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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1156-1159/8/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Wednesday, 6th October 2010

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

VIRGIN MEDIA, INC.
FOOTBALL ASSOCIATION PREMIER LEAGUE
BRITISH SKY BROADCASTING LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

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

Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Mark Hoskins QC and Mr. Gerald Rothschild (instructed by Ashursts LLP) appeared for Virgin Media, Inc.

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

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

Mr. Thomas Plewman, Miss Sarah Ford and Miss Sarah Love (instructed by BT Legal) appeared for British Telecommunications Plc.

Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Respondent.

Mr. Ben Rayment (instructed respectively by the Legal Department, RFL, the Legal Department RFU and Olswangs, Bird & Bird LLP, Onside Law, Denton Wilde Sapte LLP) appeared on behalf of RFL (Governing Body) Limited, Rugby Football Union, The Football Association Limited, PGA European Tour and the Football League Limited.

Miss Marie Demetriou (instructed by DLA Piper UK LLP) appeared for the England & Wales Cricket Board.

Mr. Tim Ward (instructed by SJ Berwin LLP) appeared for Freesat (UK) Limited.

Mr. Daniel Beard (instructed by Milbank, Tweed, Hadley & McCloy LLP) appeared for Top Up TV Europe Limited.

1 THE PRESIDENT: Good afternoon everybody. Thank you very much for coming. I hope we
2 will not be too long, but I did think it was important, in the light of the correspondence that
3 has been floating around from the end of July through to quite recently, that we get together
4 at a reasonably early stage just to have an exchange of thoughts.

5 I know, Mr. Holmes, that Ofcom felt that to give a full picture of its considered thoughts on
6 timetabling required longer, and I appreciate that. That may well be the case, but that does
7 not preclude us from meeting again, but I just feel that, for my own part and I am sure for
8 some of you, it is useful if we see where we have got to at the moment.

9 At the CMC we had at the end of June there were various time estimates given. I think the
10 majority were for four to six weeks, some people thought it could take longer than six
11 weeks but that was getting towards the extreme end, and it may be that even longer was
12 mentioned by somebody as well. About six weeks seemed to be the rough estimate then.
13 Now, in the light of the things that I have seen in the correspondence, more than a few
14 people are talking about a minimum of eight weeks being feasible or even longer, given
15 some of the material and positional evidence that has emerged as a result of the amended
16 notice of appeal and statements of intervention. Of course, as you all know, the current
17 window, quite apart from issues of workability, is about six weeks long. That seemed to me
18 to be the big concern about this.

19 What we have done, and I hope you have got it, is provided a visual aid for our discussions
20 today showing you basically what, in the foreseeable future, are some of the options that we
21 have got for hearings of that kind of duration. I emphasise, this is purely indicative, it is not
22 meant to show unavailability or availability, it is very much a discussion document, it is
23 helping us to inform ourselves. We share it with you on that basis, that there is nothing
24 binding about it. The picture which emerges is that, leaving aside the March window, there
25 are basically two other windows for a hearing of this sort.

26 The other factor, just to mention it before I start taking your own thoughts, is, of course, that
27 the Tribunal has got to accommodate another hearing of approximately, it seems now, this
28 length with, as I understand it, some overlap of solicitors and counsel. It, therefore, seems
29 likely, indeed almost inevitable, that these two hearings could not proceed simultaneously,
30 or indeed overlap. It would also no doubt be humane to people if there were some breathing
31 space between them.

32 That is where we are. You will know perhaps more than I do about the likely length of
33 hearings and where we are going now. Shall we just have a general sounding of comments
34 from people. Who would like to go first? Mr. Holmes?

1 MR. HOLMES: Sir, to begin with the trial window, we received advance notification from the
2 Tribunal's Référendaire of these three windows and we have had an opportunity to consider
3 them in advance of today. Our preference would be for a trial within the second of the three
4 windows proposed, the summer window, or the purple window, on the chart distributed
5 today. The existing window appears to us to be too early having regard to the scale of the
6 case and the work that will need to be done in preparation for the trial. You will have seen,
7 Sir, that there are now, as well as the four separate notices of appeal, a large number of
8 interveners. There are 25 witness statements currently before the Tribunal, including
9 16 expert reports.

10 The current procedural timetable takes us to 21st December without currently making
11 provision for replies. In a case of this nature, for our part we are assuming that replies
12 would be appropriate and would assist the parties in understanding the issues, although
13 obviously it is a matter for the Tribunal, as permission will be required. Even assuming that
14 replies could be prepared for late January, this would still not give enough time for the
15 parties to consider the replies and prepare skeleton arguments by 1st March.

16 Also, Sir, you will have seen from our letter that we anticipate that there may be case
17 management issues arising along the way. We are still considering the mass of material that
18 needs to be addressed by Ofcom in its defence, and we have not yet finalised our position.
19 We appreciate the need to do so promptly, and we will of course alert the Tribunal and the
20 parties as soon as we are able if there are case management issues that we need to deal with.
21 The other parties have recognised in correspondence that there may indeed need to be
22 applications or case management issues dealt with. It, therefore, seems sensible to take that
23 into account in considering the timing of the main trial.

