Neutral citation [2008] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1096/4/8/08

Victoria House
Bloomsbury Place
London WC1A 2EB

30 October 2008

Before:

THE HONOURABLE MR JUSTICE BARLING (President)
PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

VIRGIN MEDIA, INC.

Applicant

- and -

(1) THE COMPETITION COMMISSION

(2) THE SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Respondents

- and -

BRITISH SKY BROADCASTING GROUP PLC

Intervener

Mr. Richard Gordon QC and Miss Marie Demetriou (instructed by Ashurst LLP) appeared for the Applicant.

Mr. John Swift QC and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Miss Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform.

Mr. James Flynn QC (instructed by Allen & Overy LLP) appeared for the Intervener.

Heard at Victoria House on 15 October 2008

JUDGMENT: FURTHER RELIEF

I. INTRODUCTION

1. In a single judgment handed down on 29 September 2008 ("the Main Judgment") the Tribunal decided both Sky's application for review (Case No 1095/4/8/08) and Virgin's application (Case No 1096/4/8/08). In the Main Judgment the Tribunal left open two questions relating to possible further relief in Virgin's application for review. We invited the parties to address us on these matters, which they have done both in writing and at a short further hearing on 15 October 2008. The present judgment deals with these outstanding issues. We adopt the terminology and abbreviations used in the Main Judgment, with which this judgment should be read for the background and other details of the applications of Sky and Virgin.

2. In the Main Judgment the Tribunal dismissed Sky's application for review under section 120 of the Act in its entirety, including Sky's challenge to the partial divestiture remedy recommended by the Commission and imposed on Sky by the Secretary of State to remedy the SLC and the consequent adverse effects on the public interest identified by the Commission in the Report. No adverse effects finding was made by the Commission in relation to the relevant public interest consideration – the so-called plurality issue – and hence the Respondents' chosen remedy was designed to address *only* the adverse effects of the SLC.

3. On the plurality issue, which was raised by Virgin's application for review, the Tribunal held that the Commission had misdirected itself as to the meaning and effect of the legislation and in particular subsection 58A(5) of the Act, with the result that in assessing whether after the Acquisition there remained "sufficient plurality of persons with control of" relevant media enterprises, the Commission had taken into account irrelevant considerations (see paragraph [266] of the Main Judgment). Those considerations appeared to us to have been material to the conclusions reached by the Commission in relation to both the sufficiency of the plurality of controllers under subsection 58(2C)(a) and the related question, under section 47 of the Act, whether the Acquisition may be expected to operate against the public interest having regard to that media public interest consideration. Nor was it possible to say with any confidence what the Commission's conclusions on those questions would have been had it directed itself in accordance with what we found to be the correct interpretation of the legislation (see paragraph [267] of the Main Judgment). Accordingly we granted the

relief sought by Virgin to the extent of setting aside the conclusions of the Commission relating to plurality and the corresponding decisions of the Secretary of State (see paragraph [268] and sub-paragraph (2) of paragraph [334] of the Main Judgment).

4. In its application Virgin had also challenged the SLC remedy, and had done so on a number of grounds. The Tribunal dismissed Virgin's challenge to the remedy in so far as it was based on arguments unrelated to the plurality issue (see paragraphs [310] to [328] of the Main Judgment). However, Virgin had also argued that in its choice of remedy the Commission had failed to have regard to the adverse effects on the public interest arising from the specified media public interest consideration. The submission was that if (as the Tribunal in fact found) the Commission and Secretary of State had erred in law in their approach to that consideration then that unlawfulness would also have an impact on their conclusions as to the appropriate remedy. This argument was not further developed by Virgin nor was it addressed by the other parties in their submissions to the Tribunal.

