IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1152/8/3/10 (IR)
1155/3/3/10
1156-1159/8/3/10
1170/8/3/10
1179/8/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6th February 2013

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)
MICHAEL BLAIR QC (Hon)
PROFESSOR JOHN BEATH

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/Interveners

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

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

Interveners

_____

Transcribed from tape by Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
(info@beverleynunnery.com)

_____

HEARING

APPEARANCES

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.

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

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

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

_____

THE PRESIDENT: Good morning, just like old times!

MISS ROSE: It is just like old times, how lovely it is to see everybody looking so well! Sir, can I just raise one point at the outset, which is that we received last night from Herbert Smith Freehills a letter containing information about the level of Sky's costs.

THE PRESIDENT: Yes, we got that too.

MISS ROSE: They said they were only prepared to share it with us and the Tribunal. I just wanted to make the point that there is no basis for that information being confidential, and it ought to be open. There is an obvious public interest in that.

THE PRESIDENT: Yes. The costs issue does not necessarily concern everybody here, and therefore we might try and deal with these things sequentially.

MISS ROSE: Yes, but I just wanted to make clear that that is public information and cannot be treated as confidential.

THE PRESIDENT: If there is an issue about that we will obviously have to hear it, but let us hope it does not arise. Thank you for raising it.

I suppose, relating to that, there is a question that some of the submissions on some of the things, and I cannot remember now whether this is just related to costs or something else, were said to be confidential. I do not know to what extent that is going to trouble us. I hope not much.

MISS ROSE: I think, from Ofcom's perspective, the only matter we gave a confidentiality marking to was the amount of costs that had been communicated to us by Sky at that time, which they said was confidential. There are some passages in the other parties' submissions, but they are not matters that we consider to be confidential.

THE PRESIDENT: We do not need to go into any kind of camera, or anything, we will just have to be wary of those bits of information. They are not at the top of my mind at the moment, but people will warn us, I am sure, at the appropriate time.

Mr. Flynn, how shall we debate this? First of all, I should say we are very grateful for the efforts that everybody has made to try and reach some kind of agreement on what the consequential arrangements should be. We are conscious that that has taken a great deal of effort, but we have not quite reached the situation where you are agreed on everything. I think we have got in mind in a general sense what it is that still needs to be debated. Am I right in what I have just said to Miss Rose, that we should leave costs perhaps, and deal with matters sequentially and then some people can, as it were, happily go away?

MR. FLYNN: Sir, yes, as I understand it, the Tribunal has indicated that it will deal with most of the points that have not been resolved on the papers, but wishes to hear argument on, or is

prepared to hear argument on two points. One is BT's application for a stay, and the other is the costs point. I believe it is the Tribunal's intention to hear it in that order.

THE PRESIDENT: I think those are generally the two, although there are some other little bits and pieces.

MR. FLYNN: There are some other matters that are not resolved, indeed. Most of the parties involved are here, should the Tribunal have any further questions. It is certainly the indication that we had taken from the letters from the Registry is that today is for argument on stay and argument on the costs, and in that order, because it will enable one or two people who are here now to fade away after the stay application.

Should I merely, because it is BT's application, just say who is here?

THE PRESIDENT: That would be very helpful, thank you.

MR. FLYNN: Just to remind the members of the Tribunal, should they have forgotten in the intervening weeks, I am here with Mr. Pickford and Mr. Scannell for Sky. Then going down from me, Miss Davies is here for the Premier League, BT are today represented by Mr. Turner with Mr. Facenna and Miss. Ford.

THE PRESIDENT: Mr. Turner is a new face, certainly in this case.

MR. FLYNN: He will be happy with that description! Mr. Facenna is also a very new face. Ofcom today are represented by Miss Rose and Miss Boyd. Miss Weitzman is also there. Then at the far end Mr. Hoskins is here for Virgin. As far as I am aware, that is everyone. It is certainly everyone in the front row. I do not know if there is anyone else who is here in a speaking basis. On that basis, Sir, I assume that it is for Mr. Turner to explain his application for a stay.

THE PRESIDENT: Yes. Mr. Turner? Perhaps I should tell you where we have got to on this, only in a very provisional sense, but open to persuasion by either side. I am sure we have a very imperfect understanding of what the ramifications may be. We are minded provisionally to allow the status quo to continue because in the great scale of things we are talking about, one hopes, a relatively short space of time. We, I should tell you, wanted to, as it were, hear some of these other matters debated before we made our final decision on permission. We anticipate that we would make that very swiftly now. Subject to what we hear today, the likelihood is that we will refuse it and therefore either you will be not be pursuing it or you will be going to the Court of Appeal to renew the application.

If that is what happens, then we are also of a mind to allow the current arrangements to continue, at least until the Court of Appeal can have an opportunity to consider permission

and any other application that might be made to them at that stage, depending on what they do.

We have seen a draft order from BT which attempts to create something like that situation, and whether that is the right mechanism is entirely another matter. But, leaving aside mechanisms at the moment, that is where we have got to, but it may be that others will persuade us that we should not do that, and so we are perfectly open to that possibility. What we have not fully understood, I think, are what the dangers are; and we might appreciate a word or two from you elaborating what you have said in your helpful written submissions about why it makes a difference — why, as it were, if the Court of Appeal (on that assumption that it goes there) decided to investigate and, if the appeal were allowed, why it would make a huge difference if these orders had not come into effect.

MR. TURNER: Yes. I am grateful for that indication, sir. It may be that it is important for me to address you on the issue, at least briefly, because Sky's case is that there is no power in the Tribunal for you to even make that sort of order.

THE PRESIDENT: Yes.

MR. TURNER: The exchange of written submissions has not fully dealt with this point. You have seen or noted that we did put in an alternative or revised form of order, you have got that and you probably had an opportunity just to look at that briefly. If I may, can I hand up a slightly corrected version of that, which I would like to work from today?

THE PRESIDENT: Yes, please.

MR. TURNER: It has been supplied to the other parties, and I will talk you through it.

THE PRESIDENT: Right.

MR. TURNER: It is hopefully a bit clearer than the one you will have received with the letter, and it should also be in colour, it is marked in colour.

THE PRESIDENT: Yes.

MR. TURNER: Essentially, what we are saying is we would like postponement of the effect of parts of your final order, and the reason we want it is to preserve the integrity of the subject matter of the appeal and prevent some irremediable harm. You have seen the key documents: our submissions; Sky's responsive submissions; and you had seen the draft order sent with our letter on Monday. That draft had inadvertently failed to incorporate certain agreed changes which had been made by Sky in the introductory section of the order. For example you will see at the top of p.2 the meaning of the Pay TV decision is now defined. It was inadvertently not there in the version sent to you on Monday. So, this

is a corrected draft, and it also corrects a very minor error in the version sent to you on Monday.

THE PRESIDENT: The green ones are the minor changes, are they? I have probably got the colour wrong. Yours is not coloured?

MR. TURNER: Well, unfortunately, I think you cannot distinguish the author from the colour.

THE PRESIDENT: Right.

MR. TURNER: It is just that the colour helps you pick out the changes more easily than the mere underlining, black on a slightly smudged copy.

THE PRESIDENT: Yes, okay.

MR. TURNER: Now, we are asking for the preservation until our appeal is finally decided one way of the other of two aspects of the status quo. Those are the WMO condition in Sky's licences, and the practical arrangements which are designed to hold the ring which were put in place by your interim relief order back in April 2010. Those two aspects may, in this debate, need to be considered separately.

The form of the order, if you turn to p.3, it has obviously got three dimensions to it: there is the basic approach, if you look at paragraph 3, there is the substance of what is being ordered, and then there is timing.

The approach — which no-one is quarrelling with — is based on section 195(3) and 195(4) of the Act and, as the Tribunal knows, this is legislation where you do not yourself have the function of setting aside or annulling the decision which is under appeal. You remit it intact, the Pay TV decision, to Ofcom.

THE PRESIDENT: Yes.

MR. TURNER: And you then give them such directions as you consider appropriate for giving effect to your own judgment in the appeal. So, that is the approach.

On the substance, again, there is no quarrel. The substance is agreed in sub-paragraph a. the Pay TV decision is passed back, remitted, to Ofcom, and Ofcom has directions to take steps to withdraw it and remove condition 14A from Sky's licences.

THE PRESIDENT: So, subject to the stay, that is agreed. That is appropriate —

MR. TURNER: That is agreed.

THE PRESIDENT: Yes.

MR. TURNER: The approach of what is to be done. So, when you think about it, the dispute between us and them is timing.

THE PRESIDENT: Yes.

MR. TURNER: I am sorry. I am told that in relation to the Picnic statement, that is not agreed.

THE PRESIDENT: That is b, is it not?

MR. TURNER: Yes.

THE PRESIDENT: b. is not agreed, as I understand it.

MR. TURNER: Yes. We are focusing on what matters to us, which is 3a.

THE PRESIDENT: Yes.

MR. TURNER: So, for us the approach is clear, the substance is clear, it is a timing issue. Now, Sky has agreed to a draft in which Ofcom is required to take these steps within a period of seven days from the date of your order, which could be made today. And we are proposing (over the page) that these steps are instead directed to be taken within seven days from the date when our appeal is finally decided. That applies to the setting aside of the main Pay TV decision and I understand that there is some argument about whether it also swallows up the ancillary decisions, including the Picnic statement.

THE PRESIDENT: Yes. So, that would be us ordering that throughout any — if permission is given and an appeal goes ahead — until that appeal is determined, finally determined by the Court of Appeal, or indeed whoever, that the stay should remain in place.

MR. TURNER: Well, that the condition is not removed; that Ofcom does not take the steps to do those things until that point.

THE PRESIDENT: Yes.

MR. TURNER: So, there is just a difference in the point at which your direction to them takes effect.

THE PRESIDENT: Yes, I mean, I think, subject to our power to do this, what we were minded to do was rather, was not to be quite so dramatic but to leave it so that people could argue this and let the Court of Appeal decide whether they should continue the stay. In other words, I mean, we are not at all sure that the stay will have any effect anyway, or will matter, and that is the thing and that is what, in a way, we need to be helped on.

MR. TURNER: And I will deal with that. What I would say immediately, sir, following your enquiry, is that you are in a good position and perhaps a better position than a Court of Appeal judge coming into this cold in an application, if permission application is renewed before them quite quickly, to deal with this, because you have a good sense of how this all fits together, and therefore it is not obvious that you should leave that stage to a Court of Appeal judge who may not be in as good a position as you to judge this. And therefore, if you see sense in what I am saying, that there is some merit in holding the ring, preserving the subject matter of the appeal, you are in a good position to decide that that can be done

until the appeal is finally decided one way or the other — as good a position as a Court of Appeal judge would be in those circumstances. But, that is paragraph 3.

And, just to complete the survey, paragraph 4 —

THE PRESIDENT: Do you mind, sorry, I know it is not necessarily all in your interests, but just while we are dealing with, just so we have it in mind, are c. and d, remind me, is that also agreed subject to the stay?

MR. TURNER: It is by us.

THE PRESIDENT: But is it by everybody? Yes. Thank you.

MR. TURNER: So then we drop down to paragraph 4, and you will see at the end of paragraph 3 was our proposal on the timing. Instead of seven days of the date of the order, it is within seven days of something that means when the appeal is finally over one way or the other. Then you drop down to paragraph 4. And paragraph 4 is about the ending of the practical arrangements which were put in place by the interim order. And here the key focus is on the escrow arrangements.

Now, paragraph 4 is a rather complex paragraph. It was crafted by Sky, who proposed the original draft order which they sent to us under cover of a letter on 9th November. And sub-paragraph a. requires the distributors including BT, and we have added in Sky for practical reasons to arrange for the payment out to Sky of the escrow sums which have accrued in the escrow account. b. envisages the continuation of the distributor's undertaking to pay money into escrow after today's order and until certain conditions have been met. You see that from the introductory wording by Sky in 4b. They "be released from the undertaking to pay monies into escrow" if and when certain things happen. c., over the page under (iii) and (iv) provides that the interim orders, and the first is the important one, will cease to have effect.

The proposed changes to all of this by BT are again the same ones of timing because the aim is to keep in place the practical escrow arrangements until the date when your final order is given final effect, and that is the date when Ofcom withdraws the Pay TV Decision and removes condition 14(a) from Sky's licences.

THE PRESIDENT: That is the intention.

MR. TURNER: That is the intention, to put back the timing from what was there before, which was essentially seven days from the date of this order to, you will see from the scorings out, the time limit set out in para. 3 above to the date when the appeal is finally decided.

What is our argument? Our position is quite simple, it is in the interests of justice and it does make plain common sense to keep the condition alive, and the escrow arrangements pending the final decision on the appeal.

The starting point has to be that whatever the Tribunal considers to be the merits of BT's appeal we could get permission from the Court of Appeal, we could win on the appeal, this sort of thing has happened before. But, if the condition is removed now and you direct Ofcom to strike it out of the licences it is extinguished, and nobody argues about that. Sky, in its written submissions accepts that the only way a new WMO could then be instated is after a consultation process by Ofcom which would be protracted. What would that mean? It would mean that you could not have the WMO in force again after a successful appeal. There would have to be then a period of at least, realistically, probably at least 12 months before Ofcom could make a replacement decision. In that lengthy period the harmful consequences for competition in general, for BT in particular, of there being no WMO, when the assumption is that there should be, could be important. So the potential for harm in that situation to BT and to the public interest is a clear and compelling reason why the condition should be preserved pending the outcome of our appeal. Nothing in Sky's written submissions deals adequately with that point. It is just a fundamental matter of preserving the subject matter of a potential appeal.

A similar, but separate, point arises about the escrow arrangements. If BT's appeal succeeds, if we and Ofcom are eventually proven right then the money which will have been paid to Sky above the WMO condition level should not have been paid, and it is accruing, going forwards currently at a rate of more than £100,000 a month.

Sky says, fairly: "We are prepared to undertake to refund escrow money, which has been accrued to date if it is released and paid over to us and if BT subsequently wins the appeal, so you should not have an argument about that. But, they say, from the point when the WMO condition is removed following your orders, and which they say should be in no more than seven days, then Sky refuses to undertake to refund the difference between the rates which are paid by BT and the WMO price.

For the sake of illustration, so the Tribunal has it in mind, from the period from now to June this year, and I am thinking now following your indication, Sir, of a period when we would potentially be in front of a Court of Appeal Judge, the total cost to BT of the difference between Sky's rates and the WMO price could be – and will be – more than half a million pounds.

THE PRESIDENT: Everyone together.

MR. TURNER: That is February, March, April, May, adding it up – more than £100,000 a month. That is a great deal, you assume, of overcharged money that Sky should not have at all if the WMO condition turns out to have been justified. If we do get permission to appeal from the Court of Appeal, and if that appeal is ultimately upheld, the sums in question, which have been wrongly paid over will roll up and will be much greater than that. So that is the irremediable prejudice from BT's side.

On the other hand, what is the prejudice to Sky if the WMO and the escrow arrangements trundle on until the final disposal of our appeal? Sky suffers a temporary cash flow issues. There is no irremediable loss because if we do not get permission, or if we lose our appeal they get the money. So what does Sky say about that? I will leave Mr. Flynn to develop his submissions having heard your indication about what you are interested in, but their gist is that you, as an institution first, have no power to stay, or to put it more neutrally, to postpone the effect of a final order that you make. They go on to say that even if you do have that power it is inappropriate to exercise it at all in this case. Then they say that interim relief cannot outlive a final order.

If I may, because it could accelerate things, I can deal very quickly with those claims to lay down a marker for Mr. Flynn. I will start with the first point: do you, the Tribunal, have the power to stay or postpone the effect of a final order?

Sky attacks a Judgment given by the Tribunal in the 0800 numbers case. That was a case where the Tribunal expressed the view that it does have, in general, a power to stay its own final decision in an appropriate case. Sky says that because you are a creature of Statute you have to locate an express power written somewhere in your Rules permitting you to stay the effect of your final decision and your Rules do not contain anything about that. But Sky's argument on jurisdiction is just wrong, and it is necessary to focus in a practical way on what we are asking for.

In para. 3 of this draft order we are asking for the date when Ofcom is required to take certain steps to extinguish the condition to be postponed until the conclusion of our appeal. Plainly, you have got the power to specify the date when Ofcom has to take steps pursuant to your direction. Even Sky's original formulation of the draft order envisages directing Ofcom to remove the condition within seven days of the date of this order. That is why it is a timing issue. There is nothing wrong with what we suggest and there cannot be a serious question about power.

