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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3 December 2015

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)
Professor John Beath OBE
Michael Blair QC (Hon)

Sitting as a Tribunal in England and Wales

BETWEEN:

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

- v -

OFFICE OF COMMUNICATIONS Respondent

- and -

THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD Interveners

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CASE MANAGEMENT CONFERENCE
(Remittal)

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

Miss Helen Davies QC and Mr. Richard Blakeley (instructed by DLA Piper UK LLP) appeared for The Football Association Premier League, the Football League Limited and England and Wales Cricket Board.

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

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

1 THE CHAIRMAN: Just before you start, Mr. Flynn, can I say welcome to everybody, and thank
2 you very much for all your submissions and for the bundles. A word about housekeeping. I
3 do not know how long this is going to take. We have allocated the whole day. If it gets that
4 far we will break for lunch in the normal way, and we will probably take a comfort break
5 during the morning if we are working through the morning. There is no fire drill scheduled
6 today, so if the alarm goes off it is real, and I have not arranged one!

7 A couple of preliminary remarks, if I may, before we get into the substance. As you all
8 know, this is a remittal case. It is not to re-hear, but it is to complete a process which took
9 place in 2012. So that is the context of these proceedings. In the meantime, of course, since
10 2012, as you all know, the remedy originally decided by Ofcom in 2010 has been reviewed
11 and withdrawn. So the purpose of the proceedings, as we have them at the moment, seems
12 to us to be devoted essentially to the validity of the 2010 Decision, and then associated
13 matters such as the monies held in escrow and the possible basis for a costs award.

14 In the meantime, we have had and noted the letter from Ofcom yesterday inviting the other
15 parties to essentially withdraw their claims. I want to make it clear that we have absolutely
16 no wish to devote unnecessary public resources to this case. The reason we are here is
17 because it has been referred back to us by the Court of Appeal following an appeal.

18 I suppose the first thing I would like to do, in order to see where we all are, is to ask the
19 addressees of Ofcom's letter what their position on that is. I do not suppose you have not
20 thought about this, but I was going to suggest that if it would help you to put your
21 comments together with us out of the room we are quite willing to withdraw for a few
22 moments to let you come to a view, but we would like to know what your position is on that
23 letter from Ofcom. Mr. Flynn?

24 MR. FLYNN: I do not know if the Tribunal needs introductions. You have a list of people, but I
25 can tell you who they are going down the line.

26 THE CHAIRMAN: That would be very helpful. Let us stick to the well tried convention.

27 MR. FLYNN: This may be the least controversial part and Mr. Turner will tell me if he disagrees.

28 I am here with Mr. Pickford and Mr. Scannell. Going down, Miss Davies and Mr. Blakeley
29 are here for the Premier League and other sports bodies. Miss Rose is here for Ofcom.

30 Mr. Turner, Miss. Ford and Mr. Facenna are here for BT. Agreement so far!

31 In relation to the Ofcom letter, that was going to be the subject of my first submission in
32 relation to what is the first item on the agenda, if we were to be following that, which is to
33 consider the implications of Ofcom's role in the remittal proceedings. We have, of course,
34 reflected on the Ofcom letter overnight and I think I can say immediately that, of course,

1 Sky has no interest in going over matters of pure historical concern. The problem we have
2 is that BT apparently has, and wishes to keep the 2010 Decision in play in some form or
3 another for a possible appeal against the 2015 Decision. So unilateral disarmament, as it
4 were, is not a possibility for Sky. If there is a possibility of multilateral disarmament that
5 might be something else, but our concern is to make sure that the 2010 Decision has no
6 further life. We succeeded in the first round of this appeal, as you know, in establishing that
7 the core concern, the principal concern, motivating the Pay TV statement was unfounded,
8 and we are ready in the remittal to demonstrate that the pricing question, the pricing
9 concern, was likewise unfounded. That we will have to do if there is to be some form of
10 half life for the Decision because BT is maintaining its own appeal against the 2010
11 statement on the basis that it was all right, but it should have gone further.

12 That, in a nutshell, is where we are. If the appeals are to continue then we are ready, of
13 course, to do that. If the 2010 Decision can be set aside and cease to have any force, then of
14 course, we would be delighted. I am not sure that there is an obvious middle ground
15 between that. We have suggested, as you know, that the principal course and indeed the
16 legal course is for the Tribunal now to direct Ofcom to set it aside, and I can develop that
17 submission at any point should that be helpful.

