

Thursday, 13 October 2016

1

2 (11.30 am)

3 THE CHAIRMAN: Good morning.

4 MR BEARD: Good morning, sir, and members of the tribunal.

5 THE CHAIRMAN: I hope the morning finds you well.

6 MR BEARD: Very well, indeed, sir. Very well, indeed.

7 I hope that it won't be to the credit of my advocacy if  
8 those behind me, or either side, fall asleep, but there  
9 has been, as you can tell, significant endeavours to try  
10 to provide the tribunal with fairly full written closing  
11 submissions, and indeed I am going to refer to ours as  
12 a speaking note, essentially.

13 THE CHAIRMAN: We were going to thank all parties, actually,  
14 for preparing very detailed closing submissions in  
15 writing.

16 I have to say, I had rather assumed we were going to  
17 get a slightly more succinct aide-memoire, and I think  
18 we have to think of, in the future, if this way of  
19 proceeding is to become established, the wisdom or  
20 otherwise of such a lengthy written document at this  
21 stage of the proceedings.

22 I'm not sure that it helps anybody.

23 Having said that, we have read them as best we can  
24 in the time. We shall certainly study them very  
25 closely, and we appreciate that they are essentially

1 concentrating on picking up the results of the oral  
2 exchanges, and I think that is a perfectly valid  
3 exercise. But I come back to what I said the day before  
4 yesterday, which is that, at this stage, what we need is  
5 concentration on the salient points, the points that  
6 each of you want to draw to our attention. You can take  
7 it that we will have absorbed, or be absorbing,  
8 everything else. Indeed, we have had several  
9 opportunities to do this. I don't think, from the  
10 tribunal's point of view, we want to have a settled  
11 practice that there is, essentially, a fifth round of  
12 pleadings. That is not satisfactory. This is an oral  
13 hearing process.

14 MR BEARD: The point is well made, sir.

15 THE CHAIRMAN: We did have these discussions about  
16 Blaise Pascal and how long it takes to write a short  
17 submission, and I assume, from what we have got, that  
18 you didn't have time to write a short submission. Is  
19 that right?

20 MR BEARD: Yes, I think that would probably be fair for --

21 THE CHAIRMAN: Particularly, we can't break off an oral  
22 hearing for two days while you go away and prepare an  
23 aide-memoire.

24 MR BEARD: This is the dilemma of dealing with these sorts  
25 of submissions at this stage of the proceedings.

1 THE CHAIRMAN: I agree.

2 MR BEARD: I think all concerned have endeavoured to provide  
3 something that is of use to the tribunal. As I say,  
4 what I will try to do, in relation to ours, is to use it  
5 as a speaking note.

6 THE CHAIRMAN: Again, a related question: how do you now see  
7 the time available for the completion of this process  
8 evolving over the next day or day and a half or two  
9 days?

10 MR BEARD: The timetable has been set down.

11 THE CHAIRMAN: Has it? I have got five hours, four and  
12 a half hours -- are you really going to talk for five  
13 hours, Mr Beard?

14 MR BEARD: Sir, I am going to spare you that, certainly not  
15 in one go.

16 THE CHAIRMAN: Even so ...

17 MR BEARD: Just a minute is a challenge, but four or five  
18 hours ...

19 THE CHAIRMAN: It is not a competition. Well, I suppose it  
20 is a competition, but it is not a competition to speak  
21 for the maximum amount of time that you can.

22 MR BEARD: The intention is that we would take some time for  
23 a reply after submissions from Ofcom and Sky. The  
24 indicative timetable that had been put forward was four  
25 hours for BT to close, four and a half combined for

1 Ofcom and Sky, and then an hour's reply was the  
2 timetable that has been put in place. If I can, I will  
3 endeavour to be shorter than the time allocated for this  
4 first part of the closing.

5 THE CHAIRMAN: I confess, when we saw the length of  
6 the written submissions, we thought maybe we could wrap  
7 the whole thing up today?

8 MR BEARD: I'm very happy to try to skid along, sir.

9 THE CHAIRMAN: Then we woke up.

10 MR BEARD: I'm not sure I can guarantee that. I will do my  
11 best.

12 THE CHAIRMAN: You are the applicant. We will hear what you  
13 have to say. We are not trying to curtail your right to  
14 present your case.

15 MR BEARD: The point is noted. As I say, what I will try to  
16 do is use this as a speaking note, not try to  
17 necessarily go back to each of the documents which are  
18 referred to in it, and move things along.

19 Indeed, my intention, though, normally, to start at  
20 the beginning is "a very good place to start" --

21 THE CHAIRMAN: Not in current fiction writing, Mr Beard.

22 MR BEARD: No, well, this may be a bit more Italo Calvino.  
23 I was intending to start with ground 5, if I may.

24 THE CHAIRMAN: How very radical. So you may not go on for  
25 the whole of the day, is what you are telling me?

1 MR BEARD: Yes.

2 THE CHAIRMAN: That would be a commendable target to bear in  
3 mind. If you could finish, perhaps, by the break in the  
4 afternoon, that would introduce a nice discipline into  
5 the proceedings. On that basis, we are at your  
6 disposal, Mr Beard.

7 MR BEARD: If I may, then, as I say, I am going to use the  
8 written closing as a speaking note. Our submissions in  
9 relation to ground 5 begin at page 55.

10 THE CHAIRMAN: We have had one version of this and an  
11 updated version of this. We are using the updated  
12 version. It is to do with confidentiality.

13 MR BEARD: I think the updated version doesn't change in any  
14 way except for indicating relevant confidentiality  
15 markings.

16 MS POTTER: I think the pagination may have changed slightly  
17 because it seems to begin on 56 rather than 55.

18 THE CHAIRMAN: This is your last word on the matter. It is  
19 positively your last written word on the matter.

20 MR BEARD: I'm not sure there are any word differences  
21 between the two, but I think that the outline of  
22 the confidentiality marking may just change the  
23 alignment.

24 If I may, I think the paragraph numbering won't have  
25 changed, so I will use paragraph numbering, perhaps.

1 Closing submissions by MR BEARD

2 MR BEARD: We have set out at 155 the foundational findings  
3 that Ofcom has made, and we have footnoted the  
4 references, that Sky has a strong market position both  
5 as a supplier of key sports channels and as a pay TV  
6 retailer. You see that at 5.71 in the WMO statement.

7 And that, secondly, without access to Sky's key  
8 content, pay TV retailers really will be unable to  
9 compete effectively for the sizeable and valuable  
10 proportion of pay TV subscribers that value Sky's key  
11 content. So stronger market position and key content --  
12 WMO 5.71 and 5.74.

13 Of course, in relation to the grant-back condition,  
14 in the light of these findings, Ofcom has gone on and  
15 agreed with BT that reliance on a grant-back condition  
16 is potentially prejudicial to fair and effective  
17 competition. It recognised, in particular, in the WMO  
18 at 6.83 that there is potential for concern where  
19 a vertically-integrated operator in a strong market  
20 position, such as Sky, makes the supply of its key  
21 content subject to a requirement which may condition the  
22 way in which its competitor chooses to supply its own  
23 content, and that can be to the detriment of effective  
24 competition.

25 Now, of course, this analysis also accords with the

1 view expressed by the president of the tribunal in his  
2 ruling on 5 November at paragraph 67. Just for your  
3 notes, that judgment is at authorities bundle tab 7.  
4 I just refer to the last part of that quote:

5 "I don't see that BT should be required, in effect,  
6 to deprive itself of the competitive gain from that  
7 investment in order to achieve the benefit of the WMO  
8 remedy ordered by Ofcom."

9 THE CHAIRMAN: You are suggesting we should have due regard  
10 to that, are you?

11 MR BEARD: Due regard. Obviously not binding. But,  
12 nonetheless, indicative of an instinctive analysis by  
13 a judge expert in this field and, as I will go on to  
14 explain, it's right.

15 What we see in the WMO statement from Ofcom are five  
16 reasons why it does not maintain the WMO in order to  
17 remedy the effect of Sky's insistence on a grant-back  
18 condition. Now, I think the courtroom is confidential  
19 to BT.

20 THE CHAIRMAN: Can we get this clear, please?

21 MR BEARD: I'm sorry.

22 (In camera session - BT)[redacted pages 7-34]

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(Public session)

MR BEARD: I was dealing with Professor Mayer's point in relation to vicious circles and saying that one can see that the possibility of vicious circles existing in other markets may well be right. We don't need to go so far as to identify that here.

I am now picking up at 193 more specific points in relation to footnotes 317 and 318 and, indeed, in Ofcom's defence at paragraph 182. Those are matters which were dealt with in Dr Padilla's second report which were further addressed in the hot-tub evidence before the tribunal, and I just refer the tribunal to the bullets that are there set out that, first of all, none of the assumptions which Ofcom claims don't match the real world had an impact on the results; Sky's

1           insistence on the grant-back condition would result in  
2           non-supply even where the static model is amended to  
3           include Ofcom's suggestion of wholesale payments; the  
4           results of the static model took into account and  
5           remained unaltered when Dr Padilla accounted for  
6           potential efficiencies which Ofcom considers may result  
7           from Sky retailing BT Sport direct to subscribers; the  
8           only assumptions which could have had an impact on the  
9           conclusions in the static model were not only reasonable  
10          but have been subject to empirical confirmation, and  
11          that of course is the choice modelling exercise; and of  
12          course Ofcom's criticisms only relate to the static  
13          model. None of those criticisms relate to the dynamic  
14          model.

15                 Finally, in paragraph 194 to 197 we note  
16          Ms Fyfield's evidence in this regard.

17                 I think I can trespass on the text to this extent:  
18          we say Ms Fyfield's evidence doesn't undermine the  
19          conclusions that the incentives existed and that the  
20          grant-back condition was prejudicial to fair and  
21          effective competition and, just picking up at 197, this  
22          is not an instance here where BT is somehow concerned  
23          with competition failing in theory but working in  
24          practice. It is concerned with explaining why the  
25          actions of insistence on the grant-back condition have

1 real practical impacts on the way that competition in  
2 the pay TV market works.

3 Now, 6.88 I won't refer to in open, but it  
4 essentially is the same as the first point with which  
5 I have already dealt in respect of paragraph 6.85 in the  
6 WMO.

7 Then we pick up the fourth point that's raised in  
8 the WMO, 6.89, that BT has invested in rights at a time  
9 when the WMO had not been confirmed as extending to  
10 YouView. Now, this is an odd contention. Quite apart  
11 from it being very limited in its scope, it's only true  
12 in part and, in any event, it is irrelevant.

13 First of all, just noting the timing of  
14 the investments that are being referred to, they were  
15 made at a time when the appeal against the first CAT  
16 decision was with the Court of Appeal. Second of all,  
17 Ofcom is not entirely accurate in its characterisation  
18 of the scope of the interim WMO obligation because it  
19 did in fact apply to YouView. What it didn't apply to  
20 was the provision of Sky Sports to BT for distribution  
21 by BT on YouView using IPTV technology. It was for that  
22 very reason that BT sought, and indeed was granted, the  
23 clarification and amendment of the interim relief order  
24 which made clear that the interim relief covered  
25 provision to BT for the distribution by use of IPTV

1 technology.

2 So quite apart from that situation in fact  
3 illustrating Sky's obstructive approach to provision of  
4 Sky Sports to BT, which Ofcom just chooses to ignore,  
5 what we see here is that, at the time, BT could have had  
6 confidence about WMO protection when it was making its  
7 investments.

8 And, third, it is impossible in the circumstances  
9 for Ofcom to suggest that it could tell whether Sky's  
10 strategy of insisting on the grant-back condition  
11 affected BT's strategy at that time because the  
12 grant-back condition demand was effectively rendered  
13 inoperative. In that regard, it might be suggested that  
14 the factual situation set out in 6.89 is actually  
15 potentially misleading, but let's leave that to one  
16 side.

17 Then if I move to the fifth of the reasons that are  
18 set out in the WMO, this is the substantive reasons,  
19 negotiations between Sky and BT over reciprocal supply  
20 were not concluded. So it wasn't possible to treat  
21 existing negotiations of evidence of actual or likely  
22 conduct which might prejudice fair and effective  
23 competition. Well, whether or not negotiations between  
24 BT and Sky could be characterised as being formally  
25 concluded, and I note again the fact that Ofcom has

1 focused only on a period between 2012 and 2013, what is  
2 clear beyond any doubt is that Sky wouldn't do any deal  
3 other than a stopgap interim deal pending this  
4 litigation without a grant-back condition, and  
5 Ms Fyfield set out her position clearly in this regard.

