IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 March 2015

Before:
THE HON. MR JUSTICE BARLING
(Chairman)
Professor John Beath
Michael Blair QC

Sitting as a Tribunal in England and Wales

BETWEEN:

VIRGIN MEDIA INC
THE FOOTBALL ASSOCIATION PREMIER LEAGUE
SKY UK LIMITED
BRITISH TELECOMMUNICATIONS PLC Appellants/Interveners

- and –

OFFICE OF COMMUNICATIONS Respondent

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H E A R I N G
DAY ONE

APPEARANCES

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

Mr. Jon Turner QC and Miss Sarah Ford (instructed by BT Legal) appeared for British Telecommunications PLC.

Miss Helen Davies QC and Mr. Richard Blakeley (instructed by DLA Piper UK LLP) appeared for the Football Association Premier League.

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

THE CHAIRMAN: Good afternoon.

MR. TURNER: Good afternoon. I appear today for BT with Miss Ford. If I quickly call the register, to my left we have Miss Rose QC and Mr. Holmes for Ofcom. To my far right, Mr. Flynn QC, Mr. Pickford QC and Mr. Scannell for Sky, and then Miss Davies QC and Mr. Blakeley for the Premier League.

May I ask whether the Tribunal has had a chance to read the skeleton arguments?

THE CHAIRMAN: I think we have read all the skeletons, yes. Thank you all very much for those. Just before I forget, Mr. Blair, who is very industrious, has turned up a case which I confess I have not had time to read properly yet, which does seem to have a bearing on some of the issues. It has a long title, but it is about Mr. Urumov – a Court of Appeal decision where Mr. Justice Eder recused himself, and then the Court of Appeal looked at it. I am not sure it was referred to in any of the skeleton arguments, but I mention it in case people want to have a glance at it and perhaps say something about it.

MR. TURNER: Does the Tribunal have copies of it, or a reference that we can chase down?

THE CHAIRMAN: We have copies of it. (Same handed to the parties)

MR. TURNER: It is most convenient if I kick off anyway, in view of the timing, and Miss Ford and everyone else in the room can be quietly glancing at the case as I speak.

THE CHAIRMAN: I am sorry that we were not able to accommodate your request because it was on a first come/first served basis because otherwise we would have lost the possibility of sitting at all tomorrow, and because we were giving up half of our reading day today it looked impossible, otherwise we would have lost the fixture.

MR. TURNER: As matters have turned out, Lady Justice Gloster wrote last night to say that the hearing is off.

THE CHAIRMAN: Anyway, I am sorry that we could not accommodate you, but no harm done. You are going to kick off, Mr. Turner.

MR. TURNER: Members of the Tribunal I will attempt to keep this as concise as possible. BT considers that a different composition of the Tribunal should adjudicate and rule upon the matter that has been sent back by the Court of Appeal. Ofcom takes the same position. The other parties are opposed.

I am going to focus on the points that are made in our written submissions, and pick out the highlights. We say, first, there are circumstances which create a real possibility, looking at the matter objectively, that this composition of the Tribunal may find it difficult to deal with the arguments on the pricing issues, which are to come in impartially. They include the

Tribunal's statement after the Judgment that even a successful appeal to the Court of Appeal by BT would be unlikely to rescue the WMO remedy and BT's appeal had a lack of utility. Our case is that the test for a judicial Tribunal to recuse itself is met, if necessary, but the true situation is that this is not about recusal.

THE CHAIRMAN: So the application is not?

MR. TURNER: No, it is not about that. This Tribunal is not yet seised of the substance of the remitted question. On the contrary you are deciding whether you should take the case, or whether another constitution of the Tribunal should do so, and I will come to that and show you the correspondence that has come from the Tribunal about how this has been arranged. It is because of that that we say that the guidance given in cases such as *Sinclair Roche & Temperley*. In other cases, and I mention one that Miss Davies has drawn attention to, *Loftus Brigham* which you might have seen in her skeleton. Those apply here and they give a greater flexibility simply to decide that it is better for another constitution to deal with a remittal weighing up everything in the round.

Miss Rose will make supplemental submissions on behalf of Ofcom, and she will raise a separate area of concern that you will have seen from her skeleton on lack of impartiality arising from the speech, and we are going to leave her to cover detailed submissions on that. Given the difficulty of the subject matter, as I say, I will treat this as concisely as I can, and we may be able to finish by the end of the afternoon, counsel have spoken about time estimates, although I have to say it is not guaranteed.

If I then turn to the structure of the submissions I am going to make, I will approach it, with your permission, in this way. First, I would like to pick out certain paras from the Court of Appeal Judgment and that is important because I would like to isolate the error that the Court of Appeal identified, and because it will help cast light on the future task which is involved in assessing the remitted issue.

The second matter will be to turn to the question, broadly, whether a fair minded and informed observer – now I am adopting the classic test on apparent bias ----

THE CHAIRMAN: Yes.

MR. TURNER: -- would perceive a real possibility that you, the original members of this Tribunal would have difficulty adjudicating on the remitted matter impartially.

Thirdly, I will turn from that to focus on the statement from the ruling in February 2013 that it is difficult to see that even a successful appeal by BT would be capable of rescuing the instrument, the WMO remedy. That suggests to the fair minded and informed observer, if not pre-judgment, at least an inclination to decide the issue on the remittal in the same way

as before, concerning the lawfulness of the remedy. We say it reinforces the first set of concerns. Again, picking up something in Miss Davies' skeleton, she has referred to the case of *Locabail* which points out that if there are grounds for doubt, if you are looking at this strictly as an apparent bias case, the right course is not to take the case. She cites that at para. 7 of her skeleton.

Fourthly, I will explain the point that I mentioned at the outset that the right test here is not to look for apparent bias or not. It is not that simple binary approach, such as to justify recusal of a panel already presiding over a matter, because at this juncture the question is broader. Essentially, it is whether, in view of the history of this matter, and in view of all the circumstances it is better that the pricing issue should be approached afresh, and that is the test we say you should apply.

Fifth, and finally, I will comment briefly on Sky's and the Premier League's argument that we should have raised the question of the constitution of the Tribunal before the Court of Appeal or not at all.

If I may begin then with the Court of Appeal judgment. That is in the first hearing bundle (not the authorities bundle) at tab 6. What I would like to do, first of all, is to summarise their essential findings. They say that there were three flaws: first, that the Tribunal wrongly analysed and misunderstood the extent of Ofcom's competition concerns in the Pay TV statement; second, that the Tribunal did not grasp the nature and extent of the challenges that were made to Ofcom's findings and to the exercise of Ofcom's judgment, that those were live in the appeal; and third, that the Tribunal did not ensure, when it was making its own findings of fact that it work out the impact that its own different conclusions of fact would have on all of the relevant conclusions in Ofcom's statement. Then the Court of Appeal concluded in a nutshell that isolating one monolithic competition concern of Ofcom's and disposing of the entire case as to the lawfulness of the WMO remedy without addressing the economic issues on pricing before it was a fundamental error. It meant, in conclusion, that the Tribunal failed to deal with the appeal on the merits, as the legislation requires.

If you have the judgment in front of you, would you go, first, to section IV which is above para.25, and I apologise, in my version this is not paginated. The pricing issues were clear in the statement, in particular in the section on competition issues, section VII, and you see, if you look at para.27 at the foot of that page, the first reference there to the particular competition concern of Ofcom relating to the pricing which is dealt with in section 7, and it is then picked up on the facing page, if you look at para.30: "Section 7 then has two

important paragraphs at ss.7.192 and 193." The judge, Lord Justice Aikens, recites the relevant parts of s.7. That is what they say the statement contains.

Then, if you go to section V above para.39, a few pages on, "Sky's appeal to the CAT and the CAT judgment". You see at para.39 you see the points picked up, that the notice of appeal by Sky addressed the pricing issue, which is now to be the subject of the remittal. If you go six lines or so down:

> "Sky alleged that it was 'price, rather than the availability of wholesale deals' that was at the heart of Ofcom's desire to regulate the market as it proposed. In Section 4 of the Amended Notice of Appeal, Sky referred to Ofcom's 'view' that the rate-card price, which was the basis for negotiations for wholesale supply to other potential retailers, would not allow them to compete effectively with Sky …"

and so on:

> "Sky said that it was clear that 'DTT entry' was perfectly viable at wholesale prices at the rate-card rate or higher."

That was the notice of appeal. Then on the facing page of the judgment at para.41, Ofcom joining issue in its defence, and without needing to read that extensively, the first five lines:

> "Ofcom served a Defence."

Then the judge continues to record Ofcom's defence concerning the price levels, you see the quote:

> "… 'but also that the negotiations would be likely to lead to rate-card price which would not ensure fair and effective competition'."

So those were the pleadings. Then you go from setting the scene to the Court of Appeal's analysis and conclusions, which are just above para.81 in section VIII, entitled "The rate-card issue: analysis and conclusion". Would you go first to para.82 under the heading, "What precisely did Ofcom conclude in the Statement concerning rate-card prices and penetration discounts". You see a few lines into para.82:

> "However, Ofcom's concern about the price at which Sky might be prepared to offer the [Core Premium Sports Channels] CPSCs to other broadcasters at the wholesale level is clearly identified at s.7.192 to 193."

It is then picked up also in para.83, fourth line down, for example:

> "Ofcom concluded 'at the time' of those negotiations that price reduction based on penetration discounts would not meet Ofcom's competition concerns for the reasons it set out at 9.98 and 9.100."

Then 84, perhaps we can go straight to the end of it:

> "Fourthly, because of these conclusions, it was necessary for Ofcom to set actual prices for the WMO remedy, in relation to the provision of SD versions of CPSCs."

So there is the analysis of what Ofcom concluded.

Then at 88, if you turn the page, you have a key paragraph in which Lord Justice Aikens sets out three exercises that the Tribunal was required to carry out. Looking at para.88, third line down:

> "First, the CAT had to ensure that it had correctly analysed and understood the extent of both the findings of fact that Ofcom had made in its Statement and also the full basis on which Ofcom had exercised a judgment to impose conditions in the exercise of its jurisdiction under ***section 316***."

That is the first.

> "Secondly, the CAT had to ensure that it had grasped the nature and extent of the challenge being made to Ofcom's findings and the exercise of its judgment. Thirdly, the CAT had to ensure, when making its own findings of fact on a particular aspect of the Ofcom Statement that had been challenged, that it worked out fully the impact that any different conclusions of fact it made would have on all the relevant conclusions made in Ofcom's Statement (as correctly analysed), both as to Ofcom's findings of fact and as to the exercise of its judgment in imposing the remedy it did."

Then what Lord Justice Aikens does in the remainder of his judgment is to run through those three exercises in turn. The first exercise is considered beginning at para.90, just over the page, and you will see if you look at the foot of that page, para.92:

> "But the broader issue of the possible competition effect of the rate-card price and penetration discounts in relation to other potential competitors, including new entrants, is not discussed."

Then 93 is an important paragraph. The Court of Appeal refers to the peremptory treatment of the pricing issues in the case in your original judgment in the all important paragraph 821, which contains the reasoning in relation to pricing that one does find in the main judgment.

Without needing to read it in detail because you will be familiar with it, I go then to 94 where Lord Justice Aikens turns to the second exercise, understanding the nature of the challenges that have been brought to Ofcom's statement, and you will see from 94 that he

emphasises that the issues were very much live and pleaded out in the appeal. Four lines down he says:

> "On my analysis, there can be no doubt that the rate-card price and penetration discount issues were part of Ofcom's competition concerns, even if they were not its 'key' concern. The issues of rate card-price and penetration discounts were before the CAT on the parties' Notice of Appeal and Defence. As already noted, there were 18 reports or statements relevant to the level of price fixed by the WMO remedy before the CAT."

Where Lord Justice Aikens says: "As already noted", he is referring back to a footnote of his, footnote 49, which you will see three pages previously at the foot of the page which begins with para. 65 at the top. Footnote 49:

> "Miss Rose pointed out at footnote 4 of her written submissions that 18 expert reports or statements were relevant in whole or part to the issue of the level of price fixed on to the WMO and cross-examination of the experts on this topic took seven days before the CAT."

Para. 95, the failure to look into the pleaded issues by looking into what the wholesale prices might have been and what their effects might have been on competition is considered, and this is relevant when one is thinking about what the remittal will involve. Thus, if you look half way down para. 95 you see:

> ". . . the CAT does not indicate what those prices might have been or, more importantly, what their effect might have been on competition. Indeed it emphasised that there was no way of knowing what the outcome of genuine commercial negotiations might be and regarded this as a good reason for it being unnecessary to make further conclusions on this issue. But the very fact that the CAT did not find what actual prices might have been agreed meant that it could not conclude whether or not the prices that might have been agreed would have impeded 'fair and effective' competition."

So that is their conclusions on that point. Then the third exercise is picked up from para. 98.

THE CHAIRMAN: It is worth reading 96, is it not: "Thus, in my view, the CAT has not dealt with Ofcom's finding that the rate-card price is, in itself, an impediment to 'fair and effective', and that is a summing-up, is it not, of what has gone before? A quite convenient summing-up.

MR. TURNER: It is, absolutely. So that finishes: "There is nothing in the judgment that deals with Ofcom's statement in that paragraph", in other words that there should have been. "Nor is there anything in the judgment that explains why", and there should be, "even assuming that finding stood, there was no requirement for the imposition of the WMO prices that Ofcom proposed".

THE CHAIRMAN: Sorry, which finding again?

MR. TURNER: Sir, you referred me to para. 96 quite rightly, and I am saying at the end of that paragraph, just at the top of that page, above 97 you see Lord Justice Aiken saying what was absent from the judgment which should have been in the judgment.

THE CHAIRMAN: "even assuming" – that is the finding he is referring to.

MR. TURNER: Yes. This is not the occasion, I would suggest, for us to go into the detailed discussion between counsel and the Bench about the precise extent of the matters that would be needed to be considered on the remittal, but it is clearly relevant for the Tribunal to have an appreciation of the sort of things that the Court of Appeal has in mind that would need to be dealt with going forward, and that is part of the purpose why I am looking at this now. If you go then to para. 98 you come to the third exercise referred to by Lord Justice Aikens ten paragraphs back, where he finds that that exercise also was unsound. At para. 98 he says:

> "Two reasons were given in [821]. In my view neither was satisfactory. First, as noted above, the CAT did not perform any analysis of what the discounts 'referable to penetration rates achieved by the retailer' would have been."

Pausing there again, implicitly that is the sort of exercise that is needed.

> "So, even assuming such discounts would have been available, the CAT did not and could not have made any conclusion on whether those discounts would not have given rise to any competition concern."

Then at para. 99 he continues:

> "The second reason, viz. that there was no way of knowing what the outcome of 'genuine commercial negotiations' would have been in the absence of likely regulatory action, is equally unsatisfactory. If such an outcome were unknown, then it cannot be said that this must remove the basis for a competition concern. The CAT therefore lacked any solid foundation for holding that Ofcom's concern on rate-card prices and penetration discounts was unsound. The CAT could only do so . . ."

And, again, this helps us understand what they have in mind for remittal:

". . . if it had analysed and reached conclusions on the expert evidence and submissions on price, penetration discounts and competition which, we understand, were before it."

THE CHAIRMAN: Can you just help me on that sentence: "The CAT therefore lacked any solid foundation for holding that Ofcom's concern", which holding is the Court of Appeal referring to there?

MR. TURNER: This is 821 I imagine. If you go back to 98, first sentence: Two reasons were given in [821]. He then continues the overall conclusion that, Sir, you referred to before, drawing the strands together. That begins at para. 100. 821 you can also find reproduced in the judgment itself, if you want to go back to it.

THE CHAIRMAN: I have it anyway, now.

MR. TURNER: You also find it, for reference, above para. 53.

THE CHAIRMAN: I just cannot find that holding in para. 821. I seem to remember wondering about that once before. I have just come fresh to this again, but it may be that there is an explanation for it somewhere.

MR. TURNER: Yes, I am not going to speculate, but the way that I read this ----

THE CHAIRMAN: No, no, I just thought you might be able to ----

MR. TURNER: -- and the submissions made to the Court of Appeal were that if you go to 821, one of the reasons that is referred to there was that because you do not have negotiation on price having taken place, unclouded by likely regulatory action, you cannot draw conclusions that a particular kind of discount structure is going to lead to a particular sort of concern at all. The genuine commercial negotiations the Court of Appeal reads as being an answer that is given by the Tribunal to the concern about pricing that was raised in the particular context of Virgin Media.

We then come to para. 100 and the overall conclusions.

THE CHAIRMAN: Yes, this is a summary, really, is it not?

MR. TURNER: It is a summary except that they draw the final conclusion at the beginning of para. 101 that there are two reasons "why this amounts to errors of law", because there was an issue about whether it was law or not. "First, the CAT has thereby failed to deal with the appeal to it 'on the merits'."

The only other paragraph that I shall briefly refer to and then put this to one side is at para. 118 in the judgment of Lord Justice Vos, two pages on.

THE CHAIRMAN: And it was based on an incomplete set of conclusions I think?

MR. TURNER: Yes, it was based on an incomplete set of conclusions and analysis.

THE CHAIRMAN: Because we had not reached any conclusion about the ability to compete of hypothetical people on the rate-card basis and penetration discounts, and we had given insufficient reasons for not reaching that conclusion?

MR. TURNER: Yes, for stopping short before going on to deal with all of those.

THE CHAIRMAN: Yes, so that was the incompleteness as it were, as I understand it, anyway.

MR. TURNER: That is right. Picking up the third of his three reasons at para. 88, that it is necessary then to go on and say ----

THE CHAIRMAN: I think it is worth reading the last sentence: "The only way in which this error can satisfactorily be dealt with is for the order of the CAT . . . to be set aside and for the matter to be remitted ----"

MR. TURNER: Absolutely.

THE CHAIRMAN: "—for further consideration, findings and conclusions".

MR. TURNER: Yes, and we obviously take that as essential. The Tribunal Registrar, in their first letter to us, after the Court of Appeal's judgment was delivered in March 2014 picks that out as the basis for the debate which we are now having.

THE CHAIRMAN: So then you are going to Lord Justice Vos?

MR. TURNER: One paragraph, 118. He essentially says that it is unlikely that there was not a sufficient competition concern to warrant a remedy. He says that because the focus which is to be explored now for the remittal – Sir, I adopt what you have just said – is on possible, hypothetical new entrants to Pay TV, not on BT or Virgin Media. That is, therefore, the exercise that he envisages. He said: "That was what led to the WMO remedy", his last sentence, and that is what he envisages should be done.

THE CHAIRMAN: He goes on in 120 to say that and the penetration rate discounts amount to an additional free-standing competition concern that the CAT needed to deal with.

MR. TURNER: That is right. Standing back, the purpose of showing you that judgment is twofold. First, to engage with you, Sir, on that point, it shows the nature of the exercise that they envisaged taking place on the remittal. It also, however, shows, the nature of the errors that it has identified and refers to the essential nature of those errors, the importance of them, and that is an important point because as between the parties you will see there is a difference of view about the significance of this and what that means for the remittal.

To draw the strands together in view of our submissions, the first point is that your judgment was – and I think there is no dispute – a major piece of work, which took over a year after the hearing to produce, and which came to the single conclusion that the WMO remedy was unlawful.

THE CHAIRMAN: Well, actually, to be strictly accurate, that is not quite right, because we had made our findings and then we said that we would leave the remedy to the parties to decide. I think we said it means that Sky's appeal must be allowed, but it was the parties who agreed that the WMO should be set aside as a result of it, and that seemed perfectly logical, but that was actually what happened.

