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Tuesday, 4 October 2016

(10.00 am)

THE CHAIRMAN: Good morning, Mr Holmes.

MR HOLMES: Good morning, sir.

Opening submissions by MR HOLMES (continued)

MR HOLMES: There are two outstanding points from yesterday which I should briefly address. The first is whether Ofcom's review was under section 318 of the Communications Act. The answer, sir, is that Ofcom was not required to conduct the review under section 318 which applies, on its face, to codes, guidance or directions, but not to conditions themselves.

THE CHAIRMAN: I won't ask why that should be, but I will take that clarification, thank you.

MR HOLMES: Of course, sir, no-one in the proceedings disputes that Ofcom was entitled to conduct a review of the WMO statement. It made good sense to do so in the light of the tribunal's judgment, and indeed Ofcom had said in the 2010 statement that it would, and both BT and Sky welcomed the review when it came. But the basis for it, I think, is not section 318.

THE CHAIRMAN: So an intervention on the basis of section 316 which takes the form of a licence condition does not fall to be reviewed under section 318?

MR HOLMES: No, sir, but it is, of course, subject to the

1 general obligation to review under section 6.

2 The other loose end was the Court of Appeal's  
3 reasoning on BT's further appeal. We should perhaps  
4 look briefly at the judgment. It is at AB1 at tab 6.  
5 This is BT's appeal against the reasoning at  
6 paragraph 821 of the tribunal's pay TV judgment. We can  
7 pick it up in the judgment of Lord Justice Aikens, who  
8 gave the leading judgment, and his conclusions begin at  
9 paragraph 81 on page 697 of the version in your bundle.

10 In paragraphs 82 to 84, he considers what Ofcom  
11 concluded in the statement concerning rate card prices  
12 and penetration discounts. His conclusion can be seen  
13 at paragraph 84, where he says that the following is  
14 clear from the statements that he has considered:

15 "First, Ofcom concluded that, insofar as Sky might  
16 be prepared to offer the core premium sports channels on  
17 a wholesale basis to other broadcasters, the basis for  
18 doing so would be the rate card price. Secondly, the  
19 only reductions Sky would offer would be discounts on  
20 the basis of platform penetration by the wholesale  
21 buyer, but that in itself produced a competition  
22 concern. Thirdly, both the rate card price itself and  
23 the proposed basis of discounts were 'competition  
24 concerns' ... Although the Ofcom statement does not  
25 expressly use the statutory terminology, Ofcom's

1 phraseology in the statement is only consistent with  
2 a conclusion by it that these were 'practices' of Sky  
3 that Ofcom considered were prejudicial to 'fair and  
4 effective' competition ... Fourthly, because of these  
5 conclusions, it was necessary for Ofcom to set actual  
6 prices for the WMO remedy, in relation to the provision  
7 of standard definition versions of the [core channels]."

8 So he found that Ofcom's decision was based in part  
9 upon pricing concerns, both as to the rate card price  
10 itself and as to the penetration discount that Sky had  
11 been prepared to offer.

12 Lord Justice Aikens then considered how the tribunal  
13 had dealt with this, and he considered that it had not  
14 dealt with the aspects of the Ofcom's decision which  
15 were the subject of paragraph 84. It had not considered  
16 whether Ofcom was right that Sky's wholesale pricing at  
17 the time would not allow other retailers than Virgin to  
18 compete effectively, and he found that the tribunal's  
19 reasons in paragraph 821 of its judgment for not  
20 considering the issue were insufficient. One sees this  
21 at 98 to 99 of the judgment on page 702:

22 "Two reasons were given in [821]. In my view,  
23 neither was satisfactory. First ... the [tribunal] did  
24 not perform any analysis of what the discounts  
25 'referable to penetration rates achieved by the

1 retailer' would have been ... [and, therefore] did not,  
2 and could not, have made any conclusion on whether those  
3 discounts would not have given rise to any competition  
4 concern", as Ofcom had found that they did.

5 As regards the tribunal's observation that the  
6 outcome of genuine commercial negotiations would have  
7 been -- sorry, "there was no way of knowing what the  
8 outcome of 'genuine commercial negotiations' would have  
9 been", he reaches the same conclusion:

10 "If such an outcome was unknown, then it cannot be  
11 said that this must remove the basis for a competition  
12 concern."

13 So, in short, the tribunal lacked any basis for  
14 rejecting on appeal Ofcom's conclusions that Sky's  
15 wholesale pricing was prejudicial to fair and effective  
16 competition. This is relevant to BT's submission that  
17 Lord Justice Aikens' reasoning is inconsistent with  
18 Ofcom's observation in the WMO statement that the  
19 negotiations between Sky and BT on the issue of  
20 reciprocity had never reached a conclusion, given BT's  
21 recourse to regulation, and that it could not be known  
22 what the ultimate outcome would have been.

23 But in my submission, BT's argument neglects the  
24 different context in which Lord Justice Aikens made his  
25 comments about uncertainty.

1           The Court of Appeal's point that was Ofcom had found  
2           that there was already a practice prejudicial to fair  
3           and effective competition in the market, and the  
4           tribunal had to have some reason for setting it aside.  
5           It could not decline to consider the correctness of  
6           Ofcom's finding as to the practice in question on the  
7           basis that, if matters had been otherwise, Sky might  
8           have behaved differently. It had to consider the  
9           evidence in fact relied on by Ofcom in support of its  
10          finding.

11          In the WMO statement, Ofcom was conducting  
12          a different exercise from the tribunal. It was  
13          considering, as the primary decision maker, whether  
14          a practice prejudicial to fair and effective competition  
15          had already crystallised as BT was alleging, and it  
16          found that this was not the case. So, in my submission,  
17          there is nothing in the Court of Appeal's judgment to  
18          suggest any error of principle in Ofcom's approach.

19   THE CHAIRMAN: Can you just remind us where in the statement  
20          Ofcom say this?

21   MR HOLMES: Where they say --

22   THE CHAIRMAN: In terms.

23   MR HOLMES: The passage to which BT takes exception, yes,  
24          sir. If you turn to section 6 and to the part relating  
25          to reciprocity, at 6.90 Ofcom says:

1           "Because the negotiations between Sky and BT over  
2           reciprocal supply were not concluded, we do not consider  
3           that it is possible to rely on the negotiating positions  
4           or offers made during those negotiations as evidence of  
5           what would have happened in practice. Therefore, we do  
6           not consider those negotiations provide evidence that  
7           any deal agreed would have contained terms prejudicial  
8           to fair and effective competition."

9   THE CHAIRMAN: So the practice we're considering is the  
10           conclusion of a deal which is prejudicial to fair and  
11           effective competition, not the process of negotiation?

12   MR HOLMES: Or the failure to conclude a deal on the basis  
13           of a settled position following the outcome of such  
14           negotiations. But we have never reached that stage.  
15           That's Ofcom's position in the statement.

16   THE CHAIRMAN: So we are not considering the rightness or  
17           wrongness of that at the moment; we are considering  
18           whether it is the same situation that the Court of  
19           Appeal considered?

20   MR HOLMES: Indeed, sir, yes.

21   THE CHAIRMAN: I think there will be further debate on the  
22           correctness of that view.

23   MR HOLMES: Indeed, sir. It will be a matter for evidence.

24   THE CHAIRMAN: Thank you.

25   MR HOLMES: So that concludes my consideration of

1 the regulatory context to the appealed decision.

2 I want now, if I may, to turn to the decision itself  
3 and to address Mr Beard's criticisms of Ofcom's  
4 reasoning and analysis. I propose that we work, sir,  
5 from the fully confidential version of this document.  
6 You may have it in another place, but you can find that  
7 in defence bundle 1 at tab 4.

8 The first point to note is that Ofcom focused,  
9 unsurprisingly, on establishing whether there was  
10 a concern about prejudicial conduct of the kind which  
11 had led it to introduce the WMO obligation in 2010.

12 On page 5, you see the heading:

13 "We have reviewed whether there are practices which  
14 may prejudice fair and effective competition in pay TV  
15 services."

16 Then at paragraph 1.8, two practices are identified  
17 that might give rise to concern -- paragraph 1.9, I beg  
18 your pardon -- and which form the basis for Ofcom's  
19 consultation prior to the WMO statement. The first is  
20 non-supply of channels containing key content, that is,  
21 key sports content not being supplied to certain pay TV  
22 retailers and/or platforms; and, second, distribution of  
23 channels containing key sports content on terms which  
24 would not enable retailers to compete effectively in  
25 pay TV retailing and other parts of the value chain.

1           Then at paragraph 1.11, Ofcom sets out the three  
2           main questions which its assessment has considered to  
3           determine whether these practices may be prejudicial to  
4           fair and effective competition. First, what is key  
5           content? That is, is there content which is important  
6           enough to influence the choice of pay TV provider for  
7           a significant number of consumers? Second, what is the  
8           impact of that content on the ability of pay TV  
9           retailers to compete effectively, taking account of  
10          the amount of content held and the market position of  
11          the content holders? And, third, what is the likelihood  
12          of content holders engaging in the practices identified,  
13          taking into account both their incentives and their  
14          current supply arrangements.

15          So, as the third question shows, Ofcom recognised  
16          that the enquiry encompassed the risk of future  
17          prejudicial practices, the likelihood of content holders  
18          engaging in the practices identified, as well as  
19          existing conduct in the market.

20          In relation to the first and second questions, Ofcom  
21          found that Sky's sports channels include important  
22          content for consumer subscription decisions, and that  
23          conclusion is summarised at paragraph 1.19: "because of  
24          the importance of Sky's content to a significant  
25          proportion of consumers, we consider that the way in



1           which Sky's key content is distributed has the potential  
2           to have an impact on pay TV competition. In particular,  
3           without access to this content, competing retailers are  
4           likely to struggle to compete for a sizeable and  
5           valuable segment of the retail pay TV sector, and,  
6           therefore, would be less able to contest Sky's strong  
7           market position in pay TV."

8           Pausing there, in this respect, its conclusion  
9           aligned closely with that in 2010. Sky held valuable  
10          content that was important to consumers' decision making  
11          in the market and competing pay TV retailers would  
12          struggle if they did not have access to it.

13          It is in relation to this response to the first two  
14          questions that BT alleges that Ofcom erred in failing to  
15          conduct an orthodox competition analysis. It says that  
16          Ofcom was required to define the relevant markets at  
17          wholesaler retailer level and to assess market power on  
18          the markets thus defined. The question which arises,  
19          however, is what difference this would have made. As  
20          Mr Beard accepted during the course of his submissions,  
21          Ofcom and BT are basically agreed in relation to the  
22          upshot of Ofcom's analysis of questions 1 and 2, namely,  
23          that Sky holds important content and that competition  
24          problems may arise if it's not supplied or is supplied  
25          on terms that do not permit an efficient competitor to

1 compete effectively.

2 BT complains that Ofcom did not take account of  
3 content aggregation. The combination of key sports  
4 content with other sporting content into channels and  
5 packages of channels which are the relevant products.  
6 BT says that the focal product is the full suite of  
7 Sky Sports channels, which it calls the "Sky Sports  
8 proposition".

9 BT is incorrect to contend that Ofcom did not take  
10 account of content aggregation. Ofcom recognised, of  
11 course, that key content was provided as part of  
12 channels and packages of channels, and one sees this at  
13 paragraph A1.41 in the first annex to the decision,  
14 which in my copy is on page 96. I think it is on 98 of  
15 yours.

16 THE CHAIRMAN: 96 of mine.

17 MR HOLMES: Oh, very good.

18 You see there:

19 "Ofcom observes that Virgin, Real Digital and BT all  
20 said that consumers value access to a range of sports  
21 content. We agree that this is the case. We also  
22 recognise that, in practice, consumers purchase channels  
23 and packages of channels rather than individual sporting  
24 events. Accordingly, as BT acknowledges, in section 5  
25 we consider the importance of packages of content, ie,

1 channels or bundles of channels to consumers'  
2 subscription decisions. This assessment takes into  
3 account all content on each channel package, not only  
4 the content we have found to be capable of influencing  
5 the choice of pay TV provider for a significant number  
6 of consumers. We therefore consider that our analytical  
7 framework is appropriate because ..."

8 There is an omitted word there:

9 "... it takes account of the fact that consumers'  
10 actual purchasing decisions are based around such  
11 packages of content."

12 If one then turns to section 5, one sees that Ofcom  
13 refers generally, and without distinction, to  
14 Sky Sports, the Sky Sports proposition. Its analysis  
15 does not turn on a distinction as to the particular  
16 sports channels in the bundle that contain the key  
17 content.

