRESIDENT: It is pretty close to it in the skeleton argument.

18 MR. GORDON: Pretty close, and I am going to deal with the construction argument separately
19 and the practical arguments separately still, but the first point to make is, as a matter of what
20 is asserted, and what has been perhaps most materially asserted in the decision of the
21 Secretary of State, it is not submitted that remittal would inevitably be otiose. Can I explain
22 why I make that submission? First, we turn to para.20 of the Secretary of State’s decision,
23 and that is cited in the judgment at para.331, at pp.98-99 of the copy I have at least.

24 Paragraph 20 of the Secretary of State’s decision, which is perhaps what really matters for
25 the purposes of considering remittal, says that the existing remedy: “... is likely also to be
26 an appropriate remedy to address any adverse effects on media plurality.” Sir, can I stop
27 there just to highlight the word “likely”?

28 Similarly, when one looks at the Commission’s written submissions (see para.4) those
29 submissions state – we would say “merely state” – that the Commission: “... does not at
30 present see ...” and I emphasise the words “at present”,

31 “... how an adverse finding on plurality could lead to the imposition of a more
32 onerous remedy than divestment by Sky to below 7.5%.”

33 Sir, what we say about those two formulations is that each of the parties, that is to say the
34 Secretary of State and the Competition Commission, are careful and have chosen their

1 words carefully so as not to shut the door completely on the possibility that there could be a
2 different remedy. We say that those formulations and, in particular, the actual contemporary
3 document (para.20 of the decision of the Secretary of State) are as a starting point crucial to
4 the question of whether it is otiose to remit.

5 THE PRESIDENT: Could you also look at para. 13 of the Commission's skeleton?

6 MR. GORDON: Yes, I will.

7 THE PRESIDENT: It is phrased slightly differently, but I am not sure the effect is any different:

8 "The matter should not be remitted to the Commission and/or the Secretary of
9 State, at substantial cost to the public purse, if the only realistic outcome would be
10 a further recommendation of a remedy which is already to be given effect in any
11 event."

12 "...only realistic outcome"?

13 MR. GORDON: Yes, I would submit that whether one uses the words "likely" or "at present", or
14 "only realistic outcome", one is in the territory of all those cases which were helpfully
15 addressed by Mr. Justice Megarry in *John v Rees* and you, Sir, will know what I am talking
16 about.

17 THE PRESIDENT: Yes.

18 MR. GORDON: Unanswerable cases that somehow were answered, etc. There is a space, and if
19 there is a space – if there is a space – the critical point of analysis that we would make is
20 this: it is crucial to the question of whether remitting back is otiose, and it is crucial for this
21 reason. The CAT may not, to any extent, substitute its own decision for that of the primary
22 decision maker and we, in our outline submissions at para.11, have compared the powers of
23 this Tribunal under the Competition Act, para. 3 of Schedule 8, much more intrusive powers
24 than would exist in this context. So that is why, as a starting point, and I emphasise it is a
25 starting point, we say that it is a hopeless submission to say that it is otiose to remit when
26 one looks and unravels at what is meant by the word "otiose" in the context of
27 administrative law.

28 THE PRESIDENT: We should also, for the sake of completeness, should we not look at the
29 Secretary of State's latest ----

30 MR. GORDON: Yes, Sir.

31 THE PRESIDENT: -- and in particular para. 16.

32 MR. GORDON: Ah, but I was going to come to that.

33 THE PRESIDENT: Were you? Sorry.

1 MR. GORDON: I was going to approach this on three limbs. The first limb is to say the
2 argument never gets off the ground because it is not otiose if you have regard to the wording
3 of the decision and actually the formulations put. The second argument, however, is to
4 address what they are actually saying as to why they think it is very likely, and so on. The
5 third argument is to submit to the Tribunal that if they were right what wider consequences
6 would it have? That is the practical argument.

7 If I may turn to the way in which the argument is put in a substantive form against us, it is
8 put in slightly different ways, or at least it has been at different times, but it consists of one
9 underlying proposition, and that proposition is that the existing remedy removes Sky's
10 control over ITV, and so the argument proceeds, it is said, that once the remedy is
11 implemented there will be no adverse effect on media plurality, and if that is correct it is
12 said that there is therefore no basis for imposing a more onerous remedy; that is the
13 argument.

14 Now, the Competition Commission's argument (see para. 7 of its submissions) is that both
15 the competition issues and the media plurality issue only come within the scope of the
16 merger regime – I am summarising so I hope it is not an unfair summary – only come within
17 the scope of the merger regime because of the creation of a relevant merger situation. So if
18 the existing remedy has removed the relevant merger situation it must, as a matter of logic
19 (see para. 9 of the Commission's submissions) remove any adverse effect on the public
20 interest resulting from media plurality concerns. That is how we see the argument of the
21 Commission.

22 That submission, now supported by the Secretary of State, but originally formulated slightly
23 differently. Sir, you will recall the decision focused more on s.58A(5) and I will come to
24 that separately. That submission, i.e. the Competition Commission's submission, is, we say,
25 a surprising one. The first point we would make is that it is simply wrong as a matter of
26 statutory interpretation and the reason it is wrong has to be, I suppose, traced back to the
27 three or four sections that link "relevant merger situation" to the Act.

28 The concept of a relevant merger situation is defined in the Enterprise Act in s.23, and we
29 see that section in the Handbook at p.152. The only point at the moment that perhaps I
30 should make is that it links in two sections, either expressly or by necessary implication, it
31 links in s.24 and s.26. What one is looking for in terms of "what is a relevant merger
32 situation?" as s.23 makes clear is the creation of a relevant merger situation at a particular
33 point and in particular circumstances. That point and circumstances take us to s.24 and s.26
34 deals with enterprises ceasing to be distinct enterprises.

1 So the creation of a relevant merger situation is linked, as I say, through the statute to a
2 particular set of circumstances and a particular time, it is the creation of something.
3 When we come to remedies, which is what we are concerned with in these proceedings, we
4 look at s.47(7) and s.55(2), which I have already taken the Tribunal to, but it is quite
5 obvious in our submission that the remedies are looking to the action to be taken to address
6 the adverse effects. What adverse effects? The adverse effects flowing from the creation of
7 a relevant merger situation. I have already made the point that the creation of a relevant
8 merger situation is temporal and circumstantial event and what the Commission and the
9 Secretary of State are looking at is what consequences flow from that event? That is to say,
10 the creation of the relevant merger situation.

11 So the fact that the relevant merger situation may now itself no longer exist says nothing
12 about the adverse consequences flowing from its creation, and the word “creation” was the
13 important word. That is our first point on statutory construction.

14 The second point is really a wider ramification point. We can put this point very practically.
15 As far as we can tell the Competition Commission’s and the Secretary of State’s discretion
16 in respectively recommending and determining an appropriate remedy, whether in respect of
17 adverse consequences flowing from SLC or media plurality has never been supposed to be
18 fettered in the way this argument compels or mandates. It has never, for example, been
19 limited to requiring an acquirer to divest its shareholding to a level below which applying
20 s.26, a merger situation, would not arise. Indeed, s.47(9) (p.174 of the Handbook) I think
21 the Tribunal will remember it, that section deals admittedly with SLC but it must be part and
22 parcel of the same analysis, provides that the Commission must have regard to the need to
23 achieve as comprehensive – and I emphasise the word “comprehensive” – a solution as is
24 reasonable and practical. So “comprehensive” is an important word which shows the
25 breadth of the remedial discretionary area of judgment.

26 The focus under s.47(9) is on addressing the substantial lessening of competition and
27 adverse effects and not on ensuring that the criteria necessary for a merger situation to be
28 created are no longer satisfied.

29 It may be that this Tribunal will recall two things: first, that if the arguments now being
30 advanced were right as a matter of statutory construction, all the points Virgin made on
31 remedy about proportionality and everything else, would not have mattered, we could have
32 been dealt a single blow of the sword with this argument, yet the argument that proceeded in
33 front of this Tribunal was on what was necessary in the circumstances. It will also be
34 important for the Tribunal to recall as a matter of practicality, what is in para. 6.66 of the

1 Competition Commission Report. I can read it, it is in I think the first bundle at tab 1. This,
2 of course, is not a construction argument, but it is a practical argument. Does the Tribunal
3 have it?

4 THE PRESIDENT: Yes.

5 MR. GORDON: I will read it, if I may – I can make the point very simply. We conclude that two
6 remedy options ...” and I underline the word, mentally, the word “options”, “... would be
7 effective in addressing the SLC and consequent adverse effects on the public interest
8 expected following the acquisition by BSKyB of a 17.9% shareholding in ITV.

9 (a) divestiture of the whole of BSKyB’s shareholding; and (b) ...” what I will summarise as
10 “part divestment”.

11 In the event, as the Tribunal knows, the Commission decided on partial divestment on the
12 basis that this would be more proportionate, that is why we had the proportionality
13 argument, but it certainly took the view in its report that it had the power in principle to
14 order full divestment – see the phrase: “Remedy options”, an “option” is necessarily that
15 which one selects of two possible choices. Once you get into the question of proportionality
16 you are into questions of margin of appreciation, discretionary area of judgment, we are
17 back to the same point about what is otiose and what is not.

18 What I am told, and it may strike a chord with the Tribunal, is that in many if not most
19 divestment or prohibition cases, the divesting company is not normally permitted to retain
20 any or more than an immaterial shareholding, and I am given an example in the
21 Commission’s Report on the completed acquisition of Emap plc of ABI Building Data
22 Limited – it may be that the Tribunal has knowledge of that or not. We do not have the
23 documentation here. There the Commission found that the merger would give rise to a
24 substantial lessening of competition and that the only appropriate remedy to address the
25 adverse effects would be for Emap to divest the entirety of the ABI business. We say that
26 there are several other cases where the Competition Commission or the MMC before that,
27 have adopted a similar approach, and Virgin, in its response to remedies (see the notice of
28 application para.3.5) refer to some of these cases in its response on the Commission’s
29 possible remedies.