6 THE CHAIRMAN: We will just read that.

7 MR BEARD: In relation to the arguments in the WMO up to  
8 paragraph 6.90, we say that none of those reasons  
9 remotely amount to a good basis for lifting a WMO which  
10 effectively prevents the imposition, the compulsion, and  
11 requirement of a grant-back condition by Sky in relation  
12 to BT. But there are some additional arguments, the  
13 first of which is the cross-reference to section 7 that  
14 is made in paragraph 6.91 of the WMO, the possibility of  
15 future intervention, as I say, a matter that took on  
16 a far more significant role in Ofcom's opening  
17 submissions.

18 I have just set out here what Mr Holmes said in  
19 opening:

20 "Ofcom stands ready to address concerns insofar as  
21 a practice has crystallised. Grant-back is a point in  
22 relation to which action could be taken easily and  
23 quickly in relation to the two industry participants to  
24 which it's relevant. There has been no complaint to  
25 Ofcom. Ofcom has not yet been called upon to address

1 the position, although it continues to monitor the  
2 market and has published a statement indicating its  
3 current assessment of the market and has also collected  
4 other material which it keeps for its own purposes as  
5 part of the monitoring of the market."

6 It is worth just unpacking this, in the sense that  
7 Ofcom is there, tense and panther-like, ready to spring  
8 at any moment. I will deal with each of the points in  
9 turn, but it is wrong in overlooking the fact that the  
10 grant-back condition demand has been crystallised. The  
11 prospect of easy and quick action is completely unreal  
12 and, as to complaint, I'm not quite sure what Ofcom  
13 thinks that BT could have done more to complain about  
14 this.

15 If I take each of these points in turn, and I will  
16 also deal with the market monitoring that doesn't offer  
17 any proper protection. Let's look at the first point.  
18 Ofcom's statement entirely overlooks the fact that the  
19 grant-back condition has emphatically been crystallised.  
20 It is just incomprehensible to understand what Ofcom is  
21 standing ready to do. The panther is sitting tense,  
22 poised, as the 800-pound gorilla wanders past and does  
23 nothing about it. It is waiting to identify a practice  
24 occurring when that practice is already happening, and  
25 BT has explained very clearly why it is that the demand

1 for so-called reciprocal supply is amounting to  
2 effective non-supply of Sky Sports channels because it  
3 is a grant-back condition which is [redacted]  
4 ##### and, indeed, as we have explained, Sky would  
5 rationally prefer non-wholesale supply to. So, as  
6 I say, what is unclear is what Ofcom is waiting for  
7 here, what more crystallisation do you need?

8 THE CHAIRMAN: If you have got material flagged in red here,  
9 you should not be saying it in front of Sky. Is that  
10 right?

11 MR BEARD: Yes.

12 THE CHAIRMAN: I think you just have.

13 MR BEARD: Sorry, my version is not marked accordingly.

14 THE CHAIRMAN: We will look at the transcript.

15 MR BEARD: We will look at the transcript. I apologise.  
16 I am trying to stick with the confidential --

17 THE CHAIRMAN: I understand that.

18 MR BEARD: I'm grateful.

19 THE CHAIRMAN: We have an updated version, updated for  
20 confidentiality, and that's what we are working on.

21 MR FLYNN: Perhaps I could just point out, whatever that  
22 version is, it has not been sent to us. We have  
23 a version that was not delivered to us very long before  
24 the hearing started and there are certainly no markings  
25 on this page.

1 THE CHAIRMAN: Is it possible, as a practical matter, to  
2 make the version you are reading from available to  
3 everybody?

4 MR BEARD: Yes. The version I am reading from is the  
5 version they have got. There is a further updated  
6 version where there is an additional confidentiality  
7 marking.

8 THE CHAIRMAN: You have to be particularly careful.

9 MR BEARD: I quite understand, Mr Chairman. I think in  
10 relation to that particular comment, we will make sure  
11 it is excised from the transcript.

12 THE CHAIRMAN: Yes.

13 MR BEARD: We were dealing with the crystallisation point.  
14 The next point I want to deal with is the prospect of  
15 easy and quick action. Now, there are two points I want  
16 to highlight here. First of all, when Ofcom talks about  
17 easy and quick action, it is just worth bearing in mind  
18 what we have had to deal with in terms of timing on  
19 decisions relating to WMO matters over recent years.  
20 The 2010 WMO decision was the outcome of a three-year  
21 consultation process. The 2015 decision came almost two  
22 years after the Court of Appeal judgment.

23 Now, it is important to have those particular  
24 timeframes in mind, because what Ofcom says in the WMO  
25 statement, and Mr Holmes specifically didn't take you to

1 this, is at 7.16. 7.16:

2 "Should evidence emerge that Sky was engaging in  
3 practices which are prejudicial to fair and effective  
4 competition, we will reassess the need for ex ante  
5 regulation. In particular, our expectation is that  
6 consumers should continue to have access to, and choice  
7 of, packages and services", and so on.

8 I understand, of course, from the exchanges at the  
9 outset of these proceedings that the tribunal has  
10 concerns about an ex ante, ex post taxonomy for  
11 regulatory measures and how much assistance it may be,  
12 but what is absolutely --

13 THE CHAIRMAN: It is the terminology, as much as anything  
14 else.

15 MR BEARD: Well, terminology or actual allocation within the  
16 terms.

17 It is absolutely clear here that what Ofcom is  
18 stating is that, if it sees actual practices which, to  
19 use Mr Holmes' terms, are crystallised, which prejudice  
20 fair and effective competition, it will act under what  
21 it calls ex ante powers; in other words, the imposition  
22 of licence conditions. So that is section 316.

23 What Ofcom is saying here is that it will use  
24 powers, ex ante powers, if it sees a problem. It is not  
25 here talking in particular about Competition Act powers

1           which Ofcom always treats as ex post in this sort of  
2           description.

3   THE CHAIRMAN:  They would have, under the statute, to  
4           consider that anyway, wouldn't they?

5   MR BEARD:  They would.  That is undoubtedly right under 317.  
6           They would have to do that.  The reason I mention it is  
7           because what it is thinking about here is 316.  Now,  
8           I know that there are other powers that Ofcom may have,  
9           but here it is clearly referring to what it can do in  
10          relation to 316.

11                 So when we are talking about easily and quickly,  
12           which is Mr Holmes' submission, we have no good reason  
13           to think that that is in any way true.  None of our past  
14           experience makes that out to be the case.

15                 Indeed, even if, contrary to the WMO statement  
16           itself, one were actually focusing on Competition Act  
17           powers, there is no good reason to consider that such  
18           process would operate swiftly, or indeed effectively,  
19           itself.  Ofcom's pointed to no example where it's shown  
20           readiness to act under what it calls ex post competition  
21           regulation.  Indeed, it is striking that BT's complaint  
22           which it made under the Competition Act about the  
23           grant-back condition, which was pursued to parallel to  
24           these continuing WMO proceedings, took almost three  
25           years before it was shut down in February 2016 on the

1 basis that Ofcom had other administrative priorities.

2 In shutting that down, that investigation, of course  
3 Ofcom specifically referred to the fact that BT had  
4 obtained supply under the WMO.

5 So this idea --

6 THE CHAIRMAN: Your written comment says, "It is therefore  
7 clear" --

8 MR BEARD: I think that's a vestigial --

9 THE CHAIRMAN: A slight AP Herbert reference there, I think,  
10 "It is therefore clear that ..."

11 MR BEARD: Yes, I leave it for the tribunal to decide what  
12 is clear, but we would say --

13 THE CHAIRMAN: We have to fill in the blanks, have we?

14 MR BEARD: Yes, yes.

15 THE CHAIRMAN: It is a novel form of closing submission.

16 MR BEARD: It makes sure everyone is paying attention, to  
17 have a challenge along the way.

18 THE CHAIRMAN: We are awake. Thank you.

19 MR BEARD: It is, therefore, clear that the suggestion that  
20 an easy -- that easy and quick action can deal with  
21 these matters is plainly not any good substitute for  
22 dealing with what is a crystallised problem now under  
23 section 316 by way of the WMO.

24 218 refers to lack of complaint. It appears to be  
25 marked up as Sky confidential. I'm not sure it could

1 possibly be Sky confidential. I think that is just an  
2 error in terms of the marking up of confidentiality.

3 THE CHAIRMAN: I think you can take it we have read it.

4 MR BEARD: I think all concerned are aware of both the  
5 vociferous complaints of BT in the course of the WMO  
6 process and, indeed, the Competition Act complaint that  
7 was made by BT. So when Mr Holmes says that they stand  
8 ready for easy and quick action but there's been no  
9 complaint to Ofcom, it really is rather mystifying what  
10 it is that BT could have done more.

11 As for market monitoring, well, of course, this is  
12 to some extent a new strand of argument, unusually  
13 developed in evidence given by Mr Holmes whilst  
14 Mr Matthew was being cross-examined. Because, if you  
15 recall, Mr Matthew said that Ofcom keeps markets under  
16 periodic review and gathers data in order to do so, and  
17 he said those reviews were every two years. Mr Holmes  
18 was clearly very concerned about this and from the Bar  
19 gave evidence that the reviews were six-monthly --

20 MR HOLMES: Sir, this can't be contentious. We are happy to  
21 enshrine it in a witness statement if the tribunal  
22 requires it. The matters that I set out were given on  
23 instruction.

24 THE CHAIRMAN: There may be limits to judicial knowledge,  
25 but I think we have our own views of the way in which

1 Ofcom monitors the market. I don't think it is a great  
2 matter for discussion.

3 MR HOLMES: I'm grateful, sir.

4 MR BEARD: The main point is, two years or indeed six  
5 months, Ofcom hasn't put forward relevant evidence as to  
6 how that monitoring is going to result in, somehow, this  
7 quick and easy action to deal with a problem which it  
8 says is not crystallised.

9 So it is unclear how this point, whether it is two  
10 years or indeed six month, assists Ofcom in any way.

11 Just to pick up another point that Mr Holmes raised  
12 in opening, Mr Holmes sought to emphasise that if a WMO  
13 obligation were to be put in place, it would not  
14 necessarily be straightforward because an assessment of  
15 pricing would be required. Well, that may potentially  
16 be true if one is going to try to specify particular  
17 pricing if one is looking especially at ground 4, but of  
18 course ground 5 is directed to the point that Ofcom have  
19 entirely failed -- sorry, and that submission at the  
20 time was directed at proportionality analyses. But  
21 first of all, it is worth bearing in mind that if the  
22 concern is that prices do need to be set, of course  
23 Ofcom has previously considered itself able to do that,  
24 and it is wrong to suggest that such a process would be  
25 disproportionate. But in any event, when we are

1 focusing on ground 5 and the grant-back condition, any  
2 such submission is fundamentally flawed because an  
3 effective WMO needs to be focused on prohibiting the  
4 conditionality or compulsion in supply. It doesn't need  
5 then to be going through the rubric of specifying  
6 particular prices.

7 Of course it's recognised that you can have  
8 constructive conditionality through pricing that would  
9 undermine the effectiveness and the remedy, and so one  
10 way of dealing with these matters would be to impose  
11 a fair, reasonable and non-discriminatory pricing  
12 requirement, which plainly could have been done, and, as  
13 we know, in particular from the December consultation at  
14 paragraph 7.33, if Sky knows that it must supply, as  
15 Ofcom has recognised, its incentives in relation to  
16 pricing and other terms may well change, so that there  
17 is reason, once the compulsion is taken away, that  
18 a deal may be done. As I say, even if a FRND assessment  
19 were to be required in the event of a potential  
20 disagreement, it is a matter with which Ofcom is  
21 familiar in relation to pricing assessments.

22 But, thirdly, it is worth bearing in mind that Sky's  
23 rate card prices at the very least give an indication of  
24 possible pricing levels for these purposes, provided  
25 Ofcom is satisfied that such prices are not prejudicial

1 to fair and effective competition. So we say, in  
2 relation to ground 5, the position is absolutely clear:  
3 Sky insists on the GBC; the GBC, the grant-back  
4 condition, is a form of compulsion by a market  
5 participant with very significant market power and an  
6 essential input. It plainly does prejudice competition,  
7 and Ofcom has accepted that the insistence on the  
8 grant-back condition can prejudice fair and effective  
9 competition. In those circumstances, Ofcom was wrong to  
10 take the view that the anti-competitive consequences of  
11 Sky's insistence on a grant-back condition have not  
12 manifested themselves in practice. On the contrary,  
13 they are crystallised, they have manifested themselves  
14 in the deadlock and non-supply of Sky Sports channels  
15 save under the WMO remedy.

16 I refer you also to paragraph 227, and we say, in  
17 those circumstances, the refusal to maintain the WMO in  
18 the face of the grant-back condition is flawed.