5. However, in the Decision at paragraph 20, the Secretary of State had made the observations which we cited at paragraph [331] of the Main Judgment and which we repeat here for convenience:

> "Accordingly, the Secretary of State has decided to make an adverse public interest finding on the basis that the transaction operates against the public interest taking account only of the substantial lessening of competition within the UK market for all television. It may be noted that even if Virgin Media's construction of the implications of sections 58A(4) and (5) of the Act were correct and this were to result in a different conclusion about the impact of the transaction on the sufficiency of plurality, the remedy the Secretary of State has concluded is necessary in order to address the substantial lessening of competition (see below) is likely also to be an appropriate remedy to address any such adverse effect on media plurality, given that once effect has been given to the remedy, there will be no change in the number of persons with control of media enterprises arising out of BSkyB's shareholding. However, this has had no bearing on the Secretary of State's decisions on remedies, which relate entirely to addressing the substantial lessening of competition that arises in this case."

II. ISSUES TO BE DECIDED

6. In the light of this statement from the primary decision maker and Virgin's submissions, we invited the parties to address the Tribunal as to whether any further relief was appropriate in relation to Virgin's review application. In particular we identified the following questions: (1) whether our conclusion that the Commission had

misdirected itself in relation to the plurality issue had any and if so what effect on the existing remedy imposed in order to deal with SLC, and (2) whether the plurality issue should be remitted to the Commission and/or the Secretary of State for further investigation or whether such a course would be otiose (see paragraphs [332] to [334] of the Main Judgment).

7. On these questions the battle lines are drawn up as follows:

   (a) Virgin now submits that the existing remedy is not affected by our conclusions on plurality, but that the plurality issue itself must be remitted to the Commission and/or the Secretary of State to consider afresh, as we are not able to find that such a remittal would be otiose.

   (b) The Commission and the Secretary of State agree with Virgin that the existing remedy is unaffected by our conclusions on plurality but submit that we should not remit the latter to them as they cannot see how a different remedy could result even if they were to find insufficient plurality with adverse effect on the public interest following the merger.

   (c) Sky, in an unholy alliance with Virgin on this aspect, argues that we have no alternative but to remit the plurality issue for reconsideration. However the alliance ends there, as it is Sky's submission that the Tribunal's conclusions on plurality mean that the existing remedy in respect of SLC cannot stand.

III. DOES THE TRIBUNAL RULING ON PLURALITY AFFECT THE EXISTING REMEDY FOR SLC?

8. In order to consider Sky's submission that the existing remedy imposed in order to deal with SLC must fall away as a result of the invalidity of the Commission's approach to the plurality issue, it is convenient to set out the relevant statutory provisions.

9. As a result of the Secretary of State's reference to the Commission under section 45(2) of the Act, the latter was required to answer a number of questions set out in section 47:

> "(1) The Commission shall, on a reference under section 45(2)…, decide whether a relevant merger situation has been created.
>
> (2) If the Commission decides that such a situation has been created, it shall, on a reference under section 45(2), decide the following additional questions—

(a) whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and

(b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest."

10. If the Commission decided that the RMS operated or may be expected to operate against the public interest, it was required by subsection 47(7) to answer the following further questions as to possible remedies:

"(a) whether action should be taken by the Secretary of State under section 55 for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation;

(b) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation; and

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

11. Subsection 47(9) provides that, in deciding the questions mentioned in subsection 47(7), the Commission:

"shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to—

(a) the adverse effects to the public interest; or

(b) (as the case may be) the substantial lessening of competition and any adverse effects resulting from it."

12. Section 50 requires the Commission to prepare a report for the Secretary of State which must contain:

"(a) the decisions of the Commission on the questions which it is required to answer by virtue of section 47;

(b) its reasons for its decisions…"

13. The scene then shifts to the Secretary of State's obligations under sections 54 and 55 of the Act. Those sections, so far as material, state:

"**54 Decision of Secretary of State in public interest cases**

(1) Subsection (2) applies where the Secretary of State has received a report of the Commission under section 50 in relation to a relevant merger situation.