24 Lastly, Sir, if the trial did over-run, there would be the interruption of Easter, which we
25 think would not be ideal in a case of this nature.

26 As regards the third of the windows in time – that is to say the autumn window – for our
27 part we think that this would involve too much delay. It is not appropriate for the market to
28 be kept in uncertainty for too long. Ofcom's decision is currently effectively only for
29 specified retailers, and it would therefore be preferable to have this matter resolved so that
30 everyone knows the position going forward and the full scope of Ofcom's remedy can take
31 effect.

32 Our strong preference is, therefore, for dates in the middle, summer window. We have a
33 specific difficulty, which I should flag now, in relation to the first week of the summer
34 window, the May, June and July window. Our leading counsel is unavailable in the week

1 commencing, taking account of the Bank Holiday, 3rd May, so we would request within that
2 window that the trial should begin, at earliest, on 9th May, the Monday.

3 As regards the time estimate for trial, as presently advised, Ofcom expects that, even given
4 the size of the appeal and taking account of the overlaps between the appeals brought by
5 various other parties, six weeks should still be ample. We have no strong objection, in the
6 interests of prudence, if the Tribunal were to wish to keep two weeks in reserve. We doubt
7 though whether those two weeks would be needed.

8 Finally, as regards the next procedural steps –I have already indicated that we do not have
9 any objection to replies in this case – we do note with some concern that some of the
10 appellants have already indicated in correspondence their view that reply evidence
11 definitely will be necessary. They were indicating that as early as July. It may be that short
12 reply evidence may be required but, in our submission, there is a need for caution here. The
13 case is already a substantial one, and we hope that all parties will appreciate the need to
14 avoid expanding the scope of the appeal at the reply stage, which we say would not be
15 permissible.

16 THE PRESIDENT: Reply evidence is one thing. Sometimes submissions in reply just overlap
17 with skeletons, although evidence obviously is a different matter.

18 MR. HOLMES: Yes, Sir, we did have that in mind, and it did occur to us that in this case the
19 reply and the skeleton could be rolled up, given that otherwise there two sets of submissions
20 immediately following one another and that would not necessarily be conducive to
21 procedural economy. If that we were to be the case, we would submit that an adequate
22 period would be required, perhaps longer than one would normally see between skeleton
23 arguments, to allow Ofcom to digest what might be weightier than a typical skeleton
24 argument, and so a period of one or two weeks, as one sometimes sees, would be unlikely to
25 be sufficient to enable Ofcom to have considered matters adequately to enable it to have
26 prepared its skeleton argument.

27 THE PRESIDENT: Can we just bear this in mind, I have really listed today mainly because of
28 the window. Of course we do need to deal with the remaining steps, that is perfectly true,
29 beyond the 21st December, but I think as far as today is concerned it may be that what I will
30 do – just thinking aloud – is suggest that you all try and agree the remaining steps instead of
31 draft directions at some convenient time. There is obviously no hurry for that, but we all
32 need to know where you are.

33 MR. HOLMES: Sir, I am grateful for that. I should perhaps have mentioned that the provision
34 that is currently made, I believe in the order, for a further CMC in December would appear

1 to us to be a sensible step along the way and I did not mean to pre-empt the business that
2 would be transacted then.

3 THE PRESIDENT: It is conceivable that we should address our minds to the steps before then,
4 try and agree them, or reach agreement as far as you can between yourselves on those steps
5 we know that are going to take place, and you might as well include reply evidence. For my
6 part I would prefer you rolled up reply submissions with the skeleton arguments, but if that
7 is not going to work then obviously I will hear that and decide it. That would be my
8 preference, if it works.

9 Also, just to make it absolutely clear, we will not necessarily have a choice as between these
10 two windows. Other factors, from the Tribunal's point of view as well, may determine
11 which window we use. I do want to deal with what people's preferences and availabilities
12 are.

13 MR. HOLMES: Sir, I am grateful. One of the factors that you mentioned that may influence the
14 timing of this trial and it may be one of the factors to which you adverted as regards these
15 windows is the *Tobacco* litigation. The Tribunal will obviously be much better placed to
16 understand the issues in play in that case than many of the counsel here present today, but it
17 does appear from our understanding of the issues in that case that they are largely of
18 relevance to money ----

19 THE PRESIDENT: Historic.

20 MR. HOLMES: They are largely historic in nature, exactly, whereas of course you will have well
21 in mind that this appeal has very, very serious ramifications going forward.

22 THE PRESIDENT: We do. Thank you very much, Mr. Holmes. Mr. Flynn?

23 MR. FLYNN: Sir, on the listing, could I intervene largely in support of Ofcom. We have a very
24 strong preference for the mauve window. We have explained why we think the March
25 window really is pretty difficult to achieve in any event.