19 I am going to move to ground 4 unless the tribunal  
20 has questions.

21 THE CHAIRMAN: Can you polish off another ground before  
22 lunch?

23 MR BEARD: I don't think I can polish off the ground before  
24 lunch. It might be more sensible, perhaps, to rise and  
25 start at 1.50 pm or earlier?

1 THE CHAIRMAN: I think we would like to go on until 1.00 pm.  
2 Just carry on.

3 MR BEARD: I am going to move back in the speaking note,  
4 then, to ground 4 in relation to pricing.

5 THE CHAIRMAN: What do we need to do about confidentiality  
6 for this?

7 MR BEARD: I think, in relation to this, I can start the  
8 submissions and make some submissions possibly for the  
9 next 10 minutes which don't stray into confidential  
10 matters, but then it will be confidential for everyone,  
11 I think.

12 THE CHAIRMAN: That would be very helpful.

13 MR BEARD: Just picking up where BT says that Ofcom clearly  
14 erred in its conclusions, essentially, there are two  
15 conclusions which BT challenges here. The first is  
16 found in the WMO statement at paragraphs 6.52 and 6.62,  
17 where Ofcom says that there didn't appear to be concerns  
18 related to the wholesale price charged by Sky which  
19 would warrant an independent consideration of pricing  
20 issues. The second is that it didn't consider Sky's  
21 current commercially-agreed wholesale pricing outside  
22 the WMO obligation to be set at a level which prejudiced  
23 fair and effective competition. That is at 6.64.

24 Those particular submissions -- I am going to take  
25 things slightly out of order -- are particularly

1 remarkable, given the absence of any proper consultation  
2 in relation to these matters. If one could turn on,  
3 then, in this note to paragraph 133, there we have  
4 identified the concerns with the consultation process  
5 that was undertaken in relation to pricing, matters upon  
6 which Mr Facenna cross-examined Mr Matthew.

7           What we know is that the conclusion on pricing in  
8 the WMO statement relies in particular on Ofcom  
9 asserting that it consulted on the issue  
10 in December 2014 in the consultation document that it  
11 promulgated at that time, and one can see references to  
12 that in the WMO statement at paragraphs 6.38 and 6.62.

13           But the tribunal has also seen in that December  
14 consultation document, in particular at 7.3, that there  
15 Ofcom had identified two kinds of practices that might  
16 have a prejudicial effect on competition, the second of  
17 which was supply on terms that don't allow fair and  
18 effective competition. They are including supply of  
19 the channels on a wholesale basis, but on terms that  
20 don't allow the rival retailer to compete effectively or  
21 undermine the rival retailer's incentives or ability to  
22 compete in other parts of the value chain, particularly  
23 channel development and distribution. To that  
24 paragraph, a footnote referred to setting prices that  
25 don't allow sufficient retail margin to enable the rival

1 retailer to compete effectively.

2 What we see in that consultation document is Ofcom  
3 setting out, at the end of each section, questions that  
4 it wants responses on, consultation questions, and what  
5 we see is that Ofcom did not ask any specific question  
6 on pricing, and the only reference to retail margins and  
7 prices that we have identified in that consultation  
8 document is in that footnote.

9 As Mr Facenna illustrated in the course of  
10 cross-examination of Mr Matthew,  
11 [redacted]#####  
12 #####  
13 #####  
14 #####  
15 #####  
16 #####  
17 #####  
18 #####

19 But of course, what we see is that no consultation  
20 exercise ever took place. BT was only able to make  
21 submissions on pricing late in the process because it  
22 demanded to do so and then was criticised by Ofcom for  
23 not submitting the materials sooner.

24 THE CHAIRMAN: Are you going to stop there?

25 MS POTTER: It has a confidentiality marking.

1 THE CHAIRMAN: This is no good if you haven't got a text  
2 which you can follow.

3 MR BEARD: I ask the tribunal to read that. I will refer to  
4 this updated version. Just for your note, the document  
5 referred to in the confidential section to which you  
6 have been taken is in DF2 at tab 19.

7 The legal principles relating to lawful consultation  
8 are well established, sometimes I think referred to as  
9 the Sedley principles:

10 "First, that consultation must be at a time when  
11 proposals are still at a formative stage. Second, that  
12 the proposer must [be given] sufficient reasons for any  
13 proposal to permit of intelligent consideration and  
14 response. Third ... that adequate time must be given  
15 for consideration and response and, finally, fourth,  
16 that the product of consultation must be conscientiously  
17 taken into account in finalising any statutory  
18 proposal."

19 Now, in this context, we highlight the fact that  
20 issues relating to rate card pricing were squarely  
21 raised by BT in its consultation, and we say that Ofcom  
22 clearly was under a duty to examine it further. Indeed,  
23 looking at Ofcom's own consultation principles, which  
24 are set out in annex 2 to the December 2014  
25 consultation, they require Ofcom to abide by the

1 following commitments, "will be clear about whom we are  
2 consulting why, on what questions, for how long", and  
3 just noting in relation to paragraph 7 there, "We think  
4 it is important that everyone who is interested in this  
5 can see other people's views, so we usually publish all  
6 the responses on our website as soon as we receive  
7 them."

8 What is striking is that, despite the protestations  
9 in the WMO statement, and Mr Matthew's view, it cannot  
10 fairly be said that the December consultation document  
11 was clear about the fact that it was the only  
12 opportunity for making submissions in relation to  
13 pricing before a decision was taken. It is clearly not  
14 the position that Ofcom was taking prior to July 2015,  
15 when it acknowledged, essentially, that the document  
16 hadn't been explicit about pricing and the stakeholders  
17 had, as a result, not commented on that.

18 THE CHAIRMAN: I see you refer to the SkyScanner case,  
19 Mr Beard.

20 MR BEARD: A matter with which you are familiar, sir.

21 THE CHAIRMAN: It was a judicial review case.

22 MR BEARD: Of course. But in relation to consultation  
23 duties, of course those are duties of law that fall for  
24 consideration by a tribunal in an appeal or a judicial  
25 review in rather a similar way, being matters of law

1 going to fairness in the circumstances.

2 Indeed, the Moseley case from which the summary of  
3 consultation requirements is made was also a judicial  
4 review, sir.

5 What is more, BT had actually provided Ofcom with  
6 a non-confidential copy of its subsequent submission and  
7 cost-stack analysis in order specifically that Ofcom  
8 could publish it in accordance with its own consultation  
9 principles. Ofcom didn't even do that. So it was  
10 provided with a non-confidential version, which  
11 obviously BT doesn't need to do if it's just providing  
12 material to Ofcom. It provided that material and Ofcom  
13 didn't publish it. So none of the other industry  
14 parties had an opportunity to see what BT had said, to  
15 support or indeed challenge it, before the decision.

16 The fact that Ofcom failed to take steps to set out  
17 relevant evidence in order to reach an informed  
18 conclusion and, indeed, the attempt to rely on the  
19 absence of specific complaint is inappropriate in the  
20 circumstances. Indeed, it is somewhat disingenuous for  
21 Ofcom to say it had no evidence to suggest a need to  
22 carry out further investigation into pricing when it  
23 took a conscious decision not to gather such evidence  
24 from industry players.

25 Indeed, the contrast between the conscientious and

1 thorough economic and financial modelling which  
2 underpinned Ofcom's decision to impose the remedy in  
3 2010 and the approach adopted when removing it in 2015  
4 is telling. Ofcom appears to have made pretty much  
5 every effort to avoid having to engage with what is  
6 referred to as the costly and time-consuming technical  
7 analysis of Sky's wholesale prices.

8 So we say that the consultation process in the  
9 circumstances was entirely inadequate, and for Ofcom in  
10 the circumstances to say that it lacked evidence in  
11 relation to these matters is a matter of some concern in  
12 relation to that, because referring back to the criteria  
13 for proper consultation, in circumstances where it is  
14 only very shortly before the decision comes out that BT  
15 is able to provide that material, not having realised  
16 that it was going to be required, this was the only  
17 opportunity to provide it, what we end up with is  
18 a situation where the provision of that material is only  
19 very shortly before the decision itself and the idea  
20 that the decision was still in a relatively formative  
21 state at that point is one that is, with respect,  
22 difficult to accept.

23 I'm going to move on to the substance, and perhaps  
24 now is a convenient moment.

25 THE CHAIRMAN: So after lunch we will be in camera?

1 MR BEARD: Yes.

2 MR HOLMES: Sir, is it the tribunal's intention to try to  
3 wrap up the proceedings today and, if so, could we  
4 briefly discuss division of time for this afternoon?

5 THE CHAIRMAN: We are in your hands on that. I was under  
6 the impression that wrapping it up today wasn't  
7 possible.

8 MR BEARD: I think, frankly, it is not going to be possible.  
9 I will try to accelerate through things.

10 THE CHAIRMAN: We would like to make as much progress as we  
11 can so that we are not applying Parkinson's law of  
12 closing submissions to the time available.

13 MR HOLMES: I don't know if Mr Beard is able to indicate,  
14 with a fair wind, how long he thinks he needs --

15 THE CHAIRMAN: Mr Beard is cracking on.

16 MR HOLMES: He is. He is making good progress.

17 MR BEARD: Heading backwards at speed, I think. What I will  
18 do, of course, is over the short adjournment see what it  
19 is I can deal with --

20 THE CHAIRMAN: It might be better if we have a view on that  
21 when we reassemble.

22 MR HOLMES: Understood, sir. I'm grateful.

23 (1.05 pm)

24 (The short adjournment)

25 (2.02 pm)

1 MR BEARD: If I could take the tribunal to page 33 --

2 THE CHAIRMAN: Timing. We were going to come back to it.

3 MR BEARD: I am going to try to finish by the break point,

4 mid-afternoon. But I don't think that means we are

5 going to be done this afternoon.

6 THE CHAIRMAN: If we finish by the break point, how are you

7 going to be?

8 MR HOLMES: We will see what Mr Beard says, but I think

9 I can respond to the points that have been made so far

10 within an hour, if that would assist the tribunal. If

11 the tribunal were prepared to sit a little late, it may

12 very well be that we could deal with matters today, but

13 obviously --

14 THE CHAIRMAN: Let's crack on and see.

15 MR BEARD: Back to page 33, if I may, I was dealing with

16 ground 4 on pricing. Paragraph 105 --

17 THE CHAIRMAN: Sorry, we have a confidentiality ring in the

18 tribunal, have we?

19 MR BEARD: Yes, we should have a pure confidentiality ring

20 for the tribunal at the moment.

21 (In camera session)[redacted pages 57-80]

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(Public session)

MR BEARD: If I may, I will just pick it up at page 3.

1           Essentially, in relation to section 316, there are  
2           two competing interpretations that have been put  
3           forward. The first is that the language of section 316  
4           is mandatory, the use of the word "must" indicates that  
5           once a relevant and material risk is identified,  
6           a corresponding regulatory condition has to be imposed,  
7           as long as one can be identified, and of course there is  
8           a discretion as to the nature and terms of that  
9           condition.

10           The alternative reading, which is that favoured by  
11           Ofcom and Sky, leaves Ofcom with a very broad  
12           discretion, and Ofcom says simply that the requirement  
13           of 316 is that it apply its mind to the question,  
14           I think was the phrase that Mr Holmes used in response  
15           to questioning by the tribunal.

16           If I may, I just want to run through a series of  
17           factors why it is that "must" is mandatory and,  
18           therefore, the first interpretation is appropriate.

19           First of all, and I'm taking this at paragraph 13,  
20           the term "must" was specifically chosen by the  
21           legislator. The ordinary language of the term "must" is  
22           imperative, it is not discretionary.

23           The use of that term "must" is particularly notable,  
24           given the difference in wording between section 316(1),  
25           where you have no reference to "must", and

1 section 316(2), where it is specifically introduced.

2 Section 316(2) thus requires Ofcom to do more than  
3 merely include any conditions it thinks appropriate for  
4 ensuring fair and effective competition. That is  
5 covered by 316(1).

6 Ofcom can't just decide that although there are  
7 conditions which will be appropriate to prevent the  
8 conduct in question it won't impose any such conditions.  
9 The fact that the statutory language then goes on and  
10 refers to "if any" doesn't change that analysis. The  
11 reference to "if any" is simply to cover situations  
12 where there are no appropriate conditions that could  
13 remove or attenuate the risk in question.

14 Now, of course, any terms in the statutory provision  
15 must be interpreted in context, but having, since the  
16 opening, reviewed further the relevant case law, it is  
17 notable that the imperative nature of the term "must"  
18 has been recognised in case law.

