IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1152/8/3/10 (IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26th April 2010

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING LIMITED

Proposed Appellant

- v –

OFFICE OF COMMUNICATIONS

Proposed Respondent

- supported by

BRITISH TELECOMMUNICATIONS PLC
TOP UP TV EUROPE LIMITED
VIRGIN MEDIA, INC

Proposed Interveners

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HEARING

APPLICATION FOR INTERIM RELIEF

APPEARANCES

Mr. James Flynn QC and Mr. Meredith Pickford (instructed by Herbert Smith LLP) appeared for the Proposed Appellant.

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

Mr. Mark Hoskins QC and Mr. Gerard Rothschild (instructed by Ashurst LLP) appeared for the Proposed Intervener Virgin Media.

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

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

Mr. Keith Jones (of Baker McKenzie) appeared for the Proposed Intervener Orange Personal Communications Services Limited.

Ms Maya Lester (instructed by DLA Piper UK LLP) appeared for the Proposed Intervener Football Association Premier League.

THE PRESIDENT: Miss Rose.

MISS ROSE: Sir, I would like to pick up some points from Friday before we go into private session to consider the question of the undertakings.

THE PRESIDENT: Yes.

MISS ROSE: First of all on the legal test, whether it is enough – "sufficient" as the CFI put it – simply to show irrecoverable cost as a basis for getting interim relief, we submit that there are good reasons of principle why the CFI and the CAT hitherto have taken the position that simply for an undertaking to show that it will suffer financial loss is not sufficient for interim relief to be granted even if that loss will not be recoverable unless the undertaking can show that its survival will be in jeopardy.

The reasons are as follows. These are appeals against regulatory decisions intended to benefit competition and consumers across the scope of whole markets. It is in the very nature of decisions of that type that they will require companies to change their business practices and that they will have financial cost implications for particular undertakings, it is the inevitable result of such regulatory interference, otherwise there would be no point doing it in the first place.

The second point is that it is also inevitable, and this case is a good illustration that interim relief will come before the CAT at the time when the CAT simply does not have the material before it to be in a position to make any kind of assessment of the merits of the appeal. CAT cannot make any provisional view about the strength of the merits and in this case there has been no attempt by Sky to suggest that they can demonstrate a strong case at this stage.

If it is sufficient for a company to obtain the suspension of a regulatory decision taken for that purpose and in that context for many months, simply to show, first, that their appeal is not wholly ungrounded and secondly, that they will suffer irrecoverable costs, then we submit that the prospects of effective regulation in the competition field in future, and in related fields such as telecoms will be very seriously undermined.

THE PRESIDENT: Is that not why you have to look at all the factors? It would be a very rigid and formulaic approach to say that all you have got to do is prove irrecoverable loss and show an arguable case and you get your interim relief. I do not think anyone would say that is the right approach and the rules require us, and we would probably anyway because it would be implicit, consider all the factors and inevitably there may come a time, depending on the sort of case it is, where there is a sort of weighing process to be had.

MISS ROSE: Yes, but there are different kinds of factors.

THE PRESIDENT: Yes.

MISS ROSE: One sort of factor that you have in front of you today is simply Sky on the one hand saying it will cost us this many millions and the interveners, other commercial parties saying that "If you give them the relief they seek it will cost us this many millions", and you can balance, if you like -----

THE PRESIDENT: You are saying it is not as simple ----

MISS ROSE: -- the commercial interests on that basis. We say that leaves out of account what is actually by far the most important countervailing consideration which is the reason that the decision was taken in the first place, namely to ensure fair and effective competition and to benefit consumers, and in the nature of things that is not something that you can sit down and tot up as a number of millions saved or cost over the next few months. What you are talking about is a systemic effect on the market which is the result of years of consideration by the Regulator on the other side of the scale.

THE PRESIDENT: I do not think anyone doubts that is a very important factor.

MISS ROSE: Well if I can just finish the submission. We submit that an approach which says it is sufficient simply for a party to point to irrecoverable financial loss is going to mean that there will be a financial incentive and an obvious commercial incentive for every party that is going to be adversely commercially affected by any regulatory decision immediately to appeal it.

THE PRESIDENT: It would if that were the case but I just do not see anyone putting that forward.

MISS ROSE: It does not matter that the CAT will then go on to balance that against other factors, because they will always think "Well we are in with a shout; it is worth having a go."

THE PRESIDENT: Well if you are going to suffer irrecoverable huge financial loss in some case or other obviously you are going to be looking for a possibility of avoiding it. Is that not just the world we live in? It is just inevitable, is it not? I do not think we can do much about that so long as we have the availability of interim relief. People who are going to suffer irrecoverable financial loss as a result of a regulatory decision might well think from time to time it is in their interests to have a crack at it, that is where we are.

MISS ROSE: Indeed, the question, Sir, is why is it that the General Court of the European Union has taken the strict approach that it has to interim relief? It is not just something they have plucked out of thin air, there is a reason why that strict approach has been taken and in my submission the reason for the strict approach that has been taken, and the underlying policy reason why the CAT has taken the same approach up until now, reflected not only in the

case law but also in the CAT Guidance is because that approach recognises that you are comparing apples and pears. On the one side of the scale you simply have the inevitable effects of the regulatory decision which are that some people will be winners and some will be losers, but on the other you have the question of the benefits to competition, and you are not comparing like with like. What the CFI has said is that what you have actually got to show is a detriment to competition, and detriment to competition means that there is a risk that somebody is actually going to go under so there will be les competition while the appeal is taking place. The fact that this decision is going to cost you money just is not enough, that is the approach that has been taken.

We submit in the alternative that if you are going to go down the Divisional Court route the right approach to factor in the importance of the points that I have just been making has to be the *Monsanto* approach where you start with a strong presumption against interim relief and where you factor into the status quo the fact that this regulatory decision has been taken, and that it is presumed to valid until set aside. If you do not start from that point and you say the status quo is simply that Sky at the moment only wholesales its service to Virgin and does not wholesale it to anybody else, if you just start from that position we submit you are leaving out of account some of the most important factors that need to go in right at the beginning of the exercise, and you start then wrongly with the presumption that you want to preserve a status quo which has actually been superseded by regulatory activity. That is the problem.

It has been suggested by Sky that they have put forward a new authority this morning, a case called *Ashworth Hospital*, and they rely on a particular paragraph in that decision to suggest that the Court of Appeal has held that the status quo does not include the regulatory decision. I will come back on that in reply, if necessary, but my submission in summary is going to be that *Ashworth Hospital* was not even considering that question. The question in *Ashworth Hospital* was whether or not the Administrative Court had jurisdiction to grant a stay of proceedings in relation to a decision that had already been implemented. The comments that were made by Lord Justice Dyson in that context, that the purpose of interim relief is to maintain the status quo, are made in a context where there was no consideration in that case of how you assess the nature of the status quo following a regulatory decision of this type.

We submit that whether you adopt, if you like, the more rigid *CFI* approach or the more flexible Administrative Court approach, the reality that you come down to in a case of this type is the same, because when you consider the significance of the public interest on the

other side of the scale we submit that there is not any damage short of damage that is both serious and irreparable that is going to be enough to outweigh the balance on the other side of the scale. Anything falling short of that is not going to be enough.

Can I just very briefly recap in relation to Sky's allegations of serious and irreparable damage. The first is that its credibility in negotiations for withdrawing wholesaling if it wins its appeal will be undermined because of the damage to its reputation if it were to withdraw its services, which it says will weaken its negotiating position, there is very little that I want to add to what I said on Friday on that point, except one matter, which is if you just turn up Mr. Darcey's second witness statement, he deals with this point at para.9, the bottom of p.3. He says, significantly, that Sky did not expect the severity of the backlash from consumers that resulted from that episode and would not wish to repeat it. Again, Sir, as I have submitted before, this is a witness statement drafted with the benefit from Herbert Smith and leading and junior counsel, and its language is very carefully chosen.

Mr. Darcey does not say anywhere in his evidence that Sky would not repeat it, instead he says they would not wish to do so. Indeed, one can understand that a company would not wish to be placed in a situation where it was withdrawing its wholesale supply to a retailer, but they very clearly are not saying that they would not be prepared to do so if it was in their long term strategic interest.

I am going to have some more to say on that when we come into the confidential session, but I will come back to that.

The second argument mounted by Sky is that they say that there would be a permanent devaluation of their channels in the minds of consumers if the decision were implemented because it would enable other retailers to undercut Sky on price. We have done a short note on this point which, in particular, focuses on the question of internet retailing. (Same handed)

THE PRESIDENT: Thank you very much.

MISS ROSE: Can I just take you through this quickly? At para.1 of that note we identify the three propositions that Sky make under this head. First, they say that competing retailers, such as Virgin, BT and Top Up, would reduce the retail price in sports channels. Second, they say that a large of number of retailers over the open internet may take advantage of the Wholesale Must-Offer obligation and offer services at very low cost at or below the wholesale cost of supply. Thirdly, they say that the consequence of either or both of those activities, even for the few months that an appeal would take, would be permanently to devalue the channels in the minds of consumers. That is the argument. We say all three of

those propositions are unsubstantiated.

If we just look at the first one, that competing retailers would reduce the retail price of the sports channels, I made the point on Friday that the only evidence put forward in support of that is the three comments referred to at para.41 of Mr. Darcey's first witness statement, two of which pre-dated the decision and were based on the much lower wholesale price that Ofcom was contemplating in its third consultation. So two of those comments have no value at all. The third is the vague statement by BT in its online Q and A. In any event, we make the point that each of BT, Virgin and Top Up have given evidence that that is incorrect, and that is in our skeleton argument.

Then we make the point – and I am not sure to what extent we focus on the actual figures here – that as a matter of fact retailers will not be able to undercut the prices that Sky charges for its existing packages. The wholesale price for Sky Sports 1 and 2 that has been set by Ofcom is £17.14, excluding VAT, and at the moment Sky's incremental retail price to its own satellite customers is £18.

Sir, you can see that Ofcom has indeed been relatively generous to Sky and that Ofcom's assessment that entry by any firm will be challenging is not surprising in the light of those figures. The notion that any retailer is going to be able significantly to undercut Sky is, we submit, fanciful.

We then make the point that there may be new entry level packages, particularly on digital terrestrial television and that Sky, itself, is proposing such a package, and that it will be able to proceed with it if it implements the Wholesale Must-Offer obligation. We make the point that Sky's willingness to offer an entry level package is, in itself, inconsistent with Sky's concerns about the devaluation of its channels for its satellite customers.

Then we make the point that there could be new packages which offer a different balance between price and quality, and Sky itself is already in this game. You have seen the evidence about the much, much lower price that Sky is charging for its sports channels received over the iPhone, only £6 a month, massively, massively cheaper than its retail price for television. What Mr. Darcey said in his second witness statement was, "That is because the quality of service over the iPhone is much worse because it is a tiny little screen". Understood, but again we submit it wholly undermines their submission that these are channels that will only have value in the eyes of consumers if the price is kept very high.

That then brings us to the question of low cost offers over the open internet, and the first point that we make is that no evidence at all has been put forward to support Sky's second proposition. All we have on this is para.49 of Mr. Darcey's first witness statement which

begins with his admission that the impact of Ofcom's remedy is hard to anticipate. Putting that paragraph at its highest, it is no more than a statement of opinion put in by a witness of fact which has no evidential value. On the other hand, there is significant evidence to demonstrate that the concerns of Mr. Darcey are unlikely to be realised. We drew your attention on Friday to the fact that the wholesale must-offer obligation permits Sky to impose fair and reasonable minimum qualifying criteria and minimum security requirements, and that the imposition of those is likely very substantially to limit the number of retailers over the internet who could take advantage of the wholesale must-offer obligation. We give some examples of the sorts of MQCs that Sky could impose. First of all, it could require retailers to meet conditions on financial standing; secondly, to provide minimum revenue guarantees to exclude frivolous requests; thirdly, to meet minimum standards regarding picture quality; fourthly, to comply with obligations concerning distribution, such as access services, widescreen switching, geographical restrictions, compliance with rules on editing, overlay and re-sizing of content and robustness of service; and, importantly, fifthly, to meet minimum standards regarding the look and feel of the service, such as restrictions on other advertising appearing on the page on which the channel is shown. We submit that is a very important consideration because Sky is saying, "Oh, well, people like Google and Yahoo might try and entice people on to their pages with our sports at very cheap prices and then have it swamped with advertising". They could impose contractual restrictions that prevented internet retailers from doing that.

THE PRESIDENT: What would Ofcom's approach be to those?

MISS ROSE: All that Ofcom requires is that the minimum qualifying requirements are fair, reasonable and non-discriminatory.

THE PRESIDENT: Would you regard, for example, the one you have just been describing as reasonable?

MISS ROSE: If you go to the statement at para. 10.323 ----

THE PRESIDENT: I have not had a chance to read it all. (After a pause): Is there a section that deals with all these - in which case I can read it?

MISS ROSE: If you look at paras. 10.322 and 10.323 we identify the fact that it is common practice for channel providers to define rules in relation to how channels can be exited, re-sized on screen and how interactive and other content can be overlaid by the retailer, e.g. rules on how channels can be shown as a mini-screen within an EPG. That is the point where you have a little screen with other contents surrounding it. You can have rules restricting that. We then say,

"Whilst it may be reasonable for Sky to include such requirements in its reference offer, the overlay of interactive content is a key area for innovation".

THE PRESIDENT: You do not disapprove of it.

MISS ROSE: No, we do not disapprove.

THE PRESIDENT: So, they will not be able to get away, as it were, with restricting other advertising.

MISS ROSE: That is right.

THE PRESIDENT: That is it, is it not? These are all things that exist, but you will be the final arbiter of whether they can have it, or not.