18 So turning to 5.1 in section 5 on page 43 of my  
19 version, you see at paragraph 5.1 Ofcom assessing the  
20 impact that Sky Sports and BT Sport may have on  
21 competition, the assessment based on the sports content  
22 that the channels carry -- the channels carry; evidence  
23 on the influence of Sky Sports and BT Sport on  
24 consumers' pay TV subscription decisions and the market  
25 positions of Sky and BT.

1           Then the heading below 5.2, "Key sports content is  
2           currently shown on Sky Sports", not Sky Sports 1 and 2,  
3           but Sky Sports as a whole.

4           Over the page, the heading at the top of page 45  
5           above 5.10:

6           "Sky Sports is important to a significant proportion  
7           of pay TV subscribers."

8           Over the page again, the conclusion, the heading:

9           "The Premier League content on Sky Sports is the  
10          main driver of its importance."

11          Now, BT takes issue with this, but my question,  
12          rhetorical question, is, to what end? Ofcom is still  
13          considering Sky Sports as a package.

14          At page 51, the heading above paragraph 5.32:

15          "Sky maintains a strong market position in the  
16          supply of sports channels."

17          Again, the discussion is by reference to the  
18          Sky Sports proposition as a whole. Then the conclusion  
19          as to potential anti-competitive practices at page 59,  
20          the heading above paragraph 5.69, "Limited distribution  
21          of Sky Sports may harm competition."

22          Over the page, at the bottom of paragraph 5.73, the  
23          passage Mr Beard took you to:

24          "Therefore, we consider it is sufficient to indicate  
25          that limited distribution of Sky Sports could prejudice

1 fair and effective competition between pay TV  
2 retailers."

3 Then the assessment of practices. We will go  
4 through the substance of section 6 in a moment, but just  
5 to look for a moment at the executive summary. At  
6 page 8 --

7 THE CHAIRMAN: Just on 5.73, that sentence, as I understand  
8 it, it means that it's the evidence set out above which  
9 is sufficient. That's right, isn't it? You have to  
10 read the last sentence in the light of --

11 MR HOLMES: In the context -- yes, indeed.

12 THE CHAIRMAN: Not that it is sufficient to indicate in some  
13 detached way.

14 MR HOLMES: Indeed, sir, you are correct. The sentence  
15 stands in the light of what is said before:

16 "The evidence set out above as to the importance of  
17 content to a significant and valuable proportion of  
18 subscribers and on Sky's market position."

19 But the consideration of Sky's market position, as  
20 I have submitted, is by reference to the Sky Sports  
21 proposition.

22 MS POTTER: Just quickly, Mr Holmes, I suppose looking at  
23 something like 5.74, obviously the emphasis is on Sky's  
24 key content, and that in fact is the Premier League  
25 rights. Now, in the event, given that the decision was

1           that the WMO was no longer required, it wasn't necessary  
2           to look at which particular elements of Sky Sports were  
3           essential, but if you look at the passages you have  
4           taken us to in section 5, it is probably the case that,  
5           if you had been going to retain the WMO and look at  
6           scope, then the analysis about the distinction between  
7           the Premier League content and other content doesn't  
8           seem to be there.  Would you say that's --

9   MR HOLMES:  That's correct.  Had it come to the imposition  
10           of a remedy, Ofcom would have needed to consider what  
11           a proportionate solution would be, and would no doubt  
12           have taken account of the fact that particular content  
13           shown on particular channels from within the Sky Sports  
14           proposition was particularly important.

15  MS POTTER:  As far as analysis of a remedy.

16  MR HOLMES:  Exactly.  But for the purposes of determining  
17           the practices which Ofcom had regard to, the references  
18           are to Sky Sports as a whole, the entire package of  
19           channels which contain the key content rather than  
20           individual elements.

21           The paragraph I showed you in the annex is important  
22           because it shows that that was intentional and that it  
23           provides an answer to the ground which is now pursued by  
24           BT in this appeal under ground 3, that it matters  
25           whether the key content consists only of Premier League

1 or extends to other types of sporting --

2 THE CHAIRMAN: Is this basically a criticism that you didn't  
3 define the market correctly, and your answer to that is  
4 that it doesn't matter?

5 MR HOLMES: Yes, sir. In a nutshell, yes.

6 My submission, you have anticipated, is that BT is  
7 really arguing here about the scope of a remedy which  
8 Ofcom decided not to impose. One sees that most clearly  
9 from the evidence of Mr Petter. He will of course be  
10 cross-examined on his evidence, so the tribunal will  
11 hear more about this, but if I could just show you how  
12 he puts it in his witness statement, it's at bundle N1  
13 at tab B.

14 His discussion of content aggregation is on page --  
15 it begins on page 56 in section E. My point is a very  
16 simple one. If one looks at the heading, "The required  
17 scope of the WMO obligation", one sees where the cash  
18 value of what follows lies. It is in the scope of  
19 a remedy that Ofcom decided not to impose. One sees  
20 that at paragraph 117 on page 61:

21 "Once the importance of content aggregation and the  
22 fact that the product is bought and sold is sports  
23 channels and packages of channels ..."

24 Your point, sir, that the market is the market for  
25 channels:

1            "... is appreciated, in my view the importance of  
2            competing retailers having wholesale access to the  
3            complete Sky Sports proposition becomes more apparent."

4            So he's saying, "We need access to all of  
5            the Sky Sports channels". That's the scope of the WMO  
6            obligation that Ofcom would need to impose.

7    THE CHAIRMAN: You can see how he gets there, though, can't  
8            you? I think the BT argument is that, if you had done  
9            your analysis properly, then you would have realised  
10           that a broader WMO was necessary, and you shouldn't have  
11           taken it away. I'm summarising, but I think that's how  
12           it's been put. The fact you didn't do it properly means  
13           you never realised that there were all these other  
14           aspects.

15    MR HOLMES: But the difficulty with that argument is, if one  
16           looks at the substance of the analysis which led Ofcom  
17           to the decision to withdraw the WMO remedy, it analyses  
18           Sky's market position by reference to Sky Sports without  
19           distinction. The practice which it considers is  
20           identified by reference to Sky Sports without  
21           distinction. But if one then comes to consider the  
22           evidence of supply arrangements in the market, Ofcom  
23           found that the full suite of Sky Sports channels was  
24           being supplied on commercial terms outside the WMO  
25           remedy. This is why I say that the point might have



1 assumed some importance had Ofcom decided to impose  
2 a remedy but to confine it in scope to the remedy that  
3 was already in place. But given that it decided not to  
4 impose a remedy on the basis of an analysis that doesn't  
5 turn on any distinction between Sky Sports 1 and 2, on  
6 the one hand, and the wider suite of Sky Sports  
7 channels, on the other, our submission is that this  
8 ground goes nowhere.

9 THE CHAIRMAN: Understood. Thank you.

10 MR HOLMES: Just to make good my point about the actual  
11 supply arrangements that Ofcom found in the market, if  
12 I could take you to the summary, executive summary, to  
13 page 8 --

14 THE CHAIRMAN: Have you finished with Mr Petter?

15 MR HOLMES: Yes, sir, that is all I need from Mr Petter.

16 On page 8, Ofcom summarises its conclusions about  
17 Sky's current practices:

18 "Sky is currently supplying its sports channels on  
19 commercial terms outside the WMO obligation."

20 At paragraph 1.24, you see that the wholesale  
21 arrangement with TalkTalk since 2012 has encompassed all  
22 Sky Sports channels and the long-term agreement with  
23 Virgin Media, in the following bullet, covers all  
24 Sky Sports channels. Then the conclusion at 1.25:

25 "Sky is therefore supplying its content widely."

1           So my submission is, in conclusion on this point,  
2           the distinction between particular channels, which  
3           include the key content and the broader Sky Sports  
4           proposition, does not materially affect Ofcom's  
5           reasoning.

6           Returning to the three questions identified in  
7           paragraph 1.11 of the WMO statement, we have considered  
8           now the first two, what is key content and what is the  
9           impact of that content on the ability of pay TV  
10          retailers to compete effectively, and we have seen how  
11          Ofcom answered those questions. The third question was,  
12          what is the likelihood of content holders engaging in  
13          the practices identified, taking into account their  
14          incentives and their current supply arrangements? Ofcom  
15          considered incentives and current supply arrangements as  
16          part of its assessment of likelihood in section 6 of  
17          the statement.

18          If I could take you first to 6.23, which summarises  
19          Ofcom's conclusions about incentives, these were the  
20          conclusions it had already arrived at in December 2014,  
21          and it remained of the view that it had expressed there:

22                 "We recognised that it was difficult to conclude  
23                 definitively on the likely conduct of Sky with regard to  
24                 the supply of Sky Sports because it depended on  
25                 a complex commercial trade-off which could be affected

1 by a number of factors that were inherently uncertain.  
2 However, we considered that there were risks that Sky  
3 might have incentives to not supply other retailers'  
4 platforms and, having considered stakeholder comments,  
5 we remain of the view that this is the case. However,  
6 in considering the likelihood of Sky acting on these  
7 incentives, we have further considered Sky's existing  
8 supply arrangements, as we discuss in more detail  
9 below."

10 Again, sir, I would attach significance to the word  
11 "likelihood" there. It shows that the consideration of  
12 current supply arrangements was partly to see whether  
13 there was already a practice in the market,  
14 a prejudicial practice, but it was also to consider the  
15 risk of a prejudicial practice for the future.

16 Just to explain the complex commercial trade-off,  
17 one sees at 6.24:

18 For Virgin Media, Ofcom considered that, "because of  
19 the significant wholesale revenues from subscribers to  
20 Sky Sports on Virgin, the static incentive to carry on  
21 receiving revenues and making profits, and because of  
22 the relatively low proportion of customers on that  
23 platform that Sky might expect to win back at the retail  
24 level, Sky may have static incentives to supply  
25 Virgin Media on a wholesale basis. There might be

1 dynamic incentive to withdraw supply. However, in our  
2 view, it is still not clear as to whether any dynamic  
3 incentives to Sky, as a result of limited distribution,  
4 would overcome its likely static incentive to supply."

5 Sir, I just note in relation to Virgin Media that in  
6 2010 Ofcom considered that the likelihood of Sky  
7 withdrawing supply to Virgin Media was low. So we have  
8 a similar --

9 THE CHAIRMAN: This is because Virgin Media is cable,  
10 effectively?

11 MR HOLMES: Yes, sir. There is a category of retail  
12 customers there that might very well not go to Sky  
13 because, for example, they are not permitted to have  
14 a satellite dish on the side of their house or they have  
15 some other reason for not wanting a satellite dish or  
16 supply from Sky, so they are likely to remain with  
17 Virgin Media. But also there is the consideration that  
18 a bird in the hand is worth two in the bush. They have  
19 already revenues and profits of a substantial nature  
20 from the number of subscribers that they have on  
21 Virgin Media as a result of the wholesale arrangements  
22 and they have to be weighed against any dynamic  
23 incentive.

24 At 6.25, one sees that for other pay TV platforms  
25 Sky's "static incentives to supply or not supply will

1 still depend on the amount of subscribers who might  
2 switch, the additional subscribers to whom Sky could not  
3 otherwise retail Sky Sports and the relative margins  
4 earned by wholesaling or retailing." So a complex  
5 equation even within the static incentives.

6 At 6.26, "Overall commercial incentives to supply  
7 key content will be driven by the net impact of  
8 the static and dynamic incentives."

9 To address a point that I discussed briefly with  
10 Professor Mayer yesterday at paragraph 6.28, one sees:

11 "One of the possible strategic benefits to Sky of  
12 limited distribution was that limited distribution could  
13 reduce competition for future sports rights. We still  
14 consider that platforms with fewer subscribers may be  
15 less able to monetise rights and consequently less  
16 effective when competing for sports rights."

17 So Ofcom did consider the risk that there would be  
18 a strategic benefit to Sky in withdrawing supply or  
19 limiting distribution to competitors so that they would  
20 be less likely to go upstream and acquire the sports  
21 rights for themselves.

22 So a complex equation in relation to both static and  
23 dynamic, and uncertainty as to the balance. Ofcom  
24 therefore considered also how Sky was actually acting in  
25 the market to see what light that shed on Sky's

1 propensity to act on its incentives.

