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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House
Bloomsbury Place
London WC1A 2EB

25 June 2010

Before:

THE HONOURABLE MR JUSTICE BARLING (President)

Sitting as a Tribunal in England and Wales

B E T W E E N:

VIRGIN MEDIA, INC.

THE FOOTBALL ASSOCIATION PREMIER LEAGUE

BRITISH SKY BROADCASTING LIMITED

BRITISH TELECOMMUNICATIONS PLC

Appellants/ Proposed Interveners

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

RFL (GOVERNING BODY) LIMITED

TOP UP TV EUROPE LIMITED

THE FOOTBALL ASSOCIATION LIMITED

FREESAT (UK) LIMITED

RUGBY FOOTBALL UNION

THE FOOTBALL LEAGUE LIMITED

PGA EUROPEAN TOUR

ENGLAND AND WALES CRICKET BOARD

DAVID IAN HENRY (REAL DIGITAL)

Proposed Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

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

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

Mr. David Anderson QC and Miss Sarah Ford and Miss Sarah Love (instructed by BT Legal) appeared for British Telecommunications Plc.

Miss Dinah Rose QC and Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Office of Communications.

Mr. Paul Harris and Miss Fiona Banks (instructed by the Legal Department, RFL, the Legal Department RFU, Bird & Bird LLP, Onside Law, Denton Wilde Sapte LLP) appeared respectively 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. Timothy Ward (instructed by SJ Berwin LLP) appeared for Freesat (UK) Limited.

Mr. Julian Strait (of Milbank, Tweed, Hadley & McCloy LLP) appeared for Top Up TV Europe Limited.

Mr. David Henry appeared in person.

1 THE PRESIDENT: Good morning everyone. Thank you very much for coming, and thank you
2 for all the written material that you have been sending. It appears that quite a few of the
3 issues that we have to deal with are reaching a conclusion. First of all, perhaps I could just
4 get one thing out of the way, which is that no one suggests, as far as I can see, that for the
5 purposes of Rule 18 of our Rules any of the appeals should be treated as other than
6 proceedings in England and Wales. I see heads nodding.

7 I also think it is pretty clear that everyone feels that the four appeals that we are concerned
8 with should be heard together. No one suggests there should be any form of consolidation,
9 or anything of that kind, but you are envisaging one composite hearing. I think that is not
10 controversial.

11 When we come to matters which may not be entirely a matter of consensus, which I think
12 relates mainly to intervention questions, and in particular there is an objection by Virgin to
13 the non-appellants sports proposed interveners – I am using that a composite term for all the
14 various governing bodies of rugby, football, rugby union, cricket and golf, I may have
15 missed something out, but there are quite a lot of them – mainly represented by Mr. Harris
16 and Mr. Banks, and the odd person out is Miss Demetriou representing cricket. That is one
17 issue.

18 Then is Mr. Henry present? Yes. There is an objection to your application to intervene
19 which we will also have to deal with because that objection is raised by a number of
20 appellants.

21 In addition there is the confidentiality ring question and the position of BT's in-house
22 lawyers. I have seen quite a lot of development on that. I do not know whether it has
23 reached the end state or not. Mr. Anderson is shaking his head, but whether that shake of
24 the head means it is unlikely to or it is still developing, I do not know.

25 MISS DAVIES: Sir, there is one point of principle on which we will require a ruling in relation
26 to the confidentiality.

27 THE PRESIDENT: I think the sensible thing to deal with is who is going to be a party.

28 Mr. Flynn, just picking on you for convenience, have I identified so far as the interveners
29 are concerned what seem to be the two issues?

30 MR. FLYNN: As I understand it, Sir, I hesitate to speak for everyone in this room, as far as we
31 are concerned the issue of interventions is Mr. Henry. The sports bodies we are not
32 concerned with. As far as I know, those are the issues with interventions.

1 THE PRESIDENT: Are there any other issues apart from the confidentiality and the intervention
2 issues at all? I know there is a debate about dates and there will be various points. I have
3 not actually identified any serious points of principle other than those two.

4 MR. FLYNN: I think, if I may say so, the issues of disagreement you have identified, but
5 obviously we will have a discussion about timetable when those are out of the way, which is
6 not to say everything is agreed on timetable, but I think there is probably a measure of
7 consensus.

8 THE PRESIDENT: Mr. Hoskins, you represent Virgin, who object to the sports bodies as
9 interveners?

10 MR. HOSKINS: Sir, it does smack a bit of “mob rule”, I have to say, seeing umpteen sports
11 bodies coming in. As I understand it, Mr. Harris’s “mob” will be in the Sky and FAPL
12 appeals, because they are happy to have them there, not surprisingly. The interests that they
13 have in our appeal seems to be far more indirect. I must admit, our interest and concern was
14 peaked by the way in which there is a formula used in each of the individual applications to
15 intervene. It is stated that for each of the bodies they do not intend to support either Virgin
16 Media or Ofcom, which is slightly odd in an appeal by Virgin against Ofcom, but rather it is
17 likely that, for example, RFL will support interventions by other sports governing bodies.
18 I must admit, I am not sure whether Mr. Harris’s “mob” are just, excuse the mixed
19 metaphor, “chasing their tail”, as he is supporting each of the other interventions.
20 I must admit, I would quite like to know what he thinks he is going to do in our appeal,
21 because as far as we see it, if they want to put in evidence saying, “WMO is bad for us
22 because it will impact on the value of our sports rights”, fine, but they can do that in the Sky
23 and the FAPL appeals where that arises. I am just not sure what they are going to do in our
24 appeal.

25 THE PRESIDENT: I think they are also worried about channels 3 and 4, because you want to
26 push the thing a bit further than the current conditions and include channels which some of
27 Mr. Harris’s and, I cannot remember, possibly Miss Demetriou’s clients are more directly
28 concerned with. That would give them an interest, would it not, in your appeal?

29 MR. HOSKINS: Sir, do they have an interest? Yes. Given the multitude of issues, yes, they
30 have an interest. Is the degree of interest the same in all the issues? No. Would it be
31 helpful to have a degree of pragmatism in trying to organise the “mob”, because this is
32 going to be practically – you do not need me to say it – difficult.

1 THE PRESIDENT: I do not think there is any doubt that we need to have some organisation of
2 the “mob”. Yes, I think you are pushing at open door anyway. It does not sound as though
3 you are wanting to swing by this. It sounds more like a whinge.

4 MR. HOSKINS: It is a whinge with a yellow jacket and a baton saying, “Mob this way”!

5 THE PRESIDENT: Miss Rose?

6 MISS ROSE: Sir, Ofcom does have a view on the interventions of the sports bodies. We take the
7 view that people who have a proper interest and who wish to support an appellant or support
8 the decision of the regulator should have the right to intervene and make any points that are
9 not being covered by other parties, obviously not to duplicate points that are. We do,
10 however, have a concern about the interventions that are being proposed by the sports
11 bodies in the Virgin and BT appeals where it is being said that they would to intervene not
12 either to support the appellant or to support Ofcom. To give the example that you just
13 raised in relation to the Virgin appeal, Virgin are appealing the decision by Ofcom not to
14 include channels 3 and 4 in the Wholesale Must-Offer remedy. If the sports bodies wanted
15 to say Ofcom was right not to include channels 3 and 4 that would be one thing and we
16 would have no objection to them intervening for that purpose. From their applications it
17 does not appear that that is what they want to say.

18 Our concern is that what appears to be happening is that they want to run points which are
19 properly to be run by them in the Sky appeal producing evidence where they want to
20 support Sky to say that the effect of our decision could be to reduce the value of their rights
21 in future. That is evidence that we accept is properly admissible in relation to the Sky
22 appeal, but we do not accept that it is proper for them to run points in the Virgin and BT
23 appeal which would effectively be separate appeals against our decision which they,
24 themselves, chose not to bring within the time limit for the appeals.

25 It may be that this seems to you like a rather technical point, given that we are not objecting
26 to them being here, participating in the appeals and making the points that they want to
27 make in the context of Sky’s appeal about the value of their rights.

28 So far as Ofcom is concerned, there is an important point of principle here which is that
29 managing these cases is already extremely challenging and we do submit that it is
30 appropriate that the CAT should scrutinise the circumstances in which parties are seeking to
31 intervene, not simply to ask whether the party has an interest in the appeal, but whether the
32 points that they want to make the appeal are properly points for an intervener to make, or
33 whether they are seeking to use somebody else’s appeal to, as it were, launch their own
34 under the counter appeal out of time, which we say is not an appropriate use of the CAT’s

1 process. We would ask that there should be a little bit of disciplining of the “mob” from
2 that perspective otherwise these appeals could be even more unmanageable than they
3 already are.

4 THE PRESIDENT: Yes, thank you. One is anxious not to impose artificialities on something
5 that is not going to help. I take your points. I will obviously hear Mr. Harris and
6 Miss Demetriou on those.

7 MISS ROSE: Yes, Sir. There is one other point that strikes us as slightly odd, and that is that
8 most of the sports bodies have chosen to be represented by separate firms of solicitors, but
9 all using the same team of counsel. We applaud that because it is obviously sensible to
10 streamline the representations. Rather oddly, the ECB is represented by the same solicitors,
11 DLA Piper, and indeed the same individuals, as the Football Association Premier League,
12 but has different counsel, Miss Demetriou. At the moment, we are somewhat puzzled
13 because the fact that DLA Piper are acting for both the Football Association Premier
14 League and the ECB would be a very powerful indication that there cannot be conflict of
15 interest. If that is so, we are not sure why Miss Demetriou needs to be here separately both
16 from the Premier League’s counsel team and from the counsel who are acting for the other
17 sports bodies. Again, this does seem to us to be a matter that might perhaps be profitably
18 explored now, because we are very concerned about the length and the cost and the
19 proportionate case management of this hearing.

20 THE PRESIDENT: Sometimes conflicts can be dealt with in that way, can they not, by having
21 separate counsel and the same solicitors. It depends on the nature of the conflict.

22 MISS ROSE: It does seem a bit odd that they alone out of all the other sports bodies are being
23 dealt with in this way. There may be a good reason but we have not heard what it is and we
24 would like to be reassured that we are not going to have unnecessary duplication of counsel
25 in the main hearing.

26 THE PRESIDENT: Thank you very much.

27 MISS DAVIES: Sir, if I may raise a point. I know Mr. Hoskins does not suggest that I am part of
28 the “mob”, but in Miss Rose’s submissions just then there was a reference to “all sporting
29 bodies applying to intervene in BT and Virgin Media appeals”, and I would like to clarify
30 that there is no objection to our intervention?

31 THE PRESIDENT: No, I think that was directed at all the other sports bodies.

32 MISS ROSE: I mean the non-appellant sports bodies.

33 THE PRESIDENT: That is what I assumed.

34 THE PRESIDENT: Shall we hear from the others. Mr. Harris, you have got to your feet first?

1 MR. HARRIS: Sir, I am grateful. Perhaps I could just explain who Miss Banks and I do
2 represent and firmly scotch the nomenclature that has been attached to them. We represent
3 the Rugby Football League, the Rugby Football Union, the Football League, the Football
4 Association and the PGA European Tour. So there are five national governing bodies.
5 I doubt that any one of them has previously been described as a “mob”, let alone as a
6 collective. People in this room may have a view as to how best to describe me, but
7 I suspect that is not appropriate where I am in a team with Miss Banks to be described as a
8 “mob”.

9 THE PRESIDENT: I am sure no disrespect was intended by anybody to any of your clients.

10 MR. HARRIS: I am very grateful. Much more imply, why is it that we want to intervene? I will
11 deal with that in a matter of seconds. Perhaps the key issue is how we see our role in these
12 four appeals.

13 Briefly then as to why we wish to intervene, as set out in our applications for intervention:
14 we are concerned by the WMO conditions as they are, specifically the low wholesale price
15 and the impact that it will have upon the dynamics of the broadcast market and the impact
16 therefore upon the value of the content held by my clients.

