

Monday, 3 October 2016

1

2 (10.00 am)

3 THE CHAIRMAN: Mr Beard, good morning.

4 MR BEARD: Good morning, Mr Chairman, members of
5 the tribunal.

6 THE CHAIRMAN: Welcome, everybody, to the tribunal. I am
7 not going to make an opening statement, you will be glad
8 to hear. We are going to get straight on with it.

9 Just two questions, really -- well, my opening
10 statement is that we are going to operate on the basis
11 of five-minute breaks halfway through each session.
12 I am sure that will be generally acceptable, much as
13 we'd like to hear your voice and not interrupt your
14 flow.

15 Also, if you have a slightly more precise timetable
16 for the next day and a half, we would be very glad to
17 hear it. With that, over to you, Mr Beard.

18 MR BEARD: Just to do basic introductions for the tribunal,
19 I appear today for BT with Mr Facenna and Mr Grubeck.
20 At the far end, for Ofcom, Mr Holmes, Ms Boyd and
21 Mr Kuppen. In the middle, literally but not perhaps
22 metaphorically, Mr Flynn and Mr Pickford.

23 You will have read a great deal of material in
24 relation to this case, so I am going to get on with the
25 grounds that BT has raised.

1 There are five points I would like just to highlight
2 before I turn to dealing with ground 1, if I may.

3 On the timetable, insofar as it is with us, the
4 intention is that we will take up our allotted time in
5 providing an opening. If there is any time left for us
6 at the end, we will briefly reply, but don't anticipate
7 that is going to be necessary. We will deal with those
8 matters in closing. As between Ofcom and Sky, we
9 haven't discussed those matters.

10 THE CHAIRMAN: Your allotted time is one hour into the
11 afternoon?

12 Opening submissions by MR BEARD

13 MR BEARD: Yes. The first point to make of the five
14 introductory points is a plain and obvious one, but it
15 is worth emphasising, that this is an appeal against the
16 decision by Ofcom. It is against the decision that
17 Ofcom made to withdraw the WMO, to remove the protection
18 and certainty that comes with the WMO, to those that are
19 seeking to deal with Sky. But it is worth emphasising
20 this is not a fight with Sky, it is a fight to be able
21 to fight with Sky.

22 Over the past few years, BT has sought to, as
23 Americans I suppose would put it, bring the game to Sky.
24 It has invested very large amounts of money in trying to
25 compete with Sky, and this is, therefore, not a case

1 where BT is saying to the regulator, "Please make our
2 lives easy", or, "If you don't help us, we won't help
3 ourselves". The level of commitment by BT runs into
4 billions and it belies that proposition. All that BT is
5 asking for is that the regulator does its job properly,
6 it correctly applies the law and undertakes a proper
7 investigation and consideration of these matters and, as
8 we will also see, on both counts Ofcom has got it wrong
9 here.

10 That really takes me to my second point. The
11 essence of this challenge is about what Ofcom failed to
12 do. First, it failed to apply the law properly, and
13 that is the first point I will go on to deal with in
14 relation to ground 1. But in addition, it failed to
15 look at the facts properly. It failed to undertake any
16 sort of orthodox competition assessment. Now, we are
17 not saying that there is a sort of one-size-fits-all
18 approach to investigations, but when you are dealing
19 with concepts of economic competition, there are
20 well-recognised ways of assessing issues which were here
21 ignored. It failed to have a good basis for its
22 conclusions. It started off correctly, recognising that
23 there were real risks to retail competition in pay TV
24 because, absent the WMO, Sky had both the incentive and
25 the ability to restrict wholesale supply of key sports

1 channels, whether by refusing to supply outright or by
2 making the terms, pricing or other terms, such that they
3 had undermined fair and effective competition. But then
4 it didn't follow through that concern properly.

5 On the facts, it clutched at the fact that Sky had
6 done wholesale deals with Virgin and TalkTalk, and that
7 of course is particularly strange because Virgin had
8 been a party to a wholesale deal going back to 2010
9 when, of course, then Ofcom emphatically decided that
10 a WMO was necessary. Of course TalkTalk is really
11 a rather small player who has moved from self-retail of
12 Sky to a wholesale deal but has a small number of
13 subscribers.

14 It is just worth noting that terminology: subscriber
15 numbers are different from customer numbers, the
16 difference being that subscribers are those consumers
17 who are paying a regular monthly fee for a pay TV
18 service. Customers have a set-top box that allows them
19 to make ad hoc purchases but don't pay any sort of
20 regular subscription fee.

21 But the main thing here is that these deals with
22 Virgin and TalkTalk do not tell you whether there is
23 a potential problem in future. Not a fanciful problem,
24 a real problem, a real risk in future.

25 A lot of evidence has been put forward in this case

1 explaining why Ofcom was far too optimistic about what
2 it had said and its appraisal of the position in the
3 pay TV market. Ofcom has put in very limited material
4 in this appeal in response by way of witness support.
5 Sky has sought instead to throw in a lengthy witness
6 statement, but it really doesn't assist here, because
7 Sky, needless to say, wants to emphasise in its view
8 that everything in the garden is rosy and Ofcom
9 shouldn't have worried as it did. But insofar as any of
10 that intervention evidence seeks to disagree with
11 Ofcom's appraisal, it is clearly not relevant to our
12 challenge. Insofar as it seeks to bolster Ofcom's
13 conclusions, it really doesn't rectify the key failures.

14 So the third point I want to emphasise is that this
15 is all about competition. Again, the emphasis on
16 competition may be obvious, but it is important. The
17 conditions of retail competition have not improved.
18 Ofcom says in its skeleton:

19 "Ofcom's assessment is that Sky remains dominant."

20 It is absolutely true. Ofcom has not reached
21 a conclusion that retail competition has actually
22 improved since 2010 when it concluded there was a real
23 problem and the WMO was required. Nothing changed
24 because of the excursion through the CAT and the Court
25 of Appeal. The fact that the previous CAT misdirected

1 itself by focusing unduly on negotiation really doesn't
2 alter this fact.

3 So when it comes to looking at what Ofcom did, what
4 we will see is that they say, "Well, back in 2010 we
5 were concerned that Sky was not distributing Sky Sports.
6 Now they are", but this is just a linguistic move which
7 is wrong: first, because this is not simply about
8 distribution, it is about competition; and, second,
9 because in fact what we see is that, apart from
10 TalkTalk, there are no wholesale deals. All the rest is
11 what is referred to as self-retail, and that's not
12 increasing competition. It might be increasing numbers
13 of eyeballs to Sky but it is not more competition. No
14 doubt Sky see this as a great virtue: the more people
15 seeing Sky, the better the world is, in their view. But
16 that is not how Ofcom should see things. More Sky from
17 Sky is just not competition to Sky.

18 The WMO sought to address those problems. Those
19 problems, as I say, have not gone away and Dr Padilla
20 has explained in evidence that has not been challenged
21 by Ofcom why that is the case, and yet Ofcom here says,
22 "We will remove the solution to that problem", so far as
23 they identified it.

24 Fourth point. It is all about competition and it is
25 all about competition in pay TV. As we will see, at

1 a couple of points along the way, Ofcom mentions
2 triple-play, so TV, broadband and phone. But the key
3 focus is, and has to be, pay TV. The question that was
4 critical to be assessed was whether there would be
5 practices on the part of Sky which, if they were engaged
6 in, would prejudice fair and effective competition in
7 pay TV. Then the fifth point, really picking up from
8 the first: there are good reasons why Sky would not want
9 to supply BT or not supply on terms that allow for fair
10 and reasonable competition. Because BT is a threat. It
11 may be limited in TV now, but if it is given a fair
12 crack against this super-dominant pay TV provider, BT
13 may succeed where others like ESPN and Setanta have
14 failed. If it has the certainty that it will be able to
15 get Sky Sports on fair terms, it can continue to push
16 for rights, it can continue to develop its pay TV
17 business and it could, in future, begin to take
18 customers away from Sky. That is real competition,
19 retail competition, and indeed breaking what Dr Padilla
20 refers to as the vicious circle of Sky's incumbency.

21 So then to turn to ground 1. We say that Ofcom has
22 misunderstood the relevant legal test. The statutory
23 test requires Ofcom to adopt a precautionary approach by
24 considering whether there are future risks and acting to
25 prevent them. Indeed, it must ensure that there will be

1 fair and effective competition. Even if, as Ofcom
2 says -- I will come back to this -- it has much more
3 discretion under the test than BT suggests, we still say
4 that the approach adopted was wrong and in particular
5 the reliance placed by Ofcom on proportionality being
6 the key doesn't help them here. I am going to take the
7 points in two stages: first of all, looking at the
8 relevant legal provisions; then going on to the WMO
9 itself, and in doing so I will look at what went wrong.

10 If I may, I will start with the Communications Act
11 itself, which one finds in the authorities bundle.
12 There are various extracts. Now, I should say that the
13 Communications Act, in terms of the powers conferred on
14 Ofcom in relation to licensing -- we don't have all of
15 the provisions in here. One or two additional
16 provisions have been included in what is called the
17 H bundle, a hand-up bundle. Because the structure of
18 the Communications Act is that Ofcom is charged with
19 various functions, including functions on licensing,
20 that were conferred on it as functions transferred in
21 particular from the previous ITC. Under that scheme,
22 Ofcom is under a duty to secure that the holder of every
23 Broadcasting Act licence at all times holds his licence
24 on conditions which are included in chapters 4 and 5 of
25 the Communications Act. What we will come to see is

1 that section 316, which is the key provision here, is in
2 chapter 4.

3 Now, the provision I just referred to that imposes
4 the general duty on Ofcom to ensure that every holder of
5 a Broadcasting Act licence holds a licence subject to
6 the terms under chapter 4 and chapter 5, that is now,
7 just for your notes, in tab 10 of bundle H2,
8 section 263.

9 So with that overall structure in mind, a duty on
10 Ofcom to impose on the licensee conditions that are for
11 the time being included under chapter 4 and chapter 5,
12 I will start, if I may, at the beginning of the extracts
13 in the authorities bundle at tab 10. This is referred
14 to as the general duties of Ofcom. At sub 1 one can
15 see:

16 "It should be the principal duty of Ofcom, when
17 carrying out their functions, to further the interest of
18 citizens in relation to communications matters and to
19 further the interests of consumers in relevant markets
20 where appropriate by promoting competition."

21 So it is not merely a maintenance of competition, it
22 is a promotion of competition here. The reason
23 I mention the other provisions is because this is
24 referred to as the principal duty of Ofcom in carrying
25 out their functions, but those functions include

1 securing that the holder of every Broadcasting Act
2 licence holds his licence on the conditions which are,
3 for the time being, included in chapter 4.

4 So then we see in sub 2 the things which Ofcom are
5 required to secure. Then, if we go to sub 3:

6 "In performing their duties under subsection 1 Ofcom
7 must have regard in all cases to the principles under
8 which regulatory activities should be transparent,
9 accountable, proportionate, consistent and targeted only
10 at cases in which action is needed and any other
11 principles appearing to Ofcom to represent the best
12 regulatory practice."

13 So here we have, when you are carrying out your
14 relevant functions, you are subject to the duties under
15 subsection 1 and, in performing those duties, you must
16 have regard to those principles of transparency,
17 accountability, proportionality, consistency. So no
18 real surprise in the structure so far.

19 Then in 4, what we see is a range of other
20 requirements to which Ofcom must have regard in
21 performing those duties, including in particular (b):

22 "The desirability of promoting competition in the
23 relevant markets."

24 Now, I refer to those because of course Ofcom places
25 great weight on the points raised in section 3(3) on

1 transparency, accountability, proportionality and
2 targeting regulatory activities only in cases in which
3 action is needed and, to anticipate our primary
4 submission, that is all good but it doesn't change your
5 primary legal duty, the function of ensuring that the
6 Broadcasting Act licence includes conditions under
7 chapter 4 provisions.

8 So that is subsection 3 and section 3 more
9 generally. Just turning over now to tab 11, I am just
10 taking them in order of the bundle, section 6:

11 "Ofcom must keep the carrying out of their functions
12 under review with a view to securing that regulation by
13 Ofcom does not involve:

14 "(a) the imposition of burdens which are
15 unnecessary; or

16 "(b) the maintenance of burdens which have become
17 unnecessary."

18 That is in sub 1. Then in sub 2:

19 "In reviewing their functions under this section it
20 shall be the duty of Ofcom:

21 "(a) to have regard to the extent to which matters
22 which they are required under section 3 to further or to
23 secure are already furthered or secured, or are likely
24 to be furthered or secured, by effective
25 self-regulation; and

1 "(b) In the light of that, to consider to what
2 extent it would be appropriate to remove or reduce
3 regulatory burdens imposed by Ofcom."

4 And sub 3:

5 "In determining for the purposes of this section
6 whether procedures for self-regulation are effective..."

7 It then sets out some considerations in
8 subsection 3.

9 THE CHAIRMAN: Mr Beard, just a minute. The matters they
10 are required to secure are the matters in section 3(2);
11 is that right? You haven't referred to them. They are
12 not required to secure, for example, competition?

13 MR BEARD: They are not required specifically to secure
14 competition in relation to 3(2), no, that is quite
15 correct on the face of those general duties. That is
16 absolutely right. The reason why I referred to the
17 relevant scheme -- it may just be, for these purposes,
18 that it is relevant to turn up 263 -- is that the
19 emphasis on the general duties of Ofcom in relation to
20 section 3 doesn't capture the fact that there is
21 a regulatory structure that is built into chapter 4 and
22 chapter 5 as to the terms of the licences that have to
23 be put in place.

24 So the point is that you are required to comply with
25 the requirements of chapters 4 and 5 when you are

1 setting out licensing conditions, and of course it is
2 right that, when you are doing that, you carry out your
3 functions and, in doing those functions, you are being
4 governed by section 3. When you are governed by
5 section 3, the things which by virtue of subsection 1
6 Ofcom are required to secure in carrying out their
7 functions include, in particular, each of the following,
8 and none of those provisions in subsection 2
9 specifically say, "and your role here is simply to
10 secure competition". That is true, that language is not
11 used, but that doesn't cut across what we will come on
12 to see as being the duties under 316, is the key point.

13 THE CHAIRMAN: I am familiar with section 316, but I am sure
14 you are going to make me even more familiar.

15 MR BEARD: I must apologise in advance. I am certainly
16 going to spend some time on it. Whether it becomes more
17 familiar after that is a separate issue entirely.