When you turn to para. 4 and the escrow arrangements, equally there is nothing wrong with the Tribunal specifying in your final order the dates when particular aspects of your order

have operative effect, when they bite, like the payment of escrow money to Sky at the end of the appeal process rather than in seven days' time (para.4.a).

If I may, I would note that the Premier League submission, Miss Davies' submissions, are built on a common assumption with us that you do have the power to order that parts of your decision take operative effect from a future date.

May I just invite you briefly to turn up her submission which is at tab 25 in the H2 bundle.

THE PRESIDENT: This is the 18th January one?

MR. TURNER: Yes, 18th January, and the heading is "Submission on orders", and at the end of it on p.6 you have a heading, "BT's Application". Does the Tribunal have that? That is where the Premier League comments on our application.

THE PRESIDENT: Yes.

MR. TURNER: If you look at para.5.1, the Premier League says, starting on the second sentence:

> "If the Tribunal is, however, minded to take the view that, as matters stand, the correct approach would be to dismiss the Appeal, the Premier League submits that the order should provide that the dismissal of the appeal (and any provision there should be no order as to costs) will only take effect in the event that:
>
> 5.1.1 Any application for permission to appeal has been finally rejected …"

that is our application –

> "… or
>
> 5.2.2 In the event that an application for permission is granted (whether by the Tribunal or the Court of Appeal), that appeal is finally dismissed in its entirety."

She points out that without that provision there could be a procedural lacuna. She wants to keep her appeal warm just in case the thing does continue. We have no objection to that, but what we focus on, which is of interest, is that she is also assuming that a part of your final order, if it is made, will only take effect after BT's appeal to the Court of Appeal is finally determined.

THE PRESIDENT: Just while you are mentioning that – I know it is not your point - you have not, and neither has VM, sought that kind of protection in respect of your separate appeals?

MR. TURNER: No, we have not.

THE PRESIDENT: The practical approach?

MR. TURNER: No, we have not.

THE PRESIDENT: That was not by accident, I assume. I thought we should clarify that.

MR. TURNER: Sir, if I can come back to that?

THE PRESIDENT: Yes, I would be grateful if we could just have an indication from VM and BT. Your point is that they are saying they can do it.

MR. TURNER: In terms of the mechanism, she sees nothing wrong with it, nobody else sees anything wrong with it, and indeed it is common sense that you can, as a matter of regulating your procedure, even at this stage in making your final order, make provision for when certain parts of your order bite, when they take effect.

Sky, itself, is perfectly happy that some practical arrangements continue after the date when this order is made today. That is why, in para.4.b. of this draft, Sky, itself, envisages the undertakings pay money into escrow continuing, or the possibility of it continuing, after the date of the order and until certain conditions are fulfilled.

In summary, there is no serious question about your power to reach the just result under scheme of the Act and given the powers that the legislation confers on you. Section 195 is flexible enough for you to direct the operative steps are taken by Ofcom at a later date or, as the Premier League agrees, that parts of the order take effect from a later date. It is an aspect of regulating the Tribunal's procedure.

THE PRESIDENT: Are we assisted at all by that Court of Appeal decision – it was not exactly the same because it was not a stay – where we told we could extend time?

MR. TURNER: Is this the *Ryanair* case?

THE PRESIDENT: *Ryanair*, thank you, yes.

MR. TURNER: It may be, Sir. In any event, the position is simply one of a practical arrangement that you make. I can go on to deal, for completeness, with what Sky has put forward as basically a theological attack on the proposition that you have got an inherent jurisdiction to stay any part of your final decision. Really, the assumption there is that you make an order, it takes effect now, but then you put it on ice. What I am saying is that you can look at it in a completely different way, which is that it is up to you decide the sequence of the steps that are taken.

THE PRESIDENT: An appeal of the final order, so as to delay it, or determine when it comes into effect.

MR. TURNER: In order to do justice, and in line with the Act. It fits with the scheme of the legislation.

THE PRESIDENT: Let us hear what Mr. Flynn has to say about that.

MR. TURNER: I will hear what he has to say, but if I may I will make just one headline point, which is that on this *0800* case the Tribunal had relied on a Privy Council decision in a case

called *Bibby v. Partap*. That was one where Lord Nicholls had said that under English law a court of first instance has an inherent power to suspend its order until an appeal, or with the appeal to the Court of Appeal. They say that is limited to the High Court, of course, because a statutory court or tribunal cannot have an inherent power to do anything. Very briefly, we say that that is wrong, because it is not limited to the High Court. Lord Nicholls refers to "a court of first instance", and it is clear in any case, our primary submission, that a power to grant some form of stay in order to prevent injustice is something that you could imply into the statutory scheme of the Act and your Rules.

THE PRESIDENT: Lord Justice Lloyd gave a terribly wide – this may not be the only route to this – definition of "Directions" in the *Ryanair* case which, as I said, extended to directing the OFT that time should stop running under the statute so as to preserve for the OFT to refer it and the CC to investigate it. I suppose directions here also have to be given, do they not, and we could direct that things do not happen until a certain point, which is really the effect of what is being suggested.

MR. TURNER: That is what I am saying and Lord Justice Lloyd is simply assuming the same point. It is perfectly natural. In fact, we say it would be absurd if the consequence of an appeal being upheld by this Tribunal, just as a general matter, was that in some cases real injustice could result, or real harm to competition, because it would mean extinguishing the subject matter of the appeal, and that would be bad. It just cannot be right as a matter of principle.

THE PRESIDENT: We would not be there to do it in time for someone to go to the Court of Appeal to get some kind of relief?

MR. TURNER: On their argument that is absolutely right, because their argument is black and white, there is just no power. After today, that is it. It cannot be right. So that is it on the power.

Very briefly, on the question of whether it is appropriate or not, assuming you have got a power to preserve this remedy or the escrow provisions, Sky itself recognises that what you are concerned with, once you have got over the power hurdle, is a balancing exercise. You are in the business of weighing up the risk of injustice to each side and having an eye on the interests of competition as well if a stay is or is not granted. I am using "stay" in the wider sense that I have outlined.

On BT's side of the argument, you have got the points that we are relying on the destruction of the subject matter of the appeal with some lengthy delay before a replacement could be

imposed, and the irremediable loss of more than £500,000 of money which would be an overcharge that should never have had to be paid. That is on our side.

On Sky's side of the scales, they actually refer to very little indeed. They say you can always remake the WMO. That may be true, but only after a long and no doubt hard fought consultation exercise, in which Sky may be expected to take every available point, quite legitimately, but in the meantime the benefit of the WMO remedy is unavailable, not just to BT but to other distributors, and it may affect the competitive structure of the industry.

Secondly, Sky says that we have nothing to complain about because we have supply of the Sports channels on DTT distribution until the end of June this year, but that does not meet our point which is that the removal of the condition now cannot be instantly reversed. It cannot ever be reversed without huge delay, and nor can the payment of more than, let us say, £500,000 in rates be reversed unless the escrow arrangements are preserved at least for the time being.

So, Sir, those are our submissions. We see this as an extremely clear case where your initial instincts that you outlined at the outset of this hearing are correct, that it is appropriate to hold the ring going forward.

On the question of the period of time during which that should obtain, for the reasons I gave earlier, we say that it would be appropriate for the Tribunal now to order that that should obtain until the final determination of BT's appeal, whenever that is. If we just stagger forward to the next stage, which is appearing before a Court of Appeal judge, it is not satisfactory, they are not in necessarily as good a position as you are to appreciate all of the aspects of this case.

THE PRESIDENT: Mr. Turner, just help on this: how realistic is it, assuming you were to win an appeal – it depends very much on what the nature of that win was, there may be a spectrum of winning – how realistic is it, given the passage of time and everything else, to expect that the statement would not have to be revised and reviewed and the WMO looked at in any event, even if kept alive?

MR. TURNER: Even if kept alive. The answer to that is quite straightforward, which is that there is a big difference between a situation where at the end of an appeal process, let us say, Ofcom's decision to impose it in the first place is upheld and it is there and in force, and the situation where there is nothing there until a consultation exercise cranks up from scratch to try and impose something. At least while the consultation exercise is in train, it is there and in force and exercising effects in the market place. So there is a big difference. I do appreciate, of course, that Ofcom needs to examine market conditions from time to time,

but the question from your point of view is that the platform from which it does so will be radically different. That is really the point.

Sir, perhaps it is convenient, subject to any questions from the Bench, if I sit down and allow Mr. Flynn to make his submissions, and then I can try to deal with points in reply.

THE PRESIDENT: Certainly, yes. I do not know, you must take your own order, whether anyone else is entering into this fray or not.

MR. HOSKINS: I may or may not have something to say, but I think it is sensible for Mr. Flynn go first because then I may not have very much at all to say.

THE PRESIDENT: Fine. By *nem con*, it is up to you, Mr. Flynn?

MR. FLYNN: Indeed, Sir, as far as I know, BT's is the only show in town, at least as far as an application is concerned, in front of you today.

Sir, we set out our case on the application as then formulated in our submissions which you have starting at para.20 onwards. Our starting position really is that the new formulation in the colourful draft order that has been handed up to you makes no difference in principle. It is still a dressed up stay, as it were, and we say it is a difference in character to have a provision in the order that says Ofcom should do something within seven days, and a detailed developed condition covering various hypothetical scenarios which would have the effect, if everything went BT's way, of the final order never taking effect. That, in our submission, is a quite different animal. Our position, as Mr. Turner says, is, firstly, that the Tribunal does not have the power to grant that sort of a stay, and in any event it should not exercise a discretion to do that if it finds that it has it.

We have set that out in some detail. I am not going to go into everything, but reference was made, firstly, to the case of *BT v. Ofcom*, which probably does not help you. It is CAT 28 and it is in the authorities bundle at tab 33.

THE PRESIDENT: Yes, this is what was described as a tentative conclusion that —

MR. FLYNN: It is a tentative conclusion. For the first point, the first point to note is the Tribunal's tentative conclusion is based on an interpretation not of the Tribunal's rules, but of the CPR, because what the Tribunal in that case did was to go through its own rules and conclude that those rules did not give it the power — the rules of themselves did not give any power to grant a stay of the final decision. You see that, if starting at para.17, you see that the Tribunal there works through the rules and the conclusion is, at para.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".

As we point out in our written submissions, that conclusion was supported by Lord Justice Lloyd in the *Ryanair* case. He explained why that conclusion might have been correct, namely that you cannot look at the powers in relation to interim measures to determine what you can do in respect of a final order.

THE PRESIDENT: I do not think he quite decided. Can we, sort of, leave it open. Well, we can look at it in a minute.

MR. FLYNN: Yes, the (I will just give you the reference).

THE PRESIDENT: It is 40, is it not? It is tab.40

MR. FLYNN: In respect of this matter, it is footnote 3 of our submissions, but we quote his paragraph 46.

THE PRESIDENT: Yes.

MR. FLYNN: Where he says:

> "As it seems to me, a possible reason why rule 61(2) could not itself justify a stay of the Tribunal's own order may be that, like rule 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".

So, if the power is to be found, it has to be somewhere, we say, outside the Tribunal rules, and what the Tribunal did in the BT Ofcom case, CAT 28, was then to consider various other options and purport to derive the power to stay its final order from the CPR, para.52.7. And you see the reasoning there.

THE PRESIDENT: Yes.

MR. FLYNN: That is the tentative conclusion. Now, we develop, in our submissions why, with the greatest respect, we consider that is erroneous, because part 52, the CPR rules do not purport to confer powers on the lower courts. They deal with, there are certain provisions which the Tribunal there refers to where it may be that the lower court has a particular power and then, in that case, that may affect the course of appeal, and it may indeed affect the Court of Appeal's own power in relation to those particular appeals. But it does not, of itself, we say, confer any power on the lower court or the Tribunal — the Tribunal from which the appeal is coming, as opposed to the higher court before which the appeal is proceeding.

And so we say the right place for any application that BT may wish to make is actually in the Court of Appeal and, of course, that is what Lord Justice Lloyd was concerned about in the *Ryanair* case, the scope of what the Court of Appeal could do in that particular case in

relation, as you said, to extending statutory time limits, but not at all a case on what could be done in respect of staying final orders.

THE PRESIDENT: Assuming Mr. Turner is right, that it has a dramatic effect, once the order is given and the WMO is withdrawn, we should just delay our final order until they have time to go to the Court of Appeal; or should we do it nevertheless and then they have to act like lightning before the axe falls, or —

MR. FLYNN: Well, there may be a few other points I would wish to make before cutting to the chase, as it were.

THE PRESIDENT: Yes.

MR. FLYNN: But clearly, you know, the order as currently drafted says seven days. That is not because seven days is the maximum that it can be, for example. Nevertheless, I would apprehend that for Mr. Turner to be able to bring an appeal on, he would need a final order to appeal against.

THE PRESIDENT: But, you accept it can be a period, but your criticism is that it cannot be an indefinite period.

MR. FLYNN: It cannot be a contingency.

THE PRESIDENT: No.

MR. FLYNN: It cannot in itself be a contingency. I mean, obviously, it is always, there is the contingency that the Court of Appeal may take a different view, but that is for the Court of Appeal — both, as we say, at the interim relief stage as well as, of course, on the final, in relation to the final determination and, as we have noted, the Court of Appeal has extensive powers and that will be a question for argument at the time. Mr. Turner did not develop in any detail the question of inherent —

THE PRESIDENT: I am sorry to interrupt, could one do it for three months? Could one say take effect in three months?

MR. FLYNN: Well, or in five years' time.

THE PRESIDENT: No, well, let us not say five years!

MR. FLYNN: Yes.

THE PRESIDENT: I mean, it is interesting to know what, because —

MR. FLYNN: Cutting to the chase, sir, cutting to the chase, if the Tribunal determines that it has a power and is minded to exercise a discretion in Mr. Turner's favour, our submission would be that the appropriate way to deal with that would be to give Mr. Turner the time to get in front of the Court of Appeal to make his interim application, and no more. And we

certainly do think that, you know, then the matter is in the Court of Appeal's hands. Yes, of course, you could also say a month.

THE PRESIDENT: Sorry, my question — yes. I was not really cutting to that chase. I was really trying to test, it seems to be accepted by you that we can order it within seven days, that we can give a period for when the order comes into effect. And I was just really wonder where you reach the impermissible stage?

MR. FLYNN: Sir, if you could not impose a time period, then Ofcom would be in breach the minute the order was, before the ink was dry, as it were.

THE PRESIDENT: Yes. So, therefore, we can delay the effect of the order beyond the immediate. I am looking at the jurisdictional point now, the point you were on. I mean, you would just say that what implicitly that jurisdiction, which must be implicit, must it not, because we do not find anywhere saying we can delay it for seven days.

MR. FLYNN: Well, there is the statutory provision.

THE PRESIDENT: Yes.

MR. FLYNN: I have not got it in front of me. It says you give such directions as may be appropriate, or something of the sort.

THE PRESIDENT: Yes.

MR. FLYNN: Giving effect to your judgment.

THE PRESIDENT: Giving effect to the judgment, yes.

MR. FLYNN: And that, of course, is the point, that it must be for giving effect to the judgment.

THE PRESIDENT: Yes.

MR. FLYNN: And so introducing a contingency under which that will never happen is what we see as the objectionable point in principle.

THE PRESIDENT: Yes.

MR. FLYNN: You can, of course, give reasonable time for compliance; that I think is, if it is not, maybe it is implicit, or it is in the wordings of "reasonably appropriate", or whatever the statutory phrase is.

THE PRESIDENT: Yes.

MR. FLYNN: And someone will tell me if I am going off piste on that, but that it is the fact that, as I say, if everything went Mr. Turner's way, then your order would never take effect, and that is not a way the Tribunal itself should contemplate, because that is a matter for the Court of Appeal, in our submission.

On inherent jurisdiction, as I say, Mr. Turner did not develop that in any detail. Our submission in short is that the case law makes it clear that statutory tribunals have the

powers that are within their rules and can be properly implied into them, but there is no — it has been described by Lord Justice Moses as "a superstition that has been dismantled", that a statutory tribunal has any general inherent jurisdiction to do anything going beyond what is necessary to regulate its own procedures by means of implication into the words of the statute or the statutory instrument upon the ordinary rules of statutory construction.

