

1 MR. FLYNN: I cannot pretend to have measured it, Sir, and I am to an extent in your hands, but I
2 am certainly not intending to take a huge amount of time on this. Our basis is we have put
3 in an application, we have put in evidence, we have indeed put in evidence this morning
4 which I need to raise with you but I am obviously not going to go through all of that. The
5 aim will really be to try to outline our case and respond to some of the points that have been
6 put against us.

7 THE PRESIDENT: Well let us see how we get on.

8 MR. FLYNN: See how we get on, I would say I would hope to be not much more than an hour
9 but that may be wrong and may depend on you, Sir.

10 THE PRESIDENT: Just so you know I certainly have not read everything, I have read the
11 skeletons, I have read all witness statements, skim read your second one that came in this
12 morning from Mr. Darcey and I have delved into a bit Ofcom's statement, but I cannot
13 pretend that I have read it all.

14 MR. FLYNN: You are probably doing better than most of us then. It is a big document. It is
15 clearly well recognised that it is not ideal for people to receive a further witness statement
16 just before the hearing at 9-ish or whenever it was.

17 THE PRESIDENT: Are there any sustained objections to it? Nothing is ideal in this world, but it
18 does seem to me that it is pretty much par for the course.

19 MR. FLYNN: I just want to say it may be par for the course, but it is also actually all that was
20 humanly possible given that Mr. Darcey actually cleared his diary for yesterday morning,
21 but was not able to look at – for reasons we do not need to go into – the version of the
22 Ofcom evidence that he could see that was not available until the end of the morning at
23 which point he had a meeting with the Chief Executive of Ofcom on something else, and
24 other things in the afternoon, so he read it later on and the statement has been worked on
25 overnight. He has read it and approved it this morning so that is where we are. I do not
26 know if there are any sustained objections. Mr. Beard may wish to say something.

27 MR. BEARD: It is not so much a sustained objection in the sense that we are not opposing the
28 admission of this evidence but we are disappointed with the way it has been dealt with. A
29 letter was copied to the CAT this morning. My solicitor specifically communicated with
30 Herbert Smith last night asking whether or not a witness statement was in preparation.
31 What we have just heard from Mr. Flynn was that indeed a witness statement was in
32 preparation, there were reasons for its delay and one accepts that in the course of an
33 accelerated hearing such as this one there are going to be difficulties, but it is simply
34 unacceptable to have this sort of obfuscation in the run up to a hearing of this sort. It was

1 plainly open to Herbert Smith to indicate that such a statement was in preparation, we
2 should anticipate it and there is no excuse for that sort of statement being provided that
3 instructions needed to be taken.

4 THE PRESIDENT: Well you have made that point now, I saw the correspondence.

5 MR. FLYNN: This then is Sky's application for interim suspension of the Wholesale Must-Offer
6 obligation which is imposed by the Ofcom decision which was issued on 31st March. The
7 purpose of this application, like any interim application should be, is to preserve the
8 integrity of the appeal process in circumstances where we say that compliance in the period
9 between now and the determination of our appeal will lead to effects on Sky which are
10 serious and irreversible, and for which no compensation will be available. I observe that the
11 nature of the appeal is a full merits appeal, it is not a judicial review. The circumstances of
12 the decision are that, of course, Sky, unlike many applicants before this jurisdiction has not
13 been found to be in breach of any competition law prohibition. The decision is, we would
14 say, on any view a far reaching and novel exercise of powers that have been little used and
15 certainly have not been the subject of detailed consideration in this Tribunal or judicially
16 and that the effect of the decision is to strike at the heart of Sky's ability to dispose of its
17 assets and its intellectual property to whom, and at prices, that it sees fit, subject of course
18 to its obligations under the law, including the competition law.

19 Ofcom is telling the Tribunal in its skeleton that the Tribunal is at a significant disadvantage
20 as compared with Ofcom to determine this application. They are saying that Ofcom is the
21 expert body, it spent over three years on this investigation and basically that it knows best,
22 and that you should operate a presumption against the granting of interim relief. We say
23 that this is an extraordinary starting point. Of course, Ofcom say - and no doubt it is true -
24 that they reached their decision after close and careful consideration of all the relevant
25 matters. Of course, they say that implementation of it is in the public interest. Every
26 authority will say that, and they should say that when coming to this learned Tribunal. It
27 would be astonishing if they did not. But, Ofcom seems not to recognise that however
28 careful their conclusion is, however thorough their inquiry it is the role of the Tribunal to
29 scrutinise that output on an appeal. The purpose of this interim measures application is to
30 enable you to do so. Indeed, Ofcom goes on to suggest that the appeal process in this case
31 should be abridged - in other words, not only should Sky be denied interim relief, but it
32 should have its opportunity to put its appeal, its full case to the Tribunal, limited. They say
33 that if you grant interim relief we will drag it out; we will not have any incentive to pursue
34 an expeditious appeal. That really is not open to them in my submission. It is a slur on Sky

1 to start with, and the Tribunal would not let us behave in that way. In a sense, all
2 proceedings before this Tribunal are expedited, with very ambitious timetables compared
3 with the High Court. However, in a case like this abridged timetables, in our submission,
4 are simply not a realistic alternative to interim relief. It is a very substantial decision. It has
5 taken years of effort.

6 There are going to be at least two appeals - possibly a third - as the witness evidence
7 suggests. In other words, there may be going possibly in the opposite direction. A mere
8 glance at the auditorium will suggest, Sir, that a number of people will be interested in those
9 proceedings - interveners on both sides probably, or on all sides. The hearing itself is likely
10 to take a certain amount of time. Nobody is in a position to give a time estimate, but this is
11 a case where there will inevitably be factual and expert evidence put in by a number of
12 parties and interveners. Our estimate that this could take nine months (which we put in our
13 documents) is, we would say, firstly quite demanding, given that sort of line-up and the
14 nature of those appeals, and one with which at least Virgin, amongst the interveners, seems
15 to agree. We say in that period the serious effect that Sky has set out in its evidence would
16 be manifest.

17 Ofcom, in my respectful submission, seems to have no real recognition of the seriousness of
18 the step -- the enormity, I would say, of the step that it has taken in this decision when you
19 bear in mind that Sky has never had any kind of legal or natural monopoly, has built a
20 business from scratch, which is widely recognised as a flagship success story for private
21 enterprise, at considerable risk, with considerable investment and facing very serious
22 competition from established and well-resourced competitors. Now it is proposed that those
23 assets should be taken under regulation. It is the opposite way round. Instead of regulation
24 being a transition to the market, this is the market being brought in under regulation. This
25 seems too indefinite, because according to the Statement Ofcom does not expect the
26 wholesale must offer to affect Sky's market power. In our submission it is appropriate
27 before such a draconian step is made irreversible that Sky should be able to put its case
28 before this Tribunal. It is not an appropriate case to equate, as the interveners do in effect
29 do, with a case where the Authority has found the company to be in breach of competition
30 law. That is the way the interveners make it sound - as if it is the most natural thing. But,
31 of course, none of them has actually sought to make a case of breach of competition law,
32 which they could do even now, if they so felt. What they asked Ofcom to do at the
33 beginning of this lengthy process was to make a market reference to the Competition

1 Commission, which Ofcom is now, in a rather late flip-flop in the process, inclined to adopt
2 for the movies channels.

3 Sir, in the case of competition law breaches, as our application shows, the general practice
4 in this Tribunal has been to grant interim suspension on appropriate terms even in those
5 cases where, again, contrary I think to what could be described as a general practice the
6 relevant Authority has not consented to it. We say that in those circumstances there would
7 have to be some exceptionally compelling reason to depart from that practice.

8 Again, we have set out our view on the test that the Tribunal should be applying in our
9 application - the meaning of Rule 61. Perhaps I can make some observations about that?
10 Would it help to look at it?

11 THE PRESIDENT: I might glance at it while you are making your observations.

12 MR. FLYNN: I am not going to read things out that you do not want me to read out.

13 THE PRESIDENT: Do not do anything differently.

14 MR. FLYNN: These are the rules. A domestic statutory instrument. One construes the rules as
15 they are written. So, these are domestic rules. In our submission, as we have said, the
16 correct approach is the one which you adopted in the *Morrison's* case, which relies
17 effectively on the domestic jurisprudence. The approach that the European Union
18 institutions, whether the Commission or the General Court, as it now is, to the grant of
19 interim relief is certainly not in any way binding on you. In our submission it is of limited
20 relevance to an application in this statutory context. We say that the way the issues are
21 joined three particular issues arise as to the test which you are to apply. Do we have to
22 show serious and irreparable harm? In that context, is financial loss sufficient or relevant?
23 Does the applicant's very survival or viability have to be in question? As to those we say it
24 is plain on the face of the rule, if you look between sub-paragraphs (1), (2), and (3) the rule
25 does not say that anyone has to prove serious and irreparable harm in making an application
26 for suspension in whole or part of the effect of any decision which is the subject matter of
27 proceedings before you. Subparagraph 2 is expressly said to be without prejudice to
28 generality of the foregoing, and that a circumstance in which you may give directions as
29 you consider appropriate are those for preventing serious and irreparable damage.
30 We say in any event that the damage that is outlined in our evidence is both serious and
31 irreparable. In relation to the question of whether financial loss is to be taken into account
32 for an application for interim relief, I think what is said against is that the Tribunal in *Napp*
33 said that it was not, and I am now going to turn to the authorities bundle if I may. (After a

1 pause): Sir, I have just been told, contrary to my understanding, while I had given a couple
2 of extra authorities to my learned friends that they have not been handed up to you.

3 THE PRESIDENT: I have *Napp* in a bundle.

4 MR. FLYNN: Yes, you have *Napp*, I was also going to refer to the order in *IMS Health*, that I
5 would like to hand up if I may. (Same handed) Mr. Beard is observing that there are extra
6 tabs at the back of the authorities bundle should you wish to use those, Sir. In which case I
7 suppose *IMS* could be 18, 19 the extract from **Kerse and Khan** and 20 *RTE*. The passage
8 in *Napp* that is referred to is the *Napp* that is in tab 12 in my bundle for the proposition
9 about serious and irreparable damage and that is para. 88 et seq.

10 THE PRESIDENT: Tab 12 is *Genzyme*.

11 MR. FLYNN: I think I am misleading the Tribunal, I think we can do it with *Genzyme*. It starts
12 at para. 88.

13 THE PRESIDENT: “Is serious and irreparable damage shown?”

14 MR. FLYNN: Is it shown and there you will see that the President was relying on the *IMS Health*
15 decision. In para. 89 the President says: “Genzyme’s loss is, first of all, financial.” “the
16 loss of revenue”, and so forth, and then he refers to *IMS Health* saying that:

17 “President Vesterdorf considered that the possibility of an undertaking being
18 unable to recover financial losses is not generally sufficient in Community law to
19 constitute serious and irreparable damage unless the survival of the undertaking is
20 threatened.”

21 And he refers to *IMS Health* which we have just put in at tab 18, at paras. 120 and 121. Our
22 quick point on that, Sir, if you would not mind just turning up those paragraphs on *IMS*
23 *Health* which is in tab 18 and it is on p.20 of 26 in the top right in the version I have. The
24 President refers to paras. 120 and 121, our quick point on that is that if you look at para. 119
25 you will see what President Vesterdorf was understanding by the rationale for the rule that
26 the undertaking’s viability had to be threatened, because what he says is at para. 119:

27 “Nevertheless, it has consistently been held that damage of a purely financial
28 nature cannot, save in exceptional circumstances, be regarded as irreparable, or
29 even as being reparable only with difficulty, if it can ultimately be the subject of
30 financial compensation ... This case law is based on the premiss that damage of a
31 financial nature is not eliminated by the implementation of the judgment in the
32 main proceedings constitutes an economic loss which may be made good by
33 means of redress provided for in the Treaty.”

1 And he goes on to consider whether that is possible in the present case. So the underlying
2 reason for saying that on an interim basis financial loss was not going to be taken into
3 account is premised on redress being available, and I do not think there is anyone in the
4 courtroom who is suggesting that any harm suffered by Sky, if the Ofcom decision were to
5 be struck down would be compensable in damage form from anyone here.

6 MR. HOSKINS: Can you just look at para. 121 before we leave it? Thank you.

7 THE PRESIDENT: Yes.

8 MR. FLYNN: (After a pause): Sir, that still leaves our point, I think, that the underlying
9 rationale is that it should be compensable. We do say that the losses will be serious. We
10 are obviously not saying, just to be quite clear, plainly that Sky's survival is in question in
11 these proceedings. In any event, and as the Tribunal has recognised, going back to
12 *Genzyme*, relying on *IMS Health*, is that serious and irreparable harm will also be made out
13 if the structure of competition is affected in a way which would be difficult, if not
14 impossible, to reverse. That is the passage from paras. 90 to 93 of *Genzyme* on which we
15 relied in our application. I probably do not need to read those out, but, again, to the extent
16 that the EU precedent is available, is relevant, then that also comes from *IMS*, carrying on
17 really from where we left off.

18 THE PRESIDENT: This is para. 92, is it?

19 MR. FLYNN: That is right. The reference in *Genzyme*. The passage from *IMS* to read - and I
20 will not read it out now, is from where we were to something like para. 132. That is clearly
21 a case where what was in issue was a decision which was, in effect, a compulsory license
22 which we say is an analogy here.

23 THE PRESIDENT: Shall I just have a quick glance at para. 130, which I think is the one relied
24 upon?

25 MR. FLYNN: I think maybe you should read from paras. 123 to 132. (Pause whilst read): Sir, it
26 is essentially that passage which you have just read and similar words in the *Magill* case
27 (the *RTE* case) which you have just tucked into Tab 20, paras. 14 to 19 of that. I do not
28 think we need go to it. It is essentially the same point. That is, if you like, the Euro analogy
29 on which the President was relying in the *Genzyme* case at paras. 90 to 93, which again I
30 will not read out. Your Lordship may wish to have a look at that now or later. Essentially
31 (at Tab 12, internal p.30, para. 91) the President is saying that the implementation of the
32 decision prior to the hearing of the main appeal would not merely involve *Genzyme* in
33 financial loss, but would require a major change in its business operation which he then

1 considers, noting that the NHS and its constituent parts would be likely to resist any
2 reversion to the previous position irrespective of the outcome of the appeal.

3 “It seems to me that I cannot exclude the risk that Genzyme might find itself in
4 practice unable to re-establish the previous arrangements, even if it were to win
5 the appeal.

6 92. In addition, in *IMS Health* the President of the Court of First Instance took
7 into account the fact that the implementation of the contested decision would
8 restrict the applicant’s freedom to define its business policy”.

9 He takes into account the specific facts of that case. That is a notion to which we point
10 here. He says,

11 “Taking all those matters into consideration, notably possible difficulties in re-
12 establishing the previous position even if the appeal is successful, in my view
13 Genzyme has further surmounted the hurdle ----”

14 THE PRESIDENT: The President seems to have thought that, as it were, the power of suspension
15 was dependent upon serious and irreparable damage, notably,

16 “Taking all these matters into consideration, and notably possible difficulties in re-
17 establishing the previous position even if the appeal is successful, in my view
18 Genzyme has further surmounted the hurdle of ‘serious and irreparable damage’
19 so as to give this Tribunal jurisdiction to suspend the Directions”.

20 MR. FLYNN: He did, Sir, and he did in *Napp* as well.

21 THE PRESIDENT: He was dealing with a different rule. I think that was the 2000 rule.

22 MR. FLYNN: I will be corrected, but I think it is simply the predecessor rule which, as far as I
23 am aware is not different in any relevant particular. We say, as I have said, that we are not
24 actually bound by European precedent into how the rule should be interpreted. As I have
25 said, on the face of the rule you can make an application under sub-paragraph (1) which has
26 to be considered according to the criteria of sub-paragraph (3). Mr. Beard has pointed out
27 that the old rule is set out at para. 49 of *Genzyme*.

28 THE PRESIDENT: You argue that you would suffer serious and irreparable damage.

29 MR. FLYNN: We say that even if you are bound to follow that approach and you are bound by
30 the European authorities as to what serious and irreparable harm actually means, neither of
31 which we accept, then our evidence is sufficient to meet that pressure. We remind the
32 Tribunal also of its oft-stated position - should I really need to rely on this - that it retains
33 sufficient flexibility to do justice in individual cases. We say that the European authorities

1 are not determinative, but even if that is the test, our evidence is sufficient to meet it. I will
2 go over that a bit.

3 We say that what you have to look at are the matters that are set out in Rule 61(3) with an
4 additional requirement for an arguable case, so you have to look for that, you have to look
5 for urgency, you have to consider the effect on Sky if interim relief is not granted, and the
6 effect on competition if it is granted, bearing in mind in particular the undertakings that Sky
7 has offered. I will flag up now that although this may have to be addressed in confidential
8 session, that having seen some of the concerns raised, shall I say, I may be able to explain
9 or amplify those undertakings not to be done in public immediately. I just flag that up for
10 handling.

11 In relation to an arguable case the respondent disclaims any intention to argue that we do
12 not have an arguable case, obviously some disobliging things are said about what has been
13 put forward in the application and also by BT, but let me say very briefly on the case,
14 firstly, as you will have noticed, Sir, the decision is extremely long and complex and it is
15 different in material respects from the previous, as it were, statement of intention in the
16 Ofcom's third consultation document. Because the decision issued on 31st March came into
17 force immediately, Sky was obliged to pursue its interim relief application immediately, in
18 effect. It is not feasible in this timescale to draft elaborate grounds of appeal not least as
19 much will depend on evidence of experts as well as factual witnesses and it is not, as really
20 I think anyone who is engaged in the process will appreciate, it is not simply a question of
21 recycling our previous submissions. It is going to have to be a new exercise, it is not
22 possible to serve a draft notice of appeal in this timescale, and I do not think anyone is
23 really suggesting that that is necessary or appropriate. But that is not to say that Sky's
24 challenge is in any way half hearted or a weak one. Sky firmly believes that the decision is
25 legally flawed, and s.316 is not to be used by Regulators simply to dream up a better future
26 for us and impose its own vision on the market by reference to an unexplained view of what
27 constitutes fair and effective competition, and we say in particular where the concerns that it
28 expresses are essentially based on conduct, to wit ordinary competition law and deals and is
29 familiar with applying, such as for example refusal to supply or margin squeeze, or
30 compulsory licensing, when it comes to remedies, that Ofcom should stick closely to the
31 principles of competition law be informed by them.