26 THE PRESIDENT: You like May, June, July?

27 MR. FLYNN: We like that as a window, Sir, yes, we do, firstly, for the reasons we have
28 explained, we just think March is going to be too ambitious; and secondly, because of the
29 length. Our estimate has always been at least six to eight weeks. I think we have upped
30 that to eight weeks. We have always said, equally, that it will be only possible to give a
31 more detailed explanation of how long the thing might take once we have seen the whole
32 case, which at the moment will not be until at least Christmas, and probably after that. So
33 exactly how much time will be needed and how it might be structured is obviously for down
34 the road. If it were to be kept for six weeks, and I think Mr. Holmes said he thought you

1 could have a couple of weeks in reserve, we tend to think those weeks will be needed. In
2 terms of the window and the length of the window, I think our position is that we would like
3 the window starting in May, and we think that at least eight weeks will be needed.

4 If you wish, Sir, I can go on to address you a little further on the steps to that, but that is our
5 principal point.

6 I think also, in relation to the *Tobacco* hearing, I echo again what Mr. Holmes has said, that
7 as far as one understands it that is to do with a situation in the past, whereas here we are
8 very much in a situation where a dynamic market is at stake and it is all to do with the
9 future. So to the extent that the Tribunal itself has a choice, I would urge the Tribunal to
10 exercise it in favour of the summer window.

11 As I say, if you would like me to address you on further steps, but perhaps you would prefer
12 to save that for another day. We hear what you say about trying to agree it in any event.

13 Our short view has always been that reply evidence probably will be necessary on the
14 factual level of case but it will only be on 21st December, assuming no slippage, that we get
15 the case against us, as it were, from BT and Virgin, and it may well be that there are
16 elements there as to which we need evidence.

17 THE PRESIDENT: Probably when we get a window sorted out then that will be the time for the
18 parties to get together to try to see what they can agree themselves.

19 MR. FLYNN: Precisely, Sir, but I would just flag those points. That, I think, is our position.

20 THE PRESIDENT: Thank you. Miss Davies?

21 MISS DAVIES: Sir, likewise we have a very strong preference for the second window.

22 Essentially, in relation to the first window our position is the same as both Ofcom and Sky,
23 we think it is impracticable for the reasons we have explained in correspondence.

24 Our difficulty with the third window is a different one and, if I may, I just need to explain it
25 a little bit. That creates from my client's perspective a very real commercial problem which
26 arises from the next round of auctions.

27 THE PRESIDENT: They are some time in 2012, are they not?

28 MISS DAVIES: Exactly, the next round of auctions will have to take place by the first quarter of
29 2012.

30 THE PRESIDENT: By the first quarter?

31 MISS DAVIES: Yes. The reason for that is that the contracts for the audiovisual rights in issue
32 have to be fully signed for the UK by July 2012. My client's member clubs need to know
33 from a financial planning and banking arrangement perspective all the arrangements for
34 those contracts, in particular the fund flows, for a three year period hence starting any

1 season, and therefore it is absolutely imperative that those contracts are fully signed and let
2 by July 2012. That means that the latest the auction process can take place is the first
3 quarter of 2012. As soon as we move into the third trial window, the green trial window,
4 we are obviously in a position where we are unlikely to get a decision from this Tribunal
5 until the first quarter of 2012, exactly the same period.

6 Could I just remind you, Sir, if you have had a chance to read it before, of a few paragraphs
7 in Mr. Scudamore's witness statement explaining the very real problems from my client's
8 perspective of the uncertainty associated with the Wholesale Must-Offer in relation to the
9 next auction round, and just the next auction round, and the long term impact that might
10 have. Perhaps I could hand this up, it is only three paragraphs. (Same handed)

11 THE PRESIDENT: Thank you.

12 MISS DAVIES: We have just given you the relevant extract from the whole feast, as it were. It
13 is paragraphs 206 to 208 where Mr. Scudamore, who is the chief executive of the Premier
14 League, is addressing the impact of the WMO on the next auction process, the 2013 to 2015
15 seasons, and in paragraph 206 he says, firstly:

16 "... the WMO would entirely remove any incentives that Virgin Media and BT
17 may have had to bid and would fundamentally change the dynamic of the next
18 auction process such that an important element of uncertainty would be entirely
19 removed."

20 Then in 207:

21 "In my view this would on its own be enough to damage the value of the
22 Broadcasting Rights."

23 Then he refers also to the even more significant reduction in Sky's bidding incentives, and
24 goes on in para.207 to say that this will:

25 "... trigger a virtuous circle in reverse which will lead to reduced investment in the
26 quality of playing talent, stadia and other facilities which will in turn result in all
27 potential bidders having further reduced incentives to bid in subsequent auctions."

28 He then makes the point that in his view none of that had been properly considered by
29 Ofcom, and in para.208 he says:

30 "I want to emphasise particularly the fact that, if there is any significant reduction
31 in the value of the Premier League's Broadcasting Rights in the next bidding
32 process, then for the reasons that I have explained the adverse consequences will
33 be long term and will extend potentially far beyond the next three year term of
34 Premier League Broadcasting Rights."