MR. TURNER: Yes, I understand that, and it is a point well taken.

THE CHAIRMAN: I do not know if it makes any difference, but as a matter of accuracy that is what happened. The reason, because it touches on another matter which you raise, which I think was raised during the hearing and can be a matter of some concern generally – I think it goes to one of the other points you are going to touch on in a moment which is to do with what we said about whether the WMO could survive even if the appeal was successful.

MR. TURNER: Yes.

THE CHAIRMAN: One thing the Tribunal has to be careful about, it is not the regulator. So the question I think that that was going to was if some of the strands, if you like, some of the basis for the WMO are established as being wrong or unlawful, or whichever way one wants to put it. Is it for the Tribunal then to determine what the remedy should be, and whether the existing remedy is right? Or, in that situation – subject to any appeals in relation to those grounds - is it for the Regulator to decide whether it upholds its original finding and that is an issue which I think was on people's minds during the hearing, and which I suspect - although you will show it to us in a minute and refresh our memory again – was behind what the Tribunal said in the stay judgment, when it said that it was questionable whether the WMO itself could survive, or whether it would have to be effectively, in parenthesis, remitted for the Regulator, the primary decision maker, to decide what effect, as it were, the knocking away, if you like, of one leg or two legs, or whatever it was, of the stool on which the WMO was sitting. I think the concern was, otherwise, would the Tribunal not be, as it were, substituting itself for the Regulator? I just throw that out now but it is a matter that may feed into your submission on that.

MR. TURNER: I am grateful. A few immediate reactions. The first is that this was a bar stool, it had a single leg, and that leg was kicked away as a result of the findings made in the judgment, namely, that Ofcom's single competition concern was unjustified, therefore the basis that it had given for the imposition of what was considered to be an intrusive remedy was absent.

Secondly, that led to, under s.195 of the Act, the Tribunal's duty to give effect to the decision it had made in the directions that it gave to Ofcom in the remittal. I cannot recall if that is s.195(3) or (4), it is one of the two.

Thirdly, when we, therefore, came to the stay hearing, the issue was about staying that particular relief, those directions that would have been given to remove the WMO, telling Ofcom to do that.

THE CHAIRMAN: Yes, and we granted a stay on that.

MR. TURNER: Yes, and the reason why that was important was because, had Ofcom done that, then the subject matter of an appeal to the Court of Appeal ----

THE CHAIRMAN: Would be otiose.

MR. TURNER: Would have gone. Therefore, it is not a case that the Competition Appeal Tribunal is detached from that elimination of the WMO remedy. It would have given directions to Ofcom telling it to remove the WMO remedy. but for the stay.

To continue, therefore, to draw the strands together from this, the first point which we made in the skeleton argument, and now I am simply adopting the perspective, or seeking to do so, of the fair minded and reasonable observer ----

THE CHAIRMAN: This is a pair of eyes.

MR. TURNER: This is an objective vantage point, which is relevant however one looks at this. We do not say that this is stronger than that, but we do say that this is an important point.

The first issue is that the judgment was undoubtedly a monumental document, and it took a very long time to produce. On the issues which it does cover it is extremely thorough and detailed, and it leads to the conclusion that the basis for the WMO remedy, the single leg of the bar stool, was wrong.

The second point is that, despite the enormous labour that went into the judgment on which the Tribunal wryly commented at footnote whatever it was ----

THE CHAIRMAN: There was a lot of work, yes, for everyone, including your side of the bench.

MR. TURNER: Yes - the Court of Appeal nonetheless found, despite all of that, that it was wrong peremptorily to dismiss the pricing concerns, para.821.

THE CHAIRMAN: We did not deal with them. Everything that we dealt with stands. The bit that we did not deal with, we should have done. Quite frankly, it is very helpful to look at the Court of Appeal decision, but that is what they decided, there was a free standing ground of concern, competition concern, with which we had not dealt, and our reasons for not dealing with it were insufficient, and it had to be dealt with.

MR. TURNER: Yes, absolutely, that the Tribunal stopped short for the reasons given in para.821, and does not go on to do what the Court of Appeal expected it should have done. That was found to be, in the paragraphs that I have shown the Tribunal, a fundamental error in approach to the judicial task.

THE CHAIRMAN: Not to the whole judicial task, just to that. The rest of the 391 pages was untouched.

MR. TURNER: The rest of the 391 pages ----

THE CHAIRMAN: It was not appealed.

MR. TURNER: Absolutely not, because that deals with one area, about which, absolutely, there was no appeal.

THE CHAIRMAN: It did not just deal with one area, it dealt with what was discussed throughout the hearing as the "core concern", which was basically the fact that Sky were said, for want of a better expression, to be theologically opposed to wholesale, and were not entering into negotiations *bona fide* effectively. Then it dealt with a number of subsidiary concerns, what were called subordinate competition concerns, relating to the rate-card price and the supply to the cable companies, and the supply of other services.

It dealt with all those. It did not deal, for the reasons which are insufficient, we now know, with what Lord Justice Vos describes as a free-standing point on whether we should have looked at whether hypothetical retailers could compete effectively with Sky at the rate-card price. That seems to me to be clearly the position.

MR. TURNER: May I deal with that with three remarks? The first is that one may say that it is not the key concern. It is nonetheless, because this was the outcome of the Court of Appeal judgment, a very material concern, and I have shown you the paragraphs that go to that point.

THE CHAIRMAN: It was the only point that was being argued about. It was the only one that was before the Court of Appeal, so of course it was treated ----

MR. TURNER: It may have been the only one that was before the Court of Appeal, but the paragraphs that I have taken the Tribunal to to establish that it was a material and significant element in Ofcom's competition concerns.

THE CHAIRMAN: Of course, that is a given. That is what the Court of Appeal said.

MR. TURNER: That is the first point. The second is, if I may take you back to para.118 in the Court of Appeal's judgment - we do not perhaps need to open it up again.

THE CHAIRMAN: This is Lord Justice Vos.

MR. TURNER: Yes, as he points out there, it is not a likely outcome that if there had been the negotiations for wholesale supply that there would not have been a sufficient independent competition concern to leave Ofcom to impose the WMO or other remedy.

THE CHAIRMAN: That may be the case, but whose decision is that to be? If it is not a likely outcome, that surely is for Ofcom to decide.

MR. TURNER: Yes, that is ----

THE CHAIRMAN: What Lord Justice Vos seems to be postulating there is that if everything about the negotiations that we spent so many weeks on, and evidence on, was not before the court, and that the only thing that was before the court was the rate-card price then it was still - I do not know whether he is saying "likely" or "not unlikely" - that the WMO would be needed.

MR. TURNER: My second remark is, therefore, that what he is emphasising is that this is a sufficiently concern for it to have been very likely ----

THE CHAIRMAN: To run short.

MR. TURNER: -- to underpin a remedy in its own right.

THE CHAIRMAN: That may well be true, but that would be a matter for Ofcom. That was not the only basis on which Ofcom reached their decision, which is I say to you that one of the interesting questions is whether, if the point is decided in Ofcom's favour by the Tribunal on remittal, whoever does it, is it not still going to be for Ofcom to decide whether, given the undisturbed findings of the Tribunal, the WMO is the appropriate remedy?

MR. TURNER: I will deal with that in just one moment, but ----

THE CHAIRMAN: It may not be strictly relevant now, so do not worry too much. It is just that it is a question that might arise at some stage.

MR. TURNER: It is an important issue, because ----

THE CHAIRMAN: I do not know whether it goes to today's hearing.

MR. TURNER: -- the predicate of the Court of Appeal's reasoning is that this may well be something that would be an independent basis if the findings lead you to conclude ----

THE CHAIRMAN: Lord Justice Vos makes that comment ----

MR. TURNER: Yes, he does.

THE CHAIRMAN: -- but I am not sure that the others necessarily do. They may do.

MR. TURNER: No, but what I would say is that it must, therefore, be considered with an open mind ----

THE CHAIRMAN: Of course it must.

MR. TURNER: -- that this is a very, very credible outcome of a very fair reading of what the rate-card issue on remittal is likely to involve.

THE CHAIRMAN: It would have made a much shorter trial, I must say, if we had only been dealing with it.

MR. TURNER: The point that you make, Sir, about how a huge focus is on the matter that was dealt with in the judgment is, of course, a fair point. At the same time, what is said here is that there is a whole other vista that was not dealt with.

THE CHAIRMAN: We are all in agreement on that.

MR. TURNER: No, no, but, therefore, to say that the judgment has dealt essentially with the burden of what was before the Competition Appeal Tribunal is not what the Court of Appeal is saying here.

THE CHAIRMAN: I do not think anyone is saying that.

MR. TURNER: No, no, absolutely not, but footnote 49 and the comment later on by Lord Justice Aikens points that there was a wealth of evidence also on the pricing issues, that that could have been also, and should have been, the subject of adjudication ----

THE CHAIRMAN: And it was so far as Virgin Media were concerned.

MR. TURNER: -- and of findings. No, not in relation to the points where the Court of Appeal has found that there was an error.

THE CHAIRMAN: I know, but that is why we are here, Mr. Turner, we all know that. Can we not move on from that? We know that there is something that the Tribunal should have dealt with, did not deal with, and now has to deal with.

MR. TURNER: Yes. The point that I am coming towards is that it is, therefore, not a minor problem requiring tidying up.

THE CHAIRMAN: No one said it was.

MR. TURNER: In relation to the submissions that the Tribunal has received in writing, the implication of Sky's skeleton is that this is a minor issue, that the core competition concern was dealt with.

THE CHAIRMAN: I do not think they have said that.

MR. TURNER: I can take you to it.

THE CHAIRMAN: I would not agree with it, because it seems to me that it is a substantial issue.

MR. TURNER: Very good. I am content with that, but let me come to the ----

THE CHAIRMAN: Speaking entirely for myself, because if you only look at how long it is likely to take, it is not going to be done in a day or two days. It is a substantial issue.

MR. TURNER: Yes.

THE CHAIRMAN: If it is, as we now know it is, a live issue it is substantial, not minor.

MR. TURNER: I am grateful, and we do endorse that. Sky, as you know, says to the contrary, they say it can be done in a matter of days.

THE CHAIRMAN: I did not see that.

MR. TURNER: I will take you to that, because my friend has stood up, so we may as well see what he has said. Our point is this: these matters take one to the following conclusion. They mean, in our submission, that a fair minded and reasonable observer would see a real risk of the Tribunal being tempted to tackle the problem of the pricing issues in the remittal, if this constitution of the Tribunal keeps it, in a way that leads to the same final answer about there being no justification in Ofcom's competition concerns for the WMO remedy. In view of this, the natural wish to say, "I told you so", all that huge time and effort devoted to reaching the original conclusion was ultimately justified.

THE CHAIRMAN: The huge time and effort has not been wasted. The huge time and effort was dealing with issues which had to be dealt with. We just did not deal with one issue that did also have to be dealt with. It is not as though whatever you are describing as this multitude of things has somehow been blown sky high, it has not. I do not see what point you are making about this. The judgment stands except for the fact that it was incomplete. The conclusion may well be affected, of course, and there may be an interesting issue if you were to succeed on your point on the issue that is still to be decided. Then the issue may arise to what then happens. Does this Tribunal, and I am repeating myself, decide whether the WMO stands or does Ofcom effectively have to look at it in the light of the overall findings now, rather than the incomplete findings as we now know they are?

You keep saying in the papers, "I told you so", but I do not understand that in the context of this case. We are not revisiting anything. We are looking at something that we have explained in para.821 we took the view we did not need to decide.

MR. TURNER: Yes. What has happened because the Tribunal stopped short and did not deal with the pricing issues, the para.821 point, was that a large amount of time was devoted, a large amount of effort and paper, to producing the judgment which dealt with the ----

THE CHAIRMAN: All that had to be dealt with.

MR. TURNER: -- deliberately withholding point.

THE CHAIRMAN: It all had to be dealt with. How could we not have dealt with it? There were reams of evidence about it, reams of evidence, and we were told by all the parties that the truth of these matters would all actually become clear when we analysed the

contemporaneous evidence of the negotiations, the various sets of negotiations going on over several years. How could we not deal with it?

MR. TURNER: Of course it would have been dealt with, Sir, but there is no such thing obviously as a cap on the length of a judgment or the time it takes to deliver it.

THE CHAIRMAN: Judgments are far too long, I agree, and this no doubt was far too long, but we had to look at it very carefully because we had an awful lot of evidence about it.

MR. TURNER: Yes, but had the Tribunal been considering the pricing issues as well, the balance and nature of this judgment ----

THE CHAIRMAN: It would have taken a bit longer, yes.

MR. TURNER: Well, there is a question as to that, because my first point is that a lot of time and effort went into the production of the judgment devoted to the first competition concern, and that ultimately there will be a natural inclination to say that all of that exceptional time and effort devoted to producing it were not wasted ----

THE CHAIRMAN: Why would they be wasted on either view? They had to be decided.

MR. TURNER: They had to be decided ----

THE CHAIRMAN: You have not appealed, and neither has Ofcom – you may have tried to appeal some things, but there has been no appeal against the judgment, so I do not understand why you say it would be wasted, regardless of the outcome. If the outcome is, as it may well be, that you succeed on showing that this other standalone concern is justified, if that is the outcome, there is still then a question is there not, over what does that mean for the WMO?

MR. TURNER: Absolutely. The question is whether that time and effort which were devoted to the single issue dealt with, with great thoroughness ----

THE CHAIRMAN: Yes, it was not a single issue but I know what you mean.

MR. TURNER: On the substance, on the deliberate withholding competition concern, the single issue in relation to competition concerns, that would have been different had the Tribunal dealt with it in a different way and considered the pricing issues as well.

THE CHAIRMAN: You say so, but I am not sure that that is necessarily right, I do not know, because we never had any submissions about what should happen if some of the grounds were successful and others were not. Supposing, for example, we had found that Virgin Media could not compete effectively, what would the effects of that have been? That was said to be a subsidiary concern on the part of Ofcom, what would we have done then? The concern about Sky, the practice that Sky has been accused of is not made out, not established on which we have spent a huge amount of time and evidence, but the concern

about Virgin Media is made out. It may well be that the answer would have been we would have had to remit it for Ofcom to consider that, because obviously the landscape would have changed on the basis on which the decision was taken would be different. So, I am sorry, I do not understand your ----

MR. TURNER: May I present it from a different direction, the same point, then?

THE CHAIRMAN: Yes.

MR. TURNER: The Tribunal's judgment, which took 13 months to produce, and 330 pages and so on, came to the conclusion ultimately that the basis in terms of Ofcom's competition concern for the WMO remedy was absent.

THE CHAIRMAN: We came to the conclusion that certain practices on which that conclusion had been based were not established.

MR. TURNER: You came to the conclusion that the only basis that you perceived in Ofcom's Pay TV statement as a competition concern was unjustified.

THE CHAIRMAN: We had "concerns" in the plural, and we obviously looked at some of them, but there was one we should have looked at and we obviously did not.

MR. TURNER: That conclusion that the only competition concern that was discernible in the statement was absent, was arrived at after a 13 month period in a very long and detailed judgment. It is those factors that – and this is not a criticism on a human level, but it is embracing the fact that on a human level if one does that sort of thing, it is natural to say I told you so in terms of reaching ----

THE CHAIRMAN: This is the confirmation bias point?

MR. TURNER: Yes – in terms of reaching or desiring, even unconsciously, to reach the same conclusion, it is unjustified. "I devoted 13 months and 330 pages last time, and I am seeking to reach the same conclusion to justify the huge amount of effort ----"

THE CHAIRMAN: I cannot understand why you keep saying "reach the same conclusion" Mr. Turner, we had reached no conclusion on that point.

MR. TURNER: You have reached the conclusion that there is no basis for the imposition of the WMO remedy in Ofcom's Pay TV statement.

THE CHAIRMAN: We reached the conclusion that the bases that we examined were not established, and we can analyse our judgment if you like, but this may be purely semantics. We looked at what we thought, mistakenly as it turned out, were the effective competition concerns.

MR. TURNER: Yes.

THE CHAIRMAN: We simplified them a bit by saying they were twofold, because the one relating to Virgin Media took quite a lot of effort in terms of evidence, and submissions and so on and so forth, and it was comprised not just in relation to the rate-card price charged to the cable companies, but also other negotiations for other services, the HD service, and so there were various aspects of that, all of which were competition concerns, and we looked at those. We looked at what we regarded was, in fact, the major plank of Ofcom's concerns in relation to the negotiations with BT for wholesale supply with various potential retailers. We found that those concerns were not established, and we said we recognised that BT in particular was also saying that it would not be able to compete effectively, but for the reasons that we gave in that paragraph we said we did not need to look at that.

That was obviously mistaken, we know that thanks to the Court of Appeal's judgment. In both circumstances the Court of Appeal themselves say the judgment was incomplete. I do not see where this confirmation comes in. Why should we be afraid if, when we do look at it, we find that a potential retailer who comes in at a certain level and in certain hypothetical circumstances, would not be able to compete effectively at the rate-card price? Why would we be going back on anything that we have said already? I do not understand it.

MR. TURNER: I will, perhaps, just make this point one more time for clarity and then ----

THE CHAIRMAN: I think if you could move on a bit because we have got the point.

MR. TURNER: -- move on. Just to be absolutely clear, partly so that my friend can also respond to it, so the Tribunal has it. The basis for Ofcom's competition concerns, and the basis therefore that was perceived for Ofcom to have imposed the WMO remedy, that was found to be absent, which meant that the Tribunal did not need to go on to consider these other issues. A huge amount of effort and time was devoted to arriving at that conclusion which meant that the basis for the imposition of the WMO remedy was not there. In these circumstances there would be a human tendency to seek to arrive at that same ----

THE CHAIRMAN: We understand the point.

MR. TURNER: So, that is the point. Now, if I may give a more concrete and immediate point concerned with the same issue, there is a dispute which you have now seen between the parties, not least on the skeletons that have just come in, as to what will be necessary to determine the remitted question. What are you going to have to do and look at?

THE CHAIRMAN: Yes, there are issues, as I understand it about new evidence – well, there is a number of issues. There is an issue about whether the matter should be stayed pending the current review that Ofcom is engaged in. Is there any other?

MR. TURNER: Those are the main ones. I was going to focus on the evidence point because there is a sharp division between this side and the other side of the Bar on the question whether new factual and expert evidence will be appropriate or needed to take account of the actual data and information on market developments. We have referred to two ways in which we say that will be relevant, I perhaps need not elaborate them now looking at the clock.

THE CHAIRMAN: That is a real question, is it not?

MR. TURNER: We say it is a real question. I have given the references in our main reply skeletons.

THE CHAIRMAN: We have read that.

MR. TURNER: They take the opposing view.

THE CHAIRMAN: Yes.

MR. TURNER: They say the evidence record is closed. They say that you can have a short oral hearing of a few days to make submissions about it. Perhaps given Mr. Flynn's half intervention, if I pick up Sky's letter, which you will find in the second bundle within tab 1, sub-tab "aa" towards the back. There is a letter dated 14th November 2014, which is one of the places where Sky sets out its stall on how this matter should be managed going forward. On the third page of that letter, in tab "aa" – a letter from Herbert Smith Freehills – you have para. 8.

In para. 8 you will see, taking the third line from the top:

> "The evidence has been heard and the parties submitted full written closings and closings in reply comprehensively referencing the evidence. Sky contends that it would be helpful to the Tribunal to have written and oral submissions which assist the Tribunal in navigating through the material and putting it into context, given the matters remitted to it; it does not envisage the need for a further lengthy oral hearing for that purpose – a hearing of a few days only is likely to be sufficient assuming that the original panel is reconstituted. Sky also agrees with Ofcom that there is no need for witnesses to be reheard, but again this is only practical if the Tribunal as originally composed and which heard that evidence deals with the remittal (which matter is addressed at paragraph 13 below)."