18 I was just in section 6 on the duties to review
19 regulatory burdens. Again, this is a provision that
20 Ofcom prays in aid and we will come back to, because
21 they say "We are under duties to keep matters under
22 review, and that's what we do", but obviously what this
23 provision is primarily concerned with is a concern, as
24 the title suggests, to review regulatory burdens. So
25 this is a provision that is primarily concerned with

1 where you have a situation where you have imposed
2 regulation, you don't just leave it, you are under an
3 active duty to keep it under review and come back to see
4 whether or not it is necessary periodically.

5 That is why you get the language, for instance, of,
6 "Well, will self-regulation do? Is there no need for
7 the regulation anymore?" That is what section 6 is
8 about.

9 We will come on to talk about the position that
10 Ofcom have taken, which has been referred to in the
11 submissions as being a "wait and see" approach, but the
12 only point I emphasise here is that section 6 is not
13 really concerned with that. Of course Ofcom has
14 a continuing power to keep matters under review in
15 relation, for instance, to its concurrent
16 Competition Act powers, but this section 6 duty to
17 review regulatory burdens is really not the primary
18 focus of all of these matters and, as we will also come
19 on to see, what section 316 does is imposes obligations
20 on Ofcom vis-a-vis conditions in licences which mean
21 that approaching it on a "wait and see" basis is not
22 appropriate in all the circumstances.

23 So if we go from section 6 on to 192, that is simply
24 the appeals process. I don't think that is anything
25 that one needs to take significant time on for the

1 present. What, instead, I would do is turn on to 316
2 itself. So 316 is part of chapter 4 under the
3 Competition Act. As I see, pursuant to section 2 --

4 THE CHAIRMAN: The Communications Act?

5 MR BEARD: The Communications Act, I'm grateful,
6 Mr Chairman. Section 263, as I say, is:

7 "... the duty of Ofcom in exercising its powers to
8 secure that every Broadcasting Act licence at all times
9 holds its licence on the conditions which are, for the
10 time being, included under this chapter in the
11 regulatory regime for the licensed service."

12 Then we start 316(1):

13 "The regulatory regime for every licensed service
14 includes the conditions, if any, that Ofcom consider
15 appropriate for ensuring fair and effective competition
16 in the provision of licensed services or of connected
17 services."

18 So here we have parliament laying down the
19 requirement that under the regulatory regime you must
20 put in place conditions for ensuring fair and effective
21 competition in the provision of licensed services or
22 connected services.

23 So although the terms of section 3(2) are not
24 specifically including a general obligation to secure
25 competition, by means of the structure of the licensing

1 regime, that is precisely what parliament is seeking to
2 do in relation to licensing conditions. If one then
3 goes on to 316(2) itself:

4 "Those conditions must include the conditions, if
5 any, that Ofcom consider appropriate for securing that
6 the provider of the service does not enter into or
7 maintain any arrangements or engage in any practice
8 which Ofcom consider, or would consider, to be
9 prejudicial to fair and effective competition in the
10 provision of licensed services or of connected
11 services."

12 So what this provision does is, it says that Ofcom
13 is required, as part of the regulatory regime for every
14 licensed service to include conditions -- I will come
15 back to these words -- if any, that Ofcom consider
16 appropriate for ensuring fair and effective competition.
17 So this is the requirement that Broadcasting Act
18 licences must include such conditions. Those conditions
19 must include the conditions, so those conditions that
20 form the regulatory regime for every licensed service
21 must include the conditions, if any, that Ofcom consider
22 appropriate for securing that the provider of
23 the service doesn't enter into arrangements or practices
24 which Ofcom consider, or would consider -- so there are
25 two points here. First of all, it is requiring those

1 conditions to be included. What conditions should be
2 included? The conditions that Ofcom consider
3 appropriate for ensuring fair and effective competition.

4 What sort of conditions must they be? Subsection 2:

5 "Conditions that Ofcom considers appropriate for
6 securing that the provider of the service does not enter
7 into arrangements or practice which Ofcom consider ..."

8 So that's present:

9 "... or would consider [future] to be prejudicial."

10 So you have got "must include the conditions which
11 Ofcom would consider to be prejudicial" -- sorry, "must
12 include conditions which prevent the service provider
13 entering into arrangements or practices which Ofcom
14 would consider to be prejudicial to fair and effective
15 competition".

16 So you have got a mandatory statement here. You
17 have got a mandatory statement in relation to the
18 future, and you have a threshold consideration of, would
19 the arrangements or practices be prejudicial to
20 competition? That is the structure that is being laid
21 down here. One can understand why parliament has done
22 that, because this is part of the ex ante regime, the
23 licence conditions regime, the regulatory regime for
24 every licensed service, to ensure that conditions are
25 put in place appropriate for securing that the provider

1 of the service does not enter into arrangements which
2 would, as Ofcom considers it, be prejudicial to fair and
3 effective competition, because it is a precautionary
4 approach effectively.

5 THE CHAIRMAN: Mr Beard, between the time that the
6 Broadcasting Act equivalent provision was framed and the
7 Communications Act was passed by parliament, we acquired
8 the Competition Act 1998. You are going to talk to us
9 about how the two relate?

10 MR BEARD: The simplest way in which they relate is the
11 Competition Act is an ex post structure.

12 THE CHAIRMAN: I really don't like that phraseology.

13 MR BEARD: I'm happy for it not to be either in Latin or to
14 be --

15 THE CHAIRMAN: It is not a linguistic objection, it is the
16 fact that both approaches, either under the licensing
17 provisions or under the competition legislation, involve
18 elements of looking backwards and forwards. I'm not
19 sure trying to draw a very sharp distinction gets us
20 home.

21 MR BEARD: Actually, I think there are two things going on
22 here. One is that you are dealing with here
23 a regulatory regime for a utility or a system of
24 services that parliament considers requires to be
25 regulated. But in those circumstances, parliament have

1 put in place a structure to ensure that steps were taken
2 by the relevant regulator in relation to the proper
3 protection of the conditions of delivery of those
4 services both in terms of public service aspects, but
5 also pre-empting concerns about undermining,
6 prejudicing, fair and effective competition, which is
7 very different from a set of rules which are set out in
8 the Competition Act which are of general application and
9 of course only bite when there has been an infringement.

10 Now, sir, you refer to the Competition Act being
11 forward looking, but of course the extent to which the
12 Competition Act is forward looking is limited. If one
13 takes the two provisions: 101, you have to have an
14 agreement or concerted practice having been entered
15 into. The prospect of an agreement or concerted
16 practice is not good enough to fulfil the requirements
17 of 101. The same is also true, abuse of dominance under
18 102. You have to have had the conduct in question.

19 It is of course true that when you come to analyse,
20 for example, whether or not you have an abuse, there are
21 circumstances where you look at whether or not the
22 conduct that has occurred is capable in the future of
23 adversely affecting competition. You see that in
24 certain cases. So to that extent, one can see that you
25 have an element of consideration of the future, but the

1 fundamental difference is, you are having to engage with
2 activities that have occurred with the Competition Act.
3 You are not here, you are specifically not doing that.

4 THE CHAIRMAN: Can I ask you one more question, which is,
5 the matters to which your client objects, the things
6 that have been done or not been done to it, are they
7 capable of falling under the competition legislation as
8 well as section 316 or are there some things only
9 covered by section 316?

10 MR BEARD: There are certainly elements that could fall
11 within the scope of the Competition Act provisions.
12 There is no doubt that that could be the case. For
13 instance, a dominant undertaking refusing to supply
14 essential content, for example, can amount to a breach
15 of article 102 and the chapter 2 prohibition.

16 On the other hand, the extent and scope of 316 is
17 undoubtedly broader, and intentionally so. Because
18 there are a range of considerations. First of all, the
19 fact that it's talking about the future and risks
20 plainly deals with a situation which falls outside the
21 scope of 102, and it is with that that we are primarily
22 concerned today. Second of all, the test that is being
23 laid down, prejudice to fair and effective competition,
24 it is not suggested that that is somehow co-terminus
25 with the definition of abuse of dominance, nor indeed

1 prevent, restrict or distort competition under the terms
2 of 101 and chapter 1.

3 So we do say that 316, as -- to use the language
4 that is often used, but, sir, you may not like, it is
5 part of a regulatory or ex ante regime that is doing
6 something broader than the scope of the Competition Act
7 provisions.

8 THE CHAIRMAN: So when your client made a complaint under
9 the competition legislation, that wasn't meant to cut
10 out the application of section 316?

11 MR BEARD: No, it doesn't. There is no sense in which one
12 could reach a conclusion that, following on from the
13 Broadcasting Act and the advent of the Competition Act,
14 that somehow one had a situation where parliament had
15 impliedly carved out from the operation of section 316
16 the consideration of matters that could fall within
17 both. After all, if you have a situation where someone
18 is found to have breached the chapter 2 prohibition or
19 102, there is a salient difference in consequence
20 between that situation and the one here, in that the
21 natural consequences, quite apart from ceasing and
22 desisting, a significant penalty can be imposed in
23 relation to those matters.

24 I recognise that there are enforcement provisions
25 that exist under this regime in relation to licensing

1 conditions, but that is nonetheless a very different
2 structure that is being put in place. If this tribunal
3 were to consider that, what you have is essentially an
4 obligation to consider all matters that can fall within
5 the scope of the infringements under chapter 1 and
6 chapter 2, or 101 and 102, that have to be dealt with
7 under the Competition Act, and 316 is there only
8 a residual protection. That would be a fundamentally
9 wrong approach to the interpretation of section 316 and
10 its precautionary approach that is being adopted in
11 relation to this industry.

12 So, as I say, what we have here is a scheme whereby
13 licences under the Broadcasting Act must have conditions
14 in them that are covered by chapter 4. I think, given
15 that I have referred to 263 on a number of occasions, it
16 is perhaps worth picking up the second bundle and
17 referring to it. As I say, it is in tab 10 of
18 the second hand-up bundle. I'm sorry, it may not be
19 there. We may need to hand a copy up. My apologies.

20 MR HOLMES: Sir, the other parties haven't had it either.

21 MR BEARD: I apologise. I will come back to it.

22 THE CHAIRMAN: Good idea.

23 MR BEARD: Whilst we are discussing the consideration of
24 the Competition Act provisions, it is perhaps just worth
25 turning over to 317, which is at tab B under tab 13 in

1 the bundle. Because 317 is specifically dealing with
2 the exercising of Broadcasting Act powers for
3 a competition purpose. So what parliament has done is
4 identified the regulatory regime under 316 and then
5 separately considered the interaction with the
6 Competition Act powers and their exercise in the context
7 of those that are subject to a Broadcasting Act licence.
8 So 317(1), this section applies to the following powers
9 of Ofcom, their Broadcasting Act powers. So this is
10 their powers under this part of the Act and under the
11 1990 Act to impose and vary the conditions of
12 Broadcasting Act licence.

13 Then 317(2):

14 "Before exercising any of their Broadcasting Act
15 powers for a competition purpose, Ofcom must consider
16 whether a more appropriate way of proceeding in relation
17 to some or all of the matters in question would be under
18 the Competition Act 1998."

19 So here you have the structure being put in place
20 that, before they decide to exercise any particular
21 Broadcasting Act powers, and of course that includes the
22 licensing powers under 316, you do consider whether or
23 not the arrangements, the practices that you are
24 considering could be dealt with under the terms of
25 the Competition Act.

1 So in this context, one could ask oneself, would it
2 be -- before you exercise your power under 316, should
3 we deal with those matters under the terms of
4 the Competition Act? But of course, as we have already
5 noted, where one is talking about concerns about risks
6 of things coming to pass, matters which do fall within
7 the scope of 316, it is difficult to understand how the
8 relevant powers that are being referred to in 317(2)
9 could be relevant, because here you have a situation
10 where you would have to ask yourself, would it be more
11 appropriate to proceed under the Competition Act? No,
12 I couldn't do so if I am talking about something that
13 hasn't come to pass. In those circumstances, you are
14 then left with the position of section 316 operating in
15 relation to the relevant regulatory powers and those
16 powers, as I say, requiring the conditions being imposed
17 on the licence must be for securing that the provider of
18 the service doesn't enter into any arrangements which,
19 as I say, would be considered prejudicial to fair and
20 effective competition.

21 So although, sir, it may be correct that there may
22 be elements of the consideration of Competition Act
23 powers that involve a consideration of the future, when
24 one comes to the interaction between the Competition Act
25 and 316, this has actually been dealt with by the

1 legislative scheme so that it would only be where Ofcom,
2 pursuant to its obligations under 316, was actually
3 identifying arrangements or practices that were in place
4 that it would then have real merit in considering how to
5 operate the Competition Act powers instead.

6 THE CHAIRMAN: Of course, we are not considering a situation
7 where Ofcom has to decide whether to impose a licence
8 condition or proceed under the Competition Act. What
9 you are complaining about is the removal of an existing
10 licence condition which you say creates a risk for the
11 future.

12 MR BEARD: Yes.

13 THE CHAIRMAN: How does the exercise of choice work in those
14 kinds of situations?

15 MR BEARD: In that situation, what you are effectively
16 considering is whether or not that condition should be
17 extended in order to obviate the risks that were
18 previously identified. Now, we say the fact that you
19 are taking away a condition may influence the way that
20 one has to consider all of the relevant evidence. We
21 can see that. But in terms of the relevant legal test,
22 what one is asking oneself is, are there continuing
23 risks that justify the maintenance of that licence
24 condition which instead Ofcom is deciding to withdraw?
25 So, again, it is all about the risk.

1 Now, the terms of how the Competition Act could deal
2 with that, plainly the Competition Act can't deal with
3 that at the moment, because there aren't -- save in
4 relation to the scope of the WMO, but certainly as to
5 the supply of Sky Sports 1 and 2, there is no conduct
6 here that could be said, in relation to Sky, to amount
7 to a refusal to supply such that it was a practice that,
8 for example, fell within the scope of 102, or chapter 2.
9 THE CHAIRMAN: You are going to deal with that when you come
10 on to ground 5, are you?
11 MR BEARD: In relation to the ground -- well, and in
12 relation to pricing. That is why I was careful to refer
13 to the existence of the supply of Sky Sports 1 and 2 and
14 I didn't refer to either the terms of it under pricing
15 under ground 4 or in relation to the grant-back
16 condition in relation to ground 5.
17 THE CHAIRMAN: Is that what you regard as actual conduct?
18 MR BEARD: Yes, in relation to both of those --
19 THE CHAIRMAN: Ex post.
20 MR BEARD: Yes. Both of those do amount to matters that
21 could fall within the scope of Competition Act
22 considerations, yes, absolutely. There is no suggestion
23 to the contrary in relation to those.
24 What we are focused on in relation to the
25 application of the condition is the risk. That is what

1 we are really concerned about here: should you withdraw
2 the WMO because there is no risk of prejudice to fair
3 and effective competition? We use the word "risk", we
4 talk about things being forward looking, because it is
5 clear from the terms of 316(2) that we are dealing with
6 what Ofcom currently considers to be arrangements or
7 practices that are prejudicial to fair and effective
8 competition or would consider to be prejudicial to fair
9 and effective competition, which is necessarily talking
10 about practices or arrangements that don't currently
11 exist but could exist in the future.