30 We do make this point because it is a wider ramifications point, it would be in our
31 submission extraordinary if the result of this argument were that the Commission accepted
32 that its discretion as regards remedy to require divestment was limited in the way that the
33 logic of its arguments suggest it is, because it would have a much wider effect on future

1 cases, of course it is not decisive as a matter of construction but it is highly relevant to what
2 may or may not be otiose, and how the Tribunal should approach that question.

3 We make a wider point which is this, that the existing remedy was fashioned only to address
4 the identified SLC. We say that it cannot be assumed that it will be equally effective to
5 address any concerns arising as a consequence of the relevant public interest consideration.

6 The remedy recommended by the Competition Commission was dealing with special
7 resolutions. The very specific objective was clearly linked to the fact that a special
8 resolution was identified as the means by which BSKyB would be able to influence the
9 behaviour of ITV. Again, I do not want to go back and back and back to the judgment, but
10 if I can by reference at least refer to para. 262 of the Tribunal's judgment, p.75 in my copy,
11 what we respectfully did succeed in persuading the Tribunal was of the fragile nature of
12 media plurality, and it is such that once lost it may be extremely difficult if not impossible to
13 restore. That being the case the approach to remedies adopted to address adverse effects
14 arising from that consideration may be very different from those considered appropriate to
15 address SLC adverse effects.

16 The way in which strategic influence may become relevant was articulated by Virgin in its
17 notice of application in this case, can I give the Tribunal a further reference? It is paras.3.73
18 to 3.74 of Virgin's submission to the Competition Commission of 15th June 2007, which
19 was attached to its notice of application. As far as that is concerned, that was dealing with
20 Newscorp's acquisition of 7.5% shareholding in John Fairfax Newspapers in Australia, and
21 the point being made there was that the acquisition was a strategic one; it was a minority
22 holding, it fell below the 15 per cent stake permitted by Australian cross-ownership
23 provisions, but it was enough to influence the commercial decisions being made by Fairfax
24 management.

25 THE PRESIDENT: Was that reference of 3.73 to 74, was that in your notice of application?

26 MR. GORDON: It was. So that is the Competition Commission's argument, that is our response
27 to it and, as I say, that is largely mirrored now by the Secretary of State. I only need to add
28 to our analysis the separate argument – but it is not really separate – which was advanced in
29 the decision (para.20) relying on s.58A (5) of the Enterprise Act. All I think that we would
30 say is this: the Competition Commission considers, as we do but perhaps for different
31 reasons, that s.58A (5) is irrelevant to this question. One sees the Competition
32 Commission's dismissal of its relevance at para.11 of the Commission's outline
33 submissions. But the reason – and the very short and simple reason – why it is irrelevant in
34 our submission is that s.58A (5) is simply a deeming provision which conditions assessment

1 of the sufficiency of media plurality in the first place, but rather like the Competition
2 Commission's argument on other aspects of the matter a deeming provision is only a
3 deeming provision, it says nothing about appropriate remedy. It is merely how you get to
4 the assessment, it has nothing to do with remedy at all.

5 If any of these arguments succeed, that is to say, what is otiose in the administrative law
6 sense? What is the right construction? What are the wider ramifications? In our
7 submission it cannot be said as a result of para.20, which was the question I think the
8 Tribunal posed in remedies, cannot be said that it would be otiose to remit, and we say that
9 if it is not otiose to remit then the matter must be remitted because there is currently no
10 determination at all that stands in law as a result of the quashing that has taken place.

11 Sir, those are our submissions.

12 THE PRESIDENT: Mr. Gordon, if you remove all realistic possibility of influence being
13 exercised over ITV, which is the finding in the report which we have upheld as being at least
14 unimpugned in a judicial review sense, what realistic scope does that leave? I appreciate
15 your fragility point, but what realistic scope does that leave for an additional remedy to cope
16 with any plurality insufficiency?

17 MR. GORDON: It is the fragility point. It is the fragility point which the Tribunal accepts in its
18 judgment at para.262, and that is, in our submission, absolutely crucial because no one
19 knows now how the Commission is going to deal with media plurality, what it is going to
20 say if the matter is remitted. I think the Tribunal makes that point itself, I was just trying to
21 find it in our written submissions where we pick that up from the Tribunal decision. I think
22 it may be around para.27:

23 "… the fragile nature of media plurality is such that once lost it may be very
24 difficult or indeed impossible to restore. That being the case, the approach to
25 remedies adopted to address any adverse effects … may be very different from
26 those considered appropriate to address the SLC."

27 That is why we do submit that one cannot, at this stage, say it is otiose to remit back. I
28 make no submissions about what the remedy would be at the end of the day, and it may be
29 that it would stay the same, but what I do submit is that it is certainly not otiose to remit.

30 THE PRESIDENT: I think you were going to comment briefly on some paragraphs in the
31 Secretary of State's skeleton where they seem to put in slightly more trenchant terms, and
32 that may lead to alternative submissions about fettering and so on, but I think 16 really
33 through to 18 and 20.

1 MR. GORDON: I found it hard to extract from these paragraphs anything more than a mirroring
2 of what the Competition Commission's argument was, namely, that if you take away the
3 RMS you take away the situation that caused the problem, but I may be simplifying it. We
4 have of course put the fettering point, my learned friend reminds me it is in our submissions,
5 the *Venables* case. It is not clear to me how it is put any differently in these three
6 paragraphs. What is said at 18 is, given the Tribunal's affirmation that a reduction of Sky's
7 shareholding to a level below 7.5 per cent is appropriate to remedy the SLC, that seems to
8 be the premise on which it is then said that:

9 "… the imposition of the remedy will result in the position where there is no effect
10 whatever on the sufficiency of plurality of persons with control flowing from Sky's
11 remaining shareholding."

12 We say, as I hope I have indicated, what one is looking at in terms of remedy is the effects
13 by reference to the media plurality concerned, the adverse effects flowing from the creation
14 of the merger situation. If the Secretary of State is correct what it means, in very blunt
15 terms, is that the final remedy for SLC will always be sufficient for plurality, there is a
16 match between them and that seems to follow from para.18. If that is right, and I may have
17 oversimplified Miss Holmes's argument, but if that is right not only does it immediately
18 trigger fettering feelings, intuitions, but it has an artificiality about it which seems not to
19 place enough weight on what we say is the critical element of the fragility of plurality.

20 THE PRESIDENT: Another thing to comment briefly on, no one is suggesting we do not have a
21 discretion under s.120?

22 MR. GORDON: I was not going to suggest that.

23 THE PRESIDENT: No, and no one else has so far. To what extent, in your submission, should
24 we take account of what the ultimate decision makers say is likely to be the result and to
25 what extent should we take account of the implications for uncertainty and costs to the
26 public purse, uncertainty for ITV and its shareholders and so on, that arguably result from a
27 remission?

28 MR. GORDON: In my respectful submission each of those three possible criteria that you, Sir,
29 have identified would be materially irrelevant, legally irrelevant, to the exercise of a
30 discretion.

31 THE PRESIDENT: Irrelevant?

32 MR. GORDON: Irrelevant, and I say that really picking up first of all the point on which we are
33 all agreed that the Tribunal is an administrative law body dealing with judicial review
34 principles, and one will recall I think the talk by Lord Bingham in public law on "Discretion

1 in Judicial Review”, how rarely and how circumscribed it should be in terms of its exercise.
2 I struggle to find any accepted basis for the exercise of discretion to refuse relief on these
3 three criteria. Before we get to the factors which might be said to exercise it they contain
4 two different routes. One of them is what the decision maker says about the likelihood of
5 the final decision. In our submission that is not discretion to refuse relief, that is
6 straightforward application of *John v Rees* principles, in other words, you do not get into
7 discretion, you cannot exercise discretion to refuse relief because the decision maker says
8 that the result will not be any different, because there are all sorts of cases where, once the
9 matter is reconsidered, the result is different. To say the result will not be any different is a
10 fettering of discretion, and if I can pick up a case called *R v North & East Devon Health*
11 *Authority ex parte Pow* about 10 years ago where the local authority said “We do not bother
12 to consult because it will not make any difference to our decision”, and that was struck
13 down as unlawful. We say that second factor is not relevant.

14 The cost to the public purse is again as a matter of discretion not relevant because the only
15 heading under which something which is nobody’s fault but is the consequence of bringing
16 a case has been occasionally turned down, is “administrative inconvenience”. What that
17 means, of course, is administrative inconvenience in the sense of actually being impossible
18 really to implement the remedy. One can think of all sorts of social security examples where
19 you might get into that situation but that is not this, this would be a very great extension of
20 that principle.

21 I am just trying to remember the third – it is categorisation by the decision maker, public
22 purse – uncertainty. Again, if one goes through – and I am going through deliberately
23 because Lord Bingham said they should be closed not open categories – I cannot think of
24 any judicial review decision in the last 20 years where the kind of uncertainty that we are
25 talking about here would ever have been held to be a ground for refusing relief that had been
26 established, after all, if the premise is that the result might be different, then it might be
27 different and I cannot at the moment think of uncertainty being a ground for refusing relief
28 in anything other than a delay case. There, of course, uncertainty can be prejudice to third
29 parties in the statutory sense, that is if you have not brought your case quickly enough, but
30 that is not a ground for discretion for refusing relief once you have your case up and
31 running.

32 We say that we do not get into arguments about whether it is uncertain, whether it is going
33 to cost a lot, whether it is going to get into administrative resource expenditure. The
34 discretion to refuse relief could, we do accept, be exercised under s.120 if the matter was

1 otiose, because then you really do get into an accepted head of discretion, but we say that
2 you do not get into that and it would be hard, even if we were not in any of the territory we
3 are in about why the ramifications and so on, to say that something is otiose to remit when
4 the legislation itself says there must be a determination on X and Y, and currently there is no
5 determination at all. I do not say it is impossible to reach that conclusion but it is a fairly
6 forbidding first hurdle.