2 In attending to Sky's current conduct in the market,  
3 Ofcom was taking a course that was being urged upon it  
4 in consultation by both BT and Sky, and it would perhaps  
5 be worth showing you briefly the consultation responses  
6 that Ofcom received to its December 2014 consultation,  
7 beginning with BT's first consultation response, this is  
8 in bundle N2 at tab Q. The passage which I would like  
9 to show you is on page 151, at paragraph 6.17, under the  
10 heading "It is evident that Sky has limited the  
11 distribution of its Sky Sports proposition in practice":

12 "While BT believes that it is instructive to  
13 consider Sky's incentives to limit the distribution of  
14 Sky Sports proposition as explained in annex 1  
15 consistent with competition law orthodoxy Ofcom's  
16 analysis should focus on the objective observable market  
17 outcome that limited distribution of the Sky Sports  
18 proposition is occurring and has had an impact on fair  
19 and effective competition in pay TV markets. Thus an  
20 appreciation of the importance of the Sky Sports  
21 proposition, Sky's market position, the observable fact  
22 of limited distribution of the Sky Sports proposition  
23 and the observable fact of a lack of fair and effective  
24 competition in pay TV markets provides a more than  
25 sufficient basis for Ofcom to intervene. When

1           considering Sky's incentives, Ofcom is not required by  
2           section 316 to consider whether Sky acted in  
3           a particular way out of any subjective, malign,  
4           anti-competitive intent, ie, Ofcom should avoid getting  
5           drawn into speculation as to Sky's intent and whether or  
6           not Sky deliberately limits the distribution of its  
7           Sky Sports proposition specifically to impede  
8           competition. It is sufficient for Ofcom to observe, on  
9           the basis of its economic analysis, that the limited  
10          distribution of the Sky Sports proposition is likely to  
11          have the effect of limiting the emergence of fair and  
12          effective competition."

13                 That point is developed in annex 1 at page 179 of  
14          the document, at paragraphs 10 and 11, under the heading  
15          "Objective evidence provides the best indicator that the  
16          limited distribution of Sky Sports has an effect on fair  
17          and effective competition".

18          THE CHAIRMAN: Is that paragraph 11?

19          MR HOLMES: Paragraphs 10 and 11, sir, are both relevant to  
20          this point. But the key point to take home is that BT  
21          considers in paragraph 11, as you say, sir, that Ofcom's  
22          analysis should focus upon the objective observable  
23          market outcomes:

24                         "Limited distribution is occurring and has had an  
25          impact."

1           So BT founding itself principally on evidence of  
2           objective market outcomes and allegation of existing  
3           conduct in the market.

4   THE CHAIRMAN: I think the gist of what they were saying is  
5           that you should look and see whether fair and effective  
6           competition is affected.

7   MR HOLMES: By having regard to observable market outcomes,  
8           indeed, sir.

9   THE CHAIRMAN: But go further than just ascertaining whether  
10           there are agreements in place.

11   MR HOLMES: Yes, but not to focus on the intention, on Sky's  
12           purposes, but, rather, on whether it is actually  
13           restricting supply and what effect that's having.

14           My attention has been drawn to paragraph 12, at the  
15           end. The point, sir, is that in the final sentence of  
16           paragraph 12 BT observe that in assessing whether an  
17           impediment to effective competition will eventuate,  
18           future conduct, the commission will in particular take  
19           into account the type of strategies presently and/or  
20           previously adopted on the market. There is reference to  
21           various merger documents in support of that proposition.  
22           It is a short point, but it is just -- and an obvious  
23           one, perhaps, but it is just to show that, when  
24           assessing likely conduct, actual conduct in the market  
25           in the past or in the present is a relevant



1 consideration.

2 Sky's consultation response similarly urges Ofcom to  
3 focus on conduct in the market. That's at bundle G1,  
4 tab 3 on page 31. You will see from the front page that  
5 this is Sky's response to the first consultation  
6 document. At page 31, section 4 begins:

7 "Whether Sky is likely to limit distribution ..."

8 And then above paragraph 4.3:

9 "Ofcom should focus on Sky's behaviour rather than  
10 attempting to determine its incentives in a vacuum."

11 At 4.5:

12 "Focusing on propositions about Sky's incentives  
13 derived from speculation or hypothetical theories about  
14 Sky's motivations, however, is an inapt approach to the  
15 assessment of the issues raised in the consultation.  
16 This is because, while the so-called static incentive to  
17 distribute Sky's key sports channels widely associated  
18 with their high fixed-costs basis is clear cut,  
19 attempting to discern what other incentives Sky faces is  
20 extremely difficult."

21 At 4.6:

22 "Ofcom should instead focus on what Sky is likely to  
23 do in reality absent regulation, and the best evidence  
24 on that issue in Sky's case is what it has done in the  
25 past and what it does now, which are discussed in the

1 following part A."

2 At 4.8:

3 "A robust, evidence-based analysis of Sky's actual  
4 behaviour in relation to the distribution of key sports  
5 channels is a superior approach to the issues raised in  
6 the consultation to focusing on an abstract analysis of  
7 Sky's incentives that is not grounded in any evidence."

8 Then, in the preceding section, you see the heading  
9 of part A, "Sky distributes its key content widely".

10 So an element of consensus between Sky and BT in  
11 urging Ofcom to look at present conduct and examine  
12 what's happening in terms of practices in the market  
13 today. Just to complete the picture, BT's supplemental  
14 consultation response contains BT's comments on Sky's  
15 consultation response, and that is in bundle N2 at  
16 tab S.

17 Within that tab, the relevant passage is in annex 1,  
18 which begins after the pink interleaf, the first pink  
19 interleaf. It is green in some of the bundles, and  
20 absent in others. Do you see the document begins with  
21 the body of the consultation response, which runs to  
22 page 28, and then you see another BT cover sheet,  
23 annex 1, "BT comments on third party responses". Do you  
24 have that, sir?

25 THE CHAIRMAN: Yes.

1 MR HOLMES: Within that, at page 12, you see BT emphasising  
2 the "Importance of examining actual behaviour" in the  
3 heading above 3.8:  
4 "Sky asserts that Ofcom should assess whether 'in  
5 practice, (a) it is plausible that Sky has particular  
6 incentives and/or disincentives to distribute ... and  
7 (b) the overall balance of those incentives' as 'theory  
8 alone cannot determine those matters'. Similarly, FAPL  
9 states that it considers that 'Ofcom's whole case on  
10 potential consumer harm is thus entirely theoretical.  
11 This is not and cannot be an adequate basis for  
12 intervention'. BT agrees that Ofcom needs to have  
13 regard to whether Sky has limited the wholesale  
14 distribution of Sky Sports in practice. However, as set  
15 out below, it is disingenuous to argue that Ofcom's case  
16 in respect of [BT's] behaviour is entirely theoretical  
17 or unsubstantiated. BT has provided ample evidence that  
18 Sky has limited the distribution of its Sky Sports  
19 proposition in practice.  
20 "Sky argues that, on an allegedly 'evidence-based  
21 approach', it does not limit the distribution ...  
22 Contrary to Sky's assertions, objective and observable  
23 market outcomes demonstrate that the limited  
24 distribution of the Sky Sports proposition is occurring  
25 and has had an impact on fair and effective competition

1 in pay TV markets. For the avoidance of doubt this is  
2 not about Sky's subjective intent."

3 I'm not seeking to suggest, sir -- you are right to  
4 make that clear -- that anyone was suggesting that  
5 conduct was the end of the story. But it was clearly an  
6 important aspect of the analysis. There are passages in  
7 BT's notice of appeal which criticise Ofcom for its  
8 focus on present conduct in the market. So my  
9 submission is a narrow one, sir. It is simply to point  
10 out that the parties were urging Ofcom to adopt that  
11 focus in assessing likelihood of conduct.

12 Sir, with that observation in place, let me turn to  
13 consider Ofcom's conclusions on Sky's conduct in the  
14 market. The discussion begins at 6.30, or 6.29, which  
15 Mr Beard has already shown you, in which Ofcom makes the  
16 point that the incentives analysis is inconclusive, but  
17 that there is a risk, but that they further consider the  
18 relevance of existing supply arrangements for Sky's key  
19 content in assessing whether Sky is engaging in  
20 a practice of non-supply.

21 Now, I think Mr Beard suggested that there was  
22 a non-sequitur there, Ofcom moved rather too briskly  
23 from incentives relevant to future conduct to existing  
24 supply arrangements on the market, and that showed that  
25 its focus was exclusively on present practices and not

1 on the future.

2 But, sir, 6.29 needs to be read in light of  
3 the other passages which I showed you, 6.23 and in the  
4 questions at paragraph 1.11, which show that Ofcom was  
5 considering existing conduct as an indicator of  
6 likelihood of future conduct, as in accordance with the  
7 approach that BT commended to Ofcom.

8 Then one sees at 6.30 evidence as to Sky's current  
9 supply arrangements which have been agreed outside the  
10 scope of the WMO obligation, and these arrangements will  
11 remain in force for a period even if the WMO obligation  
12 were removed.

13 Mr Beard skated over this paragraph somewhat, but it  
14 is worth pausing on it. The first bullet relates to an  
15 agreement with TalkTalk. The first point to note is  
16 that the agreement is in respect of all Sky Sports  
17 channels. The second point to note is that it is  
18 confined to standard definition. But there is relevant  
19 evidence before the tribunal about that. It is  
20 confidential, but I can show you it so that you can read  
21 it and have it in mind.

22 If you take up Sky's bundle, Sky 1, Sky's witness  
23 evidence is given by Ms Fyfield, Sky's chief strategy  
24 and commercial officer. Her statement is at  
25 subdivider B within the bundle. If you turn within the

1 statement to page 44, you see that she gives evidence  
2 there as to the wholesale supply of Sky's premium sports  
3 channels to TalkTalk. The point that I want to take you  
4 to now is in paragraph 129 on page 47. If I could ask  
5 you to review that, please. The point that I take from  
6 that is simply the evidence that it contains as to why  
7 TalkTalk does not take HD channels from Sky. This was  
8 consistent with the evidence that was before Ofcom at  
9 the time.

10 The third point to note about the TalkTalk deal  
11 concerns the terms of supply. Now, we are still on the  
12 first limb, if you like, the fact of supply, but while  
13 we are here, let me just pick this point up.

14 You see the confidential material at the end of  
15 the first bullet in paragraph 6.30. The significance of  
16 this information is that it suggests commercial  
17 flexibility and a willingness to negotiate on  
18 a commercial basis.

19 If I could take you also to the meeting note which  
20 is identified in footnote 259, that is at DF2, defence  
21 bundle 2, at tab 11. You will see that this document  
22 is, in its entirety, confidential to TalkTalk, so  
23 I shan't read any of it in open court, but I would like  
24 the tribunal to review the paragraphs on page 2 under  
25 the heading [redacted]xxxxxxxxxxxx So the points that







1           At paragraph 113, new negotiations commenced when  
2           the existing arrangement expired in June 2013.

3           At paragraph 121(i), all Sky Sports channels in HD  
4           and SD and associated subscription video on demand  
5           content were supplied, much of that new supply.

6           As to price, you will see Ms Fyfield's evidence at  
7           (ii) and (iii). It is confidential, so I won't read it  
8           in open court. My point on term is illustrated by (iv).  
9           At (vi), a right to distribute Sky Sports channels off  
10          platform, allowing its consumers to watch on mobile and  
11          tablet for the first time.

12          Paragraphs 121(viii) and (ix) show the depth of  
13          the relationship between Virgin Media and Sky and are  
14          again, in our submission, consistent with Sky wanting to  
15          promote the uptake of its channels on cable via this  
16          wholesale arrangement.

17          As regards the terms of the agreement with  
18          Virgin Media, Mr Beard set some store by  
19          [redacted]xx  
20          xx  
21          xxx If  
22          I could take you to an email which is alleged to be  
23          confidential, for reasons that are, I have to say,  
24          unclear to me, but it is in bundle N1, tab G. This is  
25          one of the exhibits to Sean Williams' evidence, one of

1 the BT witnesses. The document is on page 39. You see  
2 at the bottom of the page  
3 [redacted]xx  
4 xxx  
5 THE CHAIRMAN: [redacted]xxxxxxx  
6 MR HOLMES: [redacted]xx  
7 xxx  
8 xxx  
9 [redacted]xx  
10 xxx This is another  
11 allegedly confidential document. I should give the  
12 tribunal a moment to review it.  
13 THE CHAIRMAN: We remember it.  
14 MR HOLMES: Very good.  
15 [redacted]xx  
16 xxx  
17 xxx  
18 xxx  
19 xxx  
20 xxx  
21 xxx  
22 xxx  
23 xxx  
24 xxx  
25 Returning to paragraph 6.30 in the statement, the

1 third bullet refers to BT's agreement for supply on  
2 Cardinal, which covers the Sky Sports 1 and 2 channels  
3 but also 5, and it is via IPTV, which was excluded from  
4 the scope of the original interim relief order.

5 [redacted],xx  
6 xx  
7 xx  
8 and so I propose to address that in my closing  
9 submissions, after we have heard evidence.