The Premier League, in a letter of the same date, puts forward the same approach, and you have seen it also in their skeleton, to which we replied in our reply skeleton, where they say there is no business introducing any further material, because the only question is what was

available to Ofcom at the time. We have come back at that with the authority of the 08 evidence appeal in the Court of Appeal.

It requires a degree of, we say, self-awareness on the part of this Tribunal that our position is that it is inevitable from the vantage point of an informed, reasonable, observer. The original Tribunal would have instinctive sympathy with Sky's and the Premier League's perspective on this issue, even if they do not go all the way with them with their radical conclusion.

THE CHAIRMAN: You mean we would be liable instinctively to decide in their favour on how the hearing should be run?

MR. TURNER: An instinctive desire to seek to minimise the extent of the error that was found by the Court of Appeal. The quicker the remitted issue is got rid of the less the further evidence is required, the less significant the error that is identified, and the amount of work that is needed to deal with it will be. That is why, and I am looking at this objectively, there is a real risk that the Tribunal may be perceived as unable to consider the question of what new evidence is needed to determine the remitted matter with an open mind. So I am not saying that you would come to a radical conclusion along the line of Sky's extreme position but, nonetheless, there will be that tendency when you are, if you take this case, considering how should one go about it, how much new evidence is required, to try to minimise the extent of the error found by the Court of Appeal. That is the concretised variant on the submission that I first made.

THE CHAIRMAN: I must say, that strikes me as very odd, one needs to think about it. Is that put in your skeleton?

MR. TURNER: No, it is not, I am developing that point orally.

THE CHAIRMAN: So we would want to make it as short and quick as possible?

MR. TURNER: Yes, in line with the balance that was struck before and the error that was identified by the Court of Appeal.

THE CHAIRMAN: Speaking personally, I would like as much help as possible. The idea of having to have it done very shortly. Speaking for myself I am not sure that it is a short thing, in fact, I think it is quite a major undertaking. It seems a bit of a thin point, frankly, Mr. Turner, that one. Anyway, there we are. That is part of confirmation bias, is it? A sort of variant of confirmation bias?

MR. TURNER: Yes. It is a variant of that point. That takes me on to the other related concern, which we did identify in the skeleton, but which Sky and the Premier League did not touch in their responsive skeletons. This is that the Tribunal had given its view in one of its

judgments, the one concerning a stay, but it is difficult to see that BT's appeal, if successful would be capable of rescuing the WMO. The relevant judgment is in the first bundle at tab 5, p. 14. To re-orientate you, the Tribunal was, at that stage, considering factors for and against the granting of a stay of the order requiring the withdrawal of the WMO licence conditions, and it is in that connection that you consider factors for and against.

At para.39 you refer to the nature and merits of BT's proposed appeal. At the top of p.15:

> "In addition, on the basis of the grounds as they stand, it is difficult to see that BT's proposed appeal, even if successful, would be capable of rescuing the WMO."

There is an echo of that at para. 41 where you say:

> "Given the view we have taken about the merits and ultimate lack of utility of BT's proposed appeal, we do not consider it at all appropriate to accede to [counsel's] invitation."

So the following points fall to be made about this. The grounds as they stand included precisely the ground of appeal that the Court of Appeal upheld. I have noticed that the permission to appeal ruling I do not think is in this bundle, unfortunately – would it help if we handed up a copy?

THE CHAIRMAN: Yes. (After a pause) Tell us about it.

MR. TURNER: I will simply read it out. The Tribunal considered permission to appeal in a ruling a few weeks earlier on 7th February 2013. We will hand up copies after this. The two grounds in our application for permission are recorded at para. 3. 3(b) included:

> ""The Tribunal failed properly to consider Ofcom's second competition concern, namely the effect of the rate-card prices on the ability of new entrants to compete effectively with Sky."

And then there is an and/or conclusion reached about the negotiation position, which I do not rely on. Then it goes on: "Thus the Tribunal only considered the effect of the rate-card prices on Virgin Media".

You refer to the application. I think the Tribunal should see a copy of that.

THE CHAIRMAN: What is your point about this – that we were here expressing a view? The view seemed to be premised on the basis that you might succeed, and ----

MR. TURNER: And then the consequence of us succeeding in the Court of Appeal is addressed. What you say there is that even if we win in the Court of Appeal, which we did, that is not capable of rescuing the WMO. In other words, it is doomed, it is damaged goods; ultimate lack of utility of BT's proposed appeal.

THE CHAIRMAN: This is going back to the point which I have already raised with you, which is it is an interesting live important – or may become a live important point if you win.

MR. TURNER: But therefore if you, Sir, say that how is that reconcilable with "difficult, even if successful to see how it would be capable of rescuing it"?

THE CHAIRMAN: Is that not the point I have just been making? Supposing you succeed 100 per cent before the Tribunal? You are smiling, but if you succeed 100 per cent before the Tribunal on the point, which is obviously possible, I do not know - I keep saying this but I will repeat it again – is the situation though Ofcom would have to look again, in the light of both judgments, in the light of the judgment we have given, and in the light of the new judgment which, hypothetically finds in your favour on this strand of it, if we were to then determine the WMO stands or falls, that would be putting us in the place of the Regulator. Would Ofcom then not have to reconsider what the appropriate remedy was given that some legs of the bar stool – let us not count them – have been cut off. They would then have to decide, would they not, in view of what is still standing by way of a leg on the bar stool, this was the appropriate remedy?

MR. TURNER: It is an appeal on the merits, Sir. If, on the remittal it is found that there was a sufficient independent competition concern to justify the WMO remedy ----

THE CHAIRMAN: Can that be decided?

MR. TURNER: Yes.

THE CHAIRMAN: Can it be decided? Would that not be for the Regulator to decide?

MR. TURNER: No, that is not. There is an appeal by Sky that the WMO remedy should be set aside, or it falls for certain reasons. If that appeal is refused then the WMO remedy, there is no basis for saying the WMO remedy should not be rescued, or that there is an ultimate lack of utility ----

THE CHAIRMAN: That is the interesting point. You tell me that answer; that answer may be right. But it seems to me that there is going to be, if you win here, down the road, whoever hears it I would be surprised if there was not a debate about whether at that stage, and in view of our first judgment, indeed, notwithstanding that there was the single leg standing, that it did not have to go back to Ofcom, but I do not know what the answer to that is, but there must at least be a question as to whether that would be the right approach because, I am not sure, would we be putting ourselves – as I keep saying – in the position of the Regulator if we were to say, given that one of these three concerns have been established and the other two have not, we think that that still means that the WMO is okay, or is not

okay. Is that not usurping the function of the Regulator because there would not be the same concerns that they thought there were at the beginning?

MR. TURNER: The Tribunal in the appeal on the merits can decide that the competition concern it identifies is sufficient to mean that the WMO remedy should be upheld and then in disposing of the appeal, rejecting Sky's appeal, *ex hypothesi* and giving appropriate directions under s.195(4) to Ofcom as to what it should then do, you would not come to a conclusion that the appeal, even if successful, would be incapable of rescuing the WMO, or that there was an ultimate lack of utility of BT's proposed appeal, as it then was.

THE CHAIRMAN: That may well be right.

MR. TURNER: So I am grateful to you, Sir, for talking me through and giving me your reactions to these points. What we say about this one, in conclusion, is that you have to look at this text at the eyes of the reasonable and fair minded observer. What is said is something which appears clear to mean that a reasonable observer will see a risk that there is a pre-disposition or leaning against the rescuing of the WMO remedy, about it being capable of being rescued, and about there being any utility in the Court of Appeal. We say that that is a problem.

I turn to the fourth point. This is not a recusal case, and I trust that I am not going to need much by way of labour on this point. You are not already seised of the remitted question. The task of the Tribunal here today is to consider whether you should be seised of the remittal. If the Tribunal would be so good as to take up the Tribunal's letter to the parties that kicked all this off, which is in the second bundle at tab a. You find there a letter of 4th March 2014. This is a letter from the Registrar - I referred to this a little while earlier – shortly after the judgment has come from the Court of Appeal.

The letter begins by referring to relevant paragraphs of the Court of Appeal's judgment. Then the Tribunal invites observations from the parties as to how the case should proceed with regard to the consideration and determination of the remitted questions.

> "As far as the constitution of the Tribunal panel is concerned, the parties should indicate whether they consider that it would be appropriate for the original Tribunal panel to decide the Remitted Question, or whether a new panel should be constituted for this purpose. The former route is complicated by the expiry of the term of appointment of Mr. Justice Barling as President (and the Tribunal is investigating what steps are possible and would need to be taken in order for him to be appointed as a chairman in order to continue with this case). However, the latter route would inevitably involve the appointment of new panel members who

would not have heard the evidence filed in the original proceedings before the Tribunal and be starting completely afresh."

So the Tribunal Registrar sets the framework in March 2014. The preliminary question is whether it is appropriate for the original Tribunal to decide the remitted question, or whether there should be a new panel. That, I would say, is precisely what the Tribunal has proceeded to deal with as an institution, and what we are here for today. So, if you go forward in the same bundle to tab "dd", you have the letter from the Registrar towards the end of last year, 19th December. Just under halfway down the first page of the letter, after pointing out the disagreement between the parties about whether to withdraw the appeal or staying some of the appeals would be the right course:

"Furthermore, there is disagreement between the parties as to whether the Tribunal, as originally constituted, should continue to hear and determine the matters remitted from the Court of Appeal. This would therefore appear to be the most immediate question for the Tribunal to decide ----"

THE CHAIRMAN: "… for that Tribunal to decide."

MR. TURNER: Exactly.

"On that basis the Tribunal will list a one day hearing for it to decide whether it should continue to sit in these proceedings or whether a new Tribunal should be constituted."

It is true that this one is written in terms of whether it should continue to sit, or whether a new Tribunal should be constituted. In my submission this is not saying that you are therefore already seised of the remitted matter. You are seised of the question which we are here today to debate, whether you should take the remitted matter, or whether it is better that an alternative Tribunal composition should do that.

THE CHAIRMAN: But unless the Court of Appeal or the appeal court, says it should go to a different one the assumption is that the matter goes back – especially in a case where they have been told that there is something they ought to have considered and their judgment is incomplete – surely the assumption is that it goes back to the Tribunal as originally constituted, the same Tribunal. Otherwise it would be a nonsense. Anyway, here we are, we are deciding whether to recuse ourselves.

MR. TURNER: Well, you are deciding whether you or another Tribunal should take the case. The Tribunal as an institution is deciding that issue and this Tribunal has been appointed to decide this issue. Sir, you have not been asked to consider the question of whether you need to recuse yourself from something you have already decided, or it has been decided

you should deal with namely, the remitted question, the substantial matter that we discussed earlier.

My submission is that the Tribunal can and should apply a broader test than simply looking for apparent bias, and that is why I move to this point. We referred, as the Tribunal knows to the case of *Sinclair Roche & Temperley*. Another illustration is very helpfully provided again by the Premier League, one of their cases, *Loftus Brigham v Ealing Borough Council*. I am not sure whether your pre-reading will have extended to looking at this particular authority.

THE CHAIRMAN: If someone cited it.

MR. TURNER: The Premier League.

THE CHAIRMAN: Yes, and I think there was a quote from something.

MR. TURNER: Yes.

THE CHAIRMAN: I certainly read that bit. I am afraid I have not studied it ----

MR. TURNER: It is not a case focusing on bias. It was a fairly small dispute, as you see from the front page, "damage by subsidence resulting from desiccation". The question was whether certain tree roots were responsible and, if they were, the extent to which they were responsible. It was heard at first instance by His Honour Judge Hallgarten QC in Central London County Court. It goes to the Court of Appeal. This is not a case that was focusing on bias, but it is a case where the trial judge takes an erroneous view of the law. He thought it was necessary to show that tree roots, the evil tree roots, were the dominant cause of subsidence damage rather than being an effective and substantial cause. He refused permission to appeal, and he said the test he had applied was, in fact, the same as the one that was required by law.

I can take the Tribunal through it, but perhaps I will go straight to the crunch point. The Court of Appeal, if you go to para.26, p.110, pick up the point echoing what your Lordship has just said:

> "Normally, and particularly in view of the interests of economy remission should be to the same judge."

They start with that point there. They go on:

> "We are however persuaded that that course would be inappropriate, in view of the judge's strong expression of view, when the issue was ventilated with him after the trial, that the test that he had applied was in fact the same as that which the law requires."

He apparently said, if you went back to para.21 on the page before, when refusing permission to appeal:

> "… that the two verbal formulations, an effective and substantial causer, and a dominant cause, meant the same thing."

That is what the judge said. Then Lord Justice Chadwick continues in para.26:

> "We fully accept that, if the matter were remitted to him, the judge would now apply the law as directed by this court. However, the claimants are entitled to say that, in view of the history of the matter, it would be better for the matter to be approached afresh."

Then he goes on:

> "There are, in addition, two reasons why the normal course of remission to the judge who has already heard the evidence is less compelling in this case."

It is not an irrebuttable presumption. He is considering other factors. The one he takes first is:

> "… although the judge has heard the evidence, he is now a long way away from it. Six months elapsed between the trial and delivery of judgment, and the appeal process has now added a further period (though, it should be noted, less than the six months just referred to) to that time. Second, much of the evidence seems to have been given on a mistaken basis."

They then go on at para.27 to say:

> "We therefore consider that the action should be remitted to a different judge for retrial."

That is it essentially, but you see that the Court of Appeal looks at the strong expression of a view by the judge after the trial as saying that he had effectively applied the right test as being something that made it better for the matter to be approached afresh by someone else.

THE CHAIRMAN: They did it at a stage when they could do that because, as the appeal court, they have got the power to make an order, have they not? That was all dealt with at the hearing, as I understand it, the appellant presumably there argued. Was this also the substantive hearing of the appeal?

MR. TURNER: Yes, this is the end of that hearing. This is a judgment dealing with this point.

THE CHAIRMAN: If you had said to the Court of Appeal, "And what is more, if you find in our favour on this point, you should not send it back to the same panel for these reasons". If the Court of Appeal had said that it would be better, that is fine.

When the matter comes before us, parking at the moment your other point, that we have not got it yet, if we have we are not allowed to recuse ourselves. We cannot just say, "Oh, it is better if another judge does it", because we are in the position where we have to do it. It is our judicial duty to do it unless it is appropriate for us to recuse ourselves. That is the problem. I do not think that we have got the luxury that the Court of Appeal had in that case of being able to just say it would be better.

MR. TURNER: That is the question that I am about to turn to directly, because I will say that you are not in a position of needing to say, "Should I recuse myself?" I have covered those points now, so I will leave them to one side. Moving forward, the first point I wanted to make here is that this case is clearly one where the Court of Appeal here is looking not just at the factor of apparent bias, but is weighing up a range of matters. They take into account, for example, the distance in time between the appeal being heard and the original matters. They are weighing various matters. The test that they apply is, very simply, whether, in view of the history of the matter, it would be better for the matter to be approached afresh.

THE CHAIRMAN: You are not suggesting that a judge who is seised of the matter in the High Court, for example, can just have the luxury of saying, "Well, I do not really fancy doing that, I think it would be better actually if I did not, because I have said this and I have said that". That is exactly what the Court of Appeal has said in several decisions that judges are not allowed to do.

MR. TURNER: I entirely agree. We do not say that at all. The premise of what I am saying is that this Tribunal, bearing in mind the letters I have shown you from the Tribunal already, has not been convened to try the remitted matter, we are here to consider a first issue which immediately arises: which Tribunal, which composition, should try it? It is an important question of emphasis. We say that the Tribunal, as an institution, rightly perceived that this point would need to be grappled with as a first issue. That was what the Registrar wrote in the letter of 4th March 2014. That is what we have understood the position to be now, that although it is this composition of the Tribunal considering the point, it is not that you are seised unless displaced by the test for recusal being established with the remitted matter. We say that the focus today is on the broader test, and that you can approach matters in the same way that you have seen from cases like this or *Sinclair Roche & Temperley*.

May I then turn back to the point that you raised with me a moment ago, which you find in my learned friends' skeletons: should we have raised this before the Court of Appeal or not at all? We have no business raising these matters now. By the time of the Court of Appeal judgment in February 2014, and the Tribunal will obviously know this, two members of the

Tribunal had gone. At that stage there is no necessity to open up the issue of the constitution of the Tribunal on the remittal that would take place before the Court of Appeal.

Moreover, and rather differently from the *Loftus-Brigham* case we were just looking at, in this case it would also have involved not just looking at the points in the appeal going through the judgment, and so forth, but considering certain material and arguments additional to what we were saying to the Court of Appeal, and bringing it in at the time of the draft judgment being handed down, the 2013 ruling, the issue of the need for new evidence and its implications, what my friend is going to say about the speech. Various other matters which are collateral would have had to have been raised at that point. It would have involved an additional exercise for the Court of Appeal, likely an additional hearing after the draft judgment was delivered, and on the other hand we have this institution, the Competition Appeal Tribunal, which, itself, has the machinery to decide which constitution should be appointed to hear the remittal. So far as we are concerned it is currently using that machinery. The letter from the Registrar in March 2014 certainly appeared to be considering, "We now have to decide which is the right body to hear the remitted question".

Those are my submissions ----

THE CHAIRMAN: I cannot remember now at what stage the matter was first raised in correspondence. You might be able to help me. There was some correspondence about this, was there not, from BT, and indeed I think all the parties actually. An objection was taken, I think, by either you or Ofcom at some earlier stage. There was some correspondence.

MR. TURNER: Oh, yes, absolutely. This has been aired, and the Tribunal's letter that I went to of 19th December last year refers to the fact that there has been this ----

THE CHAIRMAN: That March letter, had you already been in correspondence about it before then?

MR. TURNER: I doubt that. We will check that. I do not think so, because the Court of Appeal had only given judgment in February, fairly recently. Miss Ford confirms that.

THE CHAIRMAN: Mr. Blair has just shown me that there was a letter from Ofcom on roughly the same date as the letter from the Tribunal.

MR. TURNER: I would imagine it comes after it, because the letter from the Tribunal says, "Here is something we have got to consider, can we have the parties' views?"

MR. BLAIR: I have not discovered whether you had written before that.

MR. TURNER: If we did it will be in here. I think this is a fairly full account of the correspondence.

MR. BLAIR: I am sure it is.

MR. TURNER: I will find our letter. We and Ofcom do write in. There is a holding letter on 12th March. You will see that both we and Ofcom are thinking about what the Tribunal has asked us to consider, which is the constitution of the Tribunal. Our substantive letter is at M. We come in on 26th March, and we refer to some of the same matters, *Sinclair Roche & Temperley*, and so on.

The sequence is that the Tribunal, therefore, immediately picks up the ball saying we have to grapple with this on 4th March write in, and the parties write in in the following weeks.

THE CHAIRMAN: That was all in the wake of the Court of Appeal decision remitting it. An immediate problem, of course, for the Tribunal was that I had ceased then to be President and could not be a chairman because I was only appointed President.

MR. TURNER: I think Mr. Blair had also ----

MR. BLAIR: I had been unseated, I believe, and was then re-appointed for this one case only.

THE CHAIRMAN: That was the Tribunal side of the problem.

MR. BLAIR: The appointment was continued, I have been corrected. I was never 'disseised' apparently.

THE CHAIRMAN: I might have been.

MR. BLAIR: I think you had gone back to the Chancery Division.