32 THE PRESIDENT: Just pause for one second – I do not want to take much time up with this –
33 but there has to be some content in s.316 above and beyond somebody complying with the
34 competition rules, the *ex post* competition rules.

1 MR. FLYNN: We say this is a tricky argument that we have made at some length in the previous
2 consultation document and to which we say Ofcom has effectively not answered. Indeed,
3 when I opened, or started to read my copy of the statement, I thought something had fallen
4 out in the relevant chapter, because the discussion of the test is so brief and it effectively
5 says it is what the section says, but in essence we say that when the concerns which the
6 Regulator is expressing are matters to which competition law would apply, such as refusal
7 to supply, then the disciplines and processes of *ex post* competition law should be brought
8 to bear. We do not say this section only deals with breaches, or indeed prospective breaches,
9 it is not only – but may be principally – to stop prospective breaches of competition to
10 prevent situations arising which will lead to them, but basically we say when you are in
11 refusal to supply territory, or margin squeeze territory, you have to have a good reason for
12 doing something very different from what competition law would teach you, that is broadly
13 it.

14 Secondly, on Sky's incentives, the entire basis really of Ofcom's case, and the interveners'
15 position is based on a refusal to supply, withholding a wholesale supply of Sky's Premium
16 Channels, Premium Sports Channels as it is now, core sports channels. Ofcom accepts that
17 Sky is subject to an incentive to maximise distribution, in other words to make its channels
18 available, but what they say is that Sky has a strategic incentive, or is acting on a strategic
19 incentive not to supply to weak and other platforms and limit their "appetite" if I can put it
20 that way, to bid for content. We firmly contest that view of the world, and that will be a
21 significant part of the appeal. They say that we are acting on that incentive by not entering
22 into wholesale deals. In other words, what they are saying is that we have had opportunities
23 for profitable dealings, that we have turned down, walked away from and again Sky entirely
24 contests that view of events. To do that would require a detailed history of negotiations that
25 have been carried out and an explanation of those, and that will be a significant part of the
26 appeal. The interveners here today are seeking to litigate that point now.

27 THE PRESIDENT: This is a separate point from your 'in principle' point about the role of s.316?

28 MR. FLYNN: It is, it is saying what has led them to think that their powers are necessary, it is
29 this context in which they say Sky is acting on an incentive not to supply. We contest the
30 entire premise of their basis for axing.

31 We do say these interim relief proceedings cannot be the appropriate forum for resolving
32 differences of view on negotiating history.

1 THE PRESIDENT: You have got to get over the hurdle, however you describe the hurdle, of an
2 arguable case, or whatever the other way it is put in Euro terms -- not manifestly unfounded
3 or ----

4 MR. FLYNN: -- or ungrounded.

5 THE PRESIDENT: As I read the skeleton arguments no-one suggests that there should be a big
6 dispute about that in the context of this.

7 MR. FLYNN: I think that is right.

8 THE PRESIDENT: Weaknesses are pointed to.

9 MR. FLYNN: Alleged weaknesses are pointed to, but only ----

10 THE PRESIDENT: If anyone says -unless I have misunderstood - that you get over the hurdle,
11 although you do not get over it by very much is probably the way ----

12 MR. FLYNN: I think that is what they are saying. I am explaining two things: one is that in a
13 sense it is early days for developing the full scope of our appeal because it is a new job and
14 will require substantial evidence. I am also saying that the fact that it is short or indicative,
15 particularly in fact when it is not being contested by the respondent, does not allow them to
16 go on to say that, anyway, Sky's case is weak, or to draw conclusions from that. BT,
17 likewise, says it is noticeable that Sky does not say that, "Because the case is so strong our
18 application is overwhelming". We are not in a position to lay before the Tribunal a detailed
19 account of the appeal, but it is not appropriate for them to draw that conclusion. Sky has
20 every intention of bringing before the Tribunal a full and thorough and, it will trust, a
21 convincing appeal. There are major issues which will be engaged and joined and some of
22 those are what have been put in front of you now. We say at the very least in relation to
23 negotiating incentives, the evidence of Mr. Darcey will show that we have an arguable case
24 there at the very least.

25 I am not doing especially well on timing, but I do not need to press that point further unless
26 maybe by way of reply. On arguable case we say that it is not contested; it is there. It is not
27 a high standard. There are good reasons why we cannot develop a full case for you now,
28 with experts being instructed, and so forth.

29 In relation then to the remaining conditions, which are urgency and the respective harms --
30 Urgency I think we can deal with fairly shortly. We are obliged under the terms of the
31 Wholesale Must-Offer to put out a reference offer by 14th May. I think in theory anyone
32 who chose to accept that reference offer would then be entitled to take supply and, as soon
33 as may be after that, obviously some people may wish to negotiate around the reference
34 offer. But, nevertheless, in principle, Sky could be supplying in a very short space of time.

1 As we said, the appeal period, even on a fairly challenging timetable looks as though it
2 could take up to nine months to be determined.

3 THE PRESIDENT: So, urgency, in the sense, merges with the effects of the damage.

4 MR. FLYNN: Yes. It is not as if, as might have been done, there was a transitional period of any
5 length for Sky to discuss with Ofcom the terms on which supply were to be made or to have
6 an opportunity to go back on the license conditions. There are all sorts of aspects on clarity
7 which are being pursued in parallel discussions with Ofcom. However, in principle, it is
8 14th May. Sky is intended to have to wholesale to the world from 14th May.

9 In relation to the harm to Sky if relief is not given -- Firstly, sir, it is clear that we cannot go
10 through everything that has been -- Firstly I am not going to take you through everything
11 that Mr. Darcey said in his first witness statement. We would be here at least all day if we
12 went through the response to what has been said. Mr. Darcey, in the time available, has
13 responded, as he says, to some of the principal points.

14 Can I just make a few points? We say, as a matter of principle, that the Tribunal cannot, in
15 these proceedings, rely on confidential material, confidential evidence that has been put in
16 to which Sky itself is not able to respond. That, in our submission, is fundamentally unfair
17 because we are not able to take instructions on important aspects of the evidence. I just
18 make that point.

19 THE PRESIDENT: You might want to indicate which of those aspects fall into that category.

20 MR. FLYNN: I might at a later stage possibly.

21 THE PRESIDENT: I think I will need to know that at some point.

22 MISS ROSE: Sir, can I just raise a point about this? This is the first time we have had any
23 indication that Sky intended to take that point. Initially Herbert Smith objected to the
24 establishment of a confidentiality ring for the purposes of this hearing, but then, after
25 debate, they consented.

26 THE PRESIDENT: We have got one now.

27 MISS ROSE: We have got one now.

28 THE PRESIDENT: I think it very much will depend upon which points it is said should not go
29 into play before we need to get too concerned.

30 MISS ROSE: Yes. I just wanted to put on the record Ofcom's concern, that point being raised
31 for the first time mid-way through the hearing.

32 MR. FLYNN: I think I can say immediately, and without saying anything I should not, that that
33 is not going to be a concern for Miss Rose. That is not material which has been put in by
34 Ofcom.

1 THE PRESIDENT: It might not be put in by Ofcom, but I suppose Miss Rose might still be
2 concerned about it.

3 MISS ROSE: Sir, you have seen from our skeleton argument that we do indeed rely on material
4 that has been put in by the interveners ----

5 THE PRESIDENT: Yes, I have seen that.

6 MISS ROSE: -- as an indication of the adverse effect of the relief that Sky is seeking on third
7 parties, and consequently on competition and on the benefits to consumers.

8 THE PRESIDENT: You rely on that.

9 MISS ROSE: We absolutely rely on it.

10 MR. FLYNN: It will be best to have this discussion, if we have it, at a later stage.

11 THE PRESIDENT: In relation to concrete matters.

12 MR. FLYNN: Some headline points on the harm to Sky. As has been pointed out in the evidence
13 by Mr. Darcey - and it is a major plank of Sky's submissions throughout this - it has a
14 preference for what is called 'self-retailing' - in other words, that it is Sky who sells (if I can
15 put it that way) the channels to the viewer, whichever platform it is on. That preference, we
16 say, is legitimate. We do not think it is contested as such. We say in terms of the business
17 model that it is legitimate for Sky to explore the possibility for self-retail with anyone who
18 approaches Sky for wholesale supply. This might apply in the present context. A good
19 example of that are the open internet retailers. Sky will want the freedom to determine its
20 distribution strategy for this mode of delivery. That is an example, we say, where the
21 wholesale must offer will operate in a context that is quite different from DTT, and has the
22 potential for severe interference with Sky's choice of business model. Indeed, the very
23 existence of a wholesale must offer obligation severely compromises Sky's ability to
24 bargain for such deals. That is an example of the sort of thing that we say the President had
25 in mind in *Genzyme* on changing effect on business strategy and business models.
26 In respect of wholesale, I think it is being said that Sky does not preclude - and indeed
27 expresses willingness to - wholesale. So, to be required to wholesale is hardly a major
28 change for Sky.

29 We say on that that Ofcom cannot just brush aside the objections that Sky has to that -
30 notably the undertakings that Sky was prepared to offer a couple of years ago which are
31 referred to in Mr. Darcey's witness statement (paras. 18 and following). It is in a very
32 different context. I do not propose to read that out. But, I think that is a particularly
33 important passage in Mr. Darcey's witness statement. Paragraphs 18 to 31 deal with those
34 matters. In particular, being prepared to offer to wholesale to particular people, as opposed

1 to being required to wholesale to all comers, is quite a major change. Of course, the
2 wholesale must offer obligation is at specific prices which Sky itself would not have
3 chosen. Yes, as Mr. Darcey says, and as Sky maintains, it is prepared to discuss wholesale
4 deals when a reasonable commercial deal is available. Now, it cannot simply be for Ofcom,
5 or Sky's counterparty, to say what is a reasonable commercial deal. It takes two to tango,
6 and what is a reasonable commercial deal may depend on the beholder, as it were.

7 THE PRESIDENT: Would any of this matter for present purposes if it was reversible - relatively
8 easily reversible after a successful appeal - these disadvantages that you are pointing out
9 now? They have some financial implications. Put those on one side. The immediate
10 financial implications we can perhaps put on one side for a moment. Is it the reversibility
11 that is really -- the 'unscramblability' that is really the crux of it?

12 MR. FLYNN: Yes, I think it is fair to say that, and some great degree of emphasis is placed on
13 that in Sky's evidence.

14 THE PRESIDENT: I include what you suggest is a reputational brand, and so on?

15 MR. FLYNN: For a number of reasons but including, as it were, commercial irreversibility but as
16 well brand damage, and all those things Mr. Darcey goes through, and indeed Mr.
17 McWilliam. I would maybe take time to make a couple of points on this.
18 Just before I get to Mr. Darcey's responsive evidence, again the other side of the coin then
19 is the harm to competition if relief is not granted. Ofcom I think says that if relief is granted
20 you should presume there is an adverse impact on competition because that is what they
21 have found. Our submission is that that cannot be the right test. The question is if you are
22 with us that there are harms of the right kind for Sky, the question is, is there something so
23 important, something that outweighs that harm to the applicant. I think what is really being
24 said to us is that it is very important that this all happens now, and again Mr. Darcey's
25 second statement deals with that in some detail. But let me say shortly it cannot be right that
26 Sky's entitlement or otherwise to interim relief will depend on the timing of the issuing of
27 the Ofcom decision. The timing -- it happens to have been issued so close to the start of the
28 football season, but Sky's right to interim relief cannot be determined just by when, after
29 such a lengthy process the Ofcom decision is issued. I am not making a cheap point, it is a
30 lengthy and difficult matter, but if it really had been desperately, desperately urgent, one
31 imagines that less time would have been taken on it to reach a result.

32 What else is special about now? A lot is said about the World Cup. I think it is important
33 to remember that the World Cup is not on Sky.

34 THE PRESIDENT: It is on Free to Air.

1 MR. FLYNN: It is on Free to Air television.

2 THE PRESIDENT: It is said that ability to raise the awareness of football adds to the importance
3 of the start of the Premier League Season.

4 MR. FLYNN: I think that is said and what Mr. Darcey says is that the marketing impact will be
5 extremely limited. Essentially there are not going to be many people who are suddenly
6 going to wake up and say “Oh football, the World Cup, goodness me, football, I would like
7 to see more of that”, there just are not going to be very many people in that category. As he
8 says you do not see peaks of interest from new subscribers every couple of years when you
9 have either the World Cup or the other championships.

10 THE PRESIDENT: I think the other points making headlines for Ofcom are the crucial stage that
11 roll-out of DTT - if I have got the right expression – has reached.

12 MR. FLYNN: I think that might be Digital switchover.

13 THE PRESIDENT: Yes, a lot of people who are going to be switching over will be deciding
14 what their platform is now, and a year later they may have already made their decision and
15 be reluctant to fix another one. I do not know how far this treads on legality, concern about
16 some preparations being made by individual people for getting the benefit of the wholesale.
17 Those are very rudimentary sort of things, I suppose, as to why now.

18 MR. FLYNN: As to why now, and Mr. Darcey has addressed that.

19 THE PRESIDENT: Do not go out of your order.

20 MR. FLYNN: I am anxious not to take up the Tribunal’s time précisng what Mr. Darcey has
21 said, but I will go through those points if those are of particular concern to you. He also
22 says that there is nothing particular about this football season, as opposed to any other
23 football season and it may be evidenced from the file but I do not think it is disputed that
24 there are no rights coming up just now.

25 Mr. Darcey has made a number of points which respond, I think to the questions that you
26 have just put, to the extent that he can based on what he has seen. Is it of assistance to the
27 Tribunal, or is it time wasting to walk through that second statement?

28 THE PRESIDENT: I am very much in your hands, I have only skim read it, because I was trying
29 to read everything, as it were, so I cannot pretend I have taken it in thoroughly. Would you
30 like to have a five minute break, and then you can have a quick flick through and you can
31 see where you want to go?

32 MR. FLYNN: Yes, I will see what I wish to highlight from that.

33 THE PRESIDENT: We will just take a very short break then.

34 (Short break)

1 THE PRESIDENT: Mr. Flynn, yes?

2 MR. FLYNN: Sir, in a longer few minutes – I hope we have made some good use of it. In
3 relation to the second Darcey statement, just picking up the points which you mentioned.
4 The reversibility issue is, of course mainly covered in his first statement and he refers back
5 to that at para.5 of the second statement which is, I anticipate, the one you have in front of
6 you.

7 THE PRESIDENT: Do you want me to turn those up?

8 MR. FLYNN: I think if you have the second statement in front of you.

9 THE PRESIDENT: Yes,

10 MR. FLYNN: And if we just turn the pages I will make a couple of points. Start with para. 5,
11 this goes to the reversibility and he is referring back to his first witness statement. For your
12 note it is para. 28 et seq of that witness statement. Then he responds to some points that
13 have been made in the evidence. You will see therefore what he says in paras 7 and 8 in
14 relation to the suggestion that it is equal misery or worse for the retailer if Sky withdraws
15 channels following a successful appeal. He explains in para. 9 why he does not agree with
16 that proposition, giving three reasons there. I will not burden the transcript, or the
17 Tribunal's time, by reading them out. You will see what he says in para. 10. While you are
18 on it, you will see what he says at para. 11, which is a slightly different point but a very
19 serious one. He talks then, in paras. 12 to 14, about perceptions of value and whether there
20 be price undercutting.

21 THE PRESIDENT: In relation to the withdrawal of services are you able to say, if the WMO
22 goes ahead, what the likely term of arrangements that would be made or acceptable to
23 Ofcom? Is that out in the open, or is that still to be determined, as it were? Has Ofcom said
24 anything about ----

25 MR. FLYNN: -- as to the length of the contract?

26 THE PRESIDENT: Is it over a year or a month?

27 MR. FLYNN: (After a pause): I do not think I have a clear answer to that. It is not going to be
28 bumping along from month-to-month, as I understand it. (After a pause): That was Top-
29 up tipping up!

30 THE PRESIDENT: I am just really thinking along the lines of withdrawal.

31 MISS ROSE: I am so sorry. I did not hear what was said on account of the Top-Up TV attempt
32 at sabotage. What was the crucial ----

33 THE PRESIDENT: I do not think there was an answer. I think you were taking instructions ----

1 THE PRESIDENT: There is a bit more over the page. Virgin Media called for a ninety day --
2 That is a notice period for changes in prices.

3 MR. FLYNN: Yes. I was just looking for a notice period under the agreement, but -- I do not
4 see one. Clearly, the intention would no doubt be for someone to have a wholesale supply
5 from which they can build a business.

6 THE PRESIDENT: I just want to get a bit of a better idea of what will happen with both sides --
7 Well, all parties have been talking about this question of withdrawal. Presumably it would
8 not be necessarily straightforward just stopping immediately. There would be a contractual
9 term of some sort presumably.

10 MISS ROSE: Sir, I am instructed that there is no reason why a contract could not be offered on
11 the basis that it would be terminable if this appeal succeeded, provided that were offered to
12 everybody on non-discriminatory terms.

13 THE PRESIDENT: That is something that Ofcom does not, would not query.

14 MISS ROSE: Because the concern of Ofcom is that the terms should be reasonable and non-
15 discriminatory.

16 MR. FLYNN: Sir, obviously the focus of Sky's evidence is how difficult that would be to achieve
17 and the impacts that withdrawal would actually have. That is what Mr. Darcey and Mr.
18 McWilliam are talking about, whatever the period ----

19 THE PRESIDENT: You say there will be an awful lot of disappointed customers if you were to
20 exercise such a right. So, the consumers would be up in arms; Sky would get some of the
21 blame, if not a lot of it ----

22 MR. FLYNN: If not all of it -- a great deal of it, yes.

23 THE PRESIDENT: In the meantime prices may have been reduced -- retail prices may have been
24 reduced leading to a perception that the content is not as valuable as you would like it to be
25 perceived to be or as it is perceived to be now, and there may be litigation. You may find
26 yourself the subject of applications for interim relief to stop you terminating these deals.

