



Neutral citation [2013] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

Cases No: 1152/8/3/10 (IR)
1155/3/3/10
1156-1159/8/3/10
1170/8/3/10
1179/8/3/11

27 February 2013

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PROFESSOR JOHN BEATH
MICHAEL BLAIR QC (Hon)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
BRITISH TELECOMMUNICATIONS PLC
TOP UP TV EUROPE LIMITED

Appellants / Intervenors

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

TOP UP TV EUROPE LIMITED
RFL (GOVERNING BODY) LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Intervenors

Heard at Victoria House on 6 February 2013

**RULING (STAY AND OTHER MATTERS
ARISING OUT OF MAIN JUDGMENT)**

APPEARANCES

Mr James Flynn QC, Mr Meredith Pickford and Mr David Scannell (instructed by Herbert Smith Freehills LLP) appeared for British Sky Broadcasting Limited.

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

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

Mr Mark Hoskins QC (instructed by Ashurst LLP) appeared for Virgin Media, Inc.

Miss Helen Davies QC (instructed by DLA Piper UK LLP) appeared for the Football Association Premier League Limited.

INTRODUCTION

1. This ruling deals with matters arising out of the Tribunal's judgment of 8 August 2012 in cases 1156-1159/8/3/10 *British Sky Broadcasting Limited & Ors v. Office of Communications*, [2012] CAT 20 ("the Judgment"). The ruling should be read together with the Judgment, and it generally adopts the terms and abbreviations defined therein.
2. The Judgment concerns four separate appeals, brought by each of Sky, FAPL, BT and VM in respect of Ofcom's 2010 Pay TV Statement ("the Statement"). It also affects three further appeals, namely the STB and CAM appeals (see paragraph 7 of the Judgment) and an appeal brought by TUTV on 27 May 2010 in relation to the Picnic Statement ("the TUTV appeal"). In the Judgment, the Tribunal found in Ofcom's favour on two arguments made by Sky and FAPL as to the scope of Ofcom's jurisdiction to take action under section 316 of the 2003 Act. However, the Tribunal upheld Sky's challenge to the key findings on which Ofcom's exercise of that jurisdiction in the present case was based. In the light of the Tribunal's conclusions, it was not necessary for us to determine the other issues raised in the appeals of Sky and FAPL, challenging the validity, effectiveness and proportionality of the WMO remedy imposed by Ofcom to address the specific competition concerns which the Tribunal had held to be unfounded. Similarly, it was not necessary to determine the appeals of BT and VM, as these were exclusively concerned with the WMO remedy. Furthermore, our conclusions in Sky's appeal rendered it unnecessary for the Tribunal specifically to consider the STB, CAM and TUTV appeals.
3. BT alone has sought permission to appeal against the Judgment.¹ The Tribunal refused BT's application in a ruling dated 7 February 2013 ([2013] CAT 2). In its ruling the Tribunal concluded that BT's proposed grounds of appeal disclosed no point of law with a real prospect of success and no other compelling reason for the appeal to be heard.

¹ By the President's Order of 10 August 2012, the deadline for requesting permission to appeal the Judgment was extended until one month from the date of publication by the Tribunal of a non-confidential version of the Judgment. The Tribunal published a non-confidential version of the Judgment on 24 October 2012.

4. In the Judgment, the Tribunal stated that Sky's appeal must be allowed but that the Tribunal would hear the parties in due course on the appropriate consequential orders and directions in respect of all the relevant appeals, the interim relief order and generally.² Following the publication of the non-confidential version of the Judgment on 26 October 2012, the Tribunal invited³ the parties to confer with a view to reaching agreement on these and any other outstanding matters relating to the appeals. The parties were asked to inform the Tribunal about their progress and to supply the Tribunal with the text of any agreed draft order by 5 December 2012, indicating whether an oral hearing was required.
5. In the event, some measure of agreement was reached and the parties indicated that they were content for some of the unresolved matters to be determined on the papers without a hearing. However, it became clear that an oral hearing was needed on the question of costs and also on the issue whether the status quo under the Statement, as modified by the Interim Relief Order, could or should be maintained pending the outcome of BT's proposed appeal to the Court of Appeal. Accordingly an oral hearing took place on 6 February 2013 following lodging of detailed written submissions on these matters.
6. The present ruling deals with most of the consequential matters other than the disputed applications for costs by Sky and FAPL, which will be the subject of a separate ruling. That ruling will also determine the issue of whether FAPL's appeal should be allowed or dismissed in the light of the Judgment – a question which is closely related to FAPL's application for costs. We do not understand there to be any objection to FAPL's request that, if the Tribunal decided that dismissal was the appropriate disposal of FAPL's appeal, that order (and any provision that there be no order as to FAPL's costs) should only take effect in the event that the Court of Appeal rejected any application by BT for permission to appeal or, if the Court of Appeal granted permission, that appeal is finally dismissed in its entirety.

