Neutral citation [2008] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL Case No: 1095/4/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

23 April 2008

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

- and -

(1) THE COMPETITION COMMISSION

(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Respondents

- and -

VIRGIN MEDIA, INC.

Intervener

Mr. James Flynn QC (instructed by Allen & Overy) appeared for the Applicant.

Mr. Daniel Beard and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Ms. Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform.

Heard at Victoria House on 17 April 2008

RULING OF THE PRESIDENT ON DISCLOSURE (Non-confidential version)

Note: Excisions in this judgment marked "[…][**C**]" relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002

I. INTRODUCTION

1. Following an oral hearing on 17 April 2008 I granted an application by British Sky Broadcasting Group plc ("Sky") for disclosure, indicating that I would give my reasons in writing in due course. The reasons are as follows.

2. The disclosure application is made in the context of an application for judicial review pursuant to section 120 of the Enterprise Act 2002 ("the Act") in which Sky is challenging a report of the Competition Commission ("the Commission" and "the Report") relating to the acquisition by Sky of 17.9 per cent of the shares in ITV plc ("ITV" and "the Acquisition") and a related decision by the Secretary of State for Business, Enterprise and Regulatory Reform ("the Secretary of State" and "the Decision"). A separate challenge to the Decision and the Report has been brought by Virgin Media, Inc. ("Virgin") (Case no. 1096/4/8/08).

3. The background to the Report and the Decision is set out in a reasoned Order made by me on 9 January 2008. That order extended the time within which any application was to be made pursuant to section 120 of the Act in relation to the Report so as to be coterminous with the expiry of the time for making any application pursuant to section 120 in relation to the Decision.

4. Sky filed its notice of application for a review of the Report and the Decision on 22 February 2008. Virgin filed its notice of application on 25 February 2008.

5. On 26 February 2008, I ordered that any requests for permission to intervene in the Sky or Virgin proceedings be made by 7 March 2008. A case management conference was held on 11 March 2008 at which Virgin was granted permission to intervene in the Sky proceedings and Sky was granted permission to intervene in the Virgin proceedings. There were no other requests for permission to intervene. Pursuant to the Tribunal's order dated 11 March 2008 the Sky and Virgin proceedings will be heard together at a hearing commencing on 3 June 2008.

6. The Commission and the Secretary of State filed their defences in respect of both sets of proceedings on 28 March 2008. Virgin and Sky filed their statements of intervention in each other's cases on 14 April 2008.

II. CONFIDENTIALITY RING

7. The Report was first notified to Sky on 19 December 2007. In the versions of the Report supplied to Sky and Virgin respectively various passages were excised as containing material which was considered confidential to the party (or third party) which had supplied that material. Thus at that stage neither Sky nor Virgin were provided with an unredacted version of the Report. The treatment of confidential information was raised at the first case management conference on 11 March 2008. The discussion related, in particular, to information and documents said to be confidential to ITV which ITV had provided to the Commission and on which the Commission had relied in the Report and/or would rely upon in its defences to the applications for review. Although not a party to either of the review applications, ITV had written to the Tribunal on 10 March 2008 setting out its submissions as to how its confidential information should be protected. In summary ITV requested that its confidential material supplied to the Commission and/or to the Secretary of State should not be disclosed other than within a confidentiality ring limited to Sky and Virgin's respective external counsel and solicitors and subject to various other safeguards set out in ITV's submissions. In addition ITV asked that it be given the opportunity to make further representations to the Tribunal prior to the disclosure of any document provided by ITV to the Commission or the Secretary of State. Subject to these terms ITV was content for the material which it regarded as confidential and which it had supplied to the Commission or the Secretary of State to be disclosed.

8. The Tribunal's Order dated 11 March 2008 provided, *inter alia*, that "4. The parties formulate and agree between themselves and, so far as applicable, ITV plc, arrangements for the disclosure of confidential information and documents relevant to the Sky and Virgin proceedings and submit the agreed arrangements to the Tribunal in the form of an agreed draft order as soon as possible, and in any event no later than 4pm on 28 March 2008". Following further discussions and correspondence between the parties as to the precise terms of the proposed confidentiality ring, arrangements were agreed between all the parties to the two proceedings, and an order incorporating

those arrangements and establishing the confidentiality ring was made by the Tribunal on 31 March 2008.