27 MR. FLYNN: Yes.

28 THE PRESIDENT: Does that sum it up?

29 MR. FLYNN: I think those are important. Then, of course, he goes on to explain how difficult it
30 is to get the customers back to Sky, and the costs and difficulty of that. So, those are the
31 points which are made. Again, as he says, the rather striking words are in para. 9. It is said
32 rather glibly, I think, by those on the other side, "Well, actions speak louder than words.
33 Sky is prepared to withdraw. Look what it did with Virgin". The answer to that, as Mr.
34 Darcey says, is, "Well, that's not something we would want to repeat. It was not planned,

1 not something we enjoyed. The consequences were actually far worse in terms of
2 reputation and difficulty than we had expected”.

3 THE PRESIDENT: This would not be a battle with one person. If things go as people hope it
4 would go, presumably this would be a battle with lots of people.

5 MR. FLYNN: It would be a battle with lots of people. Potentially, what Sky is obliged to do by
6 14th April is to formulate a general set of criteria for the so-called reference offer, and that is
7 basically capable of acceptance by people who meet certain minimum qualifying criteria -
8 yet to be defined, but to do with things like credit-worthiness no doubt, and security, and
9 such matters. This could be a very large category of people. So, you have a roomful
10 already and all sorts of people may wish to take advantage of this offer. If Sky is obliged to
11 enter into arrangements with them in the currency of the appeal, what the evidence is
12 suggesting is that it will be extremely difficult for Sky to unwind those arrangements should
13 it prevail. So, in effect, the horse will have bolted, and there will have been a shift in the
14 market. It would be difficult to get out of those arrangements. There may be lasting damage
15 to the brand and to the value. Those are things which cannot be reversed.

16 Again, going back to Darcey 2, I think the perception of value he deals with in paras. 12 to
17 14 where he counters this view, “What is Sky talking about if it is discounting its channels
18 the whole time?” As you see, there are a certain number of confidential figures in para. 14.
19 It is not correct that Sky goes in for wholesale discounting on pay TV packages. Win-back
20 activity is very targeted. Win-back activities are something rather different. Likewise, the
21 idea that, as it were, we are giving it away on the i-phone is simply not correct. That is the
22 same sort of deal as is available for all mobile networks.

23 He talks about the cost of win-back in paras. 15 to 17. Perhaps I could just invite your
24 attention particularly to the end of para. 16 where what Mr. Darcey is saying is that it
25 appears from what he has been able to see of the evidence in this case that BT and Top-Up
26 are really looking to Sky's subscriber base for their customers. The idea that suddenly a
27 large number of brand new people are going to be looking at these channels for the first
28 time is not how Sky expects it to operate and not what he infers from what is being said in
29 those witness statements. He points to the costs that Sky would have to undertake to get
30 those customers back. I cannot say the figure.

31 I am not going to read everything out in this statement. The ‘Why now?’ point is seen in
32 para. 21 onwards. Is the start of a football season a critical period? He says, “No” and that
33 the World Cup and the European Championships are not particularly key events for getting
34 subscribers either. He talks about the World Cup and he makes the point towards the

1 bottom of para. 23 that you should realise that Setanta and then the successor to those rights,
2 ESPN, in fact began their broadcasting activities in August, the start of the football season.
3 In other words, the growth that you see in subscribers there would be growth, as he says, he
4 would expect is not the start of the football season phenomenon it relates to the launch of
5 the service. It just so happens that they were able to switch on, they acquired the rights in
6 August. I skate over the confidential paragraphs, and he then deals from 27 onwards –
7 leaving aside the start of the football season, is there something particular about this year?
8 Is 2010 something special, Mr. Darcey says “no”, if capacity is needed he would expect it
9 to be available. If you have a proposition capacity for valuable content such as the Sky
10 Sports Channels you will be able to get hold of channels including buying it from existing
11 broadcasters who may welcome an offer for capacity.

12 Digital switch over which is a point you specifically raised sir, in para. 28 he says most
13 people have already switched, 88 per cent, and those that are left in Mr. Darcey’s view, as
14 chief operating officer of Sky, have a lower propensity to subscribe to a Pay TV service.
15 He also makes the points about Top-Up. That is the hasty walk through Darcey two.
16 I think to take anything further it may be necessary now or at a later stage to have a
17 discussion about handling. I do not think I can say anything more that is useful in open
18 court. So that might either be regarded as a time for me to sit down and someone else to
19 stand up or you might just wish to carry on.

20 THE PRESIDENT: Is it going to render your submissions less coherent if we go on?

21 MR. FLYNN: I would rather finish, if you would not mind.

22 THE PRESIDENT: That would be sensible. Has anyone any observations? Otherwise we will
23 just clear the court except for people who are in the confidentiality ring. I am sorry,
24 members of the public, you will have to go and wait outside for a bit, we have to deal with
25 this matter. Are you in or not, I cannot remember?

26 MR. JONES: We are still applying to intervene, we are not yet a member of the confidentiality
27 ring due to ... and timing reasons. Essentially my role here today is to try and protect our
28 commercial and legitimate interests, and I am perfectly happy to give the confidentiality
29 undertaking immediately. We are at a slight disadvantage in not having seen most of the
30 material due to being outside of the confidentiality ring and coming in late, but I would,
31 with the permission of the Tribunal, orally give the undertaking and ask to be permitted in
32 the in camera hearing.

1 THE PRESIDENT: Does anyone have any observations or objections to that? (After a pause)

2 No, well, Mr. Jones, I think we can probably rustle up the undertaking while people are
3 leaving. Is there anyone else?

4 MISS LESTER: Sir, we have all signed the confidentiality undertakings in anticipation of this,
5 everyone representing the Premier League has done so yesterday.

6 THE PRESIDENT: Yes, right. Mr. Beard?

7 MR. BEARD: Sir, there is one individual in relation to which there is an issue arises, however, it
8 might actually be easiest to deal with that if once we have effectively cleared the rest of the
9 court, if that is sensible.

10 THE PRESIDENT: Yes, I think I know the issue you refer to. I am sorry, could people please
11 therefore leave if they are not a member of the confidentiality ring. I think you are pretty
12 safe in leaving until 2 o'clock.

13 (For Closed Session proceedings see separate transcript)

14 (Adjourned for a short time)

15
16 THE CHAIRMAN: Mr. Flynn, we are no longer In Camera; is that right?

17 MR. FLYNN: We are no longer In Camera, sir, because Mr. Beard and Mr. Pickford have spoken
18 over the adjournment, but we have not got a solution yet. That is being worked on.

19 MR. BEARD: If I could just assist? Sky have suggested which part of the statement from Mr.
20 Chance they would like to have further access to, or, rather, further people within Sky have
21 access to. It is not a modest request. So, it is going to have to be given some further
22 consideration. The intention is, having spoken to others, it appears that the likelihood of us
23 finishing today is relatively low. In the circumstances, therefore, the sensible course would
24 seem to be for us therefore to respond to Sky's request later this evening, and see whether or
25 not matters can be resolved.

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

27 MISS ROSE: Sir, at the outset of his submissions Mr. Flynn made a number of introductory
28 points. He made the point that Sky had not inherited a natural monopoly, but had built up
29 its business. He asserted that this was something that Ofcom had not taken account of.
30 With great respect to him, that is a matter that has been at the forefront of Ofcom's
31 consideration throughout the investigation. If we look at the statement -- I am only going
32 to show to you two paragraphs which are on the first two pages of the statement. They are
33 an indication of how integral to Ofcom's thinking its sensitivity to Sky's importance as an
34 innovator in the field of Pay TV has been. If we go to p.1 in the summary, at para. 1.2,

1 “The Pay TV sector has delivered substantial benefits to consumers since its
2 emergence in the early 1990s. More than 12 million consumers now pay to access
3 a greater choice of content at higher quality with a greater degree of control than
4 has historically been available from Free to Air broadcasters. Sky has been at the
5 forefront of this development and has delivered substantial benefits to millions of
6 consumers in the UK”.

7 Then, at para. 1.11,

8 “In deciding what is appropriate to do to ensure fair and effective competition we
9 are particularly mindful of the benefits that Sky has historically delivered to
10 consumers both through investment and innovation on its own platform and its
11 willingness to make long-term investments in UK sport. That is why we have
12 deliberated carefully on these issues over the course of three consultations”.

13 Then they say that they believe that their remedy is appropriate for the reasons set out at the
14 bullet points.

15 Sir, we submit that that criticism is unwarranted.

16 The second point that he made was that he said this was a very important decision for Sky
17 and Sky needs to have a proper opportunity to make its case - so, an abridged appeal is not
18 appropriate. Sir, I am going to come on later in my submissions to the question of the
19 proper timing of this appeal. There is obviously a trade-off between the questions of
20 expedition and the questions of whether interim relief is appropriate. What Ofcom had
21 sought to explore with Sky in the course of correspondence before this hearing was whether
22 there was any potential for Sky to agree to a highly expedited timetable for the whole of this
23 appeal because, of course, the shorter the length of the appeal the more easy it may be
24 to accommodate certain forms of interim relief. But, it has become clear that Sky - and now
25 also, it would appear, the Premier League - are not prepared to contemplate that sort of
26 solution. Therefore we are looking at a situation in which the interim relief that Sky is
27 seeking would be in force for a very substantial period of time. That, we submit, is going to
28 be a relevant factor when considering whether interim relief ought to be granted. Sky has
29 rejected the option of expedition. I understand the reasons why they feel that they have to
30 do that, but there may be consequences.

31 THE PRESIDENT: I think I have read that correspondence. Someone said that we tend to
32 expedite everything really. So, there are not two tracks in this Tribunal.

33 MISS ROSE: No, sir. How can I put this? Ofcom has been scarred by bitter experiences, in
34 particular in relation to the 2.6 spectral appeal. This was the *T-Mobile* case.

1 THE PRESIDENT: Was that the one where it started here and then we did not have jurisdiction
2 and so it went to the Admin Court?

3 MISS ROSE: Yes. That was a case of particular urgency. All parties agreed it should be
4 expedited, but it was, of course, in the commercial interest of the appellants to drag it out.
5 Ofcom's unfortunate experience, without alleging any improper conduct or bad faith on the
6 part of anybody, was that it is actually ----

7 THE PRESIDENT: Possible.

8 MISS ROSE: -- pretty easy to hurry slowly. It took more than a year to resolve the question of
9 jurisdiction in that case. In the end, the government intervened. So, there was never any
10 final hearing ----

11 THE PRESIDENT: It went to the Court of Appeal, did it?

12 MISS ROSE: It went from here to the Court of Appeal. We won both here and in the Court of
13 Appeal on the question of jurisdiction. It was then remitted back to the Administrative
14 Court for a judicial review. Before the judicial review could be heard the government
15 intervened and the whole matter became moot.

16 THE PRESIDENT: Yes. I remember now.

17 MISS ROSE: But, our experience was that that preliminary issue took more than a year to be
18 determined. What is being suggested by Sky ----

19 THE PRESIDENT: That is including the Court of Appeal hearing.

20 MISS ROSE: That is including the Court of Appeal. What is being suggested by Sky is that the
21 appeal process in front of this court alone would take nine months. If you then factor into
22 that the strong likelihood that one party or another may appeal whatever decision is made
23 by this Tribunal, we submit that you are looking at a minimum delay of about fifteen
24 months.

25 THE PRESIDENT: Interim relief would be a matter then for the Court of Appeal, would it not?

26 MISS ROSE: Yes, sir. But, you can understand the argument would be made, if interim relief had
27 been granted by the CAT, that it would be inappropriate not to continue it during the appeal
28 in the Court of Appeal.

29 THE PRESIDENT: I suppose the only different factor would be depending on what the Tribunal
30 had said about the merits - which way round it was.

31 MISS ROSE: Yes.

32 THE PRESIDENT: It could happen. You are right.

33 MISS ROSE: It could happen. It is also not clear whether Sky are suggesting that the period
34 would be nine months from now or nine months from the date on which they lodge their

1 appeal. They are saying that they will not undertake to lodge their appeal any earlier than
2 1st June. If they mean nine months from 1st June, then they are suggesting a minimum
3 period until February of next year.

4 The next point that he made was that there was no allegation in this case that Sky was in
5 breach of its obligations under the Competition Act, which is true, but irrelevant because
6 this is not a case brought under the Competition Act. This is an exercise by Ofcom of a
7 distinct regulatory power. By way of comparison, if you had a situation in which Ofcom
8 had taken a decision also under the Communications Act but in relation to telecoms to
9 impose an SMP condition on a mobile operator and the mobile operator was seeking
10 suspension of that condition pending the appeal, the mobile operator would be able to say,
11 “Well, we have not been found to be in breach of the Competition Act”, to which the
12 answer would be, “Well, so what? The remedy that has been imposed has nothing to do
13 with you being in breach of the Competition Act. What it is about is securing effective
14 competition”. The similar point applies here.

15 THE PRESIDENT: Is it being said, “Well, it is not quite so urgent?” If someone is doing
16 something unlawful and been found to be doing something unlawful, then there is perhaps
17 more urgency. In the case here, no-one has been doing anything unlawful, but it is common
18 ground that Ofcom thinks that there should be, as it were, a different way of doing business.

19 MISS ROSE: It is more than that, sir. Ofcom is concerned that the development of competition
20 in this market is being restricted and distorted by the conduct of Sky.

21 THE PRESIDENT: Yes, but not in an unlawful way. I am only trying to interpret what Mr.
22 Flynn is saying.

23 MISS ROSE: Absolutely, but the point is it is not about blameworthiness ----

24 THE PRESIDENT: No, no.

25 MISS ROSE: -- it is about the public interest. Once you have a situation in which the Regulator,
26 after a very lengthy investigation has concluded that competition is being restricted and
27 distorted that consumers are being harmed, then in my submission it is urgent to do
28 something about it, and it is no less urgent because that is the result of conduct which has
29 not been found to be unlawful, the question is: is there a sufficient reason to delay imposing
30 the remedy which has been found to be in the public interest.

31 Next he made the submission that there was a general practice in this Tribunal of granting
32 interim relief. We submit that there is simply no basis for that submission. The practice of
33 this Tribunal in relation to interim relief was set out in both *Napp* and *Genzyme* and is very
34 clearly to look at the facts of the individual case and to apply the tests that are set out in

1 those cases without a presumption that there should be interim relief, so we submit that is
2 simply wrong.

3 He also suggested that a submission that we make that there should be a presumption
4 against interim relief on the facts of this case is seeking in some way to deprive this
5 Tribunal of jurisdiction over the merits. We say that is a mischaracterisation of our
6 submission; I am going to return to it in a moment in more detail, but this of course is a
7 submission that we make at the interim relief stage. Of course, there is going to be a full
8 merits appeal at which this Tribunal will look into the question of whether Ofcom made an
9 error in its decision. The point we make is that at this stage this Tribunal is inevitably at a
10 severe disadvantage in seeking to second guess the assessment that Ofcom has made of
11 where the public interest lies and what would be beneficial for the promotion of
12 competition. It is in that sense that we submit that the starting point should be a
13 presumption that there would be harm to competition if the implementation of the decision
14 is delayed. I am going to come back in a moment to look at that in more detail and look at
15 the authorities on that point.

16 Can I then start with the proper legal approach to interim relief? The starting point, of
17 course, is Rule 61. Can we turn it up, it is in the authorities bundle at tab 2. Rule 61(1)
18 gives a general power to the Tribunal to suspend in whole or part the effect of any decision
19 which is the subject matter of proceedings before it. But 61(1) says nothing about the
20 criteria upon which or the circumstances in which such power should be exercised. Rule
21 61(2):

22 “Without prejudice the generality of the foregoing, if the Tribunal considers that it
23 is necessary as a matter of urgency for the purpose of:

24 (a) preventing serious, irreparable damage to a particular person or
25 category of person, or

26 (b) protecting the public interest,

27 the Tribunal may give such directions as it considers appropriate for that purpose.”

28 The point to note there is the concept of urgency is introduced at Rule 61(2) specifically as
29 being urgency for the purpose of preventing serious irreparable damage; that is what is
30 meant by “urgency”.

31 The other point to note about Rule 61(2) is that it closely parallels the language of the Rules
32 of what used to be the CFI, now the General Court and the test for the grant of interim relief
33 that has been applied in the CFI, and that is the point that Sir Christopher Bellamy was
34 making in *Napp* that it is clear that the person who drafted this Tribunal’s Rules had in mind

1 the parallel regime of the European Union. Of course, we do not suggest that the decisions
2 of the CFI are binding on this Tribunal, but we submit that they are of persuasive force
3 because it is clear that the draftsmen of this statutory scheme had them in mind.

4 We then come to 61(3) which imposes a duty on the Tribunal about the way that it is to go
5 about considering interim relief. “(3) The Tribunal shall exercise its power under this
6 rule ...” and you will note, Sir, that there is only one power referred to there – “... taking in
7 to account all the relevant circumstances, including – (a) the urgency of the matter.”

8 As I have already indicated, “urgency” is a concept that we have seen in the preceding sub-
9 rule as being “urgency for the purpose of preventing serious, irreparable damage”. So, in
10 my submission, 61(3) makes it a mandatory, relevant consideration when considering the
11 grant of interim relief, that the Tribunal must consider whether it is urgent for the purpose of
12 preventing serious irreparable harm, or in the public interest. That is made even clearer by
13 61(3)(b) and (c) specifying the effect on the party making the request, and the effect on
14 competition as mandatory considerations.

