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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1246/8/3/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 February 2016

Before:

PETER FREEMAN CBE, QC (Hon)
(Chairman)
PROFESSOR COLIN MAYER
CLARE POTTER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

SKY UK LIMITED

Intervener

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Official Court Reporters and Audio Transcribers
5 Chancery Lane, London EC4A 1BL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

CASE MANAGEMENT CONFERENCE

APPEARANCES

Miss Sarah Ford and Mr. Nikolaus Grubeck (instructed by BT Legal) appeared on behalf of the Appellant.

Mr. Josh Holmes (instructed by Ofcom) appeared on behalf of the Respondent.

Mr. James Flynn QC and Mr. Meredith Pickford QC (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Intervener.

1 THE CHAIRMAN: Good morning, welcome to court number 2. There is other business, not
2 necessarily more important but more numerous, in court number 1.

3 MISS FORD: Sir, I appear for BT with Mr. Nikolaus Grubeck. Mr. Josh Holmes is here for
4 Ofcom. Mr. James Flynn QC and Mr. Meredith Pickford QC are here for Sky. As the
5 Tribunal will be aware, this is the first CMC in this matter, which is BT's appeal against
6 Ofcom's Statement of 19th November 2015, and the review of the case of the Wholesale
7 Must Offer obligation.

8 Housekeeping, the Tribunal should have three bundles: volume 1 which is the
9 confidentiality marked copy of volume 1 of BT's appeal. You should then have BT notice
10 of appeal core bundle 2, which contains confidential information. That has the statement in
11 it, in particular at tab 18. You should then have volume 3, which is the agenda, the parties'
12 submissions and correspondence. You should also have a small file of authorities.

13 Dealing with matters in the order that they appear on the Tribunal's agenda, the first matter
14 that comes up is Sky's request for permission to intervene under Rule 16(1) of the Rules.
15 That is, of course, a matter for the Tribunal, but we have indicated we do not object to it in
16 principle. We do, however, feel that the scope, or the potential scope, of Sky's statement of
17 intervention is something which requires comments. Rule 16(6) makes it clear that it is a
18 matter of discretion for the Tribunal to supervise and oversee the scope of an intervention,
19 and the authorities tell us that the scope of the intervention should be appropriate to the type
20 of case, and it should be as concise as possible to prevent the intervention, essentially
21 hijacking-----

22 THE CHAIRMAN: Just before we get into that, if I can interrupt you, are there any factual
23 developments that we should be made aware of that are relevant to this case?

24 MISS FORD: Do you mean in terms of the parties' preparation for this hearing, sir?

25 THE CHAIRMAN: In terms of relevant events to the market, events that are relevant to the
26 market? We heard somewhere that Ofcom had closed a file in some case or other - is that
27 right?

28 MR. HOLMES: Yes, sir, I would need to take instructions, but my understanding is that the
29 Competition Act investigation, which was ongoing, has recently been the subject of a case
30 closure decision.

31 THE CHAIRMAN: And the published reasons for that we thought might be possibly relevant to
32 the dispute in this case, but it may be that we are wrong. Is somebody going to tell us?

1 MR. HOLMES: They may very well be covered in the parties' pleadings, and in their skeleton
2 arguments. I am not sure that any of the parties have submissions to make in respect of
3 them today.

4 THE CHAIRMAN: No. Obviously we will be taking odd breaks as we go through the morning.
5 If anybody thinks that there is something that we ought to be told, I would quite like to be
6 told rather than have to pick up information on the various websites.

7 MR. HOLMES: Indeed, sir, I shall take instructions and I shall give the Tribunal the----

8 THE CHAIRMAN: Presumably BT has a view on it as well.

9 MISS FORD: Sir, we certainly have not anticipated addressing it before the Tribunal today.

10 THE CHAIRMAN: I should have said something about timetable. My colleague has to go at one
11 o'clock, so we have to do this during the morning. We will do a full morning and we will
12 probably take a break in the middle. If we have to adjourn for any reason to decide
13 something, we will adjourn, but we would like to dispose of this during the course of a full
14 morning. All right. I interrupted you, please go on.

15 MISS FORD: Sir, I was addressing the potential scope of Sky's intervention, and simply making
16 a number of observations. We consider that in one important respect Sky's application to
17 intervene, and its skeleton for the purposes of this hearing, did not accurately represent the
18 nature of the issues in BT's appeal. We feel that this is something that needs to be
19 identified from the outset, because it will be relevant to the exercise of the Tribunal's
20 discretion.

21 Sky's perspective is that this challenge includes allegations about Sky's conduct, and so it
22 says that it is entitled to full rights of defence in these proceedings - that is para.6 of its
23 skeleton. It is certainly not our intention to suggest that the appeal is not important to Sky's
24 interests, but we do say that this is not the sort of case where it is appropriate to talk about
25 having full rights of a defence.

26 The reason is that BT's case in these proceedings is that Ofcom has taken the wrong
27 approach to a piece of legislation, which is concerned with potential future risks of harmful
28 practices occurring, and addressing those potential future risks by means of licence
29 conditions. Sir, we say the answer to that problem does not turn on an inquiry as to whether
30 Sky has misbehaved or whether there is a remedy for actual misbehaviour. We say this is
31 not a Competition Act *ex post* case, and that is why, in particular, Ground 1 of our appeal is
32 about the forward looking approach that the legislation requires Ofcom to take when it is
33 looking at the market.

1 BT's complaint is precisely that Ofcom was wrong to focus on whether or not there are
2 actual current instances of Sky misbehaving as the touchstone to whether or not it should
3 not intervene. We say Ofcom should have focused on whether Sky has the ability and the
4 incentive potentially in the future to engage in practices which are harmful to fair and
5 effective competition.

6 I can make that good by referring very briefly to our notice of appeal.

7 THE CHAIRMAN: Let us not get into the merits of the issues at this stage. I think we
8 understand what you are saying.

9 MISS FORD: I am grateful. The simple point is that, since this is not concerned with allegations
10 of actual misconduct, we say this is not the sort of case where it engages a full rights of a
11 defence type response.

12 We do acknowledge, of course, that in relation to grant-back, we have complained that Sky
13 has already engaged in a practice which is potentially prejudicial to fair and effective
14 competition. Even so, the essence of BT's complaint, even in relation to that, is to say that
15 Ofcom should have focused on the risk of a future risk.

16 THE CHAIRMAN: That is why I raised the point I raised, grant-back.

17 MISS FORD: Sir, yes. We simply say this is a public law decision by the Regulator, informed by
18 its duty to promote competition in pay TV. It is not a competition case about past conduct.
19 For those reasons we say that that is something that the Tribunal will, in due course, need to
20 take into account in considering the scope of Sky's potential intervention. We would not
21 want that intervention to misfire by treating this case as a case about a grievance or
22 misconduct when that is, in our submission, not what it is.

23 THE CHAIRMAN: Subject to that you are happy to allow them to intervene?

24 MISS FORD: We are.

25 THE CHAIRMAN: What does Mr. Holmes think about that?

26 MR. HOLMES: We have no objection to Sky's application to intervene, subject to the usual
27 provision that the Tribunal often makes about avoiding duplication so as to ensure that
28 proceedings----

29 THE CHAIRMAN: Absolutely, we do not want any duplication. Mr. Flynn, potential
30 intervener?

31 MR. FLYNN: Potential intervener at this stage, sir. If I may say so, the way Miss Ford put her
32 point really answered the question in the way she put it, in that there is some of our conduct
33 at issue, she recognised, in fact, but actually para.6 of our skeleton does not refer to conduct
34 at all. What it says is that we are entitled to full rights of defence because BT seeks to

1 secure the imposition, or re-imposition, of regulation on Sky. Given the extent of that,
2 which I do not need to emphasise, I suspect, this is a case where the intervention should not,
3 and indeed cannot, be limited to simply saying, "Hear, hear" to what Ofcom says, not least,
4 as we say, because there may be many points on which we would disagree with Ofcom on
5 this.

6 In a case where the relief sought is so extensive and so targeted on the intervener, this is not
7 the sort of case where we should be necessarily tucking in behind Ofcom, as it were. We
8 support the conclusion that they reach, that the appeal should be dismissed, but we may
9 have our reasons. For that reason, I would also say the risk of duplication is actually fairly
10 slight.

11 THE CHAIRMAN: I think it is pretty clear, we are going to allow Sky to intervene. We are not
12 going to impose any formal conditions. We will be watchful though, may I say, Mr. Flynn,
13 that this does not become an appeal by Sky against Ofcom's reasoning, because that is not
14 really what we want. We want to concentrate on BT's dispute with Ofcom's findings. That
15 is the issue in dispute, and I am sure you will take that very much to heart.

16 Next issue?

17 MISS FORD: Sir, the next issue is confidentiality, and it is common ground between the parties
18 that there should be a confidentiality ring. Ofcom has initially proposed a form of order
19 which we have worked with. I wonder if I might hand up the latest version of that to the
20 Tribunal. (Same handed) The Tribunal will see that there are two recitals that have been
21 added at the beginning, and these are to address the concerns expressed by the Football
22 Association and Premier League in relation to confidential information that was in the
23 statement. What the recitals reflect is the accommodation that has been reached whereby
24 BT has agreed at this juncture not to seek disclosure of that information, but reserving----

25 THE CHAIRMAN: What does "at this juncture" mean?

26 MISS FORD: It means, sir, that this is material which has been redacted and so we have not seen
27 it, and so we are not able to express a view as to whether it is or is not relevant to BT's
28 appeal. Indeed, we are concerned that potentially it may well be relevant to BT's appeal.
29 So we do not feel at this stage that we are able to say that we will not in due course make an
30 application for disclosure of that information.

31 What we have undertaken to do is to give reasonable notice of not less than seven days of
32 any such application to enable the Premier League to respond appropriately. This is the
33 accommodation that has enabled the Premier League not to attend this hearing.

34 THE CHAIRMAN: All right, go on, please.

1 MISS FORD: We then have what are essentially fairly standard terms of a confidentiality order.
2 The key question between the parties is the provision for undertakings in respect of in-house
3 lawyers. In this case, BT does not have external instructing solicitors on the record, but it
4 does have its in-house lawyers who equally have professional obligations and are subject to
5 discipline by a professional body. In previous cases in-house lawyers have been admitted in
6 to confidentiality rings on the giving of additional appropriately tailored undertakings.
7 Ofcom originally proposed an undertaking, and this is in part B of the order at para.6, and
8 we have marked that proposal to reflect our comments. The current proposal that BT makes
9 to the undertaking that its in-house solicitors will give is:

10 “... where the relevant adviser is an in-house solicitor employed by British
11 Telecommunications Plc, the relevant adviser will not, during these proceedings
12 and for a period of 24 months following the conclusion of the proceedings in the
13 Tribunal, be involved in, advise or act in, whether as a legal adviser or otherwise,
14 any other matters in relation to which the confidential information is relevant, save
15 ...”

16 and the first proviso is:

17 “... any directly related matters in relation to the same or substantially the same
18 subject matter as these proceedings ...”

19 The reason for the deletion of “further legal proceedings between the same parties” was that
20 it was our concern that we should not have to wait until matters can properly be
21 characterised as “legal proceedings” before these persons can be instructed on them if they
22 are directly related matters.