17 THE PRESIDENT: To that extent you are supporting the attack on that?

18 MR. HARRIS: Precisely.

19 THE PRESIDENT: You are supporting Sky effectively?

20 MR. HARRIS: Yes, and as regards Sky and the Premier League’s appeal, nobody objects to the
21 presence of all five bodies that we represent.

22 As regards Mr. Hoskins in his own agreement “whinge”, his appeal and that of BT, they
23 effectively take to the next level the complaints that we have and the concerns that we have
24 about the impact upon us of Ofcom’s decision. The WMO prices is said to be too high. If it
25 comes down then plainly there is yet further impact upon the five bodies that we represent.
26 That seems to us to be a legitimate interest, and I understood Mr. Hoskins to accept – his
27 words were, yes, we do have an interest – there is the first of them – in his appeal. The
28 same applies to BT.

29 Secondly, in BT’s case, as we understand it – although of course we have seen virtually no
30 paperwork – their appeal, and in Virgin’s case, their appeal, they seek a further extension to
31 more services, namely Sky 3 and 4. As we have explained in our applications for
32 permission, each of the five bodies that we represent has a direct interest in the further
33 extension of the Ofcom conditions to yet more sporting channels. It has a greater impact
34 upon them. Those are the sorts of matters ----

1 THE PRESIDENT: So you support Ofcom in relation to ----

2 MR. HARRIS: It is a sterile debate, in our respectful submission.

3 THE PRESIDENT: I think it is a formal point. You are attacking Ofcom in relation to your first
4 point, and you are supporting them in relation to the extension?

5 MR. HOSKINS: Yes, if you like, Sir, this would have been my final point, but for the purposes
6 of Mr. Hoskins' intervention, one could easily characterise our position in the BT and
7 Virgin appeals as supporting Ofcom. It supports Ofcom in the sense that we object to the
8 extensions sought in the grounds of appeal by both BT and Virgin. In so far as his
9 submission is founded upon the formulation, which we say is misconceived for another
10 reason that I will come to in a minute, it can be just swept under the carpet because one can
11 simply say that we support Ofcom's opposition to the extension of the WMO conditions
12 that are sought by BT and Virgin. Then the whole thing just disappears.

13 Most importantly and most substantively, and this effectively is our key submission as
14 regards everything in this CMC, we, the five bodies that we represent, see our role as
15 interveners in all of these cases as a limited one. Firstly, there is going to be absolutely no
16 duplication by us across the four appeals. That is not in our interests and plays no part of
17 our role. Secondly, we currently propose, and I do not foresee any reasons at the moment
18 why this should change, to come in and not cover any of the territory at all that is covered in
19 opposing Ofcom's decision by Sky and by the Premier League.

20 On the contrary, our limited role as interveners is to explain to this help with the help of
21 evidence what the impact is upon us of this decision or a putative extension of the decision;
22 and why and how that should have been taken into account by Ofcom but was not, and why
23 and how it should now be taken into account by the tribunal. It effectively goes to the
24 proportionality, the impact of this decision or a putative extension thereof, upon us. Of
25 course, that is a bespoke individual set of evidence and submissions for each of the five
26 bodies. By definition, therefore, it will not overlap as between themselves. It is also the
27 same as between the four appeals.

28 That takes me on to where, subject of course to this Tribunal's direction, we see ourselves
29 fitting in to any series of hearings, or hearings back to back, listed sequentially, or whatever.
30 Subject to the Tribunal's view and subject to any further developments in the case, we only
31 see ourselves as effectively attending at one point in time, one relevant point in time, in
32 order to make sure that the Tribunal, to the extent it needs to by way of oral submissions,
33 the points that we make across the four appeals.

1 THE PRESIDENT: How do you envisage dealing with the evidence? I think you said that your
2 major role is to make sure that we have got the evidence. Without committing yourself, but
3 I am interested to know, presumably you envisage discrete evidence for each of your
4 bodies, do you?

5 MR. HARRIS: Yes, we do not envisage lengthy. It certainly will not duplicate because, by
6 definition, they have different things to say. Yes, it is effectively witness statement
7 evidence and no doubt exhibits, explaining the impact upon the five bodies from where they
8 sit and stand of the decision as it is, or of the decision if it is extended by virtue of BT's and
9 Virgin's appeal. Plainly, in terms of case management, every relevant person in whose
10 appeal we appear will have to have the opportunity, as they see fit, to test, if necessary, any
11 of that evidence. Frankly, it is a bit difficult to see, as we currently sit here today, where
12 that testing or cross-examination will ever need to take place. There is nobody who can
13 really gainsay what the impact is upon each of the five bodies that I represent. Be that as it
14 may, that can all be managed.

15 The crucial point, Sir, is this: if Mr. Hoskins' concern and that of Miss Rose, as it appears
16 to be, is lengthening the hearing or complicating it, we do not see it like that at all. We do
17 not see the fact that we are in all four appeals in the formal guise as interveners has any
18 additional impact upon the length of the hearing. We effectively only want to attend once at
19 the relevant moment. Of course, by putting our statements of intervention, we are only
20 seeking to preserve the position technically. We do not want it ever said at the end of the
21 day, for instance in Virgin's case, "That is all very interesting, your evidence and your
22 submissions about proportionality and impact, but they are not technically evidence in the
23 Virgin appeal, so I cannot take account of them". That would be an odd staffs and
24 unsatisfactory. That is why we took the view that we had to formally seek to intervene.
25 Notwithstanding that, we only wish to play a role, if you like, in one part of these
26 compendious hearings.

27 Sir, those are the reasons we want in. I have already dealt with the final thing I was going
28 to say, which is, strictly speaking, one could say that we are supporting Ofcom.

29 May I, just very briefly, deal with the technical nature of Mr. Hoskins' objections. We say
30 it is wrong-headed in any event because actually the Rules say you should identify whether
31 you support "any" person. It does not say that you have to support a named principal party.
32 To make that point good – I could hand it up, if need be – in the CAT Guidance about the
33 Rules the exact sentence is, your statement of intervention "should state whether the
34 intervention is made in support of any other party". It does not say that you have to support

1 a named other party in any event, and nor should it, because that denies the flexibility that
2 this Tribunal should have in dealing with these matters.

3 Last but not least, we do not really understand the substance of the complaint and perhaps it
4 was revealed as more of a “whinge” and a “let us just be careful about how this is managed”
5 type submission, in the event that, for instance, the Premier League is allowed. There does
6 not seem to be any objection to the Premier League technically intervening in the Virgin
7 appeal, so as to make sure that in that appeal its voice and its evidence is heard, nobody
8 could say otherwise. In those circumstances, we would find it peculiar if the other national
9 governing bodies that we represent ought not somehow to be allowed to have their evidence
10 and their voice technically taken into account in those appeals.

11 Nobody else objects, in any event, but Virgin. Virgin’s objection does not have much
12 substance. In any event, the whole thing is dealt with by the manner in which we propose to
13 intervene – the case management manner in which we propose to intervene. Unless I can be
14 of any further assistance, that is what I have to say on that.

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

16 MISS DEMETRIOU: Sir, in relation to our proposed intervention in the Premier League appeal,
17 there seems to be no objection to that at all, and we have set out the reasons why we say we
18 have sufficient interest. It is clear from those that an enormous proportion of the ECB’s
19 revenue derives from broadcasting, 68 per cent, which really is vast. We say it is plain that
20 we have a commercial interest in the outcome of these appeals.

21 In relation to BT and Virgin Media’s appeal, our proposed intervention is very narrow. We
22 have nailed our colours to the mast, and we have said that in relation to those appeals we
23 support Ofcom. We have said that clearly in our application to intervene. We propose only
24 to intervene in relation to the narrow issue of whether or not the WMO should be extended
25 to cover Sky Sports 2 and Sky Sports 3, and cricket is broadcast on those channels, and so
26 we have something direct and relevant to say in relation to that narrow point. I think that
27 deals with the narrow point that Mr. Hoskins made in his objection to our proposed
28 intervention in his appeal. Sir, I am very happy to clarify that the scope of our intervention
29 is going to be very narrow.

30 Generally, I would echo what Mr. Harris said, which is that we are very conscious of the
31 need to carefully case manage these appeals. Our intervention would be very focused and
32 narrow in scope. We are not going to duplicate anything anyone else says.

33 In relation to Miss Rose’s point about why we have needed separate representation, that is a
34 decision that my client has made. The Cricket Board has different commercial interests to

1 the other sports governing bodies. It certainly has very different interests to Premier League
2 football, which is why it has instructed different counsel. I do not think it is necessary or
3 appropriate to elaborate on its reasons as to why it has decided to instruct me rather than
4 anyone else, or instruct the same counsel as the Premier League. It plainly has different
5 interests. In my submission, that is really a question of case management. If it transpires
6 during the course of these appeals that we are duplicating anything that anyone else says,
7 which of course we undertake not to, Miss Rose can make her point then. In my
8 submission, that is not an objection which should be taken at the outset.

9 THE PRESIDENT: At any rate, there is no specific conflict. It is not a conflict matter, it is
10 simply a choice matter.

11 MISS DEMETRIOU: Sir, in relation to the evidence, then my clients are in a very different
12 position to Premier League football. A far higher proportion of their revenue derives from
13 broadcasting revenue. Given that their evidence is different and that their interests may not
14 be precisely identical, they have deemed it appropriate to instruct different counsel. I think
15 that is as much as I can say at this stage.

16 Sir, unless I can assist any further that is all I wanted to say.

17 THE PRESIDENT: Thank you very much. Mr. Anderson, are you going to get up and say
18 something on this?

19 MR. ANDERSON: I was not going to take very long, Sir, but since our appeal is one of those in
20 which the interventions are contemplated, I just wanted to say very briefly what our position
21 is.

22 THE PRESIDENT: Yes.

23 MR. ANDERSON: We do not, as you know, object to any of the sports bodies intervening in our
24 appeal, but that is of course subject to the principle that, like any intervener, they take the
25 appeal as they find it. The ambit of the appeal is defined by the issues as they are identified
26 by the appellant and responded to by Ofcom. I only mention that because I was a little
27 concerned when Mr. Harris was on his feet that that point might not wholly have sunk in.
28 There was a suggestion that the sports body might all produce a lot of evidence on why
29 lower prices were a bad thing, for example. That may be appropriate at the interim relief
30 stage, but as Mr. Harris will have seen from the summary of our appeal, and as he will see
31 in more detail when he sees the appeal itself, our appeal is on certain rather narrow and
32 rather specific grounds.

33 THE PRESIDENT: There is an issue, but I cannot remember now whether it is your appeal or
34 Virgin's, challenging the price saying it should have been lower.

1 MR. ANDERSON: We both take the point on price, just as we both take the point on scope. I am
2 simply firing a warning shot.

3 THE PRESIDENT: Yes, but is he not entitled to say, "It was right not to go lower because"? Is
4 that not a legitimate issue to raise?

5 MR. ANDERSON: The appeal will be defined by, I think, four respects in which we say Ofcom
6 went wrong in its approach to the setting of the price. As you will have seen, Sir, they are
7 fairly technical and fairly specific respects. What we are anxious to avoid is a situation in
8 which the scope of the issues as defined in the appeal is expanded by the advent of an
9 intervener. We would certainly want to reserve our position in the future as to the relevance
10 of the sort of evidence that Mr. Harris was talking about.

11 THE PRESIDENT: You have certainly reserved it.

12 MR. ANDERSON: Other than that, Sir, I do not think there is anything I need to say.

13 THE PRESIDENT: Thank you very much. Miss Rose?

14 MISS ROSE: We would just like to put on the record that we endorse the comments that have
15 just been made by Mr. Anderson, and I, too, was troubled by some thing that were said by
16 Mr. Harris. We will obviously be looking carefully at the scope of the evidence they seek
17 to adduce.

18 THE PRESIDENT: Does anybody else want to say anything about the sports bodies' proposed
19 intervention? No.

20 Mr. Henry, you are not represented, are you?

21 MR. HENRY: No.

22 THE PRESIDENT: You have put in an application on 18th June, essentially seeking to intervene
23 on your own behalf and indicating that your interest in the outcome relates to your interest
24 as a UK citizen and also as a stakeholder – you are a shareholder?