(2) The Secretary of State shall decide whether to make an adverse public interest finding in relation to the relevant merger situation and whether to make no finding at all in the matter.

(3) For the purposes of this Part the Secretary of State makes an adverse public interest finding in relation to a relevant merger situation if, in relation to that situation, he decides—

(a) in connection with a reference to the Commission under subsection (2) of section 45, that it is the case as mentioned in paragraphs (a) to (d) of that subsection or subsection (3) of that section;

…

(4) The Secretary of State may make no finding at all in the matter only if he decides that there is no public interest consideration which is relevant to a consideration of the relevant merger situation concerned.

…

(7) In deciding whether to make an adverse public interest finding under subsection (2), the Secretary of State shall accept—

(a) in connection with a reference to the Commission under section 45(2)…, the decision of the report of the Commission under section 50 as to whether there is an anti-competitive outcome; and

…

55 Enforcement action by Secretary of State

(1) Subsection (2) applies where the Secretary of State has decided under subsection (2) of section 54 within the period required by subsection (5) of that section to make an adverse public interest finding in relation to a relevant merger situation and has published his decision within the period so required.

(2) The Secretary of State may take such action under paragraph 9 or 11 of Schedule 7 as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned.

(3) In making a decision under subsection (2) the Secretary of State shall, in particular, have regard to the report of the Commission under section 50.

(4) In making a decision under subsection (2) in any case of a substantial lessening of competition, the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned."

14. The Tribunal's powers to grant relief are set out in subsection 120(5) of the Act:

> "(5) The Competition Appeal Tribunal may—
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

15. Mr Flynn QC for Sky took us to the above provisions, and drew our attention to subsection 47(2)(b), subsection 47(7), subsection 50(2) (particularly the words "questions which it is required to answer"), subsection 54(2) and subsection 55(2). His submission, in short, was that in a reference of this kind the statutory provisions require the Commission to examine the issue of SLC and the relevant public interest consideration and then, taking these two aspects together, consider whether there is an adverse effect on the public interest in accordance with subsection 47(2)(b). If there is such an effect then the Commission is required by subsection 47(7) to make its recommendations as to the appropriate remedy. In Sky's submission it is not permissible to divide these matters up at the remedies stage. The Commission and the Secretary of State are required to come to conclusions on the remedy having examined both the SLC and the plurality issue and their full effects on the public interest. The action that should be taken for the purpose of remedying any of the effects adverse to the public interest which may be expected to result from the creation of the RMS has to be made in the light of that overall examination. Mr Flynn put the matter rather elegantly when he submitted that there were two channels, the SLC channel and the plurality channel, which "*flowed into a single remedies assessment*". The result of the Tribunal's ruling on the plurality assessment was, he submitted, that the Commission has failed in this regard, and the Report under section 50 is therefore "incomplete" and the Decision is also vitiated.

16. Mr Gordon QC for Virgin, Mr Swift QC for the Commission and Miss Holmes for the Secretary of State all took issue with this. They referred to the fact that the Tribunal had dismissed all of the challenges to the validity of the Commission's findings of SLC and the remedy imposed in order to deal with the SLC and resultant adverse effects on the public interest. They submitted that it followed that the existing SLC remedy remained unaffected by anything determined on the plurality issue.

17. The first question the Commission is required to answer under section 47, once it has found an RMS to exist, is whether that RMS has resulted or may be expected to result in an SLC (see subsection 47(2)(a)). Although the next question (under subsection 47(2)(b)) requires the Commission to consider whether, taking account only of any SLC and the plurality issue, the RMS operates against the public interest, it is clear that when it comes to identifying any such adverse effects the Commission will inevitably need to distinguish between those (if any) resulting from the SLC and those (if any) resulting from the plurality issue. This is implicit throughout, but is made explicit in subsections 47(7) and (9): thus subsection 47(7)(a) requires the Commission to state whether action should be taken by the Secretary of State under section 55 to remedy "*any of the effects adverse to the public interest*", and if so subsection 47(7)(c) requires the Commission to identify what action is to be taken and "*what is to be remedied*". This separating out of the SLC (and any resulting adverse effects) from the specified public interest consideration (and its adverse effects) is further pursued in subsection 47(9). As one would expect, the same applies once the Commission has reported and the Secretary of State takes the baton: see subsections 54(3)(a), 55(2) and 55(4). Moreover the distinction between the SLC and the specified public interest consideration is further emphasised at this stage by the fact that the Secretary of State is bound by the Commission's findings as to the former but not the latter (see subsection 54(7)(a) of the Act).