23 The second proviso is:

24 “... or with the written consent of the parties’ information relevant to the new
25 matters, which consent shall not be unreasonably withheld.”

26 There is a provision for the Tribunal to resolve any disputes.

27 So that is the form of undertaking, in our submission, that we would say it is appropriate to
28 offer.

29 There is an alternative form of undertaking which Sky has proposed and it is in bundle 3,
30 tab 19. The covering letter is dated 15th February. Sky circulated its own version of the
31 draft order, and the relevant undertakings are in Part B2 of that order. We have very
32 significant concerns about the breadth of the undertaking that is sought from our in-house
33 lawyers. Starting at para.8, it is said:

1 “My activities in relation to BT TV and any other television service that was or is
2 or may be offered by BT, whether on its own or in conjunction with any other
3 party, will, for the duration of these proceedings and for two years from their
4 conclusion by a judgment from any final competent Court of Appeal be limited to
5 the conduct of these and any directly related proceedings and to the provision of
6 legal advice on competition and regulatory matters unconnected to the subject of
7 these proceedings.”

8 Then para.9:

9 “During the relevant period I will have no involvement, whether by the giving of
10 legal advice or otherwise, in the consideration or formulation of commercial
11 strategy or policy in relation to BT Television.”

12 Pausing there, this is not simply no involvement in matters that are relevant to the
13 confidential information, this is a blanket exclusion for a period, the relevant period, being
14 two years after the end of these proceedings, from any commercial strategy or policy
15 matters in relation to BT TV, which we say, in our submission, is excessively wide.

16 There is then a further provision which goes on to say:

17 “In addition, for the relevant period and for three years thereafter ...”

18 So we are now talking five years after the end of these proceedings, we are being asked to
19 undertake -

20 “... I will not advise BT in relation to any matter concerning the supply or
21 acquisition of audio visual content, including but not limited to sports content and
22 channels.”

23 So this is any content related matter whatsoever, it is not limited to sports rights which are
24 what is in issue in these proceedings. It is a blanket five year ban on advising in relation to
25 the acquisition of content. Then:

26 “I will not advise BT in relation to any bid or negotiation for audio visual rights or
27 in relation to any actual or potential sale, acquisition or use of audio visual rights,
28 including specifically the following in relation to sports rights:
29 any future invitations to tender ...”

30 etc, Again, this is not confined to the sports rights that are in issue in these proceedings.

31 This is a five year ban on advising on bids for the acquisition of audio visual content. In our
32 submission, this is excessively broad and it is not necessary to protect the information that
33 will be put into the ring.

34 Sir, those are my submissions on the issue of in-house lawyers and the undertaking.

1 THE CHAIRMAN: Mr. Holmes?

2 MR. HOLMES: Sir, we agree that a confidentiality ring should be established. The issue of a
3 specific treatment of in-house lawyers is really one for the party whose confidential material
4 is in issue to address the Tribunal, and we do not take a view on that.

5 THE CHAIRMAN: Otherwise you are content with this draft?

6 MR. HOLMES: Yes, sir.

7 THE CHAIRMAN: Mr. Flynn, in your new found status as the intervening party.

8 MR. FLYNN: Yes, we have been rapidly upgraded to version 1.1, or something of the sort. May
9 it go no further.

10 Sir, what Miss Ford has referred to at Part B(ii) of our suggested order is essentially the one
11 that BT signed up to in previous iterations of these proceedings after a hard fought fight
12 particularly run by the Premier League, but also by Sky. In our submission, it is appropriate
13 to have that sort of reservation when documents and material are going to be, as it were,
14 within the BT building that go to the heart of everyone's strategy in relation to pay TV and
15 particularly the content rights. Although Mr. Holmes says it is for those whose confidential
16 information is at stake to make representations to the Tribunal, I can only do this on behalf
17 of Sky, but plainly there is confidential material of other third parties, not limited to the
18 Premier League either, that is going to be covered by this order, and they are not here today.
19 I can only remind you of that fact.

20 THE CHAIRMAN: I was coming to them, so do not worry.

21 MR. HOLMES: Sir, I was proposing to make submissions in respect of other third parties when
22 considering the scope of material to be disclosed.

23 THE CHAIRMAN: Absolutely. I am just trying to get through this issue of restrictions on in-
24 house lawyers, which is effectively BT's in-house lawyers.

25 MR. FLYNN: It is in respect of BT's in-house lawyers, because those are the only in-house
26 lawyers who have proposed to go into the ring, and Sky has never thought that it would be
27 possible for its in-house lawyers to do their job if they were within the ring----

28 THE CHAIRMAN: Your position basically is that this is sensitive information, and if it is in the
29 BT building special provisions should apply?

30 MR. FLYNN: Special provisions should apply, have been accepted in the past, and should extend
31 - perhaps I could just point you to para.4, the arrangements for security and custody of these
32 documents. As you say, it is sensitive information, and some of it is information of the
33 highest possible sensitivity.

1 Perhaps I can just flag at this point, Miss Ford referred to the recital, which I understand to
2 have been agreed between BT and the Premier League in relation to para.5.41 of the
3 Statement. That paragraph includes references to Sky material. It is followed by another
4 paragraph, 5.42, which we say should essentially have the same treatment for the same
5 reasons.

6 THE CHAIRMAN: Mr. Flynn, I will come on to that, we have got that as a separate issue.

7 MR. FLYNN: If I can just flag that now----

8 THE CHAIRMAN: There are matters of confidentiality to particular entities.

9 MR. FLYNN: I have made the essential point that Part B is essentially the form of order that has
10 been accepted by BT in these proceedings before in view of the level of sensitivity of
11 material that will be disclosed.

12 THE CHAIRMAN: Subject to the point about providing for particular confidential instances, if I
13 can call them those, now you are an intervening party, how are we going to marry your draft
14 order with the order that Ofcom and BT have said they are both happy with, because we
15 need to get this resolved?

16 MR. FLYNN: I can only say, sir, it is a matter of regret that BT has not engaged with our draft
17 which we sent them several times several days ago, and have essentially said, "Ofcom has
18 proposed a draft, so we are happy with that". I have made the points that we think are
19 important in our draft.

20 THE CHAIRMAN: In terms of getting it agreed, how would you propose to go forward?

21 MR. FLYNN: We would propose that our conditions go into the order.

22 THE CHAIRMAN: It is your conditions into the framework?

23 MR. FLYNN: The conditions to which I have drawn attention should appropriately be
24 incorporated in----

25 THE CHAIRMAN: Which are 8 and 9?

26 MR. FLYNN: Which are 4 and 8 and 9. Those are the particular ones.

27 THE CHAIRMAN: I think we will leave that where it is for the moment.

28 MISS FORD: Sir, may I make four very short points in reply? The first point is that it is being
29 said that this is essentially the BT signed up to last time. In fact, it is wider than the BT
30 signed up to last time, in that 9(a) was not in previously.

31 THE CHAIRMAN: That is the advice one?

32 MISS FORD: This is the advice one. It is also the case that in the previous proceedings the
33 material in the ring included models relating to pay TV businesses generally. One can see

1 the justification there for having a restriction that applies to pay TV businesses generally.
2 In our submission, that will not apply in the present circumstances.

3 Thirdly, it is very much the case that BT did offer those undertakings last time, but found
4 them excessively onerous and impracticable to work with. So this why, having had the
5 experience of the undertakings which were offered last time, we are aware of the difficulties
6 and we seek to make them more tailored and appropriate in this instance.

7 THE CHAIRMAN: Have you engaged with Sky on this, or have you just exchanged letters, or
8 what?

9 MISS FORD: We do not agree with the characterisation of events.

10 THE CHAIRMAN: I am hearing “no” from a sedentary position.

11 MISS FORD: What of course happened is that Ofcom circulated a draft, and we responded on
12 that draft. It was not particularly helpful for Sky, instead of engaging with that draft, to
13 produce an entirely different draft. We now hear, of course, that the only things that need to
14 be inserted into the draft are paras.4, 8 and 9. So those could have been inserted into the
15 Ofcom draft. We have no objection to para.4, but we do have very great concerns about 8
16 and 9.

17 THE CHAIRMAN: If we were to say what we thought about this, would you then be in a
18 position to agree a draft order between yourselves?

19 MR. FLYNN: We would use our best endeavours, certainly, sir.

20 MISS POTTER: I think it would just be useful to understand what you are saying are the
21 difficulties that were encountered in terms of why this form of undertaking is considered to
22 be too onerous. I think that is directly relevant in terms of understanding how you would
23 see the differences between the two sets of undertakings?

24 MISS FORD: The undertaking we have proposed is limiting BT’s in-house lawyers in the
25 matters that they can engage in that are relevant to the confidential information that is in the
26 ring. We consider that that is appropriately tailored to the protection that is required.
27 The concern is that Sky’s draft order is essentially requiring the BT in-house lawyers not to
28 act on any matters in relation to commercial strategy or policy in relation to BT television,
29 which is enormously broad in terms of the restrictions; and also not to advise in relation to
30 any matter concerning audio visual content - again, enormously broad; or bids for
31 audiovisual content.

32 Of course, BT does have limited resources in terms of the lawyers that are available to deal
33 with the many matters that it has to deal with, and it does raise very real practical problems

1 when those lawyers have undertaken not to become involved in such a broad spectrum of
2 matters that are not necessarily related to the confidential information in issue.

3 THE CHAIRMAN: So para.4 is all right from your point of view?

4 MISS FORD: Sir, yes, we are content with that.

5 THE CHAIRMAN: So we are talking about 8 and 9, and whether they go too far and extend for
6 too long?

7 MISS FORD: Sir, yes.

8 THE CHAIRMAN: Mr. Flynn?

9 MR. FLYNN: Might I just make a couple of observations, as it were going the other way? The
10 BT proposal refers to directly related matters and would allow the legal adviser concerned
11 to advise on those. That is an extraordinarily wide phrase, and we are troubled by the idea
12 that in-house solicitors with knowledge of the commercial strategy of those engaged in pay
13 TV could be advising BT on commercial matters in relation to pay TV. In our submission,
14 that is just completely inappropriate. Some of this material is not the sort of thing that you
15 can forget you know. The suggestion made by Miss Ford in a rather airy way that the
16 material at issue in the 2010 proceedings relating to the 2010 Statement was materially
17 more sensitive than those that would be available on disclosure of the Statement and other
18 materials that BT seeks, I think is just wrong. There are many highly sensitive and
19 commercially confidential matters that would be put into the ring, as we understand it. So,
20 in our submission, a much tighter restriction is appropriate.

21 By way of example, Mr. Williams, in his witness statement, refers to a regular meeting of a
22 regulatory strategy group fortnightly, and then as necessary on individual cases. In our
23 view, it would be entirely inappropriate for in-house solicitors with knowledge of the
24 material that will be put in the ring to be involved in the preparation of, or participating in,
25 or reporting to, that sort of group. This would give BT essentially an unfair and
26 inappropriate advantage in the market. It is not confined to bidding strategy for content
27 rights, although that is a key part of the concern.

28 THE CHAIRMAN: Has anybody got anything else to say on this issue? It strikes us that if 2010
29 is a point of comparison, BT is hardly less of a competitor to Sky than it was then, and
30 arguably more. So we are dealing with a potential exchange of confidential information
31 between competitors. This is not comfortable ground for a Tribunal to be on. Our
32 inclination is to be quite cautious.