15 THE PRESIDENT: Whether you were looking at 61(1) or 61(2) you take account of urgency for
16 the purposes of preventing any ----

17 MISS ROSE: Yes, 61(2) “... necessary as a matter of urgency for the purpose of (a) preventing
18 serious, irreparable damage ... or (b) protecting the public interest.” That, we submit, is
19 what is meant by the concept of urgency in this scheme, and that is the same sense in which
20 urgency is described in the CFI case law. That, we submit is the context of the general
21 guidance given most fully in *Genzyme* which also sets out the material paragraphs from
22 *Napp*. If we look first at para. 78 in *Genzyme* which is at tab 12, there is a lengthy citation
23 from *Napp* which starts at that paragraph. Over the page, p.25, there is para. 38 from *Napp*
24 which emphasises that “a principal purpose of interim relief is to preserve the integrity of
25 the appeal”. The point that is being made there is that if a party will suffer serious
26 irreparable damage, their appeal may be futile. The converse of that, of course, is that if the
27 effect of granting interim relief is that the effectiveness of the remedy which the regulator is
28 intending to impose would be irreparably impaired then equally interim relief should not be
29 granted.

30 Paragraph 39, Sir Christopher Bellamy dealt with the submission that the *American*
31 *Cyanamid* test was appropriate and rejected it, and importantly rejected it on the basis that
32 this is not party and party litigation –

1 “the Director is not obliged to offer any cross-undertaking in damages. The
2 matters arise in a specific statutory framework in which the public interest figures
3 prominently alongside the private interests of the applicant.”

4 We submit that that reasoning is closely parallel with reasoning that has been used in the
5 Administrative Court where the *American Cyanamid* test is similarly modified so that the
6 public interest can be properly accommodated, and my submission essentially is whether
7 you look at the approach that has been taken by the CFI or that has been taken by the public
8 law courts in this country it is essentially the same, and that is that you are not simply
9 weighing up the private interests of the parties who happen to be before the court. The
10 element in the room is the public interest.

11 Then at para. 40 he draws the analogy with the CFI and makes the point that Rule 32 is
12 similar to the rules governing the grant of interim relief in the court’s rules of procedures.
13 He also has regard to the specific statutory provision under which the appeal was brought in
14 his case. Of course, that is a point that is not applicable to this case, but we submit that the
15 point that he makes about the similarity between the CAT Rules and the CFI Rules is still a
16 good one.

17 Then going on to para.79 in *Genzyme*, he sets out the five questions that need to be
18 answered, and we submit that is the right approach and I do not understand Mr. Flynn
19 seriously to dissent from that proposition.

20 Then at para.80 he addresses first of all the question of the merits; and then:

21 “As to ‘serious and irreparable damage’, the view of the President of the Court of
22 First Instance is that financial loss which cannot be compensated in the event of a
23 successful appeal does not constitute serious and irreparable damage unless the
24 survival of the undertaking is in question.”

25 He cites *IMS Health*.

26 A valiant attempt was made by Mr. Flynn to contend that *IMS Health* was in his favour.

27 Mr. Hoskins was rapidly on his feet pointing out that Mr. Flynn had misread *IMS Health*.

28 With respect to both of them, Mr. Hoskins is right, because if we go to *IMS Health*, which is
29 at tab 18, para.119, this is the paragraph on which Mr. Flynn sought to rely. At para.119 the
30 argument is set out that the reason why mere financial loss is not said to be sufficient to be
31 serious and irreparable loss could be because you could compensation for it later. Then the
32 point is made that in this case it is unlikely that compensation would be available.

33 At para.120:

1 “ -- it would, at first appearance, seem unlikely that the applicant could succeed in
2 any action for damages brought against the Commission.”

3 In other words, it is unlikely that the grounds on which the contested decision might
4 ultimately be annulled would suffice to constitute a serious breach. In other words, this
5 would not be compensable damage. Then he goes on:

6 “Nevertheless ...”

7 a critical word, “nevertheless” –

8 “... even though the possibility of *IMS Health* being unable to recover the financial
9 losses it may suffer as a result of the execution of a contested decision cannot be
10 excluded, interim relief is generally not granted in respect of financial damage
11 unless the applicant is in a position to adduce evidence that would justify a *prima*
12 *facie* finding that, failing the relief sought, the losses alleged could be such as to
13 threaten its survival.”

14 Then at the end of that paragraph he makes a finding that the financial strength of *IMS*
15 *Health* is such its survival is clearly not endangered. He says:

16 “It follows that such damage cannot, in itself, suffice to justify the interim relief
17 sought.”

18 We submit that Mr. Flynn has wholly misunderstood *IMS Health* and that the whole point
19 about *IMS Health* is that that is the case in which the CFI said that the reason that financial
20 loss is not enough is not simply because you can get compensation for it later, it is because
21 it is only if it is so serious that you go out of business that it comes within the category of
22 serious irreparable loss.

23 THE PRESIDENT: There is a bit of a tension there between that and the approach even in the
24 Admin Court, is there not?

25 MISS ROSE: It is interesting. As a matter of fact, my submission is that there may not be such a
26 tension. There may be some degree of tension but not to a great degree. Sir, you will recall
27 the *Monsanto* decision.

28 THE PRESIDENT: Yes, which is in the bundle.

29 MISS ROSE: Which is in the bundle. I am going to come to it later, but there is at least a
30 suggestion in *Monsanto* that even if damages would not be an adequate remedy for the
31 claimant in that case, that would not be sufficient to entitle them to interim relief because of
32 the importance of public interest.

33 THE PRESIDENT: The question is whether it is a factor. It is not an irrelevant factor, is it?

1 MISS ROSE: Sir, the difference is that the CAT has rules which are modelled on the CFI and
2 which incorporate the concept of urgency for the purpose of preventing serious irreparable
3 damage. That concept of urgency for the purpose of preventing serious irreparable damage
4 is a concept that the CFI has very developed as excluding pure financial loss unless the
5 survival of the undertaking is threatened. That is the distinction.

6 THE PRESIDENT: Yes, but, as you said at the outset, those cases are not binding on us.

7 MISS ROSE: Sir, they are not binding, but you would have to explain why it was that a concept
8 that was a concept well established as a legal principle in European law was directly
9 imported into the CAT Rules, but was intended to have some different meaning.

10 THE PRESIDENT: I am not sure that that is necessarily right. I am not sure one would have to
11 go that far actually. One would not have to go much further than saying “an approach
12 consistent with the Admin Court’s approach would be acceptable”.

13 MISS ROSE: My submission is going to be that the result is the same, but there is a difference on
14 this particular point as to the extent to which it is simply left out of account. On that my
15 submission is that the language of Rule 61 is very clear, because the concept “serious
16 irreparable damage” is an EC law concept derived from the Rules of Procedure of the CFI
17 and interpreted by the CFI.

18 THE PRESIDENT: I do think we have to be a bit careful about being too slavish about the
19 approach of the CFI where different considerations apply. It is a different system. It is a
20 different system of judicial review and we have very well developed rules for interim relief
21 and public law in this country. I would have thought that should be one’s first port of call.

22 MISS ROSE: Sir, I am certainly not going to disagree as a general ----

23 THE PRESIDENT: There is no inconsistency with ----

24 MISS ROSE: Yes, I am certainly not going to disagree as a general concept, but where you have
25 incorporated into the CAT Rules a particular phrase which is lifted from the procedure rules
26 of the CFI, you have to ask the question, “What is the statutory intention? Is the intention to
27 use the same concept or some different concept?”

28 THE PRESIDENT: I have to say, I find the particular paragraphs that we have looked at in *IMS*
29 *Health* slightly internally inconsistent. On one hand you read one and you think it is saying
30 that it is okay provided that it is not irreparable, provided it can be repaired by
31 compensation; and then it goes on to the next bit and says that that is all irrelevant, because
32 actually if it cannot be compensated it cannot be. I have a problem with that, whereas I do
33 not have quite the same problem with the Administrative Court’s approach.

34 MISS ROSE: Sir, you have my submission on the point.

1 THE PRESIDENT: Yes, but the great happy thing is that you say it does not make much
2 difference.

3 MISS ROSE: The great happy thing, as I say, is that it does not make much difference, which is
4 marvellous.

5 If we come back to *Genzyme*, still in para.80:

6 “As regards the likely effect on competition and third parties, the Tribunal is
7 entitled to take into account the protection of the interests of competing
8 undertakings where such interests cannot be separated from the maintenance of an
9 effective competitive structure ...”

10 So those interests are relevant. Then at 91, the point that this is a general framework and
11 the jurisdiction must remain flexible.

12 The final point on *Genzyme* is that very considerable weight was given by the CAT in that
13 case to a risk that the grant of interim relief would cause a competitor to exit the market,
14 and that was clearly regarded by the CAT as a very serious matter. We see this at para.101:

15 “The issue here is no whether HH as a company might become insolvent, but
16 whether during the appeal HH might be constrained by commercial pressure to
17 withdraw from the market for home care services for Gaucher patients which it has
18 already been serving on an uncommercial basis for two years. The risk that HH
19 might be constrained to withdraw from those activities is not a risk that the
20 Tribunal to prepared to run.”

21 We submit that the reason for that is obvious as a matter of principle, that the CAT should
22 be very careful to avoid a grant of interim relief which would have the effect of reducing
23 competition by causing a competitor the appellant to have to withdraw from the market.

24 2.35

25 --- withdraw from the market. We do submit that it would be a very rare case in which
26 interim relief could properly be granted if, on the one hand you had a party saying, “Well, I
27 may suffer some financial loss, but my survival is not at stake”, and, on the other hand, you
28 had a party saying, “There is a significant risk that if this relief is granted I may have to
29 withdraw from the market”. It is very difficult to think of any circumstances in which the
30 right course in that situation would be to grant interim relief.

31 The final reference from *Genzyme* is para. 98. This is the point that I was making earlier -
32 that the flip side is,

33 “-- preserving the integrity of the appeal is that the integrity of the OFT’s decision.
34 The Tribunal should be prepared to intervene if not to do so will run a real risk the

1 decision will be without practical utility even if the appeal were unsuccessful. Just
2 as the procedure for interim relief is there to ensure that the applicant, if
3 successful, does not enjoy a purely pyrrhic victory, so too the Tribunal should
4 ensure that the OFT, if successful, does not lose in the meantime the competitive
5 outcome which, in the public interest the decision seeks to achieve”.

6 Sir, can I now turn to the approach of the Administrative Court? The *Monsanto* case is at
7 Tab 9. This was a case in which the applicant had a product, a herbicide, which had been
8 under patent and the patent had expired, and a decision was made by MAFF to permit a
9 competing product to enter the market. There was a judicial review to challenge that
10 decision. Monsanto sought interim relief to suspend the implementation of the decision
11 pending the judicial review. The relevant passage starts at p.1172F. Here you can see a
12 very similar modification of *American Cyanamid* to that which is set out in *Napp*.

13 “In our judgment, although American Cyanamid principles are to be applied in the
14 context of the public law questions to which the judicial review proceedings give
15 rise. Such proceedings are, generally speaking, intended to provide swift relief
16 against abuse of executive power. They are neither intended for nor well suited to
17 inhibiting commercial activity, particularly over an indefinite, substantial period
18 of time”.

19 Then there is a clear indication that Monsanto is likely to suffer loss and has no adequate
20 remedy. So, there is likely to be uncompensatable loss. Then at p.1173C,

21 “Turning to consider the balance of convenience, there are a number of public
22 interest factors of relevance and significance. First, in *Scotia Pharmaceuticals*
23 *International Ltd.*, Evans LJ said that he began ‘with a strong presumption in
24 favour of there being no order by way of interim relief’, because such an order
25 would have the effect of restricting free competition. We respectfully agree”.

26 That is the starting point of my submission that in a case such as this there should be a
27 strong presumption against the grant of interim relief - not, as Mr. Flynn would submit, in
28 favour. But, that is the first factor.

29 If we go on, he then identifies some other factors - that there is no hazard to health or the
30 environment; that the competitor has paid a significant amount of money. Then, at E,

31 “Fourthly, although we attach rather less weight to this factor in the circumstances
32 of the present case, it is in the public interest that, until set aside, the decision of a
33 public body should be respected. This is a variant of the argument which favours
34 maintenance of the status quo”.

1 That was a case dealing with a single decision that had been made by MAFF. This is a case
2 in which Ofcom has been investigating the question of this particular TV market for a
3 period of three years. There has been the most exhaustive consultation - three separate
4 consultation papers. Responses to the third consultation received from over sixty
5 organisations and individuals. As you can see, a very substantial decision produced by
6 Ofcom containing the most exhaustive and painstaking analysis of the market, of the
7 distortions and restrictions to competition in the market, and as to the need for the remedy
8 which Ofcom is seeking to impose. It is in that context that we submit that the question,
9 “What is the status quo?” has to be answered on the basis of as things are now, today. That
10 includes the fact that the independent expert regulator after this enormous investigation has
11 concluded that the promotion of fair and effective competition requires this remedy. You
12 simply cannot leave that out of account when asking, “What is the status quo?” We are not
13 where we were three years ago. We are not even where we were in February of this year.
14 We submit that the two principles in play are, first of all, the respect that is due to the
15 decision of the regulator and the presumption that the regulator’s decision is valid unless
16 and until it is set aside; secondly, the disadvantage that this Tribunal is under at this interim
17 stage in seeking to second-guess the judgment of the regulator as to what is in the public
18 interest. Now, that is partly because of the inevitably very limited evidence that the parties
19 have been able to put before you; it is partly because the parties who are here today are self-
20 selecting. The parties who are here - apart from Ofcom - are those commercial entities who
21 have the money and the commercial incentive to come here to argue either in favour or
22 against interim relief. That is only a small subset of the interests that Ofcom has taken into
23 account in reaching its decision. The most obvious group of interests that are not
24 represented here are the interests of consumers.

25 There was, in fact, a statement produced by Consumer Focus which is the statutory body
26 established to meet the needs and represent the interests of consumers. This was a
27 statement welcoming Ofcom’s decision. Of course, we accept that it is a matter for your
28 judgment to decide whether to grant the interim relief that Sky seeks, but we submit that a
29 factor of very great weight in the balance is the scope of the investigation that Ofcom has
30 made, the decision that it has reached, and the interests that it has taken into account which
31 are not interests that can be adequately represented before you.

32 THE PRESIDENT: I note that the consumer body thinks that it will result in lower prices which
33 is something which Ofcom says is not the intention -- or, not the primary intention.

1 MISS ROSE: It depends what you mean by 'lower prices'. Ofcom does not consider that the
2 prices that it is setting would enable competitors to Sky to offer similar packages to Sky at
3 lower prices. But, part of what Ofcom is seeking to achieve is to enable the market to
4 diversify so that new entrants might offer cheaper entry level packages to Pay TV
5 subscribers. So there might be cheaper Pay TV options, even though those would not be
6 cheaper than the same options offered by Sky, there is a distinction there.

7 THE PRESIDENT: One of the things you might at some point, Miss Rose, just help me with is
8 the controversy about the effect of the WMO order in relation to price competition by Sky. I
9 am not sure I have quite got to the bottom of it yet.

10 MISS ROSE: I will come on to that in due course, yes. Coming back to *Monsanto*, we rely on
11 factors 1 and 4, the strong presumption because interim relief would restrict fair competition
12 and the fact that the *status quo* includes the decision of the regulator which is to be
13 respected until set aside.

14 Then fifthly it is said:

15 "the purpose of the licensing provisions is to serve the public interest, not to
16 protect private commercial interests which are catered for by patent and data
17 protection. That being so, we incline to the view (although it is not determinative
18 in the present case for the reasons already given) that, even where damages are not
19 an adequate remedy for an applicant, it may still be appropriate to refuse him
20 interim relief in public law proceedings."

21 And that is the point at which I say the difference between the administrative law approach,
22 and the CFI approach really may not be very great because the point that is being made
23 there by the Admin Court is that this legislation is not intended to protect the claimant
24 against financial loss, it is intended to serve the public interest, and therefore the fact that
25 you are going to suffer financial loss because of this decision may not even be a relevant
26 consideration unless you can show it is so serious that you will go out of business.

27 THE PRESIDENT: I am not sure he is going to far as to say it is not relevant, I think what he is
28 saying is even where it is irrecoverable that would not necessarily be conclusive.

29 MISS ROSE: Well he must be saying more than that, Sir, because it is true in any application for
30 interim relief that the fact of damages are not an adequate remedy would not be enough to
31 entitle you to interim relief.

32 THE PRESIDENT: No, you still have to do the balancing.

33 MISS ROSE: It is the first hurdle, you start by showing damages are not an adequate remedy and
34 then you have to balance the interest. So you must be saying something more than that. In

1 my submission what he must be saying here is actually it is not really very important that
2 you are going to suffer an irrecoverable loss because the purpose of the statutory scheme is
3 not to protect you against loss.

4 THE PRESIDENT: It is outweighed, anyway; it is outweighed.

5 MISS ROSE: I put it higher than that, Sir, I would say that it is not the statutory purpose that the
6 regulator or the court is seeking to fulfil.

7 THE PRESIDENT: Yes, but I do not read it as saying that it is even as strongly as the *IMS* case
8 is saying it, it may still be appropriate to grant ----

9 MISS ROSE: But the reason for that is that the statutory purpose is not to protect private
10 commercial interests.

11 THE PRESIDENT: Exactly, yes.

12 MISS ROSE: So this is not a *Cyanamid* situation where you simply weigh up the loss of the
13 claimant and the loss of the defendant, decide whether they can be compensated and decide
14 what the balance would be.

15 THE PRESIDENT: No, it never would be in a public law case.

16 MISS ROSE: No, no, but in my submission it does go further than that, otherwise this is a
17 meaningless statement, because he is saying there more than what is the case in every
18 interim relief application. So that is *Monsanto*.

19 The most recent expensive consideration of the meaning of “serious irreparable harm” and
20 the circumstances in which interim relief will be granted by the CFI is the *Microsoft* case,
21 and that is at tab 14. If we start at para.2 we see what the complaint of Sun Microsystems
22 was, which was that Microsoft was refusing “to disclose to it the technology necessary to
23 allow interoperability of its work group server operating system with the Windows Client
24 PC operating system.” There was a refusal to share intellectual property to permit Sun to
25 design software that would compete with Microsoft.