12 MS POTTER: Mr Beard, can I just be clear: are you saying
13 that if there was a situation in which Ofcom identified
14 a theoretical risk because a party had strong market
15 power, that it wouldn't be possible, given the
16 interaction between 316 and 317, for it to say, "We
17 would expect to intervene using our competition powers
18 in the event that something prevailed, given that we
19 accept there is a theoretical risk but we do not at the
20 moment anticipate or see these things happening"? It is
21 your position that any possibility of risk has to be
22 addressed under 316?

23 MR BEARD: No, we don't say any possibility of risk. We
24 have made clear that we think what this has to be is
25 a real risk, not a fanciful risk, not a mere theory. It

1 has to be a real risk. That is what parliament was
2 putting in place here: a scheme of ex ante regulation
3 where, if there are real risks that there will be
4 arrangements or practices that will prejudice fair and
5 effective competition, the regulator must put in place
6 conditions, if it can identify conditions, and that is
7 what the "if any" is concerned with. It may be
8 a situation where no such conditions can properly be
9 identified. We can understand that. We also recognise
10 that in deciding what constitutes an appropriate
11 condition to meet those risks, there will be
12 a discretion for Ofcom and of course that is why it
13 refers to Ofcom deciding on the appropriate conditions
14 in these circumstances. But there is a statutory scheme
15 being put in place here that goes beyond the
16 Competition Act regime, and the danger with the
17 interpretation that says "Well, you wait and see because
18 you have always got those Competition Act powers there",
19 is that you are undermining the operation of an ex ante
20 regime which the combination of 316 and 317 recognise
21 operate in parallel.

22 317 is a very clear indication that, notwithstanding
23 the fact that there was the advent of the Competition
24 Act, those powers in 316 continue to subsist and must be
25 properly applied as an ex ante regime, as

1 a precautionary approach, and doing something different.

2 MS POTTER: Can I also perhaps, unless you feel it is
3 appropriately addressed elsewhere, just address the
4 question of whether it is reasonable for Ofcom to
5 identify that the very existence of a provision such as
6 the WMO in a sense leads to a form of regulated
7 competition rather than fair and effective competition
8 in the market, arguably?

9 MR BEARD: Well, if you have a situation where a regulatory
10 intervention is one that undermines fair and effective
11 competition, then it is plain that you couldn't justify
12 the retention of a regulatory scheme that itself
13 undermined fair and effective competition. You wouldn't
14 actually be meeting the test here, because you wouldn't
15 be putting in place a condition that was appropriate for
16 securing that arrangements or practices that were
17 engaged in, or would be engaged in, were prejudicial to
18 fair and effective competition. You wouldn't be curing
19 the problem. I think it is very difficult to understand
20 how you would maintain that. I think if you had
21 a regulatory condition in position that was undermining
22 fair and effective competition, then at that point it is
23 clear that the obligations under section 6 for Ofcom to
24 keep these matters under review would undoubtedly bite.
25 There is no doubt about that. We take no issue with

1 that suggestion. If you have put in place a scheme of
2 regulation and you think, actually, it is having a whole
3 range of unintended consequences which are undermining
4 competition, then, yes, you'd want to revisit it and
5 withdraw it and it would be difficult to see how it
6 would continue to meet the relevant test.

7 What we say here, of course, is something very
8 different. We say that this measure, the WMO, far from
9 undermining competition, it is a backstop measure that
10 is required and actually needs to be considered more
11 carefully in terms of its overall structure and terms
12 than it has been thus far by Ofcom.

13 MS POTTER: Thank you. Sorry.

14 MR BEARD: Just in relation to the interaction between 317
15 and 316, as I say, what 317 does is it doesn't change
16 the proper interpretation of 316. Of course, what Ofcom
17 have sought to do in their skeleton argument, in
18 particular just for your note at paragraph 30(c) in
19 their skeleton argument -- and just also for your note,
20 that skeleton is now in the additional bundle at
21 tab 17 -- they say that there is an inconsistency in our
22 approach to the interpretation of 316 because of
23 the existence of the requirement under 317(2) to
24 consider whether or not to exercise Competition Act
25 powers.

1 There, Ofcom are simply getting the interpretation
2 wrong. It is entirely consistent. When faced with
3 a set of facts, practices or agreements, for Ofcom to
4 approach it and say, "We are under a general duty to put
5 in place licence conditions that secure that
6 arrangements or practices prejudicial to fair and
7 effective competition are not undertaken, but we are
8 also bound by our duty to consider whether or not
9 Competition Act provisions could deal with these
10 matters. If we think Competition Act provisions would
11 deal with these matters and in particular the power to
12 impose penalties and take a decision would be
13 appropriate, we will go down that route", that's fine.
14 It does not somehow eviscerate, curtail, limit the
15 operation of 316 more generally, because if you decide
16 that those practices are such that you don't want, for
17 whatever reason, consistent with your obligations under
18 317, to go down the Competition Act 1998 route, then you
19 still will have obligations under section 316.

20 So Ofcom there have clearly got the interaction
21 between the two wrong. As I have already picked up,
22 there are review powers. I have already touched on
23 section 6. But if one goes over the page to 318, what
24 you will see there is a specific provision having been
25 built in by parliament in relation to the current

1 competition regime looking at the general review of
2 powers being exercised for competition purposes.

3 So what you do have is a set of parallel
4 arrangements for concurrent enforcement of
5 Competition Act powers, including an obligation to keep
6 matters under review under 318, but what you don't have
7 is any suggestion or any need for an implication that
8 somehow 316 in its clear wording is being limited.

9 THE CHAIRMAN: So you are saying section 318 refers to
10 reviewing matters that were dealt with under 316. It
11 doesn't tell us anything about duty to consider whether
12 the Competition Act would be better.

13 MR BEARD: No. Because what this is -- if one looks at
14 318(4), for example:

15 "For the purposes of this section a provision has
16 effect for a competition purpose to the extent that its
17 only or main purpose is to secure that the holder of
18 a Broadcasting Act licence does not:

19 "(a) enter into or maintain arrangements ... [that
20 would be] prejudicial to fair and effective
21 competition."

22 THE CHAIRMAN: That's the section 316 wording.

23 MR BEARD: It does apply a review power in relation to 316,
24 but it also is applying a review power in relation
25 to 317. I'm sorry if I wasn't being clear enough about

1 that.

2 THE CHAIRMAN: You seemed to be saying earlier that there
3 are some things, namely, risks for the future, which
4 can't be considered under the Competition Act. Is that
5 still what you are saying?

6 MR BEARD: It is very difficult to see how the
7 Competition Act bites in relation to future risks and it
8 is why one has in place licensing regimes that enable
9 the inclusion of provisions that pre-empt, prevent,
10 ensure that the circumstances do not come to pass where
11 there are arrangements or practices that are prejudicial
12 to fair and effective competition. It is difficult to
13 see how the Competition Act bites on that. That is why
14 one can see you do want to maintain two sets of
15 regulatory scheme, effectively. You have the licensing
16 scheme and you also have the Competition Act powers.

17 THE CHAIRMAN: Presumably the market investigation regime
18 cuts across both?

19 MR BEARD: Yes, it will do.

20 THE CHAIRMAN: You don't have the same cut-off.

21 MR BEARD: No, you don't. In relation to market
22 investigation regime, there is a greater degree of
23 fluidity in relation to the relevant tests you are
24 looking at, so you can be looking at past practices and
25 future risks. In those circumstances, it is the reason

1 why, in certain circumstances, people say it is
2 difficult to work out whether these are in fact things
3 that are better dealt with under licensing regimes or
4 under Competition Act powers, is the regulator dealing
5 with these things properly, which is why you get, for
6 instance, references on the energy market.

7 THE CHAIRMAN: I seem to remember the movie rights aspect of
8 pay TV was dealt with under a market investigation
9 reference.

10 MR BEARD: Yes, it was, that's right.

11 THE CHAIRMAN: It would have been open to Ofcom to do that
12 for this as well, but it chose not to. Is that right?

13 MR BEARD: That's right. It would always have been open to
14 Ofcom to have made a reference in relation to these
15 matters. It would then have been left with the CMA and,
16 of course, the CMA, in those circumstances, wouldn't by
17 any means be limited to Competition Act powers. Indeed,
18 at the relevant time, it wouldn't actually have been,
19 I think, a body that could apply.

20 THE CHAIRMAN: Just a minute, Mr Beard. On your argument,
21 section 316 would still have applied because there would
22 still have been a risk of possible damage to
23 competition, which I don't see how the market
24 investigation regime would have removed.

25 MR BEARD: Well, it depends what the consequences of market

1 investigation were in those circumstances.

2 THE CHAIRMAN: One and a half to two years' investigation.

3 MR BEARD: It might have been -- yes. It might have been

4 that it was appropriate to have in place protections in

5 the interim. It may well have been right to do that

6 whilst the enquiry was going on.

7 THE CHAIRMAN: We're in the counterfactual, of course.

8 MR BEARD: We are in a counterfactual here, certainly.

9 THE CHAIRMAN: One of several.

10 MR BEARD: Yes, we are in possible worlds.

11 THE CHAIRMAN: I'm just trying to get at the point that the

12 cut-off may not be absolute and the duty may not be an

13 absolute one. If there is a risk of damage to

14 competition, I think I'm following, from what you are

15 saying, that a market investigation reference, for

16 example, would have been one way for Ofcom to deal with

17 it. I'm finding it hard to reconcile with your

18 statement that, where there is a risk, then they must

19 intervene under section 316.

20 MR BEARD: I may have spoken loosely in the sense that what

21 you have under the market investigation regime is

22 a broader set of tests than you have under the

23 Competition Act regime, and the investigations carried

24 out by the CMA in relation to the way a market works

25 inevitably have a prospective aspect to them.

1 I certainly didn't want to fall into the trap --

2 THE CHAIRMAN: Applying an orthodox competition analysis of
3 course.

4 MR BEARD: Yes. Indeed, one could compare and contrast with
5 many CMA enquiries when one comes back and looks at how
6 these matters have been dealt with in this case. That
7 is undoubtedly true, yes.

8 Nothing in relation to the operation of the market
9 investigation regime nor in relation to the
10 Competition Act changes the way one can properly
11 interpret 316. Parliament has put in place a scheme
12 whereby, as part of the regulatory regime for every
13 licensed service, it has to include the relevant
14 conditions. Conditions must include under sub 2
15 conditions, if any, that Ofcom consider appropriate for
16 securing -- so we use the term "ensuring" synonymously.
17 I don't think any point is taken. Ensuring that
18 provider of service doesn't have arrangements or
19 practices that Ofcom would consider to be prejudicial to
20 fair and effective competition. So you need those
21 conditions to be put in place.

22 If parliament had not wanted to impose those sorts
23 of obligations on Ofcom, it could obviously have used
24 different language. It could have talked about
25 conditions that may have been put in place if Ofcom

1 considered. But it doesn't do that. It does look at
2 the future. It does apply a prejudice to fair and
3 effective competition tests that is different from the
4 test whether -- and for the Competition Act or in
5 relation to the market investigation regime.

6 So, sir, it may well be the tribunal sits here and
7 says, well, there is a whole range of regulatory tools,
8 some of which can be -- in some circumstances, multiple
9 of which might potentially be used. That is undoubtedly
10 the case. But what we are focused on is the proper
11 interpretation of 316, and, as I say, what one does is,
12 one looks at the relevant language of 316 and the
13 purpose of it. There is no doubt that 316 is intended
14 to have a precautionary approach here.

15 What Ofcom says is, but we should have a very broad
16 measure of discretion in relation to what we consider
17 appropriate. What they never grapple with is what the
18 mandatory element is, what the duty is, that's being
19 imposed on them under 316, if it is that they say, "Oh,
20 well, we must put in place something if we think it is
21 appropriate to do so. At that point, you are
22 eviscerating the language that parliament has put in
23 place because you are turning a mandatory obligation
24 into essentially a complete discretion for Ofcom. Now,
25 it might be that Ofcom would much prefer that. One can

1 understand that. That is not what parliament has done
2 and these references to other regimes don't condition
3 that in any way.

4 Just to pick up finally in relation to one or two of
5 the other arguments that Ofcom have raised, the
6 references I have already taken you to, the general
7 duties and approach under section 3 and section 6. It
8 has never been our suggestion that somehow those are
9 suspended or left in abeyance in relation to the
10 operation of section 316. When we talk about the
11 section 6 duty, as I say, what one sees in 318 is
12 actually a rather specific manifestation of an
13 obligation to keep matters under review that covers the
14 Competition Act but also specifically covers the sorts
15 of measures that would be conditions being imposed under
16 a licence in order to ensure that there wasn't prejudice
17 to fair and effective competition. That was 318(4) to
18 which I have already referred.

19 When we go back to section 3 and we talk about
20 transparency and consistency, I won't perhaps dwell on
21 the irony of a consistency condition being important in
22 relation to the approach developed by Ofcom, given the
23 position in 2010, the lack of change in retail
24 competition and the decision to remove the WMO. But
25 what I will pick up is something that Ofcom have

1 particularly now majored on in relation to their
2 submissions in their skeleton argument, is
3 proportionality. Because that is a word that is used in
4 section 3. Whether or not it would be an obligation in
5 any event, one can leave to one side. But there is
6 undoubtedly a requirement under section 3 of
7 the Communications Act, but nothing in terms of
8 the interpretation of 316 is changed by that reference
9 to proportionality. We aren't saying you ignore
10 proportionality, not at all, but proportionality is
11 a test that applies when you are looking at a particular
12 legitimate objective.

13 If one goes back and just thinks about what
14 a proportionality test is, in very broad terms one
15 thinks of a proportionality assessment as
16 a consideration of two questions: first, whether the
17 measure in question is suitable or appropriate to
18 achieve the objective pursued, and then, secondly,
19 whether the measure that's necessary to achieve that
20 objective could be achieved by some less onerous method.

21 But the proportionality test is always asking itself
22 about whether the measure is suitable or appropriate to
23 achieve the objective pursued, and the objective pursued
24 is that that's specified in 316. So you do carry out
25 a proportionality assessment. It would be most obvious

1 when you had a range of possible appropriate conditions
2 to deal with, for example, a risk of arrangements or
3 practices that could prejudice fair and effective
4 competition.