10 The final bullet concerns the wide distribution of  
11 Sky's material on various platforms, including EE and  
12 [redacted]xxxxxxxxxxxxxxxxxxx indicated in the confidential  
13 material, but with various others as well -- Sony, Apple  
14 and Google are named.

15 Mr Beard suggested that these arrangements were not  
16 relevant because they were self-retail arrangements. In  
17 our submission, they are relevant. First, the tribunal  
18 will recall that one of the types of consumer detriment  
19 identified in the pay TV statement was that Sky's sports  
20 content was altogether absent from some types of  
21 platform. That is no longer the case.

22 The second point is that some platform providers are  
23 happy enough with self-retail arrangements. For those  
24 pay TV operators, there is no particular difficulty with  
25 self-retail. Ofcom's concern in the pay TV statement

1 about self-retail was always that Sky might insist upon  
2 self-retail rather than wholesale, but self-retail is  
3 a healthy part of a mix of supply, provided that there  
4 is also the option for wholesale.

5 THE CHAIRMAN: When you say "the pay TV statement", do you  
6 mean the 2010 statement?

7 MR HOLMES: I do mean the 2010 statement. For your note --  
8 I don't propose to take you there now -- paragraphs 7.72  
9 to 7.74 address that point.

10 The tribunal's judgment also contains relevant  
11 material on self-retail at paragraphs 177 to 183, and  
12 the tribunal notes there in summary that Sky has  
13 a preference for self-retail, that Ofcom's position was  
14 that it was legitimate for Sky to prefer self-retail,  
15 but that other pay TV retailers had legitimate reasons  
16 not to want it.

17 Finally, Ofcom's belief in the 2010 statement that  
18 Sky would rather not deal at all if it cannot  
19 self-retail. That was found to be incorrect by the  
20 tribunal.

21 [redacted]xx  
22 xxx  
23 xxx  
24 xxx  
25 xxxxxxxxxxxxxxxx Given the time, I won't take you there

1 now.

2 THE CHAIRMAN: The point against you is that these means of  
3 distribution may increase availability of the Sky Sports  
4 offering, but they don't contribute to competition,  
5 that's put very simply. You are going to deal with  
6 that, are you?

7 MR HOLMES: Yes, sir, certainly. The concern that Ofcom has  
8 is that there is some type of content that a pay TV  
9 retailer needs to offer on its platform for the platform  
10 to be attractive to consumers. The risk is that,  
11 without that content, the consumer may be driven to  
12 adopt a different platform, which may not be their first  
13 choice platform, and that not only harms competition,  
14 but it also causes detriment to consumers, who are  
15 forced to go for a less desirable option.

16 Now, some pay TV retailers may attach importance to  
17 wholesaling the channel for various reasons, and Ofcom's  
18 view in 2010 was that that was a legitimate preference.  
19 Other retailers, on the other hand, may be perfectly  
20 content to serve as a marketplace for a variety of types  
21 of content, and they may be happy to receive -- for  
22 their consumers to receive content via a third party.  
23 The payment methods for receiving content are now much  
24 more straightforward than they used to be. It is easy  
25 enough to set up accounts. People are used to having

1 multiple subscriptions on their television set, to  
2 Netflix, to NOW TV, to various providers from which they  
3 obtain content via a single platform. Therefore, this  
4 is no longer necessarily a significant problem, and  
5 there may be retailers who benefit from having supply  
6 and being able to compete on the retail market to  
7 promote their platform who do not receive Sky's content  
8 by way of wholesale but rather by way of self-retail.

9 Sir, paragraph 6.30 of the WMO statement expressly  
10 identifies the point that I was making about self-retail  
11 as part of a mix in circumstances where there's no  
12 theological objection to wholesale, Ofcom's concern at  
13 the time of the 2010 statement.

14 PROFESSOR MAYER: Can I just clarify, you are putting this  
15 in terms of whether there are objections by providers,  
16 but of course providers may prefer this on the grounds  
17 that it does have different implications for prices from  
18 wholesale competition. Are you presenting this in the  
19 correct way?

20 MR HOLMES: Well, sir, the concern that Ofcom was seeking to  
21 address in both the 2010 statement and in the WMO review  
22 process was promoting competition in the provision of  
23 pay TV services generally. Its concern was not  
24 specifically either about the ability of competitors to  
25 resell Sky Sports content or about the ability of

1 competitors to move upstream and acquire key sports  
2 content for themselves. Its concern was to ensure that  
3 people could enter the pay TV market as a whole, or the  
4 pay TV field as a whole, and supply bundles of content,  
5 including the core sports content, given the importance  
6 of that content to a significant number of consumers,  
7 which might therefore affect their ability to make  
8 a sustainable proposition as a pay TV retailer.

9 So, in my submission, it is relevant and correct to  
10 consider the ability of retailers to supply pay  
11 television services with the Sky content included by  
12 means of self-retail. That's a relevant consideration  
13 as to the health and effectiveness of competition at the  
14 level that Ofcom was considering.

15 That's probably as far as I can take it. You will  
16 of course, sir, hear expert evidence. You will have  
17 Ofcom's witness who may be able to give you a more  
18 developed answer to it. But that's my understanding of  
19 the position.

20 PROFESSOR MAYER: Thank you.

21 MR HOLMES: Let me turn, sir, to the second limb of Ofcom's  
22 analysis which concerns Sky's terms of supply. Ofcom's  
23 consideration of price began at 6.38 of the WMO  
24 statement -- at 6.40, and it first considers the  
25 consultation responses which it had received on this

1 issue. The long and the short of paragraphs 6.40 to  
2 6.48 was that it was BT that alleged a current problem  
3 with Sky's prices. One sees at paragraph 6.44 the  
4 observation that other stakeholders did not comment  
5 directly on current wholesale prices in response to  
6 the December 2014 consultation, and you have seen  
7 already TalkTalk's information to Ofcom about that.

8 At 6.48, there is the [redacted]xxxxxxxxxxxxx  
9 xxxxxxxxxxxxxxxxxxxx which I showed to you.  
10 [redacted]xx  
11 xxx

12 Otherwise, the representations are all made by BT.  
13 6.40 explains that in its December 2014 consultation  
14 response, BT argued that rate card prices were too high  
15 but gave little of substance in support of that  
16 allegation.

17 At paragraph 6.41, there is an allegation by BT  
18 about the competitiveness of TalkTalk's retail pricing,  
19 but it focuses only on the incremental cost of  
20 the Sky Sports add-on. It doesn't consider the cost of  
21 the basic channels which consumers must purchase before  
22 they take Sky Sports either from TalkTalk or from Sky.  
23 So the comparison is not the correct one.

24 At paragraph 6.42, BT referred to Sky's alleged  
25 unwillingness to depart from wholesale rate card prices,



1 and the tribunal will hear evidence on this point.

2 Then at paragraph 6.45, one sees the additional  
3 submission made in October 2015 in the form of BT's  
4 pricing model. There is a description of the model,  
5 and, again, this will be the subject of evidence.

6 For present purposes, it is sufficient to note that  
7 the model did not suggest that BT could not itself  
8 operate profitably. Rather, it sought to create  
9 a hypothetical stand-alone pay TV retailer, using  
10 internet protocol TV.

11 It imagined as its central case a retailer  
12 distributing IPTV by means of a dedicated broadband  
13 connection but who did not actually supply the  
14 broadband:

15 BT also did a sensitivity test which modelled  
16 a triple-play operator, but based on a narrower product  
17 range than BT itself supplies.

18 At paragraph 6.46, BT's submission was that Ofcom  
19 should do its own modelling. At 6.47,  
20 [redacted]xx  
21 xxx  
22 xxx  
23 xxxxxxxxxxxxxx So those were the submissions that Ofcom  
24 received on price.

25 Ofcom's analysis commences at 6.49. Ofcom first

1 describes the view it reached in 2010 and the final  
2 sentence observes that Ofcom found then that Sky was  
3 reluctant to depart from the rate card. So there was  
4 one price and that was the price that Sky was considered  
5 to offer inflexibly to consumers -- to retail  
6 competitors.

7 MS POTTER: Mr Holmes, can I just say, I think we had  
8 a reference to a paragraph that is confidential a couple  
9 of minutes ago, so we might just amend that on the  
10 transcript.

11 MR HOLMES: I shall watch that. I'm grateful.

12 At 6.50, there is a discussion of the tribunal's  
13 judgment which found that Virgin Media could compete  
14 effectively and noted that effective competition did not  
15 require symmetry between retailers, and that, whilst Sky  
16 had certain scale advantages, Virgin Media had its own  
17 set of advantages, the difference in scale did not  
18 materially affect Virgin Media's ability to compete  
19 effectively.

20 I should pick up one point that was raised by  
21 Ms Potter with me yesterday, who asked whether the  
22 significance of the tribunal's judgment loomed somewhat  
23 larger in the defence than in the statement. The answer  
24 is that Ofcom did refer to the tribunal judgment in  
25 places in the statement and, in this context, it was

1 relevant because BT was urging Ofcom to follow the same  
2 approach as in 2010, but the tribunal's judgment  
3 required Ofcom to proceed cautiously, given the findings  
4 that are set out in paragraph 6.50.

5 More generally --

6 THE CHAIRMAN: I think it was my intervention, actually.

7 I think it was in the context of Sky's strategy rather  
8 than the pricing.

9 MR HOLMES: I see, yes. The point is that, generally, and  
10 throughout the statement, Ofcom didn't treat the 2010  
11 statement as the starting point. It didn't always  
12 expressly set that out. But it would obviously have  
13 been wrong for it to do so, given the various findings  
14 that were made by the tribunal, and that assumed greater  
15 prominence in the defence because of the case that we  
16 have to meet there, namely, BT's contention that Ofcom  
17 was required to take the 2010 statement as a starting  
18 point.

19 At paragraph 6.52, Ofcom observes the need to  
20 proceed with caution when disturbing prices agreed in  
21 the market:

22 "We are mindful of the need to be cautious in  
23 examining commercially agreed prices unless there are  
24 good reasons for doing so."

25 The tribunal will recall the 2012 judgment on this



1 and it was legitimate for Ofcom to have regard to those.

2 The second point, at paragraph 6.59, is  
3 a methodological observation. Ofcom gently points out  
4 that a stand-alone pay TV entrant is not necessarily now  
5 appropriate, given market developments. The reality is  
6 that the competition comes in the form of big  
7 competitors supplying various triple-play bundles, not  
8 stand alone and not just a basic offer.

9 The third point -- this is not a criticism of BT,  
10 but an observation about what conclusions can be drawn  
11 from BT's model itself -- is that the model relies on  
12 BT's costs, and there are very large differences between  
13 BT's and Sky's retail pay TV operations. BT uses  
14 a different distribution technology, IPTV rather than  
15 DSat. That is a difference from the exercise that Ofcom  
16 conducted in 2010. You will recall that Ofcom  
17 considered using a DTT measure of costs in the  
18 consultation process, but ultimately determined that it  
19 was appropriate to model Sky's own satellite costs for  
20 the purposes of determining the WMO remedy level of  
21 price subject to a scale adjustment.

22 Now, Ofcom recognised, of course, that BT had used  
23 the information that was available to it, and this is in  
24 the second sentence of paragraph 6.60, and that BT's  
25 analysis was therefore necessarily dependent upon BT's

1 own retail costs. So there was no criticism of BT for  
2 the approach that it had taken.

3 The point being made at 6.60 is simply that the  
4 model does not, in itself, show a margin squeeze on  
5 Sky's part and is not, in itself, evidence of  
6 anti-competitive conduct.

7 THE CHAIRMAN: I think BT's point is that it should have put  
8 you on notice and you should have adopted an incremental  
9 approach and asked a few questions and then seen what  
10 the answer was.

11 MR HOLMES: Yes, sir, absolutely.

12 THE CHAIRMAN: It's not suggesting that the model itself is  
13 complete evidence of anything.

14 MR HOLMES: No, indeed. They call it their best effort.

15 But Ofcom, in considering the model in the statement --  
16 it was a legitimate observation for it to make at 6.60  
17 that the model did not demonstrate the existence of  
18 a practice prejudicial to fair and effective  
19 competition, the question that Ofcom was seeking to  
20 address. Now, Ofcom didn't stop there --

21 THE CHAIRMAN: They might put it on enquiry, I think is the  
22 point.

23 MR HOLMES: Indeed, that is BT's point, but BT appeared in  
24 submission to be critical of Ofcom's approach in this  
25 paragraph, that it was making an unfair criticism of

1 Ofcom's -- sorry, of BT's modelling, but I take your  
2 point, sir, that another of BT's points is that this  
3 modelling was enough to require a further investigation  
4 and enquiry.