7 But the key point in our submission is that it is not otiose, that is the point of substance that
8 we have been trying to deal with. The very logic of the Tribunal's decision on media
9 plurality indicates why it is not otiose. One is looking at what are the adverse consequences
10 flowing from the creation of a relevant merger situation? That creation has a ripple effect,
11 and it has a ripple effect in what kind of influence can be exercised and we say that may be
12 highly relevant to remedy. At the end of the day the decision maker may reject these points
13 but they cannot be dismissed as otiose.

14 THE PRESIDENT: So what you envisage is if it were to be remitted there would then be a
15 separate remedy because you say the existing remedy is sacrosanct?

16 MR. GORDON: Yes.

17 THE PRESIDENT: So there then would be a separate remedy, possibly, if additional effects were
18 found that needed a remedy.

19 MR. GORDON: Yes.

20 THE PRESIDENT: So there would be two remedies effectively. Just another point, while you
21 are on your feet, Mr. Gordon, have you any thoughts about the logistics? Obviously, when
22 there is initially a reference and there are statutory time limits and so on and so forth, first
23 of all for the Commission to report and then for the Secretary of State to take a decision?

24 MR. GORDON: Yes.

25 THE PRESIDENT: On the second time around is it something that the Tribunal should lay down,
26 or should it just let them make some sense of it?

27 MR. GORDON: If there is any possibility of the Tribunal laying down particular time limits we
28 would strongly enforce such an approach. Where we had a little stumbling block in our
29 thinking was finding the Tribunal's power to lay down directions. But, on the other hand, it
30 is possible, of course, to appeal directions under the Tribunal Rules, and one assumes that
31 there is the possibility of the Tribunal making such a direction, and certainly if there is we
32 would endorse that.

33 THE PRESIDENT: Thank you. Mr. Swift?

1 MR. SWIFT: May it please the Tribunal, what I am proposing to do is to follow Mr. Gordon's
2 order – it seems logical - taking question 1 first and then question 2. A number of the
3 points Mr. Gordon has made this morning I believe I am going to cover in my opening, but
4 to the extent the Tribunal considers I am not meeting those points then please ask me the
5 questions as I may have some extra observations as I go along. Starting at the end, as it
6 were, I was not proposing to get into the three criteria relevant to the exercise of discretion,
7 but if those matter are going to be pursued by the Tribunal I would be grateful to put
8 comments in in writing, but we will see.

9 May I deal first with question 1 in which Virgin, the Commission and the Secretary of State
10 are at one if not for precisely the same reasons. The starting point is that the whole of Sky's
11 application in respect of SLC has been dismissed by the Tribunal. The legal effect of that,
12 in my submission, is to enable the Secretary of State to exercise the powers that he said in
13 his decision that he would exercise. It removes any legal doubt as to the Secretary of State's
14 ability to carry out the appropriate action to implement the remedy that was recommended
15 by the Commission and which was accepted in full by the Secretary of State.

16 To the extent that the Tribunal considers that it may have some power to stay, and in my
17 submission it is difficult to see from the legislation where that power would arise from, but
18 to the extent there is a discretion in my submission the following considerations really point
19 overwhelmingly in favour of an early divestment.

20 The first is that this is a completed merger where the adverse effects on SLC and on the
21 public interest are substantial and have existed now for 23 months. The fact that
22 undertakings were given by Sky in respect of the use of that shareholding does not take
23 away what I may call the toxic effect of that shareholding on the development of
24 competition in this important market. It is also very much in the interests of consumers that
25 the shareholding moves from 17.9 to less than 7.5 as soon as is practicable. The quashing of
26 the Commission's findings on plurality therefore has no relevance to the findings on SLC or
27 as to the course of action that this Tribunal should take in respect of question 1.

28 I have to say, speaking on behalf of a public authority, and therefore being extremely
29 careful in what I say, that when I read Sky's submission in respect of questions 1 or 2 with
30 its endorsement of the Virgin arguments in respect of remittal I was expecting to see the
31 word "however", Sky having been opposed to Virgin throughout this case on almost every
32 issue, but I could not find it. I realised that Sky is adopting question 2 because it has to win
33 on question 2 to have any chance of supporting its argument on question 1. In other words,
34 the Secretary of State's remedy should not be given effect to now. Of course, if the Tribunal

1 does remit on whatever grounds the Tribunal thinks is appropriate, but it must be on the
2 assumption that there is some realistic prospect of a remedy more onerous than the less than
3 7.5 per cent, then Sky stands at risk of that more onerous recommendation which it might
4 appeal. So the 23 months might go to 33 months, and in my strong submission now is the
5 time to make the break and to commence the process. There are no alternative public
6 interest arguments that can be made that go anywhere near the overwhelming public interest
7 considerations that demand, if the Secretary of State supports this, steps taken to implement
8 the divestment.

9 THE PRESIDENT: I have to say, Mr. Swift, the Tribunal was never contemplating that it would
10 stay the remedy, or would wish to stay it. I think what our question 1 really was directed to
11 was whether it could stand. Whether its legal basis was undermined by what we had found
12 on plurality. We would not be in the market for staying it if it was otherwise ----

13 MR. SWIFT: Well, in my submission, the Tribunal should be well satisfied that it stands. The
14 Tribunal has answered ----

15 THE PRESIDENT: Well that is what we are obviously interested in hearing about.

16 MR. SWIFT: It has approved the manner in which the Commission has answered all those
17 questions in respect of SLC which it was required to do by the Secretary of State when the
18 reference was made, and that is sufficient under s.47.

19 THE PRESIDENT: It is sufficient the CAT has approved all the ----

20 MR. SWIFT: It has approved all the arguments from the relevant merger situation to the SLC, to
21 the remedies and on each of those aspects of the Commission's decision the Tribunal has
22 been satisfied that the Commission has acted fully in accordance with its obligations under
23 s.47, that being the case that is done.

24 THE PRESIDENT: So you are agreeing with Mr. Gordon there is not a problem in sort of salami
25 slicing the remedy; there can be a distinct remedy for the SLC?

26 MR. SWIFT: Yes.

27 THE PRESIDENT: And another distinct remedy if necessary for the ----

28 MR. SWIFT: If necessary, yes. We say in respect of these "public interest" references the
29 Commission's duty is to make the recommendations to the Secretary of State as distinct
30 from the standard merger references in which the Commission is itself the decision making
31 body, but subject to that the arguments stand.

32 May I turn to question 2, Sir? On question 2, when we put in our written submissions we
33 were putting them in blind and we simply did not know how the other parties would
34 respond. It was perfectly possible that Virgin and its advisers, having considered the

1 Tribunal’s judgment, considered that whatever commercial imperatives had driven them to
2 bring the application, they were satisfied that it would be otiose, it would not be reasonable
3 to make the reference, so our submissions were, indeed, very, very short. But as, Sir, you
4 pointed out in your early observations to Mr. Gordon, the Commission really summarised its
5 position at para.13, where we introduced the concept of a realistic outcome, realistic
6 prospect, that the matter should not be remitted to the Commission “... if the only realistic
7 outcome would be the further recommendation of a remedy which is already to be given
8 effect in any event. To do so would serve no practical purpose.”

9 Also, at 10, which is perhaps the most succinct – I do not know whether you have our short
10 submission before you, Sir?

11 THE PRESIDENT: Yes, I do.

12 MR. SWIFT: At 10, perhaps in the most succinct way we put it:

13 “It is noted that the specified public interest consideration is the need for a
14 sufficient plurality of persons with *control* of media enterprises. By reason of the
15 remedy Sky has no realistic prospect of control of any sort recognised under the
16 merger regime, i.e. material influence, control or ownership, because there is no
17 realistic prospect of even the lowest level of control.”

18 First, may I give the assurance to the Tribunal and to all the parties, and indeed any other
19 persons who may be giving evidence, that if the Tribunal considers that there is to be a
20 remittal, however the process is then determined for handling the remittal, then the
21 Commission, of course, will be acting entirely in accordance with the principles of due
22 process, will listen to all arguments and will come to its appropriate decision and
23 recommendations. So the fact that we have responded in writing, and I am responding today
24 in direct response to questions from the Tribunal, should not in any way be considered as in
25 some way ----

26 THE PRESIDENT: Fettering?

27 MR. SWIFT: “Fettering” was the word I was looking for, yes, “fettering” – we will come on to
28 fettering a little bit later – but I wanted to make sure that there was no risk to fair process in
29 the event there is going to be a remittal.

30 I have always been an admirer of Mr. Gordon’s taxonomy, and I think I agree with him that
31 the Virgin submission can be broken down into three main types of argument. The first – I
32 am largely in agreement with Mr. Gordon – and that is that in the ordinary type of case, and
33 Mr. Gordon has taken the Tribunal through s.43, s.47, the normal type of case, a quashing of
34 an essential part of the reasoning would lead to a remittal. The Tribunal says to the

1 Commission: “You have got it wrong, now make your determination in accordance with the
2 law”, and so we would go back. Indeed, when the Tribunal wrote its judgment you said (at
3 para.265) the Commission might be expected to engage in a detailed, wide-ranging,
4 qualitative assessment on the basis of which the Commission would judge whether the
5 external plurality of the remaining controllers is sufficient which, in a nutshell, put the key
6 issue on media plurality. Then you said it was not possible to say with any confidence what
7 the Commissions’ conclusions on these questions would have been had it directed itself
8 properly. (For the record that is at para.267).

9 There is, in my submission, no duty to remit, otherwise we would not find the expression
10 “may” in the relevant section of s.120, but were the plurality issue to be, as it were, self-
11 standing, all other things being equal, let me put it that way, it may be that the Tribunal
12 would have exercised that discretion. The problem is that Virgin’s first line of argument, as
13 supported by Sky, does not take it very far in dealing with the Tribunal’s second question
14 because there is a serious issue as to the effect of an undisturbed finding that the Sky
15 shareholding will be, as a matter of law, brought down to 7.5 per cent, and that is a new
16 matter; that is the reason why the Tribunal raise question 2.