MISS ROSE: Yes, of course. If we take a decision that they consider to be wrong in principle, they can appeal it. So, they are not at our mercy. The question is: Is there now an urgent need to preserve the integrity of this appeal for Sky to have blanket interim relief which would stop not just these hypothetical internet retailers, but the actual counterparties who are here, from entering the market because of some hypothetical risk that Ofcom might in the future take an unreasonable decision about what might be a fair, reasonable and non-discriminatory minimum qualifying criteria. One only has to put it in that way to see just how speculative Sky's concern is. It requires us to make an unreasonable decision some time in the future.

Then we point out "the similar points about the minimum security requirements which would also be expected to limit the number of potential retailers, require retailers to meet security standards on encryption, implement required copy protection and comply with operational processes that would be used to monitor and maintain security protection".

We make two specific points at (d) - the first we have already addressed - which is this question about adding advertising content. The second is that Mr. Darcey expressed a concern about Apple seeking to compete in relation to the i-Phone. We make the point that since Sky is offering the service on the i-Phone at a price vastly lower than the price at which it would be required to wholesale to Apple, it is very difficult to see Apple seeking effectively to compete on that platform. Apple would be receiving the service at more than £17 and then having to retail it at less than £6 in order to undercut Sky.

So, we do submit that the concerns that Sky has raised without any supporting evidence or specificity at all, when you examine the terms of the wholesale must-offer, are devoid of any substance. But, whether or not they can establish one and two -- or, one or two does not matter unless Sky can also substantiate their third proposition. They have to substantiate the proposition that if their retail prices were undercut of the appeal process, that there is a

likelihood that that would permanently de-value these channels in the minds of consumers so as to make it impossible for Sky to restore its prices if it won the appeal. We submit that there is simply no evidence at all to substantiate that. Nothing. There is nothing. All that you have is bare assertions by Mr. Darcey at paras. 44, 45, and 50 of his first witness statement with no data to substantiate them whatsoever.

On the other hand, there is ample evidence to rebut this proposition, which includes the fact that Sky's own promotional discounting of its channels, including discounts over periods of six months has not had this effect in the past. There is no evidence at all that it has had this effect. Neither has Sky's decision to offer its service at a very, very substantially reduced price over the i-Phone had the effect of devaluing the channels in the minds of consumers. There is also the evidence of the strong intrinsic value of the sports channels for consumers which Mr. Darcey chose not to answer in his second witness statement.

Finally, we make the point that there is no reason to support that Sky would not be able to re-impose its preferred retail price structure in circumstances in which it would, subject only to the constraints of ex post competition law have complete control over the wholesale price of a product of which it is the only source.

Sir, we submit that the second of Sky's concerns simply evaporates when you look at the evidence.

The third was the alleged win-back costs. Of course, that is not an allegation from Sky of any permanent damage to its business. All that is said is that there would be costs involved. If customers left Sky and went to other retailers as a result of this decision there would be costs involved for Sky of winning them back. That is the only argument. As against that, you have the evidence that the likely effect of this decision will be to increase the size of the market so that there will be more consumers buying pay TV and that Sky will profit from the wholesale revenues of selling those services to retailers. Even putting Sky's case at its highest - and that is the figure that you see at the end of para. 16 of Mr. Darcey's second witness statement; a figure completely unsubstantiated by any explanation or calculation, simply plucked out of the blue -- Even if we take that figure at its face value it is a miniscule percentage of Sky's annual marketing budget of £1 billion. It is *de minimis*, that is the third head. The fourth head is Sky's alleged losses and the highest figure that is put forward here is the £7 million and I made the point on Friday that actually Sky do not even allege in this appeal that they will suffer a loss of £7 million, or any loss. Mr. Darcey very carefully avoids saying that at paras. 52 of his first witness statement and 18 of his second witness statement. All that they do is identify that as the cost which Ofcom assessed as the

cost to them in the first year which would, of course, be offset by profits. We submit there is a very good reason why Sky itself is not asserting that that would be the loss and it can only be that they know that they will not suffer anything like that loss; that loss in it itself is, we submit, trivial for a company of Sky's size, but they are not even saying they will suffer it. There has been no attempt by Mr. Darcey to deal with the independent views of city analysts as to the effect of this decision on Sky, and you have seen those extracted in Mr. Unger's witness statement, that the consensus in the City is that this will at worst have an adverse impact on Sky and is quite likely to be positive for it.

That point, which Sky has made no attempt to meet, we submit ought to be enough to dispose of this application, that assessment by the City analysts.

Their fifth and final point was that it was difficult for them to prepare for this appeal and implement the decision at the same time, and that point we submit is so weak that the fact that it was advanced at all in this application gives a clue as to overall strength and credibility of the application that Sky is making. So that is Sky's case.

On the other side of the equation Ofcom has identified four serious adverse effects on competition and consumers that will flow if the implementation of this decision is delayed by the grant of interim relief.

Two of those are the stage of development of ultra high speed broadband and the increase in popularity of bundling and the triple play option. Mr. Darcey has not given any answer at all on either of those effects in his second witness statements, he has ignored both of those points; they stand uncontradicted.

On the football season, the importance of the 2010/2011 football season, there is a dispute as to its significance and Sky seeks to underplay its significance and you have substantial evidence from Ofcom and the interveners to the contrary. Essentially, as in so many respects in this case, Sky's evidence amounts to assertion and it has not sought to rebut the statistics and the data that Ofcom has submitted on this point as to the significance for other players in this market of the month of August for selling subscriptions. Sky has said it does well in other months too, but it is very difficult to make a comparison given, for example, the fact that Sky is also selling premium movie packages which of course are not subject to the constraints of the football season in the same way, and a proportion of the packages they sell will be a mixture of sport and movies.

On digital terrestrial television Mr. Darcey deals with this at para. 28 of his second witness statement. He does not address the majority of the argument of Mr. Unger, he makes the single point that 88 per cent of the population have already made the digital switch, but we

submit that that misses the point. The point is that many of those who have already made the switch, as well as those who have not yet made the switch, which is still a substantial number of consumers, have not yet made the decision whether they want to buy pay tv and, if so, through what platform. Cable is only capable of being received by 49 per cent of viewers. DTT is now an option for a majority of consumers and over the next few months will become an option for almost all consumers. Therefore, this is a critical period for consumers making the choice: "Do I go down the satellite route, or do I go down the DTT route?" This is a critical period for that choice and if Sky remains for another year or more than a year the only game in town that chance will be seriously impeded probably for ever. It is probably the single ----

THE PRESIDENT: I am sorry, can you help me on this? Mr. Darcey says they have made this choice, 88 per cent have made this choice.

MISS ROSE: Their signal has been switched from analogue to digital.

THE PRESIDENT: That applies if they have bought some kind of box.

MISS ROSE: No, Sir, sorry, the position is this. Historically, BBC1, BBC2, ITV, Channel 4 received through an aerial by an analogue signal. That analogue signal is in the process of being switched off ----

THE PRESIDENT: Yes.

MISS ROSE: -- in zones over the United Kingdom at the moment; that process is due to finish in 2012. What happens is those people will now receive a digital signal instead through a set top box, they do not have to pay for the box, this is free-to-air television.

THE PRESIDENT: It is the same aerial but you need some equipment.

MISS ROSE: The point is that for the first time these people have the capacity to receive multi-channel television.

THE PRESIDENT: Yes, sorry, my question is really this: I am trying to understand whether Mr. Darcey's point is a good one. At the point where you decide how you want to receive the digital signal, if you have a satellite dish, for example, then as I understand it that is an alternative. In other words at the point where you are being switched over to digital you choose whether to have ----

MISS ROSE: Yes, but you do not have to buy anything at that stage.

THE PRESIDENT: You do not have to buy it, no.

MISS ROSE: So you may not be interested in pay tv at that stage. But then the World Cup comes along and your kids become fanatical about football, and you have switched to

digital terrestrial over the past year. At that point you are going to make a choice, and what you are talking about is a large pool of people who now have the choice ----

THE PRESIDENT: So they have not paid anything at the moment?

MISS ROSE: They have not paid anything at the moment, they have the capability of receiving a digital signal for the first time but there is no DTT option for these sports' channels, so if they want to receive Sky Sports they have to go down the satellite route. If you take the progress of the digital switchover together with the significance of the world cup and the start of the football season you can see how significant the impact of this is.

THE PRESIDENT: So you are saying the fact that 88 per cent of them are already receiving digital is really ----

MISS ROSE: It does not deal with the point.

THE PRESIDENT: In practice they still have a choice to make, they can ----

MISS ROSE: The fact they are receiving digital does not mean they are receiving pay tv.

THE PRESIDENT: They are not committed to anything.

MISS ROSE: That is right.

THE PRESIDENT: They have not committed themselves by any money.

MISS ROSE: New TVs can all receive digital they do not need a set top box.

THE PRESIDENT: No, I know with the new ones you do not need the box.

MISS ROSE: That is the point, people are being switched over inevitably, they have no choice they cannot continue to get the analogue signal, so you have a large new market opening up and choices that will be made in the context of the World Cup and the start of the new football season.

THE PRESIDENT: A lot of people have been switched over for ages?

MISS ROSE: Well no, the first switchovers were only made in late 2008 in Whitehaven.

THE PRESIDENT: Well it is quite a long time ago.

MISS ROSE: That was a tiny percentage in November 2008 just in the town of Whitehaven as a pilot project. I have been trying to get the figures for those who have switched since the last football season but nobody has been able to give them to me, but it has been an ongoing process essentially over the course of the past year, really over 2009, and will continue through 2010 and 2011.

We submit that this point is really critical; Sky do not have an answer to it and the grant of interim relief really will jeopardise the effective implementation of Ofcom's decision. The force of that point is a point that I understand will be developed by Top Up TV who, of course, are in the digital market.

Just on the question of set top boxes, new TVs can all receive digital, old TVs you have to buy a set top box which costs between £20 and £30 but there is no ongoing contractual ----

THE PRESIDENT: I thought you had to buy something.

MISS ROSE: The point is that these are people who are not subscribing to monthly TV sets.

THE PRESIDENT: Sure.

MISS ROSE: So we submit that when you look at the four effects on competition identified by Ofcom, two have not been addressed by Sky at all. One is the significance of the football season where there is a dispute, and the final one is DTT. We submit that Sky has no convincing answer to the basic problem.

Of course, these points made by Ofcom are additional to the specific issues of commercial damage which the third party interveners have addressed, which also need to be set against any concerns that Sky has. That must also be balanced.

I now want to turn to the undertakings, so perhaps it might be an appropriate moment for us to go ----

THE PRESIDENT: Yes, right. Counsel is now going to touch on some confidential material, so I am afraid it is going to be essential for all those who are not in the confidentiality ring to leave the hearing. Are you able to tell, Miss Rose, how long we are likely to be?

MISS ROSE: I expect to be only about ten minutes, if that, maybe five minutes.

THE PRESIDENT: So it is probably just time to have a coffee outside.

(For proceedings in Private, see separate transcript)

MR. ANDERSON: Sir, there were two other things I wanted to deal with. The first was to make some observations on the legal test, really following on from what Miss Rose had to say this morning; and secondly, something on the subject of open internet providers, which again was the subject of a note. Perhaps my fate in the litigation may be to be a footnote to Miss Rose, but I will seek to open my mouth only if I can find something different to say.

Sir, you said earlier on that people who lose a lot of money as a consequence of regulatory decision will inevitably seek to do something about it. That is the world we live in. Indeed, given the chance, plainly they will. The legal question is: should that be enough, should that be enough to place oneself in the game where interim relief is concerned, or should something more be required? In our submission, the key to the point, whether you are looking at it in English law or in European law, is where Miss Rose began on Friday with those two passages from the *Genzyme* case about what the purpose of interim relief is. The purpose of interim relief is not to give people indemnities for financial loss they might suffer, the purpose of interim relief is to preserve the integrity of the appeal. Then, as a

subsidiary matter, as the former President put it in *Genzyme*, to preserve the integrity of the decision. That is really what it is about.

Whether you are looking at English law or European law, they are both effectively grappling with the same question, how to balance the public interest in the measure taking effect, or the deemed public interest in the presumptively valid measure taking effect, with the private interest of those who are damaged by it. As Miss Rose says, if it were enough to point simply to damage to one's private interest then one would be in the game every single time, and one would always be applying for interim relief. It is only whichever system you look at, in our submission, if you get to the stage of damaging the integrity of the appeal by making it the case that even to win the appeal will not put things right, that one finds oneself in the territory of interim relief.

The tests are different and in neither case are they rigid. One finds authority from both sides of the fence on that. There are differences in approach. Perhaps they have something to do with the fact that the English test evolved effectively from private law from *American Cyanamid*. and the public authority parts of the test were bolted on later, whereas the Community law test in its origins was a test applicable to the acts of public authorities. When you look at their application in a public law context they do, in our submission, have this in common, that the grant of relief is not simply the application of a balance of interests but requires, in practice, the satisfaction of certain threshold requirements. It does not mean that needs to express them as jurisdictional requirements, or even that one is limited to taking all the points in a particular order and returning to go if one does not meet a particular requirement.

If you look at the way the cases are actually decided, in our submission, these thresholds do effectively exist. If one may generalise a little, the European standard requires serious and irreparable harm as a pre-condition for interim relief, a condition not satisfied by mere financial loss. The English cases are a little more flexible. Public interest cases usually are decided on the basis of the balance of convenience, because, as we have already explored, it is very rare for damages to be an adequate remedy on either side of the equation.