5 If you could have a range of possible conditions,
6 well, obviously proportionality would require you to put
7 in place the least onerous of those conditions. But it
8 doesn't somehow mean that you can move away from
9 identifying what are effective conditions, conditions
10 appropriate to dealing with the threat to fair and
11 effective competition, the prejudice to fair and
12 effective competition.

13 So proportionality doesn't take Ofcom further in
14 terms of the scope of its discretion under 316. As we
15 will come on to, in any event, even if they have
16 a broader discretion, the approach to proportionality
17 here was (a) not properly assessed by Ofcom and (b)
18 could not have reached the conclusion that was in fact
19 reached. But, as I say, the primary point at this stage
20 in terms of the overall interpretation of 316 is to
21 emphasise that nothing in terms of the proportionality
22 principle alters the legitimate objective of 316, the
23 precautionary objective to stop the risk of conduct,
24 agreements or practices which are or would prejudice
25 fair and effective competition.

1 So in those circumstances, the alternative arguments
2 that are put forward by Ofcom don't assist. One other
3 point that they raise is the suggestion that this regime
4 is different from the terms of the telecommunications
5 regime. We say, yes, absolutely, it is. The
6 telecommunications regime that was a product of a set of
7 European directives and regulations which lays down
8 a very different and detailed structure in relation to
9 the specification and markets and how one deals with
10 these things, yes, it is very different from that and,
11 yes, it is true that under that regime there are
12 specific thresholds and hurdles one has to cross before
13 you put in place, and I use the terrible phrase, ex ante
14 regulation, whether by conditions in licences or
15 directions or otherwise. Absolutely true.

16 But if that is what Ofcom was focused on, that,
17 again, is a serious legal error, because the fact that
18 there is another regime that does things differently
19 does not condition your interpretation of 316. Indeed,
20 one can see that if Ofcom has the mind-set, "Well, we
21 don't have a telecoms ex ante scheme here, it is much
22 more limited in 316 in relation to the terms that these
23 matters are dealt with by parliament here, well, if that
24 is the case, then we must be being afforded a broader
25 discretion", you can see quite easily where they went

1 wrong in relation to their interpretation here. The
2 fact that it is brief as compared to a telecoms
3 regulatory scheme doesn't mean somehow it affords a much
4 broader discretion to Ofcom in relation to its
5 interpretation of these matters.

6 I do have now copies of all sorts of things, by the
7 looks of it. If I may, I am going to pass those up over
8 the short adjournment rather than seeking to pass them
9 up now. What I will do is pass them to my learned
10 friends so that they have the relevant materials. All
11 that is included in this are the statutory provisions
12 and a copy of the Tesco case in the CAT which refers to
13 the proportionality test. I haven't taken the tribunal
14 to it. I will pass those along in a moment.

15 That, I think, deals with the overall framework in
16 relation to the relevant test and why it is we say the
17 mandatory language can't be ignored. The precautionary
18 scheme is important and hasn't been properly focused on
19 by Ofcom and, as we will see, even if they have the
20 broader discretion, that doesn't take them to where they
21 want to go.

22 With those matters in mind, I think perhaps the best
23 thing next to do is turn to the WMO itself. That is in
24 bundle N2 at tab B, although you may have it loose
25 somewhere else. It is the amended notice of appeal,

1 bundle N2 at tab B. It may be in other places as well.
2 It is also in the defence bundle at tab 4, if you have
3 marked up a different version. I have worked on N2,
4 tab B.

5 MR HOLMES: Sir, the confidential version is in DF1.

6 MR BEARD: DF1 at tab 4. No doubt the tribunal is already
7 perhaps more familiar than you would otherwise have
8 wished to be with this document, but if we just pick it
9 up at page 3, we see the overall structure of this WMO
10 document set out in its contents. Then if we can pick
11 it up then in the introduction of "Background section"
12 at page 12, we see at page 12 in the introduction the
13 indication of the consultation in December 2014 when
14 these matters came back to Ofcom following the excursion
15 through the CAT and the Court of Appeal. So there was
16 the first consultation of this phase in December 2014;
17 supplementary consultation in June 2015; and then we
18 have got reference to 316 at 2.12. Then if we go down
19 to 2.16, and I should say in passing, in their defence
20 Ofcom, perhaps somewhat half-heartedly, say, "Well, we
21 have quoted the relevant provisions, so we must have
22 applied them correctly", but we will go on to show why
23 that isn't correct.

24 If we go to 2.16, we see the overall summary of
25 the position:

1 "This statement outlines the outcome of our review
2 of the WMO obligation which we launched in 2014. The
3 focus of our assessment is whether, in the light of
4 the current market conditions, there are arrangements or
5 practices which could be prejudicial to fair and
6 effective competition in the supply of pay TV to
7 consumers within the UK."

8 So far, so much a summary:

9 "In view of that assessment, we have considered
10 whether regulation, whether in the form of WMO
11 obligation or otherwise, is appropriate for ensuring
12 fair and effective competition in the retailing of
13 pay TV services."

14 Of course, at that point, you are drifting away from
15 the focus of the statutory test, because of course what
16 the statutory test is doing is not looking at whether
17 generally regulations are appropriate but it is setting
18 out a specific scheme placing an obligation, a duty, on
19 Ofcom in relation to conditions. It is not leaving the
20 matter at large.

21 So what is implicit in this sort of "whether
22 regulation" approach is a much broader approach to
23 discretion, departing from the actual approach that is
24 mandated under 316(2), the mandatory obligation under
25 316(2) that you must include conditions appropriate for

1 securing the provider of a service doesn't enter into
2 arrangements or practices which would prejudice fair or
3 effective competition.

4 So even at this early stage, we see the seeds of
5 the problem which then besets the remainder of the WMO,
6 because these matters are being approached without the
7 relevant focus. It was said, I think, at the outset of
8 the merger control regime under the Enterprise Act that
9 the OFT was somewhat surprised when in the Isoft/Torex
10 case it was emphasised that the statutory regime imposed
11 upon it a duty to make references which it hadn't had
12 before. There is a flavour of that here, that you have
13 a duty imposed on Ofcom and Ofcom instead are taking
14 a much broader approach to their general discretion,
15 whether or not they should regulate in these
16 circumstances. So stepping beyond and outside the terms
17 of 316.

18 Then we see the last sentence:

19 "This review has not sought to review whether the
20 WMO ... remains appropriate via a re-examination of
21 the analysis and justification for imposing the WMO
22 obligation in 2010."

23 We will come back to that, but that is shorthand for
24 saying we didn't carry out any sort of competition
25 analysis that would be recognised as remotely orthodox

1 here.

2 Then we have at 218 the three-step analytical
3 framework:

4 "In the December 2014 consultation we approached our
5 analysis on the basis of the following three steps:
6 identifying key content; assessing the extent to which
7 limited distribution of channels carrying key content
8 could be prejudicial to fair and effective competition;
9 assessing the extent to which holders of key content are
10 likely to engage in limited distribution of such
11 content."

12 We will come back to, particularly in ground 3,
13 reference to going wrong in relation to the
14 identification of key content, and we will also pick up
15 in grounds 4 and 5 issues to do with the terms on which
16 the WMO operates and the terms which Sky seek to impose,
17 or sought to impose, in relation to wholesale supply.

18 But particularly in relation to ground 1, what we
19 are focused on is assessing the extent to which holders
20 of key content are likely to engage in limited
21 distribution of such content.

22 Just picking up in 220 effectively the echo of
23 the final sentence of 216:

24 "We do not agree that in considering the exercise of
25 our powers under 316 we are required to undertake

1 a market definition and market power analysis in the
2 manner suggested. Indeed, the CAT explicitly rejected
3 this position in its judgment."

4 Now, in that regard, I will come back to this when
5 we look at the way in which matters were carried out by
6 Ofcom or not, but that is not a correct appraisal of
7 the CAT judgment, in particular at paragraph 155, which
8 is cited there.

9 Then if we move through the next sections relatively
10 quickly, obviously this is all material that the
11 tribunal has no doubt read. We have section 3,
12 consideration of the pay TV sector and the relevant
13 context that Ofcom has undertaken, including
14 a consideration of the position in relation to Sky and
15 in relation to other parties involved in the provision
16 of pay TV.

17 Then we have, at page 35, the issue of identifying
18 key content. So this is the first step in the analysis.

19 Then we have, at 43, the second step, the impact of
20 key content channels on pay TV competition, so that is
21 in section 5. If I could, in relation to section 5,
22 just pick up one or two brief points, running on from
23 page 51, under the heading "Sky maintains a strong
24 market position in the supply of sports channels and in
25 pay TV retail", that's all under this section. If we

1 then turn on to 54, we will see the subheading "Sky
2 maintains a strong position in retailing of pay TV", it
3 picks up in particular at 5.48:

4 "The updated assessment continues to show Sky does
5 have a strong position."

6 And just to emphasise, at the bottom of 5.48 itself:

7 "We continue to focus our assessment of the retail
8 level on traditional pay TV retailers."

9 Again, the focus, just picking up one of the points
10 I raised at the outset, is on pay TV and should be on
11 pay TV and that's re-emphasised in paragraphs 5.54 and
12 5.55 where the recognition that, although there are
13 developments more broadly in relation to triple-play,
14 that isn't, and wouldn't be, the appropriate focus here,
15 where one is considering the impact of fair and
16 effective competition on pay TV.

17 THE CHAIRMAN: Do you agree with all that, presumably?

18 MR BEARD: Well, I don't agree with all of it, but in terms
19 of the aspects that identify Sky continuing to have
20 a very strong market position, we do concur with, we do
21 concur with the need for a focus on pay TV, because,
22 when one is looking at issues in relation to fair and
23 effective competition, you need to focus -- in relation
24 to pay TV supply, you need to focus on pay TV and not
25 look at a range of other alternative arrangements,

1 albeit we recognise that one must always take into
2 account the context of the market that one is looking
3 at. That would, of course, be part of any orthodox
4 competition analysis.

5 THE CHAIRMAN: So "strong market position" is okay as
6 a description?

7 MR BEARD: Yes, we might add some adjectives to "strong
8 market position", but, yes, the position that Ofcom has
9 taken is that Sky has a strong position in the market,
10 we say that it is a very strong position, but for the
11 purpose of what is at issue today, what we are concerned
12 with are two questions, whether or not Sky has an
13 incentive to act in a way that would prejudice fair and
14 effective competition and whether it had the ability to
15 do so. Clearly what Ofcom has found is that it does, on
16 both counts, have incentive and ability and part of
17 that ability comes from the scale of its market position
18 in pay TV.

19 We then turn on to page 60, where one sees a new
20 heading "Limited distribution of Sky Sports may harm
21 competition". 5.69:

22 "In the December 2014 consultation, we found that
23 the limited distribution of Sky's key content may
24 prejudice fair and effective competition between pay TV
25 retailers. We said pay TV retailers which are unable to

1 offer the key sports content available on Sky Sports may
2 face difficulties in competing for a sizeable proportion
3 of subscribers due to the importance attributed by
4 consumers to Sky Sports and because of Sky's market
5 position."

6 So that captures, in broad terms, what I was,
7 I hope, accurately summarising as Ofcom's position.
8 What we see is they continue to identify incentive and
9 ability here. 5.70:

10 "In this section, we confirmed our view on the
11 importance of Sky's key content. Sky continues to hold
12 a portfolio of important sports contents and in
13 particular holds the majority of broadcasting rights to
14 the Premier League."

15 If we just move down quickly to 5.73, the final
16 sentence:

17 "We consider that it is sufficient to indicate that
18 limited distribution of Sky Sports could prejudice fair
19 and effective competition between pay TV retailers."

20 So here we have a situation where Ofcom is
21 identifying that that final part of 316 is met, that
22 limited distribution of Sky Sports -- and, as we will
23 come on to see, that is either by straight refusal to
24 supply or the terms on which it is supplied -- could
25 prejudice fair and effective competition between pay TV

1 retailers. We then say, of course, the question that
2 will flow from that is going to be, what are the
3 appropriate conditions? But before we get to that, it
4 is right, of course, to look at Ofcom's assessment of
5 the practices which it's undertaken in section 6,
6 starting at page 63. So here we have assessment of
7 the practices, subheading "We have considered whether
8 Sky is engaging in non-supply of its key content". If
9 we go down, we see subheadings under that, "Non-supply
10 of Sky's key content would be prejudicial to fair and
11 effective competition", so that's just repeating what's
12 already been identified from section 5:

13 "We previously identified that Sky may have
14 incentives to limit distribution."

15 Then it's referring to the December 2014
16 consultation:

17 "We set out the view that there may be a risk that
18 Sky has incentives to limit distribution of its key
19 content in the absence of regulation, in particular in
20 respect of the supply of key sports content to
21 competitors with relatively small numbers of
22 subscribers. We said there may be benefits for Sky from
23 limiting distribution of its content where such
24 a strategy could slow the growth of those pay TV
25 retailers and help protect Sky's position. We noted

1 that Sky is currently supplying its Sky Sports channels
2 to a wide range of competing retailers and that existing
3 contractual arrangements might restrict Sky's ability to
4 act on any incentives it might have to withdraw supply.
5 We said that these existing supply arrangements may be
6 of little value in determining the extent to which Sky
7 would or would not supply its key sports channels in the
8 absence of an obligation to supply because they were
9 concluded against the backdrop of existing regulation,
10 i.e. the WMO obligation."

11 If I may, I will just pick up what this document is
12 drawing on by going back to that first consultation
13 document.

14 Now, in my bundle I have it in N2 at tab P.

15 THE CHAIRMAN: I think my colleagues can give me guidance to
16 their bundle.

17 MR BEARD: Notice of appeal bundle 2 at tab P.

18 MS POTTER: We haven't got anything labelled N.

19 MR BEARD: It is tab P to the amended notice of appeal.

20 THE CHAIRMAN: Could you direct us to the core bundle? We
21 did attach some importance to it being "core".

22 MR BEARD: Tab 5 of DF1, I am told. I am slightly
23 concerned. I didn't do housekeeping at the start.

24 THE CHAIRMAN: No, I didn't do housekeeping either.

25 MR BEARD: I wonder whether, over the short adjournment, we

1 might want to do a bundle reference translation?

2 THE CHAIRMAN: Are we still on ground 1?

3 MR BEARD: Yes, sir.

4 THE CHAIRMAN: How are we getting on?

5 MR BEARD: We are enjoying it enormously, sir.

6 THE CHAIRMAN: No, I didn't quite mean that. In terms of

7 time?