26 The remedy that was imposed included orders that are set out at para. 28:

27 “(a) Microsoft ... shall, within 120 days of the date of notification of this
28 Decision, make the interoperability information available to any undertaking
29 having an interest in developing and distributing work group server operating
30 system products and shall, on reasonable and non-discriminatory terms, allow the
31 use of the interoperability information by such undertakings for the purpose of
32 developing and distributing work group server operating system products.”

33 So it was an obligation to offer its intellectual property to all comers without limit. There is
34 an obvious analogy there with the situation in this case, indeed, we would submit that this is

1 a much more draconian remedy for reasons I am going to come on to later than that which
2 was being imposed on Sky. In that situation Microsoft contended that it would suffer
3 serious and irreparable damage. If we go to para. 240:

4 “It is settled case-law that the urgency of an application for interim measures must be
5 assessed in relation to the necessity for an interim order in order to prevent serious and
6 irreparable damage to the party applying for those measures.”

7 Then after the citation:

8 “It is for that party to prove that it cannot wait for the outcome of the main
9 proceedings with out suffering damage of that kind.”

10 Then at 241:

11 “The alleged damage must be certain or at least established with sufficient
12 probability, while the applicant is required to prove the facts forming the basis of
13 the supposed damage.”

14 Then at 245:

15 “It is therefore necessary to examine whether Microsoft has established
16 specifically how the effects of the decision are serious and irreparable. To that
17 end, it is appropriate to separate the question whether disclosure of the
18 interoperability information constitutes in itself serious and irreparable damage for
19 Microsoft and the question whether the use of that information by Microsoft’s
20 competitors will give rise to serious and irreparable consequences.”

21 So it is made clear that it really is for the person seeking the interim relief to prove the
22 damage that they say the will suffer. It is made clear later in this judgment that vague
23 speculative assertions and statements are not going to be enough, there does actually have to
24 be evidence of loss.

25 For example, if you go to paras 260 to 264, you see the conclusion at 260 that Microsoft’s
26 allegations cannot be regarded as proven to the requisite legal standard, and then at 262
27 there is a reference to particular evidence and it is said that the objections raised by the
28 Commission:

29 “...relate essentially to the vague and conjectural nature of the demonstration in
30 the Madnick & Meyer report and to the fact that that report contains theories
31 which are contrary to Microsoft’s practices.”

32 So two points made there, first it was vague and conjectural; and secondly, it was contrary
33 to their actual conduct. Then:

1 “Faced with such objections and in the absence of other more precise material
2 produced by Microsoft, it is not possible to take as established the allegations that
3 the specifications will reveal more than is necessary to ensure the interoperability
4 sought by the Commission.”

5 There is also consideration in this case of the question of requiring someone to change their
6 business practices, which is essentially the complaint that is being made by Sky in this case.
7 If we go to p.35 of the print out, para. 290: “The alleged interference with commercial
8 freedom”.

9 “Microsoft maintains that its freedom to determine the essential elements of its business
10 policy will be compromised owing to the implementation of the Decision: the decision
11 would require it to disclose information to its competitors, deprive it of its capacity to
12 develop its products and force it to ‘harden’ its protocols.

13 “In that regard, it should be pointed out that, in principle, any decision taken under
14 Article 82 EC and requiring a dominant undertaking to bring an agues to an end
15 necessarily entails a change in business policy. The obligation imposed on an
16 undertaking to alter its conduct cannot therefore be regarded as constituting
17 serious and irreparable damage in itself, short of considering that the urgency
18 requirement is always satisfied when the decision whose suspension is sought
19 orders the addressee to bring abusive conduct to an end.”

20 Pausing there, we do submit that Sky has come close to suggesting that it will suffer serious
21 and irreparable harm because, if this decision is implemented now, it will be required to
22 change its business practices by being required to offer wholesale deals to various retailers.
23 The point that is made is the obvious one. That is so in the case of every decision and that
24 would mean and serious and irreparable damage in every case, which is obviously not right.
25 Then at 292 there is an analysis of what is required for serious irreparable damage under
26 this head:

27 “Where an applicant invokes an interference with its business freedom to
28 demonstrate that the interim measure applied for must be ordered as a matter of
29 urgency, it must adduce evidence ...”

30 and I stress “adduce evidence” –

31 “... either that implementation of the contested measure will oblige it to alter
32 certain essential elements of its business policy and that, even after judgment in its
33 favour has been given in the main proceedings, the effects of the implementation

1 of that measure will prevent it from resuming its initial business policy, or that
2 those effects will cause it serious and irreparable damage of another kind ...”

3 So that is the test that is suggested. There must be a change to essential policy and it must
4 be prevented from returning to its original policy.

5 We submit that in this case Sky has not produced evidence that the changes it would have to
6 make would be changes to any essential business policy, and neither does its evidence
7 establish that it would be prevented from returning to its current policy even if that were so,
8 and I am going to come back to that point.

9 Specifically, in relation to *Microsoft*, the argument under this head was rejected because
10 *Microsoft* had previously said that it was willing to do the thing that the Regulator was
11 asking it to do and so it could not be taken to say that doing that thing would cause it serious
12 irreparable damage. We see this at paras.296 to 302. If you look in particular at para.299:

13 “Next, it is apparent from the case-file that Microsoft’s management declared that
14 they wished to pursue a policy of actively promoting licences ...”

15 Then at 301:

16 “In light of the foregoing considerations, the President cannot take it as established
17 that the Decision will cause a sufficiently significant change to Microsoft’s
18 business policy.”

19 So a company that claims it would be a significant change, but has previously said that it
20 would be willing to do it anyway cannot prove that this would be a significant change for an
21 essential part of its business policy.

22 Then specifically in relation to loss of market share – that was dealt with at para.319 – you
23 see the heading above 317, “The alleged irreversible development of market conditions”,
24 and you can see the argument at 317, and then at 319:

25 “In any event, even on the assumption that Microsoft’s argument may be
26 understood as meaning that disclosure of the interoperability information will alter
27 market conditions in such a way that it would lose market share and, should the
28 Decision be annulled, would no longer be able to regain the market share lost, the
29 President finds that Microsoft has adduced no factual evidence to support that
30 argument. In particular, it has not demonstrated that there would be obstacles
31 preventing from regaining a significant part of the share which it could have lost as
32 a result of the remedy ...”

1 Then finally we see at 476 that because Microsoft had been able to show serious and
2 irreparable damage there was no need to conduct a balancing of the relevant interests at all.
3 Microsoft had failed to overcome the first hurdle.

4 We submit that that approach makes sense in the context of a decision such as this, and that
5 the task for the Tribunal is to consider the various heads that Sky has put forward as
6 constituting serious irreparable damage and to consider whether Sky has actually
7 demonstrated that the facts that it alleges will occur; and secondly, whether there is actually
8 any evidence to establish that Sky would be prevented from returning to the position it now
9 is in if it were to succeed in its appeal. We do submit that mere financial loss is not going to
10 be sufficient to meet that condition, particularly in the case of a company of the size and
11 strength of Sky.

12 Can I turn to the particular facts and, first of all, the question of the merits of Sky's appeal.
13 With respect to Mr. Flynn, no very great effort was made by him to argue that shown a
14 strong case, and it would be impossible to see how he could argue that given the
15 rudimentary nature of the proposed grounds of appeal that are identified in the application.
16 Instead, what Mr. Flynn says is, "Well, we have had to do all this terribly quickly and we
17 have not had time to develop our case". Essentially, what they say is, "We may not have
18 shown an arguable case now, but we will do in the future". That is, of course, not the right
19 approach. A party seeking relief must be in a position to demonstrate that they have got an
20 arguable case now. We do not deny that they just cross the threshold, but it really is only
21 just, and we do submit that you should be a little bit sceptical of the complaint by Sky that
22 they have not had time to get their tackle in order. Sky have been engaged actively with
23 Ofcom in this decision making process for the last three years, and on 26th February of this
24 year they specifically warned Ofcom that they intended to apply for interim relief. That was
25 more than a month before the decision was made.

26 THE PRESIDENT: Before they had seen it obviously.

27 MISS ROSE: Oh, yes, Sir, but their first complaint is a matter of principle. They say that s.316
28 cannot be used for this purpose or in this way. That is a complaint they could have made
29 three years ago. Nothing has changed in the broad shape of the complaint that Ofcom
30 makes about Sky's conduct and the nature of the remedy that it seeks to impose. They were
31 in a position, if they ever were in a position to make a convincing case on 316, they were in
32 that position three years ago.

33 The changes that have been made to the decision after the third consultation are changes in
34 favour of Sky. Essentially, what Ofcom has done is to be more generous to Sky, to

1 understand and take on board Sky's concerns about the level of price and to permit Sky to
2 charge a higher price. The overall shape and structure of the remedy is the same as that
3 which was proposed in the third consultation. So, with respect, it is difficult to see why
4 they are in so much difficulty if they really do have a substantial case.

5 THE PRESIDENT: I suppose, to be fair, they have two months to bring their challenge and the
6 reason we are now here before that challenge is because of 14th May, is it not, which was
7 Ofcom's choice.

8 MISS ROSE: Yes, but they knew that they were intending to bring an application for interim
9 relief.

10 THE PRESIDENT: They did not know necessarily how long they would have to do it.

11 MISS ROSE: They knew they would have to do it pretty quickly because they will have seen
12 your decision in *Morrison's* apart from anything else, and would not have to take the risk of
13 waiting.

14 There is another point to be made about this. It is not just a question of the very brief and
15 sketchy nature of the proposed grounds of appeal that they have set out, it is also a question
16 of the overall quality of the evidence that they have put forward to substantiate the case that
17 they make to say that they will suffer serious and irreparable harm. The situation is not that
18 they have had two weeks to get that evidence together, but that they have had since at least
19 late February had it in active contemplation to get that evidence together. So, in our
20 submission, they are not in a position to say, "This is the best we could do in a very limited
21 period". Indeed, in their letter of 26th February, which is in the application bundle, they said
22 that Ofcom stated in the briefing note that if it decides to proceed with its proposals it would
23 expect to move swiftly to the implementation of a remedy.

24 "This suggested Ofcom might have ruled out the possibility that if Ofcom's
25 decision was the subject of an appeal, Ofcom would refrain from implementation
26 until such time as the appeal had been heard".

27 So, they were already on notice in February that they would have to make that application
28 and they would have to make it quickly.

29 Can I now turn to the case that Sky make for saying that they will suffer serious and
30 irreparable harm? The five heads are identified by them. We can pick this up in their
31 application itself. Starting at p.12, the first head, just above para. 28,

32 "The implementation of the decision will lead to a significant change in Sky's
33 business operations which it will be very difficult to unscramble and will lead to
34 irretrievable damage to Sky's negotiating position".

1 What is said is that under the Wholesale Must-Offer obligation Sky will be required to enter
2 into a new supply contract on terms it would not otherwise supply. They set out various
3 different examples of that. Then, at para. 30,

4 “Even if Sky were entitled on a successful appeal to terminate arrangements
5 entered into pursuant to the Wholesale Must-Offer obligations, it will be difficult
6 for Sky to be restored to its position prior to entering into such agreements”.

7 So, the first point that we note is that Sky does not even allege that it will be prevented from
8 restoring itself to the position it was previously in. It just says it will be difficult. We
9 submit that this is a very sophisticated litigant, with Herbert Smith instructed, leading and
10 junior counsel. They have chosen their words with care. If they considered it to be
11 impossible, they would have said so. But, they could not. That, in itself, indicates that what
12 is said under this head cannot be irreparable damage. It is damage that they say it would be
13 difficult to repair, but not damage they say would be impossible to repair.

14 There are then two arguments put forward. The first is that once they had started to supply
15 a threat to withdraw supply would be less credible because of the reputational damage that
16 would accrue to them if they were to withdraw supply. The second concern is that there
17 would be a risk of litigation if they were to threaten to withdraw supply. They say that
18 these two factors would weaken their negotiating position.

19 Now, when Mr. Flynn was on his feet you suggested to him an additional point which is not
20 in fact any part of Sky's case - that is, that it might be more difficult for them to terminate
21 contracts with a large number of different counterparties, whereas at the moment they only
22 wholesale to Virgin. There is no evidence from Sky that suggests that the number of
23 counterparties would be a problem, either practically or contractually. We submit there is a
24 good reason for that - that it is not envisaged that a large number of people will enter this
25 market over the next few months. There is a specific finding to that effect in the Pay TV
26 statement. It has not been challenged in these proceedings.

27 If we take up the statement and go to p.613, there is the heading ‘Reference offer to be open
28 to any person meeting minimum qualifying criteria’. Paragraph 10.285.

29 “In the Third Pay TV consultation we consulted on a proposed license condition
30 which required Sky to make the programme content available to ‘any person for
31 retail by that person to residential consumers in the United Kingdom’”.

32 Just pausing there. That, of course, would have been equivalent to the obligation imposed
33 on Microsoft in relation to which no interim relief was given to make available to anybody.
34 We see at para. 10.286,

1 “Sky argued that, in the extreme, this could allow individual consumers to request
2 access to the wholesale programme content. However, the proposed conditions
3 also required Sky to produce, as part of the reference offer, minimum qualifying
4 criteria that retailers must satisfy. We consider it likely that only a relatively small
5 number of organisations will meet the MQC and Sky will not in reality have to
6 agree terms and supply programming content to a very large number of retailers”.

7 Then, at para. 10.287,

8 “Requiring Sky to define the MQC provides for the most practical approach, with
9 Sky retaining flexibility to set fair, reasonable and non-discriminatory requirement
10 which satisfy its own interests, whilst providing transparency to prospective
11 retailers of the criteria they must meet”.

12 They also say at para. 10.289 that Sky could have additional objective concerns in relation
13 to individual retailers which they would expect to be dealt with by commercial negotiation.

14 “The MQC would have to be compliant with the conditions and we would
15 therefore consider investigating any future complaints that they were not fair,
16 reasonable and non-discriminatory”.

17 THE PRESIDENT: As I understand it, they did not exclude re-sellers on the internet protocol
18 platforms. I thought I saw a suggestion somewhere in the evidence that there could be a lot
19 of those people. Have I got that completely wrong?

20 MISS ROSE: Sir, the evidence here in this statement is that there are not going to be a large
21 number of people. That has not been challenged. If we then go to para. 11.58 there is a
22 figure headed ‘Figure 140 - Summary of Consumer Effects’ which summarises the benefits
23 to consumers of this remedy. This is in the cost benefit analysis - the impact assessment.

24 “All of these effects rely on new firms taking advantage of the availability of
25 Sky's core premium sports channel to launch new services. As we have explained
26 above, our approach to setting the price focuses on allowing long-term,
27 sustainable entry by firms that will compete with Sky in a manner that provides
28 greater choice to consumers and further investment in innovative new products
29 and services. We have explicitly not sought to enable rapid entry by under-funded
30 firms seeking to profit at Sky's expense. We reiterate that our prices have been
31 calculated on the basis that a firm facing the same cost structure as Sky, achieving
32 reasonably rapid growth in subscriber numbers would own an MPV of zero over
33 the long-term.

1 As a result, entry by any firm will be challenging. Success will require firms to
2 offer attractive products that boost their subscriber acquisition rate, will require
3 firms to innovate technologically to do that in a manner consumers find
4 compelling, will require firms to innovate technologically to do that in a manner
5 consumers find compelling, or require firms to bundle Pay TV with other products
6 and services, in innovative new ways potentially to identify new price and quality
7 combinations that enable them to differentiate their offerings. Even if firms do all
8 these things success will not be guaranteed.

9 The challenging nature of entry reflects in part the strong established position of
10 Sky ...”

11 And so on. At 11.60 they say that they think “retail competitors are likely to take-up a
12 wholesale must-offer remedy”, and they identify some likely names, which will be familiar
13 from the names of the interveners here. Then “In the medium term retail of Sky’s Core
14 Premium Sports channels via Freesat’s platform is also a possibility.” Then IPTV is dealt
15 with at the fourth bullet.

16 So we submit that the point you made to Mr. Flynn this morning, that the difficulty of Sky
17 extricating itself from contracts might be compounded by the number of counterparties is
18 first of all not a difficulty that Sky themselves have identified, or relied on, or put forward
19 any evidence in relation to; and secondly, is inconsistent with the findings in the statement
20 and are not challenged.

21 Before we leave the statement, on a related point para. 10.300 if I can just ask you to note
22 that that deals with the question of security:

23 “Throughout our pay TV review, we have acknowledged that provision of
24 adequate content security is necessary to protect pay TV revenues and that it is
25 reasonable to expect any platform distributing Sky’s premium channels to comply
26 with Sky’s security requirements. However, we have also been clear that
27 perceived concerns over the quality of security arrangements on a particular
28 platform should not be used by Sky as a reason for withholding channels subject
29 to a wholesale must-offer unless those concerns are objectively justified.

30 Therefore, we take the view that requiring Sky to include fair, reasonable and non-
31 discriminatory MSRs in the Reference Offer without detailing their components
32 will address its legitimate security concerns whilst also fulfilling our obligation to
33 ensure fair and effective competition.”

34 So nothing in this decision should inhibit Sky from protecting the security of its content.

1 So if we come back now to the complaint that is made by Sky, the first head. The first point
2 they make, as they say, would be a major change to their business arrangements to be
3 required to wholesale, and that is the first limb, if we were looking at the Microsoft test, that
4 first of all: is this a change to an essential part of Sky's business policy. We submit that Sky
5 cannot establish that it is for the same reason that Microsoft could not establish that it was,
6 that the activity in question is an activity that Sky, like Microsoft, claims that it is already
7 willing to undertake, namely wholesaling. Indeed, Sky already does wholesale to Virgin.
8 We deal with this at para. 28 of our skeleton argument and paras. 42 to 53 of Mr. Unger's
9 witness statement. Mr. Unger there sets out the various statements that have been made by
10 Sky to the effect that it is prepared to wholesale.