18 THE CHAIRMAN: Just to understand what you are saying, Sky is not willing to withdraw its
19 appeal unless the 2010 Decision is withdrawn? That is what you call multilateral
20 disarmament?

21 MR. FLYNN: Multilateral disarmament would involve all appeals being withdrawn - all appeals
22 being withdrawn, because otherwise----

23 THE CHAIRMAN: We are in the Decision.

24 MR. FLYNN: -- and at least a clear indication that the Decision is of no continuing effect.

25 Ofcom says that the matter is of entirely historic concern, but that is not the position that
26 everyone is taking in this.

27 THE CHAIRMAN: Could I at that point ask what the other parties' view on that specific point is:
28 whether the points made in Ofcom's letter yesterday are so persuasive as regards the use of
29 public resources, that maybe these proceedings ought to have to come to an end.

30 MR. TURNER: They are persuasive. What Mr. Flynn said was not entirely right. There have
31 been beginnings of without prejudice discussions. We have not said that we are determined
32 to defend the remitted appeal. If the parties mutually withdraw their appeals, then we are
33 prepared to treat. That is our position.

34 THE CHAIRMAN: You have got your own appeal somewhere lurking in this.

1 MR. TURNER: Yes, and we are prepared to withdraw it if Sky withdraws its appeal.

2 THE CHAIRMAN: The Premier League?

3 MISS DAVIES: Yes, sir. It will not surprise you to know that, of course, we have been keeping
4 under careful consideration the continued involvement of the Premier League in this matter,
5 not least because we do not have an interest in the escrow account. That does remain to be
6 resolved. The consideration started before we got the Ofcom letter yesterday. It will
7 continue in the light of the Ofcom letter of yesterday.

8 We do have a concern, essentially as articulated by Mr. Flynn, that other parties appear to
9 wish to maintain some kind of residual life in the 2010 Decision. One of the points that is
10 made by my learned friend Mr. Turner in his skeleton for today, for example, is that one of
11 the issues they may wish to raise in any appeal against the 2015 Decision is that Ofcom did
12 not undertake the exercise that it undertook in the 2010 Decision. It is not quite clear to us
13 how far that point is intended to go, but the concern remains that if there are going to be
14 parties who are suggesting that the 2010 Decision was a valid Decision at the time it was
15 taken, and that is going to have some continuing impact in the future, that is an issue that is
16 of continuing concern to the Premier League because we continue to maintain the view that
17 the 2010 Regulation was unwarranted, and like Mr. Flynn we can submit to the Tribunal on
18 the remitted question that it is invalid, that it was wrong.

19 So we are reviewing the position. The circumstances that are relevant to that decision
20 obviously include the position of the other parties, and also, in fact, the outcome of today.
21 If we are in a position where one is looking at a review in order to determine the remitted
22 question, one has to engage in the sort of exercise that BT is suggesting it is necessary for
23 the Tribunal to engage in. That will obviously involve a very considerable further expense
24 and cost. Sir, you have seen the points on proportionality that each of Ofcom, Sky and the
25 Premier League make in that context. Those matters will be relevant to the considerations
26 that are ongoing with my client.

27 Of course, there is another easy solution to this, which is for Ofcom to withdraw the
28 Decision. We will come back to that as that is the first item on the agenda.

29 THE CHAIRMAN: I am always slightly suspicious of easy solutions. I have not asked you, Miss
30 Rose, because I have taken the Ofcom letter on its face, but would you like to just comment
31 on it?

32 MISS ROSE: Yes. Can I suggest that it would be helpful if we just have a quick look at the
33 statutory scheme, because I think it might help to clarify exactly what the Tribunal's role is,
34 and what remains live or does not remain live on the appeal because, with great respect to

1 Miss Davies, the position that the Premier League is taking is incoherent. I think it is in the
2 authorities bundle, behind tab 12.

3 THE CHAIRMAN: At this stage you are talking exclusively about whether the proceedings
4 should continue?

5 MISS ROSE: Yes, that is right.

6 THE CHAIRMAN: Because there are other things we want to discuss with you.

7 MISS ROSE: No, this is just a question of what is the status of the 2010 Decision? What are the
8 issues that remain live on this appeal? Those are the questions I want to address.