1 THE PRESIDENT: Yes, and the timing of that bidding process has not been scheduled yet?
2 MISS DAVIES: No. Obviously my clients have some control over it. The absolute end-stop, as
3 I have explained, is July 2012 for signed contracts. Obviously there is a process between
4 bidding and negotiation of the detail of the contracts which, historically, has taken about
5 three months, which is why our view is that the auction process consistently with that will
6 have to be conducted in the first quarter of 2012 at the latest. It is fair to say that,
7 historically, sometimes it has been done a little bit sooner than that. The commercial
8 window for the auction process actually starts in October, potentially, through to the end of
9 March, but the end of March is the latest that it can be done.
10 It impacts on the member clubs because, as I have explained, their financial arrangements,
11 their banking arrangements, are all dependent on a three year cash flow forecast. That takes
12 into account what money is going to be available – for example, by way of parachute
13 payments if people are being relegated, and so on. They, therefore, have to know by that
14 July date, planning for the next three years, where they are.
15 THE PRESIDENT: In an ideal world you need to have the auction by the end of March?
16 MISS DAVIES: Yes, and conducting the auction against the uncertainty of no decision from this
17 Tribunal brings with it potentially the adverse consequences that Mr. Scudamore explains in
18 his witness statement, which are not just in relation to that auction process, but potentially
19 into auction processes going forward, if there is a reduction in rights.
20 Of course, all of that assumes that we are right in the submissions that we make, but what
21 we would submit is that it would be unfortunate if, by purely timetabling, effectively my
22 clients were deprived of the value of their appeal, or at least part of it, in the sense that if we
23 are right that will be the impact and there will ----
24 THE PRESIDENT: Of course, if you are wrong, you might be better off in the uncertainty, might
25 you not!
26 MISS DAVIES: In approaching the timetable we would respectfully urge the Tribunal not to seek
27 to deprive potentially of the outcome of our appeal. Therefore, we have a very strong
28 adverse effect, if I can put it that way, and we really urge the Tribunal, in so far as it is
29 possible, not to go for the third window. We also say it is not necessary to go for the third
30 window. Yes, the first window is too soon, but the second window is perfectly achievable.
31 This case can be ready by then. So delaying to the third window is simply delaying for ----
32 THE PRESIDENT: You do not care when in the second window?
33 MISS DAVIES: No, we are happy with the second window in its entirety. We would not have a
34 problem obviously with accommodating Miss Rose's position. I should say, Sir, that, in

1 fact, there is likely to be a large amount of Tribunal reading that needs to be accommodated
2 and to be taken account of by the Tribunal. It is difficult to say exactly how long yet
3 because we have not got all the material, but it certainly looks as if it is going to be in
4 excess of a week.

5 In terms of a time estimate our position, like Sky's, has always been that it is at least six to
6 eight weeks. Nothing we have seen since we last made that clear has reduced our time
7 estimate.

8 THE PRESIDENT: Was it not your client that said it is now eight weeks plus? Someone has said
9 it is eight weeks. I know these are estimates.

10 MISS DAVIES: They are provisional estimates, because we have not seen all the material. One
11 only has to look at the very large volume that has been served in support of the appeals to
12 see that – I do not want to take issue with Mr. Holmes, but we calculate there are 33 witness
13 statements, of which 11 are expert reports.

14 THE PRESIDENT: It was actually Sky I was thinking of, not you.

15 MISS DAVIES: We have consistently said at least six to eight weeks, we would be happy with
16 eight weeks, and the second trial window accommodates that.

17 THE PRESIDENT: Thank you very much. Mr. Hoskins?

18 MR. HOSKINS: Unlike in the hearing, we agree with Ofcom that the six week estimate is an art,
19 not a science. I am so infamous for getting time estimates wrong, perhaps I could give
20 some reasons as to why we think six weeks looks realistic. The reason why I want to spend
21 some time on this, is it also impacts on when the trial should begin. Given the nature of the
22 hearing now it will depend on how much time is needed to prepare for the hearing. That is
23 why I want to spend a little bit of time on this.

24 First of all, when one spends the time with a cold towel round their head going through the
25 various notices of appeal, it quickly becomes clear that many of the points raised are
26 actually effectively judicial review points. Obviously this an appeal on the merits, but the
27 truth is that the way most of the points are put is that Ofcom has failed to consider X. What
28 one then gets is substantial factual and expert evidence relating to that issue. The truth is
29 that if the Tribunal finds that Ofcom has failed to consider X, you do not have to go on and
30 determine the facts and expert issues. The sensible thing to do would be for the Tribunal to
31 say, "Ofcom has failed to consider X, we remit it to Ofcom to consider X", because Ofcom
32 is far better placed then to carry out that sort of evaluation than the Tribunal would be, even
33 in the context of this sort of hearing. You could say it is almost 70 per cent of the points
34 that seem to be those sort of judicial review points.

1 I think it is very important – people talk about the number of witness statements and the
2 number of expert reports – to take a step back and look at what the issues actually are in this
3 case.