25 MR. HENRY: Yes, correct.

26 THE PRESIDENT: And the managing director of REAL Digital Limited? Is it REAL Digital?

27 MR. HENRY: Yes, REAL Digital EPG Services Limited.

28 THE PRESIDENT: Objection is taken to that on the basis that it does not demonstrate a
29 sufficient interest. You have expanded a little bit in your letter of 23rd June where you
30 answer, or attempt to answer, some of the objections that are made to your personal
31 participation. It appears that you are very clearly seeking to participate on your own behalf
32 as Mr. David Henry.

33 MR. HENRY: Yes, the main reason being is that I have an Ofcom licence to provide an
34 electronic programme guide. We also have under contract a conditional access system.

1 THE PRESIDENT: You say “we” – who do you mean by “we”?

2 MR. HENRY: REAL Digital.

3 THE PRESIDENT: Your application to intervene is very specifically, in your letter, on your own
4 behalf, Mr. David Henry, not on behalf of REAL Digital.

5 MR. HENRY: However, I seek to represent REAL Digital’s interests as well.

6 THE PRESIDENT: You have not said that. Your letter is very specific.

7 MR. HENRY: Yes, it was on behalf of me, myself.

8 THE PRESIDENT: You appeared to do that, as it were, not by accident, but deliberately, it was
9 said on a couple of occasions. You seem to be trying to ride two horses now.

10 MR. HENRY: Obviously I am quite new to this process, and it came as quite a surprise that this
11 was all going to be – we sat and watched, or I should say I sat and watched and did
12 participate in Ofcom’s pay TV review. We thought that was a good thing, or I certainly did.
13 We thought that this would open up the market place, etc. There have been plans in place
14 for a long time.
15 I can only comment that my plan was to limit my submissions throughout all of this process
16 to only evidence that is not submitted by the other parties. I think some of the comments or
17 some of the points being raised are quite limited in their scope. I have one or two points of
18 interest that I have jotted down. I notice there has been no objection to Freesat, for instance,
19 and that I thought was a bit odd since Freesat is not in the pay TV business and does not
20 have the technology to deliver pay TV, whereas the body does that I am a quarter
21 shareholder in and the founder of the company.

22 THE PRESIDENT: It is not Freesat’s shareholders, Mr. Henry, who seek to be represented, it is
23 Freesat itself who apply to intervene.

24 MR. HENRY: I understand that, but they have no commercial interest in pay television and no
25 technology to deliver pay television, so I thought that was a bit odd, that Sky and the
26 Football Association would be happy for them to intervene but object to myself who clearly
27 does have an interest in pay television and conditional access technology which is used to
28 protect pay television. Therefore, I would have thought it was more relevant that I was an
29 intervener in these proceedings than a company that has no actual direct interest.

30 THE PRESIDENT: Is there anything else you want to tell me about your own reasons for seeking
31 to intervene?

32 MR. HENRY: I believe that these cases will have a major impact on the commercial activities
33 that REAL Digital plans to shortly launch, and therefore it would have an impact on the
34 consumers’ choice and possibly raise competition issues if it was deemed that Ofcom lost

1 its appeals, and the Wholesale Must-Offer was overturned. That is my main worry, that
2 perhaps some things will be missed.

3 I am not looking to be included in the confidentiality ring, I do not believe that would serve
4 any real purpose. I am simply, if you like, trying to look out for REAL Digital's best
5 interests, and also my own interests, which of course, being employed by REAL Digital, are
6 one and the same thing.

7 THE PRESIDENT: Thank you very much. Does anybody want to add anything to the comments
8 that people have already made in writing about Mr. Henry's application? Mr. Ward?

9 MR. WARD: Sir, I do not know whether it would assist, but on behalf of Freesat – as you will
10 appreciate, there is no objection to Freesat's intervention – we would happy to address the
11 points Mr. Henry has made about what he says is the relevant difference between his
12 position and Freesat's, but only if it would assist.

13 THE PRESIDENT: Mr. Flynn?

14 MR. FLYNN: Sir, I do think, you having had that exchange with Mr. Henry, I need to add very
15 much. He is apply in his personal capacity, as he has made it plain, he is a minority
16 shareholder in a company which, whatever its interests, is not seeking to intervene in these
17 proceedings, he has not made his interests plain in the observations in response. The only
18 point of any substance he mentions relates to the set-top box financial arrangements, which
19 I think may be one topic that has not been discussed in any of the thousand pages of the
20 decision and all the appeals. He cannot be in the ring, as he accepts, and it seems to us that
21 his best course to protect his own interests would be to observe the proceedings in a
22 personal capacity, and if he has observations to make he can make them to the regulator.
23 That would seem to me an entirely fair outcome, so we maintain our opposition to his
24 application.

25 THE PRESIDENT: Thank you. Miss Rose, have you any observations on this?

26 MISS ROSE: No, Sir, we take a neutral position.

27 THE PRESIDENT: Thank you. Can we deal with the other points of principle without deciding
28 on these? We probably can hear argument on that, of is it going to be helpful if I deal with
29 this point separately? The other point of principle relates to BT's in-house lawyers, does it
30 not? I think we can deal with that now.

31 MR. ANDERSON: I do not know, Sir, if you have the bundle, which I think is a common bundle
32 as between the parties.

33 THE PRESIDENT: Yes, I have, it is extremely helpful.

1 MR. ANDERSON: It does set out how this has evolved, and without taking you through that in
2 painstaking detail could I start at tab 61 where BT's position is set out. Ofcom invited
3 submissions from everybody on the confidentiality ring and BT stated on the first page of
4 that letter of 21st June, and over on to the second page, that it wanted three external counsel,
5 three named in-house counsel and an external economist. The point is made on that second
6 page that two of the in-house counsel, although relatively junior, were already familiar to
7 Ofcom because they have been assisting on the matter for a number of months. Indeed, one
8 of them was in the confidentiality ring at the interim relief stage.

9 Then the senior counsel, Charlotte Twining being on maternity leave and not I think
10 returning to this case when it has finished, senior counsel Emily Smith was named as the
11 person who was coming in, and some details were given about her. You see at the bottom
12 of p.3 that it was said that she would be willing to give an appropriate undertaking as
13 regards the use of third party confidential information, and so on, in addition to the
14 undertakings that, of course, everybody within the ring gives anyway.

15 There was then a reaction to that from Sky and from Virgin and from the Premier League.
16 All the letters are in the bundle. I suspect I probably do not need to take you to them, unless
17 you would like to see them.

18 THE PRESIDENT: I have glanced at them, but if there is anything specific ----

19 MR. ANDERSON: I think things have really moved on since then. The references if you want
20 them are Sky at tab 17, Virgin at tab 9, the Premier League at tab 63. We have moved on
21 from there. The baton has been taken up by different people at different stages, and over
22 the last 24 hours or so it has been the Premier League that has been making the running.
23 My understanding is that there are no outstanding points as between Miss Davies and
24 myself, save for the one which she mentioned. Although the Premier League have made it
25 plain that their preference was for a two-tier system in which there would be no BT in-
26 house solicitor fully inside the ring, certainly so far as sports rights were concerned, they
27 have engaged with us in dialogue on the undertaking route, which is certainly our preferred
28 way of doing it, effectively an additional or enhanced undertaking that the BT in-house
29 solicitors would enter into in order to keep everybody satisfied.

30 We have got to the stage, I am afraid only very shortly before the hearing, where we are
31 agreed on what that undertaking could look like, save for one point, as Miss Davies said, of
32 principle. Sir, I do not know whether you have a couple of pages that were handed to you?

33 THE PRESIDENT: Yes, I have.

1 MR. ANDERSON: I should apologise that because the negotiations went down to the wire, we
2 have not been in a position to produce a complete draft of the proposed order. If you could
3 turn to tab 64 of the bundle, which is Ofcom's summary letter of 23rd June, they set out
4 towards the end of that letter – I think it is p.4 and following – a draft order and a schedule
5 with a part (a) and a part (b). That is the basis upon which agreement is, I think, now very
6 close. It is these two sheets of paper you were handed today which constitute the only
7 amendments to that.

8 THE PRESIDENT: One version is headed "Proposed amended paragraph 2.2 of the draft
9 confidentiality order", and the other one is headed "Possible additional undertaking for
10 BT's in-house solicitors".

11 MR. ANDERSON: Yes. Shall I deal with the first of those first, because it is, I think, purely
12 technical and entirely uncontentious. The only point of this one, as I understand it, is the
13 concern by the Premier League that because of their in-house status BT's solicitors will be
14 sharing a building with commercial people at BT and therefore, in addition to the normal
15 undertaking that they will keep documents safely, there is to be an undertaking that they
16 will keep them in a locked filing cabinet. I think that is what it amounts to. Building that
17 into the context of the order is a bit of a cumbersome business, because one has to make it
18 clear that that applies to some people within the ring and not others.

19 THE PRESIDENT: Where do I find the proposed amendment relating to that?

20 MR. ANDERSON: The proposed amendment is on the sheet of paper headed "Proposed
21 amended paragraph 2.2".

22 THE PRESIDENT: I cannot see anything about locking anything up. Maybe it is the:

23 "The undertaking would include the clauses proposed in DLA's letter ..."

24 Is it in the middle of the last bullet point?

25 MR. ANDERSON: I thought it was all in this sheet of paper, but I am told that one has to go to
26 tab 69, and it is in part (b). I am grateful to Miss Ford. I think the style has been to
27 incorporate it by reference.

28 THE PRESIDENT: This is DLA's letter, I see.

29 MR. ANDERSON: It is the bit about the filing system that is locked and inaccessible by
30 electronic means and the number of people who can produce further copies. The reason we
31 had to re-do that was simply because, as drafted, that would have applied to everybody in
32 the ring and it needed to be plain that it applied only to ----

33 THE PRESIDENT: That is agreed, is it, that is not the point of principle?

34 MR. ANDERSON: I do not believe that is at all controversial.

1 While we are on that order, perhaps I could just show you what is already in part (b), and
2 I think this probably comes straight from the interim relief order, but you see:

3 “1. I have read a copy of the Tribunal’s Order and understand the implications.

4 2. I will not disclose the confidential information to any person who is not a
5 relevant adviser without express consent.

6 3. I will use the confidential information only for the purpose of these
7 proceedings and for the purpose of no other current or future proceedings, dispute,
8 complaint or other use whatsoever without express consent ...”

9 and so on. Those are the undertakings that already bind all members of the ring.

10 In an attempt to allay the sensitivities that exist particularly within the Premier League
11 about BT’s use of in-house solicitors, we have been prepared to offer a further undertaking,
12 and after taking into account what Virgin and Sky have said about it, and after discussing it
13 also with FAPL, we have got pretty close to agreement, and you see that on the sheet of
14 paper headed “Possible additional undertaking”. I do not know if you would like me to read
15 that out.

16 THE PRESIDENT: You do not need to, no, because I have read it. I am just looking now at what
17 is referred to in that piece of paper as “the clauses proposed in DLA’s letter”. So sub-
18 clauses (i) and (ii) there, which are the amended bits, are agreed, are they? The one, first of
19 all, beginning “in relation to hard copies of any documents containing confidential
20 information”, this was the bit that was in tab 69?

21 MR. ANDERSON: Yes, that is right, and they are agreed.

22 THE PRESIDENT: Those two are agreed, “in relation to electronic copies”, it is just to do how
23 they are stored and transmitted and locked up?

24 MR. ANDERSON: That is right.

25 THE PRESIDENT: That is all agreed.

26 MR. ANDERSON: Yes.

27 THE PRESIDENT: Then there is another little amendment, “production of further copies should
28 only be done”, and the amendment there in para.5 is also agreed?

29 MR. ANDERSON: It is, yes. The only reason why we needed a separate piece of paper is to
30 make plain that it is only BT’s in-house solicitors.

31 THE PRESIDENT: The part (b) that is referred to there that we see in tab 69 is going to be split
32 (b)(i) and (b)(ii), and (b)(ii) will apply to BT.