9 The starting point is, in fact, s.316 and s.317, at p.7 behind tab 12. At 316 you will see the
10 power that Ofcom exercised back in 2010. As you can see:

11 "The regulatory regime for every licensed service includes the conditions (if any)
12 that OFCOM consider appropriate for ensuring fair and effective competition in
13 the provision of licensed services."

14 And there is more specific provision at 316(2). So, back in 2010 Ofcom took a decision
15 under s.316 to impose licence conditions on Sky requiring it to wholesale the premium
16 sports channels at a fixed price.

17 Then, if we go to s.317 you can see the structure for the appeal. You can see at s.317(1)
18 there is a definition of Broadcasting Act powers and that includes the power under s.316. If
19 you go to s.317(6):

20 "A person affected by a decision by OFCOM to exercise any of their Broadcasting
21 Act powers for a competition purpose may appeal to the Competition Appeal
22 Tribunal against so much of that decision as relates to the exercise of that power
23 for that purpose."

24 Then we are told that sections 192(3) to (8) and 195 apply to that appeal.

25 So, the starting point is if you ask what is the appeal about? It is about the exercise by
26 Ofcom of its power to impose a condition on Sky's licence. That power was exercised in
27 2010, but in 2015 Ofcom reviewed the condition in question as it had said that it would and
28 has decided to withdraw the condition from Sky's licence. So, if you ask the question: does
29 the 2010 Decision still have any life? What is there left of the appeal? The answer is that
30 there is not currently any exercise by Ofcom of a power under s.316, which is the subject of
31 the appeal, because the Decision that was the subject of the appeal has already been
32 withdrawn, and this is, with respect, the fallacy in Miss Davies' position, and the position
33 that was taken by Mr. Flynn in the written submissions of Sky, where it was suggested that
34 this Tribunal should withdraw (sic) Ofcom to withdraw the 2010 Decision. The 2010

1 Decision has already been withdrawn by Ofcom, it has been replaced by a new Decision in
2 2015 which, at the moment, has not been appealed, but the time limit for appeal has not yet
3 expired, so that is the first point.

4 If we then come to the appeal powers, s.192, you can see that in subsection (6) the contents
5 and grounds of appeal are set out, and they must indicate to what extent the appellant
6 contends that the decision appealed against was based on an error of fact or wrong in law,
7 and to what extent the appellant is appealing against the exercise of a discretion.

8 The starting point is that you must specify in the notice of appeal what are the errors of fact,
9 what are the errors of law, what do you say are the errors in the exercise of a discretion.

10 Then at s.195:

11 "(1) The Tribunal shall dispose of an appeal under section 192(2) in accordance
12 with this section.

13 (2) The Tribunal shall decide the appeal on the merits and by reference to the
14 grounds of appeal set out in the notice of appeal.

15 (3) The Tribunal's decision must include a decision as to what (if any) is the
16 appropriate action for the decision-maker to take in relation to the subject-
17 matter of the decision under appeal.

18 (4) The Tribunal shall then remit the decision under appeal to the decision-
19 maker with such directions (if any) as the Tribunal considers appropriate
20 for giving effect to its decision."

21 Again, you can see that the Tribunal has a duty to decide the appeal on the merits by
22 reference to the grounds of appeal in the notice of appeal. So, again, any suggestion by Sky
23 or FAPL that because Ofcom has taken a resources based decision that it has no continuing
24 interest in this appeal and therefore will not be participating, that it somehow follows from
25 that that this Tribunal could make some summary determination that the 2010 Decision was
26 invalid is incorrect.

27 THE CHAIRMAN: What is a resources based decision?

28 MISS ROSE: The position is that, sir, as you know the Court of Appeal in the *O8X* case made
29 clear what is, in fact, a general principle that is common throughout public law that, even
30 though Ofcom is nominally the respondent to a s.192 appeal, Ofcom does not have to
31 actively participate in a s.192 appeal. Ofcom can take a decision that its resources are better
32 not devoted to active participation in that appeal, particularly where, as in this case, there
33 are two well-resourced commercial parties taking opposite positions.