11 As, with respect, you rightly said this morning, the crucial question is if there was a change,
12 if this did constitute a change to Sky's essential business practices would it be irreversible?
13 Would Sky be able to withdraw from contracts for wholesale if it won the appeal? I have
14 already made the crucial point in my submission that Sky does not even allege that it would
15 be unable to do so, it only says it would be difficult.

16 When you examine the reasons why it says it would be difficult we submit that they are
17 simply unsustainable. The first reason is that it says that it would suffer reputational
18 damage if it were to withdraw supply and therefore the implication is it would not do it.

19 There are a number of fundamental objections to that. The first is that it is inconsistent with
20 Sky's own conduct.

21 THE PRESIDENT: That is the Virgin point?

22 MISS ROSE: Yes. We are in the very unusual situation here of a company which has shown that
23 it is prepared to withdraw supply notwithstanding the reputational damage. Unusually in
24 this situation all you would have is competing assertions, but here we know that they
25 actually did it. Not only did they actually do it, they aggressively advertised the fact at the
26 time and we see this in Mr. Unger's witness statement, p.10. He says:

27 "Indeed, after withdrawing supply, Sky aggressively advertised the fact of
28 withdrawal in an effort to win Virgin customers over to Sky's own retail
29 operation:

30 In the days immediately following the withdrawal of its basic channels, Sky
31 broadcast promotions on those of its channels that were still distributed by Virgin.
32 One such promotion specifically referred to booking a Sky TV installation and
33 contained the following script:

1 *'Since Virgin Media dropped Sky One you may be missing out on brand new*
2 *episodes of 24, Lost and Battle Star Galactica ...'*

3 - to which one can only say "Thank God!" (Laughter)

4 *'Don't worry, if you book your Sky TV installation now you could watch*
5 *those episodes during our special Easter catch up weekend. It is easy to*
6 *switch to Sky and keep the TV you love.'*

7 And then billboard posters, so they were not just advertising this to Virgin's customers, they
8 were advertising them to the world at large.

9 "Sky also ran a series of billboards referring to popular programmes such as 'Lost'
10 and '24' which were broadcast on Sky One therefore no longer available to Virgin
11 customers following the withdrawal of that channel. The poster for 'Lost' read,
12 *'Don't Lose Lost. Virgin Media have dropped brand new Lost. Join Sky at*
13 *Sky.com.switch.'*

14 We know that the result of this is that Sky benefited and Virgin suffered. Sky does not
15 dispute, and we see this in the second witness statement of Mr. Darcey that their subscriber
16 numbers increased following the dispute with Virgin. We see this at para. 10 of Mr.
17 Darcey's second witness statement. He says:

18 "Ofcom states that Sky suffered no adverse effects in terms of subscriber numbers
19 as a result of the dispute with VM. It is true that Sky has been able to increase
20 subscriber numbers over this period and subsequently; however, this has been due
21 to further investment in the business, particularly in HD, and to material increases
22 in subscriber acquisition costs."

23 But the point that was being made by Ofcom if we go back to para. 34 of Mr. Unger's
24 witness statement, and this is by reference to a confidential table, is that you can see steady
25 growth of subscriber numbers. Each of these columns is net additions. So each of these is
26 a number of extra customers for each month and you can see the period of their dispute and
27 there is simply no dip. They are putting on subscribers throughout the whole of the period,
28 they never lose subscribers; there is not even a reduction in the rate at which subscribers
29 join them.

30 By contrast, Virgin suffered a significant fall in subscribers as a result of the withdrawal of
31 the channels, and we see this in Mr. Schweitzer's statement, para. 57(b). He relies in
32 support of that on the consumer tracker data, and that is the only evidence that Sky rely
33 upon to demonstrate damage to reputation or brand. What it amounts to is the single page at
34 the back of Mr. McWilliams' witness statement. What we are told is that the Sky tracker

1 research is a continuous study carried out by a third party research agency and that every
2 quarter a random representative sample of Sky customers and non-Sky customers are
3 interviewed and they are asked a series of questions. We are only given the most selective
4 possible piece of data, which is the answer to one single question, “Sky is a company I can
5 trust” over very carefully selected time periods, and notably not coming up to date and with
6 gaps. We submit that that evidence itself is of highly questionable significance. It is
7 obviously partial and carefully selected. Even on its own terms what it shows is that there is
8 no significant long term damage to Sky’s reputation.

9 What we see is that amongst Sky’s customers, at the beginning of 2007 there was a fall of
10 about eight percentage points in relation to the question of Sky’s trustworthiness, but it was
11 virtually back to the same level, only about two percentage points down, by 2009, and that
12 the same is true to Virgin Media. The fall in relation to Virgin Media is only 11 per cent at
13 its biggest and then back to within 2 per cent by February 2009.

14 Of course, what we do not know is whether the dispute with Virgin is the only reason why
15 these customers say they can or cannot trust Sky, because Sky attracts adverse publicity for
16 other reasons, including, for example, it was being investigated for its promotional activities
17 at the same time. So we do not know if this was the only reason why these people were
18 saying they trusted Sky less.

19 The key point is this: whether they trusted Sky or not, they have no alternative. If they
20 wanted to watch these channels they had to subscribe to Sky; and that is essentially, we
21 submit, the reason why what Sky says about any weakness in its negotiating position is
22 completely empty because Sky holds the cards. Sky has the sports channels and ultimately,
23 if Sky wins this appeal, it can say to any retailer, “We are withdrawing the sports channels”,
24 and the retailer, if they lose the sports channels, will lose customers. Those customers may
25 be angry with their retailer, they may be angry with Sky, but if they want to watch the
26 Premier League they will have no choice, they will have to subscribe to Sky.

27 So we submit that what the evidence shows is that Sky has been prepared to do this, that it
28 did not suffer any significant damage, that the damage was much worse for Virgin and that
29 in the future there is no reason why Sky would not be in a position to do it again. Indeed,
30 we submit that Sky would be in a much stronger position because Sky would be able to
31 portray itself as the innocent victim of this process. Sky could say, “A regulatory decision
32 was imposed upon us, we thought it was unfair, we exercised our right to appeal and the
33 court agreed that we were right”, and essentially blame Ofcom.

1 So what is the response to these points by Mr. Darcey in his second witness statement?
2 Could we just pick that up. It is essentially para.9. First of all, he says the channels are
3 branded, Sky Sports 1 and Sky Sports 2:

4 “As a result, consumers will associated any cessation in supply of these channels
5 more with Sky than with the retailer.”

6 That, we submit, is pure assertion. There is no evidence at all to support that proposition, it
7 is simply an assertion. One might equally say they are more likely to associate the channels
8 with their retailer who is the person that they pay their bill to.

9 “Second, under a wholesaling arrangement it is the retailer not Sky which is in a
10 direct communication with the customer. The retailer is therefore in a position to
11 attribute responsibility to Sky for any cessation in supply. Sky has no direct means
12 of communicating with the customer.”

13 With respect, that is a quite surprising assertion. We just looked at the evidence about what
14 happened when Sky withdrew supply of certain of its channels from Virgin. Sky continued
15 to promote its products and to urge people to switch on the remaining channels that were
16 still being sold on Virgin. The fact that Virgin was the retailer certainly did not prevent Sky
17 from communicating with Virgin’s customers for the very obvious reason that it is Sky
18 which controls the content. Sky is better placed than anybody else to communicate with
19 customers. They control the content of the channels.

20 It is also hardly irrelevant to bear in mind the size of Sky’s marketing budget which is
21 £1 billion per annum – vastly in excess of any other party in this market. Sky is much better
22 placed to protect its reputation than any other party. Indeed, the evidence, we submit, is
23 overwhelming that the retailers would be in a far weaker negotiating position than Sky.
24 Yet that is the totality of Sky’s case on reputation. It rests solely on bare assertion and that
25 minuscule proportion of tracker data, that is it.

26 THE PRESIDENT: I suppose it is quite hard to see what evidence there could be. It is
27 coincidence, in a sense, that the Virgin stuff was capped. Absent that, what could you do –
28 a market survey, I suppose?

29 MISS ROSE: Of course, but the fact that the Virgin incident happened means that this court is in
30 a very privileged position, because what this court is able to see is that by any objective
31 measure Sky did not suffer at all from withdrawing its channels to Virgin, it was Virgin that
32 suffered. Sky’s share price was unaffected and it continued to put on subscribers. It was
33 Virgin that suffered.

1 THE PRESIDENT: It would be slightly different, would it not, to be fair, because whether there
2 would be many, there would still be multiple people doing it, and it would be a slightly
3 different scale of withdrawal, would it not, on any view?

4 MISS ROSE: Sir, I know that this question of multiple players is something that concerns you,
5 but it is not something that has ever been relied on by Sky.

6 THE PRESIDENT: I am not saying it concerns me. I am just throwing it out.

7 MISS ROSE: I realise. But, you have thrown it out several times. I am dissuading you from
8 throwing it out.

9 THE PRESIDENT: I am just slightly surprised that because everyone sees that it is Virgin there I
10 a lot of reliance placed on the previous Virgin incident. But, this would not be a complete
11 parallel to that.

12 MISS ROSE: No, I agree, it would not. This would be a situation in which Sky would be in a
13 much stronger position because reputationally -- This would not simply be a commercial
14 dispute. It would be a situation in which Sky would be able to say, "We never asked to be
15 put in this position ----"

16 THE PRESIDENT: "It is all Ofcom's fault."

17 MISS ROSE: "-- It is all Ofcom's fault. Blame the regulator."

18 THE PRESIDENT: The customer is very forgiving. They say, "Of course, we have been
19 following the appeal very closely and ----"

20 MISS ROSE: So, ultimately, it does not matter whether the customers are forgiving or not.

21 THE PRESIDENT: They have no choice.

22 MISS ROSE: There is no other game in town - except the Premier League and that is on Sky.

23 THE PRESIDENT: What about the litigation? You say it would not stand a cat in -- No-one ----

24 MISS ROSE: I am going to come on to the litigation. We do submit that is completely fanciful
25 because if Sky won its appeal the notion that anyone would be able to bring a legal action if
26 they terminated the contracts in accordance with their terms after that, we submit, is
27 completely fanciful. There is no plausible basis on which it could be suggested. If
28 somebody brought a vexatious claim, Sky would have the usual remedies open to a party in
29 that situation, but that cannot be a reason for interim relief. That is the totality of their case
30 on Issue 1. We submit that it certainly comes nowhere remotely near satisfying the burden
31 of proof identified in *Microsoft*, and certainly nowhere remotely near establishing anything
32 that could be called either serious or irreparable harm. Of course, you already have my
33 point that they do not even contend it is irreparable. They just say it would be difficult. That
34 is Point 1.

1 Point 2, going back to the application -- This is at p.15 of the application.

2 “Implementation of the decision will lead to a permanent and unjustified
3 devaluation of Sky's channels in the minds of consumers”.

4 First of all there is a factual assertion which is that Sky will be undercut by other retailers on
5 retail prices. Secondly, there is an assertion that the effect of this will be permanently to
6 devalue the channels and make it difficult for sky to restore prices if their appeal succeeds.
7 We submit that both of these premises are wrong and are not supported by the evidence.
8 Indeed, inconsistent again, we say, with Sky's actual conduct.

9 The first proposition is that Sky will be undercut on retail prices. You have seen our
10 evidence on this point - that the price has been set by Ofcom significantly higher than was
11 being proposed in the third consultation document and has been set at a level which Ofcom
12 judges would not permit other parties to undercut Sky for selling the same products. The
13 intention is to encourage innovation and diversity in the markets, new technologies, new
14 forms of packages.

15 Sky has put forward no significant evidence to suggest that other parties would be in a
16 position to undercut them. What they rely on, if we go to the witness statement of Mr.
17 Darcey, is para. 41 of that witness statement. “There is evidence to suggest that substantial
18 price cuts in the short term would be plausible.”

19 He relies on three statements - (1) a Q and A extract from the BT website -

20 “How much is BT going to charge for Sky Sports 1 or Sky Sports 2? The answer:
21 We are examining a range of packages and options we aim to offer lower prices
22 than those charged today.

23 Richard Branson, a major shareholder of Virgin Media, stated in an article in the
24 Financial times on 23rd October that ‘under Ofcom’s proposals, some operators
25 could plan to retail Sky sports while at a price more than 20 percent below the
26 lowest price that channel can currently be bought from Sky’,

27 Gavin Paterson, Chief Executive of BT Retail ... [on]16th January, 2010, that if
28 Ofcom’s decision ‘went its way’ it could offer Sky Sports 1 ‘somewhere in the
29 mid-teens”.

30 The first obvious point is that the second and third of those statements pre-date the decision
31 and they are premised on the price level that was being put forward by Ofcom in the third
32 consultation paper which was significantly lower than the price level in the decision. So,
33 they are not evidence of anything at all.

1 In essence, the whole of Sky's argument that there would be undercutting on price is based
2 on a single statement in the Q&A from BT's website, which only says that they would aim
3 to offer lower prices and makes no specific comments about to what extent they would be
4 lower or whether they would be different packages. We submit that is clearly not enough to
5 establish any factual basis for alleging serious and irreparable harm.

6 Then, in relation to the question of internet pricing Mr. Darcey deals with that at para. 49.
7 he admits,

8 "The impact of the extension of Ofcom's remedy in this way is very hard to
9 anticipate".

10 So, he is not even suggesting that he is in a position to offer any kind of firm prediction.

11 THE PRESIDENT: I think it was this bit that I had recalled, where he says that the likely
12 argument might be that 'numerous internet re-sellers will seek to obtain wholesale access to
13 channels in order to sell them on close to, or even below, the cost of supply. Such
14 applications are very cheap to run'. I think that was what I was thinking of when I asked
15 you about the multiple people. You showed me the bits in the statement where you say that
16 you do not anticipate this.

17 MISS ROSE: Yes. We deal with that in Mr. Unger's witness statement at para. 57. The point
18 that we make is at para. 57(d) - that they could compete on IPTV because Ofcom's remedy
19 is based on retail prices of the current satellite packages. So, there would be nothing to stop
20 Sky competing with internet providers.

21 The other point is that Mr. Darcey himself admits that what he is saying at para. 49 is
22 speculation. The minimum qualifying criteria and the security criteria would also apply to
23 the internet, of course, and that is going to significantly reduce the number of people who
24 would be interested or qualified to purchase these for the internet. The key point is that it is
25 complete speculation, as he admits.

26 Then, going back to para. 39 in Mr. Darcey's witness statement, what he says is,

27 "I believe that the decision might result in a number of events which will cause
28 consumers to alter their perception".

29 So, he is very tentative at the beginning of para. 39 about the likelihood of any of this
30 material. One can see why. There is no evidence underpinning what he says here, except
31 the single Q&A extract from the BT website. That is the only evidence of retail
32 undercutting. Sir, that is why we say the first factual premises - that there will be
33 undercutting - is not established.

1 Secondly, even if Sky were right and in the absence of interim relief, during its appeal,
2 other parties entered the market and started to offer cheaper retail packages, we submit that
3 Sky has certainly not established that that would result in a permanent devaluation of those
4 channels in the minds of consumers which would impede it in restoring its prices in the
5 event it won the appeal.

6 Mr. Darcey deals with this, first of all at para. 45, he says:

7 “In the event that it is decided on determination of the appeal that Sky is entitled
8 to charge higher wholesale prices than are set out in the Decisionm Sky will
9 therefore face a risk in returning wholesale prices to their current levels, that
10 consumers will not be happy to pay the resultant higher retail prices as their
11 perception of the value of the channels will have been permanently altered.”

12 It is pure assertion, it is completely unsupported by any evidence at all, there is nothing to
13 support this. He makes a similar point at para. 50, but unsupported by any evidence. In
14 fact, Sky’s own conduct is inconsistent with the contention that retail price cutting of its
15 premium sports channels would devalue them in the eyes of consumers and make
16 consumers reluctant to pay full price, because it has been, and remains, an important part of
17 Sky’s marketing strategies to offer these channels on a cut price or even free basis for
18 introductory periods. There is a variety of evidence about this. First of all Mr. Chance, on
19 behalf of Top Up TV, paras. 122 to 124 of his witness statement. He says:

20 “Sky has consistently sought in the past to position itself as providing good value
21 for money. It has never sought to suggest that the attraction of its channels is in
22 some way dependent on their high prices. In addition Sky has periodically
23 undertaken substantial marketing campaigns which emphasise the low prices of its
24 Premium Sports channels.”

25 He exhibits an advertisement, including an offer for six months free Sky Sports at pp. 2 to 5
26 of his exhibit. Then he comments on the fact that Mr. Darcey had said at para. 44 that Sky
27 had in November 2006 ceased discounting its Premium Sports and Movie channels in its
28 acquisition marketing, and points out that Sky has continued to discount its channels in
29 relation to marketing aimed at lapsed customers. So it is those people who did take Sky and
30 then stopped they will try and attract them back with discounting offers. So at para. 124:

31 “Sky made a high profile offer to lapsed subscribers towards the end of last year.
32 Come back on any Sky TV package half price for a whole year. You can also add
33 Sky Sports or Sky Movies for 12 months, both are half price.”

34 Mr. Unger also deals with this point at para. 61:

1 “I also note that Sky has recently launched a mobile service providing Premium
2 channels via iPhone devices for only £6 per month. In neither case does Sky
3 appear to have been concerned this would harm consumers’ perception of value.”

4 Mr. Darcey deals with these points in his second witness statement, para. 14. He admits in
5 the middle of para. 14 that

6 “TUTV is correct that Sky does offer programming discounts on pay TV packages
7 in order to win back customers. However, such offers are limited in time, targeted
8 at particular groups of former subscribers, and are not publicised or available more
9 widely.”