5 THE CHAIRMAN: Mr Holmes, where would be a good point to  
6 pause briefly?

7 MR HOLMES: Indeed, sir. I am reaching the home straight.

8 THE CHAIRMAN: We have one or two questions we want to put  
9 to you, and we do want to hear Sky before 1 o'clock.  
10 That is all catered for, is it?

11 MR HOLMES: With a fair wind, I can, I think, conclude my  
12 script within another 10 minutes, which would leave  
13 10 minutes or so for questioning, if that was  
14 sufficient. I am looking to Mr Flynn. He indicated  
15 that he needed an hour, but that he was somewhat  
16 flexible about that. So unless he shouts --

17 THE CHAIRMAN: I think, unusually, our deadline of 1 o'clock  
18 is an absolute one. Otherwise, we would flex that, but  
19 we are a bit stuck. Let's reconvene literally at  
20 11.40 am.

21 (11.35 am)

22 (A short break)

23 (11.40 am)

24 MR HOLMES: Sir, I was just coming to the fourth point which  
25 Ofcom considered in relation to BT's model, which is, in

1 our submission, the answer to the suggestion that it  
2 should have put Ofcom on notice of the need for further  
3 enquiry.

4 As Ofcom sets out briefly in 6.61, but sufficiently  
5 clearly, Ofcom did not consider that BT's model on its  
6 own terms was sufficient to show, or even suggest the  
7 possibility of a competition problem. It does not show  
8 that BT cannot operate profitably using its triple-play  
9 business model and it produces a [redacted] based on  
10 adjustments which Ofcom did not find persuasive.

11 BT's model will be explored further in evidence, but  
12 for present purposes, my submission is simply that Ofcom  
13 had reasons for concluding that the modelling did not  
14 show a competition problem, and that it did not even  
15 raise a concern such as to justify further extensive  
16 analysis. I'm not sure that we can take the point much  
17 further before hearing the witnesses.

18 THE CHAIRMAN: We will leave it until after the witnesses.

19 MR HOLMES: Then Ofcom's conclusion is given in  
20 paragraph 6.62 to 6.64. Mr Beard took objection to the  
21 phraseology in 6.62 and, in particular, Ofcom's  
22 statement that it did not consider that the analysis  
23 which BT subsequently provided provides sufficient  
24 grounds to demonstrate that Sky's wholesale pricing  
25 amounts to a practice which is prejudicial to fair and



1 effective competition, particularly given the context of  
2 the existing commercial supply arrangements and Ofcom  
3 therefore does not consider it appropriate to conduct  
4 a more detailed pricing analysis. But in my submission,  
5 Ofcom's point is clear enough: there are commercial  
6 deals in the market; Sky's counterparties are not  
7 suggesting any difficulty in their ability to compete;  
8 BT comes along with modelling of a hypothetical operator  
9 following a different business model from BT's own,  
10 a model which no-one in the market in fact adopts, based  
11 on unsatisfactory assumptions, and Ofcom doesn't  
12 consider that this provides enough of a basis for  
13 a further and more intensive investigation of Sky's  
14 prices. In my submission, that was an entirely lawful  
15 and legitimate conclusion for Ofcom to reach.

16 The other term of supply considered by Ofcom is even  
17 more clearly at issue, an issue that is specific to BT  
18 and Sky. It is the question of reciprocity and Ofcom's  
19 conclusions on this topic start at 6.82.

20 THE CHAIRMAN: Just a minute, Mr Holmes. At some stage you  
21 are going to address the point about whatever commercial  
22 deals Ofcom found present in the market were "concluded  
23 against the backdrop of the WMO obligation".

24 MR HOLMES: Yes, sir, it may be necessary to clear the court  
25 for me to do so.

1 THE CHAIRMAN: We are in your hands on that.

2 MR HOLMES: Let me finish, if I may, sir --

3 THE CHAIRMAN: Do you want to do it in this round or in the  
4 conclusion or what?

5 MR HOLMES: I think it might be sensible for me just to make  
6 the submission in this round.

7 THE CHAIRMAN: I think it seems -- somebody described a seam  
8 running through the argument. I think it needs to be  
9 dealt with at some stage or another. It has been put to  
10 you.

11 MR HOLMES: It is a very short point that I will be making  
12 in response, sir, so I can do that perhaps when I have  
13 finished -- shall I run through and then we can deal  
14 with it as a final point, perhaps as one of your  
15 questions in conclusion? How would you prefer to  
16 proceed?

17 THE CHAIRMAN: That would do. I just don't want to squeeze  
18 Mr Flynn more than is fair.

19 MR HOLMES: I understand, sir.

20 At the outset, at paragraph 6.82 and 6.83, Ofcom  
21 makes clear that there is, in principle, potential for  
22 concern where a vertically integrated operator in  
23 a strong market position such as Sky makes the supply of  
24 its key content subject to a requirement which may  
25 condition the way in which a competitor chooses to

1 supply its own content to the detriment of effective  
2 competition, and Ofcom identifies various circumstances  
3 in which such a requirement might be problematic, where  
4 it's used to appropriate the benefit of an investment or  
5 an innovation made by a competitor, given the potential  
6 impact on the competitor's incentives to invest and  
7 innovate; where it is used to unduly restrict the  
8 commercial strategy of another provider; and where it's  
9 used to prevent key content from being supplied to  
10 a competing platform.

11 At paragraph 6.84 there is then the observation that  
12 this is in reality and substance a BT/Sky problem. The  
13 following paragraphs contain some confidential text, but  
14 the key point being made is that Ofcom considers that  
15 a reciprocity requirement -- that is to say,  
16 a requirement to supply some key content in exchange for  
17 other key content -- is not necessarily distortive of  
18 competition. It depends on the particular  
19 circumstances. It needs to be considered in its  
20 context, looking at the reasonableness of each party's  
21 position, at what key content is being sought and  
22 offered, and taking account of what other content each  
23 party holds. This is not an industry-wide problem that  
24 requires a comprehensive solution. In this context,  
25 sir, you asked Mr Beard yesterday whether insistence on

1 a reciprocity requirement by a dominant undertaking  
2 could infringe article 102. I think that where we got  
3 to was that Mr Beard accepted that it could, and that  
4 must clearly be BT's position, as it lodged  
5 a Competition Act complaint on exactly that question.

6 In my submission, one can see why BT turned to the  
7 article 102, or the chapter 2, prohibition in this  
8 context: this is a specific dispute between two parties  
9 and it turns on a specific analysis of the situation.  
10 Those provisions would also, of course, allow interim  
11 measures to be taken in an appropriate case.

12 So, in summary, Ofcom's findings on the question of  
13 whether there were or might be practices prejudicial to  
14 competition were starkly different in 2015 to 2010. In  
15 2010, Ofcom found that Sky was acting to restrict the  
16 distribution of its key sports content, and that concern  
17 was shared by Sky's retail competitors who were aligned  
18 in alleging a restriction of supply, both absolute and  
19 by reference to price. In 2015, Ofcom found that Sky  
20 was supplying that content widely on commercial terms.  
21 The counterparties to those agreements were not  
22 complaining about Sky's current prices. BT and Sky  
23 represented a particular difficulty, with BT complaining  
24 about both price and reciprocity. But as regards price,  
25 Ofcom did not agree that there was concern, and as

1 regards reciprocity, the concern was both complex and  
2 fact specific, and Ofcom did not consider that  
3 a practice had yet crystallised or that it would be  
4 appropriate to intervene by way of a condition under  
5 section 316.

6 There are two further points that I wish briefly to  
7 make before your questioning, in relation to the WMO  
8 statement. I will do them both by reference, if I may.  
9 The first is that the WMO statement considered the  
10 pay TV landscape to see whether there was evidence of  
11 consumer harm of the kind that it had identified in  
12 2010. The conclusions are set out in section 3 but are  
13 summarised in paragraphs 1.4 to 1.6 of the WMO  
14 statement. They are worth noting because they show that  
15 Mr Beard's suggestion that nothing in the pay TV  
16 landscape had changed since 2010 is not quite correct.  
17 That wasn't the finding that Ofcom had made. If one  
18 looks at the matters that are covered in 1.4 to 1.6 and  
19 compares them with paragraph 1.31 of the pay TV  
20 statement, specifically referred to in footnote 2 to  
21 those paragraphs, one sees that they systematically  
22 address the particular concerns about consumer detriment  
23 which had motivated the remedy in 2010.

24 The final point concerns Ofcom's decision. In the  
25 light of its finding as to Sky's current and expected

1           conduct, and as to the current consumer experience,  
2           Ofcom had to determine whether a WMO remedy remained  
3           appropriate for ensuring fair and effective competition.  
4           A question of that kind is not an easy one. It is  
5           a policy choice for a regulator which will inevitably  
6           upset one stakeholder or another.

7           Ofcom decided on this occasion that it should  
8           deregulate the market but that it would keep matters  
9           under review so that it could intervene if needed.  
10          Mr Beard has shown you the relevant parts of section 7,  
11          and in view of the time I won't revisit those. He  
12          suggested that the decision does not show any assessment  
13          of proportionality. In my submission, that is  
14          incorrect. The whole of Ofcom's decision is suffused by  
15          an awareness of its responsibility to act  
16          proportionately, doing the best it could on the basis of  
17          the evidence before it. There are two particular  
18          paragraphs I would also like to show you. The first is  
19          in 1.25. Ofcom there observes:

20                 "Sky is supplying its content widely. The only  
21                 current supply arrangement under the WMO is to  
22                 BT YouView, but Sky said it is willing to wholesale its  
23                 Premier League content to BT subject to a requirement of  
24                 reciprocal supply of BT Sport. Stakeholders argue that  
25                 Sky's existing arrangements could not be used to inform

1           what would happen in the absence of the WMO obligation  
2           and, therefore, regulation was necessary to ensure  
3           continued supply in future. However, given the evidence  
4           before us of Sky's existing supply arrangements, we do  
5           not consider that it would be justifiable or  
6           proportionate to impose regulation effectively as  
7           a backstop to address a potential concern. We will  
8           continue to monitor Sky's practices to determine whether  
9           regulation might be appropriate in future."

10                 So an express reference to proportionality as an  
11                 aspect of Ofcom's assessment.

12   THE CHAIRMAN: I think Mr Beard's point was that there was  
13                 no proportionality analysis, not that it wasn't  
14                 mentioned from time to time.

15   MR HOLMES: Sir, I would say this paragraph contains an  
16                 analysis for the purposes of proportionality. It  
17                 assesses the nature of the conduct which Ofcom has  
18                 identified and it concludes that an intervention would  
19                 not be appropriate against the risk of conduct  
20                 eventuating at some future point in time.

21                 Now, one might cavil at that, but that was Ofcom's  
22                 decision.

23                 The other paragraph is 1.33, which specifically  
24                 addresses the question of reciprocity. You see there:

25                 "On the basis of the current evidence, and the fact

1 that BT's and Sky's negotiations were not concluded, it  
2 is not clear that the identified concerns would be borne  
3 out in practice. Ofcom has a duty to have regard to the  
4 need to act in a manner which is proportionate and  
5 targeted only at cases in which action is needed. We do  
6 not consider that the concerns relating to Sky's  
7 requirement for reciprocal supply warrant the imposition  
8 of regulation. Should future negotiations conclude in  
9 such a way as to suggest that Sky's practice is  
10 resulting in outcomes which are prejudicial to fair and  
11 effective competition, we may reassess this position."

12 Sir, I had had the suspicion that we might never  
13 come to argue over some of the grounds which are  
14 advanced today, either because a deal would be done by  
15 BT or Sky over the course of the summer -- and I believe  
16 you adverted to that possibility at the prehearing --

17 THE CHAIRMAN: I have adverted to lots of possibilities.

18 MR HOLMES: I'm not pinning any responsibility --

19 THE CHAIRMAN: Perhaps I should advert a little less.

20 MR HOLMES: The point is that no deal has been done but,  
21 equally, supply has not been withdrawn and there has  
22 been no complaint made to Ofcom. Ofcom stands ready to  
23 address concerns insofar as a practice has crystallised.  
24 Grant-back is a point in relation to which action could  
25 be taken easily and quickly in relation to the two



1 industry participants to which it is relevant. There  
2 has been no complaint to Ofcom. Ofcom has not yet been  
3 called upon to address the position, although it  
4 continues to monitor the market and has published  
5 a statement indicating its current assessment of  
6 the market and has also collected other material which  
7 it keeps for its own purposes as part of the monitoring  
8 of the market.