1 THE CHAIRMAN: So you say that proposition is of general application even though it was
2 made in a case where Ofcom had effectively been adjudicating a dispute?

3 MISS ROSE: Indeed. Sir, if we can just look at it, it is clear from its terms that that is so.

4 THE CHAIRMAN: That is going to lead us into a discussion we do want to have later on which
5 is what is Ofcom's continuing role? At the moment I am just trying to get----

6 MISS ROSE: I am just trying to set the legal framework. If we just look quickly at that
7 postscript, it is in the same authorities bundle at tab 8 and the postscript is right at the back.
8 As I am sure you will recall----

9 THE CHAIRMAN: We are familiar with this.

10 MISS ROSE: Just to put it in context, the issue here was the admission of fresh evidence on an
11 appeal. Of course, that is a general point that applies across the board to s.192 appeals, and
12 the submission that Ofcom was making in that case was, as we have just seen, that the
13 Tribunal may well remit a decision back to Ofcom and require it to reconsider particular
14 aspects, and that potentially puts Ofcom in a difficult position if Ofcom actively participates
15 in an appeal where there is fresh evidence which Ofcom has not yet considered.

16 THE CHAIRMAN: We do not want to get into that today.

17 MISS ROSE: I am sorry, I am just answering----

18 THE CHAIRMAN: Keeping on what is the purpose of the present proceedings.

19 MISS ROSE: I am just trying to answer your question as to why this appeal does not just apply to
20 disputes but applies across the board. It was in response to that concern about Ofcom being
21 placed in an embarrassing position if fresh evidence was considered on an appeal that the
22 comments were made by the Court of Appeal. So you can see the submission at para. 85
23 about the potential problem for Ofcom if there was fresh evidence on an appeal which had
24 not yet been considered by Ofcom. Then, Sir Andrew Morritt asked why, in such
25 circumstances, Ofcom should feel the need to take part in the hearing of the appeal, that was
26 a matter of practice.

27 Then, the general comment about s.192, it gives a right of appeal. "It is the practice for
28 Ofcom to be named as the respondent, but it does not follow that it needs to take an active
29 part in the appeal" and then it says that there may be cases where it decides not to do so.
30 We say that must be of general application because it arose out of a concern that applies
31 across the board. It is also a point that is commonplace in public law generally, that if a
32 public law decision maker has taken a decision which is subject to judicial review they may
33 or may not participate actively.

1 One example is in relation to Magistrates' Courts. It is the general practice for Magistrates'
2 Courts, which are judicially reviewed, not to participate in an appeal against their decision,
3 and one of the main reasons for that is the matter may be remitted to them for
4 reconsideration.

5 So there are lots of circumstances where public authorities may not participate. That does
6 not affect the function of the court that is hearing the appeal or the judicial review. As we
7 have just seen, under s.195 the duty of the CAT is to decide the appeal on the merits and by
8 reference to the grounds of appeal. That applies whether Ofcom is actively participating or
9 not. So that is the answer to that point.

10 When you look at this particular case, the situation is not that Ofcom is now saying, "We
11 accept that there was a flaw in the 2010 Decision and so we are not seeking to defend it",
12 which was the position in the *Tobacco* case and the *Mastercard* case. The position is that
13 Ofcom is saying, "We took a decision in 2010, which we then reviewed subsequently
14 because we have a continuing duty as a Regulator to regulate this market, and our view is
15 that, regardless of whether the 2010 Decision was valid or not, the remedy that was applied
16 in 2010 is no longer appropriate in the current market conditions, and that is the reason why
17 we say the 2010 Decision has no continuing life and no relevance to anything".

18 BT may seek to appeal the 2015 Decision on any basis it chooses, and it might do so by
19 seeking to compare reasoning in the 2010 Decision with the 2015 Decision. Whether that is
20 a valid ground of appeal is not a discussion for today.

21 The question of the validity of the 2010 Decision will not matter in that context. What the
22 CAT will be asked to decide if there is such an appeal is whether the 2015 Decision is valid
23 or not.

24 So I do submit that the appeals are moot. The Decision against which they were brought
25 no longer exists. It was a decision to impose a licence condition which is no longer extant,
26 and in that situation there is no task for this Tribunal. There is, of course, money in escrow.