33 I think the best we can do is, we will take this away during the morning and see what else
34 we have to decide on and give you a ruling from which you could construct an agreed draft

1 order, because it is an absolute priority to get this confidentiality ring set up and to get
2 information into it.

3 As to what goes into it, clearly the starting point is the unredacted Statement. We have
4 already had one qualification to that. I suspect there are others. Who is going to address us
5 on that? It may be best if you do, Mr. Holmes.

6 MR. HOLMES: It may be sensible if I do, because I am not sure the other parties are necessarily
7 aware of the most recent developments in correspondence.

8 THE CHAIRMAN: It may be that they should never be aware.

9 MR. HOLMES: I shall proceed with caution in view of one of those letters.

10 THE CHAIRMAN: Yes, I think you should be quite cautious. We are being very cautious.

11 MR. HOLMES: The starting point from our perspective is that we do not oppose an application
12 for disclosure of an unredacted confidential version of the Decision. We do not, sir, accept
13 that all of the material in the Decision is necessarily relevant.

14 Proceeding pragmatically, it is, therefore, sensible to consider specific objections to
15 disclosure from third parties, and with that in mind we wrote to those parties whose
16 confidential material was in issue. One of those parties was the Premier League, and, as the
17 Tribunal has heard, agreement has been reached whereby the material that the Premier
18 League was concerned about is not to be disclosed in the first instance, but BT has liberty to
19 apply on notice. That appears to us a sensible conclusion.

20 A second third party is TalkTalk and, as the Tribunal may have seen from correspondence
21 that came last night, they do have concerns about the disclosure of two particular parts of
22 the Decision. They are concerned of course about the disclosure of any of their confidential
23 material, and therefore would want to see a confidentiality ring in place. The two passages
24 that they regard as particularly sensitive are paras.6.61 and footnote 292. In relation to this,
25 they oppose disclosure altogether, but they say that if the Tribunal is minded to make
26 disclosure, given that this is material that is commercially sensitive, they would not like to
27 see it go to the internal advisers of their direct competitors. They, therefore, request that
28 any disclosure be confined, if disclosure is made, to external advisers.

29 THE CHAIRMAN: Their preferred position is that these two items that they refer to are not put
30 into the ring?

31 MR. HOLMES: Yes, sir, but they do suggest, as a fall-back, the possibility that they might
32 otherwise be disclosed to external advisers alone.

33 THE CHAIRMAN: We need to be absolutely clear what that is, because from the redacted
34 version, which of course we have got also, some of the excisions are a little difficult to

1 follow, but I am taking from what you are saying that that is para.6.61, the excised bit -
2 there are actually two excised bits, that is one of the confusions, but presumably one of
3 them, footnote 292, which actually is a footnote to the previous paragraph. It is not the
4 whole footnote they want redacted, it is just the excised part that we have?

5 MR. HOLMES: Yes, that is correct.

6 THE CHAIRMAN: We understand what they are saying, I think.

7 MR. HOLMES: Our position, sir, is that this material is likely to be relevant to the matters in
8 issue in this appeal.

9 THE CHAIRMAN: Is likely to be relevant, yes, but it is confidential.

10 MR. HOLMES: But it is confidential. Sir, for that reason, we would urge upon the Tribunal the
11 fall-back position that TalkTalk has proposed, that the material should be released in the
12 first instance to external advisers alone. Admittedly, that adds another layer of complexity,
13 but BT's external advisers can consider the material and if so advised they can then apply
14 on notice to TalkTalk. So the solution is along the same lines as that proposed for Premier
15 League, save that there would be some initial disclosure and that if BT needed to apply they
16 could do so. We would hope that that could then be resolved on the papers, but TalkTalk
17 could make representations to the Tribunal, as appropriate. They are, of course, not
18 represented here today.

19 I have not had an opportunity to canvas with my learned friend Miss Ford whether that
20 would be opposed as a solution.

21 THE CHAIRMAN: Let me just be clear, Ofcom has been in touch with every party whose
22 confidential information is subject to redaction in the published version?

23 MR. HOLMES: Yes, sir.

24 THE CHAIRMAN: And the replies that you have had that we have seen are all the replies, or do
25 we take it that everybody else says fine?

26 MR. HOLMES: Sir, you have seen, I think, all of the three replies that have been received, but let
27 me just seek specific instructions to be sure. (After a pause) Sir, there is only one other
28 third party besides those three of whom the Tribunal is aware, and that is Virgin Media.

29 THE CHAIRMAN: Yes, we have been wondering about them.

30 MR. HOLMES: Indeed, sir. Our understanding is that Virgin Media has not provided any
31 response. What we should perhaps do, sir, out of caution, is to seek confirmation of that
32 fact during one of the adjournments to which you referred earlier.

33 THE CHAIRMAN: It might be helpful.

34 MR. HOLMES: This is, as you say, a sensitive ground.

1 THE CHAIRMAN: We do not want things coming up to surprise us. Can we then deal with the
2 third entity.

3 MR. HOLMES: Here, sir, because I apprehend from the way in which you introduced this, we
4 need to be cautious because they have sought to keep their identity confidential. They have
5 not specified with precision in response to the Tribunal's request which passages in the
6 Decision they are concerned about.

7 THE CHAIRMAN: Presumably you know.

8 MR. HOLMES: Ofcom can identify those passages.

9 THE CHAIRMAN: I think our question to you is, can this be solved by simply withholding all
10 the redacted passages in the first instance?

11 MR. HOLMES: Yes, sir, we think it can. In our view, this material is not of any relevance to the
12 matters raised by BT in its notice of appeal. On that basis, again BT should have liberty to
13 apply on notice. Having considered the otherwise unredacted version of the Decision, we
14 do not think the material needs to be disclosed now.

15 THE CHAIRMAN: We are debating whether they are a known unknown or an unknown
16 unknown. If that can be dealt with by redaction, that is helpful.

17 MR. HOLMES: Yes, sir.

18 THE CHAIRMAN: We are working towards a version of the Statement that is substantially
19 unredacted, but there are a few specific exclusions still - is that acceptable to everybody?
20 We are talking about the Statement.

21 MR. FLYNN: Let me just say what I was going to say and then Miss Ford will hear it. I think
22 two solutions have been proposed. One is in relation to TalkTalk, as I understood it, the
23 unredacted version should go into a ring consisting only of external lawyers. In relation to
24 others, I think it is being suggested that the version put into the confidentiality ring should
25 have excisions from it, and that is the solution adopted in relation to the Premier League's
26 material----

27 THE CHAIRMAN: And that would include Sky's material.

28 MR. FLYNN: It includes Sky's material in 5.41. We would say that same solution should apply
29 to 5.42. That is the point we make in para.9 of our skeleton. We are going back to a sort of
30 *ad hoc* version of what happened in the VULA appeals that we also refer to where Ofcom
31 identified in the first place material that did not need to go in on, as I understand it,
32 relevance grounds. We would essentially like to be in the same position as the Premier
33 League in relation to that very limited matter.

34 THE CHAIRMAN: Miss Ford?

1 MISS FORD: Sir, taking these in order, the first one was TalkTalk, para.6.61 and footnote 292.
2 We are, of course, in a position that we cannot see the information, so we are in some
3 difficulty about submissions about its relevance. It appears to us that this is highly relevant
4 to BT's appeal. BT's ground of appeal on price is essentially saying that BT submitted to
5 Ofcom a model which should have prompted Ofcom to go back and look at the question of
6 whether or not Sky's wholesale prices were incompatible with fair and effective
7 competition. This paragraph is dealing with BT's model, and so it seems to us that this is
8 likely to be information which is highly relevant.

9 THE CHAIRMAN: And also highly valuable.

10 MISS FORD: One cannot tell without seeing it.

11 THE CHAIRMAN: You cannot have it both ways.

12 MISS FORD: We do resist the proposal that this should be dealt with by means of a two tier
13 confidentiality ring. That does mean that BT is put at a significant disadvantage because
14 those parties that have instructed external lawyers are able to see that information, whereas
15 BT's in-house lawyers cannot see it.

16 THE CHAIRMAN: We have to balance your rights as a appellant, which obviously are very
17 important, with your position as a competitor. Our duty is to safeguard confidential
18 commercial information. These are very important matters, they cannot just be brushed
19 aside.

20 MISS FORD: Sir, that is certainly not in dispute, but of course we are talking about a situation
21 where BT's in-house lawyers are governed by their own professional obligations. They are
22 giving undertakings in a form to be determined in order to protect those parties' rights. So
23 it is not a situation that their having access is, in our submission, in any way problematic.

24 THE CHAIRMAN: You are on slightly uncomfortable ground while disagreeing as to the
25 breadth of the restrictions on BT's in-house lawyers.

26 MISS FORD: In my submission, that is not necessarily the case because we have proposed an
27 appropriate undertaking which addresses, in our submission, the concerns about the specific
28 confidential information that is going to be disclosed into this ring. They are undertaking
29 not to be engaged in matters that relate to that confidential information.

30 THE CHAIRMAN: You can understand why other people might think that was not enough.

31 MISS FORD: In our submission, to the extent that there are concerns, the undertakings that we
32 have offered address those concerns.

33 THE CHAIRMAN: I think we understand what you are saying.

34 MISS FORD: Sir, that was Top-up TV - sorry, that was TalkTalk.

1 THE CHAIRMAN: Top-up TV are a different kettle of fish.

2 MISS FORD: A blast from the past. Sir, there is the anonymous entity. We have not been told
3 which paragraphs that anonymous entity objects to, so we are not really in any position to
4 comment one way or the other on that.

5 THE CHAIRMAN: Nor have we, so we are in the same boat.

6 MISS FORD: We would request that we be provided with those paragraphs so that we can
7 express----

8 THE CHAIRMAN: I am not sure that is possible. You did hear Ofcom's position, which is that
9 this material is not relevant.

10 MISS FORD: We have heard that submission. We are, of course, not in any position to assess it
11 one way or the other.

12 THE CHAIRMAN: It is quite pertinent, I think. Your next point?

13 MISS FORD: Sir, the next point concerns Sky's position. Sky has said that it should be
14 permitted to exclude information in para.5.43 and footnote 186 of the statement. We are
15 told that that is because this information is highly sensitive and not relevant. The difficulty
16 we have with that is that, in our submission, it appears potentially to be directly relevant to
17 an issue in the appeal in so far as it is possible to tell.

18 Can I ask the Tribunal to turn up 5.42.

19 THE CHAIRMAN: We have the right footnote, have we, 186?

20 MISS FORD: Yes. That paragraph states:

21 "Nevertheless, BT has recently won some important rights that were previously
22 held by Sky (for example as well as the live Champions League rights, it has
23 recently won some cricket rights. We therefore recognise that Sky is facing
24 increasing competition when bidding for sports rights, in particular from BT. In
25 addition ..."

26 and then there is the excision. On its face, we understand that this is likely to concern the
27 extent of Sky's bidding advantages for sports rights, and the extent to which Sky might face
28 increasing competition from BT, when bidding for the sports rights. That is a matter that is
29 very much in issue in the present appeal.