9 Mr Beard also suggested that you could keep a WMO  
10 remedy in place, because that would be a costless  
11 solution. There are two points to make in relation to  
12 that. A requirement simply to require the offer of  
13 supply would not resolve the specific difficulties which  
14 appear to arise between BT and Sky because it would  
15 require the question of price to be assessed with the  
16 process that would be necessary to determine that price,  
17 and also with the type of intervention that would be  
18 required in consequence, and Ofcom had to have regard to  
19 section 6 based on the evidence available and the other  
20 options that were possible, both as regards how to  
21 intervene and when to intervene. It did not regard the  
22 balance -- that the balance lay in favour of  
23 intervention.

24 So those, sir, are my submissions. I said in  
25 opening that I would take you through the grounds, but

1           unless you would like me to do so, sir, I think you have  
2           a fairly clear view, I hope, of where the land lies.

3   THE CHAIRMAN:  We are joining up the dots here.

4   MR HOLMES:  Very good.  I know you have questions.  Would  
5           you like me first to address the point you have raised  
6           with me?

7   THE CHAIRMAN:  Do you actually need to do that on  
8           a confidential basis?  It is really a point of  
9           principle.

10  MR HOLMES:  It is, sir, but it turns upon the level of  
11           the prices that are in place in the market.

12  THE CHAIRMAN:  You need to be specific.

13  MR HOLMES:  It is not specific.

14  THE CHAIRMAN:  We have already been sailing quite close to  
15           the wind, I think, in discussing various aspects of who  
16           is supplying what at various prices.  So everybody who  
17           is not privy to this information needs to leave the  
18           court.

19  MR HOLMES:  That, sir, I fear confines the court to the  
20           confidentiality ring, as neither Sky -- well, Sky is  
21           privy to the information, of course it is, but BT's  
22           people aren't, so they will have to leave for this  
23           submission.

24  THE CHAIRMAN:  Mr Beard, what do you think?

25  MR BEARD:  I don't want to presume I know the words that

1 will fall from Mr Holmes' lips, but I would be surprised  
2 if it was necessary to clear the BT people from the room  
3 in order for this submission to be made. They obviously  
4 don't know the specific details of the pricing on these  
5 arrangements, but I have to say it is surprising. If he  
6 insists that that is the case, there is nothing more  
7 I can do. They are not part of the confidentiality  
8 ring. If he is going to refer to specifics, they have  
9 to go.

10 THE CHAIRMAN: I think they have to go. I'm very sorry.  
11 Can we do that now, please.

12 (In camera session)[Redacted pages 59-63]

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(Public session)

MR FLYNN: I hope I'm sufficiently audible and transcribable. I thought the tribunal had a couple of questions for Mr Holmes. I would have risen faster. Now it is time to hear from the squeezed middleman.

THE CHAIRMAN: In view of the passage of time, we are going to keep our questions for later.

MR FLYNN: Very well. I should just for the record point out that there has been inserted into your hand-up bundle at tab 16 a very short second witness statement from Ms Fyfield. I am not going to refer to that now because it is full of information which is confidential to one or other or more parties. But it does contain some updated information some of which was gone over

1           this morning. It is two pages long. You might like to  
2           glance at that.

3   MS POTTER: Mr Flynn, could I just say I think you are  
4           between microphones and I can't hear you clearly.

5   MR FLYNN: I was slightly worried that would be the case.

6           You will find at tab 16 in your hand-up bundle the  
7           second witness statement of Ms Fyfield which will give  
8           you some updates on material that's been gone over this  
9           morning.

10          You have our skeleton, you have our statement of  
11          intervention. I was not going to read it all onto the  
12          record now, you won't be surprised to hear that.

13                           Opening submissions by MR FLYNN

14   MR FLYNN: What we say about this appeal is that it is  
15          a non-too-subtle attempt to secure a regulatory  
16          advantage for BT that it couldn't obtain through  
17          ordinary commercial discussions. Whatever might have  
18          been thought in 2010, by the time of the 2015 statement,  
19          Ofcom has come to appreciate that Sky is willing and  
20          does deal and distribute its channels widely, and Ofcom  
21          sees no absolute roadblock to a genuine and acceptable  
22          commercial supply deal being entered into between Sky  
23          and the only company it's ever had any real difficulty  
24          with in this field, which is BT.

25          Just to pick up the last point, in our submission,

1           what the shadow of regulation has done is to prevent --  
2           over successive negotiations, prevent successive deals  
3           with BT.

4           We have explained in our submissions the extent to  
5           which we say BT is distorting or misreading the  
6           statutory provisions that govern the statutory powers  
7           and duties that Ofcom has under the Communications Act  
8           and has fallen back on some rather abstract economic  
9           modelling and special pleading on behalf of  
10          the stand-alone pay TV new entrant.

11          Somewhat unconvincingly, it presents itself not as  
12          the rich and powerful Goliath that it really is, but as  
13          a valiant little David that needs the regulator to even  
14          up the playing field and give it an extra tool to finish  
15          the job.

16          Ofcom has taken the position that it is not  
17          appropriate to mandate supply generally in circumstances  
18          where other operators are receiving wholesale supply on  
19          commercial terms which they regard as acceptable and  
20          that Sky is otherwise making its channels available on  
21          a very large variety of platforms.

22          I think you have probably been sufficiently reminded  
23          that in these proceedings BT is not simply seeking to go  
24          back to the future. They don't just want the  
25          reinstatement of the WMO obligation which was introduced

1 by the 2010 statement. They wouldn't be satisfied with  
2 Sky Sports 1 and 2, which they have actually received  
3 since 2010 in an uninterrupted fashion and still receive  
4 today together with Sky Sports 5, despite the fact that  
5 for the best part of a year there has been no regulatory  
6 obligation on Sky to provide them.

7 What they want is what they call the entire  
8 Sky Sports proposition, and no doubt they want it at  
9 a very attractive price as well. That is what they call  
10 the properly constituted WMO remedy, which Mr Beard  
11 referred to a few times yesterday.

12 Not only is this argument, we say, advanced on the  
13 basis of mischaracterisation of the law, but also the  
14 scope and purpose of both the 2010 statement and the  
15 2015 statement. The point has been made and explained  
16 well by Mr Holmes that the 2010 statement is a radically  
17 depleted force, given the tribunal's judgment as to  
18 Sky's willingness to supply, which was never affected at  
19 all by any part of the vicissitudes of the appeal to the  
20 Court of Appeal, the remittal. That finding by the  
21 tribunal has simply never been in issue. As I say,  
22 Mr Holmes has explained some of the consequences.

23 As far as the statutory provisions go -- I am not  
24 going to go into this in any detail, you have heard it  
25 quite a bit and you have our written case on this -- the

1 crucial two points you should bear in mind are, you  
2 can't use section 316(2) unless -- I say "you", this  
3 would be Ofcom -- without first identifying a practice  
4 that it considers would prejudice fair and effective  
5 competition in the provision of the relevant services,  
6 and it then has to consider what, if any, conditions are  
7 appropriate for ensuring the fair and effective  
8 competition.

9 In doing that, it has to be guided by reference to  
10 substantive competition law, as I think the term was  
11 used in the previous proceedings -- one will try to  
12 avoid "ex post" -- and it is also required to consider  
13 whether use of its Competition Act powers would be more  
14 appropriate, a point which is of importance in this case  
15 and to which we will come back.

16 So it is not the case, and any argument that is  
17 based on this sort of view of section 316 is false, that  
18 Ofcom can simply take the view that certain licence  
19 conditions would promote fair and effective competition.  
20 It first has to identify the practice.

21 As we said in our statement of intervention, the  
22 duty to promote competition that the statute refers to  
23 has to be exercised in the context of the statutory  
24 powers and isn't a freestanding ability to extend and do  
25 what it likes to promote competition.



1           There has been some discussion, I think the upshot  
2           is we are actually a little uncertain as to how now BT  
3           is putting its case, if it has a case, on analogies or  
4           symmetry with telecoms regulation. Mr Beard first of  
5           all referred to Sky as a utility, which was an  
6           interesting characterisation, and then seemed to be  
7           turning the point around and accepting that telecoms  
8           regulation was different, so that insofar as Ofcom was  
9           guided by principles applicable to telecoms regulation,  
10          it was wrong.

11          I think, like Mr Holmes, we will have to see how the  
12          submission is developed in closing before saying  
13          anything more. That is the first we heard of that  
14          point.

15          The second point about the Act is that it imposes  
16          duties of caution on Ofcom, vigilance and caution. You  
17          have had pointed out to you section 3(3) which requires  
18          Ofcom to pay constant regard to the need for its action  
19          to be proportionate, targeted, et cetera, and to observe  
20          what it considers to be best regulatory practice, which,  
21          as we pointed out in our statement of intervention,  
22          incorporates its regulatory principles of bias against  
23          regulation. That is absolutely crucial.

24          Secondly, Mr Holmes rightly laid the stress on  
25          section 6(1) requiring Ofcom to keep measures under

1 review to avoid imposition or maintenance of unnecessary  
2 regulatory burdens. That's the mind-set in which it has  
3 to approach reviews of existing regulation.

4 The 2012 judgment, as we have emphasised, probably  
5 to the point of losing impact, found that the  
6 non-supply, the *raison d'etre* that was non-supply for  
7 the original WMO obligation was baseless. In our  
8 submission, that strengthens the duty on Ofcom to  
9 consider whether there is a positive justification for  
10 retaining the regulation. It had to consider whether  
11 Sky in 2015, or 2014, when it was carrying out its  
12 review, was engaging in a practice, or would engage in  
13 a practice, which was contrary to fair and effective  
14 competition, and then to ask itself whether in that case  
15 the WMO obligation as it stood, or some variant of it,  
16 was appropriate to be inserted as a licence condition as  
17 a remedy to address those actual or potential practices.

18 The way BT puts its case, which in our submission is  
19 entirely wrong, is that what Ofcom had to show in 2015  
20 was that conditions of competition had changed to an  
21 extent that regulation was no longer needed. In our  
22 submission, that is not what the statute says. That was  
23 not the point of the exercise.

24 Coming to the bottom line, Ofcom's diffident  
25 conclusion, or as Mr Holmes puts it, finding that the

1 analysis was inconclusive, it found that it couldn't  
2 wholly exclude the possibility of restricted or limited  
3 supply, but in our submission it was perfectly open to  
4 Ofcom to consider all the evidence in the round, bearing  
5 in mind the statutory duties which I have emphasised,  
6 and the evidence included extensive commercial wholesale  
7 and other supply deals which are in place.

8 It is a perfectly reasonable conclusion that, given  
9 that Sky is willing to enter into those deals  
10 [redacted]xxxxxxxxxxxxxxxxxxxx and on terms which were not  
11 objected to, the practical likelihood of the theoretical  
12 risk they could not exclude actually eventuating was low  
13 and could be addressed if circumstances changed or, as  
14 Mr Holmes has put it earlier, crystallised. That, in  
15 our submission, is an entirely proportionate conclusion  
16 and one which is consistent with the statutory regime.

17 Now, we have been mindful of the tribunal's  
18 injunction, and we are only here to help the tribunal  
19 and we are not here to fight other battles. You know,  
20 and we have explained why, we take a different view from  
21 Ofcom on the incentives facing Sky in these  
22 circumstances and the risk of restricted supply.

23 For the reason that I have just given, Ofcom's  
24 conclusion is a perfectly justifiable one, so, on one  
25 view, nothing turns on that difference between us. Our

1 evidence there, we would suggest, can simply act as  
2 a matter of comfort for the tribunal. No doubt  
3 Ms Fyfield will be or at least is available for  
4 cross-examination on the point.

5 The evidence she puts forward is entirely consistent  
6 with what Sky has always told Ofcom, and including in  
7 the review leading from the 2015 statement, and you will  
8 have seen -- I think we went over some of the paragraphs  
9 in around 6.14 and 6.18 where those points of view are  
10 put forward. In our submission, the evidence from Sky  
11 underpins the diffidence that Ofcom has had in reaching  
12 its conclusions.

13 We do say we are entitled, in these proceedings, to  
14 the extent necessary, to differ from Ofcom, but what we  
15 really do object to is where BT takes what I might call  
16 a pick-and-mix approach to the 2010 statement, saying  
17 that consistency or some other regulatory principle  
18 requires Ofcom to take that as a starting point. That  
19 principally arises in relation to ground 2. But, in  
20 circumstances where it is plain that BT itself has never  
21 been happy with various aspects of the 2010 statement,  
22 it was of course an appellant here arguing that the  
23 remedy should have been wider in terms of scope and that  
24 the price should have been lower, we say it is not open  
25 to BT in these proceedings to point to certain bits --

1 to cherry pick bits of the statement that it likes and  
2 say should have bound Ofcom, especially where those are  
3 the subject of the undetermined and withdrawn appeals.