27 THE CHAIRMAN: What about the temporal element?

28 MISS ROSE: Sorry, I beg your pardon?

29 THE CHAIRMAN: The temporal element, because for five years the Decision and the power it
30 has exercised did exist, and I am sure Mr. Turner is going to talk to us about that.

31 Somebody at some stage, I am sure, is going to suggest that we do have the power to set the
32 Decision aside in some way, or to require Ofcom to set it aside. That seems to me to follow
33 from the argument that there is a historical validity or invalidity issue to be resolved.

34 Would you say that is not the case?

1 MISS ROSE: Sir, we say that the Tribunal, with respect, does not have the power to direct
2 Ofcom to set aside a Decision.

3 THE CHAIRMAN: To withdraw a Decision might be a better phrase.

4 MISS ROSE: To withdraw a Decision which has already been withdrawn.

5 THE CHAIRMAN: The exercise of the licence condition remedy has been withdrawn, but the
6 Decision remains on the record surely?

7 MISS ROSE: But it has no continuing effect.

8 THE CHAIRMAN: No, but it had effect for the five years that it was in force. That is getting
9 into a philosophical debate, and you have very helpfully covered most of the things we
10 wanted to discuss. We have been trying to keep them in separate boxes as that is the only
11 way to make any kind of coherent progress.

12 MISS ROSE: Sorry. You can see from that, sir, the reasons why Ofcom does not consider it
13 appropriate to spend public resources on this appeal.

14 THE CHAIRMAN: That was not quite the question I asked. The question was: do you think the
15 appeals are moot in the sense that there is no issue to be tried?

16 MISS ROSE: We do. The only issue----

17 THE CHAIRMAN: I think you are saying that.

18 MISS ROSE: The only issue that remains is the question of the money in escrow as a result, in
19 fact, of a consent order, I believe it was, on the interim relief position. Bearing in mind, sir,
20 it is not quite right to say that the WMO Decision has been in force for the last five years.
21 The position is that, as a matter of consent between the parties, I think in 2010, at an early
22 stage in these proceedings, there was a consent order under which, by agreement, the WMO
23 applied in a modified form whereby Sky charged the rate card price but the amount above
24 the WMO price was placed into escrow.

25 THE CHAIRMAN: Forgive me, I am new to this case.

26 MISS ROSE: In fact, the WMO has not been in force. The Decision of Ofcom was never in
27 force, not in its undiluted form. It was always subject to the interim relief.

28 THE CHAIRMAN: To come back to my opening point, is there any virtue in our asking the
29 parties, other than Ofcom, whether they wish to proceed with these proceedings in the light
30 of what Ofcom has said?

31 MISS ROSE: Sir, my submission would be, and indeed it appears from having heard the three
32 parties, that there is a slight prisoners' dilemma going on. They are each saying they are
33 prepared to withdraw their appeal if everybody else does.

34 THE CHAIRMAN: That is why we wondered if it might help if we left them to it.

1 MISS ROSE: If you left them to it for five minutes, they might do that.

2 THE CHAIRMAN: Would that be helpful? We are quite willing to do that. We will adjourn.

3 We shall be next door. You have no more than half an hour and hopefully less.

4 (Short break)

5 THE CHAIRMAN: Mr. Turner?

6 MR. TURNER: Sir, I am pleased to say that the parties have made some progress. However, we
7 have not reached a full resolution. BT's position is, as I outlined this morning, that provided
8 that Sky and the Premier League withdraw their appeals against the 2010 Decision we are
9 perfectly happy to withdraw our appeal. We think that an accommodation can be made on
10 that basis.

11 The discussion has reached the point where the parties wish to discuss the terms of any such
12 accommodation and the proposal from Sky's side in particular is that with the Tribunal's
13 indulgence, unless you wish us to make further progress now, time can usefully be spent by
14 us adjourning again until 2 o'clock and seeing whether we can agree the terms that Mr.
15 Flynn has referred to.

16 THE CHAIRMAN: Is everybody happy with that?

17 MR. FLYNN: As Mr. Turner said, that was essentially an agreed proposal, so we are happy with
18 it, but if we cannot agree we resume the CMC at 2 o'clock.