In a context such as this, albeit at the stage of the balance of interests where everything can be looked at, the reality is that they require either a strong *prima facie* case or the sort of irreparable damage that goes beyond financial loss. What in a nutshell Sky is seeking to do is to skip over both those thresholds, pausing to establish neither the strong case that would assist it under English law nor the properly irreparable harm that might have assisted under

the English or European law. The consequence is that they do not have enough to get home on either test.

Sir, I want to show you just one case because I think it probably is the leading case between the two tests. You are probably very familiar with it, but it is the decision of the Court of Appeal and then subsequently the House of Lords in *Imperial Tobacco*. I hope you have already got a report of it. I think tabs 21 and 22 might be the places for it if it is a question of inserting them. (Same handed) This was a case about the advertising of tobacco and a European Directive which proposed to ban the advertising of tobacco and required implementing measures to be taken by some, at this stage, fairly distant date. It is one of these where there was quite a long time to implement the Directive. The Government, because it also wanted to ban tobacco, proposed to implement very swiftly, well in advance of the implementation date, and proceedings for a judicial review were brought and the claimants, or it may have been the applicants in those days for judicial review, sought to have the implementation, or the intention to implement, suspended pending a reference to the European Court of Justice.

The question which preoccupied the Court of Appeal and indeed the House of Lords was whether an application to stay the implementation of a Directive before the deadline for implementation should be addressed according to the domestic test because there was, as yet, no Community obligation to implement, or whether, because implementation was only happening because of the Directive, it should be governed by the European test. That, of course, is not an issue that you have before you, but the reason why the issue appeared to matter in that case was because there was perceived to be a difference between the English test and the European test, and that is a difference on which various remarks are made, both in the Court of Appeal and much more briefly in the House of Lords.

THE PRESIDENT: I have only got the House of Lords one at the moment. (Same handed)

MR. ANDERSON: It is, in particular, in the speech of Lord Woolf that the comparisons are made. If one starts at p.171, he is setting out the terms of the *Zuckerfabrik* case, and of course this is the case that concerns the criteria that must be met when a national court is considering whether to suspend a measure that implements Community law which, on one view of the matter, was what was being requested here. The important point that is made at the bottom of p.171 is that that is effectively the same test as the test applied by the Court of First Instance:

> "Since the power of national courts to grants such a suspension corresponds to the jurisdiction reserved to the Court of Justice by article 185 in the context of actions

> brought under article 173, those courts may grant such relief only on the conditions which must be satisfied for the Court of Justice to allow an application to it for interim measures."

Then the formula of urgency, serious and irreparable damage, and so on.

> "... purely financial damage cannot, as the court has held on numerous occasions, be regarded in principle as represent. However, it is for the national court ... to examine the examine circumstances particular to the case before it."

That is cited from *Zuckerfabrik*, and you see that further on down p.172 Lord Woolf refers, for example, to the *Pfizer* case, which was a classic application for interim relief against a Council measure in the Court of First Instance. That is dealt with there. Going on to p.173 - the *Atlantic Container* case is cited. That is worth just bringing out as well. Of course, the Community test is often said to be very rigid. But, the court in that case - and this was, I think, the President of the Court of Justice, because this was an appeal against an interim measures ruling - the court stated,

> "In the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed".

At the bottom of the page, Lord Woolf comes on to *American Cyanamid*. Over on p.174, having discussed that briefly, he says,

> "This does not mean that the Community approach is fundamentally different from that which will be adopted under our domestic law. The Community jurisprudence involves examining the strength of the attack on the validity of the Community measure, the need for irreparable damage, and determining the balance of convenience. In a case where it is the domestic legislation which is under attack for being in conflict with Community law, the approach authoritatively laid down in *Factortame* was that you first considered the relevance of the availability of inadequate remedy in damages and then turned to consider the remaining issues, including the strength of the attack as part of the examination of all the circumstances in order to establish where the balance of convenience lay. It is, however, clear that, when what is in issue is whether a public authority is entitled to enforce the law, an injunction will not be granted

except in the most unusual circumstances unless a strong case as to the invalidity of the law can be established".

There is then a citation from Lord Goff in *Factortame* culminating with the words,

"Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the charge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken".

Lord Goff, of course, said that in the context of a case where an attempt is being made to suspend provisions of an Act of Parliament. But, Lord Woolf puts the case quite broadly where he says that what is in issue is whether a public authority is entitled to enforce the law a strong case will be necessary if an injunction is to be granted.

Going over to p.175, Lord Jauncey, still quoting from *Factortam*e says,

"If an applicant seeking an injunction against primary or secondary legislation cannot show a strong prima facie ground of challenge it will in the absence of quite exceptional circumstances avail him nought that a refusal of an injunction would result in greater injustice to him should he succeed at trial than would result to the other parties if the injunction was granted and he failed at trial".

Then what is, in our submission, a very apposite citation from a case which I am sure, sir, you will remember - the judgment of the Master of the Rolls in the BT case in 1994. That is described as an approach which is also not that different from that adopted by the Court of Justice. This time the boot was on the other foot and it was BT saying that they were going to lose £10 million over the next five years. The Master of the Rolls said,

"But we must bear in mind that BT is a very major company with a huge turnover and very substantial profits. It is naturally and properly concerned to avoid unnecessary expenditure and protect its competitive position, but there is no reason to think that these difficulties will do more than, at worst, dent its profits. Certainly its survival is not at stake. It may suffer damage which will be irrecoverable, and in that sense irreparable, but it cannot be suggested that it will render the litigation fruitless, even if BT wins".

So, again, one sees underlying that the concept of the integrity of the appeal. Is this the sort of thing that the applicant is putting forward? Is it actually going to damage the integrity of the appeal or are they simply talking about money off their balance sheet that they may not get back. Very similar to that paragraph, I think, is the paragraph which Miss Rose showed

you from *Microsoft* (I think at 294) where an almost identical point was made in relation to Microsoft. Lord Woolf says,

> "The difference in approach is therefore one of degree. However, the approach which the Community jurisprudence requires, where our Community legislation is under attack is stricter than the approach which is required to be adopted where it is the domestic legislation which is under attack as failing to comply with Community law. This is so even though we should not regard the Community jurisprudence as requiring a 'mechanistic' approach".

Going on to para. 177 you see the conclusory section. Mr. Justice Turner had granted an injunction applying English law principles. It was said that he should have taken into account the conditions identified in *Zuckerfabrik*.

> "However, as to the first of those conditions, the strength of the case as to the invalidity of the directive, I have come to the conclusion that the prospects of the invalidity of the directive being established are sufficient to meet the *Zuckerfabrik* threshold."

He did not think it was acte clair. They had only heard interim argument, but he does accept that it is a very strong argument.

> "In relation to the need to establish irreparable damage I do, however, take a different view from Mr. Justice Turner. If he had applied the Community approach he should, in my view, have reached the same conclusion as Sir Thomas Bingham came to in the BT case, looking at the position under domestic law".

I think I am right in saying that the only citation from the BT case has been to that paragraph, saying that a large company losing several million pounds is not enough to constitute serious and irreparable harm. So, he is effectively noting the position under domestic law, as it was described by Sir Thomas Bingham, and saying that Mr. Justice Turner should have applied the same principle by applying Community law.

> "Mr. Justice Turner rightly regarded the damage as probably falling short of irreparable, but because he did not consider this as a condition for the grant, he did not attach to this factor the importance he should".

Going down to E,

> "Even if this issue were to be regarded as one turning on the balance of convenience, because the injunction interferes with the government's freedom of action in the important area of public health, I would not regard it right to grant

the injunction. In coming to this conclusion we are considerable helped by the views expressed by Sir Thomas Bingham, M.R. in the *BT* case".

So, once again, even if it is decided on the balance of convenience, the English law position, as explained by Sir Thomas Bingham, is that it is not enough for a big company to say we are going to lose some millions of pounds.

I think the others I can take much more briefly. Lord Justice Ward agreed with Lord Woolf, M.R. He does say in the middle of p.181 that,

"-- the weight given to the serious and irreparable damage is more important in Community law than in our domestic law".

He sets out later in his judgment the factors to and fro. He refers to the margin of appreciation. Lord Justice Laws took the other view. He summarised his conclusions at 185 as being,

"First, that the Community law test for interim relief does not apply, but, secondly, however, by the common law there is a rigorous and restrictive test for the grant of interim relief".

We are a very long way away here from Mr. Flynn's opening suggestion that there should really be a presumption of interim relief in cases of this nature.

"The burden of the requirement that the applicant show damage is effected by the strength of the case in these proceedings where sufficient detriment is shown by the tobacco companies."

So, the way that Lord Justice Laws got through the case was to apply the English law, say that the English law test was a rigorous and restrictive one to satisfy, but found it satisfied because he considered it, I think, *acte clair*, or very nearly *acte clair*, that the directive was invalid. So, it was because the case was so strong that he felt compelled to do it. That is one of the alternative thresholds that is available in English law. No doubt had he been faced with somebody exiting the market, and making all their employees redundant or anything like that, well, that could have been equally a very strong threshold test, and perhaps that would have been enough to do the trick even if he had not been able to say that the case was probably going to be won.

The section on the rigorous and restrict test in the common law begin at 188, opposite F, and makes the point that the legislation's purpose will be to achieve a long-standing aim.

"It is clear that it would be wrong to adopt what might be called the unqualified or undiluted variety of the balance of convenience test as it is explained in *American Cyanamid*. By that test the applicant has to show there is a serious issue

> to be tried which does not mean showing he is more like to win. This does not apply here by virtue of principles contained in our own constitutional law. Balance of convenience may still be apt as a summation of the discretionary exercise upon which the judge ... applications such as this must embark. In my judgment our courts will not grant pre-emptive orders to prohibit the making of subordinate legislation save in exceptional circumstances"

That is, of course, what this case was about - subordinate legislation. Then Lord Goff is cited again. Then, at C,

> "The burden of the requirement that the applicant show damage is effected by the strength of the case."

The wonderful Lawsian metaphor ensues,

> "Whilst I accept that an applicant for such an order as is sought here must ordinarily show detriment . . . the requirement of damage or detriment and the requirement that a strong case be shown are in constellation with one another. The stronger the case, the lower the damage hurdle. This must be so, since otherwise there may arise a case in which a patently bad measure is sought to be foisted on the people but pre-emptive interim relief will be denied for want of a proper plaintiff."

This approach also conforms in my view to the elementary proposition with the remedy of an injunction discretionary and the court in deciding whether to grant it must look at all the circumstances of the case. So it is one thing to say we are going to decide this at the level of the balance of convenience, and we are going to look at all the circumstances, but it is quite another to suggest that while doing that one abandons the restrictive and rigorous approach applied by the English law cases in order to scrutinise either the merits or the genuinely irreparable damage in the shape of damage that could prejudice the appeal.

As he said over the page at 190 the companies in that case had shown sufficient detriment to obtain an interim order.

The House of Lords I simply show you so that it is there, I do not think that a great deal was added. The issue remained which test should apply. Their Lordships said relatively little about the content of the respective tests and, in the end, although they agreed by 3:2 as to which test did apply in this no man's land before the date for implementation, the government have eventually conceded early interim relief so they did not have to make a reference.

The only remarks relating to the test itself are I think from Lord Slynn and Lord Hoffmann. Lord Slynn is at 132, he thought that Community law was relevant, or at least it was not clear beyond doubt that it was not relevant, so you start with *Zukerfabrik*

> "How far there is a difference between those conditions and the *American Cyanamid* case has been much debated before your lordships. In many respects it seems to me that the tests overlap – urgency, of the need to avoid serious irreparable damage to the applicant, serious grounds to consider that the legislation is invalid – but there may be differences e.g. as to how far financial damage can be taken into account."

And the court in *Zukerfabrik* is cited as saying:

> "… that financial damage cannot 'be regarded in principle as irreparable', but went on:
>
> > 'However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it'."

So that is *Imperial Tobacco*. It may be, Sir, that you are in a happier position than the Court of Appeal was in *Imperial Tobacco* in that you can effectively decide whether to continue the jurisprudence of this Tribunal as seen in the *Napp* and *Genzyme* cases, by applying the Community test or whether to take as a first port of call, as I think you can put it on Friday, the domestic framework. I really have three submissions in relation to that.

The first, echoing Miss Rose, there are real advantages in the Community test. I am going to point to some slightly different ones to the ones that she identified earlier.

Secondly, and I will be very brief on this, on the Community law test the conditions for interim relief are not made out, and I simply want to supplement the reasons Miss Rose gave on Friday with one very small addition.

Thirdly, if you do apply the national law test I will submit, again briefly, that this is not made out either in the absence of either a strong prima facie case or of serious and irreparable harm going beyond financial damage to a large corporation.

On the first submission, what are the advantages of the EU test? It is sometimes described as a "rigid"approach, although the supposed rigidity can easily be overdone. *Zukerfabrik*, the passage we just saw and *Atlantic Containers* which we saw cited by the Court of Appeal.

It does, in my submission, have at least three advantages in a context such as this. First, it is a test that is simpler and more predictable in its application, and that because it avoids the need to get deeply into the merits. That is particularly important in a case such as this one

where the argument will no doubt in due course be complex, and in which it is not easy for the Tribunal coming fresh to the case in a very short timescale, to get a sense for the outcome at the start. You picked up from the judgment the extraordinary amount of time and energy that went into looking at the merits in *Imperial Tobacco* to the point where Lord Justice Laws could pronounce himself quite sure that the Directive was invalid – he was right by the way, the Court of Justice ----

THE PRESIDENT: I remember, a very good win, Mr. Anderson.