THE CHAIRMAN: There was a hiatus, but there we are.

MR. TURNER: Whatever the technicalities of it, at the time of the Court of Appeal judgment ----

THE CHAIRMAN: You say that basically we are at the stage still of having to determine these matters in the round rather than - it is a listing matter, as it were, at the moment. It is as though the case had been - I am trying to think of an analogy, it does not work.

MR. BLAIR: If it is a listing matter, it is for the President to list. So it is your submission that we are in some sense advising him? I know the documents do not say this, but your submission is that we, as a trial tribunal are not yet seised, so it must still legally be in the hands of the President to decide which way to list it? Is that your submission?

MR. TURNER: We do not say that. We say that the Competition Appeal Tribunal, following the letter of 4th March, has said, "Here is the first issue for the Competition Appeal Tribunal as the institution to decide. The President could have decided that sitting alone, absolutely. What has happened is that a hearing has been convened, and this composition of the

Tribunal is deciding that issue, not giving advice to the President as to what he should decide.

MR. BLAIR: We have been authorised to take what would otherwise be a decision of his.

MR. TURNER: You have been authorised to take a decision which he could also make, but which you are empowered to make in your own right.

MR. BLAIR: I understand. Thank you.

MR. TURNER: Sir, I am very grateful to the Tribunal for its patience. This is a difficult application. May I then draw things to a conclusion so far as BT is concerned? This is a case where, in view of the history of the matter, adopting the language there written, and the arguments which are to come and the evidence which is to come concerning the pricing issues, it is better for the matter to be approached afresh. To add to what we have already said in writing and orally today, this is a substantial matter, and we endorse, Sir, what you say about that. There have been four years since the evidence on pricing issues was given before. One can compare *Loftus-Brigham* where the court placed weight on the fact that the original trial was a long way off and that was about a year previously. It is not necessary to conclude that this is a case where there is a real possibility of lack of impartiality, but, as I said at the outset, if the Tribunal takes a view that it should consider things through that prism then we do not shrink from that. We say that matters such as the Tribunal's post-judgment statement that we debated a few moments ago, that even a successful appeal to the Court of Appeal would be incapable of rescuing the remedy, give objectively grounds for doubt along with the other factors that I have mentioned. For those reasons and the reasons to be advanced by Ofcom, we submit that a different composition should preside over the remitted matters.

Sir, subject to any questions from the Bench, those are my submissions.

THE CHAIRMAN: Thank you very much. Miss Rose?

MISS ROSE: Sir, we adopt the submissions that you have just heard from BT, and in particular the submission that this is not a recusal application. The position is that it was the Tribunal on 4th March which invited the parties to express views as to the way forward as to what Tribunal should hear the remitted hearing at a time when the two members of the original Tribunal were no longer members of the Tribunal.

Two things follow from that: first, there would have been no purpose for making any application to the Court of Appeal because at that time the matter could not have been remitted to the same Tribunal. The same composition of the Tribunal did not have authority to hear it.

Secondly, when the CAT was seised of the matter it expressly invited the parties to say what they considered was the appropriate way forward. It was in response to that invitation that the various parties set out their positions, and this is the hearing to determine that question. In that situation, in my submission, it cannot be right that this is a recusal application, because that would mean that the question that the parties were asked had in some way already pre-emptively decided, and we were now seeking to set it aside. That cannot be right.

THE CHAIRMAN: It is not a recusal application, you say, but it includes recusal points?

MISS ROSE: It includes, yes, because we say that there are two principles engaged. The first is that if the *Porter v Magill* test is satisfied then the Tribunal has a duty to stand down. The second is that if the Tribunal concludes that principle is not satisfied, the Tribunal still has a discretion to decide whether or not it is appropriate for this Tribunal to hear the remitted appeal, and we say that that discretion should be exercised on the basis of all the facts and circumstances in accordance with what would best serve the interests of the administration of justice and maintain the confidence of the public and of the parties in the proper and fair administration of justice. We have identified in our written submissions the factors that we say go to that by reference to *Sinclair Roche & Temperley*.

I only want to make one short point before I come to the discrete issue that Ofcom has raised. That was in relation to your exchanges with Mr. Turner concerning the function of this Tribunal and how it interacts with the function of Ofcom. Can I just draw your attention to s.195 of the Communications Act.

> "Decisions of the Tribunal
>
> (1) The Tribunal shall dispose of an appeal under section 192(2) in accordance with this section.
>
> (2) The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."

Then this at 195(3):

> "The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.
>
> (4) The Tribunal shall then remit the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision."

Then it is said you cannot direct the decision maker to take a decision it did not have the power to make.

So, in fact, you have a duty under the Communications Act to decide whether the WMO lives or dies. You do not remit that question to Ofcom. You have to decide what action Ofcom must take in relation to the decision, the material under appeal.

THE CHAIRMAN: So we would be precluded from remitting it with a direction for Ofcom to consider whether, in the light of our findings, the WMO was still justified?

MISS ROSE: The only situation in which you could do that is if you concluded, having heard all the evidence, that you simply could not decide the answer. That would be a very odd answer, given that you will have heard all the evidence on a merits appeal.

THE CHAIRMAN: Yes, I am a bit troubled by that. You may be right, but it would mean, with totally different findings, we would be deciding what the appropriate remedy was?

MISS ROSE: That is right. Leaving aside the question of whether that is right or not, because obviously that issue is not live today.

THE CHAIRMAN: No, it is not.

MISS ROSE: Of course, the comments that were made in the Tribunal's judgment that were being shown to you by Mr. Turner were not to that effect. They were not saying, "This is a debatable question". What was being said was that it was difficult to see how the WMO could survive, which is a very different point.

I want to turn to the separate issue which Ofcom has raised, which is obviously a delicate matter, and not easy for me and not easy for you, and it is about the speech you gave in June 2013. Can I turn, first, to the principles that are applicable to extra-judicial speeches. You have in the authorities bundle at tab 26 the Guide to Judicial Conduct dated March 2013, in fact, shortly before the speech was delivered. If you go to Section 3 you will see the heading "Impartiality", p.10. You will see at para.3.1:

> "A judge should strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, in the impartiality of the judge and of the judiciary.
>
> Because the judge's primary task and responsibility is to discharge the duties of office, it follows that a judge should, so far as is reasonable, avoid extra-judicial activities that are likely to cause to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity."

Then if you go to 3.4:

"Another application of the principle, though difficult to define and apply in specific situations, is the expression of views out of court that would give rise to issues of perceived bias or pre-judgment in cases that later come before the judge. This question is considered in more detail in Section 8.2."

Then at 3.6:

"Circumstances will vary infinitely and guidelines can do no more than seek to assist the judge in the judgment to be made, which involves, by virtue of the authorities, considering the perception of the fair-minded and informed observer would have."

So those are the general principles, and then if you go to Section 8, which you can see was referred to there, that deals specifically with activities outside court.

"8.1 The Media

Judges should exercise their freedom to comment in the media, with 'the greatest circumspection'. Lord Bingham has commented that 'a habit of reticence makes for good judges'. A judge should refrain from answering public criticism of a judgment or decision, whether from the bench or otherwise. Judges should not air disagreements over judicial decisions in the press."

Then this:

"In his speech in the House of Lords on 21 May 2003, Lord Woolf CJ referred to 'the very important convention that judges do not discuss individual cases'."

Then at 8.2.4, the last sentence:

"The risk of expressing views that will give rise to issues of bias or pre-judgment in cases that later come before the judge must also be considered."

In relation to the very important convention that judges should not refer to individual cases, we also have a speech of Lord Hope at tab 25 called "What happens when the Judge speaks out?" If you go to p.11, at the bottom of the page he discusses judges making speeches about matters of general interest, such as youth justice, ancillary relief, relations between our domestic courts and the ECJ:

"This has been described as institutional information, informing the public about the nature and importance of judicial independence and how courts function and why they function as they do. Experience has shown that they can discuss issues of that kind in a sensible and informative way without falling into the trap of compromising their impartiality. As Lord Phillips's interview with

the press shows, there is still a need to be careful. The closer one gets to an issue of current controversy, the greater the need for care. And the golden rule is that judges do not discuss individual cases."

So that is Lord Hope, at that time the Deputy President of the Supreme Court, reaffirming the golden rule of the important convention that Lord Woolf had also referred to.

Now I would like to turn to the speech which you gave. Of course, the perspective through which this speech has to be viewed - it is behind our skeleton argument at tab 2 of volume 2 - is the perspective of the reasonable and well informed observer, and the question is whether there is a real possibility of bias on the basis of the speech. That, of course, is a very difficult question for you to answer because you gave the speech and you know what you meant. It is not your perspective that matters here, it is the perspective of the reader, a well informed and sensible person.

THE CHAIRMAN: There is just one threshold question. Looking at your skeleton argument, this appeared to be very much, as you would expect, something that affects my position, not that of my colleagues, it was after the event. I assume that that is the understanding of both you and Mr. Turner?

MISS ROSE: I do not know what Mr. Turner's understanding is.

THE CHAIRMAN: That is why I am asking.

MISS ROSE: We put it on the basis that you ought not to preside.

THE CHAIRMAN: Yes, and it has no effect on my colleagues obviously.

MISS ROSE: That is a matter for you, because you will know what discussions you have had with them.

THE CHAIRMAN: Yes, of course.

MISS ROSE: One of the difficulties we have is that you, of course, come to us as a unit and we do not know what discussions you have had with them behind the scenes.

THE CHAIRMAN: This was long after the judgment and all the rest of it.

MISS ROSE: Yes, that is right, it was. If we go to p.19, I would like to invite you to read from the heading "CAT and judicial independence" to the end of the speech at p.22.

THE CHAIRMAN: I think one should actually start from the "Standard of review" bit at the bottom of p.17, because that is obviously important. I think, to be fair, that gives a rounded view of what one is talking about. That sets the scene for what I am saying. I have read it, so you can make your submissions.

MISS ROSE: The first point is the heading at p.19, "The CAT and judicial independence". The theme that you are addressing here is what you perceive as a threat to the independence of

the CAT. What you then do is refer to the difficult situation of the CAT given that it is adjudicating between, on the one hand, powerful regulatory bodies, and, on the other hand, very large industry players.

THE CHAIRMAN: And indeed the Secretary of State.

MISS ROSE: And indeed the Secretary of State. You refer to the small budget and size of the CAT. Over the page at the top of the page you comment on the fact that regulators may get very upset when their decisions are overturned, and that they may feel, rightly or wrongly, that their credibility is to some extent at stake in an appeal from their decisions.

Then you say:

> ""It would be troubling if the risk of a regulatory or enforcement decision being overturned on appeal were to lead to a desire to protect decisions from an appropriate level of scrutiny by an independent body."

In other words, the concern you are expressing is that regulators, who do not like having their decisions overturned, and who feel that their credibility is undermined by having their decisions overturned might react to that by seeking to protect their decisions inappropriately from proper scrutiny.

That theme is then developed more specifically and, in particular, you say:

> "It would be of even greater concern if pressures for changes of that kind were to be seen as a response to judgments of a court. All courts can and do go wrong. The proper way of addressing perceived errors of adjudication is by appeal to, in the CAT's case, the Court of Appeal, not by seeking to undermine the effectiveness of judicial oversight by spurious suggestions for reform of the appeal process."

Then, on the next page ----

THE CHAIRMAN: I think if you read the next bit:

> "We must also be aware of the consequences which could arise or be done intentionally from constant pressures for review and change."

MISS ROSE: Then you say:

> "It is crucially important that courts, particularly small specialist ones, whose judicial personnel are few in number and well-known to their users, should not have to expect that giving a judgment to this or that effect might well lead to intense lobbying for jurisdictional procedural changes, with the aim of lessening the scrutiny to which certain decisions will be subject in the future. To achieve such aims would do nothing at all to improve the quality of regulatory decision-making or would create unwholesome pressure on the courts concerned.

> I emphasise that I am not here speaking of proposals for reform where the need for reform is properly and fully evidenced by examples of where things have gone awry, or where genuine procedural improvements to the system can be made."

There was only one decision which you ever made against Ofcom, and that was this decision. At the time that this speech was delivered there was a process of consultation taking place with DCMS in which Ofcom was actively participating where the question of whether the standard of review on s.192 appeals should be a merits standard or a judicial review standard. Ofcom, as you were aware, were putting forward the view to DCMS, for very good reasons, that the standard of review should be a judicial review standard. The Competition Appeal Tribunal, and we can question the appropriateness of a Tribunal seeking to participate in that debate, was positively advancing the case to DCMS that it ought to be a merits standard. It is in that context that these comments were made.

THE CHAIRMAN: I think you are ignoring some of the context, with all due respect, Miss Rose. I come back to p.17. I think you need to address what I was saying from then onwards. The standard of review – I do not think there is any secret about this – there was huge concern that the standard of review in infringement cases was, for reasons which have never been clear, suddenly on the agenda again, it having been decided only a year or so before that, that as the Government said then, and I quoted it:

> "The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and therefore intends that the full merits appeal would be maintained in any strengthened administrative system."

I then go on to say:

> "It is therefore puzzling to say the least that these apparent second thoughts should have arisen so soon. Any change of the kind envisaged would be ironic . . ."

There was widespread concern that the *quasi* criminal infringement decisions were going to be subjected to a lower standard of review and I am not saying that there were not issues about the standard of review in other regulatory *ex ante* decisions. Reading this speech fairly I would suggest the real concern was about the standard of review in competition appeals, which is actually the heading there, and new evidence, the possibility of significantly restricting the introduction, on appeal, of what the consultation paper calls 'new evidence'." You have to look at this ----

MISS ROSE: This illustrates exactly the danger ----

THE CHAIRMAN: Of picking out little bits.

MISS ROSE: No, it is a different danger, Sir. The danger of you giving evidence on what you meant ----

THE CHAIRMAN: I am not giving evidence on what I meant, I am pointing to other aspects of the speech which throw a light on the bit that you are relying on.

MISS ROSE: Well, Sir, what I am seeking to do is to indicate to you what a fair and well-informed observer would take from this speech. A fair and well-informed observer would take from this speech that you are suggesting that Ofcom, whether you say you make that suggestion about other regulators as well, I know not, but you are suggesting that Ofcom, because of its unhappiness, which you assert, about the judgment in this case, was lobbying DCMS on spurious grounds seeking the lessening of the intensity of the review standard in order to insulate its decisions against appropriate judicial scrutiny, and that that was a threat to the independence of the CAT.

That is the reading which an independent observer knowing first that you had made this judgment and, with respect, it is one of only very few judgments made by you against a Regulator, and it was made against Ofcom, knowing that fact ----

THE CHAIRMAN: Would the observer also know that the CAT had taken other decisions in relation to Ofcom ----

MISS ROSE: Yes. But it would know that you, personally, had made this very substantial decision, which is the result of one of the largest hearings that the CAT has heard, and we know how many millions of pounds were spent on it.

THE CHAIRMAN: About a year before, yes.

MISS ROSE: Well, the decision on permission to appeal was made in February 2013, only about three months before this finished.

THE CHAIRMAN: Anyway, the observer would know ----

MISS ROSE: That you had made that judgment against Ofcom, and would also know that Ofcom was actively involved in making submissions to DCMS that the standard of review should not be a merits standard. In that situation, there is a very clear inference that you are accusing Ofcom of doing so for spurious reasons because of its unhappiness with this judgment.

That may or may not be right. It may be that that was not what you meant. It may be that you were referring to an entirely different Regulator who was also, at the same time, lobbying DCMS for precisely that reason, but that is not how it would appear to the reasonable reader, and if there is doubt, as Mr. Turner has indicated, that should be resolved in the interests of justice being seen to be done.

There is a real difficulty for Ofcom, having seen this speech – and I am sorry to say this – having confidence over you presiding over this hearing. I do not think I need to labour the point about the use of the word "spurious". What "spurious" means is "false".

THE CHAIRMAN: So it is "spurious" you particularly take exception to.

MISS ROSE: I take exception to the statement that there were spurious suggestions for reform of the appeal process, and to the statement at p.21 that intense lobbying for jurisdictional procedural changes with the aim of lessening the scrutiny to which certain decisions will be subject would "create unwholesome pressure on the courts concerned", which appears to go even further than spurious in suggesting that Ofcom was intensely lobbying to protect, to insulate its decisions against scrutiny and impose unwholesome pressure on the court.

That is made even clearer, with respect, by the following paragraph, where you say:

> "I emphasise that I am not here speaking of proposals for reform where the need for reform is properly and fully evidenced by examples . . ."

So what you are clearly saying is that the lobbying that you are criticising is not made for good reasons, it is not properly evidenced, appears to be spurious and to be being done with a hidden agenda.

I hope it does not need saying that the allegations that are made here are wholly without foundation, and Ofcom did nothing of the kind. Ofcom had very good reasons for being concerned about the merits standard of review and, indeed, the lamentable history of this appeal explains why. We are now in 2015, we still have no answer to the question of the lawfulness of a decision made about the state of the Pay TV market in 2010. Many millions of pounds have been expended by all parties, and we are no closer to knowing the answer, and we have no timetable for an answer.

You have been suggesting this morning remitting the matter to Ofcom. From Ofcom's perspective, the question whether a WMO was appropriate in 2010 is a matter of purely historical interest.

So Ofcom had very good reasons for lobbying DCMS as it did, but the comments made by you, Sir, in this speech, in my submission with regret, were inappropriate, they broke the golden rule, and they do make it inappropriate for you to sit on this case.

I do not know if there is anything else you want to ask me.

THE CHAIRMAN: No, thank you very much, Miss Rose.

MR. BLAIR: May I ask a couple of questions on that point? It may turn out to be three. The first is: how would the reasonable observer, Lord Hope's villager, know that Ofcom were

lobbying, considering they are both inside the Government machinery, broadly speaking? Was it a public fact?

MISS ROSE: Yes, the point is made by Miss Weitzman, they are not inside the Government machinery, they are an independent Regulator, and it was well-known, and it cannot be a good answer to the concern that we raise that the inappropriate comments made by the Judge would only have been known by those with particular knowledge to have been inappropriate. That cannot be an answer.

MR. BLAIR: That was not the question. It was whether the observer would know that lobbying was going on at all.

MISS ROSE: It was widely known; there was a consultation process taking place. ;

MR. BLAIR: But had Ofcom replied to that consultation at the time?

MISS ROSE: Information from Ofcom was in the consultation process at the time.

MR. BLAIR: So the Department of Culture – is that right "DCMS" – you had stated what your view was?

MISS ROSE: I do not know if you are asking for a witness statement on these topics, but ----

MR. BLAIR: I am asking for information ----

MISS ROSE: Yes, well, I will need to take instructions if you are asking me factual questions.

MR. BLAIR: Correspondence would be, I think, helpful, to know that fact.

MISS ROSE: We can research it and provide it to you.

MR. BLAIR: It is rather material, I think.

MISS ROSE: I am not clear why it is material.

MR. BLAIR: The state of knowledge of Lord Hope's villager.

MISS ROSE: Well, it is not a villager, the person is assumed to be well-informed, and the sort of person who reads the small print.

MR. BLAIR: Absolutely, but as described by Lord Hope, it is someone who lives in the village. It is only a shorthand, it is the ----

MISS ROSE: Yes, we will research the question and come back to you.

MR. BLAIR: Secondly, and perhaps more difficult, is there any authority on guidance that you are aware of on the relevance of comments made directly or indirectly by someone in an administrative position in the judiciary as opposed to a judge who is only a judge?

MISS ROSE: It does not make any difference to this issue. Indeed, the speech of Lord Hope addresses comments made by judges in different categories. He talks about casual social comments, comments made by judges in court, and comments made by judges in their

institutional or administrative capacity, and also media comment, but I am not sure what the relevance of your question is.