19 THE CHAIRMAN: In cricket terms "we take an early lunch". Thank you.

20 (Adjourned for a short time)

21 THE CHAIRMAN: Right, Mr. Turner?

22 MR. TURNER: Thank you for the Tribunal's patience.

23 THE CHAIRMAN: Limitless, as you know.

24 MR. TURNER: We will test that! We have made further progress to the extent that the members
25 of the Tribunal should have available to you at least an open offer which BT has now
26 presented to Sky and the Premier League. This is not acceptable to Sky and so to that
27 extent we have not reached an accommodation yet, but if I can show you what BT's position
28 is we can then take it from there, if you have that in front of you?

29 THE CHAIRMAN: We do.

30 MR. TURNER: It is very short.

31 MR. FLYNN: Sir, can I suggest that it is not very fruitful to go through what BT's position might
32 be in circumstances where the parties have been conducting without prejudice discussions
33 and have not reached a view. I can say that we have considered their drafting, we were

1 drafting our own, they have a copy of our draft with them, if they want more time to
2 consider it, that's fine, if they do not then we should carry on with the CMC.

3 THE CHAIRMAN: Your draft is not open?

4 MR. FLYNN: Our draft is not open, we are having without prejudice discussions. Of course the
5 Tribunal will do as it wishes, but it seems to me there is not a great deal of utility in
6 discussing an offer which has now been made open which is not, for reasons which I would
7 not be at liberty to explain, acceptable to Sky. This is not ordinary civil litigation.

8 MR. TURNER: My friend's offer was handed to us about two minutes ago so we have not had
9 the chance to look at that.

10 THE CHAIRMAN: Our difficulty is that although our patience is limitless, we have one day for
11 this case management conference. We would like to resolve the business one way or the
12 other during the day. We are quite happy to go back and deal with the items we were going
13 to deal with, assuming that you do not settle, if that would clear the air. It is possible that
14 by dealing with some of them we might make the possibility of a settlement easier. I cannot
15 possibly anticipate that but it might be the case. Clearing the air is always a good idea.

16 MR. TURNER: It has turned out that bringing the parties together today has been of some use
17 because the parties are at least talking, and we are grateful to you for that.

18 THE CHAIRMAN: We do not want to close the door on that, and we could proceed on a
19 provisional basis if that would be helpful. We do not want to waste time, run up more costs,
20 etc, etc, because you are all here anyway, we might as well use it. I do not see any easily re-
21 convened CMC in any short order, that is one of the problems. I think I need to hear what
22 the others have to say, but that would be our proposal if the possible settlement is still
23 gelling then we would like to encourage it. I think we should proceed to tick off the items
24 that we were going to cover by way of case management, and then you are free to go away
25 and continue the discussions as you wish, because there will then be a timetable
26 provisionally set against which you can measure the possible outcome. Are you happy with
27 that?

28 MR. TURNER: Yes. I have been asked if, however, we can have 15 minutes further because it
29 may prove fruitful if the Tribunal is willing to indulge us for another quarter of an hour.

30 THE CHAIRMAN: What do the other colleagues think about that?

31 MR. FLYNN: I could not possibly object to 15 minutes, sir. As you say, the parties are free to
32 carry on anyway if we cannot do it in 15, 20 minutes----

33 THE CHAIRMAN: If you cannot agree by 20 past 2, half past two----

34 PROFESSOR BEATH: Half past two.

1 MR. FLYNN: Half past two.

2 THE CHAIRMAN: --we are going to crack on.

3 MR. FLYNN: We crack on with the agenda, yes.

4 THE CHAIRMAN: Thank you.

5 (Short break)

6 MR. FLYNN: Members of the Tribunal, it took a little longer than you indicated, but I think I can
7 say we have an agreement in principle under which the appeals will be withdrawn, subject
8 to details of an order on which we are nearly there, but there is a little bit of drafting and
9 tidying up to do. There is nothing I can actually hand up to the Tribunal just at the moment.
10 All the relevant parties are aware of it and all comments have been taken into account and,
11 as best we know, are capable of being addressed. We are nearly there.

12 I think Mr. Turner would like me to mention that the order would provide for the Tribunal
13 to resolve the issue of the amounts held in escrow on the papers in due course. The order
14 would also provide for the resolution of any costs issues between Sky and Ofcom according
15 to a procedure to be determined, which might include a hearing as well as written
16 submissions, but otherwise costs would not be arising.