MR. ANDERSON: I attribute it all to Lord Justice Laws who saw the best point at the start, but it is a huge amount to ask, particularly in a case like this, a huge amount to ask of any Tribunal to reach a view on the merits so early on, and of course that will really be necessary under the European test because whether you describe it rigidly, or not quite so rigidly, the filter that is a primary filter is constituted by the requirement of serious and irreparable harm, and is much easier both for a party to take a view: does the best evidence we are able to produce meet that standard? And also for a Tribunal to decide relatively urgently whether it meets that standard.

The second advantage, in my submission, of the Community approach is that the inadequacy of mere financial loss makes the correct distinction between loss that prejudices the integrity of the appeal, and loss that does not, loss that is just inconvenient or unfortunate. It is not enough to show that loss is or maybe irreparable in the sense that you may not be able to get it back, it must be serious as well, that is the point of those two adjectives – that takes us back to the purpose of interim relief as we saw in *Genzyme*.

The same point is made in English Law, you saw it in *Monsanto*, and you saw it more strongly still in BT in the paragraph cited by the Court of Appeal in *Imperial Tobacco*, but the approach of the Court of First Instance and now the General Court is more consistent and, one might say, more principled, in that regard.

The third advantage that this test has is that it maintains consistency with the approach of the general court which, other things being equal in our submission, is a desirable thing. It is perfectly true that s.316 is a provision of domestic law, there is no Community requirement for a s.316, but despite that one can see the logic of applying the same test. Ofcom, of course, like the OFT , has the power to apply Articles 101 and 102 for itself – I think that is s.371 of the Communications Act 2003, and s.25 of the Competition Act, but I expect you know that, Sir, much better than I do. It has the power to do it anyway, and it would be very odd in our submission to have two tests.

The point made by Mr. Flynn, picked up in discussion on Friday, why should it be easier to get a decision of this nature suspended than a decision under Article 102. As a matter of principle why should the test be any easier to satisfy. One could say that it should be the other way around, because a decision under Article 102 is liable to have much more serious effects. In addition to the requirement that commercial behaviour be changed, which is common to both remedies there may be a very large fine, and perhaps an obligation to provide a guarantee in relation to that fine, or to pay the fine, and it may open up the prospect of civil proceedings by aggrieved parties who may wish for their own reasons to begin those proceedings whether or not they are progressed while the appeal is still pending. So where one is dealing with a *quasi* penal measure with those very extreme consequences, one might almost turn it on its head and say: "Is that not an argument for being more ready to grant interim relief where quite such serious consequences are in play and so it might be difficult to meet the guarantee?" or something of that kind rather than as regards a measure of this kind. In any event, we do not accept the contrary proposition put by Mr. Flynn that it is the other way around, and that because this is some sort of new and unfamiliar provision that has not been used very much before or has not been considered in detail by this court, the court should be more willing to suspend a measure taken under it.

That must surely go to the merits. If Mr. Flynn had persuaded you, or perhaps he has persuaded you – I am not sure he really tried to persuade you that any of his grounds were strongly arguable – he argued they were respectable and so they may turn out to be. One does not know from reading the application, but that is his submission in any event.

Just because it has not been used much before is relevant only if there is a strong argument on the table suggesting that it was unlawful to use it in this way and it is not suggested that that is a strong argument, or an argument that you, Sir, at this stage could reasonably consider to be strong. It was, I think, mentioned in argument that the extra words must be added for some reason. You have seen, I think, a little bit of Hansard, a footnote in our skeleton argument, suggesting that the Sponsoring Minister was quite clear that it was intended to have a wider scope than article 82. One could have an interesting discussion about its scope, no doubt, but that goes to the strength of the arguments raised on the substantive appeal and it is not, in itself, a criterion that should affect the standard for interim relief.

That is my first submission.

The second submission, which I take very briefly because Miss Rose has dealt with it so thoroughly herself, is that even on the European test there would be no interim relief. That

is because the threshold of serious and irreparable harm is not made out to the requisite standard.

I just mention one point on the *Microsoft* case, which again is a footnote to Miss Rose on Friday, and I think it is p.39 of transcript. She showed you how rigorous the CFI was in relation to the suggestion that *Microsoft* was prevented from returning to its original policy. That was the first of its points, 38 to 46 of its application, so the irrevocable change to its business policy. *Microsoft* said that too. She demonstrated to you how rigorous the CFI was in its relation to that argument.

The only point I want to make is that the *Microsoft* case also dealt, in a passage that you have no so far seen, with another of the detriments that Sky claims it will suffer, which is the second on its list, which is damage to its reputation. Sky puts that of course on the basis that the prices of its channels are likely to fall, the retail price, and that this will devalue the channels in the minds of consumers. It is tab 14 of the authorities bundle. Of course, we say that that submission is wrong for all the reasons that Miss Rose gave and that we set out in 23 to 27 of our skeleton argument.

THE PRESIDENT: This is 342 is it?

MR. ANDERSON: No, it was not there I was going, but I think I probably should, I do not want to miss a trick.

THE PRESIDENT: I do not know, just that was reputation. It might be the wrong bit.

MR. ANDERSON: There is certainly treatment of it there. That is in the context of tying issue.

The passage I was going to take you to is at 442, and it may be that it is simply a distinction between submissions and conclusions of the court. I have not checked that. At 442 under the heading "The alleged damage to Microsoft's reputation" ----

THE PRESIDENT: Yes, that is the passage that has been marked.

MR. ANDERSON: Here it was not just put on the basis of the price might go down a bit and people would think less of us because we are cheap, it was put on the, one might have thought, rather more serious basis, which was that its operating system would malfunction in the circumstances that it was being asked to offer it, and that the malfunction would damage its reputation. Starting at 442 that point is set out. Then at 444:

> "It is therefore first of all necessary to assess the extent to which the problems to which Microsoft refers exist and, if so, whether they could easily be avoided."

I do not take you through the detail of it, although one sees from 451 that the parties agreed in part on Microsoft's argument. The conclusion is at 453:

"It has therefore not been demonstrated that the problems invoked by Microsoft could not be avoided, at least to a large extent."

So the burden on Microsoft and some malfunctioning that could not be avoided taken in the court's stride.

The second argument is at 454 to 459:

"... it must be held that Microsoft has not adduced before the President evidence demonstrating to the requisite legal standard that end consumers or, more generally, its customers would associate any absence or malfunction those functionalities with an unforeseen malfunction of Microsoft's product rather than with the normal consequences of the absence of a media player and, more specifically, of Windows Media Player."

So again burden of proof. Conclusion at 459, it has not been shown that a customer would be capable of injuring Microsoft's reputation.

Third, at 460:

"... [even if] it has been demonstrated ... that none of the problems alleged by Microsoft could be avoided and, second, that customers and consumers could not make an informed choice, Microsoft has not adduced evidence permitting an assessment of the real seriousness of those defect and, in particular, the extent to which they might have specific effects on its reputation with the various operators in the sector."

Again they have failed to prove that.

Then, going on down, to 464, the fifth argument:

"... still on the assumption that the alleged defects should be proved to the requisite legal stand and be incurable, the seriousness of the adverse effect on Microsoft's reputation would to a large extent depend on the actual distribution of the Article 6 version ... it is not for the judge hearing the application for interim measures to prejudge the effects of the remedy on the market and, on the other hand, Microsoft itself expresses doubts as to the extent of sales .. and does not claim that there is a risk of an irreversible development on the market."

Then sixth, and remarkably:

"... even on the assumption that, in spite of all the foregoing, Microsoft has demonstrated ... that there is a risk of serious harm to its reputation, it has not demonstrated that there are any structural or legal obstacles preventing it from

implementing the publicity measures which would allow it to restore its reputation."

So when they say "irreparable" they really mean irreparable, it has got to be damaged for good so that the appeal is prejudiced, and the burden of proof is on the company throughout. It is a very striking case because the facts are so similar to this, not a natural monopoly, not a regulated industry, but a company with market power being required to supply to others, and not only to named others, but to supply generally.

My third submission was no interim relief on the English law test. I think you have really seen what I say about that from the cases that I have cited. To the extent that this about money, we rely, yes, on *Monsanto*, 1173, but also on Lord Bingham in *BT*, where damages are not an adequate remedy it may still be appropriate to refuse interim relief and large sums of money from the balance sheet of a large company are not enough.

To the extent that a strong *prima facie* case can function as an alternative, which we accept it can – see the approach of Lord Justice Laws applying the English law in *Imperial Tobacco*, there has not even been any serious attempt by Sky to make that out, certainly none made on Friday.

The fact that this a considered decision of expert statutory body, rather than a statutory instrument made by Ministers, is not to the point. It is true we are not dealing here with primary legislation, so perhaps some of the comments of Lord Goff about the case, so strong that only such an exceptional course could then be taken, do not apply in quite the same way, but the similarities are very great indeed. Ofcom acts in the public interest, just as Ministers are supposed to do; Ofcom acts pursuant to statutory powers, just as Ministers do; and its decision is certainly just as carefully considered and as fully consulted on as any decision that is contained in a regulation or a statutory instrument. The real point here is that, whether you approve of what they are doing or not, both the Ministers, when they issue a statutory instrument, and Ofcom, when it issues a determination of this kind, or the OFT or whoever it is, is pursuing the public interest when they do so. The point about this case law is not that it applies only to statutory instruments, it is that it applies in a public law context to decisions taken not to regulate relations simply between private parties but in the public good.

Sir, I only have one other submission which I can make, I think, quite briefly, but it relates to internet providers and again my task has been easier by Miss Rose and the helpful note that she gave you in relation to those. The hare, as you will remember, of internet providers was started running by Mr. Darcey at 47 to 49 of his first statement where he says that the

decision may permanently change consumers' perception of value because of Ofcom's clarification that the remedy should extend to what Ofcom refers to as "software based platforms". He was worried that the benefit of the remedy would extend to anyone capable of building and operating a player software application online, like iPlayer from the BBC, Sky-Player from Sky, and so on, and he says that the impact of the extension of Ofcom's remedy in this way is very hard to anticipate and any assessment of such impact is absent from the decision. You have seen what Ofcom have to say about that. We were alert to the fact that on Friday it was a point that came up a couple of times. In the event that despite what it has heard the Tribunal may be concerned by the possibility - however remote - and as far as we are concerned it is indeed remote - that providers of this sort might come along and seek to take advantage of the wholesale marketing operation, I would suggest an alternative. I make this very much as an alternative submission - not as part of my primary case: that it would be possible for the Tribunal, were it minded to grant interim relief on this ground, to grant interim relief only in respect of such operators. We do not say it is necessary. Ofcom have their minimum qualifying standards. They have their minimum security requirements. But, this would be a further possibility. The order would be on the basis that the only people who come to court are potential DTT and IPTV providers - just as I recall that in *Factortame,* for example, the Spanish fishermen's case, the injunction was given only in respect of named operators of fishing vessels. The injunction was given to those who came to court, and not to those who did not.

I address this remark in a way not only to you, sir, but to Ofcom: there was a reference this morning to the possibility of discrimination, and would this be a discriminatory remedy. We say, no, it would not. For a start, they have been on notice. If any of these people are in the slightest bit interested in entering this market, they have been on notice; they have had the opportunity to come along. The Tribunal has been very generous to those who have come along and wish to participate. The fact that none of them have may, perhaps in itself, speak volumes. Secondly, even if one did take the view that it could be unfair for interim relief to be granted in relation to them and not to us, any such unfairness could very easily be remedied simply by providing for liberty to apply. So, as and when they woke up and were interested by what had been going on, they could come to court and defend their interests - if, that is, any of these people are anywhere close to launching within the likely period of this interim relief.

Technically it is perhaps not the time to get into a lot of detail, but it seemed to us that the mechanics of doing this -- It may be sensible just to have a look at the Pay TV statement.

Sir, I do not know whether, with your reading, you have got as far as p.645? If so, you would have realised you were on the home straight. That is a condition inserted into the Sky Sports 1 licence. There are similar conditions for the Sky Sports 2 licence. You see the way that is structured:

> "14A - wholesale must-offer:
>
> (1) The licensee shall offer the programme content of the licensed service to any person for retail by that person to residential consumers in the United Kingdom on qualifying platforms".

That is the phrase that is relevant. Over the page, p.647,

> "Qualifying platform' means any platform used for the distribution of programmes to residential consumers in the United Kingdom, other than a platform operated solely by the licensee".

Now, not in an attempt to draft anything final, but simply in an attempt to be helpful to my learned friends in case they have any comment, it appears to us that one way to deal with this would be in order to meet precisely the concerns of Mr. Darcey, and in order to ensure that those of us providing DTT or IPTV or canvas - which is a sort of hybrid of the two which should not be caught by interim - would be to build in an additional interim exception whereby other than a platform operated solely by the licensee, it could be supplemented by also other than software-based platforms. 'Software-based platform' means, I am told, a software application residing on a home computer which enables the delivery of video content without the need for any specific operator or retailer hardware. I repeat, the intention would be to keep IPTV and canvas within the wholesale marketing obligation, but to satisfy the concerns raised by Mr. Darcey at 47 to 49.

THE PRESIDENT: Would that exclude the likes of Google and Yahoo?

MR. ANDERSON: I believe that it would. I am told that it would, sir, yes. In any event, there will be a form of words that can do it. That is the best that we have come up with. Whether Ofcom, having heard the submission, believes that this would be in any sense discriminatory or whether it is sufficient to say, "Liberty to apply. If you say you have good reasons for being exempted, then come back and ask the Tribunal. It will be for them to say". But, in our submission it will be perfectly within the principles established on interim relief that those who come to court to resist interim relief should be those who feature in the order in this way so long as liberty is given to others to come along and seek to exclude themselves.

THE PRESIDENT: I wonder how long it will be before the applications roll in?