THE PRESIDENT: Interestingly, in the *Ryanair* case which I think Mr. Flynn you are in?

MR. FLYNN: I was.

THE PRESIDENT: When it got to —

MR. FLYNN: And losing!

THE PRESIDENT: The Court of Appeal had to decide whether the CAT had the power to do what was being sought of the Court of Appeal, did it not?

MR. FLYNN: Yes.

THE PRESIDENT: On the basis under the Senior Courts Act they can only do what the —

MR. FLYNN: They derive their powers.

THE PRESIDENT: Yes.

MR. FLYNN: And the question in that case was whether, I think you have encapsulated itself, whether a direction within the meaning of the rules could be given, could be understood to mean and thereby to be given to, rather than a particular party to do something like supply.

THE PRESIDENT: Yes.

MR. FLYNN: Whether a direction could be given to Ofcom to —

THE PRESIDENT: In limbo, yes.

MR. FLYNN: -- suspend the statutory time limit. I hope I am a reasonable loser in these cases, but that was the issue, and the ruling was that, stay put.

THE PRESIDENT: Would the logic of your argument now be that when Mr. Turner got to the Court of Appeal they would make the same decision, namely, that we have not got the power and therefore they have not?

MR. FLYNN: No, because they are inherent, they have their —

THE PRESIDENT: They have got their inherent —

MR. FLYNN: And we pointed to the provision.

THE PRESIDENT: Yes.

MR. FLYNN: They of course have the power, that is the function of the Court of Appeal.

THE PRESIDENT: Yes.

MR. FLYNN: They have the power to vary any order of the lower court. So, that is a different matter.

THE PRESIDENT: Of course, yes.

MR. FLYNN: That judgment, of course, as I would say, is concerned with its own —

THE PRESIDENT: Yes. So, it is a rather special case.

MR. FLYNN: -- particular facts and your own judgments, of course, indicate that on remittal the statutory time limit, the statutory framework has been exhausted but in some way these matters can be dealt with on further proceedings in front of the Tribunal. There we have it, but it is a different case; and I do not think, in my submission, it does not lead to the conclusion that you floated.

THE PRESIDENT: Yes.

MR. FLYNN: In relation to whether you should exercise a discretion if you consider that you have it, again, in our submissions — and I am starting at para.35 here, we set out the authorities from **The White Book** and Court of Appeal case law, saying that generally the successful litigant should not be deprived of the fruits of the litigation pending appeal unless there is a very good reason, and those reasons can include both the strength of the possible appeal, as to which we have already heard your first indication; and secondly we quote in para.37 in cases in the authorities bundle from a judgment of Lord Justice Sullivan in the *DEFRA v Downes* case, saying that: the stay is an exception rather than a rule: solid grounds have to be put forward by the parties seeking the stay; and if such grounds are established then the court will undertake a balancing exercise. That is the process we say you would have to go through if you took the view that you had the discretion. You would, first of all, have to look at the grounds that have been put forward, decide if those are compelling and then undertake the balancing exercise. And Lord Justice Sullivan goes on to say:

> "It is fair to say that those reasons are normally of some form of irremediable harm, if no stay is granted",

He quotes examples of torture and deportation, but goes on to say:

> "or if some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent a kind of temporary inconvenience".

Now, those are the rules. Those are the tests to be applied. What are BT putting forward? Firstly, they say that they will be deprived of the fruits of a successful appeal and yet it was put forward as us recognising, I think both of us recognise as I think we have to, that if they were successful on appeal — assuming the Tribunal's order is not stayed — well then two things are going to happen, actually. One is that presumably proceedings before this Tribunal would be re-activated to decide the points that the Tribunal has not decided and

I am not making an in terrorem point, but I know that it is a point that is very close to Miss Davies' heart, and that is what is lying behind her submissions. Should it happen that the Court of Appeal gave an award, as you say, it is a spectrum, but should their ruling in effect be that that was no basis for setting aside the Pay TV statement, then —

THE PRESIDENT: But, on Mr. Turner's argument, it having been set aside, by then the WMO no longer existing, there would be nothing for this court to adjudicate upon.

MR. FLYNN: That is right, and what he says is, of course, if that happened then Ofcom would have to think again.

THE PRESIDENT: They would have to make a new Decision.

MR. FLYNN: They would have to launch a consultation, they would have to make a new Decision.

THE PRESIDENT: And is that wrong?

MR. FLYNN: No, we say that too, it would be up to Ofcom to determine what powers it had in relation to a new Decision but potentially, I suppose, even if the old Decision were still under challenge elsewhere, and anyway Ofcom always has the powers that it has. So he is actually trying to secure by means of a stay a result which, if the stay is not granted, just simply would not be occurring. He is trying to gain through ----

THE PRESIDENT: But is that not exactly the reason he is asking for the stay?

MR. FLYNN: Yes, he is asking, as it were, for the public interest issues, and so forth, to be pre-judged, and to be pre-judged and baked in now, so that is what he is seeking.

THE PRESIDENT: He is asking for the *status quo*, in other words that nothing is withdrawn, it has not been withdrawn yet.

MR. FLYNN: Indeed.

THE PRESIDENT: And that position be preserved until (a) he gets to the Court of Appeal, and if he makes headway then until it has been determined on the basis that if he should win that will be a better result from a good order and every other point of view for the world at large than if it had been wrongly withdrawn.

MR. FLYNN: In circumstances where, standing where we are today the Tribunal has found that the Decision was unlawful, and fundamentally flawed and should be withdrawn. You can take the point either to the level of principle or possibly later in the balancing exercise, but that is what he is seeking. He is seeking to get through the means of staying your order, something which the Court of Appeal ultimately would not be able to order, and that may be why he is making it, as it were, but we put it on this basis ----

THE PRESIDENT: That is just like the tree being cut down or something, is it not? Obviously, even the Court of Appeal cannot put a tree up again that has been chopped up. Is that not just always the inevitable result when one is dealing with holding the ring in order to preserve the possible fruits of something – sorry to mix the metaphors! (Laughter)

MR. FLYNN: I assume it is a fruit tree!

THE PRESIDENT: It might be a fruit tree. I cannot see why that is necessarily a point against him because he is saying there is no point in the Court of Appeal looking into this and finding that it was lawful after all if by then it has disappeared, and therefore a whole new process has begun which would not need to be begun in quite that way. Whether that is right is another matter because it could be said by then everything will have to be looked at and the world will be totally different.

MR. FLYNN: At all events it is going to be relevant in the balancing exercise as between the balance of justice or injustice. If Sky were to be subject, through the device of a stay, or the means of a stay – I do not mean to be prejudicial – if a stay were put in place Sky would continue to be subject to intrusive regulation in the terms of the interim order, I accept, but nevertheless ----

THE PRESIDENT: That is certainly true.

MR. FLYNN: -- effectively with the people that matter, as things stand, for whatever period it takes for the Court of Appeal to determine it.

THE PRESIDENT: That was behind the indication I gave that if we had the power to do it that our first thoughts were that that should be as short a period as possible, as to which Mr. Turner makes the point that might not be a good idea given the fact that a Court of Appeal Judge would not necessarily be in as good a position but that is something we would have to think about if we got to that point. What about the money?

MR. FLYNN: The money, yes, because before you get to the balancing exercise, as I say, it is actually incumbent on Mr. Turner to convince you that he is going to be suffering some irremediable harm.

THE PRESIDENT: I think you accept that that aspect of it would be irremediable, do you not? You accept that the position would be changed in the way that he describes?

MR. FLYNN: In relation to the money?

THE PRESIDENT: No, in relation to the WMO either being taken out or still being there when the Court of Appeal found in his favour.

MR. FLYNN: I think we accept that if the Tribunal makes an order now and it is withdrawn then the Court of Appeal is hardly going to be able to order Ofcom to reinstate it.

THE PRESIDENT: Therefore that WMO would still be there, even if it needed to be examined it would be there to be examined as opposed to nothing and therefore you accept the Court of Appeal cannot, as it were, magic it up again.

MR. FLYNN: Yes, I think we do accept that, but the prejudice then if the Tribunal makes its order, the prejudice BT suffers is through any delay in the process, however long that might be – long or short.

THE PRESIDENT: On the assumption that BT is unsuccessful.

MR. FLYNN: On the assumption there is no stay but BT is successful in the appeal.

THE PRESIDENT: Well, then you have not been prejudiced.

MR. FLYNN: No, I am talking about prejudice to them, I am sorry if I am not being clear because it is up to Mr. Turner to convince you that he is going to suffer. If you have the discretion to grant the stay it is up to him to show that he is going to suffer some irremediable harm, and he puts that on two bases: one is that if there is no WMO by the time the Court of Appeal rules in his favour then it cannot be reinstated there and then, and as to that, as I have just said, what he is really complaining about is the delay while Ofcom considers whether it should be reinstated and what he is asking for actually is that irrespective of whatever position Ofcom might take, having read your Judgment the WMO be continued, and that is why we see a tension there, in any event that consideration would re-emerge in the balancing considerations. But, in relation to the money, we do not accept that BT has demonstrated in the short witness statement that you have seen that it would be suffering any irremediable harm. Certainly, in relation to moneys so far paid into escrow, as Mr. Turner, has fairly noted, Sky has already indicated that it would be prepared to undertake to reverse that, and in relation to ongoing payments of £100,000 a month, in our submission that falls more into the temporary inconvenience category for BT than anything irremediable.

THE PRESIDENT: But you are not prepared to undertake to pay it back if that would be the right thing to do ultimately?

MR. FLYNN: Ultimately that would depend on the terms of any future WMO. If you were to stay the effect of your Judgment then the escrow arrangements will continue and we will just be seeing the difference.

THE PRESIDENT: I must say I was slightly surprised that you felt that you would not be prepared to undertake that but ----

MR. FLYNN: I have not taken instructions on that specific point, but obviously ----

THE PRESIDENT: Because if they won an appeal and the effect of winning that appeal was – which is a big "if" – that the money should not have been collected, in other words that the WMO should remain in force.

MR. FLYNN: The point we make in our written submissions, Sir, 21.2 is the point I have just made to you and if the Tribunal's Judgment is given effect to then Sky is free to price as it considers appropriate in accordance with the rate ----

THE PRESIDENT: That must be right.

MR. FLYNN: But if that is the only matter that is troubling the Tribunal at the moment, then I have instructions that we would be able to widen the undertaking to cover the interim, as it were, amounts too. As we say in para. 21.2, and this is really where we were coming from, that all of this is really a matter for the Court of Appeal and if the Court of Appeal is persuaded by Mr. Turner then it may consider some interim escrow arrangements also to be appropriate, and they may be the same in the Tribunal's order or they may be different, but that is a dispute we have elsewhere.

THE PRESIDENT: So where do we go to then?

MR. FLYNN: I think, having made the point and you have effectively said it yourself, Sir, that if ultimately your conclusion is you have discretion and despite what we say is pretty thin evidence from BT you are persuaded that they will suffer some form of irremediable harm, then the bottom line, as it were, is that that should indeed be for a very short time, and sufficient only for them to attempt to persuade the Court of Appeal that they need some form of interim protection. Certainly the experience in the *Ryanair* case was that that is the kind of application the Court of Appeal will wish to hear pretty quickly.

I think that has maybe at least covered the waterfront, Sir, unless you have any further questions.

MR. BLAIR: Mr. Flynn, I was contemplating as you were in your final submissions then, if we were against you on para. 3 of the draft order, but you wished to maintain your position in relation to para. 4, would it be possible for the Court of Appeal to deal with para. 4 by way of imposing the undertakings? Even then there would be a gap, would there not? If we were not to put a time limit on para. 4 and it came into force tonight, tomorrow or next week, the Court of Appeal could still put back the arrangements for escrow payment could they not, there would still be a gap.

MR. FLYNN: I can see on a hypothesis there might be a gap of a few days, I think – and I will be corrected – that 3 and 4 are somewhat linked, because if you are against us on 3 then there

is no direction for the statement to be withdrawn or the condition to be withdrawn from our licence, so we would still be subject ----

MR. BLAIR: So it is all or nothing?

MR. FLYNN: I think the two must go together, but I will be corrected. Yes, subject, as I say, if what is troubling the Tribunal is the width of the undertaking currently offered by Sky then it may be that this could be dealt with by way of an undertaking rather than a specific paragraph in the order.

MR. BLAIR: All that was troubling me was that the case about irremediability seemed stronger in relation to para. 3 than in relation to para. 4.

MR. FLYNN: Ultimately it is "Money" for which both parties are good, I think.

MR. BLAIR: Thank you, I think we cannot take that any further.

MR. FLYNN: Thank you.

MR. TURNER: Before I reply, I understand that Mr. Hoskins and Miss Rose would like to say something and it is probably convenient for them to do so before I reply.

THE PRESIDENT: Before you reply, yes, I am sure that is right.

MR. HOSKINS: I do not have anything to say! (Laughter)

MISS ROSE: Sir, there is just one thing that was raised by Mr. Flynn. He suggested that the effect of the stay would be that if the WMO was no longer appropriate in current market conditions while the appeal was continuing, BT would nevertheless have the continuing benefit of it, and in that sense would get something they were not entitled to.

I would just like to make the point that, of course, if there is a stay all that that means is that there would be no direction from this Tribunal to Ofcom to withdraw the WMO, but Ofcom is under a continuing statutory duty under s.316 ----

THE PRESIDENT: To keep it under review.

MISS ROSE: -- to impose such conditions as are appropriate now. So if Ofcom reached the conclusion before the Court of Appeal had made a decision or before this Tribunal had reconsidered the appeal, that, in the light of changed market conditions going forward, some different form of condition was appropriate, then Ofcom would have a duty to impose that condition.

With respect to Mr. Flynn, that argument is not correct.

THE PRESIDENT: I seem to remember there is something – correct me if I am wrong – in the statement or in the ----

MISS ROSE: We were going to review it within three years in any event.

THE PRESIDENT: Which we are coming up to, are we not?

MISS ROSE: Yes, indeed, this is the three year anniversary, because it was April 2010.

THE PRESIDENT: It will be in March or April.

MISS ROSE: Yes, so it is virtually the three year period now, but that continuing statutory duty would be unaffected by the stay. So ultimately what this appeal concerns are matters that are now of historic interest, though obviously of significance to the parties that may be involved.

THE PRESIDENT: So Ofcom will be doing its three year review in any event?

MISS ROSE: Ofcom has a continuing statutory duty to regulate Sky's conditions and will be doing so.

THE PRESIDENT: But also there is a specific provision that you have just been referring to, is there not, about the three years on the WMO?

MISS ROSE: No, that is simply an indication in the statement.

THE PRESIDENT: Do you regard that as still happening or not?

MISS ROSE: Let me just take instructions? (After a pause) Yes, we are monitoring the market under our statutory duty, not any specific three year deadline, which is, given the circumstances, understandable. If we were to conclude, while the appeal was still not resolved, that a different form of relief was appropriate, we would impose it.

THE PRESIDENT: You would do it.

MISS ROSE: We would have to, yes.

THE PRESIDENT: Thank you very much.

MR. TURNER: Sir, I can be quite quick. The first point, the *0800* case, I will just make a couple of points on that. We are not looking for support for our position in the Tribunal's Rules on interim relief, Rule 61.

THE PRESIDENT: So you do not rely on that.

MR. TURNER: We are not relying on that. That was not the relevant paragraph in that judgment. The relevant paragraph is 26 (we do not need to turn it up), which is where the Tribunal refers to the *Bibby v. Partap* case, and says that is consistent with Rule 68 of your Rules, which says that you have the power to regulate your own procedure. We say that you do have the power to decide in regulating your own procedure when Ofcom will take steps, pursuant to your directions, and when certain aspects of your final order come into force. That is very clear. On that, the Tribunal was absolutely right. So that is how we put the case on the *0800* authority.