30 Can I ask you to look at the notice of appeal, which is in bundle 1, tab 1. This is by way of
31 example. This is in the context of ground of appeal 2, error of discretion in discerning
32 whether there was a risk of Sky engaging in wholesale distribution practices detrimental to
33 the development of fair and effective competition, and this is under the heading on p.40,

1 “Ofcom’s error”, so these are the passages where we are defining where we say Ofcom
2 went wrong. Paragraph 141(d) and (e), we are saying:

3 “(d) [On] its own clear findings, in the WMO Statement, that the essential
4 conditions for *ex ante* regulation of Sky still existed ... Ofcom acknowledged
5 data demonstrating that Sky retains significant market power and that Sky’s
6 insurmountable bidding advantages remain. It found that, since 2010:

7 (1) Sky continues to possess the ability to disrupt the development of fair and
8 effective competition, by limiting distribution of channels that contain key content;

9 (2) Sky has in principle the incentive to frustrate the development of fair and
10 effective competition ...

11 (e) the fact that Ofcom refers, in the WMO Statement, to no factors which are
12 capable of giving confidence that the economic conditions are in existence for fair
13 and effective competition to emerge. To the contrary, Ofcom specifically found
14 that there were persistent structural features of the pay TV sector, such as Sky’s
15 construed bidding advantages for sports rights, which there was no reason to
16 suppose would progressively wither away. These features would lead one to
17 expect that fair and effective competition would not emerge, absent regulation.”

18 THE CHAIRMAN: I am not sure Sky are saying it is not relevant. They are saying it is highly
19 confidential.

20 MISS FORD: Sir, they have said that it is not being put in issue in BT’s appeal - I think that was
21 the way they have put it.

22 THE CHAIRMAN: As we do not know what it is, it is very difficult for us to comment.

23 MISS FORD: We are in a similar position. The point is, BT’s case is that Ofcom should have
24 taken into account, amongst other things, the fact that Sky’s bidding advantages were
25 persistent and that there was no reason to think that they would progressively wither away.
26 If Sky is not proposing to take issue with that proposition, if it is going to be no part of
27 Sky’s case that actually its bidding advantages have not reduced, and they are not likely to,
28 if it is not going to claim that it faces increased competition from BT, then this is not an
29 issue in the appeal.

30 If Sky is going to be making submissions about the extent of its bidding advantages and BT
31 is a competitor, then, in our submission, this is potentially highly material information.

32 THE CHAIRMAN: Mr. Holmes, Ofcom had a view on the parties’ relevant redacted information.
33 What is your view on this one?

1 MR. HOLMES: Sir, this is a little difficult, because we apprehend some uncertainty in relation to
2 how BT puts its case. It is accepted in the Decision that Sky has bidding advantages. That
3 is a feature that Ofcom does not dispute. Sir, that is a factual basis for the decision. It
4 seems to us that it would only be relevant in so far as BT were making the case that Ofcom
5 has under-estimated or has failed to give sufficient weight to the bidding advantages, such
6 as they are. I am not clear whether that is BT's position.

7 MISS FORD: Sir, I wonder if I could be clear. Our concern is that Sky has made it very clear in
8 its skeleton that in its intervention it does not consider itself bound by findings that Ofcom
9 has made.

10 THE CHAIRMAN: We have told them that they have got to be careful about that.

11 MISS FORD: Sir, you have, and we do not know where that will come out in terms of the scope
12 of the intervention. In so far as Sky differs with Ofcom and seeks to advance a case either
13 that its bidding advantages have reduced, or that BT is now a more effective competitor, if it
14 chooses to differ with Ofcom on that point, then this is very much in issue. If it can indicate
15 to us that it does not propose to do that then we would agree that it is not an issue.

16 THE CHAIRMAN: I have to say, I think we are going to have to deal with this in two stages. I
17 think our concern this morning is to establish a confidentiality ring and get sufficient
18 material into it so that the case can proceed. You can decide what you want to do and what
19 else you might wish to ask for. There will be a time and a place for that. I think at this
20 stage we will take a fairly cautious approach.

21 MISS POTTER: Can I just ask whether Sky would consider this material could be treated in the
22 same way as is proposed for the TalkTalk material, namely, that it could go into a super-
23 confidentiality ring. I am just conscious that it is very difficult obviously for BT to make
24 representations about relevance without having some idea of what the material is?

25 MR. FLYNN: Madam, no. We would suggest that it is the same sort of material as BT has
26 already accepted in relation to Premier League in relation to para.5.41, which includes some
27 of our material available to the Premier League, if I could put it no more specifically than
28 that. It is in the same line and it is of the same level of confidentiality, and we would say, as
29 far as we can understand BT's appeal, lack of relevance because this paragraph appears in
30 the middle of a section which begins and ends by saying that Ofcom considers that Sky has,
31 as it were, embedded structural advantages in bidding. As Mr. Holmes says. it is not clear
32 what part of that BT is going to take issue on.

33 We have always taken a different view from Ofcom as to our incentives in relation to
34 bidding. That is a quite different matter from what happened in a particular auction. I have

1 already explained the sensitivity of the material, its impossibility to forget, and the
2 immediate advantage that it might give anyone considering participating in further bids.
3 We say this should be treated in the same way as BT has already accepted in relation to the
4 Premier League's material. If, in due course, an application is made then it is going to have
5 to be made in full and not, as it were, on the hoof in the initial CMC.

6 THE CHAIRMAN: On the assumption that we will deal with that also before the end of the
7 conference, does that take us on to the material that the disclosure into the ring might give
8 rise to dispute about, as it were? Do you want to address us on that?

9 MISS FORD: Sir, yes, we have sought disclosure of documents referred to and relied on in the
10 main text of footnotes in the WMO review statement, the subjects of challenge in the
11 proceedings, and we have indicated that we anticipate that that will include confidential
12 versions of Ofcom's consultations and the relevant third party consultation responses and/or
13 responses to requests for further information. The basis for that formulation is that these are
14 documents which are both referred to and relied on in the Statement which is under
15 challenge. Sir, they are material which is being relied on by Ofcom in reaching its overall
16 conclusion that regulation in this market should be lifted. That is, of course, the challenge
17 that BT brings to the Statement.

18 In our submission, it is important to recognise that our challenge is not limited to a few
19 isolated or discrete statements which are scattered through the Statement and which you
20 could then identify the underlying documents relating to those isolated statements. It is a
21 challenge to the combination of factors that Ofcom has relied on which it considered to be
22 sufficient to satisfy itself that there was no need for further regulation in this market place,
23 and so no need to maintain the intervention. In our submission, it makes sense from a
24 practical perspective that we see the material which underpins that.

25 Just to demonstrate the point about the breadth of the matters that we are dealing with, can I
26 ask you to look at the Executive Summary of the Statement. It is in the second bundle at tab
27 18, and I am referring to this as convenient overview of the sort of matters that Ofcom is
28 dealing with throughout the Statement. If you look, for example, above 1.4, Ofcom says,
29 "There have been a number of developments in pay TV since we imposed a WMO
30 obligation in 2010", and it goes on to set them out.

31 Of course, BT's case, as set out in its notice of appeal, is that these developments that
32 Ofcom has recognised are not relevant to the existence of competition, and essentially
33 nothing has changed.

1 Ofcom then goes on to say above 1.7, “We have reviewed whether there are practices which
2 may prejudice fair and effective competition in pay TV services”. That is then developed in
3 section 6 of the Statement, and that is the subject of BT’s grounds of appeal in terms of
4 price and the grant back condition. So those sorts of matters are all very much in issue in
5 BT’s appeal.

6 You then have above 1.12, “Live Premier League matches stand out as the most important
7 content for consumer subscriptions decisions in pay TV”. As the Tribunal will be aware, it
8 is the subject of BT’s appeal on scope, that it is incorrect to focus on one particular element
9 of content in isolation from the way in which the content is actually purchased by a
10 consumer. So these matters that Ofcom have summarised are relevant to BT’s appeal.

11 The global point that I am making is that this is not an appeal where, in our submission, it is
12 practical to try and identify isolated documents that go to relevant grounds of appeal. In our
13 submission, we could spend a long time and a lot of costs trying to fillet out in individual
14 documents which it might be said are relevant, when the reality is that they all are relevant
15 to Ofcom’s assessment of the competition in this market. It would be much more practical
16 for them to be put into the ring to enable us to see the basis on which Ofcom’s reached its
17 decision.

18 In fact, we do not envisage that it will be an enormous list. What we envisage in particular
19 is that it would cover the February responses to Ofcom’s December 2014 consultation, so in
20 particular that would be responses from Sky, Virgin Media, Premier League and TalkTalk.
21 Then the September responses to Ofcom’s July consultation, which was specifically on the
22 grant-back condition, which is, of course, the subject of challenge by BT, and in particular
23 that would be Sky, and there is an anonymous respondent, who may be the anonymous
24 respondent to which reference was made earlier in these proceedings, who has made
25 comments on the grant-back condition in, for example, paras.6.70, 6.71 and 6.75. Those are
26 the matters that we consider to be immediately disclosable.

27 We are also conscious that there may be RFI responses which may be responsive to matters
28 in BT’s appeal, but our proposal in relation to that would be that we could identify those
29 once we have actually seen the other documents.

30 THE CHAIRMAN: Your position - correct me if I am wrong - is that the Statement relies on
31 these responses or material from these responses, and it has redacted the references?

32 MISS FORD: Sir, yes, so we cannot see what is being relied on.

33 THE CHAIRMAN: You cannot see what is being relied on, but you can see that it is being relied
34 on.

1 MISS FORD: We can see a redaction.

2 THE CHAIRMAN: Mr. Holmes?

3 MR. HOLMES: Sir, we do resist the request for disclosure, which we had understood from BT's
4 submissions for today was for all of the documents referred to in the Decision. If I
5 understood my learned friend rightly, that request has been somewhat refined today. It may
6 be confined in the first instance to consultation responses. I am looking to my learned
7 friend for confirmation and that appears to be correct. We say that even when confined in
8 that way the request should be declined. It is a dragnet approach to disclosure, which is
9 both disproportionate and, in our submission, premature at this stage of the proceedings.
10 A more proportionate way forward, in our submission, given the confidential material
11 which is at stake, much of it confidential to third parties not represented here today, would
12 be the two stage approach which the Tribunal has already indicated today may be the
13 appropriate one. BT will soon see an unredacted version of the Decision, with only certain
14 specific matters still redacted, as we have discussed. It will see from that what matters
15 precisely are relied upon, how those are set out in the Decision, how Ofcom reasons by
16 reference to those materials. If it considers that in any way Ofcom's Decision, which is the
17 subject of this appeal, is unclear, it should then apply, but to disclose the consultation
18 responses, which are relatively extensive and which contain material which, in our
19 submission, is not relevant but is confidential, would be excessive. It would, therefore, be
20 preferable to wait and see what is actually needed once they have seen how Ofcom has
21 explained itself in the unredacted version of the Decision.