17 So a general analysis of the provisions of the Enterprise Act can take one so far, but it does
18 not actually deal with the real kernel of the problem, or the issue, that is before the Tribunal.
19 The second type of argument relates to issues of discretion, issues of statutory interpretation.
20 Miss Holmes will deal with this probably in more detail, but Mr. Gordon refers to a well
21 known passage by Lord Browne-Wilkinson in which he uses this expression about “you
22 cannot do a *nunc pro tunc*, you cannot fetter your discretion – we are allowed a bit of
23 Latin ----

24 THE PRESIDENT: You can say as much Latin as you like!

25 MR. SWIFT: I was going to say “gravamen”, but anyway *nunc pro tunc*, and I do not think
26 anybody suggested that in some way the Secretary of State is binding himself, he said
27 “likely”. But what he said in my submission is a statement of the self-evident. He said that
28 once effect has been given to the remedy there will be no change in the number of persons
29 with control of media enterprises arising out of Sky’s shareholding. Virgin say: “That is
30 wrong, that is the wrong consideration.” They are saying that no change, even if it is the
31 restoration of the *status quo ante*, is not a relevant consideration or does not go far enough.
32 But in my submission the Secretary of State made a rather convincing statement, what he is
33 saying is almost a statement of the self-evident. How can it be seriously said that with 7.49
34 per cent the News Corporation or Sky has control of ITV? It cannot be; it cannot be, nor do

1 I hear any argument from Mr. Gordon to say “It might be.” On any proper statutory analysis
2 7.49 per cent enables ITV to carry on its media enterprises under its own ownership
3 completely unfettered. Sir, you mentioned the brief observation put in by ITV, one might
4 have thought that if anybody was concerned about the risk to their ability to make a
5 contribution to the public interest on media issues it might have been ITV, but they are not
6 worried about the 7.49 per cent .

7 The third type of argument is one that reveals the Commission’s concerns about what I call
8 the “unless” issue, and that is really the way we have tried to approach this issue before the
9 Tribunal, the “unless”. Unless there appears to be some real and substantial argument that
10 7.49 does not, and cannot be expected to remedy an adverse public interest effect on
11 plurality, but it clearly does on SLC, then the exercise in a remittal does indeed seem otiose.
12 The Tribunal will recall you used a very colourful phrase, you said that the divestment to
13 7.49 “neutralises material influence” – “neutralises material influence” – and in my
14 submission following the “unless” argument, unless the Tribunal has very strong grounds
15 for predicting or thinking that when you neutralise for one the neutralised shareholding has
16 some potency in respect of plurality, then it would seem difficult to see why this extra long
17 process has got to be gone through.

18 In my submission Virgin’s argument on relief suffers from exactly the same problem as
19 that identified by the Tribunal at para.318 of your judgment, and that is the divestment to
20 zero and divestment to 7.49 “would be equally effective” – equally effective in doing what?
21 I ask rhetorically. In removing any realistic prospect that Sky would have or be able to
22 exercise any level of control over ITV. When considering media plurality and the risk of an
23 insufficient number of enterprises is that not the key issue?

24 How does Virgin evade the consequences of the equal effect finding by the Tribunal? There
25 appear to be two strands in the argument. First, that the finding was made by reference to an
26 ability to block a special resolution, and that was all to do with an examination of the
27 shareholding and the relative powers that different shareholders had. The second appears to
28 be the fragility argument, that more onerous remedies may in principle be called for when
29 freedom of speech and other matters relating to the independence of the media are at issue.
30 In my submission it cannot be fragility, because fragility is really dealt with in the deeming
31 provisions (58) where, as the Tribunal found the Commission would have to proceed on the
32 plurality issues on the basis of a fiction that News Corporation and Sky controlled ITV
33 media enterprises. The shareholding might not be relevant, for this purpose ITV could cease
34 to exist , all its media enterprises would be under the control of News Corporation and Sky.

1 Virgin accepts, at para. 22 of its submission, that deeming provisions are not relevant to the
2 remedy stage. In my submission when you get to the remedy stage reality steps back in, and
3 when you have reality you can look at the level of shareholding as divested down to 7.49
4 and you then, just as in the case of SLC – I say “you”, we, the Commission – then have to
5 comply with the obligations in s.47(9) to determine a remedy which is comprehensive, the
6 phrase: “comprehensive, reasonable and practical”, which we know incorporates the notion
7 of proportionality where two remedies are equally effective.

8 As to the suggestion that the Commission’s remedy was made by the ability to block special
9 resolutions, in my submission that is far from the complete picture. The Commission’s
10 recommended remedy for the SLC will remove Sky’s ability materially to influence ITV,
11 i.e. to control it. If that is the effect of the remedy, irrespective of the context in which that
12 remedy was devised it is hard to see what room there is left for a different remedy for
13 plurality.

14 Pausing there, Mr. Gordon was referring to the distinction between the creation of a merger
15 situation on the one hand and the adverse effects that flow on the other. The Tribunal will
16 recall that we went through these steps at the hearing in June and, yes, of course, something
17 else has to be determined before a relevant merger situation can give rise to adverse effects,
18 and that is why the Tribunal went into the assessment of probabilities and what was likely to
19 happen. But, of course, the material influence, the 17.9, is the key, it is the mechanism by
20 which Sky is able to exercise rights, powers, in such a way as to affect the outcome. This is
21 why there is such a close connection between the merger situation and the adverse effects.
22 If you “neutralise” (using the Tribunal’s expression) that shareholding then you neutralise
23 power, whether it is the material influence level, or control, that is what has happened.
24 What is left? All we appear to be left with is something called “we cannot assume that the
25 Commission would adopt the same remedy”. That is the expression that Virgin uses in its
26 written submission – “We cannot assume that”. But this Tribunal has shown in its
27 assessment of the Commission’s decision, when examining prognoses, that one cannot
28 assume that is not in a sense sufficient. In my submission the Tribunal needs something
29 more substantial, as we said in para.13, something which establishes, is seriously arguable
30 that the public interest risks of the adverse effects that are deemed to be created by control
31 will still be there as priority issues on a shareholding of 7.49 per cent, and we have not seen
32 anything in the written submissions that addresses those arguments, nor have I heard
33 anything this morning that addresses that point. It remains speculation, not a realistic

1 prospect. The only realistic prospect is that ITV would remain an independent owner of
2 media enterprises, fully able to make its contribution to those public interest objectives.
3 In conclusion, my submission is that the Tribunal should look at the reality of the picture.
4 The reality is that with immediate effect – hopefully with immediate effect – the Sky
5 shareholding will be reduced to 7.49%. We do not think that it is seriously suggested that
6 at that level ITV is not in sole control of its media enterprises, which is the essence of the
7 plurality issue. Virgin’s arguments that on remittal the Commission and Secretary of State
8 may come to a more onerous decision are at best speculative and fail to give proper weight
9 to what, in my submission, is the key issue, there is no realistic prospect of Sky exercising
10 control on ITV whatever the circumstances, whatever the motive.

11 That was how I was proposing to end, but can I add a footnote, which is a rather dull
12 footnote? I saw the reference to the Emap merger in 2005. As the Tribunal knows, the
13 Competition Commission issues many, many reports on mergers, both before and after the
14 Enterprise Act 2002. I would not accept for one minute the categorisation, and I think it is
15 fair to appoint it as categorisation, that in some way the ordinary remedy for a finding of
16 adverse effect is a divestment of an entire business, or a divestment of a shareholding down
17 to zero. It is absolutely clear what is guiding the Commission are two things. First, above
18 all, it is the statutory obligation in the Enterprise Act to provide a comprehensive solution
19 insofar as is reasonable and practicable; and secondly, the Commission’s formulation of the
20 guidelines which are themselves required to be made under the statute, which it takes
21 account of; there is no such presumption and, indeed, I looked at the *Emap* case, and there
22 was quite a considerable debate on whether behavioural remedies would be suitable, or
23 whether there could be divestment; there is nothing in the point. Those are my submissions,
24 I hope I have made them clearly, but if there are any questions then please put them.

25 THE PRESIDENT: Thank you very much. Miss Holmes?

26 MISS HOLMES: Thank you, Sir. I, too, will deal with the first question rather more briefly than
27 the second, and deal with it first, that is the effect of the Tribunal’s decision (if any) on the
28 existing remedy. It seems to me that there are two components to this question. The first is
29 a substantive question and the second is more procedural. As to the substantive question I
30 think it is right to say that every party is in agreement, i.e. there is no effect arising from the
31 Tribunal’s decision on the substantive remedy to address the SLC alone, and I do not take
32 there to be any dispute about that.

33 But the second aspect is more of a procedural or technical aspect if you like. It is in relation
34 to this aspect of the question that Sky attempt to make a rather technical point that the effect

1 of the Tribunal’s decision is that the Commission and the Secretary of State have, if you
2 like, only made partial decisions in some respect.

3 In our submission the Tribunal’s decision for the reasons already alluded to or, in fact,
4 already stated quite clearly by Mr. Swift, dismissed all the grounds of appeal in relation to
5 the SLC and the appropriate remedy, and it is quite clear, we say, that those decisions
6 therefore remain unaffected. But it is perhaps useful nevertheless, to have a look at the
7 statutory provisions which set out what the Secretary of State was obliged to do and we say
8 we can see from that that there is still a full, not incomplete, as Mr. Flynn would ask the
9 Tribunal to find, but a full set of decisions which can now be implemented.

10 The starting point is s.54(2) of the Enterprise Act, and I do not propose to spend too much
11 time, because the Tribunal has already been taken to these. (P.179 of the Handbook).

12 “(2) The Secretary of State shall decide whether to make an adverse public interest
13 finding in relation to the relevant merger situation and whether to make no
14 finding at all in the matter.”