19 Now, there has been passed up a clip of materials  
20 that I think have gone into H3 in the tribunal's bundle.  
21 I am not intending to take the tribunal to each of  
22 the cases. Before any point is made, I quite accept  
23 that, in relation to all of these cases, they are  
24 dealing with different situations, different factual  
25 situations and, indeed, different statutory provisions

1 from those with which we are dealing today, but they  
2 are, nonetheless, instructive.

3 In the Thompson's Trustees case, a Scottish case,  
4 which is found at H3/19, I believe, although I'm  
5 slightly concerned that there may be two tab 19s in the  
6 H3 bundles, in which case it is the second 19, that  
7 looks like a case. An argument was directed to the  
8 meaning and significance of the word "shall" in  
9 section 5(2) of the relevant Act:

10 "The word 'shall' is not always used in the  
11 imperative sense, in certain contexts it may mean 'may'.  
12 If a direction is intended to be imperative 'must' not  
13 'shall' is the appropriate word as the learned solicitor  
14 general pointed out."

15 So in relation to the consideration of  
16 the interpretation of language, what was being  
17 highlighted there, that there may be circumstances where  
18 the natural imperative meaning of a word can be read  
19 down, but what was being noted was that it should be  
20 more likely in relation to the use of the word "shall"  
21 than "must".

22 More notably, perhaps, in Ravichandran, the Court of  
23 Appeal held when considering relevant statutory  
24 provisions "a requirement is never intended to be  
25 optional if a word such as 'shall' or 'must' is used".

1 So there are indications in the relevant case law that  
2 suggest that actually an imperative term "shall" or in  
3 particular "must" should be construed as being  
4 mandatory. That is also reinforced not only by the fact  
5 that the term "must" is specifically used in 316(2) as  
6 compared with 316(1), but where we see elsewhere in the  
7 Communications Act a distinction being drawn between  
8 "must", imperative, and "may", discretionary. We have  
9 just illustrated this by reference to section 7 of  
10 the Communications Act, which sets out the duty to carry  
11 out impact assessments. We have set out the text there.

12 The key point is that before implementing  
13 a proposal, Ofcom must either carry out and publish an  
14 impact assessment or publish a statement setting out  
15 their reasons for thinking it is unnecessary. So that  
16 is imperative. But then, when it comes down to  
17 subsection (5):

18 "An assessment carried out under this section may  
19 take such form and must relate to such matters" -- it  
20 should be "may relate to such matters" -- "as Ofcom  
21 consider appropriate."

22 The point being, what you have is a mandatory  
23 obligation to carry out an assessment and then you --  
24 sorry, what you have is different terminology being used  
25 here in order to indicate that you have a primary duty

1 to carry out the assessment but discretion thereafter in  
2 relation to these matters.

3 Certainly a distinction between "must" and "may" is  
4 the natural language reading approach to these matters,  
5 and what Ofcom is suggesting is that, essentially, there  
6 is no difference between "must" and "may" in the context  
7 of section 316(2).

8 THE CHAIRMAN: Let me just ask you, Mr Beard, supposing you  
9 were right and the regime includes the conditions, if  
10 any, that Ofcom considers appropriate, and Ofcom must  
11 include conditions, if any, that it considers  
12 appropriate. If it had included a condition in Sky's  
13 licence that Sky must write to it every six months  
14 telling it what agreements it had concluded, for  
15 example, that would be all right as far as you're  
16 concerned, there would be a discussion as to whether  
17 that was a correct exercise of the discretion, but you  
18 would say that was within the statutory agreement and --

19 MR BEARD: Yes.

20 THE CHAIRMAN: So you are looking for any condition, not  
21 necessarily this condition, but any condition?

22 MR BEARD: You're looking for -- yes. In the context of  
23 this discussion, of course the only condition that's  
24 been put forward is the WMO, so that's the reason why we  
25 focus on the WMO --

1 THE CHAIRMAN: I understand.

2 MR BEARD: But, yes, your point is correct.

3 THE CHAIRMAN: This is where "must" gets you over the  
4 threshold into a condition.

5 MR BEARD: Yes, and it doesn't stipulate what the condition  
6 may say, that is absolutely right.

7 THE CHAIRMAN: That is up to Ofcom, in your opinion?

8 MR BEARD: Yes, it has to be appropriate and, obviously, it  
9 is then subject to rationality conditions, public law  
10 conditions. That is absolutely true.

11 THE CHAIRMAN: Apart from the Court of Appeal in the  
12 previous litigation and a case in the 1990s which I seem  
13 to recall being involved in and our own efforts on this  
14 section, there is no other authority on this section?

15 MR BEARD: We don't believe so. No, we don't believe so.  
16 Mr Holmes tried to pray in aid the Draft Communications  
17 Bill, the policy document.

18 THE CHAIRMAN: That is a different point.

19 MR BEARD: Well, the only reason I refer to it is because --

20 THE CHAIRMAN: That's about the overall regulatory approach.  
21 We are just talking about this section. We have got  
22 these cases you draw our attention to which are  
23 interesting, but slightly over here (indicating).

24 MR BEARD: We recognise that. We have done our best, is the  
25 answer, to try to identify cases where what is being

1 tested is whether or not a term that appears to be  
2 imperative should be treated as imperative, and we have  
3 identified those cases where, interestingly, in the  
4 first one, "must" is being specified as being imperative  
5 particularly, and in the second one the language being  
6 used is "not optional".

7 THE CHAIRMAN: That is not a section that derives from any  
8 European law framework, is it, so there is no purposive  
9 or teleological assistance we can gain?

10 MR BEARD: No, I think that's not right quite, because  
11 purposive or teleological approaches are ones that are  
12 not unfamiliar to the common lawyer as well as --

13 THE CHAIRMAN: What I mean is we haven't got a European  
14 policy.

15 MR BEARD: No, there is no European policy and we are not  
16 looking at implementation of a directive or  
17 manifestation of a regulation in primary legislation,  
18 so, no, we don't have those sorts of reference points.  
19 We don't, for instance, have any guidance in the  
20 explanatory notes. There is nothing there, as far as we  
21 have seen, that is of use in this regard. So we are  
22 looking for that guidance. But it may well be that the  
23 error that Ofcom has made here is that, in cavilling at  
24 the mandatory nature of the term "must", it's lost sight  
25 of the fact that it does retain a broad discretion as to

1           what is then appropriate in terms of the condition. In  
2           this case, however, it isn't coming forward and saying,  
3           "Ah, well, we have considered other sorts of  
4           conditions", it is only focused on a WMO-type condition  
5           and that is therefore where the relevant lines are  
6           drawn. But in terms of the interpretation of  
7           the statutory framework, that is why we say a mandatory  
8           approach is clearly the right one here.

9           I should add --

10          THE CHAIRMAN: I don't want you to repeat yourself.

11          MR BEARD: Just in relation to relevant case law, the other  
12           way we have looked at it is to think about Mr Holmes'  
13           "apply your mind" threshold. Mr Holmes is saying "must"  
14           means apply your mind, but that, with respect to  
15           Mr Holmes, is plainly wrong.

16          THE CHAIRMAN: Are we on to page 9 now?

17          MR BEARD: We are on page 6, paragraph 19. Paragraph 19, in  
18           any event.

19          THE CHAIRMAN: I thought applying its mind was a bit later  
20           on. Don't let me interrupt you.

21          MR BEARD: Paragraph 19, apply your mind. We just tested  
22           this the other way. The point we make here is that  
23           "must" is not the driver of a requirement for a public  
24           body to apply its mind because, as was set out in  
25           Stovin v Wise, a public body almost always has a duty in

1 public law to consider whether or not to exercise its  
2 powers. Public bodies are always under an "If something  
3 comes to you, you should apply your mind to it" test.  
4 So in those circumstances, to say, well, "must" turns  
5 this from something into an "apply your mind" test, we  
6 say, "No, no, no, even if it had been 'may', it would  
7 have been a situation where you had to apply your mind  
8 to the problem. That doesn't tell you what the 'must'  
9 is doing here".

10 As I say, in relation to further issues in relation  
11 to interpretation, Mr Holmes' reference to the Draft  
12 Communications Bill policy document doesn't assist. We  
13 don't understand on what basis it is a relevant  
14 interpretative aid and, in any event, as, Mr Chairman,  
15 you have already indicated, it goes to the overall  
16 framework of parts of the legislation, but what we say  
17 is, and this goes back to a purposive or teleological  
18 approach or, as it is put in domestic statutory law  
19 terms, aimed at the mischief of the provision, the  
20 mischief of the provision is a precautionary approach,  
21 we say, in relation to this.

22 We carefully step around using the language of  
23 ex ante regulation, but nonetheless, it's providing  
24 Ofcom with the relevant tools to ensure that steps or  
25 actions, practices or agreements that may prejudice fair

1 and effective competition are in fact dealt with. It is  
2 applying an obligation on Ofcom to do that.

3 As I say, in relation to the contention made by  
4 Ofcom in opening that somehow this would be a floodgates  
5 argument, because, if this was mandatory, then Ofcom  
6 would have to act in relation to all sorts of  
7 circumstances, there are two issues there: one is, if  
8 that is what parliament was intending for the regulator  
9 to do in order to ensure that these markets were not  
10 subject to conduct which prejudices fair and effective  
11 competition, it is not difficult to understand why that  
12 would be the case, because what Ofcom is effectively  
13 saying is, we are not going to act, even if we think  
14 there is a risk of prejudice to fair and effective  
15 competition, and we don't accept that that was  
16 parliament's intention. But, furthermore, it doesn't  
17 grapple with the issue that, Mr Chairman, you have  
18 already raised, which is that parliament did leave Ofcom  
19 with a broad discretion as to what the terms of any  
20 condition might be in relation to appropriateness, even  
21 though a condition must be put in place where there is  
22 a real risk to --

23 THE CHAIRMAN: I'm not putting forward any interpretation.

24 I'm asking you what your interpretation is.

25 MR BEARD: No, I misspoke, sir. I am not going so far as to

1 suggest that it was any more than testing the nature of  
2 the interpretation here.

3 In those circumstances, we say that "must" means  
4 must; that the reference to section 317 and the  
5 Competition Act doesn't aid Ofcom in this regard because  
6 317 was introduced to accommodate the concurrent  
7 competition powers afforded to Ofcom, and it actually  
8 just makes specific provision under 317(3) that if, and  
9 only if, Ofcom decides to act under the Competition Act,  
10 then -- and indeed only then -- is Ofcom relieved of its  
11 duty to act under the Broadcasting Act powers. So it is  
12 putting a very specific carve-out. It requires you, as  
13 Ofcom, to consider whether to apply the Competition Act  
14 and then it says, once you have considered that, if you  
15 are taking the matter under the Competition Act, then  
16 you don't exercise your Broadcasting Act powers, but if  
17 not, then you do.

18 In those circumstances, if section 316(2) were  
19 merely a discretionary matter, it is actually slightly  
20 hard to see why you would need that provision there,  
21 but, as I say, the main point in relation to 317 is it  
22 doesn't alter the basic and proper interpretation of 316  
23 because the inter-relationship between the two has been  
24 set out.

25 Just one final point to which I have already

1 referred in relation to 317, although 317 was referred  
2 to by Mr Holmes I think fairly in relation to the  
3 interpretation of 316, one needs to be concerned here to  
4 be alive to the fact that, in the WMO statement itself,  
5 as I have indicated by reference to paragraph 7.16, in  
6 that statement, of course, what Ofcom was talking about  
7 was not the use of alternative powers under the  
8 Competition Act 1998 or applying section 317.

9 So in those circumstances, I won't take you through  
10 paragraph 24, but we indicate there why it is that the  
11 mischief of the provision is to ensure that the  
12 regulator does step in to prevent -- to secure  
13 a situation where a person doesn't act in such a way as  
14 might prejudice fair and effective competition. So that  
15 is how we set out the proper terms of 316.

16 But then we say, even if we are wrong on the legal  
17 test, and it is Mr Holmes' "apply your mind" test, what  
18 we say is that, in relation to ground 1, plainly, there  
19 was still a legal error here by Ofcom in the way that it  
20 went about this, because it is one thing to say you need  
21 to apply your mind, it is another thing to say whether  
22 or not you have applied your mind properly here. There  
23 are two aspects, we say, that mean that, as a matter of  
24 law, Ofcom didn't apply its mind properly. First of  
25 all, a matter that we have canvassed in pleadings and

1 I took you to in opening: Ofcom plainly failed to carry  
2 out a proper forward-looking assessment. The situation  
3 is in striking contrast to the articulation of  
4 the position set out in the first consultation document,  
5 which we refer to at paragraph 28 in this note, where  
6 emphasis was placed on looking at matters on  
7 a forward-looking basis, and yet there is no relevant  
8 reference to a proper forward-looking assessment in the  
9 WMO statement. I won't take the tribunal back through  
10 it. There is no reference to considerations of risk  
11 which are synonymous with considerations of  
12 forward-looking matters in relation to the proper  
13 application of 316.