4 THE CHAIRMAN: Mr Flynn, can I interrupt you? I need to be  
5 clear. What is your reason for saying that Ofcom was  
6 justified in not taking the 2010 statement as a starting  
7 point? What is Sky's position on that?

8 MR FLYNN: Our position, as I think we have explained, is  
9 the founding -- the rationale for the 2010 statement was  
10 a concern that Sky was unwilling to supply. You will  
11 find that principally, as Mr Holmes said, summarised in  
12 various provisions in the statement. Sky --

13 THE CHAIRMAN: The CAT judgment?

14 MR FLYNN: It is the CAT judgment. It is the case we made.  
15 Ofcom was of the view that, as they put it in one of  
16 the paragraphs, Sky would prefer to be absent from the  
17 platform rather than wholesale to it. That was just  
18 found to be a misreading, a misunderstanding, of  
19 the evidence. So the whole unwilling supplier point  
20 falls away, and that is what -- if there is a seam in  
21 the 2010 statement, that's what it is, that Sky is  
22 unwilling to deal -- and while it might be prepared to  
23 do self-retail arrangements, it is simply unwilling to  
24 let other people, as it were, have control of its  
25 channels even though they are, in Ofcom's view, an

1 essential input into any pay TV retail operation. So  
2 that is why we say you just cannot take the 2010  
3 statement. I have a bit more to say about that. You  
4 cannot take the 2010 statement at face value anymore  
5 because the tribunal found that, if not its only leg, it  
6 is certainly the leg it was putting the weight on, it  
7 couldn't bear the weight. That is why we say it is  
8 perfectly sensible of Ofcom to take a fresh approach.  
9 It can't start from the same place. That would have  
10 been a waste of time and would have led them up all  
11 sorts of alleys.

12 I will say something about proportionality. Perhaps  
13 it would be just worth clarifying the extent to which  
14 the WMO obligation laid down in the 2010 statement was  
15 in force, because I think that came up in discussion.

16 It was never fully in force. It never has been  
17 fully in force. That was an obligation -- the licence  
18 condition would have required Sky effectively to supply  
19 Sky Sports 1 and 2 to any prospective retail operation.  
20 It was immediately suspended on terms with four  
21 beneficiaries, as you will recall, and, as has been  
22 mentioned by Mr Holmes earlier, TalkTalk was not one,  
23 the beneficiaries being Virgin Media, BT and Top-up, and  
24 subsequently another company, Real Digital, brought  
25 itself by application to the then president of

1 the tribunal, brought itself within the scope of  
2 the order.

3 So it was only ever available, subject to the  
4 interim order, to named beneficiaries and only on  
5 certain platforms, which I think, as has already been  
6 mentioned, did not originally extend to BT's IPTV  
7 platform.

8 What happened in respect of BT's IPTV platform is  
9 that by a commercial arrangement Sky agreed with BT to  
10 extend supply to the Cardinal boxes but drew the line at  
11 doing the same for YouView and that's what led to the  
12 extension of the interim relief order by the current  
13 president of the tribunal, Mr Justice Roth, in the  
14 proceedings which have been referred to. I will  
15 probably come back to those.

16 So the WMO was only available subject to the terms  
17 of the interim relief order at any time in its life.  
18 Then, of course, we had the tribunal's judgment and the  
19 appeal. As I say, that didn't affect the basis on which  
20 the tribunal did reach its judgment. What the appeal  
21 concerned was matters that the tribunal had not, in the  
22 Court of Appeal's view, sufficiently addressed. The  
23 matter is then remitted and, at the same time as the  
24 remittal, we had the review leading to the statement we  
25 are talking about in these proceedings. So that's the

1 sort of chequered history of the status of the WMO

2 since --

3 THE CHAIRMAN: So it would be wrong to consider that the  
4 market had had this regulatory measure applying to it in  
5 an unconditional way during the five years of 2010 to  
6 2015?

7 MR FLYNN: Yes, you would say that. I think we  
8 characterised it in the proceedings as a contrast  
9 between WMO unbound, which was the full extent, and --

10 THE CHAIRMAN: A terrifying thought.

11 MR FLYNN: A terrifying thought, and really I think it was  
12 a terrifying thought, but the Court of Appeal -- it  
13 didn't happen. On the other hand, in effect, everyone  
14 who wanted supply, wanted wholesale supply, was within  
15 its terms. So you won't find anyone at the time it was  
16 entered into who was seeking supply. As has already  
17 been mentioned, TalkTalk came along later and didn't  
18 need to go down the WMO route to secure supply from Sky.  
19 I don't think it is right to say the market didn't have  
20 the benefit, in one sense, in that actually I think  
21 there was probably only one at least of the traditional  
22 pay TV retailers at the time who didn't benefit from it.  
23 What it --

24 THE CHAIRMAN: Are you saying that, subject to the  
25 uncertainties of the litigation, it worked?



1 MR FLYNN: It was in force under the terms of the interim  
2 relief order, as we have said. Virgin never took supply  
3 pursuant to the order, never has. It was always -- it  
4 was a pre-existing supply, and then other deals have  
5 come along, so Virgin has never taken supply under the  
6 WMO. The only parties who have are Top-Up, who are no  
7 longer with us, and BT.

8 It was there that -- the crucial point, from our  
9 perspective, is that it was there for the wrong reason.  
10 It was there on a false premise, that Sky wouldn't be  
11 prepared to enter into wholesale deals, and it wasn't  
12 interested in a wide distribution of its channels.

13 THE CHAIRMAN: I'm not sure that's the point that's in front  
14 of us today.

15 MR FLYNN: I only started down this line because you asked  
16 at an earlier point to what extent the WMO was in force.  
17 I'm not here to reargue or rake over those old coals.

18 Moving to the state of retail competition, which we  
19 have heard a lot about and it comes up I think  
20 particularly in ground 2, where they go as far as to say  
21 that it's parlous. Again, that is not something that we  
22 agree with or that I think necessarily Ofcom agrees  
23 with. But certainly you have Ms Fyfield's evidence on  
24 the point and she can be asked, if BT wants to, how she  
25 comes to that view.

1           We do suggest that, from the tribunal's perspective,  
2           there is no basis for the suggestion that in some way  
3           Dr Padilla's evidence should trump what she has to say  
4           because he is an expert. He is in these proceedings, of  
5           course, present as an expert economist and subject to  
6           the duties and privileges of an expert, including having  
7           access to confidential information, but he is not, in  
8           our submission, any more an expert or knowledgeable  
9           about the state of retail competition in the pay TV  
10          sector than Ms Fyfield and others. This is something  
11          which you will have to listen, we say, to the factual  
12          witnesses.

13           But, in any event, for the reasons that I have  
14          already given, the task that Ofcom had in reaching its  
15          conclusion in the review was not one of assessing the  
16          state of competition in retail pay TV and devising some  
17          regulatory scheme that could improve it. The question  
18          was to work out whether Sky was engaging in practices  
19          that would prejudice fair and effective competition and  
20          take any appropriate action, if so found.

21           I have been over the reasons why we say the 2010  
22          statement was not the right starting point for that  
23          exercise, so I shan't dwell on that much further.

24           The important point, because of what I have called  
25          the false premise on which the 2010 statement proceeded,

1           there was no basis, we say, for Ofcom to presume in its  
2           review leading to the 2015 statement that any aspect of  
3           retail competition which it might have found to be  
4           unsatisfactory could be ascribed to a practice of Sky's  
5           relating to supply.

6           In the 2010 statement, Ofcom says, "These things are  
7           not happening, there is not enough innovation, there are  
8           no retail packages, it could be a whole lot better", and  
9           any consequences that they drew, all of which they  
10          ascribe to a practice of Sky of not supplying or being  
11          unwilling to supply. Now that is gone. You can't say  
12          any feature of the retail market that you don't think is  
13          satisfactory is all down to Sky. The 2010 statement is  
14          no basis for that.

15          Furthermore, as Mr Holmes has pointed out in  
16          submissions yesterday, building on Ofcom's skeleton at  
17          paragraph 42, I think it is, the whole purpose of  
18          the WMO obligation was not to deprive Sky of its market  
19          power or produce another retailer of equal power. It  
20          was a fairly simple, in some ways, behavioural remedy  
21          designed to counter this wrongly perceived practice of  
22          withholding supply.

23          So the task for the tribunal in this case is not to  
24          determine whether there are features of competition in  
25          the retail market that could be improved or to determine

1           whether or not Sky has market power or of what sort, the  
2           job is to assess whether Ofcom was wrong by reference to  
3           the facts that it had in 2015 to conclude that it wasn't  
4           appropriate to subject Sky to a WMO obligation or some  
5           other behavioural remedy of that kind in respect of its  
6           key content.

7           I have already said we don't share BT's assessment  
8           of the state of competition in the retail market, and we  
9           don't share Ofcom's concerns about Sky's consensus. You  
10          have in open evidence Ms Fyfield saying that the idea  
11          that supply might make a recipient a stronger bidder  
12          when it comes to a sports rights auction doesn't play  
13          a part in her calculations. That is what she says.  
14          But, as I have already said, that difference between Sky  
15          and Ofcom is not going to be relevant, assuming that  
16          you, like us, support Ofcom's overall conclusion that,  
17          despite what you might regard as a theoretical risk, the  
18          probability was sufficiently low, or the likelihood of  
19          it eventuating was sufficiently low that it wouldn't be  
20          appropriate to regulate for it now.

21          We have had some discussion about the relevance of  
22          Sky's current wholesale deals which BT seeks to  
23          downplay.

24          Can I just make a couple of points, because  
25          obviously there are confidential elements and this is

1 not the time or the place to go into that, and there  
2 will be evidence on the scope of those arrangements.  
3 But if I can just make these two points, really. The  
4 first is, as regards supply to BT, the suggestion that  
5 is made at various places in their documents that supply  
6 to BT is a result of the WMO obligation is not correct  
7 or fair. Firstly, as you will know, the tribunal itself  
8 concluded that BT, through regulatory gaming, bore  
9 a significant share of responsibility for the fact that  
10 there wasn't a wholesale deal in place before the 2010  
11 statement. I think you have been shown that.

12 So the idea that -- and Ms Fyfield also gives  
13 evidence on this point. So the idea that BT is only  
14 supplied to the extent that it is because of the WMO  
15 obligation we say is a false one. I have explained the  
16 extension of supply to BT outside the regulation and the  
17 tribunal's interim relief extension order which applied  
18 that supply also to the YouView platform. That comes up  
19 more specifically under ground 5, but as I shan't be  
20 going into much detail on the grounds, I might just say  
21 now that the reference or the reliance that Mr Beard  
22 placed on that interim relief extension order by which  
23 Mr Justice Roth amended, as it were, the interim relief  
24 order to require supply to BT's YouView platform was on  
25 the basis that BT should not be deprived of the benefit

1 of the WMO while it was in force and while the remittal  
2 was still pending and that they shouldn't have to give  
3 up something in order to benefit from the WMO, so  
4 leaving entirely aside and expressly any consideration  
5 of whether the WMO was itself justified, he was simply  
6 taking that as a given. Now, of course -- so those are  
7 the very specific circumstances in which he made that  
8 order. Now, of course, the WMO regulation is not in  
9 place, and so the premise of his judgment is irrelevant  
10 in our submission in present circumstances, and I repeat  
11 has been supplied without any regulatory obligation on  
12 a continuous basis since the WMO obligation was  
13 withdrawn last year.

14 THE CHAIRMAN: It is still a slightly unreal position, isn't  
15 it, partly because of this litigation?

16 MR FLYNN: I'm not sure I understand the full purport of  
17 your question, but I would say that this is possibly the  
18 shadow of regulation point that I was making earlier.  
19 The fact is, the prospect that there might be  
20 a regulatory outcome that might lead to, from BT's  
21 perspective, a more attractive commercial deal is what  
22 has driven a great deal of this for many years.

23 THE CHAIRMAN: Your proposition, if I understand you  
24 correctly, is if there had never been a WMO, Sky would  
25 have supplied BT Sky Sports 1 and 2 at least on

1 appropriate commercial terms?

2 MR FLYNN: Yes, that is correct. That's in our evidence.

3 THE CHAIRMAN: With a reciprocity requirement?

4 MR FLYNN: That didn't arise back in 2009, but it might well  
5 have had a reciprocity requirement, even if that was  
6 a theoretical risk at the time. I probably shouldn't go  
7 further than that. There may be material I can take you  
8 to elsewhere. Undoubtedly, there would have been  
9 supply. So that was BT.