MR. ANDERSON: I cannot give evidence on my feet, sadly. Sir, you had from Miss Rose what Ofcom said about this when they were preparing the report. They actually listed the people who they thought might be interested in participating in this wholesale must-offer. I think I am right in saying - and Miss Rose will correct me - I do not think there were any names on that list who are not represented in court. It certainly was not Google or Yahoo, or any other very large and frightening companies that one might be able to dream up.

THE PRESIDENT: You have thrown this out. No doubt others will be able to say something about it.

MR. ANDERSON: Unless I can help you further, those are my submissions.

THE PRESIDENT: Thank you very much Mr. Anderson.

MR. BEARD: I am conscious of the time, sir. I am happy to start, but if two o'clock would be more appropriate ----

MISS ROSE: To assist on the final points that Mr. Anderson raised ----

THE PRESIDENT: You want to react straightaway to that?

MISS ROSE: Just on the question of who Ofcom anticipated to want to intervene, or would be interested, I believe there was one party that was identified, who is not here - FreeSat. Certainly not Google or Yahoo.

(Short adjournment)

THE PRESIDENT: Mr. Beard, it is always a bit invidious when you are down the line of people who are saying the same sort of things, but do you have any idea as to how long you will be saying them for?

MR. BEARD: I would imagine I will be a good hour.

THE PRESIDENT: A good hour?

MR. BEARD: A good hour – a barrister hour!

THE PRESIDENT: That sounds ----

MR. BEARD: Ominous.

THE PRESIDENT: Well ----

MR. BEARD: I will move through it as quickly as I can, obviously having heard from Miss Rose and Mr. Anderson I will be adopting ----

THE PRESIDENT: You will want to say lots of things about your clients, but I have read quite carefully Mr. Chance's statement.

MR. BEARD: Well we will see how fast we can move through it. I will accelerate as far as possible. As you know, Sir, Top Up intervenes in support of Ofcom and Ofcom here has carried out this very long and detailed investigation and the broad thrust of Top Up's

position is that the implementation of the WMO will have a significant impact on Top Up. Suspending it now would do it severe harm. The nature and the history of Top Up has been set out by David Chance in his witness statement at paras 1 to 50. I will not go through those in any detail but I would ask you, Sir, to review those points. Mr. Chance is someone that has worked at Sky previously, has a great deal of industry knowledge, is the co-founder and chairman of Top Up. He describes how Top Up started, how it has been innovative. In particular at paras. 18 and 19 he talks about how it developed video on demand, push technology, which Sky is often credited with, but actually Top Up was first out with apparently.

He has described how consistently in 2004/2005/2006 and 2007 Top Up has sought to obtain wholesale supply of premium channels, Sky Sports 1 and 2 from Sky without success, that is at paras. 23 to 28. Mr. Flynn makes the point: "After 2007 you did not come back any more. After trying consistently over a period of four years, Top Up turned to Ofcom. In the circumstances, if Sky had had any intention at any time of offering a reasonable wholesale deal to Top Up it could have come back, its interest had not diminished in any way.

Mr. Chance explains how, in the circumstances Top Up turned to Ofcom. Top Up is a much smaller operation than Sky or BT, or indeed Virgin, but it is lean and it is effective, and it offers real competition to Sky. Mr. Chance has estimated that there will be around 11 million homes for whom the alternatives for getting Sky Sports 1 and 2, would by Sky or Top Up. That is a lot of viewers that Top Up can compete for, and Top Up estimates there are approximately DTT set top boxes to which it can sell now if those Sky Sports channels are made available to it, and that is, of course, in addition to the BT set top boxes that create the universe of around 2.5 million to which already these channels could be supplied if wholesale arrangements were made.

So Top Up may be small, but it is nimble, it is well able to take advantage of opportunities and do so quickly, and it has the scope to grow the pay tv audience on DTT substantially.

Turning briefly to the test of whether interim measures should be granted as requested by Sky, in that context I adopt the submissions made by Miss Rose and indeed by Mr. Anderson. We agree that the differences between EC and UK tests are over played by Sky, that you look at the particular facts and circumstances of the case. In any event on either test basis Sky does not get home in relation to its interim relief application and, in particular, Sky cannot pick and choose the easy bits of each type of test, and consider them as Mr. Anderson has rightly pointed out.

Just two passing remarks, in both its skeleton and in his opening, Mr. Flynn has referred to Rule 61, which is the Rule under which the application is made, and made submissions relating to the application of Rule 61 and tried to place some emphasis on the possibility that 61(1) was applicable here, either directly or indirectly. With respect, I think that may not be in any way pertinent to this application. Clearly this is an application that falls under 61(2) and, as Miss Rose has pointed out the reference to urgency in 61(3) refers back to 61(2), and this is an application for interim relief in a situation of urgency and it is to be noted that the power in Rule 61 is for all interim orders, it is not just for urgent applications, so one can think of a situation, for example, where the Tribunal has heard a full appeal and perhaps the ground on which it grants an appeal is, say, a procedural ground whereby there might be concern that actually the substance of the decision that was to be overturned on procedural grounds was sound and therefore some sort of interim order should be made in the meantime, that clearly would not be urgent, it would fall within the scope of Rule 61. it may assist simply to explicate why there are different provisions being referred to there, it covers all interim orders.

The second remark to make in the context of the interim measures test is simply that both in EU and domestic law the acts of Government and regulatory institutions are presumed valid. There is a particular citation, I will not take you to it, Sir, because of the time, but I would refer you to tab 6, para. 48, *The Commission v BASF*. That was a case concerning an appeal against a Commission regulatory decision, not statutory instrument, primary legislation or anything else, it was a presumption of the validity being emphasised by the court in the context of a regulatory decision and the same presumption will apply in domestic law.

Now, of course, if it is the case that there is a compelling argument that the provision or decision in question is invalid, then that presumption can be reversed. But, of course, that is not the case here, because turning then to the prima facie case dimension at the interim relief test, Sky must demonstrate the seriousness of its main application. Now, of course, it cannot at this stage set it out fully and no one here is suggesting that Sky is, as Mr. Flynn put it, being required to litigate now in relation to the matters of merit. But it is important to bear in mind that the way in which the case is being put is extraordinarily thin. The grounds set out are incredibly limited. Now, Top Up has set out in its skeleton, and for your notes that is at paras. 15 to 21, BT similarly at paras. 10 to 13 of its skeleton, and Ofcom at paras. 20 to 21 of its skeleton deal with the various grounds, and set out the weakness of, in particular, one of the central grounds of argument that s.316 could not be used in the way

that it has and indeed the comments more generally about the nature of competition law and competition law principles. One thing that was pointed out to me as we were considering the terms of the skeleton application is that if you read the words "Competition law" in Sky's submissions as synonymous only with the Competition Act, then the submissions made in the grounds make perfect sense. If one recognised that competition law actually goes further than the two prohibitions in the Competition Act and encompasses provisions regulating competition or enabling the regulation of competition, whether under the Communications Act or schemes -- for instance under the market investigation regime where, of course, there is a very, very wide ranging discretion as to how these matters should be dealt with, then in those circumstances you begin to recognise quite the weakness of the focus on notional competition law that Sky places in its grounds. The second point to just make briefly, rather than working one's way through the grounds in particular, is to stress this: that where an application for an injunction or interim relief, whether under domestic law or EU law, would have a significantly and potentially determinative effect over a period, it is appropriate for this court to apply a more rigorous scrutiny to the way that it looks at the arguability of the case put before it.

In the authorities you will find at Tab 8 - I will not take you to it - the application for interim relief by the United Kingdom in relation to the prohibitions in the movement by reason of BSE (mad cow disease). There the interim relief application was made, and what one finds is that out of forty-four paragraphs (the findings of the court), thirty-two are paragraphs dealing with the merits of the claim. This is in the context of the EU test where a less rigorous approach to the prima facie case hurdle in interim relief is thought to be applicable. So, here we have a situation where the court is very ready, recognising the significance of the interim relief sought, to apply a closer scrutiny to those arguments on the merits. The same is true of the other citation – *Austria v Council* at Tab 10 of the authorities. It is also true of *Microsoft* to which, sir, you have been taken already.

Then, when one turns to the English authorities, Mr. Anderson has taken the Tribunal at some length to the *Imperial Tobacco* judgments where, again, a very detailed scrutiny was applied. No doubt Sky will say in *Imperial Tobacco*, "Well, there one was dealing with a statutory instrument. One was dealing with judicial review - not merits and a regulatory decision". The principle remains the same. It is good whether you are dealing with a regulatory decision or a statutory provision. In those circumstances it is right that this court applies a higher level of scrutiny to the grounds that are put forward.

THE PRESIDENT: The trouble with that, Mr. Beard, is that the submissions that have been made to me so far have really been on the basis that I should not look at them too closely. Everyone accepts that the hurdle, certainly from an EU and probably from a domestic point of view, is overcome in terms of arguability. Really at this stage I have not got the material -- Where is the material?

MR. BEARD: Turning to the second point in relation to prima facie case, Mr. Flynn has suggested that when it comes to considering the urgency application and the balance of interests, and so on, one does not take into account anything to do with the strength of the case because one cannot. That is plainly wrong. If this Tribunal does not have a sense that there is a strong case on the substance, then in those circumstances it becomes all the more important for Sky to have put forward a very compelling case in relation to the serious and irreparable harm ----

THE PRESIDENT: I think that is the way Mr. Anderson was putting it, was it not? You either have a strong case on the merits or you have a very good case ----

MR. BEARD: Yes. The point I make is simply an additional one - that where one is dealing with a significant impact on others, the determinative effect -- that balance is going to be tipped all the more against someone seeking interim relief unless they can spell out a very clear, substantive case. Sky has not done that.

I leave the test and turn to the ingredient of urgency, grave and irreparable harm. It is clear that Sky has abjectly failed to show grave, serious irreparable harm will be caused to it if the wholesale must-offer is not suspended. There are the citations that you have already been referred to in relation to the Microsoft case. There is also an authority at Tab 7 of the bundle - *Eridania* - which deals with the concept in a similar way. It emphasises the importance under European law of identifying that serious and irreparable harm clearly. It is quite right, as Mr. Anderson has said, that greater emphasis is placed in European law on non-financial loss, but nonetheless in both the European and domestic jurisdictions it is a balancing exercise that has to be carried out.

Sky has then said, “Well, there is an irrevocable change to our business”. But, in saying that Sky tries to face in two directions. It contends that the wholesale must-offer is a complete change of business to it, and is therefore very serious. But, on the other hand, it has sought consistently to maintain that it is willing to wholesale. Now, whilst Sky clearly prefers to retail its own channels, it has maintained to Ofcom that it is willing to wholesale premium channels, and those representations are maintained by Mr. Darcey in para. 13 of

his statement. For reference, it is also worth noting a statement made by Sky in response to Ofcom's third pay TV consultation - the Phase 3 document - where it says,

> "Given Sky's offer to Ofcom and its wholesale offer to BT, it is apparent that Sky was willing to wholesale its channels irrespective of its legitimate stated preference to retail".

So, it is saying, "Actually we will wholesale. We do not like it, but we will wholesale". To then say, "This is a radical change of business" is simply inconsistent. It can, of course, continue to retail its channels, even when the wholesale must-offer is in place. The great difference, and the reasons why Sky dislikes it so much is because, of course, others can also retail, and, in particular, Top Up would be able to.

What is notable about Sky's application in relation to the impact - and irrevocable impact - to its business is the limitations of the material put forward in that it does not provide any real indication of the total net loss of income due to the wholesale must-offer and how it would impact on its business. The only sensible conclusion that can be drawn is really that there is none. That is a fact which is brought home in the context of Mr. Darcey's second witness statement. If you could turn to para. 16 of that statement -- I am conscious here that there is a figure at the bottom of the paragraph that is confidential. I will not refer to that. What I am going to refer to is the mechanism by which that figure is reached because that figure is obviously a figure that Sky maintains is very substantial. That is open - the figure itself is closed. The calculation that Sky has carried out to reach that substantial figure is by saying that 378,000 DTT customers will take up Sky Sports in a year. Then it says that 100,000 of those customers could come from Sky.

THE PRESIDENT: This is a win-back.

MR. BEARD: This is the win-back. This is the cost of winning it back. Obviously the income that dare not speak its name in this paragraph is, of course, the total wholesale benefit that Sky obtains. If you can just take it in raw gross figures, if you have 378,000 customers who are taking Sky Sports at the wholesale level for twelve months, then you would end up earning through the wholesale revenues £77 million. So, you would earn a very, very substantial amount of money.

There are a number of reasons why that figure may be unduly high. First of all, the estimate of 378,000 is likely to be substantially lower. This would be a fantastic result for DTT if it were to obtain this sort of level of customer retention on Sky Sports in the first year. It is also worth noting that this is a figure that has generated for a year's income or a year's set

of customers, and the suggestion is that this appeal will be dealt with within a shorter period.

Indeed, one could be looking at much, much lower numbers of customers moving to DTT. In Mr. Darcey's first statement he considers a range of figures of customers moving to DTT or taking up DTT, and the bottom end of that range is around 100,000, just over. So this is obviously at the very top end of the range that Mr. Darcey expects could take Sky Sports through DTT in the year.

The second variable that is such that it may be an over-estimate by Mr. Darcey is the 100,000 customers that he suggests would come from Sky. It is worth just bearing in mind what he is saying here. He is saying that 100,000 people who have Sky subscriptions and dishes on their walls would say, "No thanks, we are going to shift over to DTT", so they are switching customers. That percentage that he suggests, when you are launching this new service on DTT, it seems extremely unlikely. As I have already indicated, the population of boxes to which BT and Top Up would be selling is about 2.5 million between them. It is obviously going to be those customers to whom BT and Top Up will be targeting their efforts initially. They are not going to be going after Sky switchers initially, they are going to be going after what is sometimes colloquially referred to in business as the "lower hanging fruit", those that incur lower costs in order to obtain the business from.