14 As emphasised in the pleadings, BT is not suggesting  
15 that Ofcom must ignore what's happening in the present.  
16 It should have, and was entitled to, consider those  
17 matters. But on the basis of what it found in the  
18 present, it needed to consider what risks arose of harm  
19 to fair and effective competition in the future, such  
20 that, in the context of this case, it warranted removing  
21 existing regulation, and what we do not see is a proper  
22 articulation of how those risks in the future are being  
23 assessed, in terms of the WMO. It is all about current  
24 situation in respect, in particular, of the two  
25 commercial arrangements to which I have already

1 referred.

2 But there is a second way that we would emphasise  
3 that Ofcom has failed legally in its approach, even if  
4 it is right on its "apply its mind" test, and that is  
5 a failure to carry out a proportionality assessment.

6 Mr Holmes, to his credit, or those with him, have  
7 done a word search of the WMO statement and found two  
8 references to "proportionate" -- in paragraphs 1.25 and  
9 1.33. He used the euphemism "compressed" for Ofcom's  
10 reasoning. There is compression to the point of nothing  
11 in relation to the reasoning on proportionality. There  
12 is no proportionality assessment here.

13 On Mr Holmes' interpretation of the proper legal  
14 test, he says that Ofcom has a discretion whether or not  
15 to intervene where it considers it is appropriate to do  
16 so. He accepts that an incident of that assessment is  
17 that its decision must be proportionate. He does not  
18 for a moment cavil at the formulation of proportionality  
19 that is set out in Tesco drawing on the ex Parte Fedesa  
20 case. Nonetheless, what we do not see here is a balance  
21 anywhere of the risks and concerns against benefits. We  
22 do not see any analysis of what sort of cost it is  
23 suggested that the imposition of the WMO might bring to  
24 bear, or, as we say, not bring to bear, on Sky in  
25 circumstances where it has maintained to date that it is

1 a willing wholesaler. Those are the very basic  
2 ingredients of a proportionality assessment, and it is  
3 not there in the WMO.

4 So notwithstanding a failure to carry out any  
5 proportionality assessment, it decided to remove the  
6 WMO, and it is just interesting to note, picking up at  
7 paragraph 38 in the note, that Sky had been highly  
8 critical of Ofcom's process and, in particular, in its  
9 supplementary consultation emphasised the importance  
10 that any conclusion that it's inappropriate to impose  
11 regulation -- and I interpose "or remove regulation" --  
12 under section 316 must be supported by evidence and  
13 analysis capable of notwithstanding profound and  
14 rigorous scrutiny which sets out on the balance of  
15 probabilities a basis for regulation.

16 We say that also includes a proportionality  
17 exercise. It is plain that that's not been fulfilled.  
18 It is entirely understandable that Sky does not maintain  
19 those criticisms anymore. But those criticisms are  
20 entirely valid, and there is a legal flaw in the way in  
21 which these matters were dealt with by Ofcom in the WMO  
22 statement.

23 That then takes me on to ground 2, unless the  
24 tribunal has any further questions in relation to the  
25 error of law.

1           There are a number of points I would wish to pick up  
2           in relation to ground 2. As you will see, our  
3           consideration of ground 2 in these submissions begins at  
4           page 13. The first point to highlight is a point that  
5           has been majored upon by Mr Holmes and Ofcom in  
6           submissions relating to the purpose of the WMO remedy.  
7           We have heard a good deal of emphasis on the idea that  
8           the WMO remedy was only in place because there was  
9           a lack of distribution of Sky Sports in 2010 or that  
10          Ofcom had a perception in 2010 of Sky engaging in  
11          obstructive behaviour and that that is a matter that  
12          then leads to the contention that Ofcom puts forward  
13          that supply to Virgin Media and TalkTalk under  
14          commercially agreed contract provides a good reason to  
15          remove the WMO.

16          But, of course, the essence of the WMO has to look  
17          at competition. It is not about just counting eyeballs  
18          and distribution.

19          If we go back to paragraph 41, in that decision in  
20          2010, Ofcom found that forward-looking regulation was  
21          necessary to address certain competition concerns  
22          arising in the light of Sky's dominant position in  
23          pay TV. The fact that access to premium sports  
24          channels, key drivers of pay TV, remains of vital  
25          importance to the competitive effectiveness of pay TV

1 business and Sky's ability to act in a manner that was  
2 prejudicial to fair and effective competition.

3 The particular competition concerns that Ofcom  
4 considered arose from this were limited distribution --  
5 so that was a symptom -- and the terms and price at  
6 which Sky supplied these channels in order to ensure the  
7 fair and effective competition in retail supply of  
8 Sky Sports channels, which in turn would be expected to  
9 deliver significant consumer benefits in terms of wider  
10 availability choice and innovation and, having  
11 undertaken the comprehensive impact and proportionality  
12 assessment, at that time Ofcom concluded that those  
13 concerns justified the imposition of the WMO.

14 What we see now is a story that focuses only on  
15 scope of distribution, rather than the key question,  
16 which is fair and effective competition.

17 It is only the risk to fair and effective  
18 competition that can justify an imposition of  
19 a condition under section 316, and, equally, it is  
20 precisely that that must be considered when one is  
21 considering removing a measure put in place under  
22 section 316. If we look at the trigger for removing the  
23 WMO remedy in this case, which we have considered at  
24 paragraphs 48 onwards, what we see is that the 2010  
25 statement to which the tribunal has already referred in

1 the course of submissions at 9.300 said, "We would only  
2 expect to remove the remedy if the circumstances at the  
3 time had changed sufficiently such that there was fair  
4 and effective competition", and noting, of course, that,  
5 "we envisage the removal of the remedy as unlikely". In  
6 opening, Mr Holmes stated an indication in 2010 that  
7 Ofcom would expect to withdraw the remedy only if Sky  
8 had lost market power, which is one of the things it  
9 said in the 2010 statement, can't possibly constrain its  
10 exercise of its discretion, applying 316. Even a year  
11 later, he said. Well, as a matter of strict public law,  
12 of course we don't dispute that proposition. But as  
13 indeed noted by Ms Potter, it is equally trite that  
14 where you are engaging in such a radical departure from  
15 a previously expressed position, you'd need to explain  
16 it.

17 Mr Holmes accepted that Ofcom really is required to  
18 explain the reasons for its decision and to that extent  
19 it needs to explain why it no longer considers a measure  
20 which it considered necessary in 2010 no longer  
21 necessary now.

22 As I say, it is just important to emphasise, in  
23 saying all of this, we are not suggesting that the WMO  
24 itself was intended to remove Sky's wholesale market  
25 power. All we are doing is pointing out that, as Ofcom

1           said in 2010, in the absence of indications that Sky's  
2           wholesale market power or the sources of that market  
3           power had been affected by events in the meantime, it  
4           would, effectively, require particularly compelling  
5           reasons for the WMO otherwise to be removed. This is  
6           doubly so, given that, as we see, retail competition,  
7           the raison d'etre of the WMO, really still is not  
8           currently effective, as Dr Padilla's report in  
9           particular shows.

10           We have emphasised in paragraphs 51 and 52 that, as  
11           Mr Williams set out in evidence, what we see here is  
12           a move away from the position in 2010. It is possible,  
13           of course, to move away from the position in 2010, but  
14           without carrying out a competition analysis or providing  
15           those compelling reasons for doing so.

16           If we turn then to look at the competition concerns  
17           in the retail pay TV market, what we see is that those  
18           concerns do continue to exist. We pick it up at  
19           paragraph 54. Dr Padilla explained in his evidence,  
20           focusing simply on the extent of Sky's distribution, as  
21           Ofcom has done, is not the correct assessment in this  
22           case. Instead, it is necessary to look at the state of  
23           competition in the markets that are in principle  
24           affected by Sky's incentives and behaviour, meaning the  
25           retail pay TV market and the upstream market for sports

1 rights.

2 Just to, I hope, unpick some confusion in relation  
3 to numbers, as Dr Padilla very clearly explained, when  
4 it comes to the question of competition for rights  
5 upstream, the relevant numbers to use are relatively  
6 straightforward. The key issue is the extent to which  
7 bidders for sports rights can monetise their rights.  
8 That can be in a whole range of ways. Now, in that  
9 respect, everyone is to be counted, so in relation to BT  
10 that would include both customers and subscribers on  
11 BT's TV platform, sports subscribers on DTH, customers  
12 and subscribers on the app, subscribers to broadband who  
13 might otherwise churn without BT Sport being offered,  
14 and so on.

15 But as he also highlighted, and we pick this up in  
16 paragraph 56, the assessment is more complex when  
17 assessing retail competition. It is answering  
18 a different question about competition on a different  
19 relevant market. Inevitably, perhaps, different numbers  
20 are relevant to that different analysis. The question  
21 in relation to retail pay TV is whether the competitive  
22 constraints on Sky have really changed since 2010, such  
23 that the WMO could be removed and, for that purpose, the  
24 critical issue is to identify what are substitutes for  
25 Sky's retail offering containing Sky Sports; what

1 products are available at the retail level that provide  
2 a new or switching retail subscriber thinking of taking  
3 Sky Sports with a genuine choice, a genuine choice to  
4 taking a subscription from Sky on DTH.

5 As Mr Williams explained, the answer to this  
6 question isn't entirely clear, and that is because Ofcom  
7 hasn't carried out a thorough assessment of the range of  
8 substitutes. But, as we pick up at 58, as Dr Padilla  
9 made clear -- and there is no evidence to the  
10 contrary -- certain subscribers are not relevant for an  
11 assessment of retail competition. Specifically,  
12 BT Sport on DTH should not be included because it is  
13 a complement to Sky's retail sports services on DTH. It  
14 is not a substitute.

15 A pay TV subscriber wishing to take a retail pay TV  
16 service including Sky Sports from BT can't do so on  
17 Sky's DSat platform. The same goes for the BTS app.  
18 Equally, as Ofcom found, retail services from Netflix or  
19 Amazon are not a substitute.

20 As we point out in 59, the same logic explains why  
21 including NOW TV is relevant to this assessment, because  
22 a subscriber wishing to subscribe to a retail package  
23 containing Sky Sports, with or without Basics and  
24 Movies, can do so from NOW TV. It has nothing to do  
25 with whether it is an OTT service or not, but, rather,

1           that it is a service that is a substitute for retail  
2           pay TV packages containing Sky Sports.

3           Similarly, BT TV on YouView is clearly a substitute,  
4           and for that reason, it is right to include it in the  
5           retail assessment.

6           Now, one of the points that's come up is  
7           a discussion about customers versus subscribers, and  
8           I think that the chairman may have observed and I think  
9           it is true that, in relation to the use of that language  
10          in various industry publications, there is undoubtedly  
11          a looseness, but the underlying point is a relatively  
12          simple one: is it right to count a customer who only  
13          buys a low-cost single movie once every three months as  
14          a substitute -- as purchasing a substitute for a retail  
15          pay TV subscriber purchasing Sky Sports at a much higher  
16          level of value month in, month out? Now, perhaps both  
17          should be counted if you are just counting how many  
18          subscribers have access to a pay TV box, but for  
19          assessing competitive constraints, it seems implausible  
20          that both should carry equal weight, but Ofcom's  
21          analysis treats them as if they do. Mr Petter's  
22          evidence was simply pointing out that that doesn't seem  
23          sensible.

24          In terms of what numbers one then uses, the WMO  
25          statement at table 3.1, which we say there are some

1 limited relevant adjustments to be made, provides  
2 relevant volume numbers which confirm that there is  
3 indeed a continuing problem in relation to retail  
4 competition in pay TV. I'm not going to read the  
5 remainder of that paragraph in open court because,  
6 although it is not marked, I'm slightly concerned that  
7 it may be confidential. So that is in relation to  
8 volume numbers.

9 But we say at 62, in any event, and in addition,  
10 stepping back it is clear that in fact the key metric  
11 for assessing retail competition is retail revenue  
12 shares that the various rivals have in relation to  
13 substitute products. The revenue shares capture not  
14 only the number of customer subscribers taking the  
15 different substitute products, but the value of them to  
16 the various retailers. Of course this also avoids  
17 having to enter into the subscriber customer debate at  
18 all in this regard.

19 In terms of share of market, it is the share of  
20 revenue in the market which is critical for all of  
21 the market participants, obviously. Mr Williams and  
22 Dr Padilla have set out these figures and no-one has  
23 challenged either on them.

24 On a revenue share basis, it is absolutely clear  
25 that Sky is dominant or perhaps even super-dominant, if

1           that term persists following European Night Services,  
2           and it has been since long before 2010, and that retail  
3           competition in pay TV is simply not effective.