Second, Mr. Flynn canvassed with you on your question the issue of whether the order could be made not to come into effect for a definite period, let us say three months, but you

will not have jurisdiction to say that it does not come into effect until some further event takes place – the Court of Appeal deciding on a permission application, for example. We do not see the basis for that distinction. As a matter of principle, there is no logic to it. If you have the power to say, "In the interests of justice, and because we accept that there could be certain irremediable harm, it makes sense to delay the coming into force of a certain step until later", it is equally possible for you, in principle, to tie that to a decision being made by the Court of Appeal at a later stage, rather than to take an arbitrary period of, say, three months and say, "It is likely that something will happen within that definite period and that seems to us to be the only way in which we can proceed". Of course, it may be, because of the way that procedural applications go, that for one reason or another we are not in front of the Court of Appeal until after whatever period you take, and then there has to be another application to you, and that would not be an efficient way to regulate one's procedure at all. It makes perfect sense to do it by reference to the definitive event which you are concerned about directly rather than by indirection to choose an arbitrary definite period. Both are an aspect of your power to regulate your procedure.

Finally on that, we agree with Sky, and I think it comes down to this point: it is implicit, in the scheme of the Act and the Rules, that you do have the power to decide when it is appropriate for aspects of your order to bite, and to therefore be considering some more abstract question is neither here nor there. It turns actually on quite a practical short question.

Moving on, Sky was wrong, Mr. Flynn was wrong in his submissions on one point to say that, as a result of our draft, you could have a situation where your final order would never come into effect. The extreme situation is where we get permission from the Court of Appeal and we go to a full appeal and the Court of Appeal grants our application and allows the appeal. Even then, your order says that it comes into effect within X days thereafter, and it would be necessary for the Court of Appeal, if they uphold our position, to overturn your order. So that is not a point.

Finally, on the balance of harm, if we get over the power issue, as between BT and Sky, the essential point is quite simple: on our side, we refer to the extinction of the subject matter of the appeal. If the WMO does go then, if we are ultimately successful, at a very basic procedural level there is nothing left to remit. The case cannot then sensibly proceed. If the BT appeal is successful it will be on the basis that the findings in your judgment are at least not the whole story in assessing the validity of the condition, and that is why, for those reasons, we do have a very substantial and solid point.

Turning to the money, that was described by Mr. Flynn from BT's point of view as being "a temporary inconvenience" to us, but it is not. Because he has refused to give an undertaking in relation to the future payment of monies, potentially you are looking at the loss of a very great deal of money which we would not get back. There is nothing temporary about that, it is an irremediable loss of a considerable sum of money.

So one asks, finally, why is all of that a matter for the Court of Appeal at a later stage? It is not. On these points you are well placed to see the force in what I am saying and therefore to make a decision that will apply unless and until the Court of Appeal reaches a decision on the appeal, because there seems to be no other basis on which conditions will be different before the Court of Appeal judge which would lead them, or could lead them, to take a different view. None have been suggested.

In relation to the question from the Bench about the linkage between para.3 and para.4, we also agree that at least, if not strictly necessary, it makes good sense, if the one is to be maintained in force, for the other to go with it. In a sense, you can see the interim relief provisions as tempering or mitigating the continuation of the WMO order. That was the original conception behind the interim relief order back in 2010. So the two ought to go together.

Finally, Sir, in relation to the question that you put to me about BT's appeal and whether we were seeking to enter the same sort of qualification as Miss Davies for the Premier League, we say that we do not have to do that. By para.2.e. of the draft order, which refers to the dismissal of our main appeal along with the other appeals, there is a definite result, but when we go to the Court of Appeal as part of the relief that we can seek we will ask for para.2.e. to be set aside if the Court of Appeal is with us and allows the appeal. That is not something, however, which is available to Miss Davies because she is not going to be an appellant and that is why she seeks, quite properly, to enter that qualification, to prevent a procedural lacuna.

Sir, unless I can assist the Bench further, those are our submissions.

THE PRESIDENT: No, that is very helpful. Mr. Hoskins, that clearly does not apply to you so I assume that, therefore, you are ----

MR. HOSKINS: We are not seeking that.

THE PRESIDENT: What about Top Up?

MR. TURNER: They do not appear today.

THE PRESIDENT: We are grateful for that, so that is the stay dealt with. We are not going to be able to give a judgment today on the matter of stays or probably the order generally. Where does that take us?

MR. FLYNN: The other matter the Tribunal directed the hearing to cover is the costs issue.

THE PRESIDENT: Is there not the question of whether the Premier League's appeal should be dismissed or allowed, or has that now been resolved? It has not, has it?

MISS DAVIES: No, Sir, that has not been resolved. That was not an issue on which the Tribunal directed there should be oral submissions, but I can make the point very simply, it is connected in one sense to the costs issues. The background is obviously that Sky proposed in their order, which we agreed, that our appeal should be allowed, and effectively the short point which we make in relation to that is that the relief that we were throughout seeking was the relief that is going to be ordered in para.3 of the order, in whatever form it takes, and I do not want to enter into the debate about whether there should be a stay or not of that, because that is a matter solely between my learned friends Mr. Turner and Mr. Flynn. We, therefore, should be treated for this purposes of this order as a successful appellant. Ofcom and the other parties suggest that our appeal should be dismissed. It is only if our appeal is dismissed that the proviso that Mr. Turner referred to in the course of his submissions becomes necessary ----

THE PRESIDENT: It sounds as though nobody is particularly objecting to that.

MISS DAVIES: Sir, there is a difference in that respect between my position and that of Sky, in that essentially the debate between my client and Ofcom is how do you treat the Premier League's appeal, given that the Tribunal has, for reasons that are understandable, in its judgment decided the points are not ones on which it is going to rule. There is, therefore, effectively no question of depriving either Ofcom or my client as of today of a ruling to which we are entitled in relation to those points on the appeal, unlike Sky who have a ruling on ground 2 of their appeal to which they were otherwise entitled, which is why we get into the debate about stay.

THE PRESIDENT: Yes.

MISS DAVIES: We are not in that scenario. What we are trying to do between the parties is to work out an appropriate formulation for the Tribunal's order to deal with the situation in which we are in, but in which everyone accepts that it is entirely appropriate that I should not face the procedural lacuna that I put in my submissions of my appeal being *functus* in the event that actually it does arise. There is a whole range of scenarios that may occur. That is where we are. The point on whether the appeal should be allowed or dismissed is a

short one. It is a question of the Tribunal's approach in relation to whether or not effectively the relief has been granted that we were seeking.

THE PRESIDENT: Yes, and it may be that it is better to leave you to deal with anything else you want to say on that in relation, when we come to deal with costs.

MISS DAVIES: Yes, because the same point carries through, in a sense. Ofcom's short position on costs is we are not to be treated as a successful party. They make a whole load of other points which are the same points they make against Sky.

THE PRESIDENT: Yes.

MISS DAVIES: But in relation to us, they say there is a distinction because we are not to be treated as a successful party.

THE PRESIDENT: So, we will leave that for now, then.

MISS DAVIES: Yes.

THE PRESIDENT: That is fine. Thank you very much. I just wanted to ask Miss Rose (sorry, Miss Rose) on the point about the stay, I think Ofcom have reserved their position, but they do not have, anyway, there are no objections, as it were, from Ofcom's point of view, there is nothing, you do not regard there as being anything irregular —

MISS ROSE: No.

THE PRESIDENT: — in being left in limbo, if that were what we determined to do.

MISS ROSE: Yes.

THE PRESIDENT: Thank you. I ought to have a little checklist, but I confess I have not got it! We probably ought to just deal with the STB and those other, if I may, there has been a debate originally about whether the set top box appeal and the CAM appeal should be allowed or dismissed. And I think that might have been resolved now.

MR. FLYNN: I believe so, sir. It is now, I should say obviously, so far the Tribunal has been looking at the BT draft order.

THE PRESIDENT: Yes.

MR. FLYNN: The Sky draft order — and I think the latest version is in tab —

THE PRESIDENT: It is the back of your submissions.

MR. FLYNN: Yes, well, it was updated, so I think it is in tab.27.

THE PRESIDENT: Yes.

MR. FLYNN: Because, it is a bit of a moveable feast.

THE PRESIDENT: Does it matter if we look at the, just because we happen to have it to hand, look at the BT —

MR. FLYNN: Yes. I think you should have ours to hand as well, if you do not mind, Sir.

MISS DAVIES: Sir, can I just mention, although I understand Mr. Turner does not object to my proviso, it is not in his order. So, his order cannot be taken as dealing with my position.

THE PRESIDENT: No. Whatever we decide to do, I think we are going to either say, "Please agree amongst you an order achieving this, the machinery", or we will send you a draft. So, you know, those points will come out in the wash. I just want to try and isolate, if there are any points that people are arguing about still.

MR. FLYNN: Well, as I say, in respect of oral submissions, I think the Tribunal has only asked for costs.

THE PRESIDENT: I know, but —

MR. FLYNN: But if you compare — and I am not saying that either of these drafts is canonical, but if you compare our draft in tab.27 with the BT draft, you will see that there are differences which indicate controversy. I am not sure why it is that the linear set top boxes appeal and the CAMs appeals appear in para.2 in Mr. Turner's draft, rather than para.1, because —

THE PRESIDENT: Yes, I see.

MR. FLYNN: I understand that, and just had it confirmed, that Ofcom having originally objected, now agree with us that the three Sky appeals should be allowed.

THE PRESIDENT: Yes. I had not realised that they were being, at the moment there is one there dismissed, and the other allowed, and yours are allowed.

MR. FLYNN: Yes.

THE PRESIDENT: Yes.

MR. FLYNN: So, I think it is at least agreed, unless anyone wishes, unless you wish to hear from anyone who takes a different view I think it is now agreed that all the Sky, the three Sky appeals should be allowed.

THE PRESIDENT: Yes.

MR. FLYNN: The status of the Premier League's appeal —

THE PRESIDENT: We will determine.

MR. FLYNN: You will determine. We suggested it should be allowed; others are suggesting that it needs to be dismissed. Miss Davies has explained the consequences.

THE PRESIDENT: Yes.

MR. FLYNN: I think all are agreed that the Virgin Media, BT and Top Up Picnic appeal should be dismissed. And then you have the consequential relief where, obviously, the BT order includes their mechanism for the stay.

THE PRESIDENT: Yes, and I think Ofcom take the view the Tribunal has no jurisdiction to order anything to happen in respect of the Picnic Statement —

MR. FLYNN: And then, that is the other point —

THE PRESIDENT: — or BT complaint.

MR. FLYNN: That is the other point which is, as it were, before the Tribunal for determination.

THE PRESIDENT: Yes.

MR. FLYNN: In our order, then draft order, you will see that actually the running order is different, but at d. and e. in our draft, we seek an order that Ofcom be directed to withdraw the decision in the Picnic statement and the BT complaint decision. And, essentially, we say that that is a matter of consequential relief because those were dependent on the main decision.

THE PRESIDENT: Yes, and I think Ofcom take exception to that. Yes.

MR. FLYNN: And others take the view that there was not an appeal, so you do not have the jurisdiction.

THE PRESIDENT: We have not asked for oral submissions on that.

MR. FLYNN: You have not asked for oral submissions since you are —

THE PRESIDENT: So, I am not going to bar anyone out, but we are not requiring —

MR. FLYNN: I just wanted to be clear that, you know, there are points for the Tribunal's determination.

THE PRESIDENT: Yes.

MR. FLYNN: And neither of these drafts purports to cover everyone's position, as it were. But, there are controversial points.

And then the other point on which you have asked for, or permitted submissions, is costs.

THE PRESIDENT: Yes. Well, are people content to move on to costs then, in that case? Is there anything else on the other aspects of the order that people are burning to —

MR. HOSKINS: I am very happy to move on, but ask to be released because obviously certain parties are not required to be here.

THE PRESIDENT: Yes, of course.

MR. HOSKINS: (If that is not too rude).

THE PRESIDENT: Well, we might just take five minutes and then — or ten minutes, let us say, and then we could have, we probably, are we, we are probably not going to finish this by lunchtime, are we? Or are we? Might we?

MR. FLYNN: I would hesitate to give a guarantee as to that.

MISS ROSE: Sir, I would be very grateful if we could perhaps crack on, because I have various commitments this afternoon.

THE PRESIDENT: Are we going to finish it, though?

MISS ROSE: Are we going to finish it today?

THE PRESIDENT: No, no, are we going to finish it before lunch?

MISS ROSE: Perhaps if we were to crack on now and have a slightly later lunch, I would have thought we ought to be able to. But, I would be anxious about us taking a ten minute pause there.

THE PRESIDENT: It was really just so people could have a chance to go out.

MISS ROSE: Yes.

THE PRESIDENT: I think we will have a quick break now, and then we will think about cracking on. We will see how we get on with that. We will just have a short break, and anyone who is not involved can depart.

(Short Break)

THE PRESIDENT: Mr. Flynn, we are happy just to bash on so far as this is concerned, if that suits other people – it obviously suits Miss Rose.

MR. FLYNN: Yes. We are in your hands, it is 20 past 12. Perhaps I could deal first of all with confidentiality, which Miss Rose mentioned right at the beginning. We put in our letter to the Tribunal I think rather late last night an indicative set of numbers in response to a request we received from the Tribunal I think on Monday.

Nobody is suggesting that ultimately when we get to arguing numbers in an assessment, should it come to that, that they are confidential information, but that estimate is, as it says, an estimate based on a number of assumptions at the moment, it is simply trying to give an indication as the Tribunal asked for the costs of all our appeals broken down by solicitors, counsel and experts. But in all of those respects, and also possibly the experts, there are costs that were incurred in relation to interventions in the other appeals. So those are not the final numbers, they are, as it were, a ball park figure for the Tribunal to have in mind should it find it helpful.

THE PRESIDENT: Those are just for the main appeal are they not?

MR. FLYNN: It is the three appeals for Sky, it is not the interim relief application.

THE PRESIDENT: So that is not included?

MR. FLYNN: That is not included.

THE PRESIDENT: I have just lost sight of it at the moment.

MR. FLYNN: I beg your pardon, I am wrong about that, that is one of the points of difference from the previous estimate which the Tribunal ----

THE PRESIDENT: What are you wrong about?

MR. FLYNN: I was on about the ----

THE PRESIDENT: Sorry, what are you wrong about – or what are you on about? (Laughter)

MR. FLYNN: I was on about and wrong about whether the costs included the interim relief, and the new ones do and the old ones do not, I beg your pardon.

THE PRESIDENT: Yes, right.

MR. FLYNN: It is the cost of the main appeal, the STBs, CAMs and the interim relief application.

THE PRESIDENT: Right, thank you.

MISS ROSE: I do not understand there to be any suggestion that the figure is confidential, I do not understand how they could be. I do not understand Mr. Flynn to have suggested that there is.

THE PRESIDENT: We might finesse this by saying it does not really matter at the moment, but it was very helpful to have an indication.

MISS ROSE: Sir, it does matter and it is a matter I want to make submissions on, and it is a matter of quite considerable public interest in my submission.

THE PRESIDENT: Yes, well, you will have to resolve this.

MR. FLYNN: With respect, if the Tribunal is ultimately to award costs in Sky's favour then the amounts claimed and the amounts awarded no doubt will be public. This is simply a working estimate for today's purposes and in my submission there is no particular reason for that to be bandied around.

THE PRESIDENT: That does not mean it is confidential though, does it? I cannot see why it is confidential actually but it may be that no one likes these figures to be necessarily bandied about and it is not a final figure, perhaps, but in terms of orders of magnitude I suspect is what Miss Rose wants to make arguments about.

MISS ROSE: Yes, but there is also a point of principle, which is the principle of open justice. This is a public hearing and with respect to Mr. Flynn it is not appropriate ----

THE PRESIDENT: It is not confidential.

MISS ROSE: No, so I say it now in public that Sky have put forward a figure of £8.7 million.

THE PRESIDENT: Okay, well you have made that point now.

MR. FLYNN: I have also made the point on the basis on which it is put forward and obviously it should not be quoted as being some other basis.

THE PRESIDENT: Anyway, let us get on.

MR. FLYNN: Our application was made in the submissions you have, the section on costs starts at para. 43.