The first universe on which they will be drawing is the people that already have the boxes and that is a large population, far larger than the figure that is being suggested by Mr. Darcey.

You have also got people, and this is a part of the submission from Ofcom, who do not have digital television at all and are contemplating getting some form of digital television as, in particular, switch-over approaches. Again, those sorts of people may well be the sorts of people that would be targeted, or targetable by BT and indeed Top Up in this context. So non-digital houses, of which there are a substantial number, would also be part of a universe that would be targeted by the DTT entrants without impinging on Sky at all, and it would only be beyond that that the targeting of existing customers on other platforms, whether it is digital, satellite or cable, would become a particular focus, because in the circumstances those would be the customers who one would expect it would be hardest to shift. After all, they already have access to these channels. They can already buy the packages with this material in it. In those circumstances, trying to target them first off is highly unlikely. So the idea that a quarter of all the subscribers, on this high percentage in any event, the quarter of subscribers, would therefore be switchers is, on the best basis, unlikely.

Notwithstanding that, we have tried to think about what the net benefit to Sky is in relation to this sort of model put forward by Mr. Darcey. These are matters that are beyond my ability, but if I could pass one of these up to the court. (Same handed) There are two pages of tables. If one turns to the back page of the tables, these are very rough and ready figures. They use numbers which we are relatively confident are accurate, drawing on sources from Ofcom reports in particular. Nonetheless, what you have to recognise is that if one takes the wholesale income across this year, if all of the subscribers all joined right at the beginning in the first month, then you would get 12 months worth of the full wholesale income if you are Sky. Of course, that is not realistic. You are not going to get all your subscribers in the first month. So this table says, you get the subscribers up to 378,000 in the last month on a linear basis, no front-loading at all. They say that is the wholesale income you would have got in relation to those customers who are not the Sky churners. So this is 278,000 across the year.

It is then recognised that Sky does make a loss on the difference for Sky churners between what it earns in retail and what it earns on wholesale if someone churns across. In other words, if someone is a Sky retail customer Sky earns net more than if the same customer is a wholesale customer being supplied on DTT for these bases.

We estimate that the most that that difference would be is £10 per month per subscriber. When one does that on a linear basis across 100,000 subscribers, that gives a net loss to Sky across the year of £6.5 million.

THE PRESIDENT: I am sorry, being stupid, where is the £10?

MR. BEARD: If one looks in the top table on the second page, third row down, it says "Less loss per month on Sky – 6.507" – that is 6.5 million loss – "100,000 Sky churners over the year x Sky loss of £10 a month".

Then an estimate is made of the Sky win-back costs. Obviously these figures were compiled by someone that has not seen the confidential information, and so no comment is made about the accuracy or otherwise of these subscriber acquisition cost entered, but this is their estimate of a very high subscriber acquisition cost, £250,000 – you can see that marks out the top of the table. That results in Sky win-back costs being negative £25 million.

Then one looks at the net position. The net position overall is Sky losing £2.5 million.

The other table on that page used different subscriber acquisition costs. They use £175 and they use the £20 that Mr. Chance has referred to in his witness statement as being the likely cost if someone does not switch their box and the relatively small incremental costs are then incurred by Sky in winning back those customers. Of course, when you are talking about a

very short period it is likely that people will have retained their equipment. So in those circumstances it is likely that the lower subscriber acquisition costs are going to be more realistic. By the bottom of that page one finds that the Sky net position is £20 million positive.

If one then turns back a page, this set of tables is this same format as the ones we have just looked at, but here, instead of looking at a linear take-up across the year, one says, actually it is the start of the football season that is important, factually a lot of people who would be interested in taking these products if it is launched at the start of the football season would join then and you will then see a decline in the take-up. What one sees there is that when you front-load the profile – and I will deal with how the front-loading is done in the closed session – what you get is a net position that even on the highest level of subscriber acquisition costs Sky is making £15 million. Then, of course, when one goes on down the tables and the subscriber acquisition costs fall, the level of return is higher and higher.

So, so far as one can see, on the basis of Mr. Darcey's own set of figures, and using some conservative assumptions drawing on Ofcom's material, what one ends up with is only when the subscriber acquisition cost is at its very highest on the estimates provided by Top Up and you are adopting an unrealistic linear take-up of customers across the year, that in those circumstances does Sky make any loss at all.

As I say, these are rough figures. They are not perfected. It has not been possible in the time available to incorporate them into a proper witness statement, and so on. What is instructive is that it is not that difficult to begin to do this sort of modelling, and there is none in Sky's witness evidence, none. Instead they highlight the costs, they never try to estimate the benefits and they never try to set them off. In those circumstances this Tribunal should be incredibly circumspect about granting interim relief where you could be affording Sky the opportunity over the period to actually be making a profit and quite a substantial profit in the circumstances.

So when we look at the damage to Sky, the irrevocable change to its business and the financial impact that it suggests, a degree of significant scepticism is to be required, and indeed that is true of a number of the other suggestions made by Sky. For instance, the suggestion that its threats will no longer carry any weight as is suggested in the application at paras. 31 to 36, that if Sky supplied its channels to the WMO to people like Top Up who do not presently have them, and was later successful in this putative appeal, Sky would not be able convincingly to threaten to withdraw them. That is frankly implausible. Greg Dyke

famously referred to Sky as an 800 pound gorilla in the broadcasting world. Now, that might be harsh. Gorillas are obviously very peaceful gentle creatures ----

THE PRESIDENT: A dangerous species too, are they not? (Laughter)

MR. BEARD: The participants in the broadcasting industry take Sky extremely seriously. It is well recognised that Sky will be ruthless in the pursuit of its objectives. The former CEO of Flextech who went on to head up Telewest, the predecessor of Virgin, once said if you throw a stone at Sky they come and bomb your village. It was their appraisal of how Sky dealt with people who threatened them.

The idea that Mr. Darcey can claim, with a straight face, that the withdrawal of Sky Sports and Sky Sports 2 from a competing retailer would in those circumstances so seriously damage Sky's reputation with consumers it would be disadvantaged in negotiations with the purchaser, given Sky's approach to these matters, is not plausible. As Mr. Chance points out, at para. 115 of his witness statement, if a pay tv retailer supplies services to customers and then ceases to supply them because Sky has pulled its wholesale supply, the customers would direct their complaints to that pay tv retailer, and that is where the principal damage will be done, and Mr. Darcey's answer in his second statement at para. 9 simply is inadequate to deal with this.

My learned friend, Mr. Hoskins, will no doubt touch on this in his submissions, that Sky has shown a readiness to withdraw channels, even as part of a simple commercial dispute; that is precisely what happened to Virgin.

Mr. McWilliam puts in selective material about the initial damage to Sky's reputation but there are two things that are very notable about that. One, there is no comparison with the impact on Virgin; and, secondly, as has been pointed out by my learned friend, Miss Rose, Sky's reputation recovers, but it is also worth noting that that comparison with Virgin is by Sky hugely overstated in any event . That was a row between parties resulting in Sky unilaterally withdrawing channels. Here if Sky were successful in overturning the pay tv statement it would be able to refer to the fact it had previously been mandated by Ofcom to supply and that mandate was unlawful, as Miss Rose put it, they could blame Ofcom.

The risk of collateral litigation in those circumstances is again hugely speculative, as Miss Rose has suggested, and it is based on that erroneous comparison. If Sky were to have succeeded in this putative appeal it would be in a position to say that a regulatory body had unlawfully required Sky to supply. The idea in those circumstances that a company would turn to litigation to force supply as a rational strategy it would be a remarkable and bold company that did that.

So then one turns briefly to the valuation in the minds of consumers. Sky's application set out how it is concerned that wholesale concern by others may lead to lower prices for Sky Sports. It is worth noting in passing just what a surprising sort of detriment that is to rely upon since normally this is precisely what we want competition in markets to achieve. But here we are in a slightly strange situation, that must be recognised. Mr. Darcey claims it will lead to a permanent unjustified devaluation of the channels, and consumers will quickly adjust downwards their perception of what the channels are worth. But as Mr. Chance has pointed out Sky has consistently sought to position itself as providing good value for money. It has never sought to suggest that the attraction of its channels are in some way dependent on their very high prices.

Mr. Chance has exhibited to his statement some examples of this – Sky Sports offering six months free. Mr. Darcey responds by saying "Actually that sort of marketing we do not do any more, we only do it in relation to other sort of marketing, not that sort of general acquisition marketing. In other words, what he is saying is for the million a year that churn from Sky, that leave Sky each year – 10 per cent of its total 10 million – it targets a million customers with discounted offers. Come back on any Sky package half price for a whole year. You can also add Sky Sports or Sky Movies for 12 months, both are half price. That evidence from Mr. Chance as to Sky's conduct fundamentally undermines the suggestion that there is any issue here that Sky's business position and its reputation would be damaged, and my learned friends Miss Rose and Mr. Anderson have also dealt with the position in relation to mobile phones.

There is one point that is perhaps important to pick up and that is at para. 40 of its application. Sky has suggested that Sky's competitors "will be afforded the opportunity to engage in price wars to which Sky cannot easily respond". The reason for this it is said is that if Sky seeks to drop its retail prices its wholesale prices will be dragged down accordingly by reason of the Ofcom mechanism under the WMO. Indeed in its application at para. 8 Sky says that if it "reduces its retail prices for the Core Premium Sports Channels, it will be required to reduce the maximum wholesale prices for those channels by the same amount." That suggests that such a drop in wholesale prices would result in an equal drop of retail prices. Leave aside the suggestion that competition law might ordinarily suggest that lower prices for consumers were a good thing, it is important to note that in the Pay TV statement at 10.95 what Ofcom confirms is that they have decided to use a weighted average of Sky's retail prices for a given core premium sports product bundled with other numbers of basic channels, and that in para. 10.249, Ofcom confirms that when

recalculating Sky's wholesale prices following any change a new weighted average is calculated. What that means, as Mr. Chance spells out at paras. 133 to 136 of his statement, is that as a consequence Sky can introduce and actively market a new package containing Sky Sports 1 and Sky Sports 2 at a lower retail price than its existing package and still leave in place the pricing of existing packages that are taken by millions of subscribers, because initially there will be very, very few subscribers to the new package therefore the weighted average does not change. It changes over time if there is significant take up of the new packages but the idea that Sky cannot compete, that it is hampered in some way by the mechanism of the WMO is simply wrong.

I have already touched on the win back costs issue. There does appear to be some difference in the total budge that is estimated for Sky's marketing, but it is around £1 billion a year and in these circumstances Mr. Chance has pointed out the idea that the costs incurred of win back are substantial, serious or grave, is simply not one that can be properly maintained. Indeed, some of the figures provided barely make for rounding errors in the overall calculation of its marketing effort, and indeed it is worth bearing in mind that in certain places Mr. Darcey, for instance, at para. 65 of his witness statement talks about numbers of take up between 113,000 and 316,000 households as very small. In other places it suggests that that is in fact rather significant. That approach therefore covers the analysis of what real financial loss has been suffered. There is a suggestion of a figure of £7 million in relation to financial loss due to projected reduction from the wholesale revenues from Virgin for a whole year. Again, those sorts of figures are barely rounding errors in the overall analysis certainly of Sky's turnover. Indeed, when set against the fact that Sky has not set out on what basis it would actually be making a loss overall, a net loss, then a degree of proper scepticism is required in relation to the assertions that are put forward by Sky in that regard.

Mr. Anderson and Miss Rose have already dealt with the suggestion that compliance with the pay TV statement will prejudice Sky's preparation for an appeal. I do not think I need to add anything in relation to that.

I then turn to the impact on Top Up itself. In that regard I would ask you to take out Mr. Chance's statement. He summarises the position at paras. 51 through to 60, but if I may I will take it slightly out of order and start at para. 71. The submissions made in this regard are, of course, in addition to the general points that have been made both by Miss Rose in relation to Ofcom's concerns about the general impact on consumers of the delay and

general detriment that will occur by reason of the interim relief that is sought, and also those submissions by Mr. Anderson in this regard.

Mr. Chance covers, in relation to the impact on Top Up, four key factors why launch this year is of particular importance and significance to Top Up. The first two of these issues are not subject to any serious confidentiality issues. I will start by dealing with those. The second two do. There are some further submissions that will need to be dealt with In Camera. The first issue is the start of the Premier League season. The consideration by Mr. Chance begins at para. 71. As the Premier League season starts up each year there is a great deal of coverage in the press and in the media more generally. Attention focuses on the season ahead, and potential subscribers to television channels showing the Premier League will look to purchase a subscription that will enable them to follow the competition from its early stages.

> "Retailers of premium sports channels traditionally spend heavily on marketing at the start of each Premier League season in order to reinforce the effect of the wider coverage and to capitalise on the desire of consumers to have access to premium channels."

The importance for retailers of premium sports channels at the period around the beginning of the Premier League season is shown by Top Up's recent experience in respect of another premium sports channel - ESPN. Now, the particular details of the pattern of growth are set out in paras. 75 and 76. The detailed numbers are confidential. But, what is clear, both from the bar chart and the table is that the start of the Premier League season, when ESPN launched, is the most significant period for the take-up of customers. That is perhaps most notable if one looks at the final row in the table. One can see the difference in figures between August in the first column, Sept in the second, October in the third, November in the fourth, and so on. That is the percentage of sales total of the year that were made during that period month.