33 MR. ANDERSON: Yes.

1 THE PRESIDENT: I follow. That first piece of paper headed “Proposed amended paragraph
2 2.2”, as it stands is okay?

3 MR. ANDERSON: Yes. I repeat the apology for noting a clean version.

4 THE PRESIDENT: Do not worry, I know it has been moving all the time, and it is possible
5 where the point’s principle arises, is it?

6 MR. ANDERSON: Yes, that is right. Each party has a primary position. Our primary position is
7 that the existing undertakings are perfectly adequate to protect everybody’s interests. The
8 Premier League’s primary position is that they would rather have had a two-tier scheme
9 which we say would have been unworkable for a number of reasons.

10 THE PRESIDENT: You mean different categories of information?

11 MR. ANDERSON: Yes, in which effectively no BT solicitor would have had access to
12 information relating to sports rights which we say would have caused difficulties, to put it
13 mildly, when one thinks of instructing experts, and so on, but I think I can leave that out of
14 account for now and concentrate on the extent to which the parties are agreed on the second
15 best option.

16 I will, I am afraid, just have to add a few words as I go through which were further and
17 better thoughts that occurred to the Premier League as we waited for the hearing to begin.
18 You see that they will undertake that their:

19 “... activities in relation to BT Vision and any other television service that is or
20 may be offered by BT, whether on its own or in conjunction with any other party,
21 will for the duration of the proceedings and a period of two years from their final
22 conclusion ... be limited to the conduct of these and any directly related
23 proceedings, and to the provision of legal advice on competition and regulatory
24 unconnected with the subject matter of these proceedings, but not including actual
25 of contemplated investigation by Ofcom, or any regulatory authority, into the sale
26 of the audiovisual rights to any sporting event(s) or competition(s).”

27 So they are not to be involved in an Ofcom investigation into sporting rights.

28 The words that the Premier League would like added and that I think BT can accept would
29 be “or any other regulatory authority” the words “or any actual or contemplated litigation by
30 any party”, then we delete “into” and substitute “relating to”, so it would say:

31 “... any future, actual or contemplated investigation by Ofcom or any other
32 regulatory authority or any actual or contemplated litigation by any party relating
33 to the sale of the audiovisual rights ...”

34 and so on. That is effectively the white list of what the person can do.

1 THE PRESIDENT: That is the black list, is it not?

2 MR. ANDERSON: Yes, the bit at the end is the beginning of the black list, if you like.

3 One then gets on to the full black list in the second paragraph:

4 “During the Relevant Period, I will have no involvement (whether by the giving of

5 legal advice or otherwise) in the consideration or formulation of commercial

6 strategy or policy in relation to BT Television ...”

7 And here we come to the point of principle, which is simply expressed, should this

8 undertaking be limited to the employment by BT Television, or should it extend also, as the

9 Premier League wishes, to any future employer offering a television service. They want to

10 impose a five year period after the end of any final appeal in these proceedings in which,

11 not only while working for BT, but while working for any other future employer that they

12 might move to, they would not advise that employer in relation to movie rights or sports

13 rights.

14 THE PRESIDENT: Sorry, I may be being a bit slow, is it the five year period that is objected to

15 or is it the extension to another employer?

16 MR. ANDERSON: It is the extension to another employer, Sir.

17 THE PRESIDENT: So the five year period as far as BT is concerned is not an issue?

18 MR. ANDERSON: No. I think Miss Davies will tell you they are worried, there is an auction,

19 I think, of Premier League rights in 2015 and they are concerned that there should be no

20 possibility of ----

21 THE PRESIDENT: Yes, they are still covered by the basic undertakings, of course?

22 MR. ANDERSON: Yes.

23 THE PRESIDENT: Those undertakings are of an indefinite duration?

24 MR. ANDERSON: Yes.

25 THE PRESIDENT: And they are not employer specific.

26 MR. ANDERSON: Yes.

27 THE PRESIDENT: It is only the words in square brackets in italics that are the sticking point?

28 MR. ANDERSON: Yes, and I am afraid, Sir, I do need add some more words into the square

29 bracket. Miss Davies very fairly makes the point that she seeks to extend this new

30 undertaking not to any future employer, but only to future employers offering a television

31 service. It might be said that it would be pretty pointless in relation to anybody else.

32 THE PRESIDENT: You mean into the second, that is what it says in the first square bracket.

33 MR. ANDERSON: It is said already in the first square bracket.

34 THE PRESIDENT: In other words, you add them into the second?

1 MR. ANDERSON: The second, the third and the fourth.

2 THE PRESIDENT: Yes, I had not got that far. Right.

3 MR. ANDERSON: The final agreed change that I can offer is in the sixth line of the second
4 paragraph, the word “and” I am told should be “or”, and I think that makes sense.

5 THE PRESIDENT: I am sorry?

6 MR. ANDERSON: The second paragraph, sixth line, it begins “rights and in relation to”, that
7 should be “rights or in relation to”. So you see the scope of the second paragraph, leaving
8 aside for a moment the future employer point, it is the relevant period plus three years – in
9 other words, it is already two years after and then you add three years on top of that – no
10 advice in relation to any bid or negotiation for movie rights or in relation to any actual or
11 potential sale of sports audiovisual rights by BT Television, and then specific matters are set
12 out in relation to sports rights.

13 THE PRESIDENT: Are “television services” not defined, or is it somewhere?

14 MR. ANDERSON: They are not a defined phrase, and one is conscious that this undertaking is
15 already about eight times as long as any of the others.

16 THE PRESIDENT: I am just thinking a “TV service” could be rental, or something, but they do
17 not rent them any more, do they?

18 MR. ANDERSON: It is a phrase that appears in the very first line of the undertaking, of course.
19 I suppose one could say “and any other similar television service”.

20 THE PRESIDENT: Anyway, it is not for me to be improving the draft.

21 MR. ANDERSON: I do not want to provoke Miss Davies into further disputes. Shall I address
22 you briefly on the point of principle?

23 THE PRESIDENT: Yes, please.

24 MR. ANDERSON: The starting point is the general position. We believe the unvarying position
25 of this Tribunal is to accept in-house lawyers into confidentiality rings where a party has not
26 chosen to instruct external solicitors, and for good reason, the reason being that in-house
27 lawyers are subject to exactly the same ethical guidelines as external lawyers, and not just
28 ethical guidelines, but professional rules. So if an in-house lawyer, who has been admitted
29 into a confidentiality ring were to misuse the information that he or she obtained as a result
30 then they would be in gross breach of professional conduct with potentially career ending
31 consequences. That is so just as much for in-house as it is for external lawyers.
32 That position is strengthened by the undertakings that you have already seen in tab 64,
33 which everybody is subject to, in particular numbers 1, 2 and 3.

34 THE PRESIDENT: By the ordinary schedule B?

1 MR. ANDERSON: Yes, and that is why our primary submission is that that is really all that is
2 necessary, and it is as a sign of good faith, reflecting the particular circumstances of this
3 case that BT has offered to go further.

4 In terms of the future employment point, we oppose that really for this reason: the
5 professional obligations of in-house and external lawyers being the same, and it being just
6 as feasible for an external lawyer to take in-house employment as it is for an in-house
7 lawyer to change employment, we, and I speak here very much for the BT in-house lawyers
8 themselves, see no good reason for subjecting them to an additional requirement that is not
9 placed on the external lawyer who might go and work for a company providing television
10 services. If the undertakings are deemed to be enough to discipline external lawyers who
11 might subsequently go in-house, well, surely they must be enough to discipline in-house
12 lawyers as well. I note, without emphasising it further, that it is a submission that is
13 strongly felt by those behind me, and, in our submission, understandably so.

14 The other point, Sir, is that to the extent that the additional undertaking goes beyond the
15 normal undertaking, and of course it does, that is the whole point of it, it constitutes an
16 unreasonable and excessive restraint of trade. A non-compete covenant in a standard
17 contract of employment will not normally exceed 12 months. We are looking here at a
18 restriction which effectively prevents people from taking employment elsewhere, where it is
19 conceivable that in the course of that employment their duties will include matters which
20 would not constitute a breach of their normal undertaking to this Tribunal, would not
21 constitute a breach of their professional conduct rules, but which nonetheless would put
22 them at risk of breaching the enhanced undertaking. We have not heard any reason why
23 that could be justified.

24 I think, Sir, that is probably all I need to say at this stage. Both parties have shown good
25 faith in negotiating, but we have certainly reached our bottom line when it comes to that
26 future employment issue, and that is why we need to ask the Tribunal to adjudicate upon it.

27 THE PRESIDENT: Thank you. Miss Davies?

28 MISS DAVIES: Sir, perhaps I could stand back from this for a moment and explain what the
29 problem is from my client's perspective and why this is also so strongly felt on my side of
30 the line. We obviously would not be troubling the Tribunal about an issue if we really did
31 not feel this was important. The problem here actually comes out of the content of the
32 decision. Amongst the hundreds of pages, within the confidential version of the decision,
33 there is a very detailed description of the auctions that were conducted in relation to my
34 client's audiovisual rights over a number of years. It was very detailed – it identifies who

1 the bidders were for each of the packages that were put up for sale, how much was bid, in
2 both the first, second, etc, rounds for both live rights and also some other rights and re-sale.
3 It is, if I may put it this way, the “crown jewels” of information so far as my client is
4 concerned.

5 The very reason that my client puts its audiovisual rights up for auction in this way, and in a
6 way which no party has access to information as to what has been bid by any other party,
7 whether in that auction or in any previous auction, who is bidding for which rights and
8 when, is to maximise the value of the rights. Uncertainty, as, Sir, you will see when you
9 come to read Mr. Scudamore’s witness statement, is absolutely key.

10 My clients have also undertaken a commitment to the European Commission to ensure that
11 the auction process is transparent and non-discriminatory. Providing information to any one
12 party as to the bids that have been made by another party would across that completely.

13 Of course I should make clear, we are not in any way seeking to impute the three
14 individuals who BT are requesting to put in the confidentiality ring, of course that that goes
15 without saying. We are talking here principally about the risks of access to this information
16 and what could occur. The risks, in our submission, are extremely high because the value
17 of this information is such to any party who might in the future bid for these rights that the
18 risks, in our submission, are not ones that should be run.

19 I should also make clear that the information is actually readily understandable and readily
20 memorable.

21 THE PRESIDENT: Is it necessary to disclose the information to anybody?

22 MISS DAVIES: In the first instance we suggested a two-tier approach, which meant that this
23 information did not go to the in-house lawyers. That remains our strong preference. Of
24 course there is precedent for that in the *National Grid* case, where Mrs. Bidwell, the in-
25 house lawyer for National Grid, was admitted to the confidentiality ring for some
26 information but not by any means all of it.

27 THE PRESIDENT: I was not so much thinking of a two class process as just no one seeing it. Is
28 it necessary to resolve the issues that we should know who bid and how much they bid?

29 MISS DAVIES: Certainly we query why BT needs to see that information.

30 THE PRESIDENT: I am not concerned with that at the moment, I am trying to think whether
31 anybody needs to see it. It may be that they do.

32 MISS DAVIES: There are issues between my client and Ofcom as to the conclusions that Ofcom
33 have reached as to parties’ incentives to bid in the future which are based on these passages

1 of the decision. To that extent, in terms of what conclusions one can make about the future
2 in relation to the past ----

3 THE PRESIDENT: You both know that already.

4 MISS DAVIES: We both know that, yes. BT and any other party are in a position to make
5 submissions as to their own incentives to bid in the future and how they might be affected
6 by the WMO obligation without actually having any knowledge about who has bid for what
7 in the past or what level of bid was made. They can look to themselves, to their own pay
8 TV business and decide, based on the position either with or without the WMO obligation,
9 what their incentives would or would not be. Obviously, in the normal course, they would
10 never access to this information. It is not, I should hasten to add, information which we
11 have put in any detail either in our notice of appeal or our supporting witness evidence.

12 THE PRESIDENT: Yes. I genuinely ask this because I really do wonder whether at this stage we
13 need to know chapter and verse of the amounts and the identification of everybody, who bid
14 for what, and so on.