THE PRESIDENT: We have had very helpfully long skeletons because the matters were matters strongly in contention and people can underline points or make any new points, but obviously we have read everybody's submissions and we have had further submissions from Ofcom in response to yours and we have all read those. So with that in mind anyway, perhaps you would ----

MR. FLYNN: I can be relatively short because you have our submissions. We say the appropriate starting point in the jurisprudence of the Tribunal, in the CPR, and in judicial review is that costs follow the event. Ofcom, particularly in its latest submissions, wishes to persuade you, as we foreshadowed in our original submissions, that there is one rule for Ofcom and a different one for everyone else including institutional defendants such as the Office of Fair Trading, and the starting point is that Ofcom does not pay costs even if it loses. It maybe Miss Rose wants to develop her case in more detail and to avoid a double dip I can save some of the points for reply. But to give, as it were, the main points as you put it – or the highlights – Ofcom derives this version of the world I think from a ruling of the Tribunal in a case called *Eden Brown*, which they attach to their submissions. I think it is important to just have a look ----

THE PRESIDENT: Is it not in the bundle?

MR. FLYNN: It was attached to their submissions. I probably have not caught up, if it has been given a specific tab.

THE PRESIDENT: I thought everything conceivable was in this bundle but apparently not.

MR. FLYNN: I think it got to the stage of not being able ----

THE PRESIDENT: I think we have only 57 authorities but not that. (Same handed) Yes, this is the recruitment case.

MR. FLYNN: Yes, it is the recruitment forum. The Tribunal, chaired by Mr. Justice Roth, considers from para. 3 the Tribunal's general approach, and he says, in para. 4 that the Tribunal has retained flexibility in its approach, but it has, over time, developed guiding principles, for example, by the adoption of specific starting points that take account of the particular nature of the jurisdiction being exercised. What he says here is "as regards appeals under s.192 of the Communications Act against decisions by Ofcom resolving disputes under s.185 of that Act, the Tribunal has stated the starting point is that Ofcom should not normally be the subject of an adverse cost order when it has acted reasonably

and in good faith." To that effect the Tribunal cites a case called *The Number UK Limited v Ofcom* and says that, by contrast, cases under s.120 of the Enterprise Act the Tribunal has determined that the appropriate starting point is that the successful party should normally attain a costs award in its favour.

What the Ofcom submissions, in referring to the *Eden Brown* case, do not quote is the phrase "resolving disputes under s.185 of the Communications Act", and that, it seems, in my submission, is a fundamental omission. If one looks also at the case, *The Number*, which is in the authorities bundle at tab 24, again it is para.4:

> "In the present case, the Appellants seek a costs order against Ofcom following the successful outcome of their appeal under section 192 of the 2003 Act against a decision of Ofcom in relation to the resolution of price disputes. Ofcom are, of course, in a unique position as regulator under the 2003 Act when dealing with the resolution of disputes under section 185. In addition, Ofcom have statutory duties to perform and fulfil a role as guardians of the public interest."

So that is the unique position of Ofcom quoted there in relation to the resolution of disputes under section 185. Even in those cases, as we have pointed out in our submissions, the Tribunal has held, and that is in the following case in the bundle, tab 25, a *T-Mobile* case against Ofcom, in the context, and also in para.4 – so all of these references come from a para.4:

> "The Tribunal's jurisdiction under section of 192 of the 2003 Act covers many different kinds of decisions taken by Ofcom, not only decisions resolving disputes under section 185 as was the case in this appeal and in *The Number (costs)*. As the Tribunal made clear in the passage quoted above [from *The Number*], there is no immutable rule as to the appropriate costs order – how the discretion will be exercised in any case will depend on its particular circumstances. As the Tribunal has said [again from *The Number*], Ofcom may be liable for the successful appellant's costs even in the absence of any bad faith or unreasonable conduct if it is appropriate in all the circumstances."

So, in our submission, there is no support in the case law for a general proposition that in all types of appeals against Ofcom decision, particularly those that are governed by the s.192 procedure, there is a presumption or a starting point that Ofcom should not have to pay costs if it loses.

Ofcom, in its latest submissions, refers to the case of *Baxendale-Walker v. The Law Society*. In our submission, that kind of case where a regulatory body, such as the Law Society, if it considers that there is a case for a solicitor to be disciplined, in that sort of case it had to take it before a tribunal. The question was: what was the costs rule if, in fact, it were held that there had not been misconduct, or at least not all the charges had been made out, as it were.

That kind of jurisdiction, where a public authority has a disciplinary function which it has to take to another tribunal, one can see why in that sort of case there is a rule that, provided they have acted conscientiously, and so forth, might be a presumption against awarding costs.

That is what is said in the *Baxendale-Walker* case and in others, the *Perinpanathan* case that is also referred to by Ofcom, and that judgment is instructive, we would say. There were two substantive judgments given by Lord Justice Stanley Burnton, and the final judgment by Lord Neuberger in his then capacity as Master of the Rolls, and Lord Justice Maurice Kay agreed with both of them. If one looks at para.40 of Lord Justice Stanley Burnton he summarises ----

THE PRESIDENT: Is that the one at tab 42?

MR. FLYNN: It is tab 56, I am told. He is summarising a deal of case law, including the *Baxendale-Walker* case, and he says:

> "I derive the following propositions from the authorities to which I have referred. As a result of the decision of the Court of Appeal in *Baxendale-Walker*, the principle in the Bradford case is binding on this court."

He quotes that, and when he is referring to the principle in the *Bradford* case then the Tribunal will need to look at para.15. That is a principle applying to licensing decisions taken by magistrates in proceedings brought by a local authority. That principle, the *Bradford* principle, was held to be applicable in the *Law Society* context by the Court of Appeal in that case. Lord Justice Stanley Burnton says that the *Bradford* principle is binding on the court anyway, this is his para.40, and he would:

> "… endorse its application to licensing proceedings in the magistrates' court and the Crown Court. For the same reasons, the principle is applicable to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest: [*Baxendale-Walker*]. Whether the principle should be applied in other contexts will depend on the substantive legislative framework and the applicable procedural provisions."

It does not apply in CPR proceedings. When the principle applies the starting point and default position is that no order should be made, but nevertheless costs can be awarded if is appropriate in discretion, and he is not going to summarise those cases. So it is not an immutable rule, even when it applies, but there is a large number of proceedings to which it does not.

To similar effect, Lord Neuberger at para.72 is saying that he:

> "… would not go so far as to say the decision strictly compels us to follow the reasoning in the *Bradford* case … However, the Court of Appeal's reasoning and decision provides very recent and highly authoritative support, in terms of both principle and practice, for the proposition that the *Bradford* case was rightly decided and that it should apply to a case such as this.
>
> So far as principle is concerned, the judgment of this court in *Baxendale-Walker* has given strong support to the notion that Lord Bingham CJ's three principles should apply where a regulatory body is reasonably carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle that costs follow the event. The effect of the reasoning is that, just because a disciplinary body's functions have to be carried out before a Tribunal with a power to order costs, it does not follow that there is a presumption that the tribunal ought to order the disciplinary body to pay the costs if it is unsuccessful, and that, when deciding what order to make, the Tribunal should approach the question by reference to Lord Bingham CJ's three principles. It is hard to see why a different approach should apply to a regulatory or similar body carrying out its functions before a court – unless the rules of that court have any presumptive principle inconsistent with those principles, such as CPR. …"

That is a reference to the starting point that normally costs follow the event.

In that sort of context, where a public authority has got to bring proceedings before a tribunal, whether that is for licensing or disciplinary measures, there may be a different costs rule, but it is a principle of general application, and, in our submission, it is quite unlike even Ofcom's role under s.185 when it has to resolve disputes between different operators in the telephony sector. This is a case where Ofcom has its own powers and is quite free to decide according to its own lights what is appropriate in the public interest and to take a decision accordingly. It is not being required to initiate proceedings before some

other body in the hope or belief that that other body ought to be giving permission for the particular activity to carry on.

In our submission, those cases are not applicable in the present context, and there is no case law or other presumption in the Tribunal's case law that Ofcom should not be required to pay costs when it loses a case.

I do not need to repeat, but this is a case where the Tribunal has found a significant number of errors of approach and assessment by Ofcom in taking the decisions contained in the Pay TV statement. We list some of those in para.52 of our skeleton.

This is not simply a case where Ofcom has raised, or been obliged to raise, a public interest issue and leave the determination to a body with different responsibilities. This is a decision, in our submission, for which it should take the responsibility and, like the s.120 cases, for the other institutional defendants before this court, the starting position should be that costs follow the event.

There is a spat, if you like – this is where these latter submissions come from – in relation to what is referred to as a disciplining effect on Ofcom. I want to make it clear that we are not suggesting that the idea that Ofcom should pay the costs of Sky's successful appeal is in any form a punitive measure, it is simply the ordinary costs rule, but naturally Ofcom, like other authorities and regulatory bodies subject to the Tribunal's rules and facing a potential award of costs, will be aware of that in the activities that it carries out. That is the disciplining effect that we speak of. It is not a caning, it is the other side of the chilling argument which, as we have explained in our submissions, has no particular traction in other areas of the courts' costs jurisdiction. The view is that the exposure to the costs liability has a disciplining effect on decision making, not on exercise of public interest functions.

No particular emphasis is placed in Ofcom's new submissions on anything they seek to derive from the principles by which their costs are recovered by licensees, so I will come back to that if that is a point that Miss Rose wishes to develop.

THE PRESIDENT: It has been developed in the written submissions. It is certainly relied upon.

MR. FLYNN: It is relied on and we have also responded to that, so it is in the written submissions. Our position in short is that that is not a relevant consideration. If the Tribunal is with us, that Ofcom ought to contribute towards Sky's costs, then how ultimately that is borne as a matter of Ofcom's own funding, it is a downstream issue, as it were, it is not a reason in itself to impose that costs' burden on Sky rather than the regulated sector as a whole, that is not a principle by which the courts, in my submission, are or should be guided

in deciding the costs' rule. We quote a Court of Appeal Judgment to similar effect in relation to the UK Border Agency. Our submission is that it is not a relevant consideration. Then I think Ofcom's alternative position is if you do not apply a rule that Ofcom simply has no cost liability then you should approach it on an issues basis and what Ofcom would suggest is that there were two issues the Tribunal decided, one was jurisdiction and one was as to the negotiations and the factual bases. In our submission that is not a fair and appropriate basis for determining the costs in this case when Sky was obliged to bring a comprehensive appeal against the Pay TV statement as a whole. But, even if you were to descend into an issues based appraisal, to describe it as victory for them on jurisdiction and victory for us on the negotiations, for example, is crude and not an appropriate way of applying the issues basis anyway.

What Ofcom succeeded on in the jurisdiction argument was the licensed services argument, it did not succeed on its alternative connected services argument, and all of those together, and certainly the part that Ofcom succeeded on, occupied really a very small part of the time before the Tribunal. Clearly it did not involve any evidence, witness statements or expertise, it was purely legal submissions.

THE PRESIDENT: Just remind me, Mr. Flynn, are you currently asking for 90 per cent, or was that part of the original open – are you 100 per cent now?

MR. FLYNN: We are claiming all our costs, yes. There was an open offer for Ofcom to consider.

THE PRESIDENT: Was the discount intended to reflect the jurisdictional issues, or was it not particularly related to anything?

MR. FLYNN: I will take instructions as to whether it was anything more scientific than a discount to reflect the fact that ----

THE PRESIDENT: You lost something.

MR. FLYNN: -- we substantially won and we were not even going to claim everything. So it was an offer that might have been thought attractive on that basis, but it was not an attempt to prefigure what we might have lost on in relation to the licensed services argument and, indeed, our estimate of that in the submissions is more like 1 or 2 per cent rather than 10 per cent, so it was not tied to that on a theoretical basis.

THE PRESIDENT: If it is convenient to ask you this now – what is the justification for Sky seeking the cost of the issues which the Tribunal did not have to determine? We know that the issues we determined basically related to the underlying reasons and the jurisdiction to

do it, but BT's appeal, Virgin's appeal and, apart from the legal issue, FAPL's appeal related to the criticism of the remedy, as did the remainder of yours.

MR. FLYNN: Yes, if one groups it down to three principal headings, I think "proportionality" was the one we were using as a shorthand catchall for the parts of our case that assumed if s.316 gives a power to adopt measures in appropriate circumstances and the circumstances are appropriate then we have criticisms of the mechanics, its proportionality and so forth, and consultation and other issues were also wrapped up in it.

The justification is simply that, as I said a minute ago, the whole appeal had to be brought before the Tribunal, had to be brought in one and the Tribunal has not found it necessary to rule on those issues but nevertheless they had to be pleaded and they had to be argued. We had no choice about that except, as it were, to abandon.

THE PRESIDENT: On the other hand, Ofcom might have won on them all.

MR. FLYNN: We shall perhaps never know. Indeed, as a theoretical matter, as a true matter they are undetermined by the Tribunal so we shall never know, but they had to be put and the effect, indeed, what the Tribunal has held in the last paragraph of its Judgment, is that Sky's appeal should be allowed. If the Tribunal had given any indication that what had not been determined was frivolous or not persuasive, or anything like that, we might be in a different game, but they are simply undetermined by the Tribunal and in our submission it all had to be raised in one go. The only matter that was ever even tentatively considered for a preliminary issue was the legal issue and that, of course, as it turns out, would not have been much of a saving. It would not have been a saving and probably would have led to proceedings being further prolonged. That is the justification. I am not claiming that the Tribunal was bound to rule in our favour, or has given any indication on that, on the proportionality and other issues they are simply undetermined, but they were a fundamental part of our appeal which ----

THE PRESIDENT: What I am trying to ask you is why should Sky get its cost of issues which were not determined, any more than Ofcom would get them, or BT would get them, or Virgin would get them?

MR. FLYNN: If they had been determined, but the lodging and the making of those arguments was necessitated by the adoption by Ofcom of the decision contained in the statement which we have successfully challenged. So in those circumstances it is fair in our submission that we should have our costs of the appeal.

I have just been handed a letter, which I think the Tribunal has seen -it was copied to the Tribunal – of 9th November, it is tab 2 in the bundle so I am being told, and it is right at the

end of that letter, para. 4(b) relates to the 10 per cent reduction point that you were asking about earlier, Sir.

> "Sky has reduced the cost of claims in its main appeal by 10 per cent considering that its ground of appeal relating to Ofcom's jurisdiction was not successful which amount Sky considers more than represents the costs that Sky would have incurred in relation to this ground."

So it is not meant to equate with it, it is meant to be an additional reduction, as it were. Sir, unless I can help the Tribunal further.

THE PRESIDENT: It is a similar point, just dealing with the set top box and CAM appeals, for which you are also seeking costs. Those appeals could be said, arguably, to have succeeded because, and I think it is now accepted, is it not, that those appeals should be allowed?

MR. FLYNN: Yes, it is.

THE PRESIDENT: And there is general acceptance, and they effectively were won because of the grounds that you won on in the main appeal?

MR. FLYNN: That is what made it unnecessary for the Tribunal to consider the remainder of the arguments raised, indeed.

THE PRESIDENT: Equally, the other issues that you raised in those appeals were not looked at?

MR. FLYNN: Were not looked at, indeed. They were argued on paper only and there was no hearing in respect of those. I think effectively they are in the same category as the proportionality arguments, if you like. In our submission our having to make those arguments was caused by the adoption of the decision and our appeal in respect of that has been successful.

THE PRESIDENT: You are also seeking costs for the interim relief, are you not?

MR. FLYNN: We are.

THE PRESIDENT: No one discussed costs at the time?

MR. FLYNN: No. I think in accordance with the Tribunal's normal practice I think costs were not raised and had not fallen for determination.

THE PRESIDENT: And that was an agreed order?

MR. FLYNN: Yes.

THE PRESIDENT: Would that make any difference? Was it a relevant factor?

MR. FLYNN: Again, Sir, we plainly had to seek interim relief because of the taking of the main decision. The fact is we were able to agree an order, indeed, but nevertheless the Tribunal made the order and granted a form of interim relief for Sky which preserved the position against what has, indeed, happened, which is success in the main appeal.

THE PRESIDENT: No one reserved their rights on costs? You did not say: "We have agreed everything apart from costs"? Could it be said that you waived, as it were, that in some way?

MR. FLYNN: It would not be said by me, plainly, and I do not recall whether, in fact, there was any discussion because obviously these were without prejudice discussions, I cannot recall them, but what was put to the Tribunal was an order which the Tribunal was prepared to make.

THE PRESIDENT: Of course, the dynamics of that order, it was not just between you and Ofcom was it? There were other people intimately involved in it?

MR. FLYNN: Indeed.

THE PRESIDENT: To what extent Ofcom held out for this, that or the other, we simply have not gone into.