III. THE APPLICATION FOR DISCLOSURE

9. By letters from its solicitors of 3 April and 9 April 2008, Sky has made an application for disclosure, within the confidentiality ring, of certain material supplied to the Commission by ITV or its financial advisers. In the (amended) form set out in the letter dated 9 April 2008, Sky's application is for disclosure of:

> "all documents submitted by or on behalf of ITV or its financial advisers and all transcripts of oral evidence by ITV or its financial advisers on which the Commission relied in finding (as summarised in paragraph 17 of the Report) that it was likely that ITV would need to make major investments requiring external funding over the next two to three years and that a non-pre-emptive rights issue would be the only feasible or efficient funding mechanism for some investments".

10. Attached to the letter dated 3 April 2008 was a confidential "non-exclusive" list of ITV material which Sky's advisers, having now had sight of the unredacted version of the Report, suggested was being relied upon by the Commission in relation to the findings in question, and of which disclosure was sought.

11. Sky, represented by Mr James Flynn QC, submits that those findings are central to the Commission's conclusions on jurisdiction and the competitive effects of the Acquisition. In its substantive application Sky challenges those findings as amounting to bare assertion. It is part of Sky's case that the findings are insufficiently supported by evidence and outside the scope of findings which the Commission can reasonably make (see for example paragraphs 54, 59, and 67-73 of Sky's notice of application). Sky further submits that, in making those findings and also in defending them against Sky's challenge, the Commission places considerable weight upon the evidence and material supplied to the Commission by ITV and its advisers. However, Sky argues that the unredacted version of the Report is too vague and general to enable the Tribunal properly to consider whether the Commission was entitled to make those findings. Sky submits that neither it nor the Tribunal can properly deal with this question without having sight of the documents requested which contain the evidence relied upon by the Commission. […][**C**].

12. Sky's application was resisted by the Commission, represented by Mr Daniel Beard and Mr Rob Williams. The Secretary of State, represented by Ms Elisa Holmes, supported the position taken by the Commission. The intervener, Virgin, stated in a letter to the Tribunal dated 15 April 2008 that the requested disclosure was primarily a matter for Sky, the Commission and ITV, and that although Virgin did not intend actively to oppose the application for disclosure, it stood by the views expressed in its letter to the Tribunal dated 7 April 2008 in which it had stated that there was more than sufficient information in the unredacted version of the Report for the Tribunal to determine whether Sky's challenge was well-founded, and that the application for disclosure amounted to a fishing expedition of the kind condemned in the relevant case law. For its part ITV wrote to the Tribunal a letter dated 16 April stating that its views remained as indicated in its submissions of 10 March 2008, to which I have already referred, and that accordingly ITV "remains happy for material falling within the description of Relevant Material to be disclosed under the terms of [the Tribunal's Order of 31 March 2008]."

13. In its written and oral submissions the Commission argues that the approach to Sky's disclosure request should be in accordance with that of the Administrative Court in applications for judicial review: orders for disclosure are the exception not the rule. Whilst the competition authority must give a full and frank explanation, should put its cards on the table face upwards and cannot sit on material adverse to it, the Tribunal should only go behind the Report if there are compelling reasons for disclosure of documentary material underlying the Commission's findings. The Commission prayed in aid the judgment in *Somerfield PLC v Competition Commission* [2006] CAT 4, in which the Tribunal indicated that in most cases such as this supplementary witness evidence from the Commission should be kept to a minimum.

14. The Commission further contends that Sky is not permitted simply to apply for disclosure in the hope that something may turn up to support its case. Whether, and to what extent, disclosure should be made in judicial review proceedings, the Commission submits, may depend on the balancing of several factors. First, the nature of the decision in question: the more detailed the decision, the less need there should be for ordering the disclosure of the contents of any underlying evidence. Secondly, the nature of the challenge being brought against the contested decision: disclosure may be more appropriate in cases where, for example, the applicant argues that decision should be set

aside on grounds of material error of fact (*E v Secretary of State for Home Department* [2004] EWCA Civ 49 (CA)). But even in these cases, orders for disclosure should not be automatic. Thirdly, the volume and types of documents which are being requested may also be material. Finally, one should have regard to the reasons why the applicant says that disclosure appears to be necessary in order to resolve the matter fairly and justly.