8 MR BEARD: I intended to spend more time on ground 1 rather

9 than the other grounds in opening, because I wanted to

10 look at both the legal framework and the WMO.

11 THE CHAIRMAN: You want to tell me that ground 1 suffuses

12 the other grounds?

13 MR BEARD: Not only suffuses but indeed determines the

14 overall nature of the appeal. That is not to say I'm

15 not going to deal with the other grounds as well.

16 THE CHAIRMAN: Do you want to pause now?

17 MR BEARD: I was going to briefly deal with this document

18 and then I was going to pause.

19 THE CHAIRMAN: Okay, thank you.

20 MR BEARD: If we just skip straight through to page 64,

21 which is section 7, "Incentives to limit distribution of

22 key content", what one sees in 7.3 is an identification

23 of "The two types of practice which could result in

24 limited distribution of key sports content to a rival

25 retailer's platform"; "failure to supply or supplying on

1 terms that do not allow fair and effective competition",
2 and one can see in the footnotes how there might be
3 a variety of ways in which that could occur.

4 Then if we just go over the page, and picking up
5 a point that I mentioned at the outset, the third
6 bullet:

7 "Supply of channels on a self-retail basis where
8 this would undermine the ability of the rival retailer
9 to compete effectively as a pay TV platform or in other
10 parts of the value chain."

11 Again, just noting the various ways in which that
12 might happen in footnote 186. In 7.4:

13 "We note that there are a number of important
14 differences between wholesale supply and supply on
15 a self-retail basis. In particular, where a channel is
16 made available on a self-retail basis, the host pay TV
17 platform operator will not be able to bundle that
18 channel with other content and services on its platform
19 and the customer will need to maintain two separate
20 subscriptions. Alternatively, from the channel
21 operator's perspective, there may be benefits from
22 a self-retail arrangement, for example, by allowing
23 a direct contractual relationship with subscribers on
24 a rival platform."

25 That is just highlighting the difference between

1 self-retail. I just pick that up as we are going along.

2 If we then go on, we see at 65 that heading "Channel
3 providers face trade-offs when making decisions about
4 distribution of key content". It is picked up in
5 relation to Sky on page 67. Then there is a discussion,
6 in particular at 7.15, of various incentives. There is
7 a discussion of what's referred to as static incentives,
8 in other words, the incentives for Sky to supply to
9 rivals so there are more eyeballs seeing Sky rather than
10 when there is non-supply through rivals.

11 But then picking up at 7.15:

12 "Turning to strategic benefits associated with
13 limited distribution, Sky has a strong position in both
14 the supply of key sports channels and as a pay TV
15 retailer. Sky has a current share of supply of key
16 sports channels of over 80 per cent and has a share of
17 pay TV retailing of over 50 per cent. Sky is likely to
18 obtain benefits from this market position. Increased
19 competition has the potential to weaken Sky's market
20 position at one or both levels. Should that occur,
21 Sky's future profits could be reduced and that could
22 give Sky an incentive to review supply or supply on
23 terms designed to limit or eliminate the growth of
24 rivals in future."

25 In 7.17:

1 " There are a number of different ways in which
2 increased competition from rival suppliers could reduce
3 profits."

4 So first at the expense of reduced sales by Sky and
5 increased competition from rival retailers putting
6 pressure on prices and margins. Rivals growing, so they
7 acquire economies of scale because, of course, to date
8 Sky has managed to retain a very strong position in that
9 regard. It is noted that how competition might be
10 evolved would be unpredictable.

11 The second bullet:

12 "This may lead to some customers choosing to stop
13 taking Sky Sports channel but the effect more likely to
14 be on pricing."

15 The third bullet:

16 "The growth of rivals is also likely to have an
17 impact on Sky's position as a channel operator (set out
18 in section 6). Sky's position as the largest platform
19 operator with a large retail subscriber base may deliver
20 advantage to it when bidding for sports rights. As the
21 relative size of Sky's retail position dissipates, this
22 advantage will reduce."

23 So there is a range of ways that Sky could be
24 adversely affected. Then if we go on to 7.18, we see:

25 "Sky's evaluation of the dynamic threats to its

1 future profitability may vary for different rivals and
2 BT in particular may represent a more serious threat.
3 It is noted that BT has invested considerable sums in
4 sports rights and marketing. At a retail level, the
5 prospect that BT could become the home of football, in
6 that it would be able to offer Sky Sports and BT Sports,
7 could lead to faster growth by BT and also BT is not
8 only a channel operator but a supplier of broadband and
9 fixed line."

10 Both have some sort of pricing flexibility. 7.19:

11 "It is difficult to conclude definitively on the
12 likely conduct of Sky with regard to the supply of
13 Sky Sports because this depends on complex commercial
14 trade-off incentives which will be affected by a number
15 of factors that are inherently uncertain. However, we
16 consider that there are risks that Sky might have
17 incentives not to supply rival retailers' platforms or
18 to supply only on unfavourable terms."

19 That is picked up then in 7.20. Just picking up the
20 last sentence there:

21 "Given this and the evidence that BT in particular
22 might pose a long-term, competitive threat to Sky's
23 existing market position, we consider that there may be
24 a risk that Sky has incentives to limit distribution of
25 Sky Sports or to supply on unfavourable terms."

1 It notes in 7.21 that Virgin may be in a different
2 position in this regard. Then, when we go over the
3 page, to 72, we see a section:

4 "We have considered whether current supply
5 arrangements provide an indication of any risk of
6 limited distribution."

7 Just noting -- go over the page, there is a table on
8 73. The point I would just note here is, of course,
9 that all of the deals that are later relied on in WMO
10 statement are deals that Ofcom was aware of at this
11 time.

12 If we then turn on --

13 THE CHAIRMAN: 7.30?

14 MR BEARD: Yes, 7.30. Sorry, I'm conscious of time. I'm
15 just not going through all of it:

16 "We note the existing contractual arrangements may
17 restrict the ability of content holders to act on any
18 incentives to limit distribution by withdrawing supply."

19 But then there are notes on the current supply
20 agreements with Virgin running to 2019 and TalkTalk
21 running until June 2016. So at the time this is
22 written, of course, those dates are some way hence. By
23 the time of the WMO they are somewhat closer.

24 THE CHAIRMAN: Even closer now.

25 MR BEARD: Yes, indeed. Then if we go on through to 7.33:

1 "... once Sky is under the WMO obligation to offer
2 on regulated terms ... it may be better off supplying
3 more channels than the regulatory obligation requires or
4 seeking to incentivise incremental sales through
5 different prices or other incentives. In this scenario,
6 the WMO may simply be the safeguard allowing different
7 deals to emerge, especially where these seek to
8 incentivise more sales to platform customers who are
9 unlikely to switch."

10 It's saying, once you are under the obligation, then
11 actually the incentives on Sky may change in relation to
12 pricing and terms that you would then offer to other
13 pay TV retailers, because you may want to incentivise
14 them to generate incremental sales. Then it notes at
15 7.34:

16 "Sky and BT failed to reach a commercial agreement
17 for the supply of Sky Sports 1 and 2 on YouView prior to
18 the grant by the CAT of BT's application to extend the
19 WMO to YouView.

20 "[Taking into account all of this section] we
21 therefore consider that the existing supply arrangements
22 may be of limited value in determining the extent to
23 which Sky would or would not supply its key sports
24 channels in the absence of regulatory intervention."

25 If we go on to 7.39, that is then specifically

1 confirmed as part of the conclusion. I am going to go
2 back to the WMO itself, but perhaps this is a convenient
3 moment for a five-minute pause.

4 THE CHAIRMAN: We will reconvene at 11.45 am.

5 (11.37 am)

6 (A short break)

7 (11.53 am)

8 MR BEARD: I had taken the tribunal back to the December
9 consultation document which sets out more fully the
10 concerns about incentives to limit distribution on the
11 part of Sky. But if I may now return to the WMO itself.
12 The reason I did that is because in the WMO itself those
13 passages from the December consultation are being
14 referred to, but then not expanded upon in quite the
15 same way there. It is important to understand the
16 broader issues that have been highlighted in
17 that December consultation.

18 It is either in defendants bundle tab 4 or I think
19 what is in your terms core, tab B, back in the WMO,
20 picking it up at page 64.

21 THE CHAIRMAN: When you say the WMO, you mean the WMO
22 review?

23 MR BEARD: I mean the WMO review statement, yes, I'm sorry.

24 THE CHAIRMAN: Not the old friend from 2010?

25 MR BEARD: No, I'm sorry, it is a lazy shorthand. It's the

1 decision document under challenge.

2 THE CHAIRMAN: We shouldn't assume anything.

3 MR BEARD: Page 64. I took you to paragraphs 67 and 68,
4 then I took you through some of the material from
5 the December con doc which set out more fully
6 the considerations being referred to in those
7 paragraphs. Then, at 64, we come on to stakeholder
8 comments in relation to these matters and it is
9 something we will come back to in due course, but
10 various stakeholders identified real concerns with Sky's
11 incentives to withhold supply. As one can see at 65,
12 Sky and the Premier League protested to the contrary,
13 and there are then also, from 6.19 onwards on page 66,
14 comments on the relevance of Sky's existing supply
15 arrangements.

16 Then if we pick it up at the heading above 6.23 on
17 page 67:

18 "We continue to consider that Sky may have
19 incentives to limit distribution of its key content.
20 However, it is currently supplying."

21 So the key thing to take from the heading and the
22 structure and what's been done so far, Ofcom is
23 identifying that there are incentives to limiting
24 distribution and key content, but there is, it says,
25 current supply. That is confirmed, the position on

1 incentives is confirmed in 6.23, and then, in the final
2 sentence you see:

3 "However, in considering the likelihood of Sky
4 acting on these incentives we further considered Sky's
5 existing supply arrangements as we discuss in more
6 detail below."

7 Then we see a consideration of what are referred to
8 as static incentives, in 6.24 in particular, in relation
9 to Virgin, and then, 6.25, discussion of further issues
10 in relation to static incentives, and at 6.26:

11 "Sky's overall commercial incentive supply of key
12 content will be driven by the net impact of its static
13 and dynamic incentives."

14 Then if we go on to 6.28:

15 "One of the possible strategic benefits to Sky of
16 limited distribution we set out in December 2014 was
17 that limited distribution could reduce competition for
18 future sports rights."

19 That was something that I picked up, and there is
20 then consideration of the fact that BT had been bidding
21 for sports rights. At 6.29:

22 "We have identified circumstances above where in
23 principle Sky may have incentives to withhold supply of
24 its key sports content. We therefore consider that
25 there may be a risk that Sky may not supply its key

1 sports content to other pay TV retailers. However, we
2 have further considered the relevance of existing supply
3 arrangements for Sky's key content in assessing whether
4 Sky is engaging in a practice of non-supply."

5 So it is confirming the incentive and ability point,
6 but this is essentially a key -- what might be seen as
7 a key misdirection here, because this is where Ofcom is
8 going wrong. It makes those findings and then embarks
9 on a mission to assess whether Sky is engaging in
10 a practice of non-supply, but the key question is
11 whether or not there is a real risk that in future Sky
12 would not supply, or would supply on terms that
13 prejudiced fair and effective competition.

14 Then you have got 6.30:

15 "The majority of Sky's current supply arrangements
16 have been made outside the scope of the WMO obligation."

17 And of course we saw in December con doc reference
18 to that. Then at 6.31, after the -- sorry, please do
19 read those bullets. 6.31:

20 "This evidence suggests that while in principle
21 there may be circumstances in which Sky has incentive to
22 withhold supply, it is not currently engaging in such
23 a practice."

24 Then there are references to those existing
25 contracts and certain dates which were previously

1 referred to in the December con doc. Then we reach

2 6.33:

3 "The only current supply arrangement which has been
4 agreed under the scope of the WMO is the BT YouView
5 platform arrangement."

6 There is reference to the fact BT had to go back and
7 actually get an extension of the WMO arrangements from
8 the CAT in order to secure that supply for the YouView
9 platform because Sky argued the WMO didn't even apply to
10 that. Then you see the subheading:

11 "We have not identified that Sky is engaging in
12 non-supply of its key content."

13 6.35:

14 "Our conclusions on Sky's incentives remain the same
15 as in December 2014, which is that, because of its
16 strong market position and the ability of Sky Sports to
17 affect the development of competition, Sky may have an
18 incentive to limit distribution, particularly where the
19 competitor concerned is relatively small but represents
20 a strategic threat to Sky's position and its future
21 profitability. However, with the exception of YouView,
22 all of Sky's main pay TV competitors have current supply
23 obligations in place which were agreed outside the scope
24 of the WMO obligation."

25 Then:

1 "There is no evidence at this time to suggest that
2 Sky will not be able to agree supply arrangements both
3 in respect of new platforms and in the renewal of
4 existing arrangements. We discuss in section 7 that we
5 expect Sky to continue to supply its key content widely
6 and that, if Sky were to withhold supply of its content
7 in future, we would reconsider the need for regulation
8 to address this concern."

9 So that's the "wait and see". What one sees here,
10 then, is in these sections, starting at 6.29,
11 consideration of an assessment of whether Sky is
12 engaging in the practice of non-supply, then a reference
13 to the majority of Sky's current arrangements being
14 agreed outside the terms of the WMO, a conclusion in
15 6.31 that it is not currently engaging in the practice,
16 and that's it.

17 The question that it should have been asking itself
18 was, was there a risk, absent the WMO, that Sky wouldn't
19 supply? And that is not even a question that Ofcom is
20 properly asking itself in this section because, as is
21 emphasised in 6.31, it is concluding that Sky is not
22 currently engaging in such a practice. Then in 6.36,
23 where it says, "Well, there is no evidence to suggest
24 that Sky will not be able to agree supply arrangements",
25 well, we recognise that Sky may well be able to agree

1 arrangements, but that doesn't mean it will or that
2 there is a risk, more particularly, that it will not.
3 Indeed, all of this is more than consistent with there
4 being a real risk that it will not.

5 THE CHAIRMAN: In 6.37, I'm sure Ofcom will address us on
6 this, where it says, "We expect Sky to continue to
7 supply", what do you understand by the word "expect"?

8 MR BEARD: It is a reference to section 7, "We discuss in
9 section 7 that we expect Sky to continue to supply its
10 content widely".