MR. FLYNN: No, we have not gone into because there was a certain amount of argument in relation to the legal position, but I think in relation to the rest that was all done out of court, as it were, which ended up at the end of the week with a draft order.

THE PRESIDENT: But nevertheless you say Ofcom should carry the can for the costs of that?

MR. FLYNN: That is our submission, Sir, yes.

MISS DAVIES: Sir, I am obviously in your hands, but it may be convenient, as there is an overlap between the points that Ofcom are making against me ----

THE PRESIDENT: Yes.

MISS DAVIES: Obviously, as against my clients there are general points which are the same as against Sky and then there are two separate points which I shall also just briefly deal with.

THE PRESIDENT: It is probably helpful if you make your submissions.

MISS DAVIES: I am grateful. On the general point, essentially the key point that Ofcom is making and has developed in its supplemental submissions is that the Tribunal ought to apply presumption under s.192 appeals that Ofcom should only be ordered to pay costs if it has behaved unreasonably etc. My learned friend, Mr. Flynn, has already addressed you on those and we respectfully adopt his submissions.

Essentially, the short point we would say is those submissions are based effectively on the Tribunal's ruling in *The Number's* case, to which my learned friend took you already this morning. The fundamental point is that they relate to s.185 appeals where, as Ofcom has itself pointed out to this Tribunal in support of that proposition, Ofcom has a unique quasi judicial role, and that is a point, for example, that Ofcom were making in the *T-Mobile* Decision, which is in the next tab of the bundle at tab 25 of the authorities' bundle, at para.

10 where, having referred to the *H3G* case and the *Baxendale-Walker* case, and Ofcom's submissions in relation to that, the Tribunal notes:

> "We recognise the force of OFCOM's argument that it is required by the 2003 Act to determine disputes referred to it and that it adopts, as OFCOM puts it, a 'unique quasi-judicial role'."

That is the unique role that Ofcom has in relation to a s.185 appeal.

> "The nature of OFCOM's role in performing the dispute resolution function is reflected in the somewhat unusual power in s.190(6) for Ofcom to make an *inter partes* order …."

that power was not exercised. In fact, the Tribunal in this case goes on to decide actually it is an appropriate one in which to order costs against Ofcom, notwithstanding the position. But, of course, under s.185 it has a regulatory responsibility once a dispute is referred to it to resolve it, come to a decision, that is why, in the Court of Appeal, in the recent BT case it said actually on appeals there is not necessarily any reason for Ofcom to get involved, you could leave it to the commercial parties who referred the dispute to Ofcom to battle it out in this Tribunal.

THE PRESIDENT: *T-Mobile* itself was a dispute resolution case, was it?

MISS DAVIES: It was, yes. That analysis, Sir, is actually reflected in a different Judgment of this Tribunal on costs, which is about the only Judgment of this Tribunal on costs that has not made it into the authorities' bundles, in the *Tesco v Competition Commission* case, which is referred to in numerous of these other authorities, but is, perhaps of some interest and for that reason for completeness ought to be before the Tribunal. Of course, it is a Judgment to which the President contributed. (Document handed)

THE PRESIDENT: Thank you.

MISS DAVIES: This is *Tesco v Competition Commission* where Tesco has succeeded on a judicial review of the Competition Commission decision, and this is the costs Judgment. The Competition Commission, one can see from paras. 13 and 14 of the Judgment, were saying in relation to an application for judicial review of the Competition Commission that the same principle for which Ofcom now contends in relation to s.192 ought to apply in relation to the Competition Commission, and because the Competition Commission is conducting the market investigation in the public interest it should not generally be exposed to orders of costs unless it has behaved unreasonably. The Competition Commission were relying on *The Number*, and *Vodafone*, and there is reference one can see from para. 14 to the Licensing Act decisions, which are also now relied on by Ofcom.

The Tribunal's analysis of the position effectively starts at para. 25, where we see the recitation of the Rules, a reference to the *Merger Action Group* case, which, of course, sets out a summary of the general principle. Then at para. 29 there is an analysis of the specific position of the Competition Commission in relation to market investigations, in particular noting that the Commission in a market investigation is required:

> "… to bring together and weigh a considerable body of evidence, make factual findings that will often involve complex economic and commercial questions, and apply legal principles to those findings, devising if necessary remediable action."

Etc. And typically the report will contain a variety, it may have wide and profound effects, that can also be true in merger assessments, and can also be true in many decisions made by Government and other bodies susceptible to judicial review.

Then generally concluding that:

> "… although the volume and scope of decisions in a single Commission report may render the Commission vulnerable to a legal challenge neither this nor the existence of wide-ranging powers to investigate justifies a more indulgent approach to the award of costs against the decision maker. Generally speaking no question of such an award would arise unless the exercise of such powers has been showed to be impaired in some respect, so therefore we apply the same rationale."

The Tribunal then went on to look specifically at *The Number* and *Vodafone Limited* in para. 30, and pointed out that there Ofcom, under s.185 of the Act is operating in this unique position as regulator, that is why Ofcom should not in the ordinary case be issued with an adverse costs order, but cases of that kind can be distinguished from the Competition Commission. The Tribunal goes on in paras. 31 through to 33 to look at the Licensing Act decisions.

We would say, effectively echoing many of the points that my learned friend, Mr. Flynn, is saying, that if there is an analogy to be drawn, this case is by far closer to the position of the Competition Commission on a market investigation than it is to the determination of a dispute under s.185 by Ofcom and *The Number* case. There is a difference, of course, but the Competition Commission, when a market investigation is referred to it, has no ability to refuse. It has to take the reference once it is made by OFT, it has to proceed to deliver the report, it has to investigate the market. Here, Ofcom did receive initially a super complaint, but over the period of the three years that subsequently followed decided to pursue that by conducting effectively, albeit not a Competition Commission market investigation, its own

form of market investigation, and determining that the remedy that it proposed was the right remedy in those circumstances.

THE PRESIDENT: Some they sent off, did they not?

MISS DAVIES: They sent off movies to the Competition Commission because they determined they did not have the ability to deal with it. But in relation to premium sport they determined they did. They were performing a very similar function, in our respectful submission, to the sort of function that the Competition Commission performs in market investigations. There is therefore absolutely no reason in our submission to draw a different approach for Ofcom in this case to the Competition Commission in that case, and we would also say, again echoing the points made by Sky, to the OFT more generally in relation to its regulatory functions under the Competition Act.

Another very small point in that context, my learned friend Mr. Flynn took you to para. 40 of the *Perinpanathan* Decision of the Court of Appeal, now relied on. One of the points Lord Justice Stanley Burnton made in that case was that the extension of that principle to other situations depended upon the substantive legislative framework and the applicable procedural provisions, that is para. 40(3). The only point, very briefly, just to note in that context is, of course, this Tribunal in the *GISC* case - the insurance brokers' case - which is at tab 15, had decided before the Communications Act was adopted that this Tribunal was not going to interpret Rule 26 (what is now Rule 55) in a way that involved the application of presumption, that a Regulator should only have to pay the costs if it behaved unreasonably. That decision pre-dated the Communications Act by two or three months, and you, Sir, may recall that in the substantive argument we had about the interpretation of s.316 Ofcom referred this Tribunal to certain authorities to the effect that Parliament is presumed to legislate against the backdrop of decisions of the court.

Parliament, when it decided that appeals under s.316 should come to this Tribunal, which it did by means of s.317 and s.192, did not as it could have done – there are other examples – impose some specific starting point in relation to costs. It is a short point but as it is part of the relevant factors that Lord Justice Stanley Burnton identifies of some relevance.

THE PRESIDENT: And that is tab 15?

MISS DAVIES: That is tab 15. That is all I wanted to say in addition to what is on paper in relation to the suggested presumption. We say it is unfounded and should not be applied.

I then perhaps ought to deal with my client's specific position.

THE PRESIDENT: Yes, you might want to start with the question of why the appeal should be allowed.

MISS DAVIES: Of course, Sir, although there is not much more to say than I said before we broke shortly.

THE PRESIDENT: Yes.

MISS DAVIES: It is the same point that feeds through into why we say that it would be appropriate for the Tribunal to make an order for costs in our favour.

The relief that was throughout sought by my client in our original notice of appeal and subsequently as amended was the setting aside of the Pay TV statement. That is the relief that the Tribunal is going to order in whatever form in paras. 3 and 4 of the order. In effect, because the decision had been taken – and a very similar point to one that my learned friend, Mr. Flynn, just made – on one basis already the Tribunal has decided was flawed - we were effectively left in the situation where, having had that decision imposed we had to come to the Tribunal in order to protect our position and seek the relief which is ultimately going to be granted. Now, of course, I accept that because of the order in which the Tribunal dealt with the points it did not actually find it necessary to resolve the additional grounds of my appeal, it resolved ground one and not the rest.

The short point, and it is not going to be improved by me repeating it, is if we had not had this flawed decision in the first place my client would not have had to bring its appeal, it would not have had to incur the substantial cost of bringing that appeal in order to protect its position.

THE PRESIDENT: I suppose you could have got as much by intervening. You could have just intervened as things turned out.

MISS DAVIES: As things turned out. No one ever suggested that my appeal should be stayed.

Another point that is made by Ofcom in its submissions is in any event there should only be one order of costs as between Sky and the Premier League, and they rely on some cases in the context of judicial review, where there is a starting point, but it is no more than that, that where parties are appearing in the same interest it might be appropriate only to ----

THE PRESIDENT: Yes.

MISS DAVIES: Our short answer to that is that we were not appearing in the same interest as Sky. Not only did the Premier League have its own specific members' interests, consumers' interests and so on – I am not going to go back into all of that – issue to protect, but perhaps one proof of the pudding is that you may recall throughout the closing submissions my learned friend, Miss Rose, kept saying that the Premier League's position on this is diametrically opposed to Sky's position. They are inconsistent and that shows the Premier League must be wrong. We said that was not right, they were not inconsistent, but it is an

indication of the fact that we did not have the same interest. We participated throughout the consultation processes, we were, in fact, the only sporting body at that time before the very final consultation that Ofcom positively engaged with on a consultation process point of view. You will recall that one of the complaints of the other sporting bodies was that they had not been engaged appropriately – I am not going to get into the merits or not of that complaint – but the reason is that everyone realised that a lot of what this was about, and Sir will remember the evidence, was Premier League football, and the Premier League football on Sky Sports 1 and Sky Sports 2.

THE PRESIDENT: You certainly raised a unique point against the remedy on the proportionality issue.

MISS DAVIES: Sky's interests in relation to the value of media rights one might say are actually diametrically opposed to my clients, as they are the purchasing party. So in order to protect our position, and that is why I say we do not have the same interest as Sky, and we had our own unique points on that, we had to bring our own appeal.

On that point, whether one puts it as not the same interest or this being an appropriate case not to follow that perhaps does not matter.

Essentially, the point is what the Tribunal has recognised in the *Merger Action Group* case and obviously the Rules provide is the Tribunal's discretion to do what is just. We submit in these circumstances it is just to recognise that we should not be forced just to bear our own costs, which is essentially what the Ofcom position is. I recognise, of course, Sir, that the Tribunal has a discretion and we have asked for 90 per cent to reflect the position in relation to ground one which was determined. I would submit it is a generous discount but it is, of course, a matter for the Tribunal whether it decides that actually, given that parts of things have not been decided, a bigger discount is justified or not; that is a question within the discretion.

We have referred in our submissions to other cases in the construction appeals where the fact that points were not decided and left moot, as it were, did not result in such a deduction, but I am not going to suggest that there is not discretion in the Tribunal to do that. It is all a matter of achieving a just result. In one sense this presents the Tribunal with a separate unique problem in that there probably has not been a decision before the Tribunal, partly because of the nature of the decision that was taken by Ofcom in the first place, but such complex interlinked appeals, where it was appropriate, and everyone agreed it was appropriate, to hear them all together, in circumstances where actually the Tribunal in the final analysis has not decided it necessary to determine all those. But a situation where an

appellant with a separate interest, such as my client, is faced potentially with knowing that even if I bring my appeal and the Tribunal might not decide my points because it may not get to them, I am not going to be able to recover my costs. There is actually also a potential deterrent effect in relation to appellants with separate interests bringing appeals which we would also point to and say that is not in this case a just result.

That is essentially all I wanted to say by way of supplement to what is in the papers. We could look at the construction cases, but the Tribunal has ----

THE PRESIDENT: We have them well in mind, and your helpful written submissions on that.

MISS DAVIES: I am grateful.

THE PRESIDENT: Thank you very much. Miss Rose?

MISS ROSE: So what is essentially being said, by both Sky and the Premier League, in relation to the general point of principle is there is no general practice in this Tribunal not to start from the starting point that Ofcom should pay costs of a s.192 appeal because, it is said, that the past practice of the Tribunal in that regard applies only to dispute resolution under s.185. We submit that that is wrong, and when you look at the case law of this Tribunal, which has been recently endorsed by the Court of Appeal, it is in fact the consistent practice of this Tribunal going right back to the first cases considered under the Communications Act that the starting point, when determining questions of costs in relation to appeals against decisions of Ofcom under the 2003 Act, is that Ofcom should not have to pay the costs if it loses unless it has behaved unreasonably, recognising of course that there is a general discretion that the Tribunal has under Rule 55. We say it is clear from the case law that that does not only apply to 185.

In the light of what is being said, I am going to need to take you through the case law chronologically so we can see how the practice of the Tribunal has developed. The first case is a case in which you appeared for BT. It is the case of *BT v. Ofcom*, which is at tab 57, a decision of the then President, Sir Christopher Bellamy, in 2005. This was the first occasion on which the CAT considered the question of whether costs should be awarded against Ofcom when there had been a successful merits under s.192. I should say that this was a dispute resolution case. If you go to para.47 – you can see at 46 they set out Rule 55, they make the point that there is no special rule. Then at 51 the CAT point out that this is the first appeal under the appellate regime established by the 2003 Act, they refer to CPR Part 44.3, which has the presumption that costs follow the event, and they make the point that that presumption is not reflected in Rule 55.

Then they say that the flexible approach that the Tribunal has taken to the question of costs is appropriate in relation to appeals under the 2003 Act, no presumption that costs should necessarily be borne by the losing party.

Then the CAT sets out the factors that they take into account in the particular case. At para.53 at the top of the next page, they make the point:

> "In exercising his duty under Regulation 6(6) the Director was further required to take into account the wide range of considerations … including the interests of users, the relative market position of the parties, the public interest, the promotion of competition, and many other matters."

Then they refer to the dispute. Then they say:

> "Having resolved the matter against BT, in our view Ofcom (…) was bound to appear before the Tribunal to defend BT's appeal against the contested Direction."

Then at para.57 they say it is unrealistic to suggest that Ofcom should have withdrawn following the lodging of that appeal. At the end of that paragraph, no unreasonable conduct in respect of which Ofcom's position is open to criticism.

At 58, in making the Direction the Director took into account what he believed to be wider benefits to the public interest.

> "This was a case in which wider public interests, and not just the private interests of BT, were at stake."

Then there is a reference to the fact that BT has market power. Then at para.60 this:

> "It is also relevant in our view that in a regulated industry such as this, BT and the other principal parties to these proceedings will be in a constant regulatory dialogue with Ofcom on a wide range of matters. The costs of maintaining specialised regulatory and compliance departments, and taking specialised advice, will not ordinarily be recoverable prior to proceedings. We accept that the situation changes once proceedings before the Tribunal are on foot, by virtue of Rule 55 of the Tribunal's Rules. However, the question whether costs orders should be made in any particular case, or whether the costs should lie where they fall, arises against a background in which BT and the interveners are, in their own interests, routinely incurring regulatory costs which are not recoverable."

That is one of the key distinctions that applies in relation to appeals under the 2003 Act that distinguishes them from appeals under the Competition Act relating to the OFT or appeals

applying the judicial review standard against decisions of the Competition Commission. Ofcom is a sectoral regulator. Those who wish to participate in broadcasting or in telecoms are required to be licensed by Ofcom to do so, and to pay the costs of Ofcom's regulation of the sector, and are under the continuing auspices of regulation by Ofcom. That is the deal which Parliament has established for people to operate in those sectors. That is completely different from those who find themselves the subject of investigation, effectively a prosecution, by the OFT.