22 THE CHAIRMAN: Has Sky got anything to add?

23 MR. FLYNN: If I might just add, sir, our proposal overall on this is that once the ring is set up on
24 whatever terms, BT will obviously put in an unredacted version of its appeal. Ofcom will
25 provide an almost completely unredacted version of the Statement, subject to the points just
26 being discussed, and we entirely agree that at that point, having seen the bits that it cannot
27 see on which Ofcom is relying, BT can then draw up some targeted requests for further
28 disclosure, whether of the consultation responses or of the requests for further information,
29 which, by their nature, will have a great deal more confidential and sensitive information
30 attached to them. A staged approach, in our submission, is entirely the right one.

31 MR. HOLMES: Sir, I have been reminded of one final point before my learned friend responds,
32 which is just that Ofcom is, of course, subject to an ongoing duty of candour as a public
33 authority in these proceedings. In so far as there are materials that are relevant it will

1 disclose them in the ordinary way. If those materials are not set out on the face of the
2 Decision, it would of course disclose them in the course of these proceedings.

3 THE CHAIRMAN: I like the idea of a duty of candour, thank you. Is there anything you want to
4 add?

5 MISS FORD: Sir, I can confirm that it was not our intention to seek every document mentioned
6 in the Statement. We have sought to confine it to documents relied on. That was the
7 intention of that wording. We have further indicated a very limited number of documents
8 that we say are actually responsive to that request. In our submission, it would be much
9 more proportionate for those documents to be provided, rather than engage in a very lengthy
10 process of review and further application and further debate, which of course is going to
11 incur further costs and further delay.

12 THE CHAIRMAN: I think we are minded to go for the two stage approach, I have to say. We
13 will obviously firm that up before the end of the morning, but that is our approach at the
14 moment.

15 On that basis are we on to how the proceedings might go forward. We are thinking of
16 taking a break about 11.30, so shall we continue with the agenda as is?

17 MISS FORD: Sir, the next item on the agenda was Ofcom's application for an extension of time
18 to serve its defence, and we had indicated in correspondence that we did not agree that there
19 was in this case the requisite exceptional circumstances that would justify such an
20 extension. The reason we took that view, apart from anything else, was, of course, that BT
21 itself was under a great deal of pressure to lodge its own notice of appeal in an agreed
22 deadline over the course of the Christmas period. We felt that it was an important point of
23 principle that comes out of the Tribunal's Rules that the Tribunal deal with parties even-
24 handedly. Since the circumstances that BT faced would not have entitled BT to an
25 extension, in our submission, the same even handed approach should be adopted in relation
26 to the defence. However, the Tribunal may be happy to hear that this issue may have
27 become academic, in the sense that BT has given consideration to the proposal that it should
28 amend its notice of appeal in the light of disclosure, and if that were the route that the
29 Tribunal were to go down, that would mean that, *de facto*, Ofcom's service of its defence
30 would be put back in any event.

31 THE CHAIRMAN: It does rather spring out of the page, does it not? Yes, that seems to be a
32 chink of light in an otherwise dark, dark scenario!

33 MR. HOLMES: Yes, indeed, sir, and we agree that that would be a sensible approach to case
34 management. It would avoid the parties having to serve a defence before the notice of

1 appeal was in its final form with further amendments down the line. As Sky has pointed out
2 in its written submissions for today, that is an approach which has found favour in a number
3 of previous appeals.

4 I am very happy to open to my application if the Tribunal considers it necessary, but in view
5 of BT's position I am equally happy not to do so. I am in the Tribunal's hands.

6 THE CHAIRMAN: You have very kindly provided us with chapter and verse. That is
7 appreciated. I think we are slightly reluctant to make a ruling on whether these are
8 exceptional circumstances, because I am sure everything will be prayed in aid in every
9 future case by every party.

10 MR. HOLMES: I understand, sir.

11 THE CHAIRMAN: If there is a practical way out of this, that would be helpful, I think. That is
12 wonderful.

13 We now have the more difficult task of actually deciding the timetable. Sitting in the wings
14 is Sky's suggestion that there is a preliminary issue to be decided. That would affect the
15 timetable. Are you still wishing to maintain this, Mr. Flynn?

16 MR. PICKFORD: Sir, we do maintain this. It is my responsibility to make submissions on this.
17 I can make them now if it would assist. It is actually one of the more substantial elements
18 of the matters that need to be canvassed this morning.

19 THE CHAIRMAN: We are not terribly well disposed towards to this, if that helps you frame
20 your submissions. We would have to be very strongly persuaded that there was a separate
21 discrete issue which got a substantial part of the dispute out of the way before we were
22 willing to entertain this, and I just wonder whether you really want to persist with this in the
23 light of that steer? I can put it no better. If you do, of course it is your right to apply but
24 pushing a rock up a hill can be quite discouraging.

25 MR. PICKFORD: I am, personally, very happy to push that rock, because we believe that when it
26 gets to the top the Tribunal will see that this is a cost saving and sensible measure. Given
27 your indication, I would wish to take some instructions first as to whether my clients would
28 like me to do that.

29 THE CHAIRMAN: If we can help you by saying we do understand the point, and we think it
30 may well be relevant to the argument, but it is not a preliminary issue. I think the status of
31 the 2010 Decision, with which I am very familiar, and which bits of it are or are not relied
32 on, or valid, that clearly is germane to the case, but we think, having read your papers, that,
33 given the legal requirements you would have to fulfil, it would be very hard for us to go
34 along with what you are suggesting. That is the steer I am giving. I do not want to deny

1 you any right you have as an intervener, but that is the background. If you want to take
2 instructions it might be helpful.

3 MR. PICKFORD: It is very helpful to have that steer. If I can take some instructions I will revert
4 in just a moment.

5 THE CHAIRMAN: Before we break, I want to leave you with our idea of the timetable, and then
6 maybe you could also use the time to work on that. Obviously, BT's rights as appellant are
7 very, very important. This is a very important issue. Lots of money is at stake, it is a big
8 commercial case, we do understand that. The issue of regulation of pay TV has been
9 around for an awful long time - that is a point I made in the previous case, after which the
10 parties were good enough to come to a very sensible settlement. We do not want this case
11 to linger on too long. It is too important. The market is developing, the regulatory
12 framework is developing, Ofcom has got its own wider considerations which may well
13 affect the case as we go along. We cannot have this case just carrying on for ever. We
14 want to try and focus on the issues, we accept the importance of the issues, and to do it in
15 the shortest possible time and the shortest practical time.

16 We had an idea of a trial date in July, the dates maybe to be put a bit more specifically if the
17 principle is acceptable. If you work back from July, you get a fairly tight but workable
18 timetable for these various stages - disclosure, amendment, defence, intervention - and we
19 think that would help concentrate the mind, get it done before the vacation. Would you like
20 to tell us whether you think that is, in principle, possible? If not, we will have to think
21 again. That would be our preference. How does that strike BT?

22 MISS FORD: Sir, I think we have indicated our position in our written submissions, we were
23 concerned that it would not be possible to do this by July, with the greatest will in the
24 world. The scale of what has to be done should not be under-estimated. We do envisage
25 that it may well be necessary, for example, to include a reply into the timetable. The
26 Tribunal will have also noticed that there are experts - BT has relied on two experts, Ofcom
27 has indicated that it may be seeking to rely on certain experts, and Sky has indicated three
28 experts. There will, of course, need to be accommodated a process whereby the experts
29 produce their reports and then the usual state of affairs is that they would meet and seek to
30 identify areas of agreement and disagreement which all need to be factored.

31 THE CHAIRMAN: We can rely on the experts to disagree, if appropriate. I was hoping in this
32 case that there may be substantial areas of agreement, because it does seem to us, just
33 looking at it at this stage, that this is an argument about the interpretation placed on an
34 assessment, not the assessment itself. There does seem to be a considerable amount of

1 common ground as to the state of the market. No doubt Sky will tell us that they take a
2 completely different view, but as between BT and Ofcom, there is a question of what the
3 Regulator's take on the market assessment is and what action it decides to take. You
4 disagree obviously and Ofcom have set out their position.

5 We do not need, it would appear, an enormous discussion about the state of competition in
6 the pay TV market because it is in the Statement and you are not really contesting it. What
7 you are saying is the wrong action was taken as a result of it. So I am hoping that we could
8 keep considerable areas of agreement between experts. Obviously they will have a different
9 way of expressing it, but one of the things I would want to leave you with today is an
10 encouragement that whatever expert evidence is adduced in reply to what you are putting in
11 at this stage concentrates on what is different and not what is common ground.

12 That is just to encourage you.

13 MISS FORD: Sir, we would certainly welcome focus from those who are responding to what we
14 have put in. We do, however, given the position that has been taken by Sky in its skeleton,
15 anticipate that we will have a considerable task in responding to Sky's statement of
16 intervention, and we are concerned that sufficient time should be included in the timetable
17 for that.

18 THE CHAIRMAN: We have not seen it yet, and no doubt Sky will take very seriously what we
19 said this morning about concentrating on the issue in dispute, not conducting a second
20 review of the market.

21 I think you have said ten days. We are working on slightly less than that. About eight I
22 would have thought would be sufficient. That is what we would encourage you to get this
23 dispute encapsulated in. We are talking about the first couple of weeks in July, more or
24 less. We can be more precise about the exact dates later, but starting somewhere like the
25 6th, something like that.

26 MR. HOLMES: Understood, sir, I am grateful for that indication. In case it proves to be the case
27 that the end of July seems more workable----

28 THE CHAIRMAN: It does not work for us, sorry.

29 MR. HOLMES: That is what I was seeking to ascertain.

30 THE CHAIRMAN: There is our point of view too.

31 MR. HOLMES: I am grateful.

32 MR. FLYNN: Sir, we think that is tight but just about doable. We will be looking considerably
33 older if we come in front of you then, but----

34 THE CHAIRMAN: It will encourage efficiency and economy.

1 MR. FLYNN: Could I just say, one important thing in disagreement with the way BT puts it is
2 that it is not going to be appropriate to squash Sky's time for responding and putting in a
3 statement of intervention after sight of Ofcom's defence. The idea that that can be done in a
4 week or two on sight of Ofcom's defence because we are essentially going to be agreeing
5 with them is, of course, not realistic.

6 I entirely take your point that we should concentrate on the points that matter, and I can
7 assure you that every effort will be made to make this a focused intervention on the appeal
8 as it stands, not least because we entirely agree that taking matters as they are today is a
9 good starting point. We entirely take that point, but I would just say that we hope, because
10 we will not see Ofcom's defence until we see it, we know that, and we will need to----

11 THE CHAIRMAN: Mr. Flynn, I have always been a very practical man on this sort of thing, and
12 I am new to this judging game, but these are appeals against a regulatory Statement, the
13 Statement is the regulatory authority's case and BT, as the appellant, attacks it. So, in a
14 sense, there is not a lot more that Ofcom is able to say outside the scope of what it has said
15 already. It can obviously come back on specific points, it can deal with new points that are
16 raised, but it cannot make a new statement. You can see what its defence is going to be.
17 You can start writing your intervention now, I would have thought, subject to any
18 amendments.

19 MR. FLYNN: That is what I was going on to say, that in fact we do have a little more time than
20 we would have done.

21 THE CHAIRMAN: You are getting much more time, I would say, anyway.

22 MR. FLYNN: Obviously what we will be responding to is an amended - potentially, who knows,
23 substantially amended case - so----

24 THE CHAIRMAN: Not amended beyond, I would hope, the grounds that we have got.

25 MR. FLYNN: I would more than hope that that would be the case. I simply put that marker
26 down.

27 THE CHAIRMAN: The grounds are fairly broad as they are already expressed. There is quite a
28 lot of material there that one can get one's teeth into, as it were.