15 MISS DAVIES: That would be a happy solution from our perspective because it would remove
16 any risk.

17 THE PRESIDENT: I am not sure I want to know if I do not need to know if the risk of
18 inadvertent disclosure is so high. I think everyone should have a think about whether, at
19 least for the foreseeable future, this should be disclosed. It may be that something will arise
20 in due course. I will decide this issue, I am happy to decide this issue of principle,
21 regardless if necessary, but I do question whether this should necessarily be disclosed if it
22 does not actually have to be.

23 MISS DAVIES: All I can say about that is we would be very happy, obviously, with that solution
24 because it would provide the utmost protection. I have got copies of the confidential
25 paragraphs in the decision which I can show you, Sir, if necessary. They are quite discrete
26 and self-contained and they can be readily identified between us and Ofcom.
27 Perhaps one way forward, which would avoid all of this, would be to adopt this course: for
28 all the other material that is about to be disclosed between the parties, the notices of appeal,
29 the supporting evidence, to be exchanged. We have submitted in correspondence and I do
30 reiterate today, actually we think BT will realise they do not actually need to see this
31 information in order to advance their appeal or to address anything that we are saying in our
32 appeal, and it may be that that is an appropriate way forward.

33 THE PRESIDENT: I can see a number of other possibilities too. Miss Davies, that may well be
34 right, I do not know, and maybe Mr. Anderson, there could be no objection to external

1 counsel anyway taking a view on that. Before we get to that, does anyone take strongly the
2 view that this information is going to be crucial for the working out of the issues in this
3 case, the specific information?

4 MISS ROSE: It may well be material that Ofcom seeks to rely on in defending the appeal.

5 THE PRESIDENT: The actual identity of people and the amounts bid?

6 MISS ROSE: Yes.

7 THE PRESIDENT: You say "it may be".

8 MISS ROSE: I say "it may be" because we are in the mere foothills of formulating our response
9 to the mighty bulk of information, but our current view is that it is likely to be.

10 THE PRESIDENT: It is "likely to be"?

11 MISS ROSE: Yes.

12 MISS DAVIES: Even if that is correct, it does not actually mean that any other party, apart from
13 my client and Ofcom, needs to have access to the information, which we already have in
14 any event. All the other parties have views, and their views that they submitted during the
15 course of the pay TV investigation as to the likelihood of other parties winning or not
16 winning packages or any rights in the future, that has all been done and all those
17 submissions have been made by every party without access to any of this information
18 because Ofcom have rightly accepted throughout the consultation process that it is
19 extremely confidential and it cannot be disclosed.

20 In those circumstances, we have, throughout this, questioned why. We were prepared to
21 accept that external counsel should be permitted to review it so that they could satisfy
22 themselves that our submission and our position was correct, essentially, which is why we
23 propose the two-tier system. That would allow Mr. Anderson and his juniors access to the
24 information. We do think that would confirm the submission that we are making, that there
25 are no points that they would wish to make with the benefit of this information, that they,
26 and only they, could be making, because of course they cannot duplicate Ofcom in response
27 to our appeal.

28 Mr. Anderson has submitted that that is not satisfactory, which is why we then proceeded to
29 discuss with them the alternative approach. The alternative approach, if there is to be
30 disclosure of this material and it is to be allowed to those within the ring is actually to ring-
31 fence the relevant in-house lawyers from the business in which they could inadvertently
32 make use of this material. That is what essentially Mr. Anderson and I have been
33 negotiating over the last 48 hours, and we feel we have achieved in relation to their
34 employment by BT. It is important to see that in relation to that the second paragraph of

1 this proposed undertaking, and in particular the last part of it, is a ring-fencing undertaking.
2 It prevents the relevant individuals from having any involvement in advising BT in relation
3 to any actual or potential sale, acquisition or use of sports rights, and then there are some
4 specific examples. So they can have no involvement in that aspect of BT's business.

5 THE PRESIDENT: He is agreeable to that?

6 MISS DAVIES: He is agreeable to that, and we are happy with that so far as BT is concerned.

7 THE PRESIDENT: Why do you need the other bit, if you do not need it against any of the others.

8 MISS DAVIES: It has no value if Miss Smith leaves BT in 18 months time and moves, for
9 example, to ESPN.

10 THE PRESIDENT: I agree that this particular undertaking has no value and you would in those
11 circumstances fall back on the general undertakings.

12 MISS DAVIES: Which gives rise to exactly the risks of inadvertent use that has led to the
13 proposal for the ring-fencing.

14 THE PRESIDENT: What do you say about Mr. Anderson's point that precisely the same applies
15 to all the out-house lawyers?

16 MISS DAVIES: There is, in fact, a difference created by the ring-fencing. Having had no
17 involvement in that aspect of BT Vision's business for this period, there are less potential
18 issues as to conflicts that will arise should an internal BT lawyer decide to move, for
19 example, to ESPN or Freesat or the BBC, whoever it might be, because they will not have
20 actually been advising BT in relation to those areas. External lawyers will be in a different
21 position necessarily because of the ring-fencing. That is one of the problems that is created
22 by ring-fencing.

23 THE PRESIDENT: I would have thought that made it worse, not better.

24 MISS DAVIES: It makes it worse for us.

25 THE PRESIDENT: It makes them more of a risk. It makes the out-house lawyers more of a risk
26 if they move.

27 MISS DAVIES: No, because we would be entitled to apply to prevent an out-house lawyer who
28 has got all access to all this material and has been advising us ----

29 THE PRESIDENT: Yes, but we are talking about inadvertent disclosure. This is the kind of
30 disclosure where you would not be in a position to take any objection, it would just have
31 happened because of inadvertence.

32 MISS DAVIES: Were we put on notice that someone was moving – and people do move
33 regularly, this is not an industry where people are not moving regularly between

1 organisations and employers. We should also note in this context that as regards

2 Miss Smith ----

3 THE PRESIDENT: What would you able to do, as a matter of interest? If one of Virgin's
4 solicitors moved to someone relevant, they would still be subject to their part (b)
5 undertakings, of course. What could you actually do about it?

6 MISS DAVIES: In those circumstances one can imagine a flurry of correspondence to make sure
7 that they were not going to be engaged in advising in relation to these ----

8 THE PRESIDENT: Supposing they said, "We are going to be but we are not going to breach our
9 undertaking"?

10 MISS DAVIES: That would then, I am sure, be an issue that would result in litigation.

11 THE PRESIDENT: I wonder whether you would have any chance in that litigation, but it is not
12 for me to decide points that I do not need to.

13 MISS DAVIES: We would have less chance if someone has not been advising in relation to these
14 very issues because they have been ring-fenced. That is the difficulty.

15 THE PRESIDENT: The risk would be the same, would it not? Mr. Anderson's point seems to
16 me to be quite a good one. I can see why you would like to cover the future employment,
17 but it does ----

18 MISS DAVIES: The real problem is that without covering it the ring-fencing actually is not
19 giving us much protection at all. If we cannot cover that we do fall back on to the two-tier
20 system and say that this information, and it is a narrow class of information that we are
21 concerned with, is so commercially sensitive that it should not be available to people who,
22 in addition to their professional obligations – and of course I accept they have got
23 professional obligations – also have obligations to employers active in the relevant business.
24 That is exactly what happened in the *National Grid* case in relation to Mrs. Bidwell. We do
25 not accept it administratively difficult or cumbersome or creates problems for counsel. All
26 counsel involved in competition matters no doubt have dealt with situations where they are
27 involved in a confidentiality ring, other people in rooms are not, they have to be careful
28 about it. It is not information, as we have submitted, that actually, commercially, requires
29 any instructions to be taken from a BT lawyer, because it is information that is readily
30 understandable and clear. In those circumstances, there is not a difficulty. We would say if
31 you cannot satisfactorily ring-fence and make sure that these individuals are not, for the
32 period when this information is of value potentially to a pay TV employer, prevented from
33 being leaked to inadvertently, I accept – because I accept these individuals will do

1 everything they can – if we cannot prevent then the right course is to go down to the two-
2 tier system and to ensure that there is not that risk run.

3 THE PRESIDENT: I thought the point of principle was either you include future employers or
4 you do not.

5 MISS DAVIES: No, I made clear to Mr. Anderson that if we could not do this we would be
6 falling back on our two-tier system. The point of principle is whether, from our perspective,
7 there is an appropriate form of ring-fencing which can protect against this issue or whether
8 there should be a two-tier system as we have proposed.

9 THE PRESIDENT: I suppose Mr. Anderson's fallback point is that there should not be anything
10 different at all.

11 MISS DAVIES: Sir, there is a sort of half-way house – we really are not trying to be
12 unnecessarily difficult here, it is because of the very, very ----

13 THE PRESIDENT: No, I fully understand the sensitivity of the information.

14 MISS DAVIES: -- which is that we start with the two-tier system, we allow Mr. Anderson and
15 his juniors to see that information and then we come back to the Tribunal if, having seen it,
16 he ----

17 THE PRESIDENT: He thinks it might be important to take instructions.

18 MISS DAVIES: Indeed. We would urge on the Tribunal, given the nature of the information,
19 absolute caution being taken in relation to it, and that might be another way forward.

20 THE PRESIDENT: Then we would not need these undertakings at that stage.

21 MISS DAVIES: We would not need the undertakings at this stage. As I say, there are two
22 alternatives to approach the information. It is either keep it away or ring-fence the
23 individuals so they are not in a position to be able to make use of it from our perspective.
24 I understand that Mr. Anderson may take a different view as to whether those are the only
25 two alternatives.

26 Sir, I do have the information and I can hand it up to you.

27 THE PRESIDENT: You have told me what it is, and I can imagine why it is extremely sensitive.
28 My preference would be to find a way that no one sees it.

29 MISS DAVIES: As I have said, we would be very happy with that.

30 THE PRESIDENT: Miss Rose says that she thinks it is likely to be relevant, at least for some
31 purposes. That may be so.

32 MISS DAVIES: Sir, I am not sure there is much I can add.

33 THE PRESIDENT: No, thank you very much. Does anyone else, before Mr. Anderson replies,
34 want to comment?

1 MR. HOSKINS: I do not want to over-complicate matters, but regardless of what happens
2 between BT and the FAPL on this issue, Virgin still requires this undertaking from the BT
3 lawyers in relation to confidential information, but we do not need the words in brackets
4 about future employment, so I do not understand that to be an issue between Mr. Anderson
5 and myself.

6 THE PRESIDENT: As I understand it, this proposed additional undertaking would apply to
7 everything that is in the confidentiality ring, so it would automatically cover it. I do not
8 think it distinguishes any specific information.

9 MR. HOSKINS: My point is that if, for example, as between FAPL and BT ----

10 THE PRESIDENT: There was a resolution that did not ----

11 MR. HOSKINS: -- this undertaking is not given. If there is a two-tier system, we still have this
12 and it is agreed with BT that we still have this, so there is no need to go into the order in
13 relation to us, but that is not an issue unless Mr. Anderson says otherwise.

14 THE PRESIDENT: Mr. Anderson, you might want to hear Mr. Harris, I do not know, then you
15 can deal with everything.

16 MR. ANDERSON: Certainly.

17 THE PRESIDENT: Yes, Mr. Harris?

18 MR. HARRIS: Sir, I am grateful, very briefly we face a similar position to the FAPL in that it is
19 possible – we have not yet seen confidential versions of decisions – that there is deeply
20 confidential information in there about my sports governing bodies' bidding process and
21 numbers and identities. In any event, it is at this stage possible that some such information
22 may be wished to be adduced by the clients I represent as part of their evidence in dealing
23 with this case. It is not clear to me yet, but there is a possibility.

24 As briefly as I can, we therefore share the concerns of the Premier League about disclosure
25 of this information. We would support a two-tier system such that truly external lawyers be
26 entitled to have regard to this material and then decide whether actually it is necessary for
27 that to be disclosed further outside the external lawyers for the purposes of taking forward
28 either respectively people's appeals, defences or, in my case, interventions. We are not yet
29 convinced, as Miss Davies is not convinced, that actually, when the external lawyers see
30 this, there will be any need for there to be further dissemination.