11 THE CHAIRMAN: Is it an admonition or is it a statement of
12 belief?

13 MR BEARD: There is no basis from this material as to it
14 being a statement of belief. It may well be an
15 admonition. Whatever it is, it is not a proper
16 assessment of whether or not there is a risk it won't.
17 Indeed, the indications that it has identified of
18 incentive and ability are not undermined by anything
19 that is said here. So even if it was saying it was more
20 than an admonition, it is an actual belief, there is no
21 basis in this reasoning for that belief because all they
22 have done is identify what is currently happening. They
23 haven't carried out, as it was put in our notice of
24 application, the forward-looking analysis. It is just
25 not here.

1 When one turns on to section 7 -- we might as well
2 just do that for completeness --

3 THE CHAIRMAN: We are still on ground 1? We seem to have
4 strayed into a discretion exercise sort of assessment.

5 MR BEARD: We are still in relation to ground 1 because I am
6 also -- I think I have made clear that this is not
7 approaching this matter by considering a forward-looking
8 risk-based -- assessment based on relevant risks that
9 are being identified, which is part of the relevant
10 legal test. So there is a legal flaw here as well.

11 If we go to section 7:

12 "Conclusions and decision to remove the WMO
13 obligation."

14 What we see is:

15 "Access to Sky's key content is important to pay TV
16 retail competition."

17 Then there are references in 7.2 to section 4 and
18 7.3 to section 5. It also goes on to 7.4. Then we get
19 the subheading:

20 "We have considered whether Sky is engaging in
21 practices prejudicial to fair and effective
22 competition."

23 It is not "is or would", it is just "is".

24 There we have, you will note, "Non-supply of key
25 content. Supply on terms which would not enable fair

1 and effective competition", so echoing elements of
2 the concerns articulated in the 2014 document.

3 Then 7.6:

4 "We continue to consider that Sky could, in
5 principle, have incentives to withhold the supply of its
6 key content and to set prices which do not enable fair
7 and effective competition in order to protect its market
8 position. However, on the basis of the available
9 evidence, we consider that Sky is not currently acting
10 on these incentives. In particular, with the exception
11 of YouView, all Sky's main TV competitors have agreed
12 arrangements. We therefore have not identified that Sky
13 is engaging in the practice of non-supply. Furthermore,
14 and given the context of that wide supply, we have not
15 identified that Sky is engaging in a practice of setting
16 terms of supply which prejudice fair and effective
17 competition."

18 This is moving into the pricing and grant-back
19 conditions section there.

20 So when, Mr Chairman, you asked how one reads the
21 relevant terms of 6.37, where they say, "We discuss in
22 section 7 that we expect Sky to continue its supply in
23 its key content widely", in terms of the reasoning in
24 relation to the relevant test, it just isn't there. If
25 we just go on:

1 "We consider it appropriate to remove the WMO
2 obligation."

3 And it seeks to depart from the position that was
4 adopted in December 2012. Then if we go on, at 87, this
5 is where "We expect Sky's key content to be supplied
6 widely on reasonable terms" comes from, so it's after
7 the assessment of the relevant legal test considerations
8 under 3.16:

9 "We expect competition in pay TV to deliver benefits
10 to consumers in the form of choice, innovation and lower
11 prices in order for retailers to be able to compete in
12 pay TV. We have identified the most important content."

13 7.15:

14 "We note Sky's current wholesale supply arrangements
15 to Virgin Media and TalkTalk will remain in place for at
16 least the duration of the agreed agreements. In the
17 case of YouView, if appropriate, and any other retailers
18 seeking supply, we would expect Sky and those retailers
19 to engage willingly, constructively and in a timely
20 manner in such negotiations."

21 So there is an expectation:

22 "We already monitor the pay TV market closely and
23 will continue to do so, in particular with a view to
24 determining whether the potential concerns identified in
25 this statement arise in future. We will continue to

1 monitor the availability and distribution of key sports
2 rights and technological developments, subscriber
3 numbers, and so on, and the importance of particular
4 content subscribers in choosing their pay TV service."

5 There are a couple of points that are worth drawing
6 out here. First of all, the expectation they have is
7 that Sky will engage willingly, constructively and in
8 a timely manner in relation to negotiations, but that
9 does not engage with what the relevant test is, which is
10 what was being summarised in the earlier section in
11 those conclusions, and it does come across as an
12 admonition because at that point it is linked to, "We
13 already monitor the TV market closely". So it then
14 looks like it is a threat on the part of Ofcom that "We
15 will keep these things under review". What's
16 particularly striking is here, "We already monitor the
17 pay TV market closely and will continue to do so in
18 particular with a view to determining whether the
19 potential concerns identified in this statement arise in
20 the future". In other words, that is not what they have
21 been doing here. They have not been thinking about the
22 future at all. This is an exercise in wishful thinking
23 with a degree of supervision being imposed that acts as
24 a threat. But it is not the fulfilment of the relevant
25 test under section 316.

1 One sees this further in 7.16:

2 "Should evidence emerge that Sky was engaging in
3 practices which are prejudicial to fair and effective
4 competition, we will reassess the need for ex ante
5 regulation."

6 One needs to just conjure with that. If it turns
7 out that in due course Sky does engage in practices
8 which are prejudicial to fair and effective competition,
9 we will reassess our position under 316. In other
10 words, if there is a problem actually identified, then
11 we might do something about it, and, in particular, we
12 will discuss whether or not we should impose, one
13 interpolates, licence conditions pursuant to 316, which
14 Ofcom would consider to be part of ex ante regulation:

15 "We would be concerned if there was evidence of Sky
16 withholding its key content from competing retailers.
17 Similarly, we would be concerned if there was evidence
18 of Sky introducing unreasonable terms".

19 So it is only if the actual concerns come to pass
20 that they say they will act. That is what they are
21 saying here. What this reveals is that they just were
22 not considering those risks into the future. But they
23 are also saying that they will do a "wait and see"
24 approach and that that is appropriate. As I have
25 already outlined, what was necessary was for Ofcom to

1 identify what the statutory objective was, which is
2 avoiding the risk of prejudice to fair and effective
3 competition, and then identify what appropriate
4 conditions could be put in place to deal with that.
5 That is not what they are doing here. They are
6 identifying only present practices for their legal
7 assessment purporting to be under 316 and then saying
8 subsequently, "Well, we would expect there to be
9 engagement in the terms of negotiation and, if there
10 isn't, and these risks actually come to fruition, then
11 we will do something about it". But that manifests the
12 error that we are faced with here, because it is not
13 applying the proper statutory approach, it is not
14 applying the precautionary principle and, in those
15 circumstances, it is not engaging with the very real
16 risk of prejudice to fair and effective competition by
17 Sky acting on incentives it has the ability to act on,
18 and Ofcom has recognised this, and instead it is saying,
19 "If it comes to it, we will act on these matters".

20 What we are seeing here is, in essence, Ofcom
21 identifying that there have been a couple of wholesale
22 deals, and that Sky has entered into those wholesale
23 deals, one of which of course was a wholesale deal that
24 was in existence back in 2010, and say that that somehow
25 is key here, but those are only things that are going on

1 now, they are not an analysis of the future. It is
2 difficult to work out what the best analogy is of what
3 it is that Ofcom are doing.

4 THE CHAIRMAN: Why isn't it a state of mind as to what might
5 continue from the present, not an analysis of
6 the future?

7 MR BEARD: If there is an analysis saying, "What is going on
8 now will obtain in the future", then we are not saying
9 you can't take into account present circumstances in
10 your overall analysis, but that is not what is being
11 done here. All that is being said is --

12 THE CHAIRMAN: If you take one of these deals, you say it is
13 in existence now and it is scheduled to go on until 2019
14 and we expect it to go on beyond that. Is that the
15 whole legal test? That is surely looking at the future,
16 in your words?

17 MR BEARD: In relation to the deal continuing up to 2019,
18 that is undoubtedly the truth. We are not there yet.
19 It does apply in relation to those matters. But what it
20 doesn't look at is the risks as they exist if you don't
21 have the WMO in place. In other words, what are the
22 risks of Sky acting on its incentives --

23 THE CHAIRMAN: You're focusing on the risk of other deals
24 not happening --

25 MR BEARD: Or further deals --

1 THE CHAIRMAN: -- because the WMO obligation has been
2 removed?

3 MR BEARD: That's right.

4 THE CHAIRMAN: You're saying Ofcom haven't looked at that?

5 MR BEARD: They haven't looked at that at all.

6 THE CHAIRMAN: Although they are saying they are looking to
7 the future.

8 MR BEARD: What is striking about this is the reference to
9 the future is, "We already monitor the pay TV market
10 closely and will continue to do so in particular with
11 a view to determining whether the potential concerns
12 identified in this statement arise in the future."

13 In other words, they are saying, if the concerns
14 identified come to pass, then we will act. But that is
15 the wrong way around, because if you have identified the
16 risk of concerns coming to pass in future, the statutory
17 test is saying you should put in place conditions to
18 deal with those.

19 THE CHAIRMAN: We may get another view, I suspect.

20 MR BEARD: I'm guessing you may, sir, but we say that is the
21 appropriate approach. What you don't see here is any
22 consideration of an analysis of what the risks are
23 beyond incentive and ability. Now, when you are talking
24 about rational economic operators having incentive and
25 ability to withhold supply or supply on terms that

1 prejudice fair and effective competition, we don't
2 understand on what basis you can then reach an implicit
3 conclusion that there is no real risk there, because
4 that is what is implicitly being done here. There is no
5 real risk -- or there is no risk on Ofcom's own analysis
6 of the legal test such that we should be intervening at
7 all, because we can wait and see. As I say, it is based
8 on the fact that two deals have been done, one of which
9 is a continuation of a deal that was done in 2010, when
10 of course the WMO was put in place and subsequently
11 maintained.

12 In those circumstances, we say that the WMO is
13 clearly following the wrong course. It does depend on
14 a degree of wishful thinking and optimism. Ofcom has
15 recognised that Sky has entered into deals -- has played
16 nicely, so it considers, with two other pay TV parties,
17 Virgin and TalkTalk, all the time whilst it's subject to
18 the WMO. But what it doesn't consider properly is, if
19 the WMO constraint or a proper WMO constraint is removed
20 from Sky, how it will deal with, in particular, BT in
21 these circumstances.

22 So that is why we say that, in relation to the
23 position under, in particular, ground 1, we have
24 a situation where you don't have a proper application of
25 the legal test, which is why we emphasise the law, we

1 don't have a proper analysis of the relevant
2 considerations that are necessary in order to meet that
3 legal test, and furthermore, to the extent that what is
4 being said is, well, our approach is proportionate in
5 all the circumstances because we have a broader
6 discretion, leave aside that word "must" in the legal
7 test, let's not assume it's a mandatory test, let's
8 assume we have a broad discretion, let's assume we
9 assess this on a broader proportionality basis, you just
10 don't see that analysis here at all. There is no
11 reference to proportionality in sections 6 and 7 at all,
12 and it is very difficult to understand how, if you have
13 identified incentive and ability on the part of
14 a rational economic operator to withhold supply, that in
15 the circumstances nonetheless you don't carry out some
16 sort of weighing exercise clearly, particularly when
17 that operator is protesting to you that it will in fact
18 be a willing wholesaler, because at that point one has
19 to ask oneself, "What is the real detriment to
20 maintaining the WMO in those circumstances?", and there
21 is no consideration of that at all. So the WMO which
22 acts as a backstop, it offers the certainty to pay TV
23 rivals that they will get supply of the key channels, or
24 it should do if it is properly constructed and goes
25 beyond Sky Sports 1 and 2, it ensures that those parties

1 have certainty in relation to someone saying, "Yes, yes,
2 we will supply", and yet the story that Ofcom tells is,
3 it's disproportionate to have that in place without any
4 analysis at all. Again, it is a fundamental failing in
5 the legal approach and in the conclusion in relation to
6 this analysis of whether or not the WMO should be
7 removed.

8 We are not standing here saying that regulation is
9 good for its own sake, not at all, nor are we saying
10 that considerations of proportionality should be left to
11 one side. But what we are saying is that, where you're
12 identifying risk, the legal test requires you to do
13 something about it, but even if we were to be wrong on
14 the legal test and Ofcom's broader approach to
15 discretion is appropriate, we do not understand on this
16 basis how it could possibly be said to be
17 disproportionate in the way that Ofcom has suggested it
18 would be.

19 Ofcom says, well, it doesn't matter that we don't
20 actually use the word "proportionality", what we have
21 done is carried out a proper analysis that leads to
22 a proportional outcome. We say that is not what has
23 been carried out here, you have not identified and
24 waived those factors as a proper proportionality
25 analysis should do.

1 I will move more quickly through the other grounds,
2 but when we move to ground 2, we are essentially saying,
3 when we go beyond the relevant legal test and whether or
4 not Ofcom's applied it, us saying, "You plainly haven't
5 on a straight wording and, even if we adopt your broader
6 wording, you haven't applied it correctly". Of course,
7 here we are dealing with broader issues including
8 whether or not there is an error in the exercise of
9 Ofcom's discretion in deciding to withdraw the WMO.

10 What we emphasise in relation to that is that not
11 only has Ofcom wholly failed to carry out an adequate or
12 appropriate assessment on the basis of which it could
13 conclude that regulation was no longer required in order
14 to protect and promote fair and effective competition in
15 pay TV retail, we also say that its approach is not
16 consistent with what it's done before, a relevant factor
17 given the broad provisions of section 3 of the Act, and,
18 in addition, we have emphasised also in relation to
19 ground 2 that it has taken into account a range of
20 irrelevant matters or failed to take relevant matters
21 into account in its consideration.

22 If I can just take those points in turn, looking at
23 the inadequacy of the assessment which Ofcom has carried
24 out here, we have already identified how it hasn't
25 carried out any form of what might be called orthodox

1 competition assessment in order to recognise
2 specifically what the continuing concerns were about
3 retail competition. We know that in 2010 it had reached
4 the view there were significant concerns about retail
5 competition, it stood by that position through
6 litigation defending the WMO until recently. That
7 analysis in 2010 was based on rigorous factual and
8 economic analysis undertaken at the time, what Ofcom
9 itself referred to as an orthodox competition analysis,
10 and what Mr Williams in his witness statement, which is
11 found in N1 or core 1, tab D at page 39, paragraph 95,
12 says -- I won't take you to the statement itself, but it
13 captures what was going on in relation to 2010:

14 "The 2010 pay TV statement was based on a framework
15 which was familiar to me as a former regulator. Ofcom
16 set out its framework at paragraph 3.10, in particular
17 the framework as it relates to pay TV sports channels
18 included: a detailed assessment of the pay TV sector;
19 a market definition exercise and an examination of
20 market power in those markets; an assessment of fair and
21 effective competition; an analysis of consumer detriment
22 arising from the lack of fair and effective competition
23 identified; an assessment of remedies addressed to
24 identify those competition issues."