4 The second point: again, it is blindingly evident when one reads through the notices of
5 appeal, there is a large amount of repetition between Sky’s appeal and the Premier League’s
6 appeal. It is not a criticism, it is a fact. The same applies as between Virgin’s appeal and
7 BT’s appeal. Again, there is a large volume, but actually I think when we distil it down it
8 will become far less daunting than it otherwise looks. As one would expect, once one
9 recognises that there is that degree of repetition, the parties need to liaise so that they are not
10 making the same submissions and not expecting to turn up and each be cross-examined to
11 the death ----

12 THE PRESIDENT: That is a big question, is it not, Mr. Hoskins, because what really takes up
13 the time is the witnesses. Submissions are often condensed into writing and can be dealt
14 with relatively briefly, it is the witnesses that take up the time.

15 MR. HOSKINS: That is why I made the first point, which is that, although we will need some
16 cross-examination because there are some factual and expert witnesses, actually the bulk of
17 the case is judicial review. It is not a case of 30 witnesses and umpteen experts and they all
18 have to be cross-examined on everything, far from it. I think the truth is that if people are
19 sensible, and everyone in this room is capable of being sensible, cross-examination can
20 actually be relatively limited, and it certainly should not be on every matter.

21 The third point, and again one sees people losing sight of this, is that Ofcom is a defendant
22 in each of these appeals. Of course, it is human nature, there is a great temptation of the
23 principal interveners – Virgin, BT, Sky and Premier League – to want to do Ofcom’s job for
24 it. That is not what they should be doing, because it is for Ofcom to defend its decision.
25 What the main interveners are doing – if I can use that word to describe the appellants – are
26 playing a supporting and subordinate role. That again will impact very heavily on the
27 nature of cross-examination. It should not be the case that if Ofcom has cross-examined
28 then all the main appellants then pile in and have a completely free hand. They are
29 interveners. Yes, it is an appeal on the merits, but it is an appeal against Ofcom’s decision,
30 and Ofcom is the defendant. When one is looking at the timing, effectively the length of the
31 hearing, and the time needed to prepare the hearing, I think that is a very important
32 consideration.

33 The fourth point is that the three points I have already made about the true nature of this
34 case and what would be involved to resolve it of course apply with even greater force to the

1 subsidiary interveners, Top Up TV and the sports bodies as they are represented. Top Up
2 TV's statement of intervention, as one would expect, is subordinate to the appeals of Virgin
3 and BT. Its interests, although they are commercial, are different interests. Its interests are
4 effectively protected by Virgin and BT, but the same applies to the other sports bodies.

5 THE PRESIDENT: So you think six weeks will do it? That is what this is going to.

6 MR. HOSKINS: It is, but it is also going, Sir, to the point about how long do we need to prepare
7 for this case to start. Of course, if one is talking about cross-examination, etc, and
8 everybody is doing it, then obviously it will take time. There have been lots of
9 generalisations in which people say there are 33 witnesses, we need X time, but the truth is,
10 when one looks at it, if it is a six week hearing of the sort that I have described then this can
11 start sooner.

12 I will come on to how the window should work, but there are at least two main reasons why
13 this needs to come on as soon as possible. The first one is that, as we know, the
14 investigation began in 2007, and as Ofcom have indicated it is of vital importance – and we
15 heard from the Premier League today – for all the parties, whatever their interests, that there
16 should be legal certainty as soon as possible because then people can get on with their
17 business. That is an obvious point.

18 The second point is that interim relief has been ordered in this case. Again, Ofcom made
19 the point. It is perfectly well recognised, it is common sense, that because of the imperfect
20 nature of interim relief, when interim relief is granted the court, the Tribunal, and the parties
21 are under an obligation to bring the matter on to trial as soon as possible. It is not a good
22 idea to let the matter hang for any longer period than is absolutely necessary.

23 That brings us to the trial windows. At the moment we are presented with three options –
24 yellow, mauve and green – as if it is a selection between them. Of course it is not, because
25 there is no reason why we cannot start at some time in March. Rather than simply wasting
26 eight weeks, or whatever it is, and saying, “Well, we cannot begin on 1st March, so we will
27 start on 9th May”, there is no reason why we cannot start and do three or four weeks in
28 March and April. What that means is that you have then got a two week gap. That is
29 actually an advantage for two reasons: one, I will be perfectly candid as everyone is aware
30 of it, it is the Easter holiday; two, what it means is that we have had three or four weeks of
31 witness evidence, people can go away and they can write their closing submissions. That
32 means that the whole trial process will actually be more efficient. That is another reason
33 why it will only take six weeks if we do it this way.

1 THE PRESIDENT: What about those people who have got to write their closing submissions,
2 they are not going to have much of an Easter holiday, are they?

3 MR. HOSKINS: Sir, with respect, it is a two week gap. Public holidays are Good Friday and
4 Easter Monday. We are all zealous of our holidays. You have teased me in the past about
5 making submissions to try and protect my holidays. That is the nature of it.
6 The choice is, if it is a binary choice between 9th May and 1st March, it is not a binary
7 choice, that is my point. There is absolutely no reason why we cannot get on and do three
8 or four weeks in March. That is our strong preference.