18. Thus the legislation does indeed provide essentially for SLC and plurality to flow in two separate channels, and it seems to us that when it comes to the remedies assessment the separate treatment must be maintained, in the sense that the Commission (and thereafter the Secretary of State) will need to identify not only the SLC and any adverse effects which are associated with it, but also the remedy which is designed to deal with those specific effects. Similarly any adverse effects which arise from the specified public interest consideration, along with an appropriate remedy, will need to be identified. It is conceivable that a case may occur where the SLC and a specified public interest consideration cause a similar adverse effect to the public interest; or where the same remedy may be appropriate to deal with adverse effects from both sources. Neither situation, however, would remove the need for separate treatment. It is therefore not correct to say that the process culminates in a "single remedies assessment", although it is true that the legislation envisages that the Commission and the Secretary of State will investigate and form conclusions about all these matters at

the same time and that a single remedy may, depending on the circumstances, suffice to deal with all adverse effects.

19. It follows that the process which the Commission carried out in this case in relation to SLC, its adverse effects to the public interest and the appropriate measures to remedy them, was one which it was necessary to carry out in any event. Having found that the Acquisition created an RMS which was expected to result in an SLC, and that adverse effects were likely as a result, the Commission was bound to go on and consider what action should be taken to remedy those adverse effects. Moreover, as already noted, in the Main Judgment the Tribunal has examined and rejected each of Sky's and Virgin's challenges to the Commission's assessment of those matters, including their respective challenges to the SLC remedy.

20. Why in those circumstances should the fact that the Report revealed an error of approach in relation to the plurality issue which led to the Commission's and the Secretary of State's conclusions on that issue being quashed, vitiate the Report and/or the Decision so far as concerns the remedy for the SLC and any consequent adverse effects? In our view it does not. For the reasons discussed above we consider that the SLC remedy is the lawful culmination of a logically distinct investigation and decision-making process on the part of both the Commission and the Secretary of State, and that the remedy can and does stand on its own in the present circumstances. Its validity is not undermined by the Report's deficiency in relation to the plurality issue. There is therefore no ground on which to quash the existing remedy, or on which it could be treated as having been invalidated. It is accepted by Sky that if the plurality issue were to be remitted to the decision makers for reconsideration in accordance with our decision in the Main Judgment, this could not result in any lesser remedy being considered appropriate.

21. We should perhaps add that it is no part of our reasoning on this issue that in the Main Judgment the Tribunal did not set aside the existing remedy. At one point in his submissions to us Mr Gordon appeared to be arguing that by not setting it aside at that stage and by dismissing the substantive challenges to the SLC findings the Tribunal had in some way already decided the question we are now considering, and that we were for that reason now precluded from setting the remedy aside by way of further relief. If that was the burden of his submission then we do not agree. In subparagraph (i) of

paragraph [332] of the Main Judgment we expressly left open, to be decided in the light of further argument, the question whether the effect of our ruling on plurality had an impact on the existing SLC remedy.