15 Now, the Secretary of State has made those decisions and that, if you like, survives the
16 extent of the quashing that the Tribunal has imposed.

17 The next step is the question of remedies, and we can just turn over the page and go to
18 s.55(2) of the Act. We can see:

19 “(2) The Secretary of State may take such action under paragraph 9 or 11 of
20 Schedule 7 as he considers to be reasonable and practicable to remedy,
21 mitigate or prevent any of the effects adverse to the public interest which
22 have resulted from or may be expected to result from the creation of the
23 relevant merger situation concerned.”

24 Now, again the Secretary of State has done that, and that decision survives the Tribunal’s
25 decision. Mr. Swift has already referred to the relevant provisions and the Tribunal has
26 already been taken to them insofar as they relate to the Commission and exactly the same
27 can be said of those provisions, and I will not take the Tribunal to them, but they are in
28 s.47(2) and (7).

29 The first point arising from that is that there is simply no impact on the remedy insofar as it
30 relates to SLC arising from the Tribunal’s decision. Secondly, what Sky say is that the
31 Secretary of State’s decision under s.55(2) is somehow incomplete, but we can see that there
32 still remains intact a complete decision which should be enforced, and which can be
33 enforced. Indeed, on Sky’s own argument, which it sets out at para.16 of its written
34 submissions for this hearing, the matter it wants remitted is the question in relation to the

1 specified public interest consideration, set out in s.47(2)(b), that is it wants quite a distinct
2 matter remitted, and a remittal of that matter does not impact upon the complete set of
3 decisions which I have taken the Tribunal to which remain in place.

4 THE PRESIDENT: Sorry, which paragraph was that again?

5 MISS HOLMES: That was para.16 of Sky's written submissions.

6 THE PRESIDENT: Thank you very much, yes.

7 MISS HOLMES: On that point, in conclusion, there is a decision in place by the Commission
8 under s.47(2) and 47(7) and we say, with respect to the Tribunal rightly so, and by the
9 Secretary of State under s.54(2) and s.55(2). These decisions, and in particular the Secretary
10 of State's decisions are enforceable and survive the Tribunal's ruling.

11 I turn now to the second question. The Secretary of State's written submissions deal with
12 why we say any remittal of the effect of the merger on the sufficiency and plurality of
13 persons with control over media enterprises would be entirely futile. I would perhaps start
14 by responding partially to Mr. Gordon's emphasis on the Secretary of State's decision. Of
15 course, when the Secretary of State made his decision, the Secretary of State was not
16 making a decision as to this question hence the use of the word "may", and we put it no
17 further than that. The question for the Tribunal now is whether the Secretary of State was
18 right when he said "may" – these are the questions which we have addressed in our written
19 submissions, and which we will expand upon now. It is simply misleading, with respect, to
20 emphasise the use of that word "may" at that stage, of course the Secretary of State would
21 have been wrong to make a final determination on that at the point of the initial decision.
22 Beginning with Sky in relation to the second question, Sky have not specifically addressed
23 the futility points, if I can put them that way, made by either the Secretary of State or the
24 Commission, rather it seems to assert and this is at paras. 5 and 6 of its written submissions,
25 since the Tribunal found that it is not possible to say with any confidence what conclusions
26 the Commission might have reached if it had carried out the assessment as the Tribunal
27 found it should have, it follows that it is equally impossible to say what conclusion the
28 Commission would have reached as to remedies, had it taken the appropriate starting point.
29 That, we say, is simply a *non-sequitur* and it simply does not follow from that that one
30 cannot, on the specific facts of this case, determine what remedial action might follow a
31 different determination on the plurality question.

32 Mr. Gordon, in his written submissions, and indeed, in his oral submissions today, makes
33 some attempt to address the futility argument, but in so doing, and this is perhaps the most
34 important point in our respectful submission, loses sight of the precise nature of the plurality

1 public interest concern, which any remedy arising from a finding of an adverse public
2 interest in this context must necessarily address.

3 Before I go any further, it is perhaps just reminding ourselves what that public interest
4 concern is, and if one turns to p.181 of the Handbook, this is s.58(2C)(a) the relevant public
5 interest which, even if it was found to lead to adverse consequences, which must be
6 remedied, is the need in relation to every different audience in the United Kingdom or in a
7 particular area or locality of the United Kingdom, for there to be a sufficient plurality of
8 persons with control of the media enterprises serving that audience. I quite clearly
9 deliberately emphasise the words “with control”. It is not, with respect, right for Mr.
10 Gordon to say that the Secretary of State’s submissions in this respect rely at all on the
11 deeming provisions with which the Tribunal has been concerned in its judgment. What the
12 Secretary of State relies on is the plain meaning, the plain words of the relevant public
13 interest consideration which inevitably any remedy responding to an adverse public interest
14 finding must address, and that is the effect of this merger on the sufficiency of persons with
15 control.

16 It follows from that, in our submission, that even if the Commission did find an adverse
17 public interest arising from Sky’s acquisition originally of 17.9 per cent shareholding in
18 ITV, taking into account the plurality consideration, such an adverse public interest finding
19 – and there are two ways of looking at this, there is one way of imagining we are in the
20 position of the Commission at the relevant time, or imagining we are approaching it afresh
21 now that we know that Sky is going to have their shareholding divested – it matters not
22 particularly which we look at it. The Commission have emphasised on the second approach,
23 but the point is that such an adverse public interest finding whether, if there was one at the
24 time, just could not withstand a reduction in Sky’s shareholding to a level at which there is
25 no realistic prospect that that shareholding brought about any change in control. So in other
26 words, whether or not the Commission did it as a whole back when they were making their
27 original determination or whether they go back and do it now, once any realistic prospect of
28 control is taken away we say it is virtually impossible to imagine what further remedy there
29 could be to address any insufficient (or perceived insufficient) plurality arising from the
30 original shareholding in plurality of persons with control, and that is because now there is no
31 change in the number of persons with control.

32 THE PRESIDENT: Yes, so I can see you say you do not rely on the deeming provision for that.

33 MISS HOLMES: Yes.

1 THE PRESIDENT: The deeming provision takes you into a specific situation when you are
2 assessing sufficiency.

3 MISS HOLMES: That is right.

4 THE PRESIDENT: Here you say that you have, as it were, restored the *status quo* in terms of
5 plurality.

6 MISS HOLMES: Yes, indeed, and one way of looking at it, as the Commission have emphasised,
7 is that there would no longer in any event be jurisdiction, if you like, for the Commission to
8 be looking at it, it is as though a merger did not happen.

9 To put it another way and, as I said, there are many ways of putting this, a remedy which
10 takes a shareholding below a level at which the purchaser has any control must necessarily
11 be sufficient to deal with an impact of the merger on the sufficiency of plurality of persons
12 with control. Further, given that the Commission is bound to impose the most proportionate
13 remedy we say it simply could not justify a remedy going further beyond that, and indeed all
14 parties agree that there would be no reduction in that remedy arising from this aspect of the
15 Tribunal's decision.

16 So we get to the question of whether there is any point in remitting this matter in this way.
17 So given that we know the remedy for the SLC is divestment to a level below 7.5 per cent
18 and that that remedy is imposed because Sky cannot exercise any control over Virgin at that
19 level, we know that divestment to at least that level would occur and a remittal would be
20 entirely futile for all the reasons that I have just said.

21 THE PRESIDENT: Mr. Gordon said that the remedy is aimed at the effects rather than at the
22 merger, it is aimed at the effects of the merger – the adverse effects – and he referred to the
23 “ripple effects”. Does your point deal with the possibility of there being some effects
24 rippling through, effects on this plurality consideration, or in relation to this plurality
25 consideration which may be different from effects on competition?

26 MISS HOLMES: With respect, in the abstract we certainly find it difficult to imagine what those
27 might be, given that the effects have to be effects in relation to the sufficiency of plurality of
28 persons with control. So they are the effects we are concerned about, because that is the
29 public interest consideration that we are remedying. It is not for Mr. Gordon to say there
30 might be any number of other perhaps undesirable or consequential effects, and I say that
31 without prejudice to our position that there probably is not, and we certainly have not heard
32 any specific examples but in our submission the Tribunal must bear in mind the kind of
33 effects that the Commission and the Secretary of State must be concerned with and those
34 effects are limited to the effects on the sufficiency of plurality of persons with control. It is

1 difficult, with respect, Sir, to take that matter any further without any concrete examples of
2 what Mr. Gordon says might be effects, ripple-on effects, on the sufficiency of plurality of
3 persons with control. We cannot think of any and indeed, we say in the absence of any
4 concrete examples that there simply is not a point which needs addressing

5 Of course, the situation might well have been different if the remedy to address the SLC was
6 something less than reducing Sky's shareholding to a level below which they had no control.
7 It is hard to imagine when that might occur, but nevertheless that might be if, for some
8 reason, there was another remedy. But the point is the remedy imposed was explicitly
9 imposed to bring Sky's shareholding to below a level at which there was any reasonable
10 chance, or any likely chance that they would have any control whatsoever, any material
11 influence which, as we are aware, is the lowest level of control.

12 I have made the point and, with respect I think the Tribunal has my point, that this does not
13 rely upon the application of the deeming provisions at all.

14 Again a point I have made, but to make it another way, Virgin itself emphasised at para. 23
15 of its written submissions, and Mr. Gordon spent some time emphasising this point but
16 obviously to encourage the Tribunal to a rather different conclusion.

17 The question of remedy insofar as the Secretary of State is concerned is governed by s.55(2)
18 of the Enterprise Act, which clearly provides that the Secretary of State has a wide
19 discretion to take such action as he considers to be reasonable and practical to remedy,
20 mitigate or prevent any of the effects adverse to the public interest, which resulted from or
21 maybe expected to result from the creation of a relevant merger situation, and again we
22 emphasise this to emphasise that what is being remedied (if there is to be a remedy) is any
23 effect resulting from the merger situation, that is from any change in control which we say
24 the Commission, and the Tribunal's decision, and the Secretary of State's decision have now
25 taken away.