9 THE PRESIDENT: Thank you very much.

10 MR. PLEWMAN: Sir, we certainly endorse what is now a so far agreed collective view which is
11 that the green window is too far away. The need for commercial certainty is just too great
12 to wait that long. Sir, I do not intend to say anything more about that.

13 One then comes all the way back to March, to the first window, the one that has presently
14 been allocated. There is something of an assumption that it cannot be ready, it has not
15 really been articulated why.

16 THE PRESIDENT: There has been quite a bit of correspondence about it.

17 MR. PLEWMAN: Yes, certainly in the correspondence, and two main points were made. One
18 point was a point as to counsel's availability. If we start down the road of ----

19 THE PRESIDENT: I thought the main point was the shortness of time and the various things that
20 had to be done in that time.

21 MR. PLEWMAN: Just to get counsel's availability out of the way, if we start down that road we
22 are going to run into a great deal of difficulty. Everybody has spotted problems thereafter.
23 BT's attitude certainly is we would rather get the case ----

24 THE PRESIDENT: I do not remember counsel on availability as being a tremendous difficulty.

25 MR. PLEWMAN: Certainly Miss Davies' position was articulated with the Premier League to
26 say that she has a problem in March. I think that is still the position.

27 MISS DAVIES: I am sorry to interrupt. The letter does refer in the very last paragraph to my
28 availability, but there are a lot of other substantive points raised first.

29 THE PRESIDENT: I think the main point really and the one that ----

30 MR. PLEWMAN: I only want to get counsel's availability out of the way. Therefore, the real
31 question is, why can it not be ready? There is then an argument as to the time that is going
32 to be required in order to do replying evidence. It is suggested by Sky in particular that
33 some six weeks would be required for that. It only took two months to put the whole appeal
34 together. That would be a substantial time to require to put the replying evidence in.

1 THE PRESIDENT: Bear in mind you are only going to get the defence at the end of November,
2 and then we have got Christmas.

3 MR. PLEWMAN: Ultimately it is a matter of the parties' willingness to bend the envelope. No
4 doubt the 1st March would place extreme pressure on all of the people parading before you,
5 but that is not in itself a good reason not to get on with it. We would suggest that March
6 should not be so likely discarded. Certainly if it cannot be March we would very strongly
7 want it to be May.

8 THE PRESIDENT: You would like March, even if it were in two bits, would you?

9 MR. PLEWMAN: I am going to come back to the two bits, but the answer to the question is yes.
10 As to the time estimate which really bears on that, I would like to be comfortable that it
11 could finish in six weeks, but certainly we are not confident of that, and we certainly could
12 not say to you that we confidently believe it can be done. What it would require, Sir, is a
13 very rigorous approach to limitation of irrelevant evidence and of cross-examination, and
14 that would obviously have to be run from the very beginning so that you do not run into a
15 problem at the end. We think it may be unrealistic.
16 We think that the best thing to do would be to allow for a longer period and then for all the
17 parties to do their best to get it done as fast as possible. Having that in mind, we do endorse
18 Virgin's suggestion that we could use at least some of March and we could then run on in
19 May, and that would be the most efficient way to get it done. We do think that the pause in
20 the middle generally is productive, not only for the reasons already given but also because it
21 allows the parties, as it were, to take a step back and re-focus and that generally accelerates
22 the process.
23 We would support, therefore, March with a run-over into May, and we would like eight
24 weeks. We think six weeks is probably ambitious.

25 THE PRESIDENT: Eight weeks you would like?

26 MR. PLEWMAN: Yes.

27 THE PRESIDENT: In terms of what has been called mauve (I am colour blind, the one in the
28 middle) you have no particular unavailability problems that you want to draw to the
29 Tribunal's attention?

30 MR. PLEWMAN: We do run into problems certainly with some members of our team in June,
31 but we think that, consistent with our general position, the right answer to you is that
32 counsel's availability cannot drive this process.

33 THE PRESIDENT: Thank you very much.

1 MR. WARD: Sir, very briefly on behalf of Freesat, as Mr. Holmes has pointed out, Ofcom's
2 decision is currently only effective for specified retailers. Freesat is not one of those
3 retailers under the terms of the interim relief. We are keen that the matter be heard as soon
4 as possible.

5 THE PRESIDENT: Yes, as soon as possible. Perhaps it is not fair to ask you, but do you want to
6 say anything about length?

7 MR. WARD: No, Sir.

8 THE PRESIDENT: Thank you. Yes?

9 MR. RAYMENT: Sir, may it please you; I appear on behalf of the five jointly represented
10 sporting bodies. Our position is that we strongly support the position taken by Sky and by
11 the Football Association Premier League. We favour the second window that the Tribunal
12 has identified. We think that that strikes the right balance between the right time for
13 preparation and deployment of people's cases, whilst at the same time resolving this as soon
14 as is practicable. I think somebody once said, "If I had more time I could be shorter". We
15 think that possibly does apply in the process of preparation in this case, of which there is a
16 lot to be done.