29 MR. FLYNN: Once we see the unredacted version we can really get our teeth into it.

30 Perhaps I could just say, while we are on that, the number of experts: we simply ask for
31 permission for three experts, because there are three expert reports in the BT appeal. We
32 may, like BT, find that one person can do both. That is likely to take longer, in fact. We
33 would simply like to be able to respond to their reports appropriately. I know what you
34 mean by "appropriately" when I say that, as it were.

1 THE CHAIRMAN: Good. I think we might adjourn briefly and re-assemble at about 11.45, if
2 that is all right.

3 (Short break)

4 THE CHAIRMAN: Mr. Holmes, you have my full attention.

5 MR. HOLMES: Sir, I am pleased to report that there has been a measure of agreement between
6 the parties, subject to caveats which they will each develop separately. We do have at least
7 a running order and certain dates which we would propose, as agreed, to the Tribunal.

8 THE CHAIRMAN: This is on a timetable, yes. Do you want to share that with us?

9 MR. HOLMES: Yes, sir. The proposal is that the parties should liaise to agree an order and that
10 Ofcom should then make disclosure of the Decision, subject to the redactions that we have
11 discussed this morning, by 22nd February - that is next Monday. Then by 29th February, BT
12 should bring forward any further applications, if so advised, for disclosure, or for
13 amendment of the terms of existing disclosure in relation to that material which has gone
14 only to external advisers in the first instance.

15 THE CHAIRMAN: This is TalkTalk?

16 MR. HOLMES: Yes, sir, subject to one other detail which I shall come to in a moment, if I may.
17 Then, subject to the Tribunal's availability, we would propose that a hearing might be listed
18 on a provisional basis on or around 14th March to address any objections to BT's
19 applications in relation to confidentiality and disclosure.

20 We then propose the 8th April for BT to bring forward in draft form any proposed
21 amendments to the notice of appeal following disclosure. We would hope that those could
22 be agreed between the parties. In the event of any disagreement we would suggest that the
23 parties make representations to the Tribunal, and that could be resolved on the papers.

24 THE CHAIRMAN: There might be none.

25 MR. HOLMES: There might very well be none. There might be no amendments, and equally
26 there might be no dispute to such amendments as are proposed.

27 THE CHAIRMAN: I am tempted to say "Dream on"!

28 MR. HOLMES: We would then propose, sir, to bring forward our defence to the amended notice
29 of appeal by 22nd April. There is then a disputed date on which the other parties can make
30 representations - we have no view on this - about the timing of Sky's intervention. BT's
31 proposed date for that is 6th May, and Sky's proposed date for that is a week later, on
32 13th May.

33 The date proposed for the reply is 3rd June.

1 We then come to a further area of disagreement in relation to the skeleton arguments.
2 Ofcom and Sky propose that, for convenience in this case and in order to ensure the July
3 trial timetable, BT should bring forward its skeleton argument at the same time as the reply,
4 as has been done in a number of other cases. Ofcom's should then bring forward its
5 skeleton on 17th June, and Sky should bring forward its skeleton on 29th June in advance of
6 the trial running to 6th to 15th July, as the Tribunal have suggested.

7 THE CHAIRMAN: I do not want to mess you around, but we think we can probably do the 4th,
8 the Monday, and start at the beginning of the week.

9 MR. HOLMES: It may be that the last two dates might need to be pushed back by a couple of
10 days to give sufficient notice to the parties.

11 BT's position is that there should be a single round of skeleton arguments simultaneously
12 exchanged on 29th June. Ofcom's position on that, if I might for a moment remove my hat
13 as the communicator of agreed good news and now make submissions, is that the Tribunal
14 is likely to be more assisted by staggered skeleton arguments so that the parties are able to
15 respond to one another's positions, and that is the approach which the Tribunal has taken in
16 a number of other cases. It avoids the risk of the parties' submissions passing like ships in
17 the night. If there were to be simultaneous exchange, we say that 29th June is, in any event,
18 too soon in advance of the hearing and gives rise to the risk of upsets or mishaps regarding
19 the scope of the parties' cases.

20 THE CHAIRMAN: Particularly if we brought it forward two days.

21 MR. HOLMES: Yes, sir. I know both parties have their own submissions to make, but I think I
22 have rightly captured the extent of agreement. I think I have also captured the agreement of
23 the parties to the Tribunal's proposal of a trial in July.

24 THE CHAIRMAN: A question from the ranks: do we actually need a hearing in March because
25 we have availability difficulties?

26 MR. HOLMES: Sir, for our part, we would hope that this could be resolved by agreement, or, if
27 not, on the papers. That is subject to hearing the other parties.

28 THE CHAIRMAN: It is not something I can do on my own, is it?

29 MR. HOLMES: That is something that I would need to consult the Rules about.

30 THE CHAIRMAN: I do not think so, anyway I need my colleagues. Could we hear from you
31 with emphasis on where you differ, if you differ?

32 MISS FORD: We have worked to agree a timetable to July. It is with this caveat, that we do
33 remain concerned as to the practicality of a July timetable, and we would say that it is a

1 provisional indication, and subject, in application, to, first, what comes out of the
2 disclosure; and secondly, what emerges from a statement of intervention.

3 THE CHAIRMAN: We may need a fall-back is what you are saying?

4 MISS FORD: We remain concerned that a trial to October would be more practical.

5 THE CHAIRMAN: I do not want the fall-back to become the dominant partner, as it were.

6 MISS FORD: We have sought to engage in the July timetable with that caveat in mind. The two
7 areas of difference between us are, first of all, the date of Sky's statement of intervention,
8 and we have proposed two weeks after Ofcom's defence. The basis of that is that Sky has
9 already had our notice of appeal since 2nd February, and on that basis it would have until
10 6th May to produce its statement of intervention. In our submission, that is a very generous
11 time in which to do what it needs to do. It is, of course, the case that it potentially will
12 receive amendments to the notice of appeal during the course of that period. Nevertheless,
13 in our submission, that is ample time for Sky to produce its statement of intervention. We,
14 of course, bear in mind and we would emphasise that the time that Sky requires in order to
15 produce its statement of intervention will be dependent on the extent to which Sky is
16 minded to try and take a stance which is different and separate to that of the principal party
17 to these proceedings.

18 THE CHAIRMAN: Is that it?

19 MISS FORD: That is our position on the 6th May date. The second point of difference is that we
20 propose simultaneous skeletons. This arises because of a concern of the burden that would
21 be imposed on BT. The current proposal is that Sky would produce its statement of
22 intervention, and we will then have the burden of producing our reply, plus our skeleton
23 argument, within a period of, on Sky's timetable, three weeks, and on our proposal four
24 weeks. That is quite a significant burden to impose on BT. Our submission is that it would
25 be preferable to permit BT to serve its reply in that period. Then the differences between
26 the parties have been adequately aired in the process of pleadings in the usual way, and then
27 the parties can produce simultaneous skeletons. That does not then leave BT in the position
28 that it has a very constrained period in which to produce a reply to a statement of
29 intervention and a skeleton.

30 THE CHAIRMAN: The date you are proposing is rather close to the trial.

31 MISS FORD: If simultaneous skeletons are acceptable in principle then that date could be
32 brought forward to a degree. The concern is more to avoid the simultaneous provision by
33 BT of a reply and a skeleton.

34 Sir, those are my submissions.

1 THE CHAIRMAN: Mr. Flynn?

2 MR. FLYNN: Sir, the principal point for us is the time for our statement of intervention. I have
3 already made the point that we might need a little more than two weeks. I have already said
4 that, so I will not repeat any of that. The BT proposal would give us less than a month to
5 take into account their amended notice of appeal and quite possibly also amendments to
6 their experts' reports on sight of further material. We maintain, for that reason and also
7 because, with the best will in the world, we are unlikely to see the Ofcom defence until it is
8 lodged, the view that we should have that extra week and we do not see that it impacts on
9 the rest of the timetable.

10 For the rest, we are in agreement with the Ofcom proposal which I think, apart from
11 anything else----

12 THE CHAIRMAN: Simultaneous skeletons, what is your position on that?

13 MR. FLYNN: No, we would agree with Ofcom's proposals in relation to that. That will remind
14 us of happy days when we were an appellant in related proceedings.

15 I should just say that all this is, of course, predicated on agreeing an order for
16 confidentiality.

17 THE CHAIRMAN: We are coming to that.

18 MR. FLYNN: Let me just say two things: we have invited BT to engage with us on the basis of
19 our proposal and any indications that have or may yet fall from the Tribunal. Just to slightly
20 sour the note of sweetness and light, I should say that if BT propose to include Ms Nicola
21 Floyd in the confidentiality ring we shall oppose that for reasons that they are well aware of,
22 and are well rehearsed between us in these proceedings. I just put that marker down for
23 now in relation to getting this timetable off the ground, as it were.

24 MISS FORD: Sir, since confidentiality has been raised, we have heard what has been said by the
25 other parties and the Tribunal, and we have come up with a potential proposal of an adapted
26 position in case that assists. Our proposal would be that the in-house lawyers would offer
27 the undertaking in our amended para..6 in conjunction with the undertaking in Sky's
28 para.9(b), that that undertaking would be confined to sports rights, rather than audio visual
29 rights. We have sought to reach some sort of compromise in terms of what----

30 THE CHAIRMAN: That is very helpful, but let us just stick to the timetable if we can before we
31 start picking holes in what has been agreed. What has happened to the second case
32 management conference? That was around at one stage. Has that died a natural death, or is
33 it still there?

34 MISS FORD: I fear, given the tightness of the timetable, that has been permitted to fall away.

1 THE CHAIRMAN: That has fallen away, has it. Subject to the odd week or two for the
2 simultaneous skeletons, I think our only concern is that I do not think we can do a hearing
3 in March. We could make a decision on the papers. If that can be done in writing we can
4 manage it.

5 MR. FLYNN: In so far as that concerns us, we would have no objection to that.

6 MR. HOLMES: The same is true for Ofcom.

7 THE CHAIRMAN: It might even be a better decision because we would have time to consider it.

8 MISS FORD: Likewise, we would be content with that.

9 THE CHAIRMAN: That is helpful. (The Tribunal conferred) I am sorry, Mr. Pickford, yes?

10 MR. PICKFORD: Sir, Mr. Holmes mentioned that there was one important caveat in relation to
11 Sky's agreement to those terms. We are happy with them, but there is one point that I think
12 it is important we emphasise, and to use an over-used phrase in the Tribunal, and put down
13 a marker, which concerns the matters that were the subject of the preliminary issue
14 application.

15 THE CHAIRMAN: I assumed that it was that, because you were on your feet, Mr. Pickford.

16 MR. PICKFORD: Sir, we are not pursuing the preliminary issue. We have heard the Tribunal,
17 and we understand the Tribunal's keenness to get this matter on by the beginning of July,
18 and we are very keen for that to happen ourselves, because we want the regulatory certainty
19 as much as everyone else does.