26 Virgin are simply, with respect, wrong to say, as they do at para.26 of their written
27 submissions, that it cannot be assumed that the existing remedy, which was addressed solely
28 at the identified SLC, will be equally effective to address any concern arising as a
29 consequence of the application of the relevant public interest consideration.

30 Sir, I do not take Virgin or, indeed, Sky in their written submissions to say that the Tribunal
31 does not have a discretion in the event that it agrees that the Commission and/or the
32 Secretary of State would necessarily come to the same conclusion as to remedies, not to
33 impose, or not to award any relief. I understand that to be common ground. In case there is
34 any doubt about that I do have, and I have not handed up yet and perhaps I can at a more

1 convenient moment when we break, an extract from both **Fordham's** book on Judicial
2 Review and **Smith** which make that unequivocally clear, at least in the case of judicial
3 review courts and, as we all know the same principles apply in these cases.

4 THE PRESIDENT: Sorry, what was the proposition briefly stated?

5 MISS HOLMES: The proposition is that the court may exercise discretion not to provide a
6 remedy if to make an order would serve no practical purpose. It is important, of course, to
7 bear in mind the distinction that doing so is not equivalent to holding that the decision is not
8 unlawful, and of course that sounds trite, but there are many examples. It is important to
9 keep that in mind, so it is not equivalent, if you like, of saying to the Commission: "The
10 Secretary of State, oh, it is okay". The point is that it would simply be redundant if you like
11 to remit it.

12 We say at this point it is of course that if the Tribunal is satisfied that remitting the matter to
13 the Commission and/or the Secretary of State would be otiose that another relevant matter to
14 throw into the mix is the delay that would occur. Perhaps I need to expand on that. The
15 delay would be significant. We take on board the Tribunal's questions as to timetable and,
16 of course, that has been a matter that has bothered us because of course there is not statutory
17 provisions which provide for any such timetable. In those circumstances, in our submission,
18 if the Tribunal were minded to remit it, it probably would be appropriate for the Tribunal to
19 make appropriate directions, but of course that is without prejudice to our very strong
20 primary submissions. It is also relevant to take into account the cost to the public purse, and
21 also as ITV have submitted in their letter in the final paragraph or thereabouts, the effect on
22 ITV and this has now been going on for some time.

23 THE PRESIDENT: You agree with Mr. Gordon that those factors are irrelevant if it is not otiose?

24 MISS HOLMES: Yes, we do. In the event that there is a prospect that the remedy could be
25 different, or there is a material prospect I suppose we would say that the remedy could be
26 different, yes, we do agree that it would not be right for this Tribunal in those circumstances
27 not to remit the matter.

28 THE PRESIDENT: So their relevance would only be on that basis? If we thought no useful
29 purpose would be served by remitting it would boost us in our ----

30 MISS HOLMES: Perhaps if you thought there was a remote possibility, Sir, or something of the
31 kind, and it was a borderline question it would be relevant to throw it into the mix. You
32 would need to think there was a realistic possibility, to put it that way and, to use common
33 jargon in other areas, a realistic possibility that with a different remedy, there could be a
34 different ultimate result. If you thought there was perhaps a remote possibility then we

1 would say it would then be relevant to take into account matters such as the length of time
2 and cost and effect on ITV and shareholders.

3 Sir, unless I can be of any further assistance, those are our submissions.

4 THE PRESIDENT: Thank you very much. Mr. Flynn?

5 MR. FLYNN: Sir, Members of the Tribunal. We agree with Virgin only to a limited extent. Mr.
6 Swift's "however" if not expressly in our submissions is there loud and clear, because we
7 take a very different view from anyone else in this room it would appear, or at least on this
8 bench I should say, as to the meaning of the statutory provisions. We take the view that the
9 question that you have asked of each of my learned friends that have had rather rhetorical
10 answers, the question you ask is whether the findings of the Tribunal have an impact on the
11 remedies decision, we say that it does as a matter of law and construction of the statute, and
12 I will need I am afraid to take you back – but I hope to do it briefly – over the statutory
13 provisions, in order to make that good.

14 Taking our written submissions as a whole, the point that we make in short is that the
15 statutory provisions require the Commission in a reference of this kind to consider SLC, the
16 public interest consideration and, taking those two together, whether there is an adverse
17 effect on the public interest and, if so, to make recommendations as to remedy, and you
18 cannot – to use a phrase that has been used a couple of times this morning – 'salami slice'
19 that issue at the remedies stage.

20 Sir, can I take the Tribunal to the provisions of the Act?

21 THE PRESIDENT: Yes.

22 MR. FLYNN: This is a reference under s.45(2) and in respect of such references – I do not need
23 to read that out – we look to s.47, what does the Commission do? If the reference is made
24 under s.45(2) its first job is to decide whether a relevant merger situation has been created,
25 that is s.47(1) and, if it does so decide, then you go to subsection (2). In that subsection the
26 Commission shall decide the following questions. The first is an SLC question, whether the
27 merger situation has resulted, or may be expected to result in SLC, and then: (b) whether,
28 taking account only of the SLC, the subject of para.(a), and the admissible public interest
29 consideration or considerations – here "media plurality" seems to be the accepted shorthand
30 – "the creation of that situation operates or may be expected to operate against the public
31 interest."

32 You go from there to subsection (7): If it is decided in a s.45 reference that the creation of
33 the relevant merger situation operates or may be expected to operate against the public

1 interest then it must decide what remedial action should be taken under subparagraphs (a),
2 (b) and (c), which I do not need to read out at this stage.

3 It is required to prepare a report on a reference under s.45 and to send it to the Secretary of
4 State, and under s.50(2) “The report shall, in particular, contain –

5 “(a) the decisions of the Commission on the questions which it is required to
6 answer by virtue of section 47

7 (b) the reasons for its decisions; and

8 (c) such information as the Commission considers appropriate ...”

9 And I emphasise those words “required to answer”.

10 Then, I think one goes to s.54, which is the decision of the Secretary of State when he
11 receives a report under s.50, as it says in subparagraph (1). He is required to decide whether
12 to make an adverse public interest finding or not in the words of para.(2) and he makes an
13 adverse public interest finding in relation to a relevant merger situation if, and (a) is relevant
14 here:

15 “in connection with a reference to the Commission under subsection (2) of section
16 45, that it is the case as mentioned in paragraphs (a) to (d) ...”

17 which I did not read out at the beginning, but you know that those relate to relevant merger
18 situation and so forth. So he has to make that decision, and if he does make an adverse
19 public interest finding as defined by that section we go to s.55. You will see what para.(1)
20 makes, if he makes that sort of decision under para.(2) he “... may take such action under
21 paras. 9 or 11 of Schedule 7 as he considers reasonable and practicable to remedy ...” etc.
22 “... the effects adverse to the public interest which have resulted from ... the creation of the
23 relevant merger situation.”

24 So we say that the statutory scheme is very clear, that the Commission and the Secretary of
25 State are required to come to final conclusions on the remedy having examined both the
26 SLC and the media plurality issue. The remedy that the Commission is to recommend has
27 to be made in the light of that overall examination. Plainly, the result of the Tribunal’s
28 ruling is that the Commission has not done so and at para.267 of the judgment, which I think
29 has been read to you earlier today, the Tribunal finds that the misdirection by the
30 Commission in relation to the media plurality construction issues is obviously material to its
31 conclusions and that it is impossible to conclude with any confidence what conclusions it
32 would have reached if it had properly directed itself as to the meaning of those provisions.
33 So we fail to understand how it can be said to you today that it is obvious from the report
34 that whatever they might have decided if they had looked at media plurality in the correct

1 way that they would have reached the same conclusion in respect of remedies. That is why
2 we say as a result of the Tribunal’s ruling the report that the Secretary of State has received
3 is vitiated and “incomplete” – a word we used – it does not meet the standards that are set
4 out in s.50 at para.2, and it follows that his decision likewise is flawed. The Secretary of
5 State, just like the Commission, is required to take a decision on remedies having considered
6 the full effects on the public interest arising from both SLC considerations and, in this case,
7 media plurality considerations. We say that this matter cannot be pre-judged for the
8 essentially pragmatic reasons that the respondents give. The two channels, the SLC channel
9 and the media plurality (in this case) consideration flow into a single remedies assessment.

10 THE PRESIDENT: Mr. Flynn, do you suggest there would be any problem with having a
11 different remedy for a different effect. Could you have a behavioural remedy to deal with
12 one effect, an adverse effect that has been found, and a divestment remedy for another
13 effect? Could you salami slice to that extent?

14 MR. FLYNN: The Commission has a range of possible remedies at its disposal to recommend,
15 and the Secretary of State has a range of possible action that he can take under the statute,
16 but the decision as to which and how many elements from the armoury should be deployed
17 has to be made on the basis of a proper assessment. Essentially you might be saying: “Why
18 not let the SLC remedy go ahead now because the media plurality remedy might be
19 something different?” Well, it might but that is a matter to be addressed, in terms of the
20 statute, in the round.

21 THE PRESIDENT: With all due respect it could only make things worse for Sky could it not? If
22 we remitted and they found sufficiency was fine even on what we would say was a correct
23 approach, then the matter would fall. If they found that there was insufficiency on that
24 approach and there were adverse effects resulting from it, it cannot make life any better for
25 your clients, can it? They could decide, well even though there are adverse effects there is
26 nothing they needed to do about it, but if they did need to do something about it, it would
27 not be a smaller divestiture than was already the case with the existing remedy?

28 MR. FLYNN: No, that is true, Sir, and of course we recognise – just to make that point – we
29 have had a couple of rhetorical points levelled at us. We recognise that the Tribunal has
30 dismissed any challenge in relation to the SLC finding and to the remedy imposed in respect
31 of the SLC finding so the way Miss Holmes put it in starting we entirely agree with that, that
32 has happened. The Tribunal has also rejected Virgin’s challenges in relation to the remedy
33 for the SLC finding. So to that extent if there was to be a remittal on the media plurality

1 issue which was salami sliced then of course I recognise on that hypothesis it could only get
2 worse for Sky.