IV. SHOULD THE TRIBUNAL REMIT THE PLURALITY ISSUE FOR RECONSIDERATION?

22. Virgin argues that since the Tribunal has quashed the conclusions in the Report and the Decision so far as the plurality issue is concerned, in that respect there is no determination as to the adverse effects of the Acquisition on plurality of media control, whereas the legislation requires such determination. Mr Gordon submits that for this reason the Tribunal must remit the plurality issue back to the Commission and the Secretary of State to be reconsidered, referring to subsections 47(2)(b), 47(7)(b), 54(2), and 55(1) to (3) of the Act in that regard (quoted above).

23. Mr Gordon's main attack, however, was targeted on Mr Swift's and Miss Holmes' contention that remittal would be otiose. Their contention can be summarised as follows. If the Tribunal were to remit the plurality issue, and the Commission and Secretary of State were to conclude on a reconsideration of that issue that the Acquisition resulted in an insufficiency of plurality of media controllers with adverse effect to the public interest, no remedy additional to the existing SLC remedy would be warranted or justified. This was because the existing remedy was calculated to remove any realistic possibility of Sky being able to exercise material influence over ITV. The public interest consideration specified by the Secretary of State in this case is contained in subsection 58(2C)(a) of the Act; it is: "the need… for there to be a sufficient plurality of persons with *control* of the media enterprises serving [the relevant] audience" (the Tribunal's emphasis). Given that the Commission and Secretary of State were satisfied that the existing remedy would be effective in removing any realistic possibility of material influence by Sky, it was difficult to conceive how, once that remedy was implemented, any form of "control" by Sky resulting from the Acquisition could persist. It followed that the existing remedy, although chosen to address the SLC and consequent adverse effects on the public interest expected following the Acquisition, would simultaneously restore the plurality of media controllers to the *status quo ante* the Acquisition.

24. In answer to the argument that remitting the plurality issue would be otiose, Mr Gordon made a number of points. First he argued that neither the Commission nor the Secretary of State went as far as to submit that remittal would inevitably be otiose. In this regard he highlighted the word "likely" in the passage "[the existing remedy] is likely also to be an appropriate remedy to address any such adverse effect on media plurality…" at paragraph 20 of the Decision, cited above. He also drew attention to the qualification "at present" in the Commission's skeleton argument for this hearing, paragraph 4, where the Commission states that it: "…does not at present see how an adverse finding on plurality could lead to the imposition of a more onerous remedy…". Mr Gordon accepted that the formulation in paragraph 13 of the Commission's skeleton argument was different: "The matter should not be remitted to the Commission and/or the Secretary of State, at substantial cost to the public purse, if *the only realistic outcome* would be a further recommendation of a remedy which is already to be given effect in any event." (the Tribunal's emphasis.) However he submitted that these qualifications were to be treated as all of a piece, and did not justify the Tribunal treating remittal as otiose.

25. Mr Gordon then turned to address the grounds on which remittal was said to be otiose. This, he said, boiled down to the single underlying proposition that since the existing remedy removes Sky's control (material influence) over ITV it will also *ipso facto* remove any adverse effect of the Acquisition on plurality of controllers of relevant media enterprises. The number of persons with control would be the same as they would have been absent the Acquisition and so any effect of the merger on the "sufficiency" of that number (which is the relevant public interest consideration) would be neutralised. There could therefore be no basis for imposing a more onerous remedy. Mr Gordon makes a number of points in response to this argument.

26. First he submits that it is wrong as a matter of statutory interpretation, because it confuses those provisions which identify the various ways in which a merger may arise with those which deal with remedies. Remedies are in respect of the adverse effects which flow from the merger, not the merger itself, which is a temporal and circumstantial event. The fact that the merger may no longer exist says nothing about its effects.

27. Secondly it was put to us by Mr Gordon that the Commission's and Secretary of State's argument would have wider ramifications: it would mean that their discretion in respectively recommending and determining an appropriate remedy, whether in respect of SLC or a specified public interest consideration, would be more limited than had been supposed. It had never before been suggested that their discretion should be limited to requiring an acquirer of shares to divest its shareholding to a level below which a merger would not arise under section 26 of the Act. Such a limitation would be at odds with the breadth of the discretion revealed by, for example, subsection 47(9), and with the understanding and to some extent the practice hitherto, that total divestiture was an appropriate response to a completed merger resulting in SLC.