31 We do echo and share the concern of Miss Davies, that there will be future bidding rounds
32 for all of my five clients and it would be unfortunate, and we unsatisfactory, given the risks
33 that she has highlighted, if there is disclosure to in-house counsel who are then going to be
34 the very people advising the bidders for our rights in future auctions.

1 Effectively, as briefly as I can, that is just echoing the concerns that Miss Davies has had.
2 Of course, in our case, in the case of some of the bodies I represent, as Miss Demetriou was
3 saying for hers, the broadcast revenues are a truly huge proportion of what we do. So the
4 impact of an inadvertent disclosure could be very, very profound.

5 Last but not least, Miss Banks and I are currently instructed by four sets of external
6 solicitors and one in-house counsel. It is possible that that will be three sets of external
7 solicitors and two in-house counsel as matters progress. We would stand by the submission
8 that I have just made, that in the first instance any confidential material from other parties
9 could come to the external lawyers, namely Miss Banks and myself, and then in the case of
10 three or four of my clients the external solicitors, and we will then take a view as to whether
11 or not there is any need for it to go the in-house counsel of certain of my clients. If there is
12 at that stage such a need then we would suggest that the way forward is for there to be
13 liberty to apply, and if it is opposed then I can come and make the relevant submissions at
14 that moment – i.e. whether my in-house counsel for certain of my bodies should at any stage
15 need to see the truly confidential information of anybody else.

16 THE PRESIDENT: Let me just get this straight, Mr. Harris, one of your clients – may we know
17 who it is, just to remind us?

18 MR. HARRIS: Currently, the RFL, Rugby Football League, we are instructed by in-house
19 counsel.

20 THE PRESIDENT: Are they solicitors?

21 MR. HARRIS: No external solicitors.

22 THE PRESIDENT: No, but are they solicitors, the in-house counsel?

23 MR. HARRIS: Yes, they have a practising certificate.

24 THE PRESIDENT: So the RFL by in-house solicitors.

25 MR. HARRIS: Correct, and it may be that shortly that will be the position for the Rugby Football
26 Union.

27 THE PRESIDENT: Might also be the position. Who is instructing you at the moment?

28 MR. HARRIS: Olswangs.

29 THE PRESIDENT: But it might go to the in-house?

30 MR. HARRIS: Yes, they are shortly to take a new in-house counsel to assess Miss Fleck, who is
31 present in court today, and in those circumstances it may be that the view will be taken that
32 there is no need for an external solicitor.

1 THE PRESIDENT: Your position, Mr. Harris, on behalf of all your clients, is that your
2 instructions are that you are not seeking the in-house solicitors to be part of the initial
3 confidentiality ring?

4 MR. HARRIS: Correct, and then we will take a view. When the external lawyers have seen it,
5 they will take a view as to whether or not there would ever be a need for the in-house
6 people to see it, and it may be that there is not, as Miss Davies explained, in which case the
7 issue dies. In the event that a different view is taken ----

8 THE PRESIDENT: You would apply.

9 MR. HARRIS: And I would have to no doubt have some good reasons and probably some good
10 undertakings.

11 THE PRESIDENT: Thank you. Is that what you wanted to say?

12 MR. HARRIS: Yes.

13 THE PRESIDENT: Miss Demetriou, are you instructed by external solicitors?

14 MISS DEMETRIOU: By DLA Piper, external solicitors, yes, so there is no issue about an in-
15 house counsel in our case.

16 THE PRESIDENT: Does anyone else wants to say anything before Mr. Anderson replies in the
17 light of Mr. Harris's position, which I have to say I had not appreciated. I thought we were
18 only dealing with BT on that front. His position is slightly different in that, as I understand
19 it, Mr. Harris is not at this stage seeking for the in-house lawyers to be part of the
20 confidentiality ring, whereas BT is. Nobody is leaping up, Mr. Anderson?

21 MR. ANDERSON: First of all, Sir, on the two-tier solution, the first point we would make is that
22 evidently it is not a solution. As you heard from Mr. Hoskins, he would not consider that
23 satisfactory, he would want an undertaking as well.

24 The second thing we would say about it is that we would counsel very great caution where
25 there is any suggestion of two-tiers of confidential information, simply because as soon as
26 the idea is floated other people are going to see the opportunity and suggest that their
27 "crown jewels" should also be within the ring. Indeed, one heard the first indication of that
28 just now from Mr. Harris. No doubt many parties before this Tribunal, many cases,
29 including this one, disclose information that they consider absolutely crucial, even crucial to
30 their future existence. One has only got to think back to the interim relief proceedings and
31 some of the evidence that you heard, Sir, in those proceedings, to understand the point that
32 I am making.

33 The reason we object so strongly to the two-tier solution is that it is very difficult to see how
34 it could work from BT's point of view. It would place a burden on counsel, very different

1 from external solicitors, which they are not equipped to fulfil, who are not in a position to
2 take instructions from our lay client, not in a position to instruct experts. To put that
3 submission in context, of course Miss Davies seized on what you said, as you would expect
4 her to do, but do not forget that even the FAPL that advanced these “crown jewels” in the
5 first place came here very reasonably with a fall-back position which is all agreed, save as
6 to three or four words in square brackets. In our submission, that is the way to go.

7 The most important thing of all about the two-tier solution is that if something special is to
8 be done about the sports rights information – we do not accept it is necessarily more
9 confidential than anything else – it must be fair to us. So, in a sense, we are more attracted
10 by your idea, Sir, of nobody seeing it than we are by the idea of everybody else’s solicitors
11 seeing it, but ours not, because that makes a distinction between external and in-house
12 solicitors that we do not understand, and that nothing that Miss Davies said helped us to
13 understand.

14 Sir, going on to the issue of principle on the order and the future employment point,
15 Miss Davies did address the question of why it was appropriate to treat in-house solicitors
16 differently from external solicitors, but she did it by reference to, in a sense, the additional
17 obligations that BT’s in-house solicitors are prepared to take on in order to placate the
18 Premier League. In our submission, that just does not work. It works the other way. If the
19 in-house solicitors are less well informed because they have not been considering or
20 discussing or helping to formulate strategy and all the other things that they are not allowed
21 to do under that order, then surely they present a smaller risk in the event that they go and
22 take employment with somebody else than the external solicitor who, as is perfectly normal
23 for external solicitors in this field, may have some input into discussions of this kind. They
24 are less dangerous, in that there is less risk of inadvertent disclosure because what they do
25 not know about strategy they cannot disclose, but they less dangerous even if one is positing
26 something that is inadvertent. Because they know less, their information is of less value.
27 So, to the extent there is a distinction, it works exactly in the opposite way from what was
28 suggested by the Premier League.

29 I think the final point I make, Sir, is that one has to look at this with a degree of realism.
30 Miss Davies was quite right to say that people move around quite a bit. I believe, and he
31 will correct me if I am wrong, that Mr. Liddell next to me, Virgin’s external solicitor, had a
32 previous life in which he was I think in-house at Sky. These things happen. Members of
33 commercial teams even go to commercial competitors. They do not even have professional
34 discipline. The only thing to stop them is the non-compete clause in their covenant, and that

1 is, as I say, a very restricted duration compared with what Miss Davies is looking for, and
2 that again was not a point that she addressed.

3 Sir, what we are offering is well in excess of what any party could normally expect, we say
4 more than sufficient to meet any special concerns the Premier League might have, and we
5 maintain our position.

6 THE PRESIDENT: Yes, thank you.

7 MISS DAVIES: Sir, very briefly, there was one new point raised by Mr. Anderson there to
8 suggest that there is less of a problem in relation to in-house lawyers because they have got
9 less knowledge. The fact is they will have knowledge of the key information, which is the
10 information in relation to our auctions by reason of the disclosure. It is that information that
11 we are seeking to protect. So they will not be in any better position at all – in fact, they will
12 be worse because of the ring-fencing for the reasons that I submitted earlier.

13 THE PRESIDENT: Is there anything else on those points? Mr. Henry, I did not give you an
14 opportunity to comment on what Mr. Flynn said on behalf of Sky about your application to
15 intervene. It may be there is nothing else you want to add on that point.

16 MR. HENRY: Just one comment actually: the Rules, as far as I am aware of them, say that there
17 should be a sufficient interest in the outcome for a party to be considered to be an
18 intervener. It appears to me that the Ofcom pay TV review statement was, in fact, designed
19 to protect the consumers' right to choose which pay TV platform they purchased services
20 from. I am a consumer, therefore I do not have an interest in the outcome of this, as well as
21 my own business interest, which is that if the appeal against Ofcom is successful there may
22 well be reduced choice for both myself and all other consumers. So I believe that is the
23 sufficient interest that is required. That is all I have to say.

24 THE PRESIDENT: Thank you very much. I think what I will do now is go and collect my
25 thoughts and think about a couple of these points. I will do that now, so we will break now
26 and I give a ruling on the intervention points and the confidentiality points before lunch. It
27 may be that we will be able to deal with the rest of it fairly swiftly because there does seem
28 to be fairly good consensus on where we go from there. Subject to anyone else wanting to
29 say anything that they have forgotten to say that might matter, I will rise. You are certainly
30 safe for 15 minutes, something like that.

31 (Short break)

32
33 (For Ruling on interventions and confidentiality see separate transcript)

1 THE PRESIDENT: That, I hope deals with most of the points. I note the time. I had hoped that
2 we might have finished everything this morning. It looks as though, with rumbling
3 tummies, we might do so by two o'clock. I am content to do that, but I think others may not
4 be. Shall we have a quick lunch and deal with the other points at two o'clock?

5
6 (For Ruling on request for permission to appeal see separate transcript)
7

8 THE PRESIDENT: Is there anyone who would find it objectionable to continue with what we
9 hope are going to be the much briefer matters straight away? Is anyone going to find that a
10 real difficulty?

11 MISS ROSE: Sir, I would strongly prefer to carry on, if we can.

12 THE PRESIDENT: I think that is the view that I have changed to as well. Shall we just go on.

13 So far as the additional points are concerned, I think we are now down to the timetabling.
14 I do not think there are any other major points of principle. If there are, they will probably
15 come out in the wash.

16 It seems there is not much between people. There is going to have to be an opportunity to
17 see whether people need to amend their pleadings, or put in further evidence – that is pretty
18 obvious. We therefore need a date for that to be done. I am inclined to set a timetable at
19 least up until the defence, possibly also any other statements of intervention that would
20 follow the defence and then take a breath and possibly have another CMC if necessary.
21 That will probably take us to October. That is where I am provisionally envisaging this
22 going. If there are any very, very dissenting voices about that general approach then I think
23 you had better speak now.

24 MR. HARRIS: Sir, if I may say, just to flag it up, we obviously have not put in our two pennies
25 worth so far as regards the timetable for our intervention since we have only just received
26 permission. For what it is worth, we do not see the timetable that has been mooted amongst
27 the principal parties for our interventions, the five governing bodies that I represent, in the
28 same way that we do. I will develop this when the appropriate moment arrives, but we say
29 that our intervention should take place after the pleadings for the principal parties have been
30 dealt with. The other parties do not see it that way, but I have a number of reasons why it
31 should happen that way for my clients in this case.

32 THE PRESIDENT: Let us just park that for the moment and see if we can get a date for either
33 amended pleadings/further evidence or notification to the Tribunal that you do not need to
34 amend or put in further evidence – one or the other.

1 MR. HOSKINS: Sir, you said you would envisage giving a timetable up until defence and
2 statements of intervention. We, very strongly, would like a trial date set. I can either
3 address that now or I can address that later.

4 THE PRESIDENT: Do not spend too long because there is going to be a problem setting it.

5 MR. HOSKINS: I will make the submissions briefly then. The reasons why we want a trial date
6 are ----

7 THE PRESIDENT: I will not be able to set it today whatever you say, because I have not got
8 details of availabilities in the period.

9 MR. HOSKINS: Can I put it this way: we would welcome it being set as soon as possible
10 because we need commercial certainty and Ofcom needs to know what it is spending its
11 next few months doing. If this is to be a four to six week trial, which it looks like, to get the
12 availability of people in the room we need as much warning as possible of when the date is
13 going to be.