17 THE PRESIDENT: Thank you very much. Miss Demetriou?

18 MISS DEMETRIOU: Sir, for the English Cricket Board, we also support the second window
19 and, for similar reasons to those given by Miss Davies, we would be adverse to the third
20 window in terms of commercial certainty for my client.

21 THE PRESIDENT: Thank you very much.

22 MR. BEARD: Sir, I appear on behalf of Top Up. Top Up makes no submissions in relation to
23 the length of the overall hearing, or indeed whether it should be the yellow, green or purple
24 patch for the Tribunal in which to hear this.

25 Two matters do arise upon which it would be sensible to put down markers. The first is a
26 concern about the characterisation perhaps by Mr. Hoskins of Top Up being a subsidiary
27 intervener in this matter. It has not lodged a separate appeal, but by its involvement to date
28 and the manner in which it has conducted itself, one would hope that it is clear that Top Up
29 is in a different position, for instance, from the various sporting bodies who have
30 intervened. They are indirectly concerned in these proceedings on the basis that they will
31 get less money. We are directly concerned, we compete in the pay TV market, which is the
32 very subject of the Pay TV statement in respect of appeals.

33 The second matter on which it may be sensible to place a marker is simply this: the
34 principal reason for Top Up being here today was a concern that has been highlighted at the

1 conclusion of its statement of interventions in the BT and Virgin cases, and in anticipation
2 of what it will say in its statement vis-à-vis Sky, that it will want to make some limited oral
3 submissions at the hearing of these appeals. It does not anticipate that those will be long
4 submissions. It does not anticipate that that should affect in any way the broad parameters
5 of timing that are being considered at present. But it is in a different position, it can give a
6 different perspective, as it did in relation to interim relief. It will of course not duplicate
7 any submissions given by Virgin, BT and Ofcom, whose positions are respectively
8 supported in the different appeals, but it is perhaps worth noting, for example, that in the
9 case of the evidence given by Sky, Mr. Darcy, there is particular evidence given about the
10 position of Top Up in negotiations, and there it is difficult to see how cross-examination by
11 one of the other parties is actually going to deal with that evidence in so far as it is relevant.
12 It is merely a marker to put down now. It is a matter that may be ventilated further in
13 December.

14 Unless I can assist you further, Sir, those are my submissions.

15 THE PRESIDENT: No, thank you, Mr. Beard, you have put down your markers on that. Is there
16 anyone else who wants to say anything?

17 MR. HOLMES: Sir, I do not know whether it would assist to hear us on the proposal for a
18 hearing across two separate windows?

19 THE PRESIDENT: Yes, by all means, anything related to windows.

20 MR. HOLMES: We have three concerns, Sir, in relation to that proposal, which I think I should
21 draw the Tribunal's attention to. The first is that it does not attend to the possibility that
22 there will be case management issues that need to be dealt with in December or January.
23 Mr. Plewman averted to the fact that for the trial to be dealt with effectively, that would
24 require a rigorous approach to irrelevant evidence and cross-examination. Sir, we suspect
25 that that will, itself, require some careful consideration of case management before the main
26 hearing, and there may indeed be applications to consider in connection with that. We think
27 that it would be heroic to accommodate those, even with a later start date than the beginning
28 of March.

29 The second point concerns the length of the gap that would occur if we were pushed back
30 because of Easter. I have drawn attention to the availability of our leading counsel,
31 Miss Rose, in the week of 3rd May. If account were taken of that, that would entail a three
32 week break in the proceedings. For our part, we are not sure that it would be such a
33 desirable thing for everyone to hear the evidence and then to go away and write closing
34 submissions. If anything, it might prolong matters in terms of the closing submissions that

1 were then drafted. Also it would mean that the evidence was not at the front of everyone's
2 mind. It would be preferable to have a single trial within a continuous window, in our
3 submission.

4 The third point to draw the Tribunal's attention to is that Sky has announced its intention to
5 appeal a further decision of Ofcom's of 11th August 2010 in relation to the application of the
6 WMO obligation to Top Up Television. We anticipate that that will not have a significant
7 effect, but it may have some effect on the timing of the trial, assuming that that is to be
8 heard together with the existing appeals which are already on foot.

9 THE PRESIDENT: Assuming an appeal on that matter is commenced, it sounds as though it
10 lends itself, taken superficially, to be rolled into the existing appeals.

11 MR. HOLMES: Yes, Sir, I think it would have to be. For my part, I think it would have to be
12 heard together with the existing appeals.

13 THE PRESIDENT: Does that go to the window or to the length of hearing or both?

14 MR. HOLMES: Sir, it may have some implications to the length of the window, although
15 I would endorse the comments that Mr. Hoskins has made regarding the window. We do
16 think that six weeks is ample provided that the parties show restraint in cross-examination
17 in particular. We think, even taking account of that, it should be possible to bring the case
18 home within six weeks.