15. Referring to its duty in section 50(2) of the Act, the Commission contends that the Report is detailed and substantial, and that the Commission's findings (and the evidence on which it relied) are sufficiently set out in the Report to show its reasons together with such information as is appropriate for facilitating a proper understanding those reasons. It is neither necessary nor appropriate, therefore, to disclose evidence and representations received from ITV during the Commission's inquiry in the circumstances of the present case.

16. In the Commission's submission, Sky has not identified any particular feature of the present case to suggest that a review of the Commission's decision requires consideration not only of the Report but also the detail of the material received and considered by the Commission. It follows, therefore, that the Tribunal does not require further material in order to determine Sky's application for judicial review, and that Sky's application should be refused.

17. At the hearing Mr Beard, whilst accepting that the application in the present case was not an onerous one – the material amounted to some 4 lever arch files of documents which could be disclosed swiftly if an order were to be made - emphasised that the Commission's primary concern related to the wider ramifications of granting Sky's disclosure application. To accede to this application might set a precedent regarding the nature and extent of disclosure properly to be made by the Commission in future cases. The Commission is also concerned that there is a risk that Sky's application was effectively inviting the Tribunal to re-appraise the evidence received by the Commission, thereby blurring the line between judicial review proceedings and appeals on the merits. Further, the Report already provides Sky with a sufficient evidential basis to demonstrate, if it is able, that there was inadequate material to support the Commission's findings or that it was irrational. By disclosing only the material supplied by ITV there was a risk of presenting a distorted picture of the totality of the

evidence relied upon by the Commission. He referred to the fact the Commission is a specialised body, whose panel members have considerable expertise and experience and that it is inappropriate to order disclosure to facilitate a challenge to the Commission's interpretation and synopsis of documentary material.

IV. THE TRIBUNAL'S DECISION

18. Section 120(4) of the Act requires the Tribunal to "apply the same principles as would be applied by a court on an application for judicial review". Guidance as to the proper approach is to be found in the decision of the Court of Appeal in *Office of Fair Trading & Ors v IBA Health Ltd* [2004] EWCA Civ 142 (CA) ("the *IBA* case"). Referring to those principles Carnwath LJ stated at paragraph [88]:

> "On its face, this seems a clear indication that, notwithstanding the tribunal's specialised composition, the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles applied in the Administrative Court."

19. In the subsequent paragraphs of his judgment the learned Lord Justice provides further helpful guidance as to the appropriate approach to be taken on a judicial review in this context (see in particular paragraphs [91] to [100]). I shall refer to one or two further passages below.

20. The starting point for analysis of requests for disclosure in proceedings before the Tribunal is rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003). Rule 19 provides, in so far as is material:

> "(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The Tribunal may give directions-
>
> …
>
> (k) for the disclosure between, or the production by, the parties of documents or classes of documents…"

21. It is common ground between the parties that in approaching an application of this kind for specific disclosure the principles appropriate to disclosure in applications for

judicial review are applicable, and that such principles are now authoritatively set out in the speeches of the House of Lords in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650. That case concerned an application for judicial review of a determination by the Parades Commission for Northern Ireland placing certain restrictions on an Orange Order parade. An interlocutory appeal from the Court of Appeal in Northern Ireland on the subject of disclosure of documents in judicial review applications was before the House of Lords. In his speech Lord Bingham of Cornhill said:

> "2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.
>
> 3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions ... for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protective Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.
>
> 4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says".

22. There were also substantive speeches from Lord Carswell and from Lord Brown of Eaton-under-Heywood. Lord Carswell, at paragraph [32], said:

> "I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice".

23. Lord Brown, at paragraph [56], said:

> "This then is the general framework within which applications for disclosure in judicial review should be considered. In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time-consuming, to flood the court with needless paper. I share, however, Lord Carswell's (and, indeed, the Law Commission's) view that the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it, "a more flexible and less prescriptive principle" should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case."