14 THE PRESIDENT: I think all that is just taken as read, Mr. Hoskins. We obviously know that
15 everybody needs to know as soon as possible.

16 MR. HOSKINS: That is the point I wanted to make.

17 THE PRESIDENT: We can come back to this maybe when we have dealt with the rather more
18 nuts and bolts points, the pleadings, and so on, and then come back to what the window
19 might be. There does not seem to be much dispute that we are looking at next year for a
20 trial of four to six weeks, possibly longer. I think someone says six to eight weeks. We will
21 not presumably know exactly, if ever, or we will not even necessarily have a reasonable
22 idea of how long until we see who wants to cross-examine witnesses.

23 MR. HOSKINS: I understand that, but if we leave, for example, setting the trial date, trial
24 window, until October or November, that is going to cause a problem.

25 THE PRESIDENT: I am not envisaging leaving it until then.

26 MR. HOSKINS: That makes me more comfortable, thank you.

27 THE PRESIDENT: I would hope that we would be able to set that before the end of term, at least
28 a start point for a hearing, although we will not necessarily know how long it is likely to
29 take. I am not guaranteeing it, but I would not want people to go away in July without
30 knowing when this trial is likely to start.

31 MR. HOSKINS: That is my concern.

32 THE PRESIDENT: Does that help?

33 MR. HOSKINS: Absolutely.

1 MISS ROSE: Sir, the question is the circulation of the confidential decision and confidential
2 versions of the ----

3 THE PRESIDENT: Within the ring.

4 MISS ROSE: Yes, because people cannot sensibly work out timetables for amending their
5 pleadings until we know where we are with that. The position in relation to Ofcom is that
6 we would be in a position to serve the confidential version with the confidential material
7 marked of the Pay TV Statement by next Wednesday, 30th June. There is a caveat to that,
8 which is that we understand Herbert Smith have been suggesting that we should mark the
9 document so that the identity of the party whose confidential information each piece of
10 material is ----

11 THE PRESIDENT: I saw that. That takes a bit longer, does it?

12 MISS ROSE: That is going to take very much longer, it is going to be a lot more expensive, and
13 also in many cases will actually not be possible, because it is not as simple as saying, “X, Y
14 and Z”, and we are also, for example, talking about a confidential model. My suggestion
15 would be that we serve the material, because it is in everybody’s interests that they have it
16 as soon as possible within the ring, and that is the only way we can do it. If later there are
17 issues about them wanting more markings then they can come back to us, and they may also
18 need to make a proposal to us about paying for it because our resources are very limited.

19 THE PRESIDENT: The reason for knowing it would tend to become more important if there was
20 any suggestion or any application to show it to people outside the confidentiality ring.

21 MISS ROSE: Which there is not at the moment.

22 THE PRESIDENT: At the moment we are not in that position, are we?

23 MISS ROSE: No, Sir. I would suggest that is, as it were, the start date, 30th June.

24 THE PRESIDENT: That seems, if I may say so, perfectly sensible, and let us pencil that in. The
25 question then is that the appellants have got to look at this and decide whether they need to
26 amend. I think various dates have been put forward by various people and then all seem to
27 land up in August.

28 MISS DAVIES: Sir, if I may raise this, as one of the appellants who has not put a date in: we
29 would respectfully seek slightly longer than that an extra week until 7th September. The
30 three appellants, apart from Sky, are in a different position in relation to this in the sense
31 that we have seen very little of the modelling work that underpins both the decision as to the
32 level of the WMO price and the impact assessment model. We have seen none of the WMO
33 model at all; and we have only seen an extremely heavily redacted version of the impact
34 assessment model. That is despite having been asking for this material since 6th April.

1 With the best will in the world, because of the August vacation period that is coming up, we
2 have difficulties in relation to experts who obviously have holidays. We have got two
3 different experts who need to look at different parts of this material and, who it is already
4 plain, may well have to do a considerable amount of work, obviously, firstly, just digesting
5 the additional material but then either supplementing or amending the reports that they have
6 already put in. A date that is still within the August period causes us some difficulties.
7 Virgin have suggested 31st August and we respectfully ask for 7th September to complete
8 that exercise. If we can do it quicker, we will, but if we get the material on 30th June,
9 having personally spoken to both my experts, they think it is going to be a week, ten days,
10 before they can actually have even digested it and come back to us, and we are then already
11 towards the end of the July and into the August period. That is why we wrote within five or
12 six days of the decision being published saying, "Please can we have this material". We
13 supported Ofcom's application for an early confidentiality ring, that has not happened, there
14 are reasons for that, but we are where we are now, and the one thing that all the parties in
15 this room would not welcome would be everything being done in a terrible rush and not
16 done properly, and points being raised that should not have been raised or later applications
17 coming in to amend because we did not have the time to deal with it properly because of the
18 intervening August period.

19 I note that Miss Rose, in her submission – we accept this – says Ofcom have got difficulties
20 in August too. All parties in this room will have those difficulties, so we seek
21 7th September.

22 THE PRESIDENT: Anyone else?

23 MR. ANDERSON: Sir, we would entirely support on behalf of BT what Miss Davies has said for
24 the Premier League for the same reasons. I do not think there is any need for me to try and
25 gloss them.

26 MR. FLYNN: Sir, could I just say, presumably it will not be in the Tribunal's interests to set
27 different dates for that. You will be setting one date for the revisions. In Sky's case, we
28 envisage, particularly with the difficulties which we do understand, or to some extent we
29 understand, with the confidentiality markings. This may lead to applications being made
30 for information to be released from the confidentiality so that we can put it to the clients.
31 We have signalled that in our letter to the Tribunal. In particular, that may relate to the
32 negotiations with various parties where there are significant redactions in the statement, as
33 well as those aspects of the models that Sky have not seen. There may be additional points
34 that at least need discussing between us and Ofcom that will have to take place over that

1 time before an amended or supplemental appeal and reports can be made. Sir, that is the
2 point I would make on that.

3 THE PRESIDENT: But equally you are content with a date in the range, are you, for
4 amendments?

5 MR. FLYNN: As I say, Sir, you will decide, I imagine, a single date. We put forward one in
6 August. We do appreciate that there will be greater difficulties for those parties who have
7 seen less, so I imagine a single date and I imagine a later date is probably what you will
8 arrive at.

9 THE PRESIDENT: Thank you.

10 MISS ROSE: Sir, Ofcom understands the problems that people face. I simply want you to be
11 aware of the particular difficulty that Ofcom has if we do not get the amended notices of
12 appeal by the sort of time we were originally envisaging, because this does have an impact
13 on the remainder of the timetable.

14 As you may or may not know, Sir, Ofcom has an appeal in the *PPC* case listed currently for
15 eight days, but I understand that there has been a suggestion that that time estimate should
16 be increased, starting on 20th October. It is the same Ofcom legal team dealing with that
17 case and dealing with this case. If we do not get the amended notices of appeal until
18 7th September, we are going to immy6 fall into the preparation period for that case within
19 two to three weeks of receiving the amended notices of appeal.

20 THE PRESIDENT: The only surprising bits, if any, will be the bits that are new. You have got
21 already ----

22 MISS ROSE: Yes, of course, I am not suggesting that we do not start planning to respond to the
23 notices of appeal until September, we have already started doing that. At the moment, we
24 do not know how significant the amendments will be. There may be further evidence, for
25 example.

26 THE PRESIDENT: You may need to apply for an extension, or something of that sort.

27 MISS ROSE: What I want to flag up is that if we do not get the amended notices of appeal until
28 7th September, we are going to need until November to put in our defences, because we are
29 going to effectively have ----

30 THE PRESIDENT: That is two weeks more – you have asked for 14th October, I think.

31 MISS ROSE: We asked for 15th on the basis we would get them by 20th August. My point is that
32 it cannot simply be a two week extension because of the problem that the Ofcom team faces
33 with the *PPC* appeal, which is listed in October.

34 THE PRESIDENT: Is it the same counsel team as well?

1 MISS ROSE: As a matter of fact, I am in the *PPC* appeal, though not of Ofcom. There are
2 problems with the counsel team, but more significantly there are problems with the Ofcom
3 solicitor team. The answer is, yes. Effectively it is going to take us out for most of
4 October.

5 THE PRESIDENT: Does anyone else have anything to throw into the melting pot on this?
6 Mr. Harris?

7 MR. HARRIS: Sir, very briefly, in the light of the impact that it has on statements of
8 intervention, we strongly support the suggestion that all amended notices should be
9 7th September. Indeed, if they are 7th September, the suggestion that I was going to make
10 about putting all statements of intervention at the very back of the pleading process will not
11 have to be made, because it would seem likely that if amended notices of appeal are going
12 to be in by 7th September, I think it is common ground that interveners should then have
13 several weeks in the usual course to put in their statement of interventions in support of the
14 appeals and that would take us to towards the end of September which is the very timetable
15 I was going to suggest to begin with.

16 THE PRESIDENT: So you would like 7th September?

17 MR. HOSKINS: Yes, Sir.

18 THE PRESIDENT: Right, got that. Mr. Flynn?

19 MR. FLYNN: Sir, with all sympathy to Ofcom's difficulties in its counsel team, you have to set a
20 timetable in this case which is appropriate for this case. What I think must not happen, if
21 I may respectfully put it this way, is that we get squeezed at the end. If it takes more time to
22 get the statements of intervention or the defence then the case will have to roll on. What we
23 cannot do is set an arbitrary end date now and then have everything squeezed because there
24 is a difficulty in the month of October for Ofcom.

25 THE PRESIDENT: You are worrying about the trial date now?

26 MR. FLYNN: If I was going to make one submission to you without putting dates on it, it would
27 be that I think you should be very cautious with the timetable in this case. With the number
28 of parties ----

29 THE PRESIDENT: I am being cautious, Mr. Flynn.

30 MR. FLYNN: Which is why I have not made it. I would suggest that you do not set the entire
31 timetable in stone now because delays may well push it back.

32 THE PRESIDENT: I am not going to. I was hoping just to go to the sort of close of pleadings, if
33 possible, rather than beyond it.

1 MR. FLYNN: If the defences have to come in in November then the defences have to come in in
2 November.

3 THE PRESIDENT: I would envisage there being a CMC to decide how big the case now looks in
4 terms of length and issues, and so on, once we have had the defence and probably all the
5 statements of intervention in.

6 MR. FLYNN: And possibly replies?

7 THE PRESIDENT: Possibly. I have not cleared my mind on that one, but possibly. I think one
8 could probably take a view of it after the defence. That is as far as I was proposing to get in
9 an order that emerges today.

10 MR. FLYNN: If there are difficulties which have to be accommodated, that should not be at the
11 expense of squeezing the proper timetable for submission of pleadings by the other parties.

12 THE PRESIDENT: Yes. This is a very important case and obviously people have got to have
13 time.
14 Notices of appeal, it is a fortnight window, is it not, at the moment between you, towards
15 the end of August or 7th September.
16 Statements of intervention: I just want to canvass with you who it is appropriate to go in
17 statements of intervention. It seems to me there is logic in the concept that those who
18 oppose Ofcom, if I can put it like that, should go before the defence. The trouble is that
19 they do not neatly fall into that, because there are those who support Ofcom on some points
20 and oppose them on other points. Has anyone got an automatic solution to that problem?
21 I think mainly it is Mr. Harris's and Miss Demetriou's clients who fall into that category, is
22 it not? It may be that Ofcom has a view.

23 MISS ROSE: I think in substance it is fair to say that they are opposing Ofcom. In form they
24 may be not opposing some parts of the appeal because Virgin is asking for even more of a
25 remedy than Ofcom gave. The substance of their case is to support the Premier League and
26 Sky. In my submission, the right course is that their material should go in in support of the
27 Premier League appeal and the Sky appeal before Ofcom's defence.

28 THE PRESIDENT: I am reluctant to split them up, that is the problem.

29 MISS ROSE: It is unlikely that they will have to say, I would suggest, given what they have said.
30 It seems to be really the single issue which is the effect of Ofcom's decision on the value of
31 their rights. That is a point that is most sensibly taken in relation to the Sky and Premier
32 League appeals.