17 As far as I am aware, those general principles are acceptable to all parties, by which I
18 include, but they can speak for themselves, those represented by Miss Davies and Virgin
19 Media.

20 THE CHAIRMAN: We have rather overlooked Virgin Media, I am sorry, Mr. Liddell.

21 MR. LIDDELL: That is quite all right.

22 THE CHAIRMAN: We had not thought you were going to trouble us so we have not troubled
23 you.

24 MR. LIDDELL: We have tried to give as little trouble as we possibly can.

25 MR. FLYNN: And successfully, from our perspective, if I may say so.

26 THE CHAIRMAN: Can I ask, Mr. Flynn, does what you are discussing bear some resemblance
27 to the open offer that we have been studying?

28 MR. FLYNN: I think there is some resemblance. I think you will find there is more detail in it
29 and a little more precision, I would say.

30 THE CHAIRMAN: I hope it does not torpedo the negotiations, but I think you should perhaps
31 bear in mind that we would prefer what was in clause 4 of your order about this agreement,
32 of which we know nothing, of 7th September to be a recital.

33 MR. FLYNN: It is agreed that will form no part.

34 THE CHAIRMAN: That is coming out, good.

1 MR. TURNER: That is coming out.

2 THE CHAIRMAN: Equally, we would be very unhappy about ordering something when we
3 know absolutely nothing about it.

4 MR. FLYNN: That is why I suggested it was actually premature to be discussing the terms of
5 this.

6 THE CHAIRMAN: All right. I just wanted to say if that was still in there we would want that
7 moved to----

8 MR. FLYNN: The Tribunal will not be troubled with that matter.

9 The position is we are drafting. All parties will need to sign off on the final draft. Given
10 where we are, both in the day and physically, some of this is probably going to have to
11 happen in the office and by email, so it may be that the order is more likely to be with you
12 tomorrow morning once people have signed off, rather than this afternoon, although we will
13 do what we can.

14 THE CHAIRMAN: As a lawyer I am always very reluctant to accept something, subject to
15 contract, which is what this is.

16 MR. FLYNN: One understands that, sir.

17 THE CHAIRMAN: As a public authority, we think it is a great idea.

18 MR. FLYNN: I make the point as strongly as I can, that we really do think the principles are
19 established. I cannot, standing here, bind any of my friends to say, "We will sign up to a
20 final draft", which they have not yet seen, but I think we are close enough to understanding
21 what everyone's red lines are, as it were, that we can deal with it.

22 I cannot do better than that, but equally we are at 2.45 and you may think that it would be
23 difficult to press on with the CMC on a contingent basis in the circumstances, but of course,
24 as usual, we are in your hands.

25 THE CHAIRMAN: Can we also be certain that this settlement, if it be such, covers all the
26 appeals in this case?

27 MR. FLYNN: Yes.

28 THE CHAIRMAN: Including the CAMs and the STB appeals.

29 MR. FLYNN: That is one of the drafting tweaks, which of course was not the first thing to be
30 discussed.

31 THE CHAIRMAN: We do not want a little case appearing from the wainscoting.

32 MR. FLYNN: Rest assured.

33 THE CHAIRMAN: Growing and taking over again.

1 MR. LIDDELL: Sir, I just wanted to say on that point, I think the aim is for everyone to
2 withdraw their appeals. Just for the sake of pedancy I did want to raise the question of
3 whether or not Virgin Media has a live appeal in any event.

4 THE CHAIRMAN: You can ask.

5 MR. LIDDELL: The background obviously was that our client's appeal was dismissed by the
6 Tribunal's order following the judgment. We did not appeal the judgment or the order. The
7 Court of Appeal's order set aside the order of the Tribunal, focusing I think, primarily, on
8 BT and Sky's appeals. In our view, it is a bit of an open question as to whether that
9 resuscitated Virgin Media's appeal. I do not think it is a matter of substance, but I did just
10 want to raise the point that that at least is a slightly open question in our mind.

11 THE CHAIRMAN: What is your submission?

12 MR. LIDDELL: Our submission is that it does not actually make any difference. We are happy
13 to withdraw our appeal on the basis that it is still live, but I did want to raise that.