24. Similarly, the general approach to disclosure before the Tribunal is that it is not automatic. It needs to be ordered by the Tribunal, usually upon a request by a party to the proceedings, and the Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it (*Claymore v OFT (Recovery and Inspection)* [2004] CAT 16, paragraph [113]). In accordance with the principles in *Tweed* the need for the requested disclosure must be examined in the light of the circumstances of each individual case. Prominent amongst those circumstances are likely to be the nature of the decision challenged, the nature of the grounds on which the challenge is being made, and the nature and extent of the disclosure being sought. Mere fishing expeditions will not be allowed. Where the disclosure sought is very onerous in extent that will be a factor to be weighed, although there will no doubt be cases where unavoidably onerous disclosure is nevertheless required in order that the matter may be dealt with in accordance with the objective in rule 19 to deal with the case justly. Where a particular document is significant to the decision being challenged, it is usually better to disclose the document as primary evidence rather than to attempt to summarise it.

25. Beyond such generalisations as these it is hardly useful to go, given the requirement to look at each application for disclosure individually. Indeed this requirement should give some comfort to the Commission in relation to their concern that if disclosure is ordered in the present case then it is likely to be ordered in all cases. I do not consider that this concern is justified. Even in relation to cases where the circumstances are superficially similar there are likely to be different factors in play which may well lead to differing results. In my view the exercise of the Tribunal's powers under rule 19

must remain flexible, ready to be adapted to the particular circumstances of the case where the interests of justice so require. The precedent value of particular cases is likely to be relatively small in this context.

26. What are the specific circumstances of this case? In its application for review Sky challenges *inter alia* the Commission's conclusions as to Sky's influence on ITV as a result of the Acquisition and as to the likely effects of that influence on competition. Those conclusions are admittedly based on the Commission's findings (1) that it was likely that ITV would need to make major investments requiring external funding over the next two to three years and (2) that a non-pre-emptive rights issue would be the only feasible or efficient funding mechanism for some investments. These findings are summarised at paragraph 17 of the Report and set out in more detail at paragraphs 4.101, 4.102, 4.106, 4.128-4.133 and paragraphs 11 *et seq* of Appendix C. The Commission considers that Sky has the power to influence ITV's policy in relation to these matters, and that there will be adverse effects on competition, because in the Commission's view a special resolution would be needed by ITV and the Acquisition has given Sky the ability to block it.

27. Sky argues that the Commission was not *entitled* to make findings (1) and (2) on the basis of the evidence before it. In other words those findings are said to be irrational or perverse. Such grounds of challenge are, of course, admissible in an application for judicial review, and can therefore be raised in an application under section 120 of the Act, subject to their being otherwise properly arguable in the light of the circumstances of the particular case. This was confirmed in the *IBA* case, to which I have already referred. There Carnwath LJ said at paragraph [93]:

> "The present case…. is not concerned with questions of policy or discretion, which are the normal subject-matter of the *Wednesbury* test. Under the present regime (unlike the 1973 Act) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to enquire whether there was adequate material to support that conclusion (see *Tameside* case, [1977] AC at 1047 per Lord Wilberforce)".

28. In support of the findings in question the Commission refers, both in the Report and in its Defence, to "substantial evidence" of a confidential nature received from ITV (see for example paragraph 4.101 of the Report; see also paragraph 174 of the Defence).

The effect of this ITV material has been summarised in the Report but the material itself has not been disclosed. Sky's disclosure application relates to this evidence.

29. It seems to me that in these circumstances the principle referred to by Lord Bingham at paragraph 4 of *Tweed* (cited above) is in point: the Commission is relying upon ITV's evidence as significant to the findings which are under challenge. The Commission's summary of the effects of that evidence is no doubt conscientious and skilful, but the material itself is the best evidence of what it says.

30. Further, the disclosure sought is expressly tailored to the findings under challenge. It is not a wide-ranging request but is specifically focused on the material relied upon by the Commission in relation to the findings. Compliance with Sky's request would, as the Commission rightly accepts, not be onerous. Nor is the confidential nature of the material an obstacle to disclosure given that ITV is content for it to be supplied to the parties' external legal advisers within the confidentiality ring.