MR. BLAIR: The third category is a relevant one because this speech was made by the serving President of the Tribunal in his capacity as such.

MISS ROSE: That is right, but that, of course, does not entitle him to break the golden rule, and nor does it entitle him to say anything which could give rise to concerns about a lack of impartiality.

MR. BLAIR: I understand the submission. The point is the Guide to Judicial Conduct does not say anything about this kind of problem.

MISS ROSE: Lord Hope's speech deals with it specifically.

MR. BLAIR: (After a pause) He certainly mentioned the problem of Lord Phillips at some point.

MISS ROSE: He does, yes. Lord Phillips gave an interview in relation to the *Purdy* case which provoked some controversy. If you go to p.12, he says:

> "Lastly, there are occasions when a judge speaks out off the bench when he is acting in a representative capacity, for example as the chief justice."

MR. BLAIR: Thank you.

MISS ROSE:

> "There is no doubt that chief justices as a group have greater freedom to say things in public. Indeed, it is generally accepted that they have a responsibility to do so, especially if they think that a judge is being criticised unfairly or the independence of the judiciary as a whole is at risk of being compromised by the executive. It is, surely, far better that a judge who is being attacked unfairly . . . should leave it to the chief justice to speak out on his behalf. The office of chief justice carries greater authority. Leaving it to the chief justice protects the judge from becoming involved personally in his own defence"

Then he makes the point that judges should refrain from answering criticisms. So he talks about judges, chief justices protecting their team, and then he talks about responses to personal attacks on judges and then half way down p.13:

> "Nevertheless it is difficult for chief justices to know how best to react to attacks of this kind."

And he discusses the implications. Then at p.14 he talks about criticism of the executive. At p.16:

> "One of the central questions in the Chief Justice of Gibraltar's case was how far it was open to a chief justice to exercise his own judgment as to what the need to

protect the independence of the judiciary required of him. The answer to it was that he can exercise his own judgment but he must be acutely sensitive to the risks that public criticism of the executive may give rise to. The likely reaction of opposition parties, media, and the legal profession generally must be taken into account. . . . At best there is a risk of a loss of respect. At worst, there is a risk that he will be removed from office . . ."

So what he is there talking about is the situation where a chief justice comes into conflict with the government, which is rather different from this case. But, in my submission, the key point here is nothing to do with that type of situation. The key point here is a speech which related directly to a particular case which was currently pending on appeal and which contained criticism of one of the parties to that case, and that, we say, is unacceptable whatever capacity a judge is speaking in. Was there a third question?

MR. BLAIR: No, it came into the first one.

MISS ROSE: If you would like further information on the consultation ----

MR. BLAIR: On the timing would be useful, if you can bring yourself to do it.

MISS ROSE: Yes.

MR. BLAIR: Thank you.

THE CHAIRMAN: So, who is next? Mr. Flynn.

MR. FLYNN: Sir, it occurs to me we are going into a second day, and this is not going to be over in 20 minutes, half an hour, or indeed probably an hour. I have got quite a lot to say.

THE CHAIRMAN: Yes, do you want to make a start?

MR. FLYNN: I am happy to make a start. It is up to you. I am in your hands.

THE CHAIRMAN: We are going to finish comfortably tomorrow afternoon?

MR. FLYNN: Undoubtedly.

THE CHAIRMAN: (The Tribunal conferred) If you can bear to go on to make a start, Mr. Flynn.

MR. FLYNN: I am absolutely in your hands.

THE CHAIRMAN: It is just that we do want to finish as soon as possible, for obvious reasons, tomorrow afternoon.

MR. FLYNN: I need no further ----

THE CHAIRMAN: Professor Beath has a flight to catch.

MR. FLYNN: Sky's position in relation to the matters that are before the Tribunal today are that this essentially does have to be construed as a recusal application made on grounds of apparent bias. We will need to go over the test a bit to discover some of the attributes of the inhabitant of the legal village. The test, in short, is what that inhabitant, the reasonable,

objective, well informed observer, would think. Is there a reasonable apprehension that the Tribunal might decide the issues that are now before it for reasons extraneous to the legal or factual merits of the case? That is the test. If the Tribunal considers that that test is satisfied, its duty, on the cases, is to stand down. If it does not consider that the test is met its duty is to say so and to proceed to hear the case. It should be robust about that. The Urumov case, if that is the right name for it, that Mr. Blair has identified for us, which I shall no doubt come to tomorrow, gives some indication of the Court of Appeal's concerns in that respect.

In the light of the, in some ways, softer way that Mr. Turner was trying to present his case, and adopted by Ofcom, we maintain the position that this is not a *Sinclair Roche & Temperley* type of case where, as it were, a superior review body, namely the appeal court or the Employment Appeal Tribunal, the Court of Appeal, or whatever, is considering whether or not to remit a matter to the original constitution of the decision making body, if I can put it in a neutral way - the original Tribunal - or whether it should direct that that should not happen.

It is not that kind of case. Ofcom intimated before the Court of Appeal that it might, or would, make submissions on the composition of the Tribunal on remittal, but it did not do so. The Tribunal, itself, will know what its own letters, which have been extensively cited, mean. Mr. Dhanowa is a man of immense power under the Rules, but he cannot change the applicable law.

The applicable law and rules include the provisions which have been activated in this particular case for the, I think, "continuation" was the phrase, of a particular member for precisely the sort of case that we are dealing with today, remittal for reconsideration by the original Tribunal. For reasons which I will also develop, even if it is right that something like the *Sinclair Roche & Temperley* criteria are to be applied here by this Tribunal itself, there is nothing in them or in what has been relied on by my learned friends to suggest that the Tribunal should stand down, or decide that it would be in some way better for another formation of another panel from the Tribunal to hear this case. Our submission is that, even if you consider that it is appropriate to take that approach and just deal with it on a case management type basis, there is no serious indication that that would lead to another panel being constituted - quite the contrary, in fact.

The many case management issues that Mr. Turner has raised in the course of his address this afternoon are essentially matters which are going to have to be addressed in due course by whatever formation of the Tribunal has to determine any relevant application which may

subsequently be made. This hearing is not, as Mr. Turner actually said, the time to be debating all those issues. He makes his arguments and then suggests that we do not. I am rather inclined to accept the invitation and say that this is not the time to be saying whether new evidence should be going in or not. I think he misunderstands our position if he thinks the phrase that we quoted means that we think the remittal is an easy matter that can be done and dusted in a few days. That is not what that letter says.

Similarly, I am not, in this hearing, or probably any hearing, going to be attempting to re-argue the appeal before the Court of Appeal. In essence, you had not forgotten that pricing issues had been argued. Your conclusion was that they did not need to be decided. The Court of Appeal has found otherwise with the result that we see in the Court of Appeal's order that "the matter has been remitted to the Tribunal". The scope of that remittal and how it is to be dealt with will have to be the subject of detailed argument in due course. The only question for today or tomorrow is what formation of the Tribunal will hear those issues and decide the substance; and still less is it appropriate, as I think was eventually accepted, to get into what s.195 might mean down the line. We just do not need to do that.

I think I will start, if I may, with just a few headline points on the test for bias. We have set these out in our skeleton. Although you have an impressive authorities bundle, what we sought to do was to extract from those cases the principles that we say apply. Our skeleton from para.6 onwards deals with the test for bias. I think we are all agreed, just about, that we are dealing with an allegation of apparent bias, potential rather than actual bias. The key issues here are that every case is a matter of ascertaining all the relevant circumstances. You see a quotation expanding on the fair minded and informed observer test from *Porter v Magill* that everyone agrees is the starting point. We see that expanded in the quotation in para.8 of our skeleton, which I think is worth quoting. This is the Master of Rolls, Sir Anthony Clarke (as he then was):

> "The court must ascertain all the circumstances which bear on the suggestion that the judge was, or would be biased. It must then ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was, or would be, a real possibility that the judge was, or would be, subject to bias, that is that the judge might have been, or be, influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case."

That, I think, is the crucial aspect which you must examine. It is a matter, probably, of anxious scrutiny, you must decide for yourselves, because however objective Mr. Turner, Miss Rose, I or Miss Davies may try to be about this, we do not represent the fair minded

and informed observer. That is someone who is not the parties, that is someone who stands to one side.

I am not going to quote all those attributes of the fair minded observer which we have set out in some detail at para.9 of our skeleton, but it is worth just noting one or two points. One, as I have already said, is that:

> "… her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions the complainer makes are not to be attributed to the observer unless they can be justified objectively …"

and so forth.

Then, next paragraph, there is the attribute that the observer is informed: That attribute makes the point that:

> "… before she takes a balanced approach to any information she has given, she will take the trouble to inform herself on all matters that are relevant, she is the sort of person who takes the trouble to read the text of an article as well as the headlines, she puts it into context, she is fair minded, so she will appreciate that the context forms an important part of the material."

Going over into the quotation that we make from Sir Thomas Bingham (as he was at the time) from *Arab Monetary Fund v Hashim*:

> "The hypothetical observer is not one who makes his judgment after a brief visit to the court, but is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried."

So that is the test that has to be applied, and the standpoint from which you have to do your best to ascertain whether the test is satisfied.

Then from 11 onwards we set out, as it were, the other side of the coin. As I said, if the court considers that the test is met its duty is to stand down, but if it does not consider it, its duty is to sit, and that is essentially the point that is made in the quotations in the following paragraphs, which are quotations from other jurisdictions, but which are effectively endorsed and adopted by one of the strongest Court of Appeals that may have sat, as you will see from the footnote, Lord Bingham, Lord Woolf and Sir Richard Scott. The importance of those collected appeals is in the judgment we know as *Locabail*. Those judges - you will find the quotation if you wanted to look at it overnight, the judgment is in tab 4 of the authorities bundle - say that they find force in these lapidary words from the Constitutional Court of South Africa:

"The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact they have a duty to sit in any case in which they are not obliged to recuse themselves."

And there are similar phrases from the Australian courts, and we show that those sorts of sentiments have been repeatedly endorsed. Although I have not really had a chance to read the case that Mr. Blair produced for our consideration, similar points are made in that case.

THE CHAIRMAN: One interesting thing in relation to that, duty to sit, is when does the duty to sit arise? Mr. Turner accepts that proposition but says we are not - in the ordinary case, when does it arise? Once the case is listed before a certain judge, I suppose. That is an administrative decision, I suppose, is it not, to list it, and he then has got a duty to sit on it or, *a fortiori*, has already been sitting on it and has to do some more work.

MR. FLYNN: I think, with respect, Mr. Turner was in a little difficulty in explaining how his proposition really works in the context of the Tribunal's own institutional rules, and whether it is really right that this Tribunal has been, as it were, asked to hear the matters put before it today in order to give a view to the listing authority function of the Tribunal as to how this case should actually be handled.

As I said earlier, only the Tribunal can know what its letters actually mean and what the job, as it were, of this Tribunal is, and I will come tomorrow to say that if this Tribunal is, in fact, to be equated with the Court of Appeal or the Employment Appeal Tribunal in *Sinclair Roche & Temperley* or other such cases, there are no reasons why, if you were applying that principle, you would, yourselves, stand down or advise the President that that is what you thought was best.

We say that the normal rule is that a matter would be remitted to the original constitution unless there was a reason not. The appearance of the Tribunal, the decision that this formation of the Tribunal should hear these applications, in my submission, does mean that what it has to be all about is recusal. If we are wrong about that and it is all about other case management issues, we do not think any case has been made out for a different Tribunal either.

THE CHAIRMAN: So you say we have got to the stage where the duty to sit has been triggered?

MR. FLYNN: That is my primary case, yes.

THE CHAIRMAN: We probably will not go on much beyond 4.30, Mr. Flynn, but if you have something to finish up on that point then…

MR. FLYNN: Really I was setting the scene, and I think I am probably coming on now to what are the allegations of bias that are being made, or, shall we say, the recusal points that are being made to you, and I think I need to go into some detail with that. If 4.29 is acceptable then ----

THE CHAIRMAN: I think it probably is, yes.

MR. FLYNN: That will mean I can no doubt give Professor Beath the assurance that I will be shorter tomorrow.

THE CHAIRMAN: We are resuming at two o'clock tomorrow then, and if we could try and finish as soon as possible - how long do you think you will need?

MR. FLYNN: I am guessing, but I would say half an hour tomorrow. I do not particularly want to be held to that, but that is what I will aim for.

THE CHAIRMAN: Miss Davies, how long do you think you will be, just so we have an idea?

MISS DAVIES: It is obviously difficult for me until I have heard Mr. Flynn. I would certainly not expect to be more than half an hour. I would hope I could be less but I just need to see what he says. I am obviously not intending to duplicate.

THE CHAIRMAN: No, and then there might be some replies. We could well be finished by 3.30.

Thank you very much.

(Adjourned until 2 pm on Friday, 27th March 2015)

(Resumed 2 pm on Friday, 27th March 2015)

THE CHAIRMAN: Miss Rose?

MISS ROSE: Good afternoon. We are very grateful to Mr. Blair for asking the questions that he did yesterday, because they caused us to do some more research. The results of that research are now before the Tribunal. You should have in front of you a letter from Ofcom, and two attached press articles. I think the best thing is to invite you, first, to read them, and then I will make some very short submissions on them.

MR. BLAIR: For my part, Miss Rose, I have read it briefly.

MISS ROSE: I was not aware you had already received them.

MR. BLAIR: And I have no questions as a result. I am grateful to you, and through you, Miss Weitzman, for a very speedy response to my request.

MISS ROSE: Can I just make a very brief submission in response to this material. You will have seen from the material that the question of standard of review had been a controversial issue for a significant period of time before your speech was made, and there had been, for example, a number of round table meetings involving industry players and the Government. On 6th December 2012, there was a report in the Guardian, which you have at p.3 of this clip, headed "Government backs reform to regulatory appeals process", proposing new measures to reduce the standard of review, and that included the statement that Ofcom has been particularly vocal about the need for change. This is the third paragraph from the bottom:

> "Its chief executive, Ed Richards, said earlier this year that the UK system was too legalistic, too open to gaming by companies able to pay for large legal teams. Everything we do now is subject to the huge shadow of threat of litigation. Ofcom welcomes the Government plans to reform the appeals process. A quicker and more focused appeals process will help us regulate the communications market more effectively to the benefit of the UK consumers and businesses."

Then, significantly, on the day of your speech, the Government published proposals for limiting the standard of review and the article that you have at p.4 appeared in the Guardian. That article, once again, records Ofcom's strong support for the Government's proposals, giving the same quote from Ed Richards, which you can see at the third paragraph on p.5, and you can also see at the top of that page that it specifically links Ofcom's support for the Government's proposals with this case, and says at the top of the page:

"Ofcom's battle to loosen Sky's grip on film and sports broadcasting, which had seen the issue passed to the Competition Appeal Tribunal and eventually the Competition Commission, took five years and ended in defeat for the Regulator. The case involved over 35,000 pages of submissions and evidence, 41 witnesses, of whom 25 gave oral evidence. The appeal was brought in 2011 and lasted around two years in total."

Sir, in my submission, the reasonable and informed observer would conclude that your speech given that evening was a response to the proposals published that day and the response to this article, which specifically said that Ofcom was strongly supporting them, and linked its support to its defeat in this case by reference to the scale of the litigation, the length it had taken and the amount that it had cost.

So, in my submission, that makes good what I was saying yesterday about the fact that the speech crosses the line in dealing with an individual case before that case has even been concluded, and making what, with respect, were unfounded allegations, or spurious proposals, against a party to that outstanding litigation.

THE CHAIRMAN: As you say, Miss Rose, we have to look at what the fair minded and informed observer would take from that. I made the point yesterday that there was considerable concern, certainly on the part of many people, about Competition Act infringement cases and the possibility, but we did not get into that.

MISS ROSE: Sir, I do not take it that you are suggesting that your comments were not relating to Ofcom. You are not suggesting that.

THE CHAIRMAN: I am not suggesting anything.

MISS ROSE: It is important to understand what you are suggesting.

THE CHAIRMAN: No, I am not suggesting at the moment anything.

MISS ROSE: Do you accept then that your comments did ----

THE CHAIRMAN: I am not going to be cross-examined, Miss Rose, with all due respect. We take very seriously what you have said in your submissions. As you have rightly said, we have got to look not at what the intention was in the speech, but at what the fair minded observer would think. You have made your submissions on that.

MISS ROSE: Yes, and of course the fair minded observer would be aware of this article on the same day.

THE CHAIRMAN: Well, it was published.

MISS ROSE: And the fair minded observer must be taken to have understood the article, and therefore will be likely to see the speech as a response to the article.

Can I, before I sit down, just deal with your point about Competition Act appeals: the speech, itself, makes it clear that the comments you are making are not related solely to Competition Act appeals, but also regulatory appeals. If you look at, for example, p.21, at the top of the page, the paragraph that I was showing you yesterday, you say:

> "Our democracy and our freedom depend upon it. This applies no less in the competition and regulatory field where infringement decisions and regulatory initiatives can have very real and sometimes adverse consequences for individuals and companies."

So it is clear that you are talking about not only the Competition Act, but also about regulatory initiatives.

THE CHAIRMAN: That is very helpful, thank you very much. Mr. Flynn, back to you.

MR. FLYNN: I had understood that Mr. Turner wanted to say a word, but possibly he does not.

MR. TURNER: It was just to say that we have handed up copies of your ruling.

THE CHAIRMAN: Thank you very much.

MR. FLYNN: Members of the Tribunal, I finished yesterday having discussed some of the principal authorities on the test to be applied, and I think what I come to now is the question of bias in the form of pre-judgment or, as those opposite me call it, confirmation bias, but I do not think there is a difference between the two. Again, in our skeleton we set out some important authorities - this is from para.14 onwards - on the issue of pre-judgment. To save time, and since we have already started a little later, I am not going to do a lot of reading them out, unless the Tribunal would find that helpful.

THE CHAIRMAN: We have read the skeleton.

MR. FLYNN: The principal point here is that pre-judgment can only be bias if the court is going to be dealing with extraneous matters. I am trying to shorten this. Where the court has made previous findings in, as it were, a judicial capacity, that is not pre-judgment unless the conclusions have been expressed in what the cases call "vituperative", "incontinent", or, I think, a coinage probably of Lord Justice Rix, "unjudicial" language. In other words, it has to go beyond the judicial function, which is to decide the issues that come up in front of the court where people hold different views. We were putting one case, Ofcom was putting another, your job was to determine who was right, and it cannot possibly be said that because you made findings adverse to Ofcom, or adverse to BT, in the original judgment, that has any relevance to what is to come unless it can be said that the conclusions that you express are in a vituperative form - which is not being said, and I do not think it possibly could, although they were described as "strong criticisms" by my friends opposite; in my

submission, they are no more than judicial determinations in moderate language - or otherwise indicate a closed mind.

In relation to this, Mr. Turner, I think, makes two particular points. He says that your first judgment was extremely long, monumental, an enormous labour, and he says it would be a natural reaction to say: "I told you so", and your second judgment is bound to be in the form of "I told you so" – "I told you what?" might be the rhetorical answer to that. This, in my submission, simply is not an "I told you so" case. Following the Court of Appeal's judgment what it is, is "You did not tell us something, and now you need to", that is the sort of case it is. It is an over simplification to say that what the case says is that there is no foundation for the WMO when what has been found wanting is an analysis of the pricing concerns, the Tribunal simply has not passed on those issues.