10 This appeal is also limited in time. Even on Sky’s assessment of how long it is going to
11 take, we are only talking about a nine month period, and not a nine month period of half
12 price Sky Sports when we have seen that Sky is happy to offer six months half price Sky
13 Sports in any event, but perhaps a modest discount. One has to ask the question: what is the
14 evidential basis for the conclusion that any significant number of consumers would have
15 their perception of the Sports Channel’s value permanently altered so that they would not be
16 prepared to pay the higher price just because of that temporary situation, when it seems that
17 these very generous offers for new customers, or lapsed customers do not have that effect.
18 No explanation, but we submit Sky’s conduct inconsistent with their unevidenced assertion.
19 He also admits in this paragraph that it is right that they charge much less for the iPhone
20 service and he says that that reflects quality because users can only view the channels on a
21 very small screen, but again no suggestion that that service devalues people’s perception of
22 the value of the channel.

23 The fundamental points here of course that are made by Mr. Unger, if we go back to his
24 witness statement are that people do value very highly the Premium Sports channels, they
25 are by far the most popular reasons why people take pay TV and there is no reason or
26 evidence to suggest that people’s intrinsic understanding of the value of those channels will
27 decline because of any temporary conditions during the progress of this appeal. That point
28 was made by Mr. Unger at para. 59, referencing the decision:

29 “Ofcom noted that the programming content on the core Premium Sports channels
30 is expected to have an enduring appeal for most consumers. I would not expect a
31 temporary period of lower prices to have a permanent adverse impact on that
32 appeal.”

33 And that is a point that Mr. Darcey has chosen not to respond to in his second witness
34 statement. There is no answer to that point about the intrinsic value of the channels.

1 We also make the point that if Sky is really concerned about this, it can be dealt with by the
2 expedition of the appeal.

3 The final point is that if Sky wins the appeal and withdraws supply, for example, from
4 digital terrestrial providers like Top Up TV then those subscribers will have no alternative
5 but to return to Sky and to return to Sky's rates, because Sky's price that it charges Virgin
6 will go back up, Sky's own price will go back up and everybody who wants to continue to
7 receive sports will have to go back to Sky. The likelihood is that Sky will get more
8 subscribers in that situation because new subscribers attracted during the period of the
9 appeal by the availability of deals from other entrants may find they are now addicted to the
10 Premier League and will have no choice but to return to Sky . So if anything they are likely
11 to benefit.

12 What there certainly is not, is any evidence of serious or irreparable harm.

13 THE PRESIDENT: So basically they should comply with the decision, there may be some takers
14 at this price, which is generally admitted to be less than the commercial price they might
15 have been able to extract – I think that is the effect of some of the evidence, had it just been
16 a commercial negotiation, assuming they were willing to supply. If they win the appeal
17 there is no way they can be protected.

18 MISS ROSE: Who could not be protected?

19 THE PRESIDENT: Sky, even in relation to that price difference, is there?

20 MISS ROSE: How do you mean?

21 THE PRESIDENT: On the assumption that I think you are making, no interim relief is granted
22 and, let us assume, there will be contracts at the regulated price which, let us assume, is less
23 than the price that they might otherwise have extracted from those players had they been
24 willing to contract with them. If they win the appeal and withdraw there will be a period,
25 whatever it is, nine months or a year, when they will have been supplying at a regulated
26 price.

27 MISS ROSE: Yes, their profit will be less than it would otherwise have been if they had been
28 willing to contract, but at the moment they are not earning those profits at all because they
29 are not contracting. So that is a financial benefit to them, not a loss.

30 THE PRESIDENT: You say that effectively there is nothing to compensate?

31 MISS ROSE: There is nothing to compensate, no. I am going to come on to the question of the
32 financial impact of this decision on Sky, but you will have seen, Sir, that the analysts think
33 that any negative impact will be marginal and that there may even be positive benefits for
34 Sky, and their share price went up once this decision was made, not down.

1 One final point before I leave this head: on the first factual premise, whether there would
2 actually be any undercutting, we make the point in our skeleton argument not only that there
3 is a lack of evidence from Sky to that effect, because there is only the single statement from
4 BT's Q and A, but in fact there is evidence before this Tribunal from BT, Virgin and Top
5 Up TV that they would not undercut, and we have set that out in our skeleton argument.
6 Paragraph 37 of our skeleton argument sets out that evidence. That is the second head.
7 The third head, if we come back to Sky's application – we are now on p.18, para.51 –
8 “Costs of winning back customers”. They say that if they lose customers to their rivals they
9 will incur substantial costs in re-acquiring those lost customers in the event that their appeal
10 is successful, including marketing, subsidised new set top boxes, viewing card costs,
11 discounted installation, sales agents commissions, call centre costs and discounted software.
12 They say their current average subscriber acquisition cost is – they set it out there, the
13 figures are confidential.

14 We make a number of responses to this point. The first is that this is a pure financial cost
15 that Sky are identifying, the cost of win-back. They are not saying they cannot win back,
16 they are saying it will cost them money. We say that is, in principle, not capable of
17 constituting serious and irreparable damage.

18 Secondly, we say that the costs set out here are inflated, and we deal with this in Mr.
19 Unger's witness statement, para.64. We make the point, first, that if Sky withdrew
20 wholesale supply from other retailers many subscribers who had switched to those retailers
21 might return to Sky without any need for win-back to get the channels, and one can see how
22 that would happen. They would simply phone Sky because Sky would be the only game in
23 town. This is para.64 of Mr. Unger, p.19.

24 There is then a point about discounted installation, but we make the point that as this is only
25 a few months they may well still have the dish on their house and may not have removed it,
26 so they may not have to install a dish and wiring at that time.

27 We also make the point that these costs need to be seen in context, that their annual
28 marketing spend is £1 billion, and Sky's operating profit in 2009 was £780 million. The
29 maximum that Sky is alleging they would lose from this you can see in Mr. Darcey's
30 second witness statement at the end of para.16. We say that figure is extremely modest in
31 the context of Sky's overall marketing operation, let alone in the context of its business.
32 That is Sky putting its case at the highest.

33 We also make the point that number switching over the period of this appeal is likely to be
34 pretty limited and that Ofcom anticipates that one of the key effects of this decision will be

1 to expand the market for pay TV. It is not a question of competitors snatching customers
2 off Sky, but new people buying pay TV who did not previously have it. That is particularly
3 significant in the context of the rise of digital terrestrial television. The result of the digital
4 switchover which is happening now, it is half way through now, many, many people have
5 access to multi-channel television who never had it before. That means that there are
6 people who are actively considering for the first time whether or not to take a pay TV
7 package. Lots of those will be lower income people who may find Sky's packages
8 somewhat on the expensive side. So if small entry level packages offering smaller numbers
9 of channels at a more modest cost are available, you may find new customers coming into
10 the market, so you are talking about market expansion.

11 That is actively to the profit of Sky in two respects: firstly, Sky obtains the wholesale
12 revenues of wholesaling the channels that those people receive; and secondly, if it then
13 wins its appeal and those people have become very attached to the Premier League in the
14 meantime, they will have to go to Sky. So Sky will get more customers, not less.

15 That brings me then to the fourth head which is financial loss. This is again in the
16 application, p.18, just above para.52. Here Sky relies on Ofcom's indication that there will
17 be a short term reduction in wholesale revenues from Virgin Media amounting to £7 million
18 per annum. What we are told, interestingly, is that Sky has not fully assessed whether this
19 figure represents the true extent of its losses as against its internal forecasts of revenue from
20 Virgin Media.

21 That coyness from Sky, we submit is highly significant. If Sky thought that it was actually
22 going to suffer a significant financial loss, I think we can assume that it would have done
23 the calculation. The fact that it has not has two consequences: first, Sky is not actually
24 alleging for the purposes of these proceedings that it will suffer any financial loss under this
25 head. All it says is, Ofcom said that in the short term there would be a fall in wholesale
26 revenues of this figure. They did not say whether that is right or not, so they are not
27 alleging that they will suffer a loss of that figure. Secondly, of course, the point is obvious
28 that this is a very, very small sum in the context of Sky's business, and what it leaves out of
29 account is the very significant opportunities for Sky to profit on the implementation of the
30 decision, most obviously from new wholesale with new customers with whom it is not
31 currently contracting, and of course the expansion of the market.

32 We submit that this again is not capable of being regarded as either serious or irreparable
33 loss and that there has not even been demonstrated to be a loss at all under this head. What
34 the objective evidence shows is that those who know think that this decision is good for

1 Sky. If we go back to Mr. Unger's witness statement, at para. 72 he refers to reports
2 prepared by independent analysts following the publication of the Pay TV statement and the
3 impact that they expected the decision to have on Sky.

4 "UBS has said: 'The outcome of BSkyB's appeal to the CAT for an injunction or
5 'stay' against the price cuts is likely to be known in the next few weeks. Sky
6 needs to prove 'irreparable harm', which may be difficult given that we estimate
7 the downgrades to 2011 earnings per share at only 3 percent'.

8 Nomura has reported that, 'Relative to our prior expectations, the Ofcom pay TV
9 decision seems to allow BSkyB to 'dodge a bullet' with a significant softening of
10 previously proposed terms ... Hence we move our earnings per share down by
11 only 1.6 percent starting in 2011'. It concluded, 'The long-term effect is unclear
12 but in the medium term it is hard to foresee major damage to company profits'.

13 RBS said, 'We believe Ofcom's ruling was relatively benign for BSkyB with
14 Ofcom taking a relatively narrow focus and leaving Sky plenty of wriggle room to
15 limit potential damage in our view. A shift from retail-led growth to wholesale-led
16 growth could even be earnings-enhancing. We reiterate a buy and target price of
17 £6.70".

18 Again, Mr. Darcey has not responded to any of that evidence in his second witness
19 statement or disputed it. We submit there is simply no evidential basis to suggest any
20 financial loss to Sky at all as a result of this decision - still less any loss that could be
21 remotely described as either serious or irreparable.

22 That leaves only Item 5 at p.19 of the application:

23 "Complying with the decision in the timelines required will prejudice Sky's
24 preparation for the appeal".

25 Sir, Mr. Anderson, in his skeleton argument said it was difficult to take this contention
26 seriously. With respect, it is slightly difficult. Given the size and resources of Sky, the
27 proposition that Sky is not capable of pursuing an appeal and implementing the decision at
28 the same time, we submit, is an optimistic one. Mr. Unger deals with this point in his
29 witness statement at paras. 75 to 79, and in particular at para. 78. Sky had said it needed to
30 review and respond to Ofcom's consultation on Pay TV movies by 14th May, but we have
31 already indicated to Sky that we would be willing to extend the consultation period in the
32 event that they required more time. Of course, the burdens are not just on Sky, but on the
33 other parties as well - including Ofcom.

1 Sir, that is the totality of the five points on which Sky rely as indicating that they will suffer
2 serious or irreparable harm. We submit that their application fails on the evidence. They
3 have not satisfied even one of their five heads to anything remotely approaching any
4 standard,. Whether you apply the public law approach or the CFI approach, they have not
5 shown any significant prejudice of any kind. There are merely a few bare assertions from
6 Mr. Darcey which are inconsistent with Sky's own past conduct, inconsistent with the
7 objective data, inconsistent with the evidence from the other parties, and unsupported by
8 any significant evidence.

9 That, we submit, ought to be the end of this application. But, in case the Tribunal considers
10 that there is some serious harm or prejudice to Sky that could be serious and irreparable
11 damage, the next question is, "What are the interests that have to be balanced against any
12 harm to Sky?" The suggestion from Mr. Flynn was that Ofcom's approach to this was to
13 say, "Oh, well, you have to presume that there will be damage to competition if the remedy
14 is not implemented". Sir, you have my submissions on the right approach, but it certainly is
15 not the position that Ofcom has not identified clear and specific damage to competition, the
16 public interest and consumers if this decision is not implemented swiftly. These are matters
17 that are dealt with in detail in the witness statement of Mr. Unger , starting at para. 81. I
18 would invite you to read - although not right now - right down to para. 120. In those
19 paragraphs Mr. Unger explains why it is important that this decision should be implemented
20 now. There are essentially four points. The first is the reason for the deadline set by the
21 statement and the importance of the football season; the second is the current situation in
22 relation to the transition to digital terrestrial television; the third is the current state of
23 development of super-fast broadband; the fourth is the importance of bundling.

24 Mr. Flynn says it is terribly unfair that what he describes wrongly as his right to interim
25 relief should be impeded by the timing of this decision. But, that is just the way things are.
26 If a decision is made at a particular time and it means that if it is further delayed there will
27 be significant damage to competition, that is a factor that the Tribunal has to take into
28 account. Sky may think that it would have been much better if the decision had been taken
29 a year ago. But, if it had been taken a year ago what we would have been facing was a
30 different kind of appeal, saying that we had not consulted adequately. That is always the
31 difficulty for a regulator taking what is, on any view, a very substantial decision - that you
32 have to consult properly; you have to analyse the data; you have to investigate. That takes
33 time.

1 The first is the question of the importance of the football season. Here we submit that there
2 is abundant evidence before you to show how important the August start date is for those
3 who are trying to enter this market. I do not intend to rehearse it.

4 There are particular factors that are relevant to the football season this year. The first is the
5 World Cup. Now, Sky says, “Well, the World Cup is Free to Air”. But, that, of course,
6 misses the point. The existence of the World Cup on the Free to Air channels will
7 massively increase the interest of the general public, including those who are slightly less
8 interested in football and who so do not already subscribe to Sky Sports in key footballers
9 who play both for the England team and in the Premier League, and, indeed, who play for
10 other international teams. So, I am sure you can remember the seismic effect of the 1990
11 World Cup on the popularity of football in the United Kingdom, and that those players
12 become icons. If the England team, by some miracle, were to do well this summer that
13 would be expected to have a very significant impact on the popularity of those players and,
14 consequently, on the take-up of channels for the next season. The next point is that there is
15 going to be a change in the availability of alternatives to Sky from this season because there
16 will be fewer Premier League matches available on the non-Sky option as from this August,
17 it will be less attractive.

18 THE PRESIDENT: I have read Mr. Unger.

19 MISS ROSE: I understand. Sir, I do not intend to labour the point, but we submit that there is
20 ample evidence to show that it is very significant.

21 The second point which is of equal if not greater importance is the development of digital
22 terrestrial television because we are at a key moment in the development of that technology.
23 The digital switchover is still in the process of happening and when that is complete over 98
24 per cent of households in the United Kingdom will have access to digital terrestrial
25 television, and for many of those households it will be their first opportunity to receive
26 multi-channel television and they will start to think about whether they want pay TV and
27 they will have to choose between getting it on their digital terrestrial option, or getting a
28 satellite.

29 THE PRESIDENT: This is complete by 2012?

30 MISS ROSE: 2012, that is right – it is part way through at the moment. So this really is a key
31 opportunity to open up competition on a different platform, and Sky has sought to meet that
32 by saying: “We were prepared to retail on DTT, but you would not let us”, but of course
33 that is no answer, because to say that they should have been allowed to become dominant
34 on yet another platform does not answer the problems in competition that Ofcom has been

1 seeking to deal with in this statement. The DTT situation we submit is not something that
2 can be compensated for in any way and a decision next year is not going to be able to give
3 the same benefits in terms of competitive pressures and opening up the markets as a
4 decision layer, it will be lost for ever.

5 The same situation, we say, is true in relation to super fast broadband, and we have
6 explained the position in relation to this starting at para. 103 of Mr. Unger's witness
7 statement, and we make the point at para. 111:

8 "Although the UK was among the world's first countries to launch IPTV ...
9 adoption here has lagged behind other countries. There is a broad correlation
10 between those countries with a higher penetration of IPTV and those countries that
11 have fibre availability. ... It is unlikely that operators would commit to make
12 large scale investment in rolling out fibre without the security of access to
13 premium content and, therefore, the opportunity to offer content propositions that
14 would be attractive to consumers."

15 And at 112 we say:

16 "Ofcom considers that access to [the] Premium channels is likely to prove
17 important to the success in the UK of IPTV and the rollout of super-fast
18 broadband, albeit as one of several potential drivers of demand. Without access to
19 Sky's Core Premium channels development of NGA networks and services will be
20 impeded."

21 And we are talking here about very significant investments that need to be made, and if they
22 are not made now on the basis of this decision there will be significant delays in the
23 development of these technologies in the UK with associated detriment.

24 The final point is the importance of bundling, we deal with this starting at 115. The point
25 here is that increasing numbers of people are obtaining their telephones TV and broadband
26 from one supplier. It is called a "triple play package". At the moment Sky enjoys an unfair
27 competitive advantage in that situation because companies like BT are heavily regulated in
28 relation to the provision of telephone and broadband services and cannot get access to Sky's
29 Premium content for the television services. Sky has got access to the Premium content
30 which is not regulated, and we see this at para. 117. We say:

31 "... regulation has been effective in delivering effective retail competition in two
32 elements of such bundles (broadband and telephony), but not in the third, creating
33 a regulatory asymmetry which favours Sky."

1 At the moment there is a distortion in the market for triple play packages favouring Sky,
2 giving Sky an unfair advantage in the supply of those packages. We can see how that is
3 reflected in Sky's success in this market which we set out in the following paragraphs.
4 We also make the point at para. 119 that it is more difficult for people to switch away from
5 triple play packages because the costs are much higher for those bundles than for stand
6 alone products.

7 THE PRESIDENT: There is a competitive advantage, whether it is a vertical and unfair one may
8 be open to doubt at the moment.

9 MISS ROSE: It is a distortion of competition because two elements of the triple play package are
10 regulated but the third is not and Sky is the person that has got control.

11 THE PRESIDENT: The reason they are regulated is for entirely different reasons.

12 MISS ROSE: Yes, absolutely, but Ofcom has reached the conclusion that this one needs to be
13 regulated too; in the absence of the imposition of that regulation Sky enjoys a competitive
14 advantage because it has control of the unregulated segment of the triple play package.

15 THE PRESIDENT: I understand the logic of the advantage.

16 MISS ROSE: Those are all general problems in terms of competition that are independent of the
17 particular impacts on individual undertakings that you have seen in the evidence of the
18 interveners, and we submit that that material is also relevant because it is related to the
19 competitive problems that we have indicated, but I will let the interveners develop their
20 cases on that material.