² Judgment, paragraph 836.

³ By a letter of 8 November 2012.

MATTERS UPON WHICH THERE IS AGREEMENT

7. It is now agreed, as indeed the Tribunal stated in the Judgment itself, that Sky's main appeal must be allowed. The parties have also been able to agree that the STB and CAM appeals should be allowed, and that the appeals by BT, VM and TUTV should all be dismissed.
8. Further, subject to the question of the "stay" sought by BT, the parties have also agreed the directions that should be given to Ofcom pursuant to sections 195(3) and (4) of the 2003 Act (as applied by section 317(7)) as regards the Statement and the decisions at issue in the STB and CAM appeals, together with the mechanism by which the escrow arrangements agreed by the parties under the Interim Relief Order (see paragraph 6 of the Judgment) should be unwound. In essence it is agreed that:
 - (a) Ofcom should be directed to withdraw its decision (within the Statement) to insert the relevant licence conditions into Sky's TLCS licences ("the Decision") and to remove those conditions from the licences, and that Ofcom should also be directed to set aside the decisions at issue in the STB and CAM appeals; and
 - (b) BT and TUTV, the only parties to have taken supply of the CPSCs pursuant to the Interim Relief Order, should be ordered to arrange for the sums paid into escrow to date to be paid out to Sky (together with interest), and that the Interim Relief Order should cease to have effect.

MATTERS UPON WHICH AGREEMENT HAS NOT BEEN REACHED

(1) BT's application for a "stay"

9. In addition to the matters identified in paragraph 6 above, the following is the main issue upon which the parties have not been able to reach accord: whether the directions outlined at subparagraphs 8(a) and 8(b) above should be brought into effect within a short, fixed period from the date of the Tribunal's order (e.g. within 7 days thereof), or whether they should be framed so that they do not come into

effect until either BT's renewed application for permission to appeal⁴ is dismissed by the Court of Appeal or, if permission is granted, BT's appeal is finally determined adversely to BT.

10. This issue comprises two sub-issues: (1) whether the Tribunal has the power to “stay” its final order and/or to frame it in such a way that its coming into effect, and the date thereof, are contingent upon, and determined by, the outcome of BT's proposed appeal; and (2) if the power exists, whether, and if so on what terms, it should be exercised here.
11. BT submits that the power exists and should be exercised in the terms we have outlined at paragraph 9, so as to preserve the *status quo* and protect BT against irreparable damage until its proposed appeal has been determined by the Court of Appeal. Sky submits that the Tribunal has no power to stay or delay the coming into effect of its final order for longer than is necessary in order to allow a reasonable time for Ofcom to comply with the Tribunal's order; alternatively, if a discretion exists, the Tribunal should not exercise it in the present case so as to deprive Sky of the fruits of its successful challenge to the Decision pending an appeal by BT. Ofcom indicated at the hearing on 6 February 2013 that it had no objections to the relief sought by BT, and VM stated in written submissions that it was “content” for the relief in question to be granted, and that if it was granted it should extend to all those entitled to take advantage of the Interim Relief Order.

Jurisdiction

12. Mr James Flynn QC, who appeared for Sky, submitted that there is nothing in the Tribunal Rules which expressly permits the Tribunal to “stay” the effect of its final order indefinitely on the basis of a contingency which may mean that the order never comes into effect. He pointed to section 195 of the 2003 Act, which, by subsections (3) and (4), requires the Tribunal to include in its judgment “a decision as to what (if any) is the appropriate action for the decision-maker to take in respect of the subject-matter of the decision under appeal” and then to “remit the decision

⁴ By letter dated 21 February 2013, BT informed the Tribunal that it has renewed its application for permission to appeal before the Court of Appeal and that it is seeking, in the event that permission is granted, an expedited hearing.

under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision”. Mr Flynn submitted that since the directions in question must be such as are appropriate “for giving effect to” the Judgment, this was not the same as framing the order in such a way as to prevent the Judgment coming into effect pending a possible appeal. He distinguished that from an order which, for example, gave the decision-maker a reasonable period within which to comply with the Tribunal’s directions. The latter was implicitly within the words of the statute.