Mr. Turner also made his extensive submissions about new evidence. As part of his apparent bias point, a point that he says he was making orally, the Tribunal would be reasonably perceived to be liable to minimise the new evidence to make it a short hearing so it could get to the "I told you so" result, and in my submission there is no basis for that conclusion. There is no reason to suggest to the external observer that when coming to deal with any issues that remain to be dealt with in this case the Tribunal will do anything other than hear them as they should be heard and decided on their merits.

The more specific areas of bias that were relied on by my friends opposite, BT makes a particular point about your statement in the judgment on the stay and related matters, you probably have this well in mind but for your note it is in tab 5 of the hearing bundle, and the relevant paragraph is para. 39. My overall submission in relation to this particular aspect is that BT cannot reasonably rely on this any more than it could in relation to the Tribunal's refusal of permission to appeal.

These remarks were made, it might be noted, in the course of an application for a stay by BT which the Tribunal granted, and the views expressed were appropriately provisional and caveated in what is inherently, shall we say, an intermediate or interim decision. Even reading the sentences which are complained of that can be seen. The Tribunal refers to its permission to appeal ruling and quotes from it, and then says:

> "In addition, on the basis of the grounds as they stand, it is difficult to see that BT's proposed appeal, even if successful, would be capable of rescuing the WMO. Any future assessment as to whether the WMO could be justified, even in the absence of the core competition concerns . . . would almost certainly need to be carried out

by the primary decision-maker . . This would be likely to create a state of affairs. . ."

And so forth. There is nothing final about that, nothing to suggest that if the matter had to be determined finally the Tribunal would not decide it with an open mind. In that connection, again, possibly without going to it but I think possibly Miss Davies will, there is an important line of authorities which come up in the cases to do with permission to appeal, which say that you have to presume that a judge is capable of changing his mind and that these are the cases where a judge, for example, has refused permission to appeal on the papers and then is in the composition hearing the substantive appeal. There are cases such as *Sengupta* and coming from this court the Welsh Water case, *Dwr Cymru*. In both those cases one member of the Court of Appeal had refused permission and then ended up sitting on the appeal and was asked to recuse himself. The basis of the refusal to do so is that it is part of the judicial function to take a view on things at some points and later be open to changing his orher mind.

THE CHAIRMAN: Mr. Flynn, as I said yesterday, in para. 39 we actually were not dealing with the merits of the appeal, we were concerned with what had not been appealed, and we were expressing a thought which is to be weighed in the balance of granting a stay whether what had not been appealed meant that there had to be some reconsideration in any event by Ofcom, and that is all that was being signified. It was not actually exposing a view in that paragraph on the actual appeal itself, although we obviously had to do in terms of deciding whether to grant permission to appeal or not.

MR. FLYNN: All the more so, my Lord, and it is a provisional view. There is nothing to suggest that if the issue becomes live, as Mr. Turner says it may - and it may well do in the remittal – that this Tribunal would not approach that with an open mind. In my submission there is nothing there which, consistently with any of the authorities, could be described as pre-judgment bias.

The other topic, which has just been ventilated again on which Ofcom relies, and I think BT supports, although I have not heard that said expressly, but I think BT does, is in relation to your speech that we have just had discussed again. I do not think it is necessary for me to go into the archaeology, or the matters that have just been put forward as to the history of any consultation, in answer to Mr. Blair's question, that may set some of the background. The high watermark, as I understand it, of Ofcom's case about this, the highest it could be put is that the Chairman believed that in a consultation on the standard of review Ofcom had taken a position seeking to limit the Tribunal's powers as a reaction to this judgment. That is

the highest I think it could be put. There are plenty of other things going on, as has been said, other Regulators disappointed by outcomes in this Tribunal. Miss Rose and I, and others possibly in this room, went straight from the Pay TV hearing into an even longer hearing which was the tobacco case, which did not go the way the OFT would have liked. That plainly rankled, and indeed Dr. Fingleton was speaking out about it just the other day. In any event, Ofcom is reading a lot into the speech, making a lot of inferences. What the speech, to my mind, says, and I claim to be as objective as the next man or woman, is that regulators, if they do not like a judgment, ought to appeal them, not seek to put pressure on the judges. It is hard to know what is wrong with that as a proposition. Actually, the only issue that is at all relevant for today's purposes is, from the perspective of the reasonable observer, this well defined inhabitant of a legal village, would that observer conclude from the speech that there was a risk that in a subsequent case involving Ofcom, the Chairman would decide that case otherwise than by reference to its legal and factual merits? That is actually the only question that is relevant. That seems to me an impossible inference. Judicial independence, which was the value which the speech points to as being of particular importance, means the ability to decide cases impartially, fairly, without fear or favour, and so on. The implication that has to be drawn - in other words, the implication that the reasonable observer would have to make to get to this being a bias problem, as Ofcom suggests - is that all those references to judicial independence were essentially hypocritical, and that the particular judge making those references might reasonably be expected to decide a subsequent case involving Ofcom in a sort of vengeful or vituperative way. In my submission, that is an impermissible inference, and it is not one which the well informed observer would draw.

It is also clear, in my submission, that this aspect of the case can only be treated by the Tribunal as a recusal application, at least against the Chairman, and, as it was put yesterday, possibly to all the members, depending on what discussions you might have had.

THE CHAIRMAN: I think that is common ground, that that aspect of the case is a recusal matter, rather than a case management matter.

MR. FLYNN: Yes, I think it is. The relevance of that I will come to. It was said yesterday that there is a real difficulty for Ofcom in having confidence in you, Sir, presiding over the hearing of the remittal. In my submission, I think it is obvious, that is not the test. Ofcom's confidence or Ofcom's opinions about a judge or a Tribunal is not the relevant issue. The question is whether those views could reasonably be attributed to the observer. If your conclusion is that that is what the reasonable observer would think, as I said yesterday, it is

your duty to stand down, but if it is not, then it is your duty to sit. I quoted some of the cases on that yesterday. The *Urumov* case that we were alerted to yesterday is another application of these principles, and it iss quite helpful… Again, it is another of these cases from the Court of Appeal which summarises the principles and disapplies them in the particular case of a judge who recused himself reluctantly, but recused himself, and was found by the Court of Appeal to have done so wrongly. I do not know if you have your copies of that case to hand.

THE CHAIRMAN: Yes.

MR. FLYNN: I am not going to read out large chunks, but it really is a helpful case. It deals with the situation of a judge in a long running case. He has already made findings in respect of the parties. The findings against Mr. Urumov had obviously not been probably what he would have hoped for, and he was held to have been party to a conspiracy to defraud, and a contempt application was pending. Obviously he could have been sent to prison and other penalties could have been imposed. One can see that an individual, particularly one without legal representation, as he was in that case, might be apprehensive about the judge who has made those findings hearing his contempt application. He might well feel that it was only going to go one way. He made an application to the judge which the judge interpreted as a mixed apparent and actual bias accusation and the judge recused himself.

The discussion of the authorities starts at p.13 under the heading "The Law". This is a judgment of Lord Justice Longmore, with which the other members of the court agreed. It states the general rule, a judge should not recuse himself, para.13:

> "… unless he either considers that he genuinely cannot give one or other party a fair hearing, or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so."

He says:

> "… there must be substantial evidence of actual or imputed bias before the general rule can be overcome …"

and it is a very fact sensitive matter.

From para.16 onwards he quotes many of the English cases. Not all of these are in the authorities bundle, but some of them are. There are interesting quotations in para.17 from the *Bahai v Rashidian* case.

Mr. Scannell tells me para.16 is important also. This is a point I think I have made already:

> "… English cases have emphasised that the fact that a judge has made adverse findings against a party or a witness does not preclude him from sitting in

> judgment in subsequent proceedings and some cases have even emphasised the desirability of his doing so."

I think we may come to some of those cases. Those say that, effectively, the judge should see it through. Having made certain findings he may well be called on to deal with a contempt application or a wasted costs application. There are all sorts of things which are consequential upon the findings that he makes. Those can be also that a particular person has lied in the witness box. We will come to that example.

I am not going to read all these quotations in para.17, but I do note over the page, at least in my version of this, Lord Justice Balcombe agreeing with Sir John Donaldson's judgment saying:

> "I accept that the judge has a discretion to direct that the application be heard by another judge, but the discretion is a judicial one, to be exercised in accordance with settled principles, of which one is undoubtedly that the application should be tried by the judge who heard the action unless there are compelling reasons to the contrary …"

The discretion being a judicial one is a point that I would emphasise.

In para.18:

> "In long trials where many applications have to be decided in the course of the hearing, a party may persuade himself that a judge is biased against him as a result of his rulings."

This is what underlay the *Arab Monetary Fund* case, which I quoted from yesterday and where Sir Thomas Bingham makes additional remarks about the disinterested observer.

Then in para.19 *Locabail* grounds are set out. I note at the end of the long paragraph, because I will come back to it, which is quoted from *Locabail*, there is the point:

> "But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts …"

Paragraph 21 refers to another case that we have in the authorities bundle and from which we have quoted, the *Ablyazov* case. That is a case where the judge at an earlier stage had found that the defendant was in contempt and had lied when being cross-examined about his assets. Again, Mr. Ablyazov did not want the judge to be trying the actions. This is where the judge in that case said he would not recuse himself, and the Court of Appeal said he was quite right about that. That is where Lord Justice Rix perpetrated, as I said, the neologism of "unjudicial language" - let me read the whole thing:

> "… unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair minded and informed observer is unlikely to think that the first judge …"

in other words, the one who made the original findings -

> "… is in any different position from the second judge - other than that he is more experienced in the litigation."

One can see how, I would say, that applies to this case.

The summary at para.22:

> "There is thus a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case unless it can be shown he is likely to reach his decision 'by reference to extraneous matters'…"

and so forth.

The judge thought it was terribly serious because they were charges of actual bias. The Court of Appeal did not think that made a difference. The fact that the allegations were expressed in that way and the fact that the litigant decides to raise the stakes in that way does not change the principles. The judge had thought that he was being consistent with previous authority, and he was not (para.24).

Then at para.25, the judge had applied the observation in *Locabail* that I just drew your attention to, that if there is any real ground for doubt, that should be exercised in favour of recusal, but the judge had not explained what the real ground for doubt is in that case. In fact, he clearly thought there were not any real grounds for that.

Doubt is not raised simply because someone applies for recusal. A serious case has to be made that the reasonable observer (a shorthand phrase) would consider that there was the appearance of bias. If you cannot decide whether or not that is the case, I daresay that may just about be enough, but there has to be a serious ground for that doubt.

The third reason that the judge gave was that the matter could be dealt with by another judge of the Commercial Court. We had a discussion about this sort of thing yesterday. No doubt it could be, but that cannot, itself, be a good reason for recusal, any more than it could be a good reason not to recuse himself that another Commercial judge could not be available. Of course someone else can deal with it, but that is not the point.

Then the remarks of Lord Justice Chadwick quoted in para.27:

> "It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant - whether it be a represented litigant or a litigant in person - criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases."

and so forth. I think that point is sufficiently made.

The conclusion one might draw from all of this, at para.32, is:

> "Usually this court will be astute to support judges exercising what I have called 'this delicate jurisdiction' of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined. Of course, if the judge himself feels embarrassed to continue, he should not do so; if he does not so feel, he should."

and so forth.

All of that, I say on the apparent bias grounds in these applications, duty to sit, basically, unless you are convinced that apparent bias has been made out.

Mr. Turner then attempted to sweeten the pill by saying that though he did not shrink from putting those points, we did not have to do it that way, if you like, we can go down the *Sinclair Roche & Temperley* route, and you can treat yourself as being in the position of the body which decides whether it is a good idea for the remittal to be heard by the original formation or by a new one.

As to that we say essentially three things: firstly, it does not work. Secondly, even if it did work, if you applied the *Sinclair Roche & Temperley* type criteria, it could only lead to one result, which is that on all the grounds that are set out there it would be a whole lot better

for this to be heard by the original formation than by a new one. Thirdly, we say that, even if it were open to you to go down that route, you should not do so in these circumstances. Just briefly on those three points, firstly, it does not work. We say, in any event, the starting point is that the default position is that the remittal should go back to the original decision maker. That certainly seemed to be the starting point in *Sinclair Roche & Temperley* itself. There is no reason to think the Court of Appeal thought anything differently in this case. It certainly was not asked to consider that.

We take the position that the Tribunal in its letters was not simply saying, "Well, we will appoint someone to be the kind of *Sinclair Roche & Temperley* review body", its original letter said that there might be some administrative machinery to be gone through to reconstitute the original panel, whatever exactly is the right phrase. I think Miss Davies and Mr. Blakeley did some research on that last night, and the Tribunal is simply asking if that should be done, or was there a view that a new panel should be constituted, recognising that the new panel would be at the disadvantage that it had not heard the original evidence.

As I said yesterday, whatever powers the Registrar has cannot change the default legal position, as we understand it, which is that in the ordinary course it goes back to the original decision maker if that can be done.

Then there were some exchanges of correspondence in which we explained for our part that the rules did provide mechanisms for reconstituting the original panel and that that can be and should be done. Although the Tribunal asked the parties to co-ordinate, Ofcom sent its own letter saying that they thought this should be dealt with on a *Sinclair Roche & Temperley* basis.

As I said yesterday, my primary case on this point is that this is not a *Sinclair Roche & Temperley* case. The original panel, the original constitution, has been retained, has always been the panel hearing this case, and it should continue to do so unless there is a very serious reason why not.

Our second point on this, as I said, is that if you run through the *Sinclair Roche & Temperley* criteria, the balance falls unquestionably, the convenience of many of the remitted matters being heard by the original formation of the Tribunal.

It is plain that the *Sinclair Roche & Temperley* criteria lead to case by case valuation with a whole wide discretion for the decision maker, it is basically a case management-type of view and the Sinclair *Roche & Temperley* review body, if I can call it that way, has a large discretion as to how it evaluates the matters that fall into the balance. We actually heard very little about that yesterday. There was no reference, for example, to the flawed decision

category, which we say is quite unsustainable anyway, and if you read *Sinclair Roche & Temperley* what they are thinking about is a Tribunal which so mishandles the matter that you could not send it back to them and, despite the many criticisms of the procedure, that the Tribunal in that case had carried out, Mr. Justice Burton thought it was fine for it to be remitted to them, and for them to complete the job.

To the extent that my friends may say they did not develop it yesterday, they referred to their skeleton arguments, we do the same. By reference to any of them in our submission it is clear that this is the better placed Tribunal. It will still be quicker for this Tribunal to pick up what needs to be picked up than a new Tribunal coming to it afresh. The period of time that the Tribunal spent deliberating and writing its judgment we say is entirely in our favour on that point.

The main point that I had understood Mr. Turner to be relying on in this case was again his view that there needs to be substantial new evidence on the remittal. He presented that as a joint Ofcom and BT view and Miss Rose did not demur from that. We do not need to go to it now, but in the correspondence that you had – the exchange of correspondence that you had following the Registrar's original letter – in tab R is a letter from Ofcom which says that there should be no new evidence, and I can go to it if needed, but it is in there; that was Ofcom's position last time we heard.

In any event, if there should be new evidence, it is clearly a matter that the Tribunal is well placed to decide. What it should be, if there is to be any, is a matter for the Tribunal to decide; how it relates to the evidence that is already before the Tribunal is something which this formation is evidently best placed to evaluate. So, on any view, we say that the *Sinclair Roche & Temperley* criteria make it clear which way you go on that.

But, and this is my last point, it would be wrong, as a matter of principle, we say, for you to accept Mr. Turner's sugared pill. That would be to brush under the carpet a bias allegation – a serious bias allegation. *Sinclair Roche & Temperley* is not itself a bias case, as you will have seen. Mr. Justice Burton clearly thought that different considerations were raised if there is a bias case. You do not start weighing things in the balance if there is bias. If there is bias you do not remit to the original body and you find someone else. It does not matter how well placed the original Tribunal would be to hear the remitted issues.

In our submission the only possible way this Tribunal can decide this case is to take head-on the very serious allegations of bias that have been made and, we say, for all the reasons that I have sought to develop, and we put in our written submission, that the outcome of such

consideration should be that the present constitution is the right one to hear the remainder of the issues which the Tribunal will have to decide.

Unless I can assist further.

THE CHAIRMAN: Thank you very much. Miss Davies?

MISS DAVIES: Sir, on behalf of the Premier League I gratefully adopt my learned friend, Mr. Flynn's, submissions, and what I was proposing to do if I may was to add a few points by way of supplement to those. I am obviously not planning to duplicate.

I did want to start with a point which my learned friend finished on, the appropriate framework for the Tribunal's analysis of the submissions that are being made by my learned friends to my left.

We, like my learned friend, Mr. Flynn, would reiterate that although they sought to soft pedal to some degree yesterday in relation to the allegations of apparent bias, it is clear at the core of both my learned friends' submissions that they are suggesting that there are circumstances in this case which would, to use the *Magill v Porter* test, which it is common ground is the relevant test on apparent bias, lead a fair minded and informed observer to conclude that there is a real possibility that this Tribunal is biased. If that submission is accepted then the Tribunal must recuse itself, that is its duty. We do submit, therefore, that that is the very first question the Tribunal must decide given that those points have now been raised by my learned friends.

I gratefully adopt all the points that my learned friend, Mr. Flynn, made in relation to apparent bias. All I wanted to do in a short passage in my submissions, is just draw attention to a few further points that come out of the authorities, in particular, in relation to the attributes of the fair minded observer, and the fair minded observer's recognition of the professionalism of any Tribunal which, with respect, my learned friend's submissions simply fail to grapple with, and that is one of the fundamental problems of their case in relation to pre-judgment and confirmation bias.

Before I come to that, just then proceeding down the analysis, the first point the Tribunal needs to decide is: is the case on apparent bias made out? It is only if, as we and Sky submit the Tribunal should, the Tribunal reaches the conclusion it is not made out that the question can then arise in our submission of whether there are broader considerations that may be taken into account by the Tribunal to decide whether or not it is the best course to use the *Loftus* or *Sinclair Roche* analogy for this Tribunal to continue to sit.

There are obviously two issues before the Tribunal. The first is the question whether that is something that is open to this Tribunal to do at all, or whether it has already been seised and the judicial duty to decide a case has arisen.

In relation to that point, there are just two points I wish to add to the submissions made by my learned friend, Mr. Flynn. We, overnight, just pulled up Schedule 2 to the Enterprise Act, which my learned friend, Mr. Blakeley, will circulate because we do submit it is of some relevance to this issue to consider the powers under which both the Chairman's and Mr. Blair's appointments have been continued. They are to be found, as we understand it, in Schedule 2 to the Enterprise Act, which is Schedule 2 to section 12 of the Act itself. In particular, in s.2.2, in relation to a chairman:

> "A person may not be a chairman for more than eight years, but this does not prevent a temporary reappointment for the purpose of continuing to act as a member of the Tribunal as constituted for the purposes of any proceedings instituted before the end of his term of office."

The same provision we see in s.4.2 in relation to an ordinary member:

> "A person may not be an ordinary member for more than eight years, but this does not prevent a temporary reappointment for the purpose of continuing to act as a member of the Tribunal as constituted for the purposes of any proceedings instituted before the end of his term of office."

What both of those sections would appear to suggest is that both you, Sir, the chairman, and Mr. Blair, have been re-appointed for the purposes of these Pay TV proceedings, and are thus seised, in our submission, of these proceedings by virtue of that reappointment.

Whilst I am on the subject of the Enterprise Act and Schedule 2, we would also note that these provisions provide the short answer to the suggestion made by both my learned friends yesterday that they had no business raising the composition of the Tribunal with the Court of Appeal.