25 What you would expect in an orthodox competition

1 analysis when you are talking about putting in place
2 measures to prevent prejudice to fair and effective
3 competition.

4 As I say, we are not suggesting that there is only
5 one way to do this, but we do say that Ofcom has gone
6 far too far in its non-orthodox approach. Indeed, in
7 part it has misunderstood what was said by the CAT in
8 relation to the application of section 316, which, as
9 I say, it referred to paragraph 220 in its decision.
10 I said I would come back to that, and if I may I will.

11 The CAT judgment in full is now found in the hand-up
12 H bundle at tab 4. Sorry, in my bundle it is H/5. If
13 I can just pick it up at page 52. There are myriad
14 issues -- well, there are a number of issues raised in
15 this. The emphasis in this judgment was, of course, on
16 what had gone on in negotiation, which of course the
17 Court of Appeal said was not the right approach to be
18 adopted in consideration of these matters.

19 THE CHAIRMAN: I was going to ask you a bit later, but you
20 did say earlier, Mr Beard, that in the CAT judgment in
21 2012 the CAT misdirected itself and looked at the wrong
22 question. I thought the Court of Appeal told us that we
23 had failed to address a question, but I don't think that
24 what we did look at, which was the factual assessment of
25 what Sky had done over the period under consideration,

1 that was not at issue. One of the things we are going
2 to have to establish is what those findings -- what
3 their effect is on these proceedings and what we are to
4 make of them. I don't want too glib a dismissal of
5 the 2012 judgment to creep into the way of talking, if
6 that is all right with you.

7 MR BEARD: That is quite understood. Sir, it is quite right
8 that the emphasis of the Court of Appeal was that by
9 failing to direct itself in relation to the pricing
10 matters, what the CAT had done was not carry out
11 a proper appraisal of the WMO, which then ended up with
12 a remittal back to the CAT which was then effectively
13 left to one side when this further round of consultation
14 and consideration was then opened.

15 THE CHAIRMAN: What we are talking about here is, as
16 a matter of law, sort of assessment section 316.

17 MR BEARD: Yes. We are dealing with something --

18 THE CHAIRMAN: Whether it is orthodox or whether it is
19 chapter 1/chapter 2 or whether it is something else,
20 whether it is sui generis, you are going to come to.

21 MR BEARD: In relation to this, all I am picking up is the
22 approach that was adopted by Ofcom, where it emphasises
23 in 220 in the judgment that it doesn't need to carry out
24 a full market definition exercise and assessment, and it
25 relies on paragraph 155 in this judgment for those

1 purposes.

2 It just is worth picking it up at 52, because this
3 gives the relevant context. This is dealing with the
4 second limb of Sky and the Premier League's challenge to
5 Ofcom's jurisdiction and an argument that Ofcom had
6 failed to adhere to an approach to section 316 based on
7 competition law which Sky and Premier League were saying
8 it was bound to do and were adopting -- I certainly
9 don't want to be pejorative -- a very narrow approach to
10 the way in which 316 should be interpreted, so it is
11 called "The 'competition' ground of appeal". The
12 relevant paragraph relied on by Ofcom is over on
13 page 65:

14 "In our view, the proper approach [to 316] is
15 therefore for Ofcom to apply the language of section 316
16 [which we entirely agree with] and identify practices
17 which are or would be prejudicial to fair and effective
18 competition in the provision of licenced services
19 without having to analyse them specifically by reference
20 to the principles and case law applicable to article 102
21 (or some approximation thereto) in order to establish
22 jurisdiction to act."

23 Now, we are highly in agreement with that. Of
24 course it is right that you are not limited to
25 a 102-type analysis here. Indeed, it is a key part of

1 our analysis that we are dealing with what Ofcom refers
2 to as ex ante regulation and it is a different test:

3 "Neither the language of section 316 nor any other
4 consideration supports the existence of any
5 jurisdictional condition such as that contended for by
6 Sky [or the Premier League]. This of course does not
7 mean that Ofcom's investigation and analysis should be
8 carried out without consideration of those principles.
9 Ofcom must of course have regard to such general
10 competition policy analysis as is applied in many
11 contexts, including the competition rules but also for
12 example in the merger and market investigation regimes
13 under the 2002 Act."

14 Now, if you remember, what Ofcom says in 2.20 is:

15 "We do not agree that in considering the exercise of
16 powers under section 316 of the Act we are required to
17 undertake a market definition and market power analysis
18 in the manner suggested. Indeed, the CAT explicitly
19 rejected this position in its judgment."

20 Well, if it's saying that market definition and
21 market power analyses are limited to the position that
22 you have to carry out under 102, then that might be
23 right, but the CAT is not explicitly rejecting a need
24 for consideration of market definition and market power
25 analysis. What it is saying is, you should apply normal

1 principles of competition analysis.

2 Now, normally, that will involve market definition
3 and market power analysis. Normally, it will involve
4 precisely the sorts of matters that Mr Williams is
5 rightly referring to and which Ofcom did carry out as an
6 analysis under the 2010 approach.

7 Just worth noticing in 156:

8 "In reaching this conclusion, there has been no need
9 or warrant for us to rely on the ministerial statements
10 in Hansard to which we were referred", which talked
11 about the various considerations there. But what we
12 have in this is an emphasis by the CAT on the plain
13 language of 316, which is precisely what we say is the
14 appropriate approach, and a further comment by the CAT
15 that in carrying out the assessment, you should be
16 applying the principles of general competition policy
17 analysis. That is just not what we see.

18 I haven't taken you through each and every element
19 of the WMO. I have taken you to sections 6 and 7 in
20 particular, which are the core conclusions where we say
21 Ofcom is going wrong, but those sections are miles away
22 from any orthodox approach to competition. It is
23 a completely different place that Ofcom has taken itself
24 to.

25 You have, of course, got copies of the 2010 report,

1 which is a vastly different beast in terms of the manner
2 and scope of analysis.

3 So not only do we say that Ofcom is misinterpreting
4 what the CAT was saying there, it is actually operating
5 contrary to reasonable logic when you are trying to
6 analyse what the potential prejudice to fair and
7 effective competition is in a market, and instead it is
8 trying to take shortcuts by reference to these two
9 particular deals. It is not carrying out a proper
10 analysis at all and it has decided to remove existing
11 regulation without that proper competition assessment
12 and trying to draw on inferences from a very narrow
13 factual set of so-called developments. Had it conducted
14 a proper competition assessment, it would have found
15 that retail competition concerns that it had identified
16 back in 2010 remained today and, indeed, if it was
17 taking a consistent approach, that would have been
18 rather instructive as to whether or not it should have
19 removed the WMO.

20 Just for your notes, the witness statements of
21 Mr Petter, which are in N1 at tab B, N2 at tab M and the
22 reply bundle 1 at tab B, and the witness statements of
23 Mr Williams, which are in N1 at tab D, N2 at K, in the
24 reply bundle at D and in the additional bundle at 14,
25 set those matters out, and of course we also have the

1 economic expert reports of Dr Padilla, particularly
2 Dr Padilla's first report, which is at N2, tab I, and
3 his third report in the reply bundle at G. They confirm
4 a lack of any material improvement in retail competition
5 since 2010. On the basis of that detailed analysis,
6 Dr Padilla concluded, and I quote paragraph 2.15 of his
7 first report:

8 "The UK pay TV sector does not appear to be
9 materially more competitive in 2015 than it was in 2010,
10 either at the upstream or the downstream level."

11 That is page 5 of his first report.

12 He also emphasises that the enduring vicious circle
13 affecting any competitors to Sky in respect of
14 the acquisition of key sports rights and the impact this
15 has on rivals' ability to compete with Sky exists and
16 continues to exist and, when he was looking at these
17 matters, it wasn't that Dr Padilla was doing anything
18 radical, he was looking at the absolute basics: numbers
19 of subscribers, market shares, extensive market entry,
20 the extensive persistent market power, switching rates,
21 relative content propositions and the availability of
22 Sky Sports.

23 Ofcom hasn't actually taken issue with this
24 evidence, and it hasn't adduced evidence contradicting
25 it. On the contrary, Ofcom concedes that Sky maintains

1 a strong market position in the wholesaling and retail
2 and sports channels. It has a significant advantage
3 over BT and others when it comes to bidding for sports
4 rights. It has a high share of supply for overall
5 pay TV retailing and Sky may have incumbency advantages
6 in pay TV retailing by reason of barriers to setting up
7 and expanding the pay TV platform.

8 THE CHAIRMAN: Isn't that the question that arises? If
9 Ofcom had done the orthodox analysis that you are asking
10 for, wouldn't it have come out at the same conclusion,
11 which is that Sky had a strong market position and had
12 incentives to limit distribution? It might have been
13 reasoned a different way, but the conclusion would have
14 been the same.

15 MR BEARD: If you are going to decide that, having carried
16 out a detailed analysis of competition analysis in 2010
17 it is appropriate, given the nature and the risks and
18 the conditions of competition that exist in the market,
19 to put in place a WMO, if you are deciding that in fact
20 it is not appropriate to maintain that WMO, it is
21 incumbent on you to consider whether or not in fact
22 those underlying ingredients, the orthodox competition
23 analysis that has been undertaken, has really changed,
24 because, if it hasn't, then the basis for you
25 withdrawing the WMO is not sound, and so what we are

1 saying in relation to ground 2 is, if you haven't
2 carried out that analysis, the reliance on the limited
3 material that you do seek to rely upon, in particular
4 these two new contracts and the fact that BT has won
5 limited rights in certain auctions, does not change the
6 position in terms of an orthodox competition analysis.
7 Therefore, if you were going to unpick that, you needed
8 to go back and revisit it. It manifests the fact that
9 the overall approach to an exercise of discretion that
10 Ofcom is adopting here is wrongly undertaken because it
11 doesn't have the basic support for its conclusions.

12 What we say is that the competition findings, such
13 as they were, by Ofcom were in fact consistent with the
14 need to maintain continuing regulation, and that, in
15 those circumstances, the need to maintain continuing
16 regulation, if you are diverging from it, needs a proper
17 analysis, an orthodox competition analysis.

18 THE CHAIRMAN: Just to be clear on that, if Ofcom were
19 approaching the market anew in 2015, with no existing
20 WMO baggage, if you like, you are not saying that they
21 would necessarily have to look at a full market
22 analysis, market definition, and all the rest of it, the
23 orthodox approach, as you put it, it would be open to
24 them to take the approach they have had and to decide
25 whether or not to impose something like the WMO. What

1 you are saying is, because in 2010 they'd done it
2 differently and the WMO was there, the justification for
3 the removal of the WMO has to be better reasoned.

4 MR BEARD: No. If you are starting completely afresh, as
5 you were in 2010 --

6 THE CHAIRMAN: I know that is fanciful --

7 MR BEARD: I see the point of the counterfactual. If you
8 are approaching things afresh, as they did in 2010, then
9 the appropriate approach is to carry out an orthodox
10 competition analysis as they did in 2010. The idea that
11 you would come along now and say, "Oh, well, we will
12 just look at a couple of deals that have actually
13 been -- at least one of them is one that's a renewal of
14 a previous deal and another one is a transformation from
15 self-retail to wholesale by a relatively small player.
16 In those circumstances, that's enough", we would be
17 aghast at that sort of approach. All I'm saying in
18 relation to the 2010 comparison is, they actually did
19 the proper analysis in 2010, and now they are saying,
20 "No, no, no, we are going to change our position, but we
21 don't need to revisit that".

22 I'm not saying that if you approached it afresh you
23 could just ignore orthodox competition analysis.

24 I don't accept that.

25 Beyond the failure to carry out a proper analysis

1 and identify what really constituted fair and effective
2 competition and, therefore, what prejudice -- what
3 actions or activities on the part of Sky could prejudice
4 that fair and effective competition and whether or not
5 there were real risks of those coming to pass, rather
6 than doing that, they have adopted an approach that's
7 not consistent with their approach in 2010, consistency
8 in approach being a matter that's emphasised in
9 section 3 in the Communications Act.

10 But further than that, the matters that they have
11 relied upon involve consideration of irrelevant issues
12 and failing to take into account relevant matters.

13 The key issue that we are thinking about in relation
14 to all of this is whether or not there is real retail --
15 fair and effective retail competition, and whether the
16 actions of Sky do or could prejudice that. I have
17 already referred to one of the factors that they rely
18 upon which damages the overall analysis they carry out,
19 which is reference to supply by Sky, distribution by
20 Sky, being wide in circumstances where much of that
21 distribution is by way of self-retail, and that
22 certainly doesn't change the position in relation to
23 whether or not there's an amelioration of the conditions
24 in relation to retail competition which had been
25 identified previously as being highly problematic.

1 Indeed, back in 2010, the 2010 statement -- I just give
2 this reference for your note, at paragraph 7.226, and
3 that is in bundle G in my numbering. I'm not sure
4 whether the numbering of the bundles will be quite the
5 same for you. Tab 1, page 365. There it was said by
6 Ofcom:

7 "We continue to take the view that Sky retailing
8 widely on all platforms would not satisfactorily resolve
9 our concerns about restricted distribution of Sky's core
10 premium channels.

11 "Put most simply, it would not ensure fair and
12 effective competition between retailers on different
13 platforms, delivering choice, innovation and competitive
14 prices to consumers, as there would only be one retailer
15 of these important channels across platforms."

16 They go on and spell those matters out more fully in
17 226. Indeed, this was a point, as I highlighted, that
18 was reiterated in the December consultation document in
19 2014 -- for your note, that was at paragraph 7.4 -- and
20 the reality is, and as BT's evidence shows, any increase
21 in availability of Sky Sports channels to consumers is
22 really due to increased self-retail, and, indeed, what
23 we see in Ofcom's responses is on this emphasis on the
24 range of distribution of Sky, but by conflating
25 distribution and competition, as I highlighted at the

1 outset, Ofcom is making an error in that regard.
2 Self-retail, as it said back in 2010 itself, doesn't
3 increase retail competition, certainly not in the way
4 that wholesale supply does.

5 The second issue that it then relies upon are these
6 two wholesale deals between Sky and Virgin Media and
7 TalkTalk, and we say that the emphasis on these two
8 wholesale deals is misplaced and does not give rise to
9 a basis for Ofcom exercising its discretion as it has
10 done.

11 First, this emphasis ignores the fact that Sky
12 already had a wholesale deal with Virgin Media prior to
13 2010 and, therefore, the only new party with whom Sky
14 has agreed wholesale terms outside the direct auspices
15 of the WMO remedy is TalkTalk.