28. The third point Mr Gordon makes in relation to the question whether it is otiose to remit is that the existing remedy is designed to deal only with the SLC and it cannot be assumed that it will be equally effective to remedy any adverse effects which might be found in relation to insufficient plurality. The remedy was very much tailored to removing Sky's ability to block a special resolution, which had been identified as the means by which Sky would be able to influence ITV's policy. However, a remedy addressing an insufficiency of plurality of controllers may be very different having regard in particular to the fragile nature of media plurality. In this connection Mr Gordon referred us to the Main Judgment at paragraph [262], and paragraphs 3.73-4 of Virgin's submission to the Commission of 15 June 2007, attached to Virgin's Notice of Application.

29. Finally, Mr Gordon commented on three factors which had been put forward as possibly relevant to the exercise of the Tribunal's discretion whether to remit, namely: (1) the views of the decision makers as to the likely result of a remittal, (2) the prolonged uncertainty for ITV and its shareholders if the plurality issue were to be remitted, and (3) the cost to the public purse which such a remittal would entail. Mr Gordon submitted that none of these was a relevant or permissible consideration for the Tribunal. As far as (1) was concerned, it could not be relevant to the question whether to refuse discretionary relief that the decision maker says that the result would not be any different second time around. He referred to a case in which a local authority had stated that it had not consulted because it took the view that consultation would not affect its decision. That decision was struck down as unlawful. (*R. v North and East Devon HA ex p. Pow* (1998) 39 BMLR 77.) As to (2), Mr Gordon said that in

the absence of delay the fact that uncertainty would be caused by the grant of relief was not a ground for refusing it. On factor (3) he submitted that in the absence of administrative inconvenience in the sense of it being impossible to implement the remedy, the mere cost to the taxpayer of granting relief is not a relevant factor.

30. Mr Flynn for Sky submitted that the Tribunal had no option but to remit the plurality issue to be reconsidered. The main ground for that submission was that the existing remedy could not survive the Tribunal's conclusions on plurality. We have dealt with that contention earlier in this judgment. In his oral submissions Mr Flynn also argued that, if the Tribunal declined to remit on the basis that the existing remedy would necessarily be adequate to deal with any conclusion the Commission and Secretary of State might reach on plurality if that matter were to be remitted, that would amount to pre-judging issues as to which the Tribunal was not the decision maker. Therefore the Tribunal was not entitled to decline to remit even if it were satisfied that to do so would be otiose.

31. Finally Mr Flynn made an additional point relating to the need for Sky to be fairly treated, on the assumption that the Tribunal did not accept Sky's primary argument that the existing remedy suffered the same fate as the plurality assessment. If, as Mr Gordon had contended, there was a possibility that on remittal a more onerous remedy might result, then Sky would be entitled to have all remedies implemented in one go. If, for example, the Commission and Secretary of State were to consider in the light of their reconsideration of plurality that total divestiture was necessary, then it would be unfair to Sky to have this remedy implemented in two stages. Mr Flynn emphasised that he was not seeking a stay of the existing remedy at this stage but was putting down a marker.

32. The first point to note is that when the Tribunal quashes a decision or part of a decision under subsection 120(5) of the Act, it has a discretion whether to refer the matter back to the decision maker to reconsider and make a new decision. In our view sub-section 120(4) applies to the exercise of that discretion, with the result that it must be exercised in accordance with the principles to be applied in a judicial review.

33. We do not accept Virgin's argument that, because the Commission and the Secretary of State were under a statutory duty to consider and determine the plurality issue once a

reference on that issue had been made under subsection 45(2), it follows that the Tribunal must now remit that issue to them so that the statutory requirement can be fulfilled. That is to confuse the statutory duty imposed on those bodies with the responsibilities of a tribunal exercising a judicial review jurisdiction. It would also mean that the discretion under subsection 120(5)(b) is more apparent than real, and that the Tribunal would be obliged to remit the matter for reconsideration even where, for example, it considered that this would be a pointless exercise.