The point they were making, insofar as we understood it, in that connection was that as two members of the Tribunal had gone, there was no necessity to raise that with the Court of Appeal. Of course, it is true, as a matter of fact, that two members had gone, but it is clear under the statutory provisions that members who had been appointed in relation to proceedings instituted before the end of their term of office can, in accordance with the Statute, be reappointed to continue hearing the case. Therefore, we do say, the more logical place for the parties to my left to have raised the *Sinclair Roche* type analysis, if it was an

appropriate one to raise, would have been the Court of Appeal and, of course, they did not do so.

The second short point I would just add in relation to this question of whether it is for this Tribunal to apply a *Sinclair Roche* type approach, if you get that far, is that despite there being two volumes of authority before the court, neither my learned friend, Mr. Turner, nor Miss Rose, have been able to point to a single case in which, what they have described as the *Sinclair Roche* type approach, has been applied by a first instance judge or Tribunal as opposed to be applied by the appellate Tribunal when decided how to exercise its powers of remission.

THE CHAIRMAN: Funnily enough I was going to ask you and Mr. Flynn about that because it had just probably struck me – it had struck others earlier, no doubt – that both that and was it the *HCA* case here, were all about whether one should remit to, as it were, a decision maker at a different level.

MISS DAVIES: Exactly, *Loftus* is the same. It is all arising at the appellate level, when the appellate level is deciding how to exercise its power of remission back to a body, should it be the same parties, or same constituted Tribunal, same Regulator in the *HCA* case, same body at the Regulator or not. There is not a single authority that has been pointed to which is a parallel with this situation where it is the first instance Tribunal to which a matter has been remitted already by the appellate Tribunal, we know that from the Court of Appeal judgment, it is the first instance Tribunal that is being asked to conduct the balancing exercise that *Sinclair Roche* would suggest in certain circumstances might be appropriate.

The suggestion appears to be that there is some unique feature of this institution, the Competition Appeal Tribunal, or the letters that it has written, which mean that it has abrogated to itself the power to decide that issue, rather than the position being, as in every other case in the bundles of authorities, or that any of the parties have managed to find, that the judge who is appointed to hear the case, or the case members of the Tribunal whose appointment has been continued in order to enable them to continue to hear the case should proceed to do so in accordance with their judicial duty. We submit, to put it no higher, that although there are many unique features of this august Tribunal it seems unlikely that this is one of them.

Of course, it is only if Mr. Turner or Miss Rose can successfully persuade you that they can overcome that threshold issue that issues other than apparent bias could become relevant on the basis of the *Sinclair Roche* approach. I understood that to have become a ground from my learned friend's submissions, but it is clear, for example, from the passages in *Urumov*

that my learned friend, Mr. Flynn, just took the Tribunal to, particularly paras. 27 and 32. We respectfully also take the same position as my learned friend, Mr. Flynn, did in relation to that. If apparent bias is put to one side, which it must be, otherwise in accordance with my submissions you would not get to this stage of the analysis because it would only be if you decided the case on apparent bias is not made out that you get to a *Sinclair Roche* balancing approach. If you put that to one side then there is absolutely nothing in our submission to point to the conclusion that anything other than the normal approach of the same Tribunal should apply. To the contrary, expediency and proportionality point to this Tribunal continuing to determine this case.

My client's wish, as with Sky, is to see as speedy a resolution of the remainder of the issues necessary to dispose of the appeal as is possible. We, of course, accept that that is going to be a substantial exercise of itself, but it is in our submission one that will obviously be more expeditiously undertaken by this Tribunal rather than a newly constituted one who has not even had the benefit yet of reading the Pay TV statement, let alone considering any of the extensive evidence that we all experienced.

On apparent bias, I just wish to bring together a few strands in relation to the relevant authorities which in our submission once brought together make clear why my learned friend's submissions, whether they are put as pre-judgment or confirmation bias, it does not matter for these purposes, or, indeed, my learned friend's, Miss Rose's, submissions, in relation to the Chairman's speech do not give rise to a case for recusal in the present case.

The first point that, in our respectful submission, it is important to bear in mind is that the core principle to which these problems of pre-judgment or confirmation bias are directed, is whether or not the fair minded and informed observer would consider there was a real possibility that the Tribunal will not bring an impartial mind to bear on the adjudication of this case going forward, by which the authorities make clear mean bringing a mind open to persuasion by the evidence and submission that is yet to be heard, not having a closed mind.

I just wish to flag one passage in the *Ablyazov* case, which is in the second volume of authorities at tab 18, para. 46. *Ablyazov* is a pre-judgment case. It was one of the cases where the first instance judge was the designated judge and he had sat on contempt proceedings in relation to Mr. Ablyazov. He had found Mr. Ablyazov not only to have breached court orders but to have lied under oath, and also to have dispersed his assets in breach of a freezing order. Shortly before the trial started there was an application made to the trial judge to recuse himself on the ground of apparent bias, given the extent of the

findings that had already been made - it, of course, being a case in which Mr. Ablyazov's credibility was again expected to be central to the issues in dispute.

I just wish to draw attention in this context to the first passage cited under para. 46 from the comments of the President in the *President of South Africa* case, which Lord Justice Rix is pointing out are particularly apposite and relevant to the current problem. Some of these passages are cited by my learned friend, Mr. Flynn in para. 11, but this section is also important in my submission.

> "The question is whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves."

So that passage is making two points of relevance in my submission. First, the relevant question is one of whether or not there is a closed mind, that is what is meant by apparent bias, but secondly, in assessing, looking at the question from the point of view of the fair minded observer, the reasonableness of the apprehension, one of the relevant factors is the oath of office taken by judges and their ability to carry out that oath by training and experience.

MR. TURNER: Could you finish the paragraph before you leave it?

MISS DAVIES: I can finish the paragraph, we have already looked at the rest of the paragraph.

> "At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate . . ."

It is a passage that my learned friend went to yesterday. Of course, that is part of the analysis, but the point one makes is that only gets to a serious doubt that leads to that, taking into account the first two features that are cited in this section.

THE CHAIRMAN: What is interesting there is it says that the litigant: "reasonable grounds on the part of a litigant for apprehending".

MISS DAVIES: That is citing relevant concepts from a South African decision. We, of course, have two bundles of authorities indicating it is the perspective of the well informed and fair minded observer.

Confirmation bias, just to pick it up, has the same assumption of professionalism built into it, insofar as it applies. One can see that from the approach of Mr. Justice Burton in the *Sinclair Roche* case, which we set out fully in para. 11 of our skeleton. The passage on confirmation bias is at para. 46.5 of Mr. Justice Burton's analysis in *Sinclair Roche*.

> "There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say 'I told you so'.

But, critically, what Mr. Justice Burton went on to say is:

> "Once again the appellate tribunal would only send the matter back if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised."

In other words, the Tribunal would be approaching matters with an open mind and listen fairly to the evidence.

Then, para. 46.6, "Tribunal Professionalism":

> "In the balance with all the above factors, the appellate tribunal will, in our view, ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission. By professionalism, we mean not only the general competence and integrity of the members as they go about their business, but also their experience and ability in doing that business in accordance with the statutory framework and the guidance of the higher courts."

He makes the point that employment law changes, and Employment Tribunals are all too familiar with that changing. Then, in the last sentence:

> "It follows that where a tribunal is corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a 'totally flawed' decision described at 46.4), then, unless it appears that the tribunal has so thoroughly committed itself that a rethink appears impracticable, there can be the presumption that it will go about the tasks set them on remission in a professional way, paying careful attention to the guidance given to it by the appellate tribunal."

And that is a feature that is recognised in the apparent bias authorities in the way I just indicated in the *Ablyazov* comments, but it was also a feature that was particularly commented on by Lord Justice Laws in the *Sengupta* case, which was the other authority I just wanted to go to briefly. It is in the first bundle of authorities at tab 8.

THE CHAIRMAN: In 46.6 "Tribunal Professionalism", I am not sure, does that go to what I call the 'case management issue' or does it go to the ----

MISS DAVIES: No, no ----

THE CHAIRMAN: It goes to both.

MISS DAVIES: It goes to apparent bias too. That was the point that was being made in the passage in *Ablyazov*, but it is a point that is clearly made by Lord Justice Laws in *Sengupta*. *Sengupta* was one of the cases – there are a few in the bundles – where the question before the Court of Appeal was whether a member of the Court of Appeal who had refused permission to appeal on paper, in this case Lord Justice Laws, could then sit on the hearing of the appeal when permission had been granted by other members of the Court of Appeal. So the judge in question had made a decision on a permission application that there was no real prospect of success, and then he is being asked to sit on the appeal to determine whether or not the appeal should be allowed.

I just wish to flag a few passages of this, starting first of all at para. 10. Lord Justice Laws, who was giving the judgment of the court is addressing in para.10 the attributes of the fair minded and informed observer, and noting that they are not a lawyer. Then, towards the bottom of the paragraph, he notes that he has been referred to the decision of the Supreme Court of South Australia in *Southern Equities Corp v Bond* citing *Johnson*, and he sets out a citation from Mr. Justice Kirby in *Johnson*, which actually feeds into Lord Hope's analysis of what the attributes are of the fair minded observer. I just wanted to flag the passage at the end of that quote:

> "The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated example of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

And Lord Justice Laws notes at para. 11:

> "All of these observations are with respect useful and important."

Turning on, he then analyses various of the relevant authorities, but picking it up at para. 35, he is pointing out:

> ". . . the judge in question has not himself had to resolve the case's factual merits, and has not expressed himself incontinently. All he has done is to conclude on the material before him that the result arrived at in the court below was correct. And he has done so in the knowledge that, at the option of the applicant, his view may be reconsidered at an oral hearing. In such a case is there a reasonable basis for supposing that he may not bring an open mind to bear on the substantive appeal . . ."

Then, in para. 36:

> "I consider, in line with a submission made by Mr Pollock, that an affirmative answer to this question would travel beyond whatever is the perception of our courts and judges that may be entertained by the fair-minded and informed observer, whoever he may be. It is not only lawyers and judges who in various states of affairs may be invited – they may invite themselves – to change their minds. Absent special circumstances a readiness to change one's mind upon some issue, whether upon new information or simply on further reflection, and to change it from a previously declared position, is a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis. It is surely a commonplace of all the professions, indeed of the experience of all thinking men and women."

Then in para. 37:

> "Who is the fair-minded and informed observer?
>
> Our fair-minded and informed observer must surely have these matters in mind. That does not turn him into a notional lawyer. It merely reflects his fair-mindedness. However much we may in the name of public confidence be prepared to clothe our observer with a veil of ignorance, surely we should not attribute to him so pessimistic a view of his fellow-man's own fair-mindedness as to make him suppose that the latter cannot or may not change his mind when faced with a rational basis for doing so. That is, I think, what this case involves: not merely the ascription to the notional bystander of a putative opinion about the thought-processes of a judge, but the ascription of a view about how any thinking, reasonable person might conduct himself or herself when, in a professional setting, he or she is asked to depart from an earlier expressed opinion. The view which

Miss O'Rourke submits should be ascribed to the bystander does much less than justice, I think, to the ordinary capacities of such a person. In my judgment, therefore, it is not a view which the fair-minded and informed observer would entertain".

Then, in paras. 38 to 39 he goes on to note:

"that the bystander may be taken to possess 'some knowledge of legal culture'. He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. Knowledge of it should, in my judgment, be attributed to the fair-minded and informed observer; otherwise the test for apparent bias is too far distant from reality. It is a commonplace for a hearing to start with a clear expression of view by the judge or judges, which may strongly favour one side; it would not cross the mind of counsel on the other side then to suggest that the judge should recuse himself . . . "

Then, in para. 39:

"Another aspect of our legal culture is the expectations which the judges have of each other. Far from supposing that his fellow-judge would or might stand by an earlier view for no other reason that he had formed it, any judge would positively expect that his fellow would without cavil alter his view if he were objectively persuaded that it ought to be altered; and, to be blunt, would think much the worse of him if he would not. This too, it seems to me, would be known to the bystander."

That is in the context of a case where the judge actually has expressed a defined view on an issue, but it is still noted by Lord Justice Laws to be the attributes of the fair minded observer, and is the reason why in the permission to appeal type context you acknowledge that a judge, properly trained and experienced, can change their mind when objectively listening to the argument, and you need something more – much more – than the fact they have just decided permission, to take one outside of that.

We are not in that context in this case. My learned friends have not been able to point, in our respectful submission, to a conclusion that this Tribunal has had to make on any of the issues that come back to the Tribunal for remission, on which the Tribunal has to change its mind. The closest submission to that effect was my learned friend, Mr. Turner's submission

based on the paragraph in the stay judgment, but that does not, with respect to my learned friend, advance matters because, at best that was a provisional view about an issue that may or may not arise later in this case, one will have to see. But it certainly was not as strong a view as the refusal of permission.

THE CHAIRMAN: You are right, we have never been called upon to express a view on the issue which has been remitted.

MISS DAVIES: Precisely.

THE CHAIRMAN: Obviously, in the permission to appeal case we have expressed a view on the merits of the appeal, but the appeal did not raise the merits of the point we did not decide, it raised the mortise of whether we should have decided it.

MISS DAVIES: Precisely, and that is precisely why it has now had to be remitted. I flagged these passages because I do submit these are important attributes of the fair minded observer that have just been ignored by my learned friend's submissions, and go to the heart of why there is nothing in this case to meet the apparent bias test, once it is properly understood.

The fourth point, just to emphasise, my learned friend, Mr. Flynn took you through the most recent *Urumov* decision on pre-judgment, and these attributes of the fair minded observer feed in very much into that line of authority and why simply having decided things adversely to one party cannot be a basis for saying apparent bias going forward.

The only other authority – I am not going to take time on it – I would just commend it to the Tribunal - is the full analysis of Lord Justice Rix in the *Ablyazov* case which we have cited in our skeleton, in particular from para. 65 through to 70, and just to note, one example that Lord Justice Rix gave in that passage was a case in which Mr. Justice Langley had granted summary judgment against a party, and then that decision was overturned by the Court of Appeal, and so the matter proceeded to trial, and it proceeded to trial before Mr. Justice Langley who had already decided that there was no real prospect of success, without any criticism from Lord Justice Rix on the basis of confirmation bias or apparent bias. Again, it is because all of this is concerned with the question of whether or not there is a reason to think the Tribunal is not going to bring an open mind to the questions that come back to it, and the judicial experience and integrity and professionalism that is part and parcel of the approach to the fair minded observer.

So far as Ofcom's reliance on the speech given by you, Sir, I would wish only to add a few points to the points made by my learned friend, Mr. Flynn, which we wholly endorse. The first point I just wish to add is my learned friend, Mr. Flynn, made the point that again the

relevant question is one of whether or not the speech would lead the well informed and fair minded observer, with the attributes that I have just been addressing, to conclude there was a real possibility of bias in the sense of not approaching the remitted matters with an open mind. That that is the relevant question is confirmed by the *Locabail* decision, which is one of two decisions in the authorities that we have before the Tribunal, where the court decided that a case of apparent bias was made out by reason of extra judicial comments made by a Tribunal. I will not take time on it, just to give the reference, it is at p.495D in which the Court of Appeal made clear that that was the relevant question.

Of course, *Locabail* was a very different case, where it was held to have been made out. That was a case where a professional barrister had strong opinions in relation to personal injury matters, had written extensively about such matters and then came to be sitting as a Deputy on a personal injury case. All his writings were pro-claimant, and he had made a lot of statements to indicate he had very pro-claimant views. The Court of Appeal reluctantly reached the view that, in those circumstances, they did not think he could have an open mind.

The other example in the bundles that we have is the case which my learned friends refer to in their skeleton, of the Tribunal expressing views that miners should not get legal aid at the time of the Thatcher miners' strikes, and again there were strong comments.

So far as the specifics of the speech are concerned, I would simply just add a few points which, in our submission, would be relevant to the question of how the well informed and fair minded observer would interpret the comments made. Obviously, it is an objective test as my learned friend, Miss Rose, fairly accepted. All I would highlight is that there is no direct reference at all in the relevant passages of the speech to Ofcom, nor indeed to this case.

Ofcom is only one of the many Regulators that appear regularly before this Tribunal. There are undoubtedly many decisions against many Regulators that have gone against them. This case is not unique in that respect, nor is this case unique in being a high profile case that had recently gone against a Regulator. Judgments in both 'Tobacco', which my learned friend, Mr. Flynn, mentioned, but also the 'Dairy' litigation had been delivered – Dairy in December 2012. Other Regulators were engaged in responding to the BIS consultation on the standard of review. In all those contexts we do submit that the fair minded observer would not be drawing the inference that my learned friend, Miss Rose, suggests, and certainly would not be concluding on the basis of that speech that you, Sir, the Chairman of

the Tribunal, or any other member of the Tribunal would be doing anything other than approaching the rest of this case with an open mind.

On the case management matters that have occupied skeletons between me and my learned friend, Mr. Turner, I have nothing to add to the points made by my learned friend, Mr. Flynn. Those are issues that will have to be decided by whichever Tribunal. We hope they can be decided relatively soon, so that we can progress the outstanding matters, but they are for another day, so I will not occupy any more time on a Friday afternoon in relation to them.

Unless I can assist further.

MR. BLAIR: One very small point, Miss Davies, on your first statutory point, do you still have para. 2 of the Schedule 2 to the Enterprise Act?

MISS DAVIES: I do, indeed.

MR. BLAIR: Paragraph 2 talks about a person not being a chairman for more than eight years. Mr. Justice Barling was a President at the time, have you taken that into account in your submissions?

MISS DAVIES: With respect to Mr. Justice Barling we do not understand he has been reappointed as the President of this Tribunal.

MR. BLAIR: Indeed not.

MISS DAVIES: He has been reappointed as a Chairman in relation to this case as we understand it, because there is not a provision in the Enterprise Act, and if we have missed it, we apologise, but we could not find any provision in the Enterprise Act, other than s.2.2 which entitled the reappointment of the Chairman for the purposes of the case. Obviously, this Tribunal will know its procedures inside out, so if we have missed it we apologise, but that is why we submitted it was of relevance.

MR. BLAIR: I think para. 4 solves my problem, if you see what I mean ----

MISS DAVIES: Yes.

MR. BLAIR: -- but I do not think you can get home just on para. 2, and I think you agree with that?

MISS DAVIES: Yes, I do.

THE CHAIRMAN: Mr. Turner or Miss Rose.

MR. TURNER: May it please the Tribunal, I will begin my short reply by training my sights on the 27th February 2013 ruling. Would you pick that up again in bundle 1, tab 5, p.50. You will recall, the statements on which we focused are paras.39 and 41, and I will refer to one other now, the statement that it is difficult to see a Court of Appeal victory would be

capable of rescuing the WMO remedy. Paragraph 41, which my friend did not specifically refer to just now, the "ultimate lack of utility of BT's proposed appeal".

Our submission, which was not directly met by the response, is that those words can only mean that you were saying that even if there is a remittal back to this Tribunal, your view was that the WMO remedy cannot be rescued, cannot survive. That involves, in my submission, a clear predisposition against upholding the validity of the independent pricing concerns of Ofcom in the remittal, and then going on to find, in line with Lord Justice Vos and Lord Justice Aikens, who also left the matter entirely open, that those pricing concerns, when found, were sufficient to lead to the conclusion that there should be a WMO remedy.