4           We have set that out in our pleadings and in our  
5           skeleton arguments. Both Ofcom's own findings in the  
6           WMO statement and in the evidence before the tribunal  
7           indicate that the key factors and competition concerns  
8           affecting pay TV at the time of the 2010 statement  
9           persist. Indeed, Ofcom's defence accepts that in 2015  
10          Sky still enjoyed a strong market position, limited  
11          distribution of Sky Sports was still liable to harm  
12          competition, and Sky might, in principle, still have  
13          incentives to withhold supply of its Sky Sports content.

14          We go on, just above 67, the subheading "Sky remains  
15          dominant and retail competition is not effective". You  
16          see in 67(a) --

17   THE CHAIRMAN: You can deal with all this, can you?

18   MR BEARD: -- relevant figures in relation to Sky's share of  
19          channel supply revenues.

20   THE CHAIRMAN: You can deal with all of this in open court,  
21          can you?

22   MR BEARD: Yes, I think I can, because I am going to refer  
23          the tribunal to passages.

24          The tribunal heard extensive and, to some extent,  
25          inconsistent evidence regarding the exact consumer

1 subscriber numbers of the various pay TV operators. It  
2 here highlights the observation, Mr Chairman, you made.

3 But nothing turns on these exact figures because it  
4 is absolutely clear that, on any basis, Sky's retail  
5 pay TV subscriber numbers continue to outnumber those of  
6 its rivals by a very significant margin. BT's evidence  
7 is effectively summarised in its corrected version of  
8 the table 3.1 that it provided graphically, which is at  
9 H2/13. It may be useful if the tribunal simply take out  
10 H2/13. All we have done --

11 THE CHAIRMAN: This table is not accepted as being without  
12 controversy.

13 MR BEARD: No, it is not accepted. We accept that there is  
14 a difference over these matters. We recognise that  
15 entirely. We say we are right. I am sure they do, too.  
16 We identify what the key number is in relation to this,  
17 which I have already adverted to, which is the position  
18 of Sky overall.

19 With that table alongside, I would just ask the  
20 tribunal to read the highlights on modifications and  
21 corrections at (d)(i) through to (iv).

22 I would just emphasise the first sentence in (iii)  
23 in that regard, because although there has been  
24 different evidence given, even if we take the evidence  
25 at its highest, it doesn't change the overall analysis

1 that one draws from this.

2 Then, if I may, just referring to paragraph 68, we  
3 note that these numbers are effectively conservative for  
4 these purposes because they don't take into account  
5 a range of other matters, including the numbers Ofcom  
6 has relied upon are likely to overstate the extent to  
7 which rivals to Sky have customers taking substitute  
8 products, and I just ask the tribunal to read the  
9 remainder of that paragraph.

10 The reference to the meeting notes there referred to  
11 is at DF2/11. I would also ask the tribunal to look at  
12 (b), because this appears to be a number that weight is  
13 now being placed on, and we think it is a number that  
14 one needs to be extremely concerned about, for the  
15 reasons we articulate.

16 The tribunal will have noted at (c) the reference to  
17 exits.

18 So we say that competition concerns persist in  
19 retail pay TV, in particular when like-for-like  
20 comparisons are made.

21 We set out in paragraphs 69 and 70 why Sky's  
22 channels remain essential to compete, a point accepted  
23 by Ofcom. We have also referred to the fact that Sky  
24 retains the incentive and ability to limit distribution,  
25 a matter we have already canvassed, and I include

1 references there. The retail competition concerns are  
2 not remedied by the factors identified by Ofcom.

3 In particular, we note at 74 that wider distribution  
4 does not equate to retail competition. Indeed, as noted  
5 at 75, Ofcom itself rightly doesn't suggest that  
6 self-retail by Sky of Sky Sports and other Sky channels  
7 suggests an increase in competition, although Sky itself  
8 has at least at times sought to suggest otherwise.

9 In relation to other matters, we do highlight points  
10 that we have already canvassed in other contexts, the  
11 deals with other counterparties, and in particular  
12 I would highlight 77 through 79 there and the importance  
13 of considering those matters in context as articulated  
14 at 80.

15 We have already referred, in connection with the  
16 discussion of ground 5, to negotiations between BT and  
17 Sky. I won't repeat myself in relation to the points  
18 there.

19 The final issue that Ofcom touched upon in passing  
20 in the WMO is BT's investment in rights. It rightly  
21 hasn't sought to place real weight in its submissions on  
22 the fact that BT has bid for rights. We explain there  
23 why Ofcom is right to do so. The out-turn of all of  
24 these matters is that Ofcom did not have good reason, it  
25 certainly didn't have compelling reasons, to consider

1           that the conditions of retail competition in pay TV,  
2           which gave rise to the need and appropriateness for the  
3           WMO, have materially improved since 2010, and I refer to  
4           the confidential material in those two paragraphs.

5           Finally, unless the tribunal has any questions in  
6           relation to ground 2, I just refer the tribunal to  
7           ground 3. Ground 3 continues the theme of ground 2 and  
8           is concerned with particular deficiency in Ofcom's  
9           approach which undermined its overall analysis and  
10          exercise of discretion. It concerned Ofcom's failure to  
11          carry out a proper analysis of what the relevant  
12          products at issue are, and I invite the tribunal to read  
13          those sections. The conclusion is drawn at  
14          paragraph 104 that, before exercising its discretion  
15          under 316 to remove the WMO remedy, Ofcom needed to  
16          identify the correct products in the market that drive  
17          competition. Without answering that question, Ofcom  
18          couldn't ultimately be in a position to decide what  
19          regulatory conditions might be needed, or might continue  
20          to be needed, to ensure fair and effective competition.

21   THE CHAIRMAN: The way you are presenting it now, it is  
22          almost as a subset of ground 2.

23   MR BEARD: Yes. I think that is perhaps the easiest way to  
24          look at ground 3.

25   THE CHAIRMAN: Will that enable us to save 100 pages in our

1 judgment?

2 MR BEARD: It depends, of course, how you are going to draft  
3 it and what the answer is, sir. It may require at least  
4 100 pages.

5 THE CHAIRMAN: You would not feel that your case was being  
6 misrepresented if we chose to treat it as a subset?

7 MR BEARD: It certainly continues the theme of ground 2 and  
8 it is a particular deficiency that it was an error on  
9 the part of Ofcom not to consider the proper product  
10 scope that is the subject of retail competition in  
11 relation to this market. To that extent, it is  
12 a particular incident of the problems of Ofcom's  
13 failings, but it is a particular failing in  
14 circumstances where an orthodox competition analysis  
15 would inevitably start with product identification.

16 THE CHAIRMAN: You have listed lots of other failings and  
17 they are not separate grounds.

18 MR BEARD: No, but this is a particular dimension of an  
19 orthodox competition analysis and, therefore, it is  
20 highlighted and separated as ground 3.

21 THE CHAIRMAN: Right.

22 MR BEARD: Unless I can assist further.

23 THE CHAIRMAN: Thank you, Mr Beard. I think we will take  
24 a short break now and see where we are when we get back.  
25 (3.30 pm)

1 (A short break)

2 (3.46 pm)

3 MR HOLMES: Sir, as the tribunal will apprehend, I am  
4 crouching like a panther, ready to spring at BT's case.

5 THE CHAIRMAN: At least you are not Peppa Pig.

6 MR HOLMES: That is a comparison which has never been made,  
7 sir.

8 THE CHAIRMAN: The dash to finish today I think we have  
9 thought better of.

10 MR HOLMES: I'm grateful, sir. That was the conclusion that  
11 we similarly arrived at discussing amongst ourselves.

12 THE CHAIRMAN: Please proceed with alacrity, but don't lose  
13 your chance to state your case.

14 MR HOLMES: I'm grateful. Our thinking was, having  
15 discussed amongst the Bar, that it may be possible to  
16 finish by lunchtime tomorrow. We can see how we go. If  
17 that is to the tribunal's liking as a proposal.

18 THE CHAIRMAN: Let's plan on that.

19 MR HOLMES: I shall take the grounds in the order in which  
20 they are set out in the notice of appeal, partly because  
21 ground 1, as the legal ground, frames the subsequent  
22 discussion and partly also because grounds 1 to 3,  
23 having been heard this afternoon, will be fresh in the  
24 tribunal's mind. I hope to get through grounds 1 to 3  
25 today.

1 THE CHAIRMAN: It is all fresh in our minds, Mr Holmes.

2 Closing submissions by MR HOLMES

3 MR HOLMES: Of course. BT's case under ground 1 is that  
4 section 316 requires Ofcom to impose a licence condition  
5 whenever it finds a risk that a licence holder might  
6 engage in a practice prejudicial to fair and effective  
7 competition. We have heard during the trial about  
8 Sky Sports Max packages. BT's argument amounts to  
9 regulation Max. It construes section 316 as an  
10 inflexible duty to use licence conditions in every case  
11 of risk, save in cases where there is no possible  
12 condition that could address the risk or it is more  
13 appropriate to act under the Competition Act by virtue  
14 of section 316.

15 We say that interpretation cannot be correct.  
16 First, it is not what the statute says. Section 316  
17 does not provide, as it easily could, that Ofcom must  
18 impose every licence condition that is apt to address  
19 the risk of a provider engaging in practices prejudicial  
20 to fair and effective competition. It in fact requires  
21 the imposition of conditions that Ofcom consider  
22 appropriate for ensuring fair and effective competition,  
23 those conditions to include the conditions, if any, that  
24 Ofcom consider appropriate for securing that the service  
25 provider does not engage in prejudicial practices.

1           So, on its face, section 316 requires Ofcom to  
2           impose conditions, such conditions, if any, as it  
3           considers appropriate.

4           BT makes a number of points in support of its  
5           interpretation, and it may be easy to pick those up by  
6           reference to its closing submissions which Mr Beard  
7           followed today. If I could ask the tribunal to turn  
8           those up, at page 4.

9           Its first point is apparent from the heading above  
10          paragraph 12, "Section 316 as a duty mandatory". At  
11          paragraph 13, it explains the term "must" was  
12          specifically chosen by parliament. The ordinary  
13          language meaning of the term "must" is that it is  
14          imperative, not discretionary.

15          There is no dispute that "must" is imperative and  
16          not discretionary. There is equally no dispute that  
17          "must" does not mean the same thing as "may". However,  
18          one needs to look to see what it is that parliament  
19          required in section 316(2). What was the duty imposed  
20          upon Ofcom?

21          It is quite clear from the provisions that the duty  
22          is to impose the conditions, if any, that Ofcom  
23          considers appropriate for ensuring fair and effective  
24          competition and for securing that providers do not  
25          engage in practices prejudicial to fair and effective

1 competition. At paragraph 14 of its written closing  
2 submissions, BT introduces a distinction between the use  
3 of "must" in section 316(1) -- the use of "must",  
4 rather, in section 316(2), but its absence from 316(1),  
5 and this is said to underline that Ofcom is required by  
6 section 316(2) to do more than merely include any  
7 conditions it thinks appropriate for ensuring fair and  
8 effective competition.

9 Two points about this. First, in our submission, it  
10 is not correct that section 316(1) is any less mandatory  
11 than subsection (2). When subsection (1) states that  
12 the regulatory regime includes the conditions that Ofcom  
13 considers appropriate, that can only mean that that is  
14 how the regulatory regime is required to be. So Ofcom  
15 is required to include the conditions, if any, that it  
16 considers appropriate for ensuring fair and effective  
17 competition, and as a subset of those, it is required by  
18 (2) to include those conditions, if any, that are  
19 appropriate for securing that providers do not engage in  
20 practices prejudicial to fair and effective competition.

21 The second point is that both subsections specify,  
22 in the same terms, that the licence conditions to be put  
23 in place are those that Ofcom considers appropriate. So  
24 there is, in our submission, no relevant distinction  
25 between the threshold for intervention under each

1 provision.

2 The third point relied on by BT can be seen from the  
3 final sentence of paragraph 14, where BT submits that  
4 the fact that the statutory language refers to  
5 "conditions, if any" does not alter its analysis. The  
6 reference to "if any" is simply to cover situations  
7 where there are no appropriate conditions, ie, where no  
8 conditions would remove or attenuate the risk in  
9 question.

10 In Ofcom's submission, BT is right that the  
11 reference to "if any" covers situations where Ofcom  
12 considers that no condition would be appropriate, but  
13 there is an unexplained jump from that position to  
14 a confining of the circumstances in which a condition  
15 would not be appropriate to a situation where no  
16 workable condition can be formulated. But that is not  
17 supported by section 316. Section 316 allows Ofcom to  
18 determine that a condition would not be appropriate  
19 having regard to all relevant circumstances, including  
20 the extent of the risk, the consequences, if it were to  
21 eventuate, and the other regulatory options available.  
22 There is no limitation of the kind suggested by BT.