10 As regards the other current wholesale deals, I will  
11 only say that the attempt to discredit them we say is  
12 inconsistent with the weight of the evidence. Obviously  
13 the BT factual witnesses do not, and cannot, know the  
14 full terms of those deals. But for reasons that we no  
15 doubt will need to explore, the points that are made on  
16 their behalf by their advisers in the ring don't carry  
17 any conviction either. The essential point is obviously  
18 that there are

19 [redacted]xx  
20 xxx that make that  
21 inference that they were only entered into because of  
22 the licence condition a hard one to defend.

23 In relation to the grounds, without sort of, as it  
24 were, taking you through a full argument, firstly, in  
25 relation to ground 3, we continue to suggest in

1           accordance with Ofcom, this is an ineffective ground and  
2           is really about what BT thinks Ofcom should do or should  
3           have done if imposing a WMO remedy, what is the scope of  
4           that. But we also say in our submissions that nothing  
5           in BT's case makes out a suspicion that there's any kind  
6           of practice that Sky has engaged in with regard to the  
7           entire portfolio, sports portfolio, sports proposition,  
8           as I think it is called, that would prejudice fair and  
9           effective competition. It supplies, as you have seen,  
10          all the sports to Virgin Media and to TalkTalk, and the  
11          reasons why BT doesn't get all the sports no doubt we  
12          will come to in connection with ground 5.

13                 In relation to ground 4, BT wishes to challenge  
14          Ofcom's conclusion that Sky's current extra,  
15          [redacted]xxxxxxxxxxxxxxxxxxxx didn't raise concerns that  
16          they prevented fair and effective competition on the  
17          part of those supplied. BT calls the Ofcom approach  
18          slapdash and says that it is not either building on or  
19          consistent with or of the same type of the extensive  
20          modelling that Ofcom engaged in in reaching the 2010  
21          decision, and BT suggests that Ofcom's reliance on the  
22          [redacted]xx  
23          xx was disproportionate,  
24          notably as those agreements were entered into in the  
25          shadow of regulation point which we have already touched



1 on. And BT says that Ofcom should have been  
2 sufficiently put on notice by BT's own pricing analysis  
3 to realise that something needed to be looked into  
4 a little harder, which I think was the point you were  
5 making earlier, sir.

6 BT accepts that its model has significant data  
7 limitations because it doesn't know Sky's costs, but  
8 nevertheless it suggests that Ofcom should have been put  
9 on notice.

10 Once again, consistency with the 2010 statement, in  
11 our submission there are a number of reasons why Ofcom  
12 should not have been consistent with that statement and  
13 it would have been wrong to take the same approach. The  
14 pricing analysis carried out in the 2010 statement  
15 was -- I think Ofcom puts it that it arose in the  
16 context of the finding that Sky was unwilling to  
17 wholesale so that a WMO obligation was needed. So what  
18 it was principally there for, we have said, is to inform  
19 the remedy design, because Ofcom said -- Mr Holmes said  
20 it once again, if you have a WMO obligation, the Ofcom  
21 view is it is not going to be effective unless you set  
22 the terms of supply, because having an obligation to  
23 supply but leaving the terms at large is not necessarily  
24 a recipe to a fast conclusion of an agreement.

25 So the 2010 statement was looking at a different

1 point for much of its pricing analyses.

2 Secondly, and I think this is the point that was  
3 made to you early on, so I don't need to dwell on it,  
4 Ofcom in 2010 concluded that Sky's rate card, which was  
5 then applicable to Virgin Media, prejudiced Virgin's  
6 ability to offer fair and effective competition to Sky,  
7 and the tribunal found that conclusion to be wholly  
8 wrong, basically. The tribunal said paragraphs --  
9 I think you were taken to them earlier -- 809 to 815 of  
10 the judgment explain why the tribunal reaches that  
11 conclusion. So Virgin was perfectly able to be  
12 a significant competitor at Sky's prices.

13 There were other elements of the 2010 statement  
14 going to supposedly excessive pricing by Sky and  
15 excessive profitability that were not defended by Ofcom  
16 in the appeal proceedings. Sky challenged them, but  
17 there was no response to the arguments and expert  
18 reports put in by Ofcom or indeed by the interveners in  
19 its support, including of BT. The judgment records that  
20 at paragraphs 816 to 819. So there are elements of  
21 the WMO statement that are just, as it were, not plugged  
22 into the analysis. So they are there but you can't  
23 really get anything from them.

24 Lastly, of course, it is precisely the pricing  
25 grounds of appeal which are the ones that were left to

1 one side by the withdrawal of the appeal and, as we have  
2 explained in our statement of intervention,  
3 paragraph 57, you see the breadth of the undetermined  
4 pricing issues. For all those reasons, we say that  
5 using the 2010 statement as your launch pad for the 2015  
6 review would have been extremely problematic, but  
7 fortunately we say there is nothing in the statutory  
8 regime as we sought to explain it that requires Ofcom  
9 either to do that or indeed to engage in any particular  
10 level of economic and financial modelling in the reviews  
11 it carries out. They have to be justifiable, but they  
12 have to be appropriate for the task being carried out.

13 For the same reasons, we would say that the  
14 regulatory principle of consistency has to have some  
15 limits, particularly when you don't want to be  
16 consistent with decisions that have been holed below the  
17 waterline, if I could put it slightly colourfully.

18 In any event, in practice, for reasons we are  
19 probably going around for the third time, the  
20 circumstances in 2015 that Ofcom examined were in fact  
21 rather different from those in 2010, because although  
22 Sky's consistent position has been that it wants and  
23 needs to secure wide distribution of its sports channels  
24 and it was doing so a long time before the WMO came into  
25 force, and Ms Fyfield gives evidence on that at

1 paragraphs 100 and 101 of her first statement, by the  
2 time you come to the 2015 statement, Ofcom is able to  
3 examine the wholesale deals as well as other deals that  
4 Sky has entered into with Virgin Media and TalkTalk,  
5 both, as I said, outside of the scope of the remedy.  
6 [redacted]xx  
7 xx So  
8 any concern expressed in the 2010 statement that Sky's  
9 pricing, whether by design or just accidentally, was at  
10 levels that made acceptance of them by retailers  
11 impossible or, if they accepted them, they wouldn't be  
12 able to compete, that obstacle simply had not  
13 eventuated. So it was perfectly appropriate for Ofcom  
14 to look at the terms of those commercial deals.

15 As has already been said this morning, actually  
16 neither of the parties concerned had expressed any  
17 concern to Ofcom that the [redacted]xxxxxxxxxxxxxxxxxxxxxxxx  
18 the terms they had secured, under those agreements  
19 prevented them from offering effective competition.

20 As Ofcom says in paragraph 6.52 of the statement, it  
21 was cautious about second-guessing commercially agreed  
22 prices and we would support that approach.

23 Again, I think I have probably already made the  
24 point that it is not valid for BT to suggest in these  
25 proceedings that the prices that are the terms on which

1 those supply deals rest can be said to influence what BT  
2 would see as a lack of fair and effective competition in  
3 the retail pay TV sector by reference to supposedly not  
4 much movement in subscriber numbers.

5 As I have already said, the 2010 statement ascribed  
6 any problems or ills that it found in the retail market  
7 to a non-existent unwillingness of Sky to supply. Now  
8 that myth has been exploded, it is not appropriate to  
9 maintain that you have to have regulation because the  
10 retail market hasn't improved.

11 We don't accept BT's description of the retail  
12 market. We don't accept the bar chart that was put in  
13 yesterday. That will no doubt be addressed with the  
14 witnesses. But it is just not -- there is a disconnect  
15 between regulation put in place in 2010 and the state of  
16 retail competition today.

17 We say that particularly where those two sensible,  
18 well-advised parties have not made any complaint to  
19 Ofcom about the terms on which they were supplied, there  
20 is plenty of evidence to suggest that they are not  
21 shrinking violets in the regulatory arena, if they have  
22 got something to complain about they will, and I think  
23 you may have seen something of that earlier. They  
24 haven't complained. They haven't complained to Sky and  
25 Ofcom's conclusion seems to us, and we submit,

1 a reasonable one in accordance with the statutory  
2 scheme.

3 We don't make specific observations on BT's  
4 modelling, so I will pass over that.

5 Very briefly, I will address reciprocity, what BT  
6 rather grandly likes to call the grant-back condition.  
7 In short, and obviously this is a matter that will be  
8 gone over in factual and expert evidence, there is  
9 a problem with the thesis, which is that BT is in fact  
10 willing to contemplate deals which involve reciprocal  
11 supply. Mr Beard sought to draw some distinction  
12 between narrow agreement that was just, as it were,  
13 a reciprocal supply of sports channels and a wider one.  
14 I don't know how wide he was going, but it doesn't  
15 really matter because the reciprocity of sports channels  
16 would be, as it were, a subset of any of these deals.  
17 That is a fundamental problem for BT's case.

18 It goes on to say -- and possibly this is now the  
19 particular emphasis we would like to give on this  
20 ground -- that Sky articulated a desire for reciprocity  
21 and this involves conditionality or compulsion.

22 We probably were slow, but we are not quite sure how  
23 you distinguish the two, but we still say it is not  
24 evident why, even if Sky were to insist on it, that  
25 would be prejudicial to fair and effective competition.

1 Obviously BT might like, from its perspective, a better  
2 deal -- more content, less money, different channel  
3 balance -- but why it is necessarily a problem for fair  
4 and effective competition isn't explained.

5 As we have said, there is a perfectly rational  
6 reason for Sky's position, that it doesn't want BT to be  
7 the place where you can see all Premier League football  
8 and BT's games not being available to Sky when you see  
9 the balance of investment that each of these parties has  
10 put into those extraordinarily expensive rights. So in  
11 our submission, there is a fair explanation for what is  
12 going on here and the way to sort it out is through  
13 commercial arrangement rather than a regulatory leg-up.

14 THE CHAIRMAN: Mr Flynn, your position on ground 5 is  
15 a little different from Ofcom's. I think what we heard  
16 from Mr Holmes was that the mischief, if there was one,  
17 hadn't crystallised yet. I think you are saying that  
18 there is no mischief. Is that right?

19 MR FLYNN: We do say, and I dare say we differ from Ofcom on  
20 that, that if, in the end, BT said, "Well, actually, we  
21 would rather not do anything", that wasn't necessarily  
22 prejudicial to fair and effective competition. I fully  
23 accept that what Ofcom would say, I think, is,  
24 ultimately, if these channels aren't supplied, there is  
25 a problem.

1 THE CHAIRMAN: You would accept that?

2 MR FLYNN: I'm sure that is what Ofcom would say and that is  
3 where these proceedings go. I don't say --

4 THE CHAIRMAN: Ofcom will assess it against the tests they  
5 have set out in the statement.

6 MR FLYNN: Yes, they would.

7 THE CHAIRMAN: You are not dissociating yourselves from  
8 those. You are just saying you don't think there is  
9 a problem?

10 MR FLYNN: We don't think there is a problem with  
11 a reciprocity arrangement. We don't see that that is  
12 necessarily prejudicial to fair and effective  
13 competition. We absolutely do support Ofcom and say,  
14 well, nothing has crystallised, this could go a number  
15 of ways, and it's, as it were, still early days.

16 THE CHAIRMAN: We will hear evidence on that.

17 MR FLYNN: A lot of that will come out in the evidence.

18 This possibly brings me to a last quick point, which  
19 is section 317. This is quintessentially, and Mr Beard  
20 accepted yesterday that any issue between Sky and BT in  
21 relation to, let's call it, the grant-back condition was  
22 something which fell squarely within the  
23 Competition Act, and, as we have already seen, they  
24 sought interim measures under the Competition Act in  
25 respect of advanced -- conduct which had not taken



1 place, so once again giving the lie to the ex post  
2 label, but the conclusion to be drawn from that in these  
3 proceedings, that it can hardly be a criticism of Ofcom  
4 for saying no general licence condition is needed to  
5 solve this BT/Sky specific problem. They have taken, in  
6 our submission, an entirely proportionate approach to  
7 that.

8 Obviously the detail of the grant-back condition is  
9 going to be thrashed out in witness and expert evidence,  
10 so we will make our position clear to you when that is  
11 being heard. I am going to stop there because I know  
12 you have a hard stop. There is plenty more I could say  
13 or could have said, and maybe one day will, but not  
14 today.

15 THE CHAIRMAN: I am sure we will find a time to hear what  
16 you have to say, Mr Flynn.

17 Thank you very much. We will resume at 10.30 am  
18 tomorrow.

19 (1.02 pm)

20 (The hearing was adjourned until  
21 Wednesday, 5 October 2016 at 10.30 am)

22 I N D E X

23

24 Opening submissions by MR HOLMES .....1

25 (continued)

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