Sky say, "Ah! Yes" But, ESPN is not really a good analogy because that take-up was because ESPN launched a new product. It launched in August for the first time". That is all true. That is also precisely what Top Up intends to do in relation to Sky Sports. It wants to launch a new product on the DTT platform for the start of the Premier League season. So, quite why it is that Sky says, "Well, actually, this is all jolly different" is very difficult to understand.

THE PRESIDENT: Is it not the point that they are saying, "Of course, you would see growth because that is when you started". If you had started in the middle of the season, the implication is that you might well have seen similar ----

MR. BEARD: It is not a coincidence that you launch then. You launch this channel at a time when you are going to be able to capitalise on that maximal exposure. We are going to find the same sort of thing. We are going to be able to succeed in a way that we would not if we were to be asked to launch mid-season.

THE PRESIDENT: You have not got an example of someone launching mid-season. That is the problem.

MR. BEARD: But that is going to be an empty set in relation to Premier League football launches. Indeed, one can see also from the Setanta material that this is not just linked to the one-off first launch. If one looks at Exhibit DC1 - again, the details are confidential - one can see the plot of Setanta take-up and the closing subscriptions for each month. Here, if one looks at the period 2007/08, through over the next three months, one sees the sharp increase in the levels of subscriptions and then a degree of tailing off. If one then moves on a year ahead -- This is a situation where you have an existing channel that is showing Premier League football. So, it is not the launch effect. What one finds is 2008/08. Again, a push upwards.

THE PRESIDENT: How do we know where the months are?

MR. BEARD: I am sorry. Along the bottom -- DC1 -- I am getting a confused look from Mr. Pickford. It is the first exhibit to Mr. Chance's statement. If it assists, it looks a little like that. The months are on the bottom.

THE PRESIDENT: I have the years on the bottom.

MR. BEARD: No. 2007/02 is February 2007. So, if one moves along 08 is August. You carry it through. The growth tails off and then actually dips -- The number of subscribers dip, but then kick on again from 2008/08.

THE PRESIDENT: It seems to tail off in August there.

MR. BEARD: That will be closing figures.

THE PRESIDENT: I have had a look at that.

MR. BEARD: Mr. Anderson is helpfully pointing out that the bar after the figure is the one that is for the relevant month.

THE PRESIDENT: The bar after the figure?

MR. BEARD: Yes. There is no tailing off in 2008/08. I am sorry. That is the confusion.

THE PRESIDENT: Where it says 2008/08 ----

MR. BEARD: That is August 2008.

THE PRESIDENT: You look at the bar after that in order to see what the result was.

MR. BEARD: Yes, that is right.

THE PRESIDENT: (After a pause): Why is there a sort of huge peak in the winter in some of these?

MR. BEARD: If, sir, you would turn back to the text of Mr. Chance's statement at paras. 79, 80 and 81 -- I would invite you, sir, to read that.

THE PRESIDENT: I have read it all.

MR. BEARD: Rather than going into closed session just to deal with those points, it is an explanation of where any numbers might occur in relation to the Setanta matter.

THE PRESIDENT: Up to para. 81?

MR. BEARD: Yes. Paragraph 82 then provides a sort of summary. That is Open - para. 82. (Pause whilst read): Sir, what we have is a situation where you have channels launching - such as ESPN - trying to take advantage of those matters. It is then suggested that one should aim off because they were launching then, but actually what one sees is that, for any sports channel carrying those rights, one has a situation where, particularly where those rights are the core of the package they are selling, in those circumstances you are going to get an expectation of a significant interest at the beginning of the season which would diminish in terms of subscriptions thereafter. Obviously Sky's experience may well be different. Sky, as has been pointed out, bundles Sky Sports in a much larger package and most of its customers take Sky Sports as part of much larger packages. Therefore, there are other parts of the package which would draw subscribers in throughout the year. Therefore, it is understandable that Sky's experience may be different, but as Mr. Anderson has already adverted to, even Sky recognises that the quarter in which the Premier League season starts, even in relation to those larger packages, that is where you get the largest gross across any of the quarters of the year. So all of the evidence consistently supports that which Mr. Chance is putting forward, that the start of the Premiership season is crucial and important in relation to the subscribers for a Sky Sports package and that in those circumstances delaying the ability to launch beyond July or August would be severely detrimental. This year that is particularly true. That is because of the way in which the World Cup will run just before the start of the Premier League season. Top Up expects growth in Premium Sports subscribers to be particularly strong at the beginning of the 2010/2011 Premier League season because of that. The marketing of a channel selling Sky Sports this year will be perfectly timed with the World Cup. It is a global advertisement for football just in the

run-up to the start of Premier League season. Interest in the game will be particularly high. It only comes around once every four years. It proclaims itself as the world's great festival of football and it runs from June until July, just in advance of the Premier League. Vast amounts of marketing are invested in it. It is on free-to-air, as Mr. Darcey points out. Of course, that is of a huge benefit to someone like Top Up because it is just an enormous advert for football. It is an enormous advert for football in relation to the players that you see in the Premiership, the Fernando Torres, Didier Drogba, John Terry, Wayne Rooney. Those people will be playing at the World Cup. It will be a great advert for them. Marketing is already under way. You are already seeing the promotion of World Cup issues, of World Cup cards, of World Cup flags. You may deprecate the proliferation of St. George flags that occurs. Indeed, Mr. Hoskins is no doubt caused great pain by this. Nonetheless it is a huge, huge draw in terms of football's consciousness in the UK in the market in which Top Up would be targeting its offering this summer.

In these circumstances, when Mr. Darcey, in his second statement, seeks to play this down, his attempts are simply implausible. He is trying to deny that this enormous festival of football, timed perfectly to run into the beginning of the next season, is not going to be of benefit to someone like Top Up who has such limited resources in terms of its overall marketing when it is competing with the likes of Sky and BT.

Turning then to capacity related issues, I am sensitive that some of this material is confidential, but in broad terms the material set out by Mr. Chance in paras.61 to 70 of his statement set out very clearly why, in order to be able to offer Sky Sports 1 and 2 to customers via the DTT platform, it will need to acquire capacity over which to transmit these channels. DTT is a scarce and expensive resource, and it is controlled by the operators of the six multiplexes. Top Up has planned its launch of the Sky Sports offer for July 2010 recognising that Ofcom was likely to give its decision early in 2010 and therefore in order to take advantage of the pre-season marketing campaigns to which I have already referred. It has made arrangements to be able to have sufficient capacity and it is, of course, critical for a company with Top Up's limited financial resources that it begins to offset the high fixed monthly transmission costs with subscription revenues from, or at least very shortly after, the day when it starts for DTT capacity. The wholesale prices determined by Ofcom in its Pay TV statement, Top Up's anticipated retail margin is relatively narrow in relation to Sky Sports 1 and 2. It is a figure that is set out in the confidential version of Mr. Chance's statement.

Top Up therefore needs to acquire (para.66) a number of Sky Sports subscribers as a minimum in order to cover its capacity cost as soon as possible, and it believes, as is set out in para.67, with a July or August 2010 launch of Sky Sports 1 and 2, it is likely to be able to surpass that break-even point within six months and may be able to acquire a greater number of subscribers. It is notable that the number of subscribers that Top Up anticipates it may be able to acquire is rather less than the number that Mr. Darcey was hypothesising. In relation to the remainder of the submissions pertaining to the capacity issues and in relation to the latter two particular points, the other two reasons which Mr. Chance gives in his witness statement, those are matters that I think can only sensibly be dealt with in Camera. I would ask, however, that in relation to that, during the course of my submissions at least, those from Top Up were able to remain in court, since clearly those matters are not confidential to them.

THE PRESIDENT: Just looking at the time, you have had nearly an hour, and I want to finish this today, if we can, but I have got to be fair because Mr. Flynn has got to reply. How much longer are you going to be?

MR. BEARD: I would have thought about 20 minutes. I will try and make it shorter than that.

THE PRESIDENT: As I say, I keep telling you I have read this.

MR. BEARD: Yes, I understand.

THE PRESIDENT: There is not much new coming at me at the moment. I am sorry, ladies and gentlemen, would you mind moving out of court just for a few minutes.

(For proceedings in Private, see separate transcript)

MR. HOSKINS: Sir, Miss Rose has already made it clear why, on a general level, interim relief should not be granted in this case and we are happy to adopt those submissions. What I intend to do in the short time I am going to take is particularly to focus on Virgin Media particular issues. However, there are some general points I would like to make.

I would like to begin with Sky's five headings, i.e. the arguments Sky has put forward on the effect on Sky if interim relief is not granted. I particularly want to focus on the first heading which is the suggestion that implementation of the wholesale must-offer will create difficulties concerning withdrawal from supply contracts due to the risk to Sky's reputation. I would like to make two points in relation to that. The first one is simply this: Sky's first argument about irreversibility does not apply to Virgin Media at all. The reason why that is the case is because Sky's argument is based on a scenario in which Sky is obliged to enter into wholesale supply contracts with new parties for the first time, by virtue of the wholesale must-offer. Sky subsequently wins its appeal. Sky then seeks to terminate that

contract'. It is loath to do so because of damage to reputation. But, of course, it is already supplying us. So, that argument simply does not apply to Virgin Media because any difficulty, any reticence Sky had about withdrawing the contract from us would not be because it had complied with wholesale must-offer.

The second point is this - and, again, Miss Rose has already made the point: given its past acts, protestations from Sky about its unwillingness to withdraw must be taken with a very large pinch of salt. As the party that suffered from those previous acts we are well placed to comment - particularly on the effects it had on us. That is first Schweitzer, paras. 57 to 58. You have seen that witness statement. We do not have to go to it. Actions do speak louder than words, particularly in the interim relief context. However, I would like to make a more general point which is about the relationship between Sky's argument about the wholesale level (which is what this argument is about) and Sky's evidence about the retail level, because there is a real tension at the heart of Sky's position on this. On the one hand, at the wholesale level Sky is suggesting that its bargaining position vis-à-vis other pay TV operators would be irreversibly altered if interim relief were not granted. That is the first of the five heads.

Contrast that with the position that Sky takes at the retail level where its own evidence indicates - and I will take you to it - that it would be able to recover a significant proportion of its retail customers as subscribers if it were to win the appeal, albeit having to incur a degree of marketing costs. I get that from first Darcey, para. 51.

THE PRESIDENT: Yes. He said it will incur substantial costs in re-acquiring them.

MR. HOSKINS: That is right. Then you get the post-script afterthought of the last sentence:

"Oh, but I consider it improbable that Sky would be able to re-acquire all lost subscribers, however". No terms of degree. But, we do get a sense of degree from second Darcey at paras. 15 to 17. It is para. 17 that is particularly telling. It is a fantastic use of language:

> "Further, it is not necessarily the case that the vast majority of customers will return to Sky".

Let us strip out the camouflage from that. On a fair reading he is saying, "It is the case that the majority of customers will return to Sky". That is the only fair reading of that suggestion.

So, what you have is that at the forefront of Sky's argument on the harm it will suffer, "At the wholesale level our bargaining position vis-à-vis other pay TV operators will be weakened", whilst on the other hand they are saying that if they win the appeal they are going to attract all their original customers back; they are going to deal with them on a

direct basis; they are going to have them on the Sky platform. Now, the importance of that is that it puts very much in context the first head. Sky's bargaining position at the wholesale level is not actually that important to it if it can get the majority of its customers back and deal with them directly on its platform.

The second of Sky's five headings is the devaluation of its channels. That has been covered certainly by Miss Rose, but also by others. I can take that very briefly. You have seen in the decision the whole thing about the wholesale prices being set at a level which do not permit undercutting. One does not have to simply take the evidence in the witness statements - the assertions. There is actually analysis of the particular position of Virgin Media in terms of its ability to reduce prices in light of the wholesale must-offer in a decision (paras. 11.91 to 11.95). In the interests of time ----

THE PRESIDENT: Do you want me to look at it briefly?

MR. HOSKINS: I am happy to. It does not take very long. 11.91 to 11.95

THE PRESIDENT: (Pause whilst read): They expect a small reduction.

MR. HOSKINS: That is right. That is confirmed by first Schweitzer at para. 60. But, the point is that that sort of level of reduction is not going to lead to the sort of devaluation that Sky is talking about. It is not dramatic slashing of prices. You will see from the margins which the price affords at best we are talking small price decreases. So, again, when one looks at the second head of argument, which is based on a material reduction in retail prices, and therefore devaluing Sky's channels, it simply does not stack up.

The third head is the cost of re-acquiring customers. That was dealt with by Miss Rose. There is no need for me to deal with it. You have seen the figures. You have seen Sky's total advertising budget for the year. It is the proverbial drop in the ocean.

The fourth heading - loss of wholesale revenue. This is the figure of £7 million that the decision estimates that in terms of wholesale revenue ----

THE PRESIDENT: This relates specifically to you.

MR. HOSKINS: That is right. It is Decision, para. 11.128 at the fourth bullet. I cannot compete with Mr. Beard's very creative table to show that Sky is likely to make a profit, but I can refer you to that part of the decision. The fourth bullet begins,

> "On cable there will be a short term reduction in wholesale revenue, more than offset in the longer term by benefits from market expansion".

You will see the £7 million figure in the first sub-bullet at the bottom of the page. You will see the conclusion in the first sentence of 11.129. So, again, one does not really need to get

into, “Well, he says this ... He says that ...” It has been analysed in the decision. There cannot be a realistic challenge at this stage to those findings.

The fifth heading is the prejudice to Sky's preparation for an appeal. With respect, that does not even pass the red face test. I note that Mr. Flynn did not even risk a red face in his opening submissions. He did not make the point - and understandably so. It is terribly weak.

So, let us see where that leaves us - at least from a Virgin Media perspective - with Sky's five headings. The first one - the irreversibility arguments due to difficulty in withdrawing channels - does not apply at all to Virgin Media because we are already being supplied. The second irreversibility argument, which is the devaluation of channels, is based on a level of price reductions that clearly will not occur because they cannot occur as a result of the wholesale must-offer.