20 The one issue that that raises for us is as follows: BT's appeal depends in a number of
21 places on a form of argument which essentially goes as follows: one starts from the
22 position in 2010 that WMO regulation was justified. You then look to assess to what extent
23 competition has changed in the market since 2010, and if you then find that there have not
24 been sufficient changes to justify a difference in approach then you must conclude that the
25 regulation should continue. That is core to a number of parts of their pleading.

26 THE CHAIRMAN: If you say so, Mr. Pickford.

27 MR. PICKFORD: I must admit, I do, if I may.

28 THE CHAIRMAN: You could equally well say that the Statement is notable for not starting with
29 the 2010 position. In a number of respects it appears to take the position as it is now and to
30 consider whether regulation should be imposed or not.

31 MR. PICKFORD: I may have misspoken. That is what BT say should have happened. That is
32 BT's argument. Ofcom's position, and I apologise if I misspoke, is not that. Ofcom's
33 position is that one looks at the world in 2015 and one looks forward and one assesses

1 whether regulation was justified in 2015, the 2010 Decision being no more than part of the
2 regulatory background.

3 THE CHAIRMAN: We accept that we will need to discuss this at some stage in the main
4 argument, but not as a preliminary matter.

5 MR. PICKFORD: Sir, if I may, the issue that arises from it, to be clear, is that we quite accept
6 that if the Tribunal is going to determine the matters that arise on BT's appeal principally on
7 the basis of Ofcom's response to them, as Ofcom sets out its reasoning in its Decision, then
8 the additional concern that I am about to come on to does not arise.

9 The additional concern is this: BT says, and I can take you, sir, to the parts of their
10 pleadings that make this good, that the right approach was not that which Ofcom took, but
11 they should have gone back to 2010 and started their analysis there, and worked forward.
12 They say that the result of that is that the WMO regulation should remain in place, and they
13 seek an order from this Tribunal that the Tribunal direct Ofcom to impose that regulation on
14 Sky.

15 We say that if the Tribunal were to accept all of the steps in BT's arguments, there is one
16 key missing link, which is whether the 2010 Decision was, in fact, correctly decided at all.

17 We do not want to revisit that because we thought that was the issue that we had all parked
18 back in December as a result of the December order.

19 Our position on that is clear, but what we do say is that that issue will be hanging around in
20 the wings if the Tribunal considers that BT is correct in its analysis that one should start
21 from 2010. If the Tribunal agrees with Ofcom----

22 THE CHAIRMAN: I am sorry, they do not ask for the WMO condition to be reinstated. Part of
23 the settlement of the old case was that they specifically would not ask for that. I am in the
24 relief paragraph in Part E on p.63, bundle 1, tab 1, and I thought they were asking for a
25 remittal of the statement, a direction to impose a condition that did something appropriate,
26 using layman's language. I thought the whole point was that the WMO was not regarded as
27 absolutely perfect in the present climate. I thought that was the position. What is your
28 concern?

29 MR. PICKFORD: What may assist is if I develop the submissions a little more fully.

30 THE CHAIRMAN: Is this what you put in your written submissions to us?

31 MR. PICKFORD: It is a development of the point in our written submissions.

32 THE CHAIRMAN: We have obviously read the parts that you directed us to very closely. That
33 was why I was giving you the steer earlier. Where does this take us? What is your point?

1 MR. PICKFORD: Where it takes us in practical terms is that in order to fit in with the Tribunal's
2 fairly ambitious but hopefully robust timetable that we are going to endeavour to ensure
3 happens, is that what we plainly cannot fit into that is a wholesale re-examination of
4 whether the 2010 Decision was correct or incorrect, and the matters that were not decided
5 by the Tribunal.

6 THE CHAIRMAN: I am very much hoping that we will not have to do that, but if we do, we do.

7 MR. PICKFORD: What we say is we cannot do that on the timetable that we have currently set
8 down. It would not be an eight day hearing. It would involve re-examination of all the
9 things that we had parked back in December.

10 THE CHAIRMAN: We will address the case on the grounds that have been pleaded and that is
11 how we will approach it. Miss Ford, I think I must hear you now. Yes?

12 MISS FORD: Sir, I wonder if I can try and short-circuit this entire concern, because it seems to
13 us that the submission that Sky is making is based on a misconception as to the grounds that
14 BT is advancing. BT is not seeking to rely on the correctness of the substance of the 2010
15 Statement. That is not the case that BT is advancing.

16 THE CHAIRMAN: Can I say that I am extremely relieved to hear you say that!

17 MISS FORD: That does not come as a surprise to me, sir! The case that BT is advancing is that
18 Ofcom's own reasoning was contained in the 2010 Statement, and that for reasons of
19 regulatory consistency and essentially rigour in terms of the reasoning, if Ofcom is going to
20 depart from its own reasoning in the 2010 Statement, then it must provide valid and cogent
21 reasons for doing so. That is echoed throughout our notice of appeal at various points.
22 So it is a point on the cogency and the validity of the reasoning in the 2015 Statement. It
23 does not proceed on the basis of any assertion as to the correctness of the 2010 Statement.

24 THE CHAIRMAN: I have got a feeling this is getting us nowhere, this argument. We will take
25 the arguments as they come. This is not a case about the 2010 Decision, but we are
26 obviously going to have to look at it and refer to it as part of the relevant background. BT
27 will make its case and we will deal with it, but we are not going to dive into that as a
28 deliberate line, and I am sure you are not going to either.

29 MR. PICKFORD: We certainly do not want to, but our position is that we need to be very clear
30 that we would need to reserve our case to the extent that that was what BT were saying. We
31 are very glad to hear the concession that has been made by BT about the nature of its case,
32 and we----

33 THE CHAIRMAN: Mr. Pickford, that is a clarification, and we are all here in a constructive
34 spirit today, and we have not yet engaged arms. We are just trying to work out the rules of

1 the game. I do not think there is any more to be heard about that. We take the point, that if
2 the case gets unmanageable it will have to go into October - understand. We very much
3 hope it will not.

4 We ought to get back to the confidentiality ring and the Rules on disclosure. Do I
5 understand that there is now a measure of agreement on the terms of a possible order
6 establishing a confidentiality ring?

7 MISS FORD: Sir, I should make clear that the proposal that I advanced a few minutes ago we
8 have not had the opportunity to put to Sky.

9 THE CHAIRMAN: So it is not agreed position, it is a proposed position. Could we hear from
10 other parties then?

11 MR. HOLMES: Sir, if I might begin with one point about date in relation to the remaining third
12 party, Virgin Media, with whom we have been able to establish contact during the course of
13 the adjournment. They have confirmed that they are content for disclosure to be made of
14 their confidential material in the first instance to external advisers on the same basis as
15 TalkTalk, and subject to application, liberty to apply----

16 THE CHAIRMAN: Are you giving their identities?

17 MR. HOLMES: Virgin Media. I hope I did not misspeak. Virgin Media, including their identity,
18 yes.

19 THE CHAIRMAN: The completely anonymous person, that is a different matter.

20 MR. HOLMES: The position is as we previously discussed. Otherwise, sir, it did sound, at least
21 to my ears, as though the parties were edging towards agreement, subject to Sky's response
22 to BT's latest proposal.

23 THE CHAIRMAN: All right.

24 MR. FLYNN: As Miss Ford was good enough to say, you heard it at the same time as us. We are
25 going to need a bit of time to take instructions, and I would hope, as I said in the light of
26 what has been said before and observations that have been made, that we could agree it.
27 That is our current position.

28 THE CHAIRMAN: Just by way of guidance, I think the conditions of the confidentiality ring are
29 very important. There are already two companies that are not parties that have asked for, in
30 a sense, a restriction to external advisers only, and I think we are inclined to grant that.
31 That seems entirely reasonable.

32 For those pieces of information that are from parties to these proceedings, and that now
33 includes the intervener, I think the issue of how stringent the conditions on internal advisers
34 are has a relationship to the information that goes into the ring - in other words, the more

1 stringent the conditions, the more likely it is that information should be in the ring rather
2 than redacted. I think that has to be the approach.

3 If, on that basis, you can work out an acceptable marriage of the two drafts, that would be
4 helpful.

5 We have also looked back at the condition that was agreed in the 2010 proceedings, and
6 although that contains a reference to movie rights, which does not seem to us to be relevant
7 any more, that should come out, we cannot really see why, in the light of the present
8 situation, it should be any wider. It is wide in scope, and also there is the question of
9 duration. I think the duration was potentially five years, the proceedings, plus two years,
10 plus three years, but the current draft proposed by Sky is slightly wider in scope than what
11 there was in 2010. Our inclination would be to go no wider in scope than 2010, and indeed
12 narrower, because the movie rights reference can come out.

13 Can we leave you to try and sort that out, bearing in mind that we want to finish at
14 one o'clock.

15 MISS FORD: Sir, before you rise, there is the point of Ms Floyd's involvement in the ring, which
16 has been raised by Sky.

17 Sir, we received a letter yesterday from Sky making points on the confidentiality ring and
18 indicating that they would revert to us further on the question of personnel to be included in
19 the ring. We did not then receive a subsequent letter. We have heard for the first time
20 today that formal objections is being taken to Ms Floyd's inclusion. We do seek her
21 inclusion in the ring, and I am in a position to address you on that today.

22 THE CHAIRMAN: Can we, first of all, hear the objection to her? What has this unfortunate lady
23 done to earn this kind of---

24 MR. FLYNN: I am sure she is very, very fortunate in a number of ways, sir. Ms Floyd is, as we
25 understand it, a standing consultant to BT on a range of issues to do with their strategy as
26 well as the conduct of these proceedings. There is quite a bit of correspondence on it,
27 which I think I am not in a position to hand up now. She was listed as an expert economist,
28 and then I think that was changed to economist. It is plain from BT's notice of appeal that
29 she is not going to be putting in an expert report. As I say, she is essentially, as we
30 understand it, a self-employed consultant, who does a great deal of work for BT. She
31 should be treated, in our submission, no differently from BT employees such as
32 Mr. Williams, for whom there would be no question of going into the ring.

33 As I say, there is an extensive amount of correspondence, and if we need to substantiate this
34 we may need to do so in writing. BT is well aware of our position on this. The practical

1 outcome in the most recent iterations of this debate has been that she has not been included
2 in the ring. BT has not sought to force the point, but if they need to now that is possibly
3 something that we could again discuss with them and see whether that can be agreed.

4 MISS FORD: Sir, can I hand up a copy of Ms Floyd's biography, which gives an indication of
5 her role and function. (Same handed) She is an independent economic consultant and she
6 provides strategic competition advice to a variety of clients, including BT. Her biography
7 indicates that her clients include many of the broadcaster and communications companies in
8 the UK. She has worked as a professional economist for 18 years, 15 years on broadcast
9 and communications matter as a senior economist in the ITC, a senior economist in Ofcom,
10 acting head of the chief economist team, Ofcom, a director of competition policy,
11 broadcasting, in Ofcom. After that she became an independent economic adviser.
12 She is also affiliated to Compass Lexecon, and she works with their teams on cases
13 worldwide.

14 What is important to emphasise is that all her work is competition and regulatory matters.

15 She does not advise either BT or anyone else on commercial strategy or their conduct in the
16 market. For that reason the comparison that has been drawn by Sky between the position of
17 Ms Floyd and Mr. Williams we say is inapt. She does not advise at all on commercial
18 strategy. She advises only on competition and regulatory matters.