Can I also ask you to turn back to the Court of Appeal judgment, while keeping open the ruling, which is at the following tab. We looked before at para.118. Just to remind the Tribunal, that followed on from Lord Justice Aikens and comments on what he said in para.97, where he said:

> "I accept, of course, that if the position is that Sky was prepared to negotiate for the wholesale supply [of the channels] and it was prepared to negotiate the price, then the fact that the discounts would have been based on penetration levels *may not*, of itself, have been sufficient of an independent 'competition concern' to lead Ofcom to the conclusion that it had to impose a WMO remedy or some other remedy. But, in the absence of any analysis of this issue by the CAT in the judgment it is unclear whether there could be an independent 'competition concern' … or what the effect of that concern might be."

Lord Justice Vos, if you go a few pages on, picks up on that, as you see from his introductory words, and he says half way down:

> "While I agree it is possible to imagine situations in which this could be the case it does not, in my judgment, seem to be a likely outcome."

Then he goes on to describe the situation and says that was what led to the WMO remedy.

You said yesterday, Sir, that your statements in the ruling were not, as we understand it, pre-judging anything about the ultimate fate of the WMO remedy. They were not pre-judging this. They were rather to the effect that the Tribunal could uphold the validity of the independent pricing concerns on the remittal and that any question whether these pricing concerns were sufficient to lead to the conclusion that the WMO remedy should stand in consequence were for someone else, for Ofcom. That is the transcript of yesterday, p.10, and pp.22-23. It is nothing to do with the Competition Appeal Tribunal's role.

THE CHAIRMAN: We said that that was not a concluded view, but I think we said that that would be an issue that would arise. It seemed to me anyway that it was an issue that would probably arise. That is why that we say at the bottom of para.39 of the stay:

> "This would be likely to create a state of affairs very similar to the situation where no stay had been granted and the WMO had been removed prior to the appeal."

If we did not grant a stay the risk was that the matter would lapse and there would have to then be a reconsideration by Ofcom. What we are postulating here, and in the reference to an ultimate utility, is that assuming that you are right on this point, that might well, depending on the arguments after any judgment in which you had won, lead to the remedy - in other words, we might feel that it was not appropriate for us to take a view on whether, with a new landscape of practices, not the ones that were the subject of the statement, the remedy was appropriate. The argument would no doubt be both ways. It seemed to me that one way would certainly be that it would be for Ofcom to decide because they are the regulator.

There is nothing, with respect, sinister about these pages. They are simply postulating that possibility, that even if this point were good, then it might mean that there still might have to be consideration of the WMO. It may come back. That might have been wrong. It may be that it is right. Miss Rose said that if you look at s.195 it may be for us to make that ruling. That is all this was directed at.

MR. TURNER: I am grateful. May I say that I have taken your remarks down, Sir, that one might feel that it was not appropriate for us to take a view and the argument might be both ways, and that one possibility was that it would be for the regulator to decide.

I give three responses to that. The first is that it is not the case that the language I read there avoids pre-judgment. Second, it does not fit with what we see as being clearly the Tribunal's role, nor how it approached the question so far. In any event, it is not an answer to the problem which I am raising.

It is not the case that it avoids pre-judgment, because that is not what the ruling says. It does not suggest that there is a live issue which would be decided in due course by another body. It says that there is a lack of utility in us going to the Court of Appeal, and that it was difficult to see, para.39, how even us winning could rescue the WMO remedy. Those are strong views, rather than tentative, leaving the matter open in the way just described.

Second, we say that it is obviously wrong to make a sharp division between the findings at the end of the appeal and the consequences of the appeal. That is not the way that the

legislation works, but it is, more importantly, not how the Tribunal applied itself in this very case.

I referred yesterday to s.195(3) and (4) of the Act. Miss Rose also referred to that when I had finished. If the Tribunal would perhaps open up your judgment in 2012, which is at tab 3 of this bundle, p.31, you there set out the relevant parts conveniently of s.195 of the Act. If you look at 195(3) and (4), you see clearly that the Tribunal's duty is to make a decision as to what is the appropriate action for the decision maker to take in relation to the subject matter of the decision under appeal. Then you remit with directions to give effect to your decision.

That is exactly what you did in this case, and if you go right to the end of the judgment, p.336, para.836, you did not leave to the parties or to another body the question of deciding what should then happen. You said you would hear the parties in due course on the appropriate ruling, and that was in view of your statutory duty, which of course you had well in mind.

Then one goes to the directions which you gave deciding the consequences as to the fate of the WMO remedy, whether it should be withdrawn or not. If we go back to tab 5, and your ruling on this, I would direct your attention to two parts. First, para.8 on p.3:

> "Further, subject to the question of the 'stay' sought by BT, the parties have also agreed the directions that should be given to Ofcom pursuant to sections 195(3) and (4) of the 2003 Act …"

THE CHAIRMAN: Paragraph 3?

MR. TURNER: I am sorry, p.3, para.8, under the heading, "Matters upon which there is agreement".

> "… as regards the Statement and the decisions at issue in the STB and CAM appeals …"

Then just above (a):

> "In essence it is agreed that:
>
> (a) Ofcom should be directed to withdraw its decision to insert the relevant licence conditions into [the licences] and to remove these conditions from the licences …"

So that was the consequences that were implemented and directed by the Tribunal. It did not hand the matter over to Ofcom to reflect on that occasion.

When you go on in the same ruling, the very same ruling, to say that BT's appeal to the Court of Appeal and a remittal to this Tribunal cannot rescue the WMO remedy, that is pre-judging an outstanding matter.

THE CHAIRMAN: No, because, Mr. Turner, what you are forgetting is that what was being postulated in para.39 was a successful appeal. At the stage of para.8 you have not won anything. Everybody was apparently agreed, and we approved it, that it should go back with a direction to withdraw. In para.39 we are postulating that you have been successful in part ----

MR. TURNER: That is the problem.

THE CHAIRMAN: -- and, therefore, the question would arise - certainly it would be at least a question - as to what should the Tribunal do, where we talked about bar stools when a leg has been cut off. Obviously, it may be appropriate that everyone would agree, "You can make an order, you can still keep the WMO in force", but that would be an issue, or whether the regulator should simply reassess it in the light of what we had found.

MR. TURNER: Sir, that is the problem.

THE CHAIRMAN: I would have thought you would be better off banging on about what we said about the merits of the appeal. I cannot understand this point, for my part, it seems to me to be a ----

MR. TURNER: May I try to explain it? We do not say that you are forming a view on the merits of the appeal, and therefore, to that extent, we are saying that you were addressing your mind which was ----

THE CHAIRMAN: We did form a view on the merits.

MR. TURNER: At this point you are, as you rightly say, Sir, addressing your mind to a further issue down the line, namely assuming that BT is successful.

THE CHAIRMAN: Exactly.

MR. TURNER: What then? And then, rather than saying, neutrally, that this something that will require further consideration, you say ----

THE CHAIRMAN: We said it is difficult.

MR. TURNER: -- it is incapable of rescuing the WMO.

THE CHAIRMAN: It is difficult to see how it would not have to be reconsidered. That is really all that amounts to saying, we will have to give serious consideration to whether that amounts to prejudging - obviously we will.

MR. TURNER: I am obliged for that indication. May I then say, that being the issue which does require reflection - and I would implore the Tribunal to reflect on this central point very

carefully after this hearing - even if it were tenable, in this ruling you were taking the view that there was a matter to be remitted to the Tribunal which would be considered fairly and should be detached from a later question about what to do, which would be something on which you had an open mind ----

THE CHAIRMAN: It is a long sentence. I will look at it on the transcript. I could not get a note of it in time.

MR. TURNER: If you were saying, Sir, that you had an open mind in relation to making findings, if you were to consider the remitted matter on independent pricing concerns, what should happen thereafter you had an open mind about because that was purely consequential. That is not the way that we read the strong language in paras.39 and 41 of this ruling.

Working on that basis, I would say this furthermore: if you proceed to hear the substance of this remitted matter, you will enter on to this case having the apparent perspective that the original findings in 2011 were so strong, because this is the way that an independent observer would read it, that it is difficult to see how the remittal could rescue the WMO remedy. You would preside over the pricing concerns issues, including over what evidence to admit, having stated your view that there is an ultimate lack of utility, an ultimate futility, in BT's attempts to uphold the WMO remedy, the practice of Ofcom that was the subject of the appeal.

This is, therefore, in our submission, a clear case which my friends have not dislodged, where this constitution of the Tribunal should step down, even assuming that it is right that you have now been given here the full task of handling of this remittal overall already, despite the Tribunal Registrar's letters to us. That is why BT's submission is that you should not take this case forward yourselves, given what has been said which is more than a mild expression of view in paras.39 and 41 of the ruling.

Before we turn away from this, may I also direct your attention, as you have it open, to para.38 and to the nature of what the Tribunal did decide. You see that on p.14. You refer to factors for and against a stay, and you begin by saying:

> "As against this must be set a number of factors. First, Sky has succeeded in its appeal on grounds which go to the heart of the reasons for the WMO as set out in the Statement. It follows that, as Mr. Flynn submits, any stay of the Judgment means that Sky will continue to be subjected to regulation, which the Tribunal has found to be unfounded."

Your comments that then follow in paras.39 and 41 about it being difficult to see that BT's proposed appeal, even if successful, would be capable of rescuing the WMO, come against the context of that statement of the Tribunal's findings and their implication.

With that I turn, and we can put this away now, to *Urumov*. I can be short on *Urumov*, if the members of the Tribunal have that to hand. Ours is not a *Urumov* case. The facts of that case are quite different, and they set out an orthodox and unobjectionable statement of the legal principle. If you have it open you will see in para.5 what the nature of the application to the judge was there, to recuse himself from the hearing of committal proceedings. You will see that the first two grounds out of the five related to apparent bias, stating the test of the fair minded and well informed observer in the first, and then went on to deal with issues that were construed as allegations of actual bias.

At para.6 the judge dismisses the apparent bias grounds:

> "… saying that no well informed or impartial observer would think he was biased against Mr. Urumov …"

Then in para.7 he accedes to recusal application:

> "… because, although he regarded the specific points relied on in support of actual bias being 'entirely groundless', the allegations were 'so serious that the appropriate course is that I should recuse myself'."

Therefore, this is a case about how one responds to very serious allegations which have nothing to them.

You were taken to earlier to para.13, which is the orthodox statement of the law. We have no problem with it.

Paragraph 27 cites *Triodos Bank v Dobbs*, and that is for the proposition that a judge should resist to recuse himself because it is more comfortable to do so in view of criticisms by a litigant.

So the judge's decision was overturned as summarised in the conclusionary para.34, two pages on.

The present case, by contrast, is not about criticism of you by a litigant. It is about what you have said and done and why it shows a risk of pre-judgment and the lack of impartiality.

There are one or two further points. The Tribunal's Rules on whether a particular formation of this Tribunal can be appointed to hear a first issue, namely, whether you should preside on the remittal or not without a decision having already been made somewhere in the machinery that you have been appointed to preside over the whole remitted case. We have

found nothing in the Tribunal's Rules to say that this is not possible. Mr. Flynn said yesterday that Mr. Dhanowa, although powerful, could not override the Rules of the Tribunal. We have searched in vain to see whether this was impossible. We say we are, therefore, entitled to take the letters from the Registrar at face value. Both the letters of 4th March 2014 and 19th December 2014 proceeded on the basis that this hearing has been arranged for a discrete issue to be decided before the Tribunal settles down to deal with further issues on the substance of a remittal. Perhaps I need not go back to the language of the letters.

The difference, in any event, between the two situations, whether you have been appointed to hear the whole case or whether you are here because there is a first issue that you are capable of deciding, we say that is not critical to the outcome of my argument because, for the reasons I have given, there is a problem here of apparent bias. What I do say is that my construction of what has happened and why we are here is far more in tune with the Registrar's letters, that the parties should be able to draw to your attention for your consideration a range of other factors which do bear on the question of whether it might be better for another formation to approach this issue afresh.

A number of the factors that I referred to before in writing and orally were canvassed by my friends. To deal with those briefly, the totally flawed point: yes, we do say that this was the finding of the Court of Appeal. That was the reason, or part of the reason, for me taking you to those passages yesterday. We said that in writing and we said it orally. We referred to three serious failures that were pointed out by Lord Justice Aikens leading to the conclusion that there had not been an appeal on the merits.

So far as the passage of time is concerned, the four year point is a point that was not specifically addressed by my friends.

So far as other points are concerned, the issue of whether there should be new evidence which was canvassed with you yesterday is a significant point. Although no concluded view can be given, naturally at this juncture, you were open to the idea that there may have to be new evidence, and that would be something again that a new Tribunal could consider.

So far as confirmation bias is concerned, I dealt with that in two ways. To deal very, very briefly with the first and broader point, all we are saying is something that we see as a fairly simple point, whether you accept it or not, it may be a matter of greater debate than the first point that I have made about the ruling, but it comes down to this: if this Tribunal devoted, as it did, very great effort and time to arriving at the conclusion that the WMO remedy has no foundation, then it will be tempted to reach the same result in the remittal.

Now I go back to what I drew your attention to a moment ago, para.38 of that ruling, to quote again there is regulation which the Tribunal has found to be unfounded. That is the conclusion that there will be a temptation to reach again. It is not right to say that the judgment that you reached before is separate, therefore, from having reached that conclusion about the fate of the WMO remedy.

Subject to anything my instructing solicitors wish to say, I will conclude as follows: I do place weight on the 2013 ruling - I note that my friends place little weight on that aspect of the case. Because it is very clear, BT's appeal lacked utility, a remittal would not be effective in rescuing the WMO remedy, or it would be difficult to see how.

There are other factors which are supportive of the conclusion that there is a risk of a lack of impartiality in the remittal, and I stress again I am taking this from the vantage point of the reasonable and well informed observer, or at least, on my approach, that you can approach this as a case where it would be better in all the circumstances, in view of the history, if another Tribunal were to consider the matter afresh.

You did not say, finally, so far as the 2013 ruling was concerned, that this is a case where a view was expressed that was dealing with an issue yet to come and expressing a view that affected that issue, but where it is possible for you to change your mind - the changing the mind that Miss Davies referred to at the end. This is a case where there is a serious problem, and that is why we place emphasis upon it.

Finally, in so far as Ofcom's position is concerned, I have left the detailed submission to Miss Rose, but yes, BT does support the point.

THE CHAIRMAN: Thank you very much.

MISS ROSE: Sir, dealing first with the question of whether this is a *Sinclair Roche & Temperley* question, in my submission, it has to be, and it has to be because of the way that the issue was presented to the parties by the Tribunal itself. In the letter of 4th March 2014, it was the Tribunal that invited the parties to make observations on the question of whether they considered it would be appropriate for the original Tribunal to decide the remitted question or whether a new panel should be constituted for this purpose. That was the question.

THE CHAIRMAN: Is that the July one?

MISS ROSE: No, the 4th March letter at tab A. The response to that from Ofcom on 14th March, which you have at tab F raised the issues, apart from the issue of the speech, which have been raised by Ofcom at this hearing. So that was squarely put before the Tribunal, that Ofcom was saying that it would be better for a different Tribunal to hear it.

There was no subsequent decision by the CAT on those observations. There are two possibilities. Either at some date between then and now the CAT took that decision knowing the matter was in dispute between the parties, but never communicated a decision to the parties and never gave reasons for it; or that is the question that this hearing was convened to decide. In my submission, the first of those possibilities is not a possible outcome, because if it is there has been a very serious procedural failing by this Tribunal which has made a decision without communicating it to the parties, or giving reasons for it, because if that was the decision we would have had to have had an opportunity to appeal it. So, Sir, it cannot be the case that a decision has been taken by the CAT already that this is the Tribunal constituted to hear the appeal, because you placed that issue - not you, the CAT placed that issue before the parties. They took up opposing positions on it and it was never resolved. That is the first point.

It was suggested by Mr. Flynn, and I think you agreed, that our point was simply a recusal point. That is not correct.

THE CHAIRMAN: Well, I suppose it must go to the other one.

MISS ROSE: It goes to both.

THE CHAIRMAN: I thought about that afterwards.

MISS ROSE: I have sought not to repeat the submissions made by Mr. Turner, but you have our skeleton argument and you can see how we put it. If the test is: would it be better for a different Tribunal to hear it, then the speech is obviously relevant to that question as well.

THE CHAIRMAN: I see that.

MISS ROSE: Mr. Flynn, with respect, misstated the complaint that we make about the speech. He said that the highest we could put our case was that the speech said that Ofcom had sought to limit the CAT's powers of review as a reaction to this case. That is not our complaint. Our complaint is that the speech said that because Ofcom was dissatisfied with the outcome of this case, instead of appealing it, it had sought to make a spurious lobbying attempt to change the standard of review so as to insulate its decisions from challenge in the court, and so as to place inappropriate pressure, unhealthy pressure on the independence of the CAT. That is an allegation of a wholly different nature. It is an allegation, Sir, of bad faith against Ofcom. It is an allegation that it was lobbying DCMS, purportedly, in the public interest, but in fact because of its dissatisfaction with this ruling and in order to insulate its decisions. That is the only way that the passages we looked at yesterday can be read, given the use of language such as "unhealthy pressure", "spurious", and the passage

where you said you were not saying anything about a properly evidenced response to consultation. The word "spurious" means "sham".

THE CHAIRMAN: So it is not the highest? You started off by saying it was the "highest", but now it is the "only" way.

MISS ROSE: Sir, that is our complaint about the speech, and there are two aspects of it which we complain about. The first is the accusation of spurious lobbying made against Ofcom, and the second is the linking of the allegation to the outcome of this case.

Miss Davies says that the reasonable and well informed observer would not think you were talking about Ofcom, because there are lots of Regulators and there are lots of adverse decisions, but as we have seen today, on the very day of the speech there was published in the Press an article responding to the new document that had just come out from DCMS that said: "Ofcom are strongly supporting a reduction in the standard of review and they are doing it because of the Sky Pay TV case." In that context for you then to make the comments that you make would strike the well informed observer, with a copy of the "Guardian" in their hand (that day's newspaper), to immediately link it to Ofcom, and link it to this case. Now, whether you intended it or not only you can say, but that is the way it was understood by my clients, and that, in my submission, is the way it would be understood by the well informed observer who had read that day's newspapers.

Mr. Flynn also said that the proposition that Regulators should not put pressure on courts was uncontroversial. Indeed, it is uncontroversial, and so uncontroversial is it that the proposition that a responsible Regulator would seek to put such pressure on Regulators is, with respect, a very, very serious one, and ought not to be made without proper evidence.

Mr. Flynn also said that we had to show that, as a result of the speech, there was a real possibility of a vengeful or vituperative decision in response from this Tribunal. With respect, that is a complete misstatement of the law. The question is whether the reasonable observer would think there is a real possibility – and it is only a possibility – of bias.

What was said by Miss Davies was that "bias" means a closed mind or pre-judgment. That is something of what bias means, but it is not all that it means.

Going back to the authorities you will see it also means any pre-disposition against a party. It is not just about a closed mind, and my submissions are not really about closed mind, they are not about pre-judgment. What they are about is the Tribunal approaching the case with a view of one of the parties that they are a Regulator who will act in the way that is described in the speech. It is bias in that sense, in the sense of prejudice or pre-disposition.

Miss Davies also stressed the importance of the professionalism of the courts and, of course, that is right, but in my submission it is immaterial to the complaint that we make. She also said that she relied on *Locabail* (tab 4, p.495) in support of her proposition that really the relevance of out of court comments was only where they indicated a closed mind. That is not correct. *Locabail* simply was a case in which that was the nature of the allegation. There is nowhere any statement in the authorities that says that an out of court comment can only lead to the appearance of bias if it indicates a closed mind.

Those are my submissions.

THE CHAIRMAN: Thank you very much. We are grateful to all of you for your submissions, and we will give our judgment as soon as we can. Thank you very much.