23 Fourthly, at paragraph 16, BT seeks to reinforce the  
24 distinction between "may" and "must" by reference to  
25 section 7 of the Communications Act, in which both terms

1 appear. In fact, section 7 illustrates that  
2 a decision-maker may be subject to a duty to exercise  
3 a discretion, and that is the case also with  
4 section 316. Thus section 7(5)(b) to which Mr Beard  
5 referred you provides that an assessment carried out  
6 under this section must relate to such matters as Ofcom  
7 considers appropriate.

8 In other words, the impact assessment under the  
9 section must relate to certain matters, but those  
10 matters, the matters in question, are those which Ofcom  
11 in its discretion regards as appropriate, and in the  
12 same way, section 316 requires Ofcom to include the  
13 conditions, if any, that it considers appropriate, but  
14 it has a discretion which is not confined to a choice  
15 among available conditions when deciding what action to  
16 take, if any, under section 316.

17 Ofcom's construction does not make "must" synonymous  
18 with "may". As with section 7, there is a duty, but the  
19 duty is not the one for which BT contends. The duty is  
20 a duty to impose conditions that Ofcom considers  
21 appropriate and only those conditions that Ofcom  
22 considers appropriate.

23 Now, in opening, Ms Potter asked in what  
24 circumstances Ofcom -- what the duty under section 316  
25 required, and my response was to say that it required

1 Ofcom to keep under consideration the question of what  
2 conditions are appropriate. I used the language of  
3 applying Ofcom's mind, but that really picks up on the  
4 language of "considering" under section 316. This is an  
5 ongoing duty.

6 In Ofcom's submission, that much is clear if one  
7 turns to another provision of the Communications Act,  
8 section 263(1), which is not in the bundle, but I hope  
9 that you may have the Grey Book -- oh, it is, I'm  
10 grateful. In which case it will be in the authorities  
11 bundle -- H2, I am told.

12 MR BEARD: H2/10.

13 MR HOLMES: I'm grateful, H2/10. That states:

14 "It shall be the duty of Ofcom, by exercising their  
15 powers under the 1990 Act and the 1996 Act, and their  
16 powers under this part" -- in our submission, their  
17 powers under this part should be read as including  
18 section 316 -- "to secure that the holder of every  
19 Broadcasting Act licence at all times holds his licence  
20 on the conditions which are, for the time being,  
21 included under this chapter and chapter 5 of this part  
22 in the regulatory regime for the licence service."

23 I would particularly emphasise the words "at all  
24 times". So Ofcom has to make sure that the regulatory  
25 regime includes the conditions --

1 THE CHAIRMAN: So that's the regulatory regime that's  
2 referred to in 316(1)?

3 MR HOLMES: Yes, sir. In my submission, that supports the  
4 position that there is an ongoing duty to monitor to  
5 ensure that the necessary conditions are in place under  
6 section 316.

7 So there is a duty, but the duty is conceptually  
8 different from that for which BT contends. It is the  
9 duty actually specified in the statutory language in  
10 section 316.

11 As regards section 317, this is a specific example  
12 of a matter to which Ofcom is required to have regard in  
13 exercising its discretion as to the conditions, if any,  
14 that are appropriate under section 316. But there is  
15 nothing in section 317 to indicate that it is exhaustive  
16 of the matters that Ofcom may take into account.

17 Mr Beard is correct that Ofcom did not apply  
18 section 317 in the WMO statement. Had Ofcom done so,  
19 the recourse to challenge Ofcom's decision would have  
20 been by way of judicial review under the provisions of  
21 section 317. Ofcom did not need to conclude as to  
22 whether the Competition Act would be a more appropriate  
23 way of proceeding, because it concluded that it was not  
24 appropriate to act under section 316, in any event. But  
25 you're correct, sir, that if and when Ofcom comes to

1 consider action under 316 in the future, it will at that  
2 stage have to consider whether it would be more  
3 appropriate to act under section 317, and, therefore,  
4 the reference to ex ante regulation in section 7 of  
5 the WMO statement necessarily comports a consideration  
6 of the other regulatory options that will be open to  
7 Ofcom at that point, including action under the  
8 Competition Act.

9 THE CHAIRMAN: Can you just say all that again?

10 MR HOLMES: Of course, sir.

11 Taking it in stages -- it might help if we have  
12 section 317 before us to develop this point. That is in  
13 the authorities bundle at tab 13/B.

14 THE CHAIRMAN: You're saying this time around, 2015, Ofcom  
15 was not considering whether to exercise its 316 power?  
16 Is that what you are saying?

17 MR HOLMES: No, sir, the language is more specific. If you  
18 look at section 317(2), the specific duty imposed under  
19 section 317 is that before exercising any of their  
20 Broadcasting Act powers --

21 THE CHAIRMAN: That would be the imposition of a licence  
22 condition.

23 MR HOLMES: Exactly, sir. You have my point. You hit the  
24 nail on the head.

25 THE CHAIRMAN: If you decide not to impose a licence

1 condition, you are not within 317(3); is that what  
2 you're saying?

3 MR HOLMES: If a licence condition is not considered  
4 appropriate for some other reason, it is not necessary,  
5 then one doesn't reach the stage of considering whether  
6 Competition Act powers should be used instead.

7 THE CHAIRMAN: So then, under part 7, next time around, if  
8 Ofcom reviews what is happening and wants to consider  
9 whether to intervene --

10 MR HOLMES: If -- sorry, I didn't mean to cut across you.

11 THE CHAIRMAN: If it then, at that point, decided no licence  
12 condition was necessary, then presumably it wouldn't  
13 have to look at the Competition Act.

14 MR HOLMES: That's correct, sir.

15 THE CHAIRMAN: But you were trying to bring into the ex ante  
16 basket every conceivable form of intervention, that is  
17 what made me ask you to repeat yourself.

18 MR HOLMES: I understand that, sir. Imagine that in a few  
19 months Ofcom learns that Sky has withdrawn supply from  
20 one of the existing pay TV retailers in the market,  
21 contrary to its expectation in the WMO statement. That  
22 would seem -- obviously I can't prejudge for Ofcom how  
23 it would act, but it would seem like an obvious trigger  
24 for Ofcom to assess whether intervention was required.

25 Now, Ofcom would consider matters in the round. It

1           would consider the option of intervening under  
2           section 316, but it has other tools in its regulatory  
3           tool kit --

4   THE CHAIRMAN:  Go through what those are.

5   MR HOLMES:  In particular, under the Competition Act, it has  
6           the possibility of considering whether the withdrawal of  
7           supply constitutes an infringement of the chapter 2  
8           prohibition.

9   THE CHAIRMAN:  Mr Beard, I think, has been telling us that  
10           that is ex post, not ex ante.

11   MR HOLMES:  The distinction, sir, in our submission, is not  
12           a helpful one when analysing the regulatory choices  
13           which confront Ofcom.

14   THE CHAIRMAN:  I think I have helped you a bit there.

15   MR HOLMES:  Under both of these possibilities, Ofcom will  
16           act to ensure the correct competitive outcome, the best  
17           and appropriate competitive outcome, going forward.  One  
18           reason why the Competition Act might commend itself --  
19           here, I am obviously not binding my clients, I couldn't  
20           do so -- is the ability under the Competition Act to  
21           take swift action by way of the imposition of interim  
22           measures.

23   THE CHAIRMAN:  Not a common feature of competition  
24           interventions, but I agree.

25   MR HOLMES:  But that is available as an option.

1           If Ofcom were deciding, in the alternative, to take  
2           swift action under section 317, it would need, before it  
3           imposed a licence condition, to consider whether it  
4           would be more appropriate to act under the  
5           Competition Act.

6   THE CHAIRMAN: I think what we are just trying to clarify  
7           with you is whether you are telling us that, in  
8           principle, Ofcom has all these possibilities -- I don't  
9           think that is controversial -- or whether you are saying  
10          that, under 7.16 of the WMO statement, the reference to  
11          reassessing the need for ex ante regulation means  
12          the whole spectrum of possible measures.

13   MR HOLMES: Sir, I am not saying that that should be  
14          interpreted as including a range of possible measures.  
15          I'm not sure that it is that specific as to the measures  
16          which it includes. I think it is fair to --

17   THE CHAIRMAN: Mr Beard made a point on it, so it would be  
18          useful for us.

19   MR HOLMES: The obvious way to read it in the context of  
20          a statement applying section 316 is as referring to the  
21          possibility of future intervention under section 316.  
22          The observation I am making is that, in the context of  
23          an intervention under 316, before intervening, Ofcom  
24          would need to consider -- it is no more than the point  
25          you were making -- and that Ofcom has a range of

1 regulatory options. I wouldn't go further than that.

2 Unless the tribunal has questions, I think that is  
3 all that I have to say about the question of statutory  
4 construction. There were two other points under  
5 ground 1 that I should quickly pick up.

6 The first is the suggestion that Ofcom did not  
7 conduct a forward-looking assessment. I think you have  
8 my submission about that, and I have referred the  
9 tribunal and shown the tribunal various provisions which  
10 indicate that Ofcom had regard to the likelihood of  
11 conduct prejudicial to fair and effective competition,  
12 which it assessed by reference both to incentives and to  
13 Sky's actual conduct in the market.

14 If I could just give you a few references to the WMO  
15 statement for your note, they are paragraph 1.11(iii),  
16 paragraph 6.3, paragraph 6.23 and paragraph 7.5. Unless  
17 the tribunal has any questions on that, I have nothing  
18 further to say about the forward-looking assessment.

19 THE CHAIRMAN: What was the second reference?

20 MR HOLMES: 6.3.

21 The other point that Mr Beard took under ground 1  
22 was that Ofcom had acted in breach of its duty to act in  
23 a proportionate manner. Now, Ofcom decided in the WMO  
24 statement not to impose a WMO obligation going forward  
25 because it did not regard such intervention as presently

1 necessary. This did not require any proportionality  
2 balancing exercise. It is never proportionate to impose  
3 an unnecessary remedy. By definition, that would be  
4 disproportionate.

5 The exercise required when deciding not to act is  
6 not the same as that which is required when imposing  
7 a measure. The Tesco test, to which Mr Beard has  
8 referred the tribunal, is specifically in the context of  
9 the adoption of a measure, and where a measure is  
10 adopted, one can readily see that one needs to weigh the  
11 regulatory burden of that intervention against the  
12 benefits that it might bring, and needs to consider  
13 whether there are other less restrictive ways of  
14 achieving the same objective.

15 So the question of proportionality arose only on one  
16 narrow issue in the context of the WMO statement.  
17 Having decided that it was not necessary to impose the  
18 WMO at present, Ofcom nonetheless considered, in the  
19 light of some stakeholder comments -- we have seen the  
20 comments of [redacted] Virgin Media in this context --  
21 whether it was nonetheless justified to impose a WMO  
22 obligation as a backstop against a potential future  
23 concern, and the tribunal will recall the passage to  
24 which I took you in which that point is considered.

25 It decided that this was not warranted. When it

1           refers to proportionality there, it is using the term  
2           "proportionate" in a commonsense way. You have a remedy  
3           that is not necessary, and the question is whether the  
4           remedy should be preserved against some future potential  
5           risk. Ofcom did not consider that that was a necessary  
6           intervention, it didn't consider that it was warranted,  
7           and that conclusion really did not require an elaborate  
8           proportionality assessment. There was no elaborate  
9           weighing exercise to be involved in that choice, that  
10          regulatory choice.

11                 I can see you are hesitating.

12   MS POTTER: Yes, I am just thinking through. We are now  
13           perhaps slightly more explicitly thinking about  
14           a two-part test in terms of an identification of  
15           a current situation and then, more explicitly, an  
16           identification of the future risk of adverse conduct.  
17           Then we also have the situation in relation to  
18           reciprocity or grant-back, which might fall into one or  
19           other basket.

20   MR HOLMES: Reciprocity and grant-back is a particular case  
21           which I will consider. I did not mean to suggest  
22           a two-part test in which the first part was confined to  
23           conduct presently eventuating on the market. My  
24           submission was that, on a proper reading, a fair  
25           reading, of the WMO statement, Ofcom decided that it was

1 not presently necessary to intervene, having regard  
2 either to present conduct in the market or the realistic  
3 likelihood of such conduct for the future.

4 MS POTTER: Can you take me to the relevant passage in the  
5 statement?

6 MR HOLMES: Of course. If we take up the statement, and  
7 this will require us to go to the specific references  
8 that I took the tribunal to that I mentioned for the  
9 tribunal's note.