21 Sir, we submit that if there are interests to be balanced it is very clear that the concerns
22 about the impacts of a delay in implementing this decision on competition are much greater
23 and more substantial than the concerns that Sky has been able to put forward about any
24 harm that it will suffer if the decision is implemented now. On the one hand you have a
25 very modest effects, barely evidenced at all for a very large and powerful company. On the
26 other hand you have potentially significant problems for consumers and significant
27 detriments in the establishment of competition on new platforms such as digital terrestrial
28 television, and for new players to enter the market at the most advantageous time of year.

29 THE PRESIDENT: I understand why you say "modest", should one take into account the fact
30 that this is effectively regulating this content for the first time?

31 MISS ROSE: It is difficult to see why.

32 THE PRESIDENT: No, I do not think that matters.

33 MISS ROSE: It is hard to see why that is ----

34 THE PRESIDENT: It is bringing into regulation, is it not?

1 MISS ROSE: Yes.

2 THE PRESIDENT: Something that has hitherto been won on the open market, so there is no
3 significance in that.

4 MISS ROSE: It is very difficult to see how that is relevant to the balancing of the interests. I am
5 just wondering, as a matter of principle, what its relevance would be.

6 THE PRESIDENT: This is only a modest, little thing, but I suppose it could be seen as quite a
7 big thing.

8 MISS ROSE: I do not suggest that the decision is modest. The decision is extremely important
9 for the future development of pay TV in the United Kingdom, very important.

10 THE PRESIDENT: It is a very big step for them.

11 MISS ROSE: What I submit is the irreversible adverse effects of a nine month appeal period that
12 Sky has been able to demonstrate are very modest, that is the point. Sky has just not been
13 able to show that it is going to be a problem for it. We submit they have had plenty of
14 opportunity to do that.

15 THE PRESIDENT: I understand all those points, yes.

16 MISS ROSE: Mr. Holmes rightly makes the point that although it is right that this is the first time
17 this market has been regulated in this way it is not correct for Sky to suggest that this is an
18 unprecedented form of regulation of television ----

19 THE PRESIDENT: No, because other countries do it.

20 MISS ROSE: -- because in the United States and other European countries there are similar
21 forms of regulation. So this certainly is not unprecedented. My submission is that is a point
22 that goes more to the merits, it is not a point that goes to the question of how you draw the
23 balance in terms of interim relief.

24 Can I turn to the way that Sky put their case on this, which is in their application, paras.54
25 and 55. At 54 they say:

26 "Put at its very highest, and putting aside the undertakings Sky would be willing to
27 offer, the worst that would result from the temporary suspension of the Decision
28 would be a short delay in the establishment of Ofcom's preferred vision of
29 competition ... Nothing crucial will have happened in the meantime."

30 Sir, from the material that I have shown you, you can see that that is a complete
31 mischaracterisation of the situation.

32 THE PRESIDENT: You say that very important things will happen.

33 MISS ROSE: Very important things will happen in the meantime and there will be serious
34 consequences.

1 Then at para.55 they say:

2 “However, the effect on competition ... must be assessed in the following context.”

3 Firstly, Sky is not said to be acting contrary to competition law or any existing regulatory
4 obligations. You have my submission on that, but that is not relevant because we are not
5 exercising a regulatory power that requires them establishing a breach of competition law,
6 so it is not surprising that they have not been found in breach of competition law. That is
7 not relevant to the balance for the purposes of interim relief.

8 Secondly, the exercise by Ofcom of its section 316 powers is entirely novel. Again we
9 submit irrelevant to the question of the balancing of the interests.

10 Thirdly, they say that no competitor is said to be at risk of exiting the market. Sir, you have
11 seen the confidential material on that point and I do not need to comment on it.

12 Fourthly, requiring supplies to be made to new entrants goes beyond preservation of the
13 status quo and was expressly rejected as a justifiable basis on which to deny an application
14 for interim relief in *Genzyme*. Of course, that depends on how you define the status quo and
15 you have seen the comments in *Monsanto* indicating that the status quo includes the
16 Regulator’s decision; and also in the *Microsoft* decision where the order required a general
17 offer of its intellectual property by Microsoft and no interim relief was given.

18 Then 55.5:

19 “Sky’s channels are already available using every transmission technology (save
20 for DTT) at retail prices with which Ofcom sees no need to interfere, in a market
21 which Ofcom’s own research indicates is characterised by high levels of consumer
22 satisfaction.”

23
24 The devil is in the brackets “(save for DTT)”, which is the single most significant platform.
25 Of course, it is also the case that Sky’s channels are only available on other platforms
26 except cable if retailed by Sky.

27 Then it is said:

28 “There is nothing unique about the 2010/11 football season as compared with other
29 seasons.”

30 Again you have seen the evidence on that. That is not accepted as correct.

31 Then at 55.6 they say that we have overstated the importance of the new football season,
32 and again you have seen the evidence on that.

33 Then at 55.7 they say:

1 “It is not clear to what extent consumers will be able to choose to receive the Core
2 Premium Sports channels on DTT.”

3 There has been an exchange of evidence on this point, but Ofcom’s evidence is that there
4 are over a million people who would be able to receive it on DTT in something like 378,000
5 households, and we certainly do not regard that as insignificant.

6 Then at 55.9 they say:

7 “Ofcom has itself taken over three years to make the Decision ... This
8 demonstrates that intervention, if justified at all, cannot be considered to be a
9 matter of urgency.”

10 That, we submit, is just a non-sequitur. Just because this is a big and important decision and
11 we have taken a lot of time and trouble over it, it does not mean that its implementation now
12 is not important and urgent.

13 Then at 55.10 they make a point about negotiations which it is not for me to deal with.

14 There are two other factors which we submit are relevant when weighing the balance on the
15 question of interim relief. The first is the likely length of time for which interim relief will
16 be required; and the second is the question of what undertakings are being offered.

17 Dealing with the first question, the likely length of time for interim relief, you have seen the
18 correspondence and that we proposed an expedited timetable that would have permitted a
19 full hearing in late September. That was our letter of 12th April. That is in the application,
20 exhibit MWD5 to Mr. Darcey’s witness statement. The timetable that we propose is
21 annexed to that letter at p.9. Sky rejected that timetable in their letter of 14th April, and in
22 their application at para.25 they estimate that the CAT appeal alone will take at least nine
23 months. You already have my submission about how long further appeal to the Court of
24 Appeal is likely to take, meaning that we are talking about something in the region of 15
25 months.

26 THE PRESIDENT: We might have had that even on an expedited hearing, might we not, and we
27 might have other appeals.

28 MISS ROSE: Yes, we are talking about a very significant delay to the implementation of the
29 decision. The difficulty is this, and I do not say this in any way to impugn the good faith of
30 Sky but just to acknowledge what is commercial reality: if Sky obtains interim relief they
31 will have a very powerful commercial incentive for this appeal to take as long as possible,
32 because as long as this appeal continues they can continue to decline to contract with other
33 parties, they can consolidated their positions on the platforms where they have already have
34 access, including the internet, and so on, and prevent access by other parties.

1 THE PRESIDENT: Yes, it is all subject to liberty to apply, is it not, interim relief?

2 MISS ROSE: Yes, Sir, but once it has been imposed it becomes very difficult to take it off again.

3 Once a discretionary decision has been taken about the balance of interests it becomes very

4 difficult to remove it. This is really the crucial moment. Our submission is this: if Sky

5 does not get interim relief, they are the ones with conduct of the appeal, it is their appeal,

6 and they will then have a powerful commercial incentive to get on with it as quickly as

7 possible. Ofcom also wants to get on with this appeal. There is a very significant

8 difference between a party paying lip service to expedition where there is a commercial

9 incentive to delay and a party dealing with an appeal on an expedited basis that wants it

10 dealt with quickly. It is a difference that is likely to translate into many months of

11 difference. It affects, for example, what points people decide to take on further appeals.

12 We would respectfully ask the court not to make an order which puts Sky into the driving

13 seat with the timetable of this appeal in that way.

14 What we had considered as a possible alternative was whether directions could be set now

15 fixing the timetable for the whole of this appeal so that there was a clear time limit, an end

16 point. to any relief that was given.

17 There are two reasons why that has proved to be difficult to achieve. The first is that we

18 were told very clearly by the interveners that it was not going to work because it is critical

19 for them that they need to be able to get into the market before the football season starts. So

20 even the expedited timetable that we were proposing was not going to be of any assistance

21 to them. The second problem with it is that both Sky and the Premier League have flatly

22 refused to co-operate and say there should not even be a case management conference in

23 this case until after June. They are saying they will submit their appeal on 1st June and there

24 should be no attempt to manage this case until after that appeal has been submitted.

25 We would suggest that is the first indication of the difference between a party that really

26 wants expedition and a party that does not.

27 THE PRESIDENT: That is time.

28 MISS ROSE: The final point is the nature of the undertakings.

29 THE PRESIDENT: Are you going to touch on these?

30 MISS ROSE: Yes.

31 THE PRESIDENT: We have to be careful, do we not?

32 MISS ROSE: Yes, we may have to ----

33 THE PRESIDENT: I am just looking at the time.

34 MISS ROSE: It may be that I can deal with that first thing on Monday morning?

1 THE PRESIDENT: We are into Monday now obviously, because there are still quite a few
2 people to hear.

3 MISS ROSE: By the time we have cleared the court ----

4 THE PRESIDENT: I think the general feeling is that we should draw stumps now and then start
5 on the undertakings on Monday. Thank you all very much for the material you have given
6 me.

7 MISS LESTER: Sir, could I just raise one point about documents before we rise, which is that
8 since the Premier League was only admitted today into the confidentiality ring we have not
9 been sent any confidential versions of documents. We did sign the undertakings yesterday
10 so that it could be put in place straightaway. Since it is now in place could we simply ask
11 that all confidential versions of skeletons and witness statements are forwarded to us today
12 so that we have them for Monday?

13 THE PRESIDENT: The logic of that is that you should have them, and so should Mr. Jones,
14 presumably. So, unless anyone ----

15 MR. HOSKINS: I object, I am afraid, because as I understand it, they have not been given
16 permission to intervene yet. As I understand it, the reason they were allowed to stay today
17 was because Miss Lester at some time - hopefully on Monday - is going to say, "I agree
18 with Mr. Flynn". Why they should have to have all the documents -- I am sorry. The boat
19 has sailed. If Premier League want to play an active part in this -- You have seen the
20 correspondence. That should have been a week ago. It is simply too late. This is just a
21 waste of everyone's time. I am sorry.

22 THE PRESIDENT: Does anyone else want to say anything?

23 MISS ROSE: Sir, you have seen our position. We also object to their intervention.

24 THE PRESIDENT: The Premier League?

25 MISS ROSE: Yes. On that basis we do not see a reason why they need the documents . Since
26 they are not proposing to make any submissions or put in any evidence, we would like to
27 know why they think they want them.

28 MR. BEARD: The same for Top Up. We are in a similar position. We are not making a fuss
29 about Miss Lester being here and attending, but the idea that in the circumstances, having
30 missed that boat that was directed by the Tribunal, there should be wide-ranging provision
31 of detailed documentation containing sensitive confidential material is not something that is
32 appropriate in the circumstances.

33 THE PRESIDENT: It was hardly widespread, but -- Miss Lester?

1 MISS LESTER: Sir, you indicated at the beginning that you thought that the Premier League did
2 have a sufficient interest in these proceedings. I realise there has not been a formal ruling on
3 it. But, we are here. We are bringing our own appeal. We have already set out our interest.
4 If all the documents that are before the Tribunal simply have not been shown to a party who
5 the Tribunal has indicated has a sufficient interest, that would be quite unfair. We cannot
6 possibly know whether there are submissions we need to make on the documents if we have
7 not seen them.

8 THE PRESIDENT: Mr. Jones, you are anxious to say something too.

9 MR. JONES: Only a short point: Miss Rose referred to the witness statement of Mr. Unger and
10 paras. 81 to 120 thereof, which would be of particular interest for Orange, as the potential
11 new entrant, to see what is being said - so that its advisors, at least, can understand whether
12 or not the commercial interests and their legitimate interests are being protected.

13 MISS ROSE: I am concerned that what seems to be being envisaged is that these parties want to
14 look at the documents to see if they need to put more evidence in.

15 THE PRESIDENT: Well, they have not put any in yet.

16 MISS ROSE: But they seem to be envisaging that they want to see this material to see if they
17 need to put evidence in now in this application. That would be obviously inappropriate.

18 THE PRESIDENT: Yes. There is no doubt in my mind, Miss Rose, and everyone else, that had
19 these parties applied at the same time as everyone else, they would have been able to be
20 interveners. I think I have already indicated as much to the Premier League. I think Mr.
21 Jones has signed and Miss Lester has signed the undertaking. What role they can play as
22 interveners is very much going to be determined by the Tribunal. It may well be that it is
23 far too late now - I imagine this case is going to finish on Monday - for us to deal with any
24 further substantive evidence. The FA Premier League indicated they did not want to put
25 any evidence in in relation to interim relief at the outset or play any part in it really.
26 Whether that was surprising or not, it seems to me nevertheless that it was right that having
27 applied to become interveners they were allowed to come to the hearing and be part of the
28 confidentiality ring.

29 In my view, subject to their undertakings, both Miss Lester and Mr. Jones should receive
30 the documents. It may be that the Tribunal will allow them to make short oral submissions
31 on something, but I think that is as far as we can take it at this stage.

32 MISS ROSE: Can I just make clear that we would consider ourselves seriously prejudiced if any
33 significant points were now to be made because I have almost finished my submissions.

1 THE PRESIDENT: It would be up to the Tribunal to make sure that you were not prejudiced. If
2 that were the case, then we will have to deal with it. This thing is, to some extent, a
3 dynamic process, Miss Rose. We have set the hearing today very early after the application
4 came in in view of the 14th May date and the need to determine the question of interim
5 relief which could not be agreed between the parties, and to determine it at the earliest
6 possible moment. That means that things have to move in a dynamic way. It is regrettable
7 that these parties have not actually made their position perhaps clearer - there is a change of
8 heart, apparently, on the part of the FA Premier League - sooner. It may well be, therefore,
9 that the Tribunal will not actually permit them to do more than to make very brief
10 submissions. To that extent I think the Tribunal needs any help that is appropriate. As far
11 as we can do so we will make sure that you are not prejudiced by something that you need
12 to have an opportunity to answer which crops up. Obviously that opportunity will be given.
13 I think we had better just leave it at that now, but I think probably they ought to see the
14 documents. Who are we talking about? We are talking about Miss Lester ----

15 MISS ROSE: If I had understood that they were going to make the submissions I would have said
16 that the Premier League should make their submissions before I made my submissions.

17 THE PRESIDENT: It may be that you have to have another opportunity, though they may not
18 make any. As I understood Miss Lester this morning, she was by no means sure she was
19 going to make any. Quite frankly there will not be much time because I do intend that we
20 should finish on Monday.

21 MISS ROSE: Can I at least invite you to direct that they are not permitted to put in evidence? My
22 concern is that we are going to arrive here at 9.30 on Monday morning and be presented
23 with two new witness statements, and then we will be told it is a dynamic process.

24 THE PRESIDENT: That is my phraseology rather than anyone else's. Nevertheless, that is the
25 fact.

26 THE PRESIDENT: Mr. Jones, I think you shook your head, did you not? You indicated that that
27 was not your intention.

28 MR. JONES: It is not my current intention, but we have not seen the documents.

29 THE PRESIDENT: Let me ask you why it was that you did not seek to come in when others
30 came in?

31 MR. JONES: The application was drawn to our attention, I think, on Wednesday. We possibly
32 could have applied the day before. We were not party to any prior correspondence. It was
33 simply a matter of priorities. Once it got before the General Counsel and we discussed the
34 matter he indicated he wished Orange to intervene. So, it was a process that we went

1 through. Now, I am conscious of what you said - and indeed what Miss Rose has said -
2 regarding further witness statement evidence. It would only be with great reluctance that
3 Orange would seek to put in such evidence, but I do not wish to preclude the possibility,
4 before we have read what documentation there is. We have not seen it. We have not been
5 past it. We did not get past it last night. So, we are simply where we are. So, without
6 seeing what has been said - and I have listened very attentively and will be discussing the
7 matter with the General Counsel of Orange very shortly - and without having seen the
8 documentation and evidence in support of what Miss Rose has said, it is not really for me to
9 give a clear and definitive statement that there will be no possible application.

10 THE PRESIDENT: Miss Lester, can you also indicate what your current position is?

11 MISS LESTER: Sir, with respect, this does seem a little harsh on the Premier League. We only
12 first had sight of Sky's application on 16th April. We indicated quite clearly that we were
13 likely to bring our own appeal. We see a letter from the Tribunal asking other parties to
14 bring to the attention of the parties likely to have a close interest in the application in this
15 hearing, we were simply not aware; as soon as we were we were indicating that we were
16 bringing our own appeal. When it was indicated to us by the Tribunal that we would have
17 formally to make an application to intervene that is what we did by letter, and quite what the
18 purpose is – in circumstances where we will be an appellant and therefore the documents
19 will be made available to us – in objecting to us seeing information at this stage is
20 unnecessary. But perhaps it would assist for the Tribunal to rule on our sufficient interest in
21 bringing this appeal.

22 THE PRESIDENT: I think I have already effectively ruled on that. I think it is more a question
23 of evidence. It is not your current understanding, is it, that ----

24 MISS LESTER: It is not our current intention to do that, no.

25 THE PRESIDENT: I will not make a direction, but what I will say is that I think it is highly
26 unlikely that the Tribunal would admit any further evidence from anyone, actually; we have
27 already got a great deal of evidence to look at and I think it is very unlikely that an
28 application would succeed so it would almost certainly be a wasted effort to start producing
29 evidence. But I do think that both of you should see the documents and I think you both
30 have a sufficient interest, but I am afraid your participation is going to be limited to very
31 short submissions or corrections on something which you have seen. I think we will leave it
32 at that for now. Thank you very much. 10.30 on Monday.

33 (Adjourned until 10.30 a.m. on Monday, 26th April 2010)

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