14 THE CHAIRMAN: You are not proposing to subscribe to this settlement?

15 MR. LIDDELL: I think we would have to. If our appeal is live, then I think it is contingent upon
16 us withdrawing it, and I just wanted to make the point about the issue of withdrawing a non-
17 live appeal being----

18 THE CHAIRMAN: That is a comparatively minor issue.

19 MR. LIDDELL: It is a pretty minor issue and I just raise it as a point of pedancy.

20 THE CHAIRMAN: Could you take instructions.

21 MR. LIDDELL: I think I have got instructions and I think we would be prepared to move on the
22 basis that we will withdraw on that basis.

23 THE CHAIRMAN: We will take that. Can I hear from the others? Presumably you have all
24 agreed this and Mr. Flynn has spoken for you all?

25 MR. TURNER: He has.

26 THE CHAIRMAN: Is there some further gloss you want to add?

27 MR. TURNER: It is a very small gloss, a point of clarification following, sir, your remarks. If
28 you have our open offer which you have already looked at, essentially we are discussing the
29 terms of the recitals, and, as Mr. Flynn says, that was what was going to be occupying our
30 attention. So far as the operative parts of this are concerned, between us and Sky the key
31 things are that we have their paragraph 1 in writing. The appeals are being respectively
32 withdrawn.

1 Instead of what you see as our paragraph 2 with our proposal on escrow, as Mr. Flynn
2 rightly says, we will submit that to you so that you can make a decision on it. Those are the
3 key terms with respect to us.

4 THE CHAIRMAN: And a different order as to costs.

5 MR. TURNER: No order as to costs, the same order as to costs as we were saying here, yes.

6 THE CHAIRMAN: You were going to come back and ask us about costs. I am sorry, I may have
7 misunderstood what you were saying.

8 MR. FLYNN: I may have misspoken, I don't think so. The order would provide for submissions
9 in relation to costs as between Sky and Ofcom, but otherwise there will be no order as to
10 costs.

11 THE CHAIRMAN: I see. We had one other question, which is what about Top-Up TV, not
12 represented here? They used to figure in this.

13 MR. FLYNN: They used to. They were in this court room and in the market, and now no longer.
14 They are not an appellant.

15 THE CHAIRMAN: So you do not need to include them in a settlement?

16 MR. FLYNN: Not in relation to the withdrawing of the appeals, but there is the issue of the
17 escrow. You have had a confidential letter from us relating to other matters, and there will
18 be provision in relation to that.

19 THE CHAIRMAN: I understand that. Are there any other matters. You are lurking behind your
20 banner.

21 MISS DAVIES: I am not lurking, just to make clear the Premier League's position: we have not
22 seen, because of the way this has evolved, the full toings and froings, but we are sufficiently
23 confident on the basis of what we have seen that what Mr. Flynn has said is correct, and that
24 there is a sufficient prospect of the Premier League signing up to this proposed settlement. I
25 just wanted to make it clear on the transcript that I have not yet, because I have not seen it,
26 got the final wording, and that is why Mr. Flynn has had to put it in the way that he has, that
27 we are sufficiently advanced in expecting to be able to get agreement, but we do not yet
28 have a fully fledged agreement.

29 THE CHAIRMAN: I do not know whether it would assist your coming to a view, but without in
30 any sense prejudicing our approach had we gone ahead with the case management
31 conference, I think you should all be aware that our inclination, subject to what we have
32 heard and we would have heard this afternoon, would be to have restricted the proceedings
33 to the relatively narrow remitted issue and to have tried to resolve that as quickly as
34 possible. That would have been our approach, but that is not to say that you could not

1 persuade us out of it. That would have been our starting point, I think, in the light of all the
2 submissions we have read. If that helps you in being motivated towards a settlement then
3 so be it.

4 Has anybody got anything else to say? I think we are inclined to let you get on with it, and
5 keep in touch with the Tribunal. Obviously if it fails, we shall be back on the job.

6 MR. FLYNN: If it fails then the CMC must be restored.

7 THE CHAIRMAN: It will be restored. It will have to be after Christmas, but it will be as soon as
8 possible after Christmas.

9 MR. FLYNN: That is well understood.

10 THE CHAIRMAN: Something to look forward to. Thank you.

11