The next two heads are the heads of financial loss, one of which is a drop in the ocean - cost of re-acquiring customers; the other, the evidence actually is, the analysis is, that this is likely to result in a profit to Sky, not a loss.

The fifth heading is Sky's limited resources in dealing with the various things it has to deal with, which is hopeless.

When you strip out those five headings and you look at them in relation to Virgin, the application just does not pass first base. I am not exaggerating. It is hopeless.

But, lets look at the flip side. Let us look at the effect on competition if interim relief is granted. Mr. Flynn suggested in opening that Ofcom had merely presumed that benefits to customers would flow from the wholesale must-offer obligation. Miss Rose has, I have to say, put him right on that point. It is certainly not a presumption. She has explained why those benefits will follow.

In relation to the benefits that would follow if Virgin Media were in a position to take advantage of the wholesale must-offer, these are set out in detail in first Schweitzer at paras. 29 to 52. The particular interest for Virgin Media is that currently, although we get supplied with Sky Sports 1 and 2 in standard definition versions, we do not get high definition and we do not get any of the interactive red button services that come with those Sky programmes. The evidence about the benefits that we would stand to gain from wholesale must-offer, as set out in Mr. Schweitzer, have not been challenged at all by Sky. So, they are incontrovertible.

There is one particular part of Mr. Shweitzer’s evidence I would like to take you to, para.48. It is our version of why the football season is so important, because we do not have that

point as such. Perhaps I could ask you to read it. You will see the importance of HD in the coming months to Virgin Media.

THE PRESIDENT: (After a pause) Yes.

MR. HOSKINS: You will see there is a timing point there. I have been asked to flag up para.51, particularly the final sentence. It simply goes to the importance of the Premier League season. It is of more importance to the other interveners, but you will see the final sentence of 51. I will not read it out because there is a confidential figure there, but you will see it is a striking statement.

THE PRESIDENT: (After a pause) Yes.

MR. HOSKINS: That is the benefits to competition if interim relief is refused. It is simply not challenged that there will be benefits in relation to Virgin Media. Can Sky pull itself out of the hole it now finds itself in by the undertakings it has offered. To use the Glasgow vernacular, those undertakings have already ----

THE PRESIDENT: You have to be a bit careful about the undertakings.

MR. HOSKINS: I am not going to say anything about the content. I was simply going to say that people have already basically given them "a good kicking", as we say in Glasgow. There is not much more I can add. The first undertaking, I do not think there is any confidentiality issue around it. No one is complaining. Mr. Flynn submitted in opening that under the first undertaking, this would allow Virgin Media everything it could have under the WMO. With respect, that is wildly inaccurate. It is not simply a case of financial recompense depending upon whether interim relief is granted or not. Under the existing contractual arrangements, Sky withholds HD and interactive services from Virgin Media. Both of those would have to be provided under the WMO and, therefore, if interim relief were granted, the first undertaking would have no effect on the provision of HD and interactive services. They would give us some money at the end of the day perhaps, but they would not give us HD and interactive services for the period of the appeal.

In any event, as explained, first Shweitzer, para.19-24, the first undertaking, even on its terms, does not even compensate us for all the types of financial loss we would suffer. It is an echo of Mr. Anderson's point. The standard form would be, "We offer to cover you for all the loss". It is very carefully drafted, and it does not go that far.

The new undertakings, they are confidential, you have got the points, they are vague, how on earth are they going to be policed. Mr. Flynn, who we all know is an eminently reasonable man, says, "Look, Sky is making all best efforts". With respect, Sky's past history on this issue is not good. In relation to Virgin, if we can look at the statement,

para.7-305 to 7.312. If I can ask you just to look at that briefly you will see a common theme.

THE PRESIDENT: (After a pause) Yes.

MR. HOSKINS: Sir, I hope again you will not think I am exaggerating when I say that new undertakings are, to use the cliché, simply not worth the paper they are written on.

The final point I want to make relates to the period of time which interim relief would cover, because we say this is actually a very significant factor in this application. The original complaint to Ofcom was made more than three years ago and it related to conduct that had been persisting for some years prior to the complaint. Sky in its submissions have sought to play down the behaviour which is the subject of the Ofcom statement, but we can look at the Summary, Statement para.1.6. It is very clear what Ofcom has found Sky has been doing:

> "Sky exploits its market power by limiting the wholesale distribution of its premium channels, with the effect of restricting competition from retailers on other platforms. This is prejudicial to fair and effective competition, reducing consumer choice and holding back innovation by companies other than Sky."

The suggestion that somehow Ofcom has suddenly appeared and interfered in Sky just going along and running its business, minding its own business, there is the truth, that is what Ofcom has found, it is exploiting its market power and that has had an effect on competition.

Sky has been able to do that prior to the complaint. It has already had the benefit of the three year investigation and it has carried on doing this. What is it asking you to do now? It is asking you to let it carry on exploiting its market power for another year because it says that it is going to put in its appeal, its substantive appeal, shortly before the deadline, 2nd June, and it says that it will take around nine months for that to be determined. We agree with that. In fact, I think the last couple of days have probably been very salutary about the speed with which this case is going to be able to be determined. So timing is all important. Sky has been exploiting its market power for over three years. It is asking you to let it carry on doing that for another year. By suspending a decision adopted by Ofcom in good faith, and you have seen all the case law – Mr. Anderson took you to it, Miss Rose took you to it – that says where you have a public interest decision adopted in good faith it is valid until overturned and that, itself, weighs very heavily in your discretion.

We say this timing issue is an important consideration in the context of this particular case. We say whichever test one adopts, EU, domestic, an amalgam of the two, somewhere in the

middle, what this timing consideration means is that Sky should be required to produce a strong case for interim relief because of the period of time they want it to apply for. With respect, they simply have not got that off the ground with the evidence they have produced and the arguments that they have put forward.

Sir, unless you have got any questions for me that is all I need to add.

THE PRESIDENT: Mr. Flynn, do you want a few minutes or are you happy to bash on?

MR. FLYNN: I think I would like a few minutes, just to see whether it is going to be possible to address everything straight away, as it were. I think I would just like a few minutes with the clients.

THE PRESIDENT: We will have a break for ten minutes then.

MR. JONES: I would, with your permission, like to say a couple of words. We can do it after Mr. Flynn had instructions, but just to remind the Tribunal of the existence of Orange and FAPL. I think we would probably like five minutes each.

THE PRESIDENT: Each being ----

MR. JONES: Orange and Miss Lester, yes.

THE PRESIDENT: Can I ask you to have a word about that. Ideally we will have an agreed position on where we are and whether we can finish tonight, which is what I would like to do ideally, even if it means sitting a little bit later. I will break for ten minutes.

(Short break)

THE PRESIDENT: Have you agreed, as it were, a way of disposing of today?

MR. FLYNN: No, Sir, I have spoken to Mr. Jones and Miss Lester, who think they would like five or ten minutes each.

THE PRESIDENT: That should probably come before you.

MR. FLYNN: That, I think, has to come before me. I came into this morning prepared with a note to respond to what we had heard on Friday from Ofcom, and obviously some more along the same lines was said this morning, and I have been scribbling as we go along. There is quite a bit in that. I think a lot has been said this afternoon on, if I call it that, the commercial side on which I, ideally, would like to take instructions before replying. So, speaking for myself, I would rather either that we carried on today for half an hour, 40 minutes, or something like that, and came back at another time.

THE PRESIDENT: You would like to have a little time tomorrow basically?

MR. FLYNN: I would, Sir, because there are plenty of points which have been put during the course of the day and I would like to take some instructions on those.

THE PRESIDENT: There has undoubtedly been a lot of material, you have a lot of opponents.

MR. FLYNN: Precisely, and our supporters only wish to have five minutes or so.

THE PRESIDENT: Shall we start by hearing Mr. Jones and Miss Lester and then taking a view on whether you want to stop then?

MR. FLYNN: At that point I will be in your hands. I can either start or do it all in one go, which has its advantages too.

THE PRESIDENT: Mr. Jones?

MR. JONES: Thank you, Sir, I will be very brief, but that may not be of assisting for concluding today.

Ofcom has material on Orange's decision regarding entering or not the pay TV market and the dealings with Sky referred to at para.7.61 of the decision. It is also clear from the evidence before the Tribunal that the prospect of having to withdraw a pay TV sports offering to subscribers any time is unattractive for the retailer at least, even if, for some, the risk may be worth taking, given that they are already in the market, and reference can be made to Ofcom's skeleton, para.32, Mr. Unger's witness statement at para.39, the BT skeleton at para.20, for example. This unattractiveness is particularly the case for a new entrant who has not yet entered the market because they will be seeking to persuade existing subscribers of their own subscriber base or potential customers who have never used a service within the brand – say Orange's brand – they will be persuading those customers to use the undertaking's services for the first time. This points to a conclusion that, for some potential entrants, the interim relief, or rather the very appeal itself, is giving rise to uncertainty, which gives rise to an unpalatable commercial choice.

So Orange's submission or point perhaps goes to timetabling and perhaps echoes the initial solution that Ofcom tried to put in place, which is that whatever the decision of the Tribunal with respect to interim relief that should not in any sense undermine the existing practice of the Tribunal to resolve appeals quickly. All parties, not just Sky and Ofcom, but all parties and all appellants and all interveners, will need to move quickly so that we can have this appeal or these appeals resolved according to a timetable which is rapid, because the uncertainty itself, given and caused by an appeal effectively is an additional barrier to entry. It may not be insurmountable barrier to entry, as opposed to expansion, but it a barrier to entry.

That is all Orange wants to say, but it is a point it wishes to underline at this point.

THE PRESIDENT: Thank you very much, Mr. Jones. Miss Lester?

MISS LESTER: Sir, can I start by saying that if Mr. Rothschild and I leave at 4.30 it is out of no disrespect, we would rather be hearing Mr. Flynn's reply, but we have a ----

THE PRESIDENT: We might have all left by then, not because Mr. Flynn will be replying, but he might be doing it tomorrow!

MISS LESTER: Sir, Ofcom's witness statement from Mr. Unger appends some analysis from various analysts as to their views of the effect of Ofcom's decision. I would like to just read two quotations from what the analysts are saying on Ofcom's side are the effects of the decision. RBS say:

> "Sky will likely face less competition for sports rights going forward. Why bid against Sky when you can wholesale at a regulated price?"

The reference to that is p.19 of SU4 – the fourth exhibit to Mr. Unger's statement.

Secondly, at p.1 of the same exhibit, another analyst says:

> "The decision is good news for Virgin Media and for BT who will be able to re-launch BT Vision with cut-price football in the summer."

The Premier League simply asks the Tribunal to bear in mind when considering whether or not to grant interim relief that the impact of the WMO is wider simply than the impact on Sky. It has the real potential to have long term negative impacts on consumers of sport who are supposed to be the people in whose interests Ofcom is acting. Sky's case, and the references are para.38 of Sky's application and 40 to 44 of Mr. Darcey's first statement, is that the WMO is likely to result in the short term in retail price reductions. If that is right, and as a matter both of common sense and of Ofcom's own analysts, we say it is, that will have the effect of depressing the value of sports rights, not just Premier League's rights. It is not right to say that the Premier League is the only show in town, and I would indicate to the Tribunal that four other sports are actively considering intervening in the appeals before this Tribunal.

Ofcom, itself, in the statement has recognised that if rights values are depressed that will cause considerable consumer detriment, and that is their phrase, as a result of a decline in investment in the sport, including a decline in investment at a grass roots level.

THE PRESIDENT: Have you got a reference to this?

MISS LESTER: I have, it is paras.11.130, 11.141 and 11.185. We simply ask the Tribunal to bear in mind, as one element of the balance, the detriment not just to Sky but to consumers of the sport and to the sport itself. Thank you.

THE PRESIDENT: Thank you very much.

MISS ROSE: Sir, I am sorry, but new points have been raised by Miss Lester in relation to the question of the potential effect of the decision on the value of the sports rights, and I would like an opportunity to reply to that.

THE PRESIDENT: I think it is something that she has referred to in your statement, and I am sure that it is appropriate that you can say something about it.

MISS ROSE: I am grateful.

THE PRESIDENT: How long do you think you will need to reply all together? Would it be shorter if you had longer to prepare, as it were?

MR. FLYNN: One can never remember whether that quotation is Montaigne or someone else, but a learned man suggests so.

THE PRESIDENT: Shall we have 15 minutes anyway. I am so sorry, I wonder if Miss Rose should – I am sorry, Mr. Flynn, about that -----

MISS ROSE: Mr. Flynn has said that he needs time because of material that was put in this morning.

THE PRESIDENT: I am sorry, I thought there were some immediate points you wanted to make.

MISS ROSE: I want the opportunity to reply to Miss Lester. I am also going to need some instructions.

THE PRESIDENT: We do not want to go in for too much ping-pong. I think in those circumstances it might be better if we stop now.

MISS ROSE: Sir, I cannot see any reason why the two minutes of what I want to say in response to Miss Lester should inhibit Mr. Flynn.

THE PRESIDENT: Do not worry about it. What I have decided is that we will stop now and we will start again tomorrow. Has anyone got any objections if we start at ten tomorrow? Is that going to cause anyone a problem? No? Do you know roughly how long, just so that we can get an idea?

MR. FLYNN: I was not very good when we started. Let me promise to keep it to an hour, and I will try to do less than that. I will try to do quite a bit less than that.

THE PRESIDENT: That is very helpful.

(Adjourned until 10.00 a.m. on Tuesday, 27th April 2010)