19 She was in the confidentiality ring for the last pay TV appeals. There were certain dying
20 iterations of that which we did not feel it was necessary to insist on her inclusion, but we do
21 request that she be included in the ring for the purposes of this appeal. We submit that there
22 is no good reason why she should not be permitted to do so.

23 It is quite true that her function is different from the functions of the economist we have
24 instructed to give evidence to the Tribunal. As I have said, she is providing independent
25 economic consultancy and strategic competition advice, but, in our submission, there is no
26 good basis to object to her inclusion.

27 THE CHAIRMAN: There is no question of her not honouring the undertakings that are normal in
28 a confidentiality ring?

29 MISS FORD: Absolutely not. I should make clear that she is not going to be giving the
30 undertakings that are being requested in respect of BT's in-house lawyers, because that
31 would constrain her practice.

32 THE CHAIRMAN: Yes, but as an external consultant.

33 MISS FORD: As an external consultant there is no basis whatsoever to suggest that she would
34 not.

1 THE CHAIRMAN: All right, we will take away that issue too. If you could have a few
2 moments, ten minutes perhaps, we will come back.

3 (Short break)

4 THE CHAIRMAN: Mr. Holmes?

5 MR. HOLMES: Sir, I am pleased to say again that there has been a measure of agreement.
6 Unfortunately, there are some outstanding issues, but the parties are agreed in principle with
7 using the 2010 order as a starting point in accordance with the Tribunal's indication.
8 There is a disagreement as to the duration of the undertakings to be given by internal
9 advisers. BT's proposal, and I will leave it for them to elaborate the reasons for it, is that
10 the period in effect be four years from the final determination of the present proceedings.

11 THE CHAIRMAN: Two plus two.

12 MR. HOLMES: Two plus two. Sky adheres to the approach taken in the 2010 order of two plus
13 three.

14 There is also disagreement about whether the scope should be as per the 2010 order, save
15 for the omission of movies, which both parties are prepared to agree to. BT proposes a
16 narrower scope, which I think is confined to sports rights, but they will make submissions
17 on that.

18 There is a further point which Ofcom must raise in relation to the inclusion of Ms Floyd in
19 the list of external advisers. We would propose that the issue of Ms Floyd's inclusion in the
20 confidentiality ring as an external adviser be deferred for the second stage to be resolved on
21 an application by BT, should they wish to pursue this. The reasons for that are twofold:
22 first, in its discussions with third parties, Ofcom advised them on the basis that the
23 information would be shared with external legal advisers and external expert witnesses, and
24 Ms Floyd does not fall into either of those categories.

25 Secondly, having regard to her CV, which was handed up before the adjournment, we are
26 concerned that it suggests a very close strategic involvement with BT, to which objection
27 may be taken by third parties, and on which they should be given an opportunity to
28 comment. Sky is obviously able to defend its own interests here today.

29 Can I take the Tribunal to her CV----

30 THE CHAIRMAN: Just so that I understand it, what you mean is that when we consider further
31 applications for disclosure which will involve third party interests, that is the stage to
32 consider this lady's position - is that right?

1 MR. HOLMES: My concern is simply that there are third parties who may have a position to take
2 who will not be heard here today. Ofcom does feel itself bound to represent their interests
3 to a degree today.

4 THE CHAIRMAN: Yes. They would agree for the information to go into the ring, and then----

5 MR. HOLMES: Just to show you the nature of our concern, could you turn to the second page of
6 Ms Floyd's CV. I should preface this by saying that, of course, nothing that we say here
7 today is to impugn in any way the integrity of Ms Floyd. We have no doubt that she will
8 respect the undertakings that are given. Those undertakings would be confined, as presently
9 proposed by BT, to the external advisers. We are just concerned that more parties have an
10 opportunity to make representations given the nature of her involvement and activities with
11 BT. If you look at the second bullet point, you will see that she provided economic and
12 strategic input for BT into Ofcom's WMO review, and that involved not only advice on the
13 economics, but also liaising with the commercial business to gather evidence, meeting with
14 and lobbying Ofcom, devising and implementing a press communications plan, and briefing
15 internal and external stakeholders. She was extremely embedded in the BT team, and her
16 activities were wide ranging as a general consultant and adviser.

17 One sees that further from the fourth bullet point, which describes her as advising on the
18 tactics, strategy and substance of BT's appeal in the Pay TV proceedings, which included
19 identifying possible arguments, drafting submissions, providing economic and factual input,
20 responding to third party submissions, managing internal stakeholders.

21 In the bullet point below, advising on overlapping economic issues between the WMO
22 review and the VULA margin investigations and review, as well as on Ofcom's
23 investigation, Virgin Media's Article 101 complaint on the joint selling of FA Premier
24 League rights, including regarding the auction structure and outcomes.

25 Over the page, the fourth bullet point down, advising on BT's Competition Act complaint
26 against Sky regarding discriminatory wholesale terms of supply, including detailed strategic
27 advice on the framing of the complaint, economic analysis, supporting evidence, drafting
28 external submissions and internal briefings, meeting with and lobbying Ofcom and
29 managing internal stakeholders across BT.

30 Then two bullets down, assisting a consortium of communications companies and providing
31 evidence to Ofcom's pay TV market review in the subsequent introduction of the WMO
32 remedy, including advice on various matters, including advice on anti-gaming solutions.

1 So there is clearly a strategic element to her work for BT, and we do think that third parties
2 in the communications world, given the closeness of that relationship, should have an
3 opportunity to comment.

4 THE CHAIRMAN: Thank you for that. Who else wants to give me good news?

5 MR. FLYNN: Since this is BT's application, it may be appropriate if I say what I have to say and
6 then Miss Ford can say what she needs to in response. In relation to the confidentiality
7 order, we are happy with your suggestion of, as it were, going down the middle by taking
8 the 2010 order, removing references to movies. We do think the period of two plus three is
9 the appropriate one. It was designed in that order to cater for the expected timing of
10 Premier League auctions, and two plus three would better do that than two plus two on
11 present expectations. That was the rationale for it then, and if you apply that rationale, we
12 say it should be two plus three now.

13 In relation to the position of Ms Floyd, of course, like Ofcom, we are not in any way
14 impugning her integrity or competence, and I understand that she is in the court today,
15 consistent with being intimately involved with these proceedings. I will not say more than
16 the biography which BT knew to bring along today, we only having learned that it was
17 proposed she should be included in the ring late yesterday, essentially makes our case. If
18 you accept Mr. Holmes' submission that argument on this will be deferred until a later
19 stage, and we will see what BT puts in an application at the time, and we trust we will have
20 an opportunity to respond on a considered basis.

21 Perhaps I could just mention one other tiny thing on housekeeping, which is that once the
22 order is in place and it is agreed that Ofcom will tip into the ring the almost completely
23 unredacted statement, the order should also record that that is the timing for BT to put in the
24 unredacted appeal and associated materials for the ring to start working on.

25 THE CHAIRMAN: That is okay presumably?

26 MR. FLYNN: I do not think there is a problem, I think that is more of a housekeeping issue, as I
27 understand it.

28 THE CHAIRMAN: We are running out of time.

29 MR. FLYNN: I have nothing else to say, sir.

30 THE CHAIRMAN: Thank you. Miss Ford, anything to add?

31 MISS FORD: Sir, yes, on the confidentiality question, the proposal that we advanced is the
32 formulation of the 2010 undertakings, but with an addition of the following words: instead
33 of the words "my activities in relation to BT TV and any other television service", they
34 substituted with "my activities in relation to the acquisition and exploitation of sports

1 rights". That is our proposal. That addresses the concern that otherwise the in-house
2 lawyers in question are essentially precluded from doing anything in relation to television
3 whatsoever save things that are connected to these proceedings.

4 We apprehend that there is concern that there might be information in the ring which goes
5 beyond sports rights and that, therefore, would not address that sort of concern. That was
6 what we were attempting to achieve with our formulation of our para.6 where we referred to
7 "any other matters in relation to which the confidential information is relevant". So we
8 would also propose that, in order to address that concern, it would then read, "my activities
9 in relation to the acquisition and exploitation of sports rights, or any other matters in
10 relation to which the confidential information is relevant". That would then seek to address
11 the concern that if there were wider information in the ring they would not act in matters
12 relating to that either.

13 THE CHAIRMAN: I think what we are going to ask you to do - we have made our position fairly
14 clear - as to the duration, I cannot see very much between four years and five years. I think
15 we would be willing to accept four years.

16 On the scope, I think we would ask you to consider further in the light of what we have
17 said, and let us have an agreed draft tomorrow. I do not want to spend further time on it
18 now.

19 As for Ms Floyd, I think we need to do that in the two stage manner proposed by
20 Mr. Holmes.

21 MISS FORD: Sir, I am sorry, I have not had the opportunity to address you on that point.

22 THE CHAIRMAN: Would you like to?

23 MISS FORD: I would. That does cause us a concern, in the sense that the next step in the
24 timetable is that BT has to make all its applications for further disclosure or for access to
25 particular aspects of the information for the in-house lawyers, and that is a matter on which
26 we would like to involve Ms Floyd. The difficulty is that if we then also have to make the
27 application for Ms Floyd to be included in the ring at that point, she cannot then assist us in
28 relation to those matters. It seems to us to be very unfortunate----

29 THE CHAIRMAN: Mr. Holmes' point is quite a strong one, which is that the third parties whose
30 interests are going to be affected by this disclosure are not in a position to comment.

31 MISS FORD: Sir, we find it difficult to see why third parties should have any objection to
32 Ms Floyd's inclusion in the ring. We note the emphasis on the word "strategic" appearing
33 in Ms Floyd's biography, but as it happens those behind me have been able to check, and,
34 for example, the CRA website includes on its front page the fact that they offer strategic

1 advice on competition matters. It is not unusual, and, in our submission, it is not in any way
2 something which should cause somebody to be excluded from the ring.

3 THE CHAIRMAN: I think we are unable to allow her to be included at this stage. It is open to
4 you to come back on that.

5 Can I just go back to the timetable? Thank you for all your constructive work on that, it is
6 very helpful, thank you. Can I read out what I think you have agreed, and where I think you
7 need us to take a view? 22nd February, assuming you can agreeing a suitable order,
8 disclosure of the confidential version of the Statement; 29th February, your application for
9 further disclosure, with notice to those affected; by 4th March, observations from affected
10 parties; a decision from us on the papers by 14th March; 17th March, disclosure to the
11 extent permitted by the Tribunal; amended notice of application or confirmation of no
12 amendment by 8th April from BT; Ofcom's defence by 22nd April; Sky's statement of
13 intervention by 6th May, Mr. Flynn; BT's reply by 27th May. Then we would very much
14 prefer staggered skeletons with BT on 3rd June, Ofcom on 17th June, and Sky on 29th June,
15 and then the trial on 4th July. Of course, like all best laid plans, that may collapse in the
16 light of events, but that is our objective.

17 Is there anything else you need our assistance on this morning. No. Thank you very much
18 for the very, very constructive contribution from everybody. Something has to give in all
19 these things, and I do hope that there is enough there to enable a proper trial of what is
20 clearly a very serious issue.

21 Thank you very much.

22 _____