34. Much the same applies to Mr Flynn's contention that we cannot decline to remit on the ground that no additional or different remedy would in our view be imposed, as that would amount to the Tribunal usurping the role of the decision makers. There would be no usurpation in those circumstances. The only issue for the Tribunal is whether it should grant the relief in question. That issue is one which Parliament has left to the Tribunal subject to any further appeal. The principles upon which a court will exercise its discretion to grant relief in judicial review are well–established, and it is not in doubt that it may decline relief on the ground that to grant it would serve no useful purpose. This principle is helpfully set out, with numerous examples of its application, in the extracts from Michael Fordham's *Judicial Review Handbook* (fourth edition), at paragraph 4.4, and De Smith's *Judicial Review* (sixth edition) at paragraphs 18.055 to 18.060, which were kindly provided to us by Miss Holmes. We accept, as did Miss Holmes, that it would not normally be appropriate to decline to remit where there was a realistic prospect that the outcome would be materially different.

35. Turning to Virgin's responses to the contention that the Tribunal can and should decline to remit on the ground that to do so would be otiose, we see little force in the point that the Commission's and Secretary of State's language in various written submissions is qualified and does not amount to an assertion that remittal would inevitably be otiose. It is perfectly understandable that they should not wish to be too categorical about the result of a remittal to them. Mr Swift, quite properly, was anxious to make clear that if the plurality matter were to be remitted the Commission would reconsider and make recommendations with an open mind and with full regard to due process. Nevertheless both bodies have put at the forefront of their submissions that it is self-evident, given their conclusions on SLC which have been upheld by the Tribunal, that the existing remedy would be effective also in relation to any adverse effects on plurality of media control. In emphasising this they could hardly have been more explicit whilst avoiding

the suggestion that they were compromising their position if a remittal were to take place. We have already cited paragraph 13 of the Commission's skeleton argument. In a similar vein the Secretary of State's skeleton at paragraph 18 states:

> "A requirement imposed in order to remedy an insufficiency of plurality of control arising out of a merger situation cannot reasonably require a divestment below that at which there is no effect on the plurality of persons with control. Since the effect on the number of persons with control is entirely negated by the remedy necessarily imposed to remedy the SLC, no further remedy can be imposed, since there would be no change in the number of persons with control to address."

36. Regardless of whether Mr Gordon is correct in submitting that the views of the decision makers are irrelevant to our decision whether to remit, what is not in dispute (save for Sky's argument about usurpation dealt with above) is that if the Commission and Secretary of State are right that remittal would be otiose, that is a relevant factor. We consider that they are right, and that if we were to remit the plurality issue, and if having reconsidered the matter in accordance with our ruling the Commission were to find that the merger resulted in insufficient plurality of media owners for the purposes of subsection 58(2C)(a) with effects adverse to the public interest, there is no realistic prospect that the Commission would recommend or the Secretary of State would impose any additional or different remedy from that which has been imposed. We have reached this view because, like the decision makers, we cannot see how any effect on the plurality of controllers caused by the merger (or any effects of the assumed insufficiency of plurality) could persist once that remedy is implemented. The *status quo* which existed prior to the Acquisition would be restored as far as the plurality of media controllers is concerned, or rather any effects of the Acquisition on such plurality would be removed.

37. It is true, as Mr Gordon points out, that the word "control" in subsection 58(2C)(a) is not defined in the Act, whether in terms of any of the levels of control in section 26 or at all. The ordinary meaning of control is already stretched somewhat by the legislation so as to deem "material influence" over the policy of a company to amount for certain purposes to "control" over that company. Mr Gordon's submission seeks to stretch it still further, so that "control" could survive for the purposes of the specified public interest consideration even where material influence has been removed. He argues that, for example, the amount of control necessary to exert influence and create adverse effects in relation to editorial control may be less than for matters connected with SLC.