16 Second, Ofcom failed to recognise the importance of
17 the fact that these commercial agreements were reached
18 only against the backdrop of the WMO. It failed to
19 undertake any analysis of what wholesale supply
20 arrangements might look like in the absence of
21 regulation or what factors could lead to such supply
22 arrangements being restricted or cut off without the WMO
23 obligation remaining in place and, if so, if it wasn't
24 to be cut off, what sort of terms would be offered.
25 Ofcom ignored the fact that concerns were raised about

1 rivals' ability to obtain reasonable terms absent the
2 WMO.

3 Thirdly, on the facts, no such actual or likely
4 improvement in retail competition that would be
5 important in this regard is apparent from the evidence.
6 The objective evidence suggests that both Virgin Media
7 and TalkTalk remain ineffective retail competitors
8 notwithstanding their wholesale access to Sky Sports
9 channels, with no indication that this is likely to
10 change in the foreseeable future. Ofcom didn't suggest
11 the contrary in the WMO statement and has not challenged
12 any of the relevant evidence.

13 Fourthly, Ofcom has failed to take into account that
14 both of the parties supplied by Sky on wholesale
15 commercial terms only compete with Sky to a more limited
16 extent than BT. Unlike BT, Virgin Media and TalkTalk
17 don't bid against Sky for sports rights but only compete
18 against Sky at the retail level itself. BT, on the
19 other hand, which is the only competitor that is also in
20 direct upstream competition with Sky for sports rights,
21 has been required to rely on the WMO obligation to gain
22 access to a subset of the sports channels. As Mr Petter
23 notes in his evidence, Sky doesn't want to see BT grow
24 its base of premium sports subscribers with a high
25 willingness to pay for sports channels and hence become

1 a stronger bidder for sports rights against Sky itself.

2 So despite recognising Sky's differing incentives in
3 relation to BT in relation to its December consultation
4 document, in the WMO statement Ofcom effectively ignored
5 the issue.

6 The third point that Ofcom does touch on, but again
7 is not material to any rational exercise of discretion,
8 or correct exercise of discretion, is reference to BT's
9 investments in sports rights, because Ofcom also touches
10 on the fact that BT invested in sports rights and says
11 this is a relevant development since 2010, and it relies
12 on it in its defence. But Ofcom has failed to reflect
13 the systematic impact of bidding advantage that Sky
14 continues to enjoy and, in particular, it didn't
15 consider the position of rational operators bidding for
16 sports rights against Sky, given the latter's much
17 larger subscriber base with a willingness to pay for
18 sports channels, better ability to monetise investments
19 and existing large holdings of key sports rights,
20 a point that is emphasised by Mr Petter in his evidence.
21 That is, for your note, in bundle N1 at tab B and the
22 relevant paragraphs are 90 through to 101.

23 So in relation to ground 2, we are identifying that,
24 even when we go beyond the legal test and we look at how
25 you assess whether or not there is a real risk to

1 prejudice of fair and effective competition by Sky,
2 Ofcom hasn't carried out a proper analysis of whether or
3 not there is fair and effective retail competition and,
4 in referring to what it refers to as relevant
5 development since 2010, has identified matters, in
6 particular the wholesale arrangements with Virgin and
7 TalkTalk, which do not provide a good basis for
8 diverging from the 2010 approach or indeed refusing to
9 put in place a proper WMO remedy in the circumstances.

10 So that takes me through ground 2 and into ground 3.

11 In relation to ground 3, I will come back to this in
12 closing, but just for the moment I can make a simple
13 point: one particular feature of Ofcom's failure to
14 carry out a proper analysis of what is fair and
15 effective competition is a failure to work out what the
16 relevant products at issue are. Ofcom failed to carry
17 out an assessment of retail competition in relation to
18 the actual product bought by pay TV consumers and sold
19 by pay TV retailers, namely, channels and packages of
20 channels, instead, Ofcom focused on ranking sporting
21 events carried on those channels and found that live
22 Premier League content is the most important.

23 As Mr Petter explains in his witness statement,
24 again in bundle N1, tab B, at page 57, and this is
25 paragraphs 107 to 133, while the importance of live

1 Premier League content is not in dispute, it doesn't
2 shed light on the issues relevant to Ofcom's review, it
3 is the attractiveness of the overall Sky Sports
4 proposition, the products actually bought, marketed,
5 sold on the retail market, that matters for competition
6 purposes. As BT has made clear in its reply, contrary
7 to the suggestions by Ofcom and Sky, this ground isn't
8 just concerned with design of the remedy that Ofcom
9 decided not to impose, it is also concerned with
10 a deficiency in Ofcom's methodology which undermined its
11 analysis and its ultimate conclusion in respect of
12 the exercise of its duties under section 316.

13 So more specifically, failed to carry out an
14 assessment by reference to relevant products as part of
15 its failure to carry out an assessment consistent with
16 competition policy principles and Ofcom relied on
17 a somewhat contrary victory justification for its
18 approach. It didn't consider the relevant economic
19 product properly because it found that providers could
20 simply buy other sports rights and assemble them into
21 competing propositions, but it made that justification
22 at the same time as it was also concluding that Sky
23 maintained significant bidding advantages for sports
24 rights. So there is an inconsistency in even the
25 justification for it not carrying out this approach.

1 So Sky not only illustrates the important failure by
2 Ofcom to carry out a proper economic analysis, it also
3 highlights contradictions in its approach. So that is
4 ground 3.

5 When we move to ground 4, ground 4 is about pricing,
6 and it is simply astonishing what Ofcom have done here,
7 or, rather, what they have not done, because the problem
8 with pricing is that Sky can effectively margin squeeze
9 people with wholesale pricing. It is very simple: if
10 the wholesale price that competitors have to pay for
11 Sky Sports channels is so high there is no chance of
12 a competitor putting together a retail proposition
13 priced at a level that will entice premium sports
14 subscriber away from Sky, then from the point of view of
15 promoting retail competition and ensuring that the
16 position of Sky will not prejudice fair and effective
17 competition, you could end up with a situation where,
18 due to the pricing, there may as well be no wholesale
19 supply at all. It can price at a wholesale level
20 leaving retailers without any real scope to compete.

21 But to say Ofcom's analysis in this area is
22 superficial is simply an understatement. Let's start
23 with two very, very basic points. First of all, did
24 Ofcom carry out a forward-looking approach in relation
25 to considering price? It did not. All that it did was

1 look at the existence of commercial deals with Virgin
2 and TalkTalk. It dismissed evidence that BT had
3 submitted, substantial evidence that BT had submitted,
4 and its conclusion -- I will come back to this -- at
5 6.64 in the WMO statement was:

6 "We do not consider Sky's current commercially
7 agreed wholesale pricing outside the WMO obligation is
8 at a level which prejudices fair and effective
9 competition."

10 But just going back to the points that were made
11 about the legal tests, and this really does pick up,
12 sir, your point about, does the ground 1 suffuse the
13 other grounds, when you are asking yourself, as
14 a regulator, do we need to put in place a condition to
15 ensure that Sky does not engage in a practice that could
16 prejudice fair and effective competition, and you're
17 thinking about the pricing practice, you have to not
18 only think about what the pricing is in particular
19 commercial deals that have been undertaken, but what the
20 incentives to price in a particular way are and the
21 ability of Sky to price in a particular way are, such
22 that they could prejudice fair and effective
23 competition.

24 All that Ofcom has really done here is say, well, we
25 don't consider Sky's current commercially agreed

1 we?

2 MR BEARD: No, I'm putting in it hypothetical terms.

3 THE CHAIRMAN: We presumably would not want to diverge from
4 our colleague's finding in relation to Virgin Media's
5 pricing on the rate card.

6 MR BEARD: What you needed to do in relation to these
7 matters is carry out a proper analysis.

8 THE CHAIRMAN: I was thinking of what we will do.

9 MR BEARD: Yes, sorry, what Ofcom had to do was carry out
10 a proper analysis of this pricing. That is what they
11 have not done here. Nowhere do they seek to consider
12 whether either the terms that are currently commercially
13 agreed or whatever terms they thought might be agreed,
14 given Sky's incentives and ability, would mean that
15 there was fair and effective competition. But we didn't
16 leave it just at that. BT has actually provided the
17 best evidence it could that there was a real problem
18 here, and Ofcom has essentially just waved it away. In
19 its decision, what we see is it dismissing BT's evidence
20 on the basis of the fact that, for instance, it's based
21 on BT's numbers. But of course those are the only
22 numbers that BT could possibly have.

23 The approach adopted here is, of course, in stark
24 contrast to the approach adopted in 2010. Back in 2010,
25 Ofcom did recognise how you have to think about these

1 things, how you have to do some sort of pricing analysis
2 in order to reach conclusions about whether actual or
3 potential pricing arrangements, given incentives and
4 ability, could be such as to prejudice fair and
5 effective competition, and there just is not any
6 economic or financial modelling by Ofcom in relation to
7 these matters, nor indeed has it taken even the most
8 basic limited steps to investigate pricing concerns such
9 as asking market participants to provide information as
10 to their margins or even published anything that BT
11 submitted on pricing. Again, as I say, this is in stark
12 contrast to the rigorous approach that was adopted in
13 2010 in relation to these matters.

14 The fact that Sky is willing to enter into, and has
15 entered into, some commercial supply arrangements simply
16 doesn't tell you whether the current or prospective
17 terms of supply are, or risk being, prejudicial to fair
18 and effective competition. Ofcom just didn't try to
19 work that out.

20 THE CHAIRMAN: So when they say they have undertaken
21 a careful appraisal of BT's evidence --

22 MR BEARD: We say it is not. We are saying they didn't
23 carry out a careful appraisal. I am going to come back
24 after the short adjournment to look at the particular
25 passages that they refer to in relation to these issues,

1 but, as I say, what is emphasised, apart from the
2 dismissal of BT evidence, is the two wholesale supply
3 arrangements, and we say that is a completely
4 unsatisfactory basis on which to conclude that wholesale
5 pricing by Sky is not, and would not be, prejudicial to
6 fair and effective competition, and I just briefly
7 highlight the reasons.

8 First of all, contrary to Ofcom's assumption,
9 whatever the terms of those deals might be, it doesn't
10 answer the question whether those terms actually permit
11 fair and effective competition.

12 [redacted]xx
13 xxx
14 xxx
15 xxx. As Ofcom itself
16 has previously conceded, agreements concluded against
17 the backdrop of the WMO are not a reliable indicator of
18 what might happen absent regulation.

19 Fourthly, Ofcom's purported consultation of
20 the industry stakeholders on these pricing issues, as
21 I have already touched upon, was procedurally flawed.

22 Fifthly, the objective evidence suggests that, in
23 practice, Virgin and TalkTalk are ineffective retail
24 competitors, notwithstanding their wholesale access to
25 Sky Sports channels, which calls into question whether

1 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx really does
2 enable fair and effective competition.

3 We have dealt with those issues in particular in our
4 skeleton at paragraphs 84 to 113. I will just pause
5 there, given the time, if I may.

6 THE CHAIRMAN: Thank you, Mr Beard. Could you, over lunch,
7 perhaps, just consider clarifying for us a point of
8 information. You have referred on a number of occasions
9 to the backdrop of the WMO, "against the backdrop of
10 the WMO", and so on. One question of precision is the
11 actual status of the WMO obligation after the CAT's
12 judgment and up to the time of its removal as
13 a condition from Sky's licence. It was sort of
14 suspended, wasn't it, but available on application?

15 MR BEARD: I will come back, because there were different
16 positions at different times.

17 THE CHAIRMAN: Okay. Thank you. 2.00 pm.

18 (1.03 pm)

19 (The short adjournment)

20 (2.00 pm)

21 MR BEARD: Just picking up a couple of questions from before
22 the short adjournment, in relation to the position in
23 respect of Virgin, rather than going into it in detail
24 now, it may be something to pick up later, but can
25 I refer the tribunal to paragraphs 13 and 95(c) in our

1 reply, which set out the position in relation to the
2 value, weight and accuracy of the findings in relation
3 to Virgin that were made by the CAT and the status of
4 those following on from the Court of Appeal decision.

5 THE CHAIRMAN: We will study it at our leisure.

6 MR BEARD: The other point that I think was raised was about
7 the extent to which the WMO had been in place throughout
8 the relevant period, and I think the answer was, yes, it
9 was, ever since the initial appeal was brought against
10 the 2010 decision. There were, obviously, skirmishes in
11 the CAT about this. The scope of the relevant interim
12 relief that was put in place was limited to participants
13 in the proceedings or those that specifically applied --
14 and people did apply. There were also arguments further
15 down the line about the scope of the WMO. In
16 particular, it had been designed to cover BT in relation
17 to DTT, digital terrestrial television. It therefore
18 covered Cardinal and YouView but not in relation to, in
19 Sky's view, IPTV. That was something that therefore had
20 to come before the CAT for clarification, which is
21 a judgment given by Mr Justice Roth that you have in the
22 bundles. I don't know if that, for the moment, covers
23 the answer to your question, but WMO has been in place.

24 THE CHAIRMAN: That will take us through the afternoon,
25 Mr Beard.

1 MR BEARD: I'm sure a more detailed chronology of the WMO
2 can be provided, but I think the simple answer is it's
3 been in place all the time.

4 Before the short adjournment, I was dealing with
5 ground 4 and, in particular, picking up the emphasis
6 that the analysis on pricing has on the two wholesale
7 deals with TalkTalk and Virgin Media, and I was running
8 through those five points, why it was that those two
9 deals weren't instructive in the way that Ofcom sought
10 to find them as such.

11 Just for ease, and perhaps speed, if the tribunal
12 could take up the additional bundle at tab 16, rather
13 than going through it in detail, I am just going to
14 direct the tribunal to where we deal with the five
15 points in our skeleton argument. We start at page 28.
16 This is under the heading "Wholesale deals with TalkTalk
17 and Virgin". Before the short adjournment, I set out in
18 summary, and without, I hope, referring to any
19 confidential information, the points at 85(a) to (e).
20 The first of those is then dealt with at paragraph 87
21 through to 93, which is the fact that the terms --
22 contrary to Ofcom's assumption, the fact of the terms of
23 those deals doesn't answer the question whether those
24 terms, or indeed any other terms, permit fair and
25 effective competition.

1 conclusion in any event, why does it need to carry out
2 an orthodox competition analysis or any form of
3 competition analysis if it's reached those conclusions?

4 THE CHAIRMAN: I didn't say "any form of competition
5 analysis".

6 MR BEARD: I'm sorry, I only qualify "orthodox" because what
7 