Furthermore, none of the parties have submitted that if the Tribunal does not make a costs order they will have suffered a financial hardship, and I make the point that that is true here too. It is not suggested by Sky or the Premier League, and indeed it could not be when one considers the financial resources, the immense financial resources, available to those parties, that there would be any hardship.

Then they say at 62:

> "In our view, we have to strike a balance, on the one hand, the fact that BT has been successful, and on the other hand, the various considerations mentioned above. Rule 55 gives a wide discretion. Our judgment is that where Ofcom has determined a dispute in accordance with the procedure in the 1997 Regulations, and could have been appealed against by either side, it would not be right to order Ofcom to pay BT's costs in circumstances where Ofcom defended the appeal entirely reasonably and wider public interests were involved. BT has benefited commercially from the stance which it legitimately took. We do not consider that BT will suffer material financial hardship if the costs of this case are treated as part of the general regulatory costs …"

Then they say they do not accept that costs would have a 'chilling effect' on the bringing of appeals by companies in the position of BT:

> "on the contrary, we have some concern at this early stage of the Tribunal's jurisdiction under the 2003 Act that an order against Ofcom would have a 'chilling effect' in the opposite direction by making Ofcom less resolved to defend its decisions, or more ready to compromise, when faced with appellants with market power and large financial resources. Any such pressure on Ofcom would not be in the public interest."

Then at para.65 they reject the notion of an analogy with judicial review by reference to the *Child Poverty Action Group*, and at 66 they say that the funding arrangements are too remote to have an impact.

Sir, the point that is made at 62 about this being a dispute resolution, you will see that the point that is made there is that either side, whichever side had lost the dispute, could have appealed Ofcom, so Ofcom effectively were stuck in the middle. Although this case is not technically a dispute resolution, the circumstances in which Ofcom found itself were exactly the same because this Tribunal will recall that appeals were brought not only by Sky on the one side, but also by BT and Virgin on the other side complaining that the condition that Ofcom had decided to insert into Sky's licence did not go far enough. It is quite clear that if Ofcom had decided not to impose any WMO at all it would certainly have faced appeals from BT and Virgin just as wide ranging as the appeals which it, in fact, faced from Sky and the Premier League. There were two commercial parties at loggerheads in this case, just as much as in a commercial dispute case.

Indeed, Ofcom was under a statutory duty to take a decision, because under s.316, if we just up the Communications Act and go to s.316, you will see at (2):

> "Those conditions must include the conditions (if) that Ofcom consider appropriate for securing that the provider of the service does not –
>
> (b) engage in any practice
>
> which Ofcom consider, or would consider, to be prejudicial to fair and effective competition …"

So Ofcom is under an obligation to impose such conditions on Sky's licence, and there is a real problem in terms of the statutory scheme if Ofcom were to be deterred from imposing the conditions that it considered to be appropriate because of the fear of an enormous costs award such as that in this case.

Indeed, Ofcom could be appealed if it declined to take a decision, because if you go back to s.192, appeals are brought against decisions of Ofcom, and if you look at s.192(7), references to a decision under an enactment:

> "(b) include references to a failure to make a decision and to a failure to exercise a power or to perform a duty …"

Whatever Ofcom had done in this case, if it had done nothing, if it had declined to impose a WMO, if it had imposed a different remedy or this remedy, it is inevitable that it would have found itself facing a merits appeal. We submit that that is a crucial part of the legislative framework when considering whether it is appropriate that an adverse costs order should be made against Ofcom.

Sir, that is the starting point, the first case that was considered by the CAT under the new legislation. The next case in which this arose was *H3G v. Ofcom*, tab 18. This is the next

year 2006. If you go to para.39, the Tribunal's analysis on costs begins. They set out Rule 55. They refer to the *RBS backhaul* judgment, which is the *BT* judgment we have just looked at. Then they say that they need to look at costs on a case by case basis. Then at para.43:

> "We have carefully considered the authorities cited to us …"

Then they say that the correct decision is all parties should be left to bear their own costs. Then they say that H3G succeeded only in part, and then at 46:

> "This was a case in which wider public interests were at stake, not just the private interests of H3G …"

At the end of that paragraph:

> "The public interest element means that costs might not follow the event to the same extent as in other litigation."

Then at 47:

> "The point relied on by Ofcom that an order for costs against Ofcom at this early stage under the 2003 Act may have a 'chilling effect' also supports the order that we propose to make, even if it would not, by itself, be sufficient to justify depriving H3G of costs …"

There are three reasons there: first, that H3G had succeeded in part; second, that there was a public interest at stake, not just a private commercial interest; and third, the 'chilling effect'.

The next case is at tab 22, and that is the case of *Vodafone v. Ofcom*, the mobile number portability case from 2008. The Tribunal will note that this is not a dispute resolution case. You can see that from para.1 where we are told that in its judgment:

> "… the Tribunal allowed an appeal brought by Vodafone Limited … By an Order of 18 September 2008, the Tribunal set aside the concluding statement published by Ofcom entitled '*Telephone number portability for consumers switching suppliers'*."

This was a policy decision by Ofcom as to what were the appropriate requirements to require of operators in relation to mobile number portability, it was not a dispute resolution case. The question in relation to costs is dealt with starting at para.14. At para.15 the Tribunal observes:

> "That the Tribunal has yet to make an award of costs following an appeal under section 192 … while of interest, is not determinative".

They say it is a matter for the circumstances in the individual case. Then, at para.16 the Tribunal cites *The City of Bradford v Booth* case, the decision of Lord Bingham; and then at para.17 cites the *Cambridge City Council* case. And then, at para.18:

> "In each of those cases, the following considerations emerge: the regulatory authority was under a statutory duty; while it acted honestly, reasonably and properly in exercise of its public duty, the court struck the balance reached by the authority differently; there existed the need to encourage public authorities to make and stand by sound administrative decisions in the public interest without fear of exposure to undue financial prejudice if the decision was successfully challenged; and it was necessary to consider the financial prejudice to the applicant if an order for costs is not made in their favour. In each case, ultimately costs were refused.
>
> Appeals to the Tribunal lie as of right and often involve complex issues on which reasonable people might reach different conclusion to those adopted by the relevant respondent".

And I would observe that the appeal that this Tribunal heard is perhaps the ultimate example of that being the case, exceptionally complex issues both in relation to fact and law and regulatory judgment.

> "In our judgement, the present case provided a useful opportunity to clarify the scope of Ofcom's responsibilities … to the benefit of all industry participants and in the wider public interest".

Then the Tribunal refers to *BT Backhaul* and the point about constant regulatory dialogue that I have already drawn to your attention. And then, at 23:

> "While the Tribunal clearly found errors in the decision making procedure … we did not find [it] had been arrived at in bad faith or in an unreasonable exercise of their public function. That they were wrong is clear from our judgment. However, we are of the view they acted as reasonable regulators and in good faith".

And for that reason they declined to award costs against Ofcom. So, that was not a dispute resolution case.

And the point was also made the Tribunal in that case, at para.8, that an appeal was inevitable in this case whatever decision Ofcom had made, because somebody was going to be adversely affected and would not like the decision and would appeal. So, that was a further point that the Tribunal took into account. Again, similar to this case.

The next case is *The Number*, and one of the points that the Tribunal will have noted is that the submissions of Mr. Flynn and of Miss Davies today have both proceeded as if our case was based on *The Number*. But, as you will see from the cases I have shown you, *The Number* comes after a number of cases in which the Tribunal had already considered the relevant principles and considered that, in general, where Ofcom was exercising its sectoral regulatory powers in the public interest subject to a merits appeal, that it would not be appropriate for an adverse costs order to be made against Ofcom in the absence of bad faith or unreasonable conduct, and *The Number* comes after those cases have been decided.

So, we then turn to *The Number*, Mr. Justice Warren. This is tab.24 and, at para.4, he makes two distinct points. And this paragraph, with respect, has been mis-read by Mr. Flynn:

> "In the present case, the appellants seek a costs order against Ofcom following the successful outcome of their appeal under section 192 … against a decision of Ofcom in relation to the resolution of disputes. Ofcom are, of course, in a unique position as regulator … when dealing with the resolution of disputes under section185".

That is the 185 point. But then the Tribunal says "In addition", in other words, "this is not limited to disputes".

> "In addition Ofcom have statutory duties to perform and fulfil a role as guardians of the public interest. They are called upon in the exercise of their functions to exercise judgments and to take positions on factual and legal issues. It is therefore strongly arguable that this puts Ofcom in a different position from other parties when it comes to making costs orders, whether against Ofcom or in their favour, in cases where the manner of the exercise of their functions is in issue".

In other words, not limited to disputes but related to the exercise of Ofcom's functions.

> "The Tribunal has taken this factor into account in other cases".

And then he cites *Mobile Number Portability*. And, as we have just seen, *Mobile Number Portability* is not a dispute resolution case. So, with respect to Mr. Flynn and Miss Davies, the submission that the rule that applies to Ofcom, or the practice that applies to Ofcom, is limited to dispute resolution cases is unsustainable on a simple reading of the case law.

Then he goes on to say:

> "It is, we think, important that differently constituted tribunals adopt a consistent and principled approach if the decision is to be exercised judicially, as it must

> be. It would, to put the matter at its lowest, be unsatisfactory if different tribunals placed radically different weight … on Ofcom's unique position as regulator. It seems to us that if any significant weight is to be given to this factor, it must follow the starting point will in effect be that Ofcom should not in an ordinary case be met with an adverse costs order if it has acted reasonably and in good faith".

And they say, of course, there is a residual discretion, and so forth.

> "So far as we are aware, the Tribunal has never awarded costs against Ofcom following an appeal under s.192".

And then, over the page, he says:

> "However, in principle we think that that is the correct approach. Ofcom is a body charged with duties in the public interest … they should not be deterred from acting in the way they consider to be in that interest — provided that they act reasonably and in good faith — by a fear that in doing so they may find themselves liable for cost".

Again, all of those statements are clearly not limited to dispute resolution. So, that is *The Number*.

The next case is the *T Mobile* case from 2009. This is at tab.25, and this is the only case in which this Tribunal has ever awarded costs against Ofcom in a 2003 appeal. It is the only time it has ever been done. And if we look at the reasons for that, first of all, at para.6 the Tribunal makes the point that they found very serious flaws in the judgment. This was a situation where Ofcom — Sir, you may recall this case, it was the notorious incident where Ofcom used a gains from trade test in order to establish a reasonable price, which was a nonsense, simply made no sense at all. So, there was an obvious and transparent flaw on the face of the decision, which is what was said by the CAT in its judgment. So, that was the first point that was made.

The next point that was made was at para.10:

> "We recognise the force of Ofcom's argument that it is required by the 2003 Act to determine disputes".

So this was a dispute resolution case. But then they said:

> "However, none of the factors raised by Ofcom's submissions detracts from our conclusion".

And they say:

> "Each case must be approached on its own particular facts".

And then:

> "Ofcom's arguments that an adverse costs order may have a 'chilling effect' on the exercise of their regulatory obligations are unduly alarmist. The modest order that we have decided to make in these appeals does not risk deterring Ofcom from standing by 'honest, reasonable and apparently sound administrative [decision making]'".

So, the crucial factor is that the CAT was making a modest order which would not have a deterrent effect on Ofcom, and you can see the orders that they made at para.16 —£100,000 to BT and £40,000 and £20,000 to the other appellants, so, a total award of £160,000. That needs to be contrasted with a claim that Ofcom is facing in this case of £8·7 million from Sky and £3½ million from the Premier League.

In fact, when you look at the letters that you have received from both Sky and the Premier League, it is clear that both of those figures are very significant under-estimates of the costs that they will in due course seek to recover from Ofcom because Sky expressly says that its £8·7 million figure does not include disbursements, with the exception of experts. So, one can assume that that figure will be very significantly higher. We do not know by how much, but very significantly higher. And the Premier League's costs only cover the costs of the main appeal.

So, what we are looking at is a total claim from those parties of something in the region of £12½ million from a single appeal — and an appeal which it was inevitable would have been brought by one or other party whatever decision Ofcom made, and even if Ofcom took no decision at all.

Now, in my submission, that is the context in which this Tribunal has to consider the problem of the effect on the public interest and good administration if an order of this type is made, because there will be serious pressure on Ofcom not to make decisions that offend very powerful commercial parties who have deep pockets because of the financial consequences. And we submit that is a very serious factor, and it underlines the consistent practice that this Tribunal has taken in the past. So, that is the *T Mobile* case. It is the only time it has ever been done.

Then, tab.36, *BT v Ofcom*. This is an award of costs in favour of Ofcom. And, without turning to the details, I will refer you to paras.9-12, 19 and 21 where the Tribunal repeatedly stresses the point that it is not considering the question of the circumstances in which it is appropriate to make an adverse order against Ofcom, and they are not necessarily the same as those that apply when considering whether to make an order in Ofcom's favour, which is

obviously correct because, of course, BT are not operating as a regulator in the public interest but are not subject to statutory duties. They have a free choice as to whether or not to bring an appeal.

Then, *EE v Ofcom*, tab.39, another costs order in favour of Ofcom. And that is the context in which you come to the *Eden Brown* decision, that is at tab.55, a decision from 2011, and we submit that by the time you come to what is said in *Eden Brown* at para.4, it is clearly right that there is a very well established practice that the starting point in 2003 Act appeals is not that adverse costs orders be made against Ofcom if the appeal succeeds, though that practice is not limited to dispute resolution.

And so that is the case of the CAT, and in my submission, that case law is consistent with the approach that has been taken in other similar or analogous regulatory contexts, and first of all that is *Baxendale-Walker* at tab.54 relating to the Law Society, and I will not repeat it, but you have para.40 which is where the relevant principle is set out.

But then, in a little more detail, we do need to consider *Perinpanathan*, tab.56, because in this case the Court of Appeal reviewed the practice that was followed by courts and tribunals in a variety of different regulatory contexts. Of course, in the particular context in this case of an application being made to the magistrates for a confiscation order. If you go, first of all, to para.30, you will see that the Court of Appeal cite in detail the *BT Backhaul* decision from 2005. The first case in which the CAT considered in detail the factors which suggested that costs should not be awarded against Ofcom. They set out the whole of the operative part of that decision at great length and at para.31, p.17, they said:

> "As is clear from the judgment, the context of the proceedings before the Competition Appeal Tribunal was very different from the present. What is relevant to the present case is the decision that a public authority carrying out a public duty and acting reasonably was not to be required to pay the costs of its successful opponent in litigation".

And so that is taken by the Court of Appeal as one of the range of decisions that they consider that supports the position that they then adopt. And, if you go to para.40 in this context, the general points that are made there are points that apply to the CAT. This is a jurisdiction in which the CPR do not apply. It is a jurisdiction in which the rules contain no presumption that costs follow the event. It is a first instance tribunal where public authorities acting in the public interest are fulfilling their functions.

If we then go on to the judgment of Lord Neuberger, paras.57-58, he also identifies the significance of being in a jurisdiction where there is no express presumption that costs follow the event as there is in the CPR. He deals with that at paras.57-58. Then, at 59:

> "The fact that section 64 contains no fetter on the magistrates' discretion as to whether, and if so to what extent, to award costs in favour of a successful party does not mean that a court of record cannot lay down guidance, or indeed rules, which should apply, at least in the absence of special circumstances. It is clearly desirable that there are general guidelines, but it is equally important that [they should not be] too rigid. There is a difficult … balance to be struck [between] flexibility … and the circumstances … and certainty, so that parties can know where they are likely to stand in advance".

This is a point that Lord Neuberger then returns to at significant length, because what he then says is you can make arguments either way as to whether or not a particular regulatory authority ought to be at risk of costs if it fails in seeking to uphold a decision. But, where there is consistent practice and consistent case law, that in itself is a reason why that practice should not be departed from, because of the importance of legal certainty and parties knowing where they stand.

So, for example, if you go to para.64 he says:

> "So far as the principles themselves are concerned, they are … consistent with the approach adopted in the high court in a number of previous decisions in the [past] eight years … and they have been applied in subsequent decisions …. Unless satisfied they are wrong in principle or inconsistent with other authority, I think that it would require a particularly good reason to overrule the principles, given that they have, at least in general, been accepted and applied for some 20 years".

And we submit that the principles in this case that we contend for, have been applied consistently in this Tribunal since the passing of the 2003 Act, and it would be wrong in principle to depart from them now.