In this respect he submits that the fragility of plurality should be borne in mind. Therefore one cannot assume that the existing remedy, tailored as it is for SLC effects and in particular the perceived need to remove the ability to block a special resolution, would be as effective in dealing with effects on plurality. We disagree and see no justification for an interpretation of "control" in subsection 58(2C)(a) which is even less than "material influence". One cannot attribute to the word a meaning that is so far removed from the ordinary understanding of it without that being the clear intention of Parliament. As Mr Swift asked rhetorically: how can it seriously be said that with no more than 7.49% of the shares Sky would have control of ITV? Nor do we consider that the Commission or the Secretary of State have misunderstood the role played by remedies in dealing with the adverse effects of a merger on the public interest rather than the merger itself. Further, other than by general references to the fragility of plurality, Mr Gordon was unable to identify what adverse effects on plurality of controllers of media enterprises could linger once any realistic prospect of any kind of control had been removed.

38. Nor do we think that there is any ground for Virgin's concern that by their approach to remedies in relation to the present questions the Commission and Secretary of State are somehow for the future limiting themselves to requiring divestiture to below the level at which a merger could arise under section 26. Remedies which are recommended and imposed under this legislation are governed by provisions which provide a wide discretion to do whatever is reasonable and practicable to deal with adverse effects on the public interest arising from relevant mergers. Such remedies should be geared to the particular circumstances of each individual case and nothing that we have seen in the present matter indicates to us that the Commission or the Secretary of State take a different view.

39. Accordingly we are of the view that for the Tribunal to remit the plurality issue to the Commission and the Secretary of State would serve no useful purpose, as whatever their findings on that issue there is no realistic prospect that an additional or different remedy would be recommended or imposed. It is therefore open to us not to remit that issue, and we consider that we should not do so. As Mr Swift pointed out, this is a completed merger which has existed for nearly two years where effects adverse to the public interest resulting from SLC have been found. The existing SLC remedy has been hanging over Sky for a considerable period, and the inevitable result of these

proceedings has been uncertainty for ITV, its shareholders and consumers as to the extent of divestiture which will ultimately take place.

40. In regard to that uncertainty ITV put before the Tribunal and the parties, for the purposes of the present issues relating to relief, a brief written submission. As we indicated at the hearing on 15 October 2008 the Tribunal thought it right to read the submission *de bene esse* notwithstanding that ITV had not at any stage sought to become a party to these applications, and despite Sky's objections to its admissibility. It was not a matter for surprise that in the submission ITV stated that the continuing uncertainty was a matter of concern to it from a commercial perspective, and submitted that the uncertainty should not be prolonged by remitting the plurality issue. ITV shared the decision makers' view that no useful purpose would be served.

41. As to these points, it is self evident that if we did decide to remit there would be a very considerable further period of uncertainty for ITV and other interested parties, as well as further substantial consumption of the Commission's, the Secretary of State's and other people's time and financial resources. In all the circumstances it is clearly very desirable that a final outcome be reached without further unnecessary delay.

42. In view of our conclusion on this there is no need for us to consider the issue raised by Mr Flynn as to the alleged unfairness to Sky of risking a divestiture remedy being applied to it in two stages.

V. THE TRIBUNAL'S CONCLUSIONS

43. In the light of the above, the Tribunal unanimously concludes that

    (1) The validity of the existing remedy is unaffected by the Tribunal's findings or the relief already granted in respect of the plurality issue;

    (2) Virgin's and Sky's applications that the plurality issue be remitted to the Commission and the Secretary of State are refused.

The Honourable Mr Justice Barling	Peter Clayton	Peter Grinyer

Charles Dhanowa
Registrar

30 October 2008