13. In the course of argument, we were referred to the decision of the Tribunal in *BT v Ofcom* [2011] CAT 28, where an intervener in the appeal sought a stay of part of the Tribunal’s final order containing certain directions to Ofcom made pursuant to section 195 of the 2003 Act. As in the present case, a stay was sought pending the outcome of an application for permission to appeal or, if granted, the outcome of the appeal itself. In the alternative, there was an application for a stay until the Court of Appeal had ruled on a renewed stay application.⁵ The Tribunal held “tentatively” that the power to grant the stay existed but, in its discretion, declined to grant it. In relation to the existence of the power the Tribunal said:

“24. Although the matter is certainly not free from doubt, we do not consider that Rule 61 gives the Tribunal the power to stay the implementation of a final order made by it.

25. We have considered whether a power to stay exists by virtue of other provisions. Tentatively, we have concluded that such a power does exist:

(1) It is possible to appeal the Tribunal’s decision to the Court of Appeal (where the Tribunal sits in England and Wales). The provision providing for this is contained in section 196 of the 2003 Act.

(2) The Tribunal Rules say very little about the conduct of such appeals (Rules 58 and 59 simply dealing with the process of requesting permission to appeal and the Tribunal’s decision where such a request is made).

⁵ The renewed application for a stay was granted by a Court of Appeal comprising Etherton and Pitchford LJJ in a judgment given on 18 October 2011 ([2011] EWCA Civ 1715). This judgment was not cited to us and we do not consider that it assists one way or the other in determining BT’s application in this case.

(3) In these circumstances, it may be helpful to have recourse to the Civil Procedure Rules (the “CPR”), the relevant provision being CPR Part 52. CPR Part 52.1(1)(a) states that “the rules in this Part apply to appeals to...the civil division of the Court of Appeal”. Further:

(i) CPR Part 52.1(3)(b) defines “appeal court” as “the court to which an appeal is made”, in this case, the Court of Appeal;

(ii) CPR Part 52.1(3)(c) defines “lower court” as “the court, tribunal or other person or body from whose decision an appeal is brought”. That must include the Tribunal. This is confirmed – were such confirmation necessary – by the Practice Direction (“PD”) that accompanies CPR Part 52, which expressly references appeals from the Tribunal (CPR 52PD 21.10 and 52PD 21.10A).

(iii) CPR Part 52.7 provides as follows:

“Unless –

(a) the appeal court or the lower court orders otherwise; or

(b) the appeal is from the Immigration and Asylum Chamber of the Upper Tribunal,

an appeal shall not operate as a stay of any order or decision of the lower court.”

(iv) The implication is that the lower court has a power to stay; and although that power is (as we have found) nowhere articulated in the Tribunal Rules, it is our (albeit tentative) conclusion that such power is conferred by CPR Part 52.7 itself.

26. We are confirmed in our conclusion by a dictum of Lord Nicholls in the Privy Council, in *Bibby v Partap* [1996] 1 WLR 931 at 934, where he stated that “[u]nder English law a court of first instance which grants relief, whether interlocutory or final, has an inherent power to suspend (“stay”) its order until an appeal or would be appeal to the Court of Appeal is disposed of”. Although Lord Nicholls clearly did not have the

Tribunal, or any UK statutorily-constituted body in mind, we nevertheless attach some weight to this statement. It is consistent with Rule 68(1) of the Tribunal Rules, which provides that, subject to the provisions of the Tribunal Rules, the Tribunal may regulate its own procedure.

27. In conclusion, we consider (albeit tentatively) that the Tribunal does have jurisdiction to stay its own judgment or order in an appropriate case, and we proceed on this basis.”

14. That decision of the Tribunal was discussed by Lloyd LJ in his judgment in *Ryanair Holdings plc v OFT* [2011] EWCA Civ 1579, to which both sides also drew our attention, although the issue before the Court of Appeal in that case was admittedly a different one. Lloyd LJ first stated that in his view Rule 61(2) of the Tribunal Rules was wider in scope than the Tribunal had considered. In particular, he was of the view that the word “directions” in Rule 61(2) was “potentially wide in its meaning”, was not “narrower than r 61(1)”, and was “a free-standing provision to be interpreted on its own terms.” Nevertheless, the learned judge appeared to agree with the Tribunal’s conclusion that Rule 61(2) did not empower the Tribunal to stay its own final order, saying: “As it seems to me, a *possible* reason why r 61(2) could not itself justify a stay of the Tribunal’s own order *may* be that, like r 61(1), it is directed at interim relief, ie relief pending the Tribunal’s own decision, not at relief pending an appeal against that decision.” (Our emphasis) His use of the words we have italicised may indicate that Lloyd LJ was not expressing a concluded view on the matter, which was not before the Court of Appeal for decision. (See paragraphs 42 to 53 of the Court of Appeal’s decision.)

15. As Lloyd LJ pointed out at paragraph 46, Rule 61(2) has its origin in paragraph 22(2) of Schedule 4 to the Enterprise Act 2002, which provides:

“Tribunal rules may also make provision giving the Tribunal powers similar to those given to the OFT by section 35 of the 1998 Act.”

16. Subsection 35(1) states that, with certain exceptions, the section applies if the OFT has begun a competition investigation under the 1998 Act “and not completed it...” A good deal of the detail in section 35 has little relation to an appeal before the

Tribunal, but there is a power in subsection 35(2) for the OFT to give such directions as it considers appropriate to prevent serious and irreparable damage to a particular person or category of person, or to protect the public interest. By subsection 35(5) such a direction has effect while the section applies, subject to two limited exceptions, which are not relevant. Thus, it would appear that a direction under section 35 would normally cease to have effect once the investigation of the OFT is complete. Moreover, Rule 61 of the Tribunal Rules as a whole is framed in terms which imply that it is dealing only with interim relief pending the Tribunal's final decision: see, for example, Rule 61(4): "Any order or direction under this rule is subject to the Tribunal's further order, direction or *final decision*." (Our emphasis)

17. In the light of this, we tend to the same view as the Tribunal in *BT v Ofcom*, and as (possibly) Lloyd LJ in *Ryanair v OFT*, namely that, despite its free-standing nature and wide scope, Rule 61(2) does not contain a power to stay the effect of a final order pending appeal to the Court of Appeal. In fact, Mr Jon Turner QC, who represented BT at the hearing on 6 February 2013, expressly excluded Rule 61 as the basis of his application, relying instead on the reasoning of the Tribunal in paragraph 26 of its ruling in *BT v Ofcom*, which we have set out verbatim above. In particular he submitted that implicit in the Tribunal's express power to regulate its own procedure under Rule 68 was the power to determine when the Tribunal's order, or any aspect of it, would come into effect. The statutory scheme, including section 195 of the 2003 Act, was sufficiently flexible to permit the Tribunal to stipulate that the operative directions would take effect at a later date. He rejected as illogical and artificial the distinction drawn by Mr Flynn between a suspension for a definite period and one the length of which depends on a further event taking place. Both, he said, are aspects of the Tribunal regulating its own procedure, which can be employed in the interests of justice.

18. We note that the Court of Appeal in *Ryanair v OFT* referred to the Tribunal's "tentative" conclusion in *BT v Ofcom* that a power to suspend its own final decision pending an appeal does exist, albeit not by virtue of Rule 61, but made no comment, adverse or otherwise, on it or on the Tribunal's reasoning which led to it (see paragraph 44 of the Court of Appeal decision). With about the same level of

confidence as the Tribunal felt able to express, we have come to the conclusion that the Tribunal was right as regards the existence of the power.

19. Like the Tribunal, we find the dictum of Lord Nicholls in *Bibby v Partap* helpful in articulating what appears to us to be a general principle, implicit in the power to make and frame a final order. Whether or not the power to stay such an order is conferred by CPR Part 52.7, as the Tribunal in *BT v Ofcom* tentatively concluded, that sub-rule is certainly a good example of the very general scope of the implication to which we have referred: at the very least, the sub-rule seems to be based on an assumption that a “court, tribunal or other person or body from whose decision an appeal is brought” is likely to have such a power (see CPR Part 52.1(3)(c)). We emphasise that so far as the Tribunal, as a statutory body, is concerned there can be no *inherent* power of this kind. Such power must be implied, if not express, or be absent.
20. Of course, any such implied power must be subject to the particular statutory and procedural framework within which a court is operating. Its powers may be defined or limited so as to exclude a power of this kind. However, no such limiting provision has been identified here. We do not consider there is anything in section 195 which has that effect. While that section does stipulate that appropriate directions, if any, for giving effect to the Tribunal’s decision must be included in the Tribunal’s final disposal of the appeal, it says nothing about the timing of the order or how it should come into effect.
21. Mr Flynn accepts that the Tribunal can bring its order into effect at a later date, but submits that this is purely in order to ensure that the parties have a reasonable time to comply; otherwise they would be automatically in breach of the order. We do not accept that the difference between a fixed period of postponement and a period the length of which depends on the outcome of a permission application, has the significance attributed to it by Mr Flynn. In particular, we do not believe that the desirability of allowing a reasonable time to comply is the only consideration which is capable of affecting the timing of a final order. The Tribunal’s general power to regulate its own procedure, embodied in Rule 68 but otherwise probably implicit, must surely serve the overriding interest in the just and efficient determination and

disposal of proceedings before it. We consider that where the circumstances make it appropriate that the Tribunal's final order should not be implemented until permission to appeal to the Court of Appeal, or the appeal itself, has been determined by that court, it is within the Tribunal's power to frame its order accordingly.

22. That it would be highly desirable that a power should exist is not, of course, a reason for holding that it does, save in so far as the desirability may support the implication to which we have referred. Nevertheless, if the Tribunal were not able to make an order of the kind sought here, then it is clear that it would also be unable to delay the implementation of its final order even for the purpose of allowing the proposed appellant to get itself in front of the Court of Appeal to seek interim relief. In those circumstances, the Tribunal might be requested to fall back upon devices, in order to achieve a just and sensible result, such as delaying the making of its final order or calculating a period for compliance so as to provide sufficient time for an urgent interim application to the Court of Appeal. Such a situation would be highly undesirable. In our view it does not arise.

Should the power be exercised here?

23. When the agreed directions of the Tribunal are implemented (see paragraph 8 above), Ofcom's disputed decision to insert the licence conditions in question into Sky's licences will be withdrawn, and those conditions will be removed. Further, the Interim Relief Order (made in 2010 with the consent of all the parties), under which the disputed element of the wholesale price paid by those retailers who take supply of CPSCs pursuant to that Order is paid into escrow, will cease to have effect, and the monies in escrow will be paid to Sky with interest.
24. Mr Turner submits that the Tribunal should delay the implementation of these directions and preserve the *status quo* until BT has obtained a decision on permission from the Court of Appeal and, if permission is granted, also until the final determination of that appeal. Mr Turner argued that, if we were minded to grant a stay, it should not terminate at the permission stage in the Court of Appeal, as a judge of that court may not be in as good a position as the Tribunal to judge

whether the stay should be continued until the end of the appeal process. So we should take that decision.

25. As to the grounds for a stay, Mr Turner submits that it is in the interests of justice and makes common sense for the licence conditions and the escrow arrangements to be preserved pending the result of BT's appeal. He relies essentially upon two grounds.

26. First, if there is no stay and the licence conditions are removed from the licences then, in the event of a successful appeal by BT, the WMO could not simply be reinstated and the conditions reinserted into the licences. In order for Ofcom to comply with its statutory duties, there would need to be a protracted period of consultation of at least 12 months before there could be a replacement decision by Ofcom. During that period, the harmful consequences for competition generally, and for BT in particular, at which the WMO was directed, would potentially arise and be unremedied. This potential harm provided a clear and compelling reason to preserve the licence conditions in place pending the outcome of an appeal of which they form the subject-matter.

27. Secondly, Mr Turner points to the fact that if the escrow arrangements are not kept in place, the money which would otherwise have been paid into escrow (which he stated was currently accruing at £100,000 per month) would not be repaid to BT in the event that it won its appeal on a basis enabling the WMO to survive. Up to the hearing on 6 February 2013, Sky had indicated that it would not undertake to repay these monies accruing after the escrow arrangements were wound up in accordance with the Tribunal's order. Mr Turner told us that the sum in question was likely to amount to more than £500,000 by June 2013 when permission might be expected to have been dealt with, and considerably more by the time the appeal was resolved. Therefore this loss to BT would be irremediable. As against those elements, Mr Turner stated that the only prejudice to Sky of granting a stay would be a temporary cash flow interruption. It would get its money in the event that permission was refused or BT lost its appeal.

28. In opposing BT's application, Mr Flynn referred to the current edition of the White Book at CPR 52.7.1, page 1718, where it is noted that the courts have established the principle that a successful litigant should not generally be deprived of the fruits of their litigation pending appeal, unless there is some good reason for this course. He drew our attention to a number of passages referring to case law, which we can perhaps summarise as follows. A stay is the exception rather than the rule. Solid grounds should be advanced, which may include the perceived strength of an appeal, and, if established, a balancing exercise should be undertaken to weigh the competing risks of injustice. Some form of irremediable harm rather than temporary inconvenience should be looked for.
29. Mr Flynn accepts that, if no stay is granted and the agreed directions come into effect, then the WMO will cease and neither the Court of Appeal nor this Tribunal on a remittal could conjure it up again in the event that BT were successful in its appeal and that the effect of such success was that the WMO should not have been withdrawn. He also accepts that in those circumstances there would be at least some significant delay while Ofcom was consulting in order to decide whether to reimpose a regulatory obligation similar to the WMO. However, he argues, first, that at best BT's complaint is one of delay before the WMO is reimposed; and, secondly, in so far as BT is complaining that there is no guarantee that Ofcom *would* decide to reimpose a WMO after reassessing the relevant features of the market, he submits that BT is seeking by means of a stay to be put in a better position than the market/competitive situation would entitle it to be put in. Thus, the fact that Ofcom might not ultimately decide to reimpose a WMO is, he submits, an argument *against* a stay rather than for it.
30. In addition, Mr Flynn argued that the loss of £100,000 per month is more in the category of temporary inconvenience than irremediable loss where BT is concerned. However, after taking instructions at the hearing Mr Flynn stated that, if this aspect was decisive for the Tribunal, Sky would extend its undertaking (currently limited to repaying the amount now in escrow) to cover also the amount of the price differences in respect of supplies of CPSCs while the matter was before the Court of Appeal.

31. He submitted that, set against this, if a stay were to be granted Sky would continue to be subject to intrusive regulation in the form of the Interim Relief Order.
32. Finally, Sky referred in its written submissions to the weakness of the proposed appeal by BT, as disclosed in the application for permission. Mr Flynn submitted that if, contrary to his primary argument, the Tribunal was of the view that a stay was justified, then it should be for the shortest time sufficient to enable BT to persuade the Court of Appeal that it should be continued.

Tribunal's conclusion on the stay issue

33. We have unanimously concluded that the directions which, it is agreed, follow from the Tribunal's findings in the Judgment, should be framed so as to come into effect 14 days after the Court of Appeal has finally determined BT's renewed application for permission to appeal. The WMO, as modified by the Interim Relief Order, should remain in place until that time. This should enable BT, if permission to appeal is granted, to make an application for interim relief to the Court of Appeal if it so desires. The Interim Relief Order itself should also remain in place so as to preserve the escrow arrangements until then. Indeed, both Sky and BT have indicated to the Tribunal that the WMO and the escrow arrangements should stand or fall together. If the renewed application made by BT is withdrawn, then our order will come into effect 14 days after the withdrawal.
34. We will state briefly the reasons for our conclusion, in relation to which we had regard also to a communication from REAL Digital TV Limited referred to separately below (see paragraph 46 below and following).
35. BT is a beneficiary of the WMO, as modified by the Interim Relief Order. As seen, it is common ground between Sky and BT that the effect of the agreed directions, once complied with, will be to terminate the WMO so that it could not be reinstated in the event of success by BT in its appeal. BT would have ceased to be a beneficiary of the WMO. Were Ofcom to decide to go down the route of imposing a similar regulatory obligation, the investigation, consultation and assessment process carried out by Ofcom prior to imposition of the WMO would have to be revisited in

the light of what are undoubtedly fast-changing market conditions in relation to Pay TV. There would, therefore, necessarily be some significant delay in the imposition of any similar licence condition, and it certainly could not be guaranteed that Ofcom would consider it permissible or appropriate to attempt to do so.

36. Given the effect of the agreed directions, it is difficult to see what purpose an appeal by BT could serve, either for BT or at all, if those directions were to come into effect before such appeal had been resolved. The appeal would have been emptied of subject-matter. Mr Flynn did not demur from this result, which was really at the heart of BT's application. Any issue about irrecoverable money has been removed by Sky's indication at the hearing that it would be willing, pending an appeal, to extend its undertaking to cover any amounts which would have been paid into escrow under the Interim Relief Order.

37. In these circumstances, we do not accept, in the event that no stay is granted and BT demonstrates in its appeal that the WMO should not have been withdrawn, that the prejudice to BT can be dismissed as the mere temporary inconvenience of a delay until a WMO lookalike is imposed by Ofcom. Nor does the absence of any guarantee that Ofcom would ultimately decide to do so neutralise any prejudice to BT as a result of the removal of the WMO now. Preservation of the subject-matter of a proposed appeal is a powerful factor in favour of a stay – at least until the matter can come before the Court of Appeal on a permission application.

38. As against this must be set a number of factors. First, Sky has succeeded in its appeal on grounds which go to the heart of the reasons for the WMO as set out in the Statement. It follows that, as Mr Flynn submits, any stay of the Judgment means that Sky will continue to be subjected to regulation, which the Tribunal has found to be unfounded. The nature of the regulation is undoubtedly intrusive, affecting freedom to choose contractual partners and to set prices.

39. The second factor concerns the nature and merits of BT's proposed appeal. As noted earlier (paragraph 3 above), the Tribunal has refused permission to appeal, concluding that BT's proposed grounds disclose no point of law with a real prospect of success and no other compelling reason for the appeal to be heard. We explained

in that Ruling that the proposed grounds appear to be based in part on a mis-reading of both the Statement and the Judgment, and also that they appear to be seeking to re-open what were essentially assessments of fact by the Tribunal. In addition, on the basis of the grounds as they stand, it is difficult to see that BT's proposed appeal, even if successful, would be capable of rescuing the WMO. Any future assessment as to whether the WMO could be justified, even in the absence of the core competition concerns upon which Ofcom mainly relied, and which formed the subject-matter of the Judgment, would almost certainly need to be carried out by the primary decision-maker, namely Ofcom. This would be likely to create a state of affairs very similar to the situation where no stay had been granted and the WMO had been removed prior to the appeal.

40. When we come to weigh the preservation of the subject-matter of the appeal against these powerful countervailing factors, the matter is finely balanced. In the end, it comes down to whether we should either make an order preserving the subject-matter of the appeal (such as it is) until the permission application can be dealt with in an orderly way, or oblige BT to make (and the Court of Appeal to accommodate) an urgent application for interim relief. In reaching the conclusion that we should preserve the *status quo* to the extent indicated at paragraph 33 above, we have borne in mind that the WMO (as modified by the Interim Relief Order) has now been in force for nearly 3 years, and that a renewed permission application is likely to be resolved within weeks or at most a very few months. In the meantime, the immediate financial risk to BT is removed by the escrow arrangements, which will also be preserved *pari passu* with the WMO (as modified).

41. Given the view we have taken about the merits and ultimate lack of utility of BT's proposed appeal, we do not consider it at all appropriate to accede to Mr Turner's invitation and take it upon ourselves to extend this protection throughout any appeal process.

(2) *Picnic Statement and BT Complaint*

42. There is disagreement between Sky and Ofcom concerning the directions that should be given to Ofcom under section 195(3) and (4) of the 2003 Act in relation

to the Picnic Statement, as well as a further decision of Ofcom taken on 29 March 2011 resolving a complaint brought by BT in relation to Sky's obligations under the Statement as varied by the Interim Relief Order ("the BT Complaint Decision").

43. Sky proposes that Ofcom should be directed to withdraw both the Picnic Statement and the BT Complaint Decision, contending that these decisions can no longer stand as a consequence of the Judgment and the setting aside of the decisions in the Statement. Sky refers to paragraph 1.5 of the Picnic Statement and submits that it is legally incoherent formally to keep in place a dependent decision, which is expressly predicated on the force of a primary decision which has been set aside. It submits that the Tribunal has the power, under sections 195(3) and (4) of the 2003 Act, to order such consequential directions as may be appropriate in any given case, including the power to give directions to Ofcom as to action which Ofcom would otherwise have power to take. Sky submits that appellants would otherwise be required to bring appeals in respect of each and every "micro-decision" associated with a primary decision in order for there to be any consequential impact on the former.
44. BT and Ofcom resist Sky's proposal, and submit that the Tribunal has no jurisdiction to remit these decisions to Ofcom with directions. In the case of the Picnic Statement, Ofcom submits, notwithstanding TUTV's appeal, that this does not contain a decision under section 317(6) of the 2003 Act in any event. In the case of the BT Complaint Decision, both Ofcom and BT note that this was not the subject of any appeal to the Tribunal and the Tribunal does not, therefore, have jurisdiction to remit it to Ofcom with directions.
45. We do not consider that it is appropriate to issue any directions to Ofcom under section 195(3) and (4) of the 2003 Act in relation to either the Picnic Statement or the BT Complaint Decision. The BT Complaint Decision was not appealed to the Tribunal (indeed the Tribunal was unaware of its existence until it was referred to for the first time in the draft order circulated by Sky in the run-up to the 6 February hearing). No argument was heard in relation to the Picnic Statement which, whilst it was the subject of a peripheral protective appeal by TUTV that has been stayed and which it is now agreed should be dismissed, was not front and centre in these

proceedings, nor the subject of any specific request for relief by the parties. The status of these decisions is, therefore, a matter for Ofcom to consider in accordance with its regulatory powers and duties.

(3) REAL Digital TV Limited

46. Following the publication of the non-confidential version of the Judgment on 26 October 2012 the Tribunal received a communication purporting to come from REAL Digital TV Limited and/or REAL Digital EPG Services Limited (“REAL”). The communication is entitled “Response to Judgment and Effect on Interim Relief Order” (“REAL’s submission”). REAL’s submission is dated 5 December 2012 and signed by Mr David Ian Henry, described as “British Consumer”, and Mr Wouter van Ruth, described as “Director”. REAL did not appear at the hearing on 6 February 2013.

47. The previous participation of Mr Henry and REAL in the present litigation is set out in some detail in the Tribunal’s judgment of 9 November 2010 on an application by Mr Henry in person (then, but apparently no longer, a director of REAL) and/or REAL that the Interim Relief Order be amended to add REAL as a beneficiary of that Order (see [2010] CAT 29). Pursuant to that judgment REAL was added on 23 November 2010. Thereafter, neither REAL nor Mr Henry played any part in the present Pay TV appeals, which culminated in a substantive multi-partite hearing over several weeks between May and July 2011.

48. REAL’s submission contains a number of allegations relating to agreements between Sky and third parties, which are said to be in breach of the EU competition rules, and about Sky’s conduct, which is also said to infringe those rules. REAL’s submission also comments upon and calls into question some of the Tribunal’s findings of fact in the Judgment. In addition, it claims that REAL and Mr Henry were excluded from adducing evidence and attending the hearings, and from access to the evidence presented to the Tribunal in this litigation. As to this last assertion, the judgment referred to in the previous paragraph explains that although Mr Henry (on his own behalf) applied to intervene in the interim relief application which resulted in the Interim Relief Order and which preceded the lodging of any of the

present appeals, he did not attend the interim relief hearing of which he was aware, nor did he or REAL otherwise pursue the application to intervene in it, notwithstanding the later successful application to vary the Interim Relief Order. As regards the four main substantive appeals by Sky, FAPL, VM and BT, Mr Henry made a separate application (on his own behalf) to intervene in these appeals at the outset of the proceedings. That application was rejected by the Tribunal in its ruling of 25 June 2010 ([2010] CAT 16), and although Mr Henry wrote subsequently to the Tribunal on 29 June 2010 inviting it to reconsider its ruling, Mr Henry did not seek permission to appeal the Tribunal's ruling (as the Tribunal advised Mr Henry to do by letter of 14 July 2010 if he disagreed with the ruling), nor did Mr Henry play any further part in the Pay TV appeals until receipt of the present submissions.

49. REAL's submission states that it hopes to have a "soft launch" of a Pay TV service, including the CPSCs, in the UK in the first quarter of 2013, and urges the Tribunal to keep the WMO and Interim Relief Order in place, albeit with Sky's rate card prices in place of the WMO price. REAL submits that supply of the CPSCs to the company is required by virtue of the EU competition rules, and that Sky has nothing to lose from such supply.

50. The present proceedings are exclusively concerned with measures taken by Ofcom pursuant to section 316 of the 2003 Act. REAL's submission raises issues which are outside the scope of the proceedings and/or which have already been determined by the Tribunal in the Judgment, subject to BT's proposed appeal. In so far as REAL is interested in the WMO and Interim Relief Order then, as explained in paragraph 33 above, the WMO (as modified by the Interim Relief Order) will remain in place, with REAL as one of the potential beneficiaries, until 14 days after the Court of Appeal has ruled on BT's renewed application for permission, unless the application is withdrawn before then.

TRIBUNAL'S ORDER

51. The parties have prepared various versions of draft orders relating to most of the issues, both agreed and not agreed, discussed above. The Tribunal invites them to agree a draft order which reflects our rulings on all issues apart from those referred to in paragraph 6 (which will be the subject of a separate ruling and order), and to submit the same to the Tribunal for approval as soon as possible.

The Honourable Mr.
Justice Barling

Professor John Beath

Michael Blair QC (*Hon*)

Charles Dhanowa OBE,
QC (*Hon*)
Registrar

Date: 27 February 2013