1 THE PRESIDENT: I think that is right. We will see if Mr. Harris agrees. I think that is probably
2 the right approach, is it not, is for your clients and, subject to hearing from her,
3 Miss Demetriou's clients to go before the defence?

4 MR. HARRIS: Sir, we have no particular objection to that characterisation or the suggestion,
5 subject to the date. If the Tribunal is persuaded that the 7th September is appropriate, as
6 I believe is more or less common ground now, for the amended notices of appeal, or
7 thereabouts, and if, as must be the case, as in every case there is a period of several weeks
8 post ----

9 THE PRESIDENT: How long do you say you need?

10 MR. HARRIS: We ask for 28th September, and we also say, in the light of Miss Rose has been
11 saying about Ofcom's various other commitments in October and putting in the defence in
12 November, that would be entirely consistent with a timetable that gives rise to defences in
13 around November – end of October.

14 THE PRESIDENT: The appellant interveners probably will not need to put anything in, will
15 they, at this stage?

16 MR. ANDERSON: I think we would want to reserve the possibility of putting something in in
17 support of Virgin. More than that I probably cannot say, since I do not know what Virgin
18 will say once they have had the confidential material.

19 THE PRESIDENT: You and Virgin are going to be basically supporting Ofcom, are you not?

20 MR. ANDERSON: We each have our own appeals.

21 THE PRESIDENT: I appreciate that. You have got your notices of appeal obviously, but so far
22 as your interventions are concerned, you will probably be happy to go after the defence, you
23 and Virgin, will you not – see how Ofcom put it and then see if you need to add anything?

24 MR. ANDERSON: I should think we would, Sir, yes.

25 THE PRESIDENT: Is that fair?

26 MR. FLYNN: That was what was envisaged in our draft timetable, and I think that structure was
27 agreed with Ofcom. The non-appellants would put in statements of intervention before the
28 defences, and the appellants, such as they wish to put in a statement of intervention, would
29 be after the Ofcom defences.

30 THE PRESIDENT: Would that apply necessarily to you and Miss Davies's clients? As far as
31 you want to intervene ---

32 MR. FLYNN: We merely said we would put in something formal in respect of the Premier
33 League's appeal just indicating where we agree basically. That would not be re-pleading,
34 but we may well wish to say more about the Virgin and BT appeals.

1 THE PRESIDENT: After they have gone. You would put that in after the defence?
2 MR. FLYNN: After the defence, precisely.
3 THE PRESIDENT: On that basis, therefore, it works. All the appellant interveners go after the
4 defence.
5 MR. FLYNN: And non-appellants before.
6 MR. WARD: Sir, in the case of Freesat, our only role is to support Ofcom so it makes sense that
7 we go after Ofcom's defence.
8 THE PRESIDENT: Yes, I think that makes sense, Mr. Ward, thank you.
9 THE PRESIDENT: Who represents Top Up, I am sorry?
10 MR. STAIT: I do, Sir.
11 THE PRESIDENT: Where do you fit in in this scheme? Basically you would go along with
12 Virgin and BT as far as intervening is concerned, would you not? You would go after the
13 defence?
14 MR. STAIT: Yes. Our position is that we will be supporting BT and Virgin in their appeals, but
15 we will also be supporting Ofcom in relation to the appeals of Sky and the FAPL.
16 THE PRESIDENT: It may be that you should go before. Miss Rose, Top Up TV, you will
17 probably want to see what they have to say, will you not, before you put in your defence?
18 They straddle to some extent as well. They support you on some things and not on others.
19 MISS ROSE: I think it would be nice, but it is not something on which we have a violently
20 strong view.
21 THE PRESIDENT: You do not have a very strong view?
22 MISS ROSE: No.
23 THE PRESIDENT: I think, in that case, I am going to, by default, as it were, suggest that Top Up
24 TV also, with the other non-appellant interveners, goes before the defence on the date will
25 apply, along with Freesat and the sports bodies. I am sorry, I am getting mixed up.
26 MR. FLYNN: With respect, I think you are not getting mixed up. The non-appellants should go
27 before the defence, and that would include Freesat and Top Up as well as the sports body
28 because they are supporters. Then the appellants' statements of intervention go after the
29 defence.
30 MR. WARD: I think Mr. Flynn included me but that cannot be right in the case of Freesat, we go
31 after the defence to be sure we do not duplicate it.
32 MISS DAVIES: Sir, there are two categories of interventions here. There are the parties who are
33 generally supporting Ofcom, who therefore are intervening in the BT and the Virgin Media
34 appeals to support those appeals. Where they are supporting an appeal they ought to put in

1 their statement of intervention to explain why they are supporting an appeal before Ofcom
2 has to serve their defence. Then there are the parties who are intervening against Ofcom
3 who are supporting my appeal, and that is the sporting bodies. They, as you have just
4 directed, Sir, will have to put in their statements of intervention to support my appeal before
5 the defence.

6 Essentially, any intervener who wants to say something to support an appeal does it before
7 the defence. Then there is a second round, which is what we have all agreed in our
8 submissions, any intervener who wants to support Ofcom in an appeal puts in their
9 statement of intervention after the defence. They can only do it after the defence to avoid
10 duplication with Ofcom if the defence has first been served. That is why it may well be that
11 some of the interveners are going to have to put in statements of intervention at two stages.

12 THE PRESIDENT: I am trying to avoid that.

13 MISS DAVIES: I do not think it is possible, with respect.

14 THE PRESIDENT: It is possible, it is just a means to avoid it.

15 MISS DAVIES: The problem is that it will just result in duplication. Until those who are
16 resisting one side of the appeals have seen what Ofcom have said they cannot put their
17 material in to resist those appeals without potentially duplicating everything that Ofcom
18 might say. That is the difficulty.

19 THE PRESIDENT: I see that difficulty.

20 MR. STAIT: Sir, if it assists, Top Up is content to adopt that approach and put in two so that it
21 goes with those at the first stage in support of Virgin and BT and then has a second
22 statement of intervention in support of Ofcom.

23 THE PRESIDENT: I will have a think about that. When you have all gone we will draft the
24 order, but I will hear you all on those points now. Yes?

25 MR. HARRIS: Sir, if I may, I will be happy to elaborate upon why it is that we need until
26 28th September for our intervention.

27 THE PRESIDENT: Do not worry elaborating. You have asked for 28th September. Let us just
28 deal with a date for those who are going to go before. I do not think it will matter too much
29 who you are for this purpose. Is there anyone who, if required to go before the defence,
30 feels that there is something wrong 28th September? No. Right. There you are, Mr. Harris,
31 no one objects.

32 MISS ROSE: That takes us to the timing for the defence. That means that we are going to get a
33 complete set by the end of September. I am sorry, but we are going to need until the end of
34 November.

1 THE PRESIDENT: The end of November?

2 MISS ROSE: The problem is, on that basis, most of October is knocked with the *PPC* appeal.

3 THE PRESIDENT: It will not be knocked out for counsel.

4 MISS ROSE: It will, Sir, because I am also in the *PPC* appeal representing a different party. Our
5 whole legal team effectively is knocked out.

6 I realise it does not need stressing, but this is the critical document so far as Ofcom is
7 concerned. You have heard submissions from the other parties about why they all need lots
8 and lots of time after they have seen the confidential material, and so on. We are dealing
9 with four appeals. So far we have got seven expert reports just from Sky. I do not know
10 how many expert reports we will have when all of the chickens have come to roost.

11 THE PRESIDENT: You are proposing to do one consolidated defence – is that right?

12 MISS ROSE: If we can.

13 THE PRESIDENT: I hope, if you do adopt that route – and I am not going to make any direction
14 one way or the other about this – it is done, albeit in one document, with very distinct
15 divisions, as it were, wherever possible.

16 MISS ROSE: We want to do a job that is both helpful and thorough and does not unnecessarily
17 duplicate. At the moment we think the best way to do that is through a consolidated
18 document. To produce a document like that is going to take us a significant amount of time.

19 THE PRESIDENT: I will move on to the next stage unless anyone is loudly objecting.

20 MISS DAVIES: Sir, can I just put down a marker about the point about consolidated defence.
21 We are concerned about that, as we put in our observations.

22 THE PRESIDENT: Yes, I saw that.

23 MISS DAVIES: The reality is that, although in particular, for example, my appeal and
24 Mr. Flynn’s appeal aim at the same target, we do raise different detailed grounds. What we
25 really want to avoid is essentially a spat about whether it has been dealt with properly or
26 not, which we do understand is arising in construction. We welcome what you said about
27 that, Sir, and we just want to put down a marker that it really is important that the different
28 points are all dealt with.

29 THE PRESIDENT: Thank you, and I am sure Miss Rose and her team realise that we will need
30 to know what the answers are to particular points, even if it is in a consolidated defence.
31 I am sure that is understood.

32 Let us go on to the time that the other interveners, whoever they may be, need to go
33 afterwards. They will presumably, having done whatever work they need to do, will then
34 need to cross-check when they see the defence as to how much they can strike out and just

1 cross-refer to. That is not a hugely lengthy exercise. Who is the best representative of this?
2 Mr. Ward?

3 MR. WARD: Sir, I am certainly in that category. I would ask for a further three weeks then
4 which would take us to something like the 21st December.

5 THE PRESIDENT: You would like until Christmas?

6 MR. WARD: Yes. It would not make a lot of difference in reality if it were any longer.

7 THE PRESIDENT: Probably not. It does not mean we cannot have a CMC, I imagine.

8 MR. WARD: No.

9 THE PRESIDENT: Which I think one will want to have at some point along the lines. Anyone
10 want to comment?

11 MR. HOSKINS: Three weeks, please.

12 THE PRESIDENT: The only other outstanding issue, I think, would be a further CMC, which
13 I imagine probably will be necessary to refine things. I do not think I want to get much
14 further than this today. Unless anyone feels strongly about it, I think what we will try and
15 do is produce an order taking us up to then.

16 I am conscious of Mr. Hoskins' point, and I am sure everyone else feels the same, so the
17 sooner we have a window the better. We will not need another CMC to deal with that. It
18 will be something that we will notify people of. We will take soundings on availability
19 first, and so on. We do not guarantee to accommodate them, but we will take some
20 soundings first. Perhaps it would be as well if people sent us availability of witnesses and
21 counsel really I think in 2011. January probably is not necessary, nor February, so shall we
22 say from March to the long vacation. Perhaps each party could do that in the next week or
23 two.

24 What we will do is send round a draft order. You can probably imagine what it will look
25 like from the discussions we have just had as far as dates are concerned.

26 MR. HOSKINS: There is just one line that has to go in, which I think is agreed – famous last
27 word – which is the service of the non-confidential, i.e. redacted versions of the pleadings
28 on appellants and interveners, which I think everyone is agreed should be 2nd July.

29 THE PRESIDENT: The confidential we are going to put on 30th June.

30 MR. HOSKINS: That is right.

31 THE PRESIDENT: Who has got to do that apart from Ofcom? There are the notices of appeal.

32 MR. HOSKINS: It is our own pleadings.

33 THE PRESIDENT: It is the pleadings and the decision, is it not?

34 MR. HOSKINS: Yes, but, as I understand it, that is agreed, 2nd July.

1 THE PRESIDENT: Is it 3rd July for the non-confidential?
2 MR. HOSKINS: 2nd July, which is a Friday.
3 THE PRESIDENT: Does that pose problems for anyone?
4 MISS ROSE: Just to say, Ofcom has already published the non-confidential version of the
5 decision. That is already available.
6 THE PRESIDENT: It may be you do not have to do anything. Does anybody require anything of
7 Ofcom? I doubt it.
8 MISS ROSE: Can I just give you the date in November for the defence, 30th November is, in fact,
9 a Tuesday.
10 THE PRESIDENT: Thank you. We will send a draft order. Could you let us have the version of
11 the confidentiality ring order and undertakings as order, electronically, if possible, please.
12 If that could come today that would be very helpful.
13 Thank you all very much.
14 _____