3 THE PRESIDENT: But even if it was not salami sliced, they would still have to deal, since we
4 found there was nothing wrong with their decision on ----

5 MR. FLYNN: That stands, yes.

6 THE PRESIDENT: And the remedy for it would still be the proportionate remedy.

7 MR. FLYNN: Yes.

8 THE PRESIDENT: And nothing else, they found, was effective.

9 MR. FLYNN: But I make the additional point from the point of view of fairness to Sky, that if
10 there is the possibility – Mr. Gordon gave some classification of possibility – if there is the
11 possibility that on remittal an additional element of remedy would be imposed it would be
12 right, as Sky has the right to expect under the statutory provisions (as I submit they should
13 be read) that that remedy be imposed and, more particularly, implemented in one go. Let us
14 say that Virgin are right, since that is what they will be contending if there is a remittal – as
15 they have throughout – that there is an adverse effect on media plurality for which the only
16 conceivable remedy is full divestment or something down to something truly insignificant.
17 Now for Sky to have to do that ----

18 THE PRESIDENT: Two bites.

19 MR. FLYNN: -- in two goes with all the risk that that involves I submit is unfair and not at all an
20 appropriate way of handling this. If there is to be remittal, we have our legal submissions
21 and we say the necessary consequence of your finding is that the remedies decision is also
22 undermined and should be remitted, you cannot legally divide it. If you are against us on
23 that we would still say that the appropriate course, if it is to be remitted, is for the
24 Commission to complete its work, the remedies issue on that side to be reassessed and then
25 an implementation period. We are not saying or seeking any form of stay here, that is a
26 matter initially for discussion with the authorities, but that is a point I make very strongly,
27 that it would be wrong and unfair on Sky for it to be divided up in those two stages.

28 THE PRESIDENT: We are still on question 1 which is the legal effect of the ruling. But
29 supposing for a moment you were right that it should have been done in that way as a global
30 remedy, or at least at the same time, we still have a discretion do we not as to what we quash
31 or set aside?

32 MR. FLYNN: Yes, you have a discretion as to what you then do, that is my legal point that you
33 have it. Having set aside the decision on the media plurality because the statutory

1 procedures have not been followed, the necessary consequence is that the remedies findings
2 fall with it.

3 THE PRESIDENT: So we do not have a discretion once it comes to that bit? We have to set
4 those aside?

5 MR. FLYNN: On that bit, in my submission it follows that that is the effect of the judgment, you
6 have already set aside the decisions as they apply the media plurality provisions. The area
7 of your discretion is what do you do next? We say the only possible answer must be that it
8 be remitted for reconsideration.

9 You say it can only get worse for us, of course everything that Virgin say in relation to
10 media plurality we, and possibly others, would be fiercely resisting but our submission is
11 that the Tribunal cannot effectively pre-judge those issues and say that it does not matter
12 because the existing remedy which was decided only in the light of an SLC finding will
13 necessarily be adequate for any conclusion the Competition Commission might reach in
14 relation to media plurality as properly understood in the light of the Tribunal's judgment and
15 therefore focusing more on external plurality than internal plurality.

16 I think I have covered, at least in brief, the legal submissions that we wish to make; they are
17 summarised in the written submissions although I think the force of them possibly had not
18 been appreciated fully and Mr. Gordon certainly should not mistake concision for force or
19 strength of feeling. We are not putting this weakly, we make it as a fundamental submission
20 of law.

21 THE PRESIDENT: Yes, just so there is no mistake about it, it is your submission that even if it is
22 otiose to remit because the same decision is for all intents and purposes on remedy
23 inevitable?

24 MR. FLYNN: I think I have put it this way, correctly or otherwise, that for you to determine that
25 it is otiose, or accept submissions that it is otiose, is in fact deciding the question that is for
26 the Commission and the Secretary of State and that is again what we said in our written
27 submissions. It may be otiose in the sense that each of the decision makers here represented
28 says that they have not made their mind up, they just cannot imagine a different
29 circumstance.

30 THE PRESIDENT: Let us suppose there had been full divestiture ordered as the remedy – we are
31 in the same position in all other respects – we still could not decide that no worse a remedy
32 was likely – was realistic – and we would then still have to remit?

33 MR. FLYNN: We are in sort of Wittgenstein territory here in speculation I think. But is it not
34 conceivable in certain circumstances not only divestment but other behavioural

1 undertakings about how a company sought to relate in commercial dealings with another
2 media company might also be thought to be appropriate. I am speculating wildly, but again
3 I do not think that is an issue that one should pre-judge, that is an issue that should be left to
4 the statutory decision makers.

5 THE PRESIDENT: It does not leave much discretion to us in s.120, does it? That follows on,
6 you say, mainly from the legal point?

7 MR. FLYNN: Yes, precisely. (After a pause) And Mr. Wotton observes to me that if you have a
8 discretion it is at that point that the points that I have made in relation to fairness to Sky
9 should be taken into account in exercising it.

10 THE PRESIDENT: Yes.

11 MR. FLYNN: Sir, unless I can assist further, those are the points I needed to cover.

12 THE PRESIDENT: I just want to make sure I have it absolutely clear – I think I have. That
13 covers question 2 as well? That covers remission as well?

14 MR. FLYNN: Sir, yes, we essentially see it as a single question.

15 THE PRESIDENT: Yes, a single question. The remedy has to fall because of the finding, the
16 existing remedy must therefore suffer the same fate and the result of that is that there has to
17 be a remittal so that the whole matter can be dealt with properly?

18 MR. FLYNN: Yes, but as we made clear in our submissions what is to be remitted, what needs to
19 be reconsidered is solely the ‘media plurality channel’ as I have called it, and the SLC bit
20 will survive, but then the Commission and in turn the Secretary of State will need to form a
21 view on the remedy issue in the light of a consideration in the proper statutory framework.

22 THE PRESIDENT: Yes, thank you very much. Mr. Gordon?

23 MR. GORDON: Sir, I am not quite sure what I have the right to reply on, but at the moment –
24 unless I am stopped – I would like to reply on both questions; certainly, I would start with
25 question 2.

26 THE PRESIDENT: Yes.

27 MR. GORDON: My learned friend, Mr. Swift, appeared to contend that para.318 of the judgment
28 at p.94 contained the solution to question 2.

29 THE PRESIDENT: Neutralising the material influence.

30 MR. GORDON: Exactly. We say that the clear answer to that point is that the prospect of
31 influence may not harm SLC, adverse consequences flowing from SLC, but may harm
32 media plurality. In other words, there is a conflating again of the situation which gives rise
33 to the creation of a relevant merger situation and the question of remedy. Really that was
34 his point. He also moved to s.58A(5), which I am going to move to as well very briefly, to

1 address Miss Holmes’s point, but that apart his analysis came down, in my submission, to a
2 footnote on the *Emap* case which I am not going to respond to given all the other cases we
3 have cited on remedy are before the Tribunal. Then a reality question, as I understood it,
4 about “What is the point?” The point I would make about that is that this Tribunal is not
5 hearing substantive argument on remedy at this stage, it is simply dealing with the effect of
6 the judgment on whether or not it is otiose to remit. So the key argument of Mr. Swift
7 focuses upon the neutralisation of the situation giving rise to the remedial jurisdiction and
8 the Tribunal has our answer to that. There is a confusion between the adverse effects
9 flowing from SLC on the one hand, and the adverse effects flowing from media plurality on
10 the other.

11 The point made by Miss Holmes, which echoes but does not quite replicate the point made
12 by my learned friend, Mr. Swift, focuses upon one word in s.58(2), which is the word
13 “control”. But the fallacy of focusing upon that word is that it assumes that the concept of
14 control for the purpose of identification of a public interest consideration as fragile as media
15 plurality and the remedy for addressing public interest considerations are one and the same
16 as the word “control” as it occurs in s.26 and as it occurs in the jurisdiction created by the
17 creation of a relevant merger situation. But the answer to the point is that the word
18 “control” is of course not defined in s.58 itself, either in s.58 or in s.58A(5). As far as
19 s.58A(5) is concerned, that is a deeming provision but it is not an exhaustive statement,
20 indeed, I think the Tribunal – in our submission correctly – used the words “particular
21 situation”. It does not define the circumstances in which a person may be in control for the
22 purpose of what is the relevant public interest consideration that we have to meet. Putting
23 the matter as concretely as I can, if we go back to this *Fairfax* case, which was not about
24 commercial or investment decisions, but was actually about editorial control, what we are
25 looking at here, in my submission, is the possibility of strategic influence being exerted with
26 a degree of influence that can affect editorial control. So to rely upon a deeming provision
27 in a particular situation, or an undefined word in a section (that word being “control”) is, in
28 our respectful submission, to miss the whole point of the public interest consideration in
29 question. Once one focuses upon that fallacy, or I should say in fairness to Miss Holmes,
30 the two fallacies – the fallacy of para.318 of the judgment and the fallacy of control – it
31 becomes, in our submission, clear that the issue before the decision maker on remittal is not
32 an abstract question but is a real question. As to the strength of the question or the strength
33 of its resolution, that is not a matter for this Tribunal to address today at all, in my
34 submission.

1 With great respect that is what we say are the answers to the two addresses put forward by
2 Mr. Swift and Miss Holmes.

3 THE PRESIDENT: I wonder if that is an answer to Miss Holmes's point though because what
4 she says is you look at the number of controllers and the sufficiency of the number of
5 persons in control.

6 MR. GORDON: Yes.

7 THE PRESIDENT: And if the remedy that has been granted restores the *status quo* so the
8 sufficiency is precisely the same as it was before, or the number of controllers – sorry – the
9 number of controllers is precisely the same as it was before the merger, how can there then
10 be any adverse effects which have not been adequately neutralised?