31. In my view these factors weigh strongly in favour of the material requested being now disclosed subject to the safeguards of the confidentiality arrangements in place. In order to deal fairly with Sky's contention that the Commission could not properly make the findings in question on the material before it the Tribunal should have sight of the material relied on by the Commission in making them rather than a synopsis, however conscientiously formulated. Those findings are admittedly very significant in relation to the Commission's overall conclusions as to material influence and effects on competition.

32. I do not consider that the Tribunal's remarks in *Somerfield*, at paragraphs 58-69, cited above, to which the Commission drew my attention are in point. The Tribunal was not there dealing with an application for specific disclosure; the Tribunal was making some general comments by way of guidance as to the desirability of the Commission supplementing its report (which was a report governed by section 38(2) of the Act and contains provisions which, for present purposes, are identical those in to section 50(2)) by lodging substantial witness statements. The Tribunal indicated that in most cases supplementary witness statements should be kept to a minimum. In particular there was no need to repeat or place a gloss on the report. The present issue does not concern supplementary witness statements of that kind; it involves the question whether

underlying raw material which has been relied upon in order to reach important findings in the Report should be disclosed where the findings are challenged as being unsupported by the evidence.

33. Nor do I consider that Sky's application is a fishing expedition. It is a focused request for specific material upon which reliance has expressly been placed by the decision-maker. The material is not being sought opportunistically in to the hope of discovering some defect which may give rise to a ground of challenge. The relevant ground of challenge has already been asserted and the material is required in order to determine whether that ground is made out or not.

34. The suggestion that the application would risk blurring the distinction between judicial review and an appeal on the merits because it would in effect invite the Tribunal to reappraise the evidence seems to me to be off the mark. As Mr Flynn for Sky submitted, there is nothing inconsistent with judicial review in the court being asked to look at underlying material; it is the purpose for which it is being looked at which must reflect the distinction between a merits appeal and a review. That is a matter for submissions in the course of the substantive application; we are only at the stage of disclosure at the moment.

35. As for the risk identified by Mr Beard that by disclosing only the material supplied by ITV the picture which would be presented by looking at the totality of the evidence would be distorted, this does not seem to me to be very significant. I have already indicated that the material sought is that which is relied upon in making certain specific findings. Those findings are such that the evidence relating to them is inherently likely to come wholly or mainly from ITV or its advisers. As Mr Flynn points out, the Report does not identify evidence from any other source as being relevant to these findings. He submits, however, that it is always open to the Commission to disclose other material should this be thought appropriate. Mr Beard in response indicated that in looking at the matter in the round the panel members would have brought to bear their knowledge and experience of the industry. No doubt that is true, but, as Mr Beard concedes, that is not evidence which is referred to in the Report and is a matter upon which submissions can properly be made.

36. In the course of his argument for the Commission Mr Beard stated that Lord Bingham's approach in *Tweed* to which I have referred (see paragraph 29 above) could be problematical if applied generally to Commission reports of this kind, not least because of the enormous amount of material which would need to be exhibited to a Commission defence. He referred to the Commission's solicitors' letter dated 28 March 2008 which accompanied the Defence in this case. In that letter the Commission explained that it did not consider it necessary to provide further documentary material "at this stage" because the Report "contains all the main reasons for the decision, sets out the principal considerations taken into account and the principal facts found." Nor was the Commission seeking to provide further evidence by way of witness statement. In other words, the Report could and should stand by itself in the context of a challenge by way of judicial review. In addition the letter referred to the observations of the Tribunal in *Somerfield* at paragraphs 58-69 as to the provision of substantial additional witness evidence in a section 120 review. It also referred to the fact that the parties could now (in the light of the establishment of a confidentiality ring) see the full unredacted version of the Report. Finally the letter drew attention to the considerable confidentiality issues that would be involved in disclosing underlying material, and to the distortions which might arise from the exercise of selecting material for disclosure. In the light of these considerations, and of the present application for disclosure, Mr Beard suggested that it would be helpful to have guidance as to whether in such circumstances as these a body such as the Commission should put in additional witness statements and if so how much material should be exhibited given the size of the Report and the statutory duties which apply to it.