19 As regards timing, there will obviously need to be provision made for a series of additional
20 pleadings in advance of the trial in relation to the appeal. We do not yet know how extensive the
21 appeal will be, or how much evidence will be involved. I think the two month period for
22 lodging an appeal lapses in a few days time. Nonetheless, it may have implications for the
23 start of the hearing if a procedural timetable for the new appeal is to be laid down in a way
24 which does not over-burden the parties who already have a significant amount of work
25 dealing with the material already on the table.

26 Thank you, Sir.

27 THE PRESIDENT: Thank you very much. Mr. Flynn, do you want to say anything?

28 MR. FLYNN: Just a couple of points, Sir. Firstly, again I really support most of what
29 Mr. Holmes has just said. We are certainly not in favour of splitting this for the sake of
30 starting three weeks later, which we do not think would be achievable anyway. We are
31 certainly not in favour of that.

32 We do not think it is for Mr. Hoskins to characterise the nature of our appeal, which is a
33 merits appeal where we will be seeking rulings on certain matters which go beyond the
34 scope of a judicial review. It will be necessary to determine quite a lot of facts about the

1 negotiations. It will be necessary, for example, to come to a view on whether or not Sky
2 has incentives to withhold supply. There are various matters on which a ruling is going to
3 be necessary, not simply, “Did Ofcom consider X or Y?”

4 As to cross-examination, we fully accept, of course, that everyone has to show discipline in
5 Tribunal cases. As Mr. Holmes has said, that will take some planning. It is not going to be
6 possible to be planning that if at the same time we are writing replies or drawing up reply
7 evidence or drawing up a skeleton argument, whatever it might be, especially if there are
8 also, as we go along, procedural applications by Ofcom or others to do with case
9 management issues. There will be a lot to deal with in the time. So we do not think that
10 anything Mr. Hoskins says should persuade that there is any more merit in the yellow
11 window than when others were making submissions before him.

12 Perhaps I could just say a very quick word on the potential appeal in relation to the Ofcom
13 determination in respect of Top Up TV. Subject to final instructions, it is expected that Sky
14 will lodge an appeal in the coming days. It is not a substantial appeal. It is certainly
15 nothing in the scope of this. It is appropriate to hear it in the course of the present appeal,
16 because it is a working out of the WMO obligation as varied by your order, Sir. It will not
17 take a huge amount of time, but nevertheless it will have to be dealt with, and there will
18 have to be some pleading and no doubt evidence and quite possibly interventions by
19 Mr. Beard of a non-subsidiary character. That will have to be catered for as well. It will
20 make sense, as you will see, for this to be dealt with in the course of the hearing.

21 THE PRESIDENT: It is going to add possibly two or three days to the hearing?

22 MR. FLYNN: Maximum, I would say. Again, it is an art, not a science, but I would have thought
23 that is the upper bound.

24 THE PRESIDENT: Yes, that is very helpful. Thank you. Miss Davies?

25 MISS DAVIES: Sir, just very briefly, we endorse Mr. Holmes’ and Mr. Flynn’s submissions in
26 relation to splitting. Could I just make one point in relation to that. What seemed to be
27 underlying much of Mr. Hoskins’ and Mr. Plewman’s submissions in relation to starting
28 some time in March was that there really would not be very much to be done because there
29 really should not be that much evidence, and so on, to come in by way of reply. I have just
30 one point to add to the points that have been made in the letters in relation to that, which is
31 this: as, Sir, you may have seen, a large part certainly of Sky’s case and my case is based
32 on expert evidence. The experts of course are independent and owe a duty to the Tribunal
33 and will necessarily have to consider with some care the material that comes from Ofcom
34 and the interveners to see whether that makes any difference to any of the conclusions they

1 have expressed in their reports. It is obviously important that they be given sufficient time
2 to do that. That is why we do submit that there is, in all likelihood, going to be reply
3 evidence as well as reply submissions, and starting some time in March simply is
4 impracticable.

5 THE PRESIDENT: Mr. Hoskins, do you want to say something else?

6 MR. HOSKINS: I will be very short. I would just correct something Mr. Flynn said. He said my
7 suggestion saves three weeks. Of course, that is not correct, because if, in fact, we start on,
8 say, 21st March, when you compare that to a start date of 9th May we are saving eight
9 weeks. So we are talking about a judgment two months earlier, not three weeks earlier.
10 This matters.

11 THE PRESIDENT: Thank you. I feel like an auctioneer looking round to see whether there is a
12 higher bid, but there does not seem to be anybody else. Thank you all. I do not think we
13 could have done this very easily in correspondence. It has been extremely helpful to have
14 all your up to date thoughts. I take on board that you might have other things to say in due
15 course, but we will deal with that as and when it arises.

16 What I envisage is that we will feed this into other problems and other cases. If there is to
17 be, as it were, a revised window we will be writing to you as soon as we can get that sorted
18 out. I imagine that in the same letter we will invite you, within a certain period of time
19 from whenever we can sort this out and write to you, to, in the first instance, agree if you
20 can some further directions in draft form that the Tribunal can look at.

21 Unless there is anything else that occurs to anyone that it is convenient to raise now I will
22 say thank you all very much, it is very nice to see you.

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