11 MR. GORDON: That comes straight back to the point I made earlier, which is that the
12 identification of the public interest consideration, the adverse effects flowing in terms of
13 remedy comes from the creation of a relevant merger situation.

14 THE PRESIDENT: What ripple effects could there be? That is the point that is being made, what
15 could there be? What could those ripple effects be? They have to be in some way related to
16 the public consideration interest in (2C)(a) do they not?

17 MR. GORDON: I do not know what page it is on ----

18 THE PRESIDENT: It is p.181.

19 MR. GORDON: I am very grateful. The public interest consideration in 58(2C)(a) – which is
20 what I think, Sir, you are looking at?

21 THE PRESIDENT: Yes.

22 MR. GORDON: -- does not have the effect that the word "control" has the limited effect of
23 meaning a person with, as it were, the stake necessary for control under other parts of the
24 Act. In particular, if one goes to 58A(5) it should not, in our submission, be assumed in the
25 context of a deeming provision that a lesser degree of control than that specified in 58A(5)
26 does not engage adverse effects on media plurality. In other words, 58A(5) is not dealing
27 with anything more than the specific situation that it there contemplates.

28 THE PRESIDENT: I think that is right, I think Miss Holmes says it does not matter about
29 58A(5).

30 MR. GORDON: She does say that, but the point we make is that the word "control" in 58(2C)(a)
31 is not a term of art restricted to majority holdings – I put that rather loosely. In other words,
32 when you are looking at media plurality and the remedy for it what you are looking to
33 address is a very fluid but important question in terms of freedom of expression, which is, is
34 there a sufficient plurality of persons with control serving that audience. If you have a

1 person with a 7.4 per cent stake – I am transposing the facts of *Fairfax* at the moment – who
2 has got that stake for the purpose of influencing editorial decisions, then in our submission
3 you would fall square within 58(2C).

4 THE PRESIDENT: But you have to give some meaning to “control”, do you not? This is
5 probably an indication that I did not understand your argument first time around. You have
6 to give some meaning to “control”. There is the range of so-called controllers that we see in
7 s.26.

8 MR. GORDON: Yes.

9 THE PRESIDENT: And the lowest form of control there being material influence?

10 MR. GORDON: Yes.

11 THE PRESIDENT: So if you remove, for the sake of argument, material influence, what other
12 form of control could s.58(2C)(a) be dealing with?

13 MR. GORDON: The amount of control necessary to exert influence, adverse public interest
14 effects on editorial control of a newspaper, for example.

15 THE PRESIDENT: It has to be “control” has it not? If you have not even got material
16 influence, how can you actually have any form of control within the scope of anything that
17 this legislation is contemplating?

18 MR. GORDON: That is, in our respectful submission, the question, because it is obvious as a
19 matter of – to use the word that has been used today – “reality” there can be a sufficiently
20 high stake to affect freedom of expression; that must be right as a matter of ordinary reality.
21 The question is, is that concept imported or recognised in 58(2C)(a). Now, in our
22 submission it plainly is not, the word “control” in that subsection is not defined and if you
23 go to 58A(5) in our submission it is clear that the deeming provision is not saying that there
24 cannot be a lesser degree of control and so in our submission, having regard to what
25 plurality is directed towards, that is precisely the kind of question that the decision maker
26 has to consider. It simply is not right to attempt to import a definition to control for the
27 specific purpose of identifying a public interest consideration and the adverse effects
28 flowing from it and the remedy for it, and that is the fallacy in the argument.
29 If the Tribunal thinks that “control” does have a specific meaning when it is not defined in
30 that context then obviously our argument on that particular point would not succeed, but we
31 submit that, as a matter of law, it must be correct – it is not defined, and deliberately not
32 defined.

33 One must bear in mind, of course, that one is looking here at something which underlies
34 plurality, which is the fundamental freedom of freedom of expression, so we do submit that

1 the control has to be looked at in that context, and certainly you cannot exclude that degree
2 of control from the ambit of the subsection.

3 Sir, I do not know whether you want me to – I can – address question 1 or not?

4 THE PRESIDENT: Well if you are minded to.

5 MR. GORDON: I only wanted to say in relation to question 1, my learned friend, Mr. Flynn, in
6 our submission, confuses two different things. The first is the need for exercise of the
7 functions in the legislation itself to reach a decision which is then capable, or perhaps not
8 capable we would say, of being appealed successfully. In terms of the review process, or
9 appeal process, a separate and quite different question arises, namely is the recommendation
10 and the decision indivisible, or is it divisible. We submit that it must be (and is) possible
11 for the Tribunal to hold – as indeed it has done in this case – that part of the decision is
12 lawful, and part of the decision is unlawful. It is in our submission clear although Mr.
13 Flynn, I think, ducked this question when it was first asked and then came to an answer
14 consistent with his analysis, that there must be a discretion not to quash part of a decision.
15 Or, putting it another way, we would say that there cannot be a discretion to quash part of a
16 decision which has been ruled to be lawful, that would be the mirror image, but the
17 impermissible mirror image of discretion to refuse relief. Of course, one has discretion to
18 refuse relief, what one does not have is discretion to grant relief to which a claimant or an
19 appellant is not entitled, yet that is the effect of Mr. Flynn's argument. The position is in
20 relation to the remedial functions or powers of the Tribunal that the Tribunal plainly has a
21 general power at least to quash part of a decision, because that is what s.120 says. I
22 appreciate that s.120 cannot itself, as it were, affect the construction of the statutory
23 provisions in question in relation to the power, but that is only because it does not purport to
24 do that. What s.120 purports to do is to direct itself towards the Tribunal's powers once the
25 decision has been exercised using those powers, and it would be a somewhat strange use of
26 the s.120(5) power to enable it to quash a decision (or part of a decision) which is lawful and
27 to remit back the whole decision for reconsideration when it is inevitable – if it is inevitable,
28 and I appreciate Mr. Flynn has made submissions on that – that the decision has been
29 reached lawfully and does not fall to be reconsidered. So we say that s.120 is the key if one
30 asks the right question which is: is a decision divisible having been made, but containing
31 within it part lawfulness and part unlawfulness? This is, in our submission, just such a case.
32 Sir, those are our submissions.

33 THE PRESIDENT: Thank you very much indeed.

1 MR. SWIFT: I raise this, Sir, really just to follow up the points that Mr. Gordon is making. The
2 Tribunal did ask for written submissions in the first place, and so far as I can see the only
3 submission that Mr. Flynn and Sky made in respect of this issue of construction was at
4 para.19 which is as short as short can be. In my submission when the Tribunal goes back
5 and considers s.47(7) and s.47(9) there is ample – ample – justification for the argument put
6 by Miss Holmes and myself, that that part – the divisible part – in respect of SLC has been
7 properly found and therefore triggers an ability on the part of the Secretary of State to act
8 accordingly, with particular reference to s.47(7) to decide:

9 “(a) whether action should be taken by the Secretary of State under section 55 for
10 the purpose of remedying, mitigating or preventing any of the effects adverse
11 to the public interest which have resulted from ... the creation of a merger
12 situation.”

13 Well, plainly SLC is one of such effects, and s.47(9): “In deciding the questions mentioned
14 in subsections (7) ...” the question of remedies,

15 “... the Commission shall, in particular, have regard to the need to achieve as
16 comprehensive a solution as is reasonable and practicable to –

17 (a) the adverse effects to the public interest, or

18 (b) (as the case may be) the substantial lessening of competition and any
19 adverse effects resulting from it.”

20 Absolutely clear, in my submission, as a matter of construction, and that is not just a literal
21 construction; in terms of purposive construction I would say that Parliament could not have
22 seriously intended that Sky should be, as it were, entitled to sit on this shareholding of 17.9
23 per cent pending the outcome of issues relating to plurality.

24 THE PRESIDENT: I think you could make the same point about “any of the effects” in s.55(2).

25 MR. SWIFT: Yes, I do, Sir.

26 THE PRESIDENT: All right, I am not barring anyone out if they want to make any brief
27 comments since we have taken a particular order. Right, we have not got on as well as I had
28 hoped, I think we are going to have to deal with confidentiality after the break – I hope that
29 does not put people in any difficulty. I am very much hoping also that we can deal with it
30 quite quickly. I do not think there is any point trying to deal with it in five or ten minutes.

31 MR. GORDON: Sir, confidentiality, as far as we are aware, does not concern us, so may we
32 absent ourselves this afternoon.

33 THE PRESIDENT: You have nothing to say, and you are happy, whatever? Yes, of course.

1 MR. SWIFT: Sir, we have one comment to make. (Laughter) It is nothing to do with ITV, it is
2 one paragraph, part of a paragraph raised by Sky, and it may be that we could resolve that, if
3 possible.

4 THE PRESIDENT: Miss Holmes is going to say something similar.

5 MISS HOLMES: Sir, we have no observations to make in respect of confidentiality.

6 THE PRESIDENT: At all?

7 MISS HOLMES: At all.

8 THE PRESIDENT: In that case you can definitely be released. I do not know whether to release
9 Mr. Swift and Mr. Williams. We have got five minutes, I suppose, so why do we not try
10 and deal with that whatever you want to say about this particular paragraph? Does this
11 mean that we have to go into camera?

12 MR. SWIFT: Yes.

13 THE PRESIDENT: I am sorry, those who are not in the confidentiality ring, that includes at the
14 moment, I am afraid, ITV, does it not? You have a lot of points you want to take, I think we
15 are going to have to deal with that after lunch.

16 MR. PRIDDIS: (no microphone) I think we are going to have to deal with it as we go. My
17 submissions are essentially as set out in the letter. I do not propose to expound on them.

18 THE PRESIDENT: I do not think this is going to take more than half an hour at the most, after
19 lunch. Shall we break, can you manage that? We will deal with a short point now, which I
20 am afraid you are not in the confidentiality ring, so we will have to ask ITV to disappear and
21 we will start again at 2 o'clock.

22 (The hearing then went into closed session)