37. I feel that the Tribunal should be very wary of seeking to give even general guidance as to what disclosure would be appropriate in other cases; as I have said, it is of the essence of disclosure applications that each must be considered in the light of its specific circumstances as informed by the objective in rule 19 of securing the just, expeditious and economical conduct of the proceedings. No two cases are likely to be the same.

38. However, I would offer the following brief comments on the concern felt by the Commission about the application of Lord Bingham's example (in paragraph 4 of *Tweed*, cited above) to a case such as the present. That example was put in terms of a particular document being significant to the contested decision. In those circumstances,

as Lord Bingham says, it would ordinarily be good practice to exhibit the document as the primary evidence. In other words the document itself should normally be disclosed at the outset rather than a deponent attempting to summarise it in a witness statement. In the present case the Commission's findings are set out in a long and detailed Report generated over several months, in the course of which a great deal of evidence was received by the Commission. In such a case it is likely to be wholly impracticable to annex to the report all the evidence relied upon, let alone all the evidence received. There is the question of bulk, and also of protection of confidentiality to be considered. The problems of redacting sensitive information on behalf of those who submitted evidence to the Commission would be very significant. Further, as Mr Beard has pointed out, the contents of the Report are prescribed by section 50(2) of the Act. The Commission's statutory duty does not require all the actual evidence received or relied upon to be annexed to the Report. The Commission is required to provide only such information as it considers appropriate to enable the issues which it has been asked to deal with and the reasons for its decision on that issue to be properly understood. Nor does Sky submit otherwise.

39. In the context of a challenge to a decision based on inadequacy of reasons Carnwath LJ said this in the *IBA* case, at paragraph [105]:

> "In a case such as the present, where the subject-matter is complex and the supporting material voluminous, there is no statutory requirement for all the evidence to be set out in the decision letter. However when a challenge is made, there is, as the Tribunal noted, an obligation on a respondent public authority to put before the Court the material necessary to deal with the relevant issues; "all the cards" should be "face upwards on the table" (see *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941)".

40. In a straightforward case, where it is reasonably clear that certain underlying material will be required in order to resolve a challenge to the decision in question, there is much to be said for that material being voluntarily disclosed at an early stage – probably when the defence is filed. However, this approach may not always be appropriate. For example, where the grounds of challenge are not entirely clear from the notice of application or are inadmissible or otherwise obviously unarguable, or where the underlying material is very voluminous, or where there are substantial confidentiality issues to be resolved which would involve a great deal of redaction, it may be more appropriate to await an application for specific disclosure.

41. In the present case the Commission was entirely open in the Report about the existence of and reliance upon evidence including the evidence from ITV, but indicated that it was not disclosing it "at this stage" i.e. on lodging its Defence, for a number of reasons. These included the fact that the parties now for the first time had sight of the passages of the Report which had been redacted, and also that the underlying material was voluminous and much of it was confidential. It seems to me that in these circumstances it was reasonable for the Commission not to disclose voluntarily the underlying material at that stage. The unredacted Report quickly generated a request for specific disclosure by Sky which may well be more limited and targeted than the disclosure the Commission might have thought fit to make had it acted on its own initiative at an earlier stage. Sky was of course made aware in general terms of the nature of the underlying evidence.

42. Finally I should perhaps make clear that in relation to the desirability of supplementary witness statements by the decision-maker in the context of a detailed report such as the present, I cannot improve on the Tribunal's observations in *Somerfield*, to which I have referred earlier.

V. CONCLUSION

43. In light of the foregoing, I consider that disclosure of the material requested by Sky is necessary (in the sense in which Lord Bingham used the word in *Tweed*) for dealing fairly with Sky's grounds of review of the Report. To this end I made the Order dated 17 April 2008. The material thereby required to be disclosed within the confidentiality ring is described at paragraph 9 above. None of the parties considered that it was necessary for the order to identify specific documents.

The Honourable Mr Justice Barling 23 April 2008
President of the Competition Appeal Tribunal