10 So starting then at page 5, at paragraph 1.11(iii),  
11 the first point there is that Ofcom is considering there  
12 the likelihood of content holders engaging in the  
13 practices identified, that is to say, restricted  
14 distribution, limited distribution, taking into account  
15 their incentives, on the one hand, and their current  
16 supply arrangements, on the other.

17 Now, that analysis is taken forward in section 6 of  
18 the WMO statement, so we turn forward to that part of  
19 the statement, which commences, in my copy, on page 62,  
20 "Assessment of practices", and at section 6.3 you see  
21 what Ofcom is doing, repeating the language that one saw  
22 in 1.11:

23 "We conclude on the impact and likelihood of Sky  
24 engaging in each of these practices, taking account of  
25 our conclusions in section 5."

1           Does the tribunal have that? Then at 6.23, Ofcom is  
2           here considering whether Sky has incentives to limit  
3           distribution of its key content in the context of its  
4           current conduct. One sees in paragraph 6.23, first of  
5           all, an indication that it's a very difficult exercise  
6           to be certain as to what Sky's incentives are, very hard  
7           to conclude about that. In the final sentence, Ofcom  
8           takes the view that, in considering the likelihood of  
9           Sky acting on these incentives, it should consider, and  
10          it has considered, Sky's existing supply arrangements,  
11          which are then discussed in more detail further below.  
12          So there again a link between the consideration of  
13          current practices as informing the likelihood of future  
14          practices. That is what section 6 as a whole is  
15          concerned to consider.

16                 Then there is the discussion of the specific matters  
17                 that Ofcom was considering, and I will take, first of  
18                 all, whether restricted supply is a reasonable prospect;  
19                 secondly, pricing; and, thirdly, reciprocity. I will  
20                 take pricing and reciprocity, if I may, when we come to  
21                 grounds 4 and 5 subsequently.

22                 At 7.5, again just an observation, there one sees  
23                 again that in section 6 the discussion was about the  
24                 likelihood and impact of Sky engaging in the identified  
25                 practices.

1           So in our submission, Ofcom's assessment was  
2           a forward-looking one. It found, in view of  
3           the evidence which it had considered, both its  
4           consideration of the incentives and its consideration of  
5           current supply, that it would not be appropriate  
6           presently to intervene. So that is the general  
7           conclusion.

8           That general conclusion, in my submission, doesn't  
9           require the kind of fine-grained proportionality  
10          assessment, the detailed balancing exercise, which is  
11          described in the quotation from the Tesco judgment. It  
12          might be helpful if we just locate it within Mr Beard's  
13          speaking note or closing submissions to see its limited  
14          relevance in the present context. It is at paragraph 33  
15          of the closing submissions. One only, in my submission,  
16          needs to read that test to see that it's articulated in  
17          terms of the imposition of a measure, so where  
18          intervention is considered necessary, is the aim  
19          legitimate, is there another way of doing it which is  
20          less onerous, and are the adverse effects of it  
21          disproportionate to the aim?

22          That exercise is not readily transposable to  
23          a situation in which the regulator has decided that  
24          intervention is unnecessary. That was my submission on  
25          proportionality.

1           So where Ofcom addressed, used the term  
2           "proportionate" after the word search that Mr Beard said  
3           I had conducted, what it was stating, I think, was  
4           a simple and commonsense conclusion that, having decided  
5           that intervention was unnecessary having regard both to  
6           whether there were current practices and the likelihood  
7           of current practices, was it nonetheless appropriate to  
8           impose a regulatory backstop notwithstanding that  
9           conclusion to address a potential concern? Again, it  
10          might help if we look at the specific language of that  
11          paragraph. I think it is 1.34, from recollection. No,  
12          I was wrong about that. It is 1.25.

13           Ofcom says towards the end of that paragraph:

14           "Given the evidence before us of Sky's existing  
15          supply arrangements, we do not consider that it would be  
16          justifiable or proportionate to impose regulation  
17          effectively as a backstop to address a potential  
18          concern. We will continue to monitor Sky's practices to  
19          determine whether regulation might be appropriate in the  
20          future."

21           What Ofcom is there having regard to is whether  
22          a potential future concern would be sufficient to  
23          justify the remedy, and it doesn't consider that it  
24          would. Again, it is not clear how that assessment could  
25          really be amplified by way of the kind of balancing

1 exercise that Mr Beard focuses upon in his  
2 proportionality submissions.

3 MS POTTER: One question. This is in an executive summary  
4 on 1.25. Is there actually a place in the main body of  
5 the text where the point is picked up?

6 MR HOLMES: I don't believe so, madam, but I will look at  
7 that point overnight, if I may.

8 That concludes my submissions on ground 1. I can  
9 take ground 2 I think very quickly, in the last  
10 10 minutes remaining.

11 My submissions on ground 2 are as follows: first,  
12 the WMO statement is a behavioural remedy. It is about  
13 whether Sky is -- it was designed to prevent Sky from  
14 withholding the supply of its content. It was not  
15 designed to remove market power. Therefore, the  
16 continued presence of market power on Sky's part is not  
17 informative as to the appropriateness of retaining the  
18 remedy. It is accepted by Mr Beard that the remedy was  
19 not intended to remove market power.

20 Secondly, Mr Beard also accepted that Ofcom has had  
21 in the WMO statement to exercise judgment as to whether  
22 to intervene based on its current understanding of  
23 market conditions and the policy which it considered  
24 appropriate in 2015. It could not rely on a statement  
25 as to its policy in 2010. Therefore, the comments in

1 the 2010 statement as to the circumstances in which the  
2 WMO remedy might be withdrawn were not ones that it  
3 could realistically afford weight to.

4 Thirdly, as I accepted in my opening submissions,  
5 Ofcom was required to explain its position, but Ofcom  
6 did explain its reasons why it did not intend to impose  
7 a WMO remedy in 2015, and Mr Beard's criticism of that  
8 was really quite non-specific. It wasn't clear to me  
9 where the gap in Ofcom's reasoning was said to lie.

10 The fourth point is that Ofcom did conduct  
11 a competition analysis in the WMO statement and, if  
12 I may, I will pick up at this point in Ofcom's closing  
13 submissions for today, which I hope have reached you, at  
14 paragraph 23 on page 14.

15 You will see the submission at subparagraph 3 on  
16 page 15:

17 "Ofcom's analysis in the WMO statement covered all  
18 the matters that needed to be addressed in order to  
19 answer the question of whether the WMO remedy should be  
20 imposed for the future."

21 I set out there the analysis which covered the  
22 competitive dynamics and current conditions in the  
23 market.

24 In section 3, there was an analysis of the current  
25 retail competitors in pay TV generally, their scale of

1 operations, distribution methods and retail offers, the  
2 bundles in which pay TV services were offered and were  
3 being consumed and developments in the upstream market  
4 for sports rights.

5 In section 4, Ofcom considered what types of content  
6 were capable of influencing the choice of pay TV  
7 providers for a significant number of consumers, what  
8 was especially significant content in terms of  
9 conditioning the competitive dynamics, and the data  
10 that one would expect to see in considering  
11 whether some content was of a special character which  
12 set it apart, just as one would in a market definition  
13 exercise.

14 So survey evidence of subscriber preferences, the  
15 amounts paid by wholesale and retail channel providers,  
16 and by consumers, internal documentary evidence from Sky  
17 and BT regarding the importance they attach to sports  
18 rights generally and for different types of sports, and  
19 also the views expressed by stakeholders.

20 So Ofcom's conclusions there were grounded in an  
21 analysis of the particular characteristics of the type  
22 of content being considered.

23 In section 5, Ofcom considered the position of  
24 the right holders, it considered the number of retail  
25 subscribers to channels supplied by Sky and BT and their

1        respective revenue shares, a point to which Mr Beard  
2        attached importance, and it examined the strength of  
3        Sky's and BT's positions as bidders for sports rights:  
4        the types of matters one would consider when assessing  
5        market power -- incumbency advantages, position at the  
6        retail level. The overall conclusion is one that is not  
7        disputed between Ofcom and BT, namely, that the limited  
8        wholesale distribution of Sky Sports may harm  
9        competition between pay TV retailers.

10        Then in section 6, a consideration of another  
11        competitive dynamic, this time not structural but  
12        behavioural, considering what the conduct of Sky was and  
13        how that was affecting competition.

14        In section 7, conclusions drawn having regards to  
15        the prior analysis.

16        So, in my submission, the analysis encompassed the  
17        respective positions of Sky and its competitors, both at  
18        the wholesale and retail levels, and in relation to the  
19        supply of pay TV sports content and of pay TV more  
20        generally. Ofcom attended to competitive dynamics at  
21        both wholesale and retail levels, having regard, for  
22        instance, to Sky's bidding advantages, its potential  
23        retail incumbency advantages and the retail sale of  
24        pay TV and bundles. It reached conclusions as to Sky's  
25        strong market position and the importance of other

1 pay TV retailers of having access to the Sky Sports  
2 channels which are not in dispute. It considered both  
3 incentives and conduct. This was an adequate  
4 competition assessment.

5 A further point at paragraph 25, in the light of  
6 the conclusions arrived at in relation to market power  
7 and Sky's position on the market, it is not clear that  
8 it would have made any material difference to Ofcom's  
9 reasoning or conclusions if it had undertaken a more  
10 extensive analysis of the relevant markets or of  
11 the precise extent of Sky's market power.

12 Now, one specific point that Mr Beard attached  
13 importance to was the distinction between customers and  
14 subscribers, and this was a recurrent theme in the  
15 witness evidence from BT's witnesses. You see that this  
16 is addressed in footnote 8.

17 So the first point is that the distinction is  
18 overstated by BT, given that both regular subscribers  
19 and non-subscribing customers may allow pay TV retailers  
20 to operate profitably, but, in any event, Ofcom assessed  
21 Sky's market position at the wholesale and retail levels  
22 by reference to its revenue share. So even if there was  
23 some point to be made about Ofcom's count of  
24 the relevant subscribers to different pay TV platforms,  
25 it really takes matters no further forward, because

1 revenue will capture the different propensity to spend  
2 of, on the one hand, subscribers and, on the other hand,  
3 customers.

4 It was the revenue measure that Ofcom attached  
5 significance to in section 5 of the WMO statement, and  
6 we give the references there.

7 A final point on ground 2. BT repeatedly focuses  
8 upon the extent to which other retailers are selling  
9 Sky's premier sports channels. As I emphasised in  
10 opening, this is not, in itself, a measure of  
11 the success of the WMO remedy or of the need for its  
12 retention. The remedy existed to enable rival providers  
13 of pay television services generally to compete for  
14 subscribers in their wider pay TV offer by including  
15 sports content so that they could appeal to those  
16 subscribers that valued such content.

17 Given that Sky does appear to be supplying its  
18 premium sports channels on the market to a number of  
19 pay TV retailers now on terms which they have not  
20 objected to, that objective is now being met, and it may  
21 be met both through wholesale and self-retail.  
22 Self-retail is relevant provided Sky is not insisting  
23 inflexibly upon it, and there is no evidence to suggest  
24 that that is the case.

25 As Mr Matthew emphasised in his evidence to the

1 tribunal, there may be reasons why sports subscribers  
2 are difficult to win over from Sky's platform. This is  
3 a sticky market characterised by subscriber inertia.  
4 But Ofcom was not seeking to conduct a generalised  
5 investigation of the pay TV sector in the WMO statement.  
6 It was looking at a particular regulatory intervention.  
7 It explained in the WMO statement why it considered that  
8 that was no longer appropriate. Its decision was not  
9 based on a loss of market power on Sky's part or on the  
10 number of individuals subscribing to Sky Sports channels  
11 on other pay TV platforms. In our submission,  
12 therefore, the matters to which BT refers in its  
13 ground 3 do not invalidate the conclusions that were  
14 reached by Ofcom in the WMO statement.

15 Sir, if this is a convenient point?

16 THE CHAIRMAN: You said ground 3, but I think you meant  
17 ground 2.

18 MR HOLMES: Ground 2, yes, I beg your pardon. I am making  
19 good progress. On ground 3, given that Mr Beard didn't  
20 really cover it in his closing submissions, I don't  
21 propose to take that further forward. I imagine I can  
22 deal with grounds 4 and 5 promptly tomorrow morning.

23 THE CHAIRMAN: Then there will be time to hear from Sky and  
24 then BT again.

25 In that case, 10.30 am tomorrow.

1 (4.33 pm)

2 (The hearing was adjourned until  
3 Friday, 14 October 2016 at 10.30 am)

4 I N D E X

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6 Closing submissions by MR BEARD .....6

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8 Closing submissions by MR HOLMES .....111

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