Finally, at para.73:

> "So far as principle is concerned … *Baxendale-Walker* … has given strong support to the notion that Lord Bingham CJ's three principles should apply where a regulatory body is reasonably carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle that costs follow the event".

So, there is no qualification of the type for which Mr. Flynn contended, and it was only in a case where the regulatory body had to bring a case in front of the Tribunal. The question is, is the regulatory body carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle that costs follow the event.

So, there is no qualification of the type for which Mr. Flynn contended and it was only in a case where the regulatory body had to bring a case in front of the Tribunal. The question is, is the regulatory body carrying out its functions before a Tribunal in which there is no cost presumption and we submit that is clearly the case in relation to Ofcom here. At 74:

> "If we are to hold that Bingham LJ's principles did not apply in a case such as the present, the proper approach to the question of costs in regulatory matters would be fairly seen to be incoherent, or at least inconsistent."

THE PRESIDENT: Was Mr. Flynn's point that that was a case where they had to come to court to fulfil their ----

MISS ROSE: That is right, yes.

THE PRESIDENT: Because they had to prosecute.

MISS ROSE: Yes, that is right.

THE PRESIDENT: They had not taken any administrative decision.

MISS ROSE: That is right. But the point I make is that Lord Neuberger clearly does not limit it by that principle. It clearly has not been limited by the CAT to that principle over the various decisions and, of course, the actual position is that Ofcom is under a statutory duty to apply the appropriate conditions and is subject to a merits' appeal whichever decision it makes and even if it does nothing, so that in fact Ofcom's appearance in front of this Tribunal is simply inevitable in the carrying out of its functions.

That, we say, is the right set of principles, and we say that this is a paradigmatic case in which it would be wrong in principle and unjust for any costs' order to be made against Ofcom. Apart from all the general principles you have considered you already have my point about the sheer size of the costs that are being asked for and the inevitable impact that that has on the public interest and on the efficacy of the regulatory regime. I would go so far as to submit that if an adverse costs order is made against Ofcom in these proceedings it will seriously undermine the effectiveness of regulation under the 2003 Act in the future, or risk having that effect.

The next question is: is there any finding of unreasonable conduct by Ofcom? We submit that there is none in the Decision. The Tribunal disagreed with Ofcom's findings of fact in relation to the history of negotiations after considering a mass of written and oral evidence

and Ofcom took a different view from the Tribunal but there was nothing unreasonable in the way that Ofcom pursued its functions.

Mr. Unger, you will recall, who conducted Ofcom's factual evidence gave oral evidence here and it was never suggested to him in cross-examination that he had acted in bad faith or unreasonably.

THE PRESIDENT: I did not understand it, but I mention it now in case I am wrong, to be suggested by Mr. Flynn or Miss Davies that they were relying on ----

MISS ROSE: Well, it was not perhaps so clear from their written submissions. Equally, it is not suggested that there is any financial hardship either to Sky or the Premier League, both of them, as the Tribunal knows, are extremely powerful, wealthy entities and these sums are not a serious problem to them. Of course, Sky has gained a very significant commercial benefit from the outcome of this appeal – another point that was made by the Tribunal in the BT case.

Then Sky seek to rely on Ofcom's press release issued after this appeal. I do not need to develop it. The only point I do make is that it is revealing, because it shows that Sky is, indeed, seeking to inhibit Ofcom in the future exercise of its regulatory powers.

THE PRESIDENT: It cannot possibly be relevant.

MISS ROSE: It is irrelevant, Sir, yes. It is irrelevant in terms of whether costs should be ordered but it is relevant in terms of the motivation of Sky in seeking ----

THE PRESIDENT: Well, the motivation of Sky is not particularly important either.

MISS ROSE: If, regardless of everything I have just said, there was a question: would it be just in any event to award costs against Ofcom in this appeal, just looking at the general exercise of your discretion under Rule 55, and if I can take Sky's appeal first, we submit that, even if you ignore all the points that I have been making ----

THE PRESIDENT: I promise you we will not ignore them!

MISS ROSE: If you find against me on them, it still would not be right to make an order against Ofcom for costs in this case.

There were essentially four overarching grounds of appeal in this case. The first was jurisdiction, the second was the negotiations, the third was the impact assessment, and the fourth was pricing. Of those four, by far the most complicated, the most onerous and those which incurred the most cost were issues 3 and 4 – impact assessment and pricing. They were the issues to which this Tribunal will recall we had a multiplicity of expert evidence over many days. In relation to impact assessment you will recall the schedule that Ofcom produced identifying all of the issues that Sky had raised under that head, well over 100

different complaints of flaws in the impact assessment. These were massively complicated questions. This Tribunal has not resolved those issues. In those circumstances the costs of those issues should lie where they fall because it simply cannot be said whether Sky was right to raise them or not. Sky says: "We would not have had to raise them if you had not made a flawed decision", but there is an obvious *non sequitur* there, which is that Sky did not have to raise them anyway, it only had to raise ground 2, which was the negotiations' argument, which was sufficient for it to win. The fact that it raised a multiplicity of other grounds, which we incurred huge costs in resisting, is not a reason why it should get its costs of those grounds. There is also, of course, the fact that it lost on the jurisdiction point. I am not going to suggest to the Tribunal that the costs of arguing the jurisdiction point are equivalent to the costs of the negotiation point, but the point I do make is that the costs of the issues that have not been determined, are greater than the costs of the negotiation point and that, overall, the right order is no order as to costs.

In relation to the Premier League, we submit that the position is straightforward. There is no basis on which the Premier League's appeal can be allowed. The task for the Tribunal when deciding whether to allow an appeal appears from s.195(2):

> "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."

So, with respect to Miss Davies, she cannot suggest that her appeal should be allowed when none of the grounds of appeal set out in her notice of appeal have been upheld. One ground has been dismissed, which is the jurisdiction point and the other grounds have not been determined at all.

In those circumstances the right order is that her appeal should be dismissed, and I stress that we do not object to her protective caveat, and in relation to costs there is no conceivable basis why Ofcom should pay the costs of the Premier League in relation to issues that have not been determined by this Tribunal.

The Premier League could have protected its interests by intervening, as the other sports' bodies did, rather than by bringing its own appeal. The effect of its appeal was massively to increase the length and cost of the hearing, as it turned out to no practical benefit because the issues that it raised did not have to be determined. In that situation we could argue that they ought to pay our costs but instead the submission that we make is simply that since those issues have not been resolved that the costs should lie where they fall. It would clearly be unjust to require us to pay them.

Unless I can assist you further, those are our submissions.

THE PRESIDENT: I think you have covered everything.

PROFESSOR BEATH: I just have one point. When you were talking about grounds 2, 3 and 4, and you were talking about Sky's case. Sky presumably had to prepare a case not knowing what would happen so it would be very difficult for them not to have prepared data to bring to this body to give evidence on grounds 3 and 4.

MISS ROSE: There are two points. The first is that they did not have to run a case which took issue with every single finding made by Ofcom in its impact assessment, they could have run a much more tailored, focused and limited appeal, which most people do. Most appeals in this Tribunal do not take the amount of time and resources that this did. The "shock and awe" tactics are not the only possible tactics.

The second point is that we do not suggest that they should not have the right to bring that appeal, of course they have the right to bring that appeal. The question is: should we pay for it in circumstances in which none of those issues have been resolved and in which we were forced to incur enormous expense in responding to them. All I submit is that in those circumstances it is right that each side pay for their own costs of those issues because other than that they were not necessary.

PROFESSOR BEATH: That is fine, it is just the logic of "they had to".

MISS ROSE: Yes, they did not have to, it was a choice.

PROFESSOR BEATH: The Decision they would have in advance would require them to ----

MISS ROSE: They made a choice as to what grounds they wanted to run and, as it turned out, one of the grounds they ran was incorrect, and two of them were unnecessary for determination. The effect of that, we say, is that they do not get their costs.

PROFESSOR BEATH: Thank you.

MISS ROSE: Unless there is anything further?

THE PRESIDENT: No, presumably people want to respond? Mr. Flynn, you are going to go first?

MR. FLYNN: I imagine the Tribunal has not the appetite for a large reply, and I shall not make more remarks along that kind of ----

THE PRESIDENT: We are okay.

MR. FLYNN: I will be short because I am not sure that I have the appetite to repeat anything that I have already said or to go through an exhaustive trawl of the case law. I would point out that Miss Rose gave a broadly chronological account of the Tribunal's costs' rules in relation to cases in which Ofcom were a party. The Tribunal will judge for itself the extent to which the fact that the context of most of those were s.185 appeals had a particular role to

play in the assessment made. In our submission it plainly does in quite a few of them, and it is very striking that it is precisely that sort of case that was seen as broadly analogous or as a relevant type of comparator in the Court of Appeal that attention was drawn to.

In relation to, I think, the one case that was not a s.185 dispute type proceeding was the *Vodafone* case at tab 22. That was an extremely narrow appeal in relation to the cost benefit analysis that Ofcom had carried out and there was no challenge in that case to the principal decision to impose mobile number portability on the industry. That is a narrow appeal.

On the other side, despite all those cases to which your attention has been drawn, of course costs have been awarded against Ofcom even in a s.185 case, which is the *T-Mobile* case at tab 25.

The other thing, I think, when the Tribunal is re-reading these authorities, what was taken perhaps rather lightly is the *BT* case, the costs ruling at tab 36, which is [2011] CAT 35, where, starting at para.4, and I am certainly not going to read all this, but just point out to the Tribunal that there the Tribunal saw it as appropriate in that case to review the historical costs case law, some of the cases that have been drawn to your attention now, emphasising that in the earlier cases, the 2005 and 2007 cases, the jurisdiction was still "relatively young", I think is the phrase, and that is a phrase the Tribunal, itself, used. It is referred to in a case which is cited in para.17, the "young" jurisdiction point at para.18. This is a case where, as Mr. Pickford says, the parties are feeling their way in these earlier cases and the costs treatment develops accordingly.

I think the whole passage is worth a read. The Tribunal is clearly saying that what happens in the early days is not necessarily any guide to the future. At the end of the day, in my submission, it has not been established that there is one rule for Ofcom and a different rule for other institutional defendants, many of which have faced no doubt expensive costs awards as a result of judgments of this Tribunal and judgments not going in favour of the OFT, the Competition Commission, Ofwat in the *Albion* case, which is in the bundle at 26, Regulators and Authorities, those with the choice to take their proceedings or not, like the CC which simply has to deal with the reference that is made to it and do it within a statutory timetable. None of that has prevented the Tribunal from deciding that the just approach in a particular case is that an award of costs should be made against them.

I am not going to repeat it all, but, in our submission, the analogy with those licensing and disciplinary cases simply is not apt. This is not a case where Ofcom had absolutely no choice. Ofcom has statutory duties, doubtless, and no doubt will investigate matters that seem to it of concern and importance. That does not dictate the final form of the decision

that it takes, still less does it require to defend that decision tooth and nail, up hill and down dale, in the proceedings.

It is said that whatever Ofcom would have, someone would have appealed. If Ofcom, having considered the matter, took the view of the facts that the Tribunal has taken – which by the way is not a difference of view with Ofcom but a finding that Ofcom materially misinterpreted the evidence in a number of respects which we have specified – if Ofcom had come to the same view of those factors as the Tribunal has, it would have simply dismissed the complaint brought by BT and others, and any appeal before this Tribunal would have been of an entirely different scale. It is not, that whatever happened they would have been here and there would have been a comprehensive appeal, it would have been a very different case altogether. In our submission, neither on the practice and the rules or the approach of this Tribunal, nor on the merits in terms of Ofcom not having a choice, in neither of those has given a reason why it should not in this case face a costs award against it.

In relation to the detail of that, that is not something I apprehend the Tribunal is going to want to deal with now. We have given a global indication of what our total costs of lawyers and experts would be, and that is as far as that has gone for now. No doubt they are substantial.

No doubt also the irrecoverable costs of the entire industry of the investigation are also substantial, as will be Ofcom's in defending this decision, including the parts on which the Tribunal has ruled, and comprehensively in Sky's favour, in my submission.

Sir, unless I can assist the Tribunal, which I think would involve me repeating things that I have said earlier or you will find in the written submissions, that is our overall approach to the costs issue before you.

THE PRESIDENT: Thank you.

MISS DAVIES: Sir, just very briefly, in relation to authorities, we say that there are actually two separate issues in play here, and in certain respects Miss Rose's submissions confused the two. The first is, is there a presumption, a starting point, that in an appeal under s.192 costs should only be awarded against Ofcom if it has behaved unreasonably.

The second is, is the situation of Ofcom, and the fact that it is a regulator and has statutory duties, a relevant factor in the exercise of the Tribunal's discretion. With respect to Miss Rose, she muddied the two as she took the Tribunal through the authorities. The only case, when the Tribunal comes back to look at the authorities, in which the Tribunal has said there is a presumption, a starting point, is *The Number*.

The other cases, the *Vodafone* case, the *H3G v. Ofcom* case which pre-dated that and on which she put much reliance, the Tribunal was saying it was a relevant factor, and on the facts of that case it was a factor that resulted in no award of costs against Ofcom.

In fact, the *T-Mobile* case at tab 25, which was a dispute resolution case, is a case where the Tribunal decided that an award for costs should be made against Ofcom, although there was no suggestion that it had behaved unreasonably, and one can see that from para.6.

Sir, we would also say that there cannot even be said to be a practice in this Tribunal that costs will only be awarded against Ofcom if it has behaved unreasonably, because the *T-Mobile* case which my learned friend accepts is the case where costs were ordered, that was not the basis on which the decision was taken. On the contrary, it was simply that Ofcom had got it wrong. So the reliance in that respect on Lord Neuberger's comments in the recent Court of Appeal decision that if there is an established practice one should not move away from it do not assist my learned friend, because there is not actually even that practice, let alone the practice in this Tribunal.

Two other very brief points: my learned friend put much weight on the suggestion that it was inevitable that they were going to be here on a merits appeal, and suggested that that distinguished Ofcom from many of the other situations. With respect, I would submit that in many competition cases where a regulator is either ruling on a complaint and finding an infringement under the Competition Act or the Competition Commission is conducting a market investigation, the reality is going to be that you have got competing commercial enterprises pushing for one result or the other, and exactly the considerations that my learned friend pointed to are going to apply in those cases, yet the Tribunal has inconsistent case law to determine that there should not be a general approach of only costs awards if there is unreasonable behaviour.

The final point is that my learned friend put much weight in relation to the *BT v. Ofcom* decision on the fact that parties such as BT are regulated entities and they necessarily have internal departments dealing with regulation, and so on. I would just simply say that that is not a point that can be made in relation to my client in relation to this appeal. We are a directly affected party by the decision. That much was clear. No one ever suggested we did not have *locus*. We are not a regulated entity by Ofcom, and so, with respect, that point does not take my learned friend anywhere, at least in relation to my client.

Unless I can assist further those are my submissions.

THE PRESIDENT: Thank you very much. Miss Rose, the only thing I forgot to mention to you, you did not say anything about *Tesco*. I am not asking you to. It was referred to. I just mention it because ----

MISS ROSE: The only point to make is really in relation to para.30, which is where the CAT in that case distinguished *The Number* and *Vodafone*, *The Number* being the regulatory point. *Vodafone* of course is not a dispute resolution point. What is said is that cases of that kind, involving, as they do, an appeal on the merits against an Ofcom decision involving a dispute between commercial operators can be distinguished from challenges by way of judicial review alleging unlawful or invalid action on the part of the decision maker. So it is simply a reiteration of the fact that Ofcom is a special case, that is all, and that it is differently treated from other regulators.

THE PRESIDENT: Thank you very much. Miss Davies, I should have asked Miss Rose that when she was on her feet before, so if there is anything else you want to say about it, please do, otherwise we will just say thank you to all of you.

MISS DAVIES: No, Sir, the Tribunal's ruling in *Tesco* speaks for itself.

THE PRESIDENT: Thank you. As I indicated earlier, we will deal with BT's permission application very swiftly, probably tomorrow, I should think. I had envisaged originally that we would hand down a single judgment for everything else as soon as possible, but I got the feeling that we ought to deal with the issues on the order first. We might do it sequentially and deal with costs at the very end, but hopefully it will not be too long.

Thank you all for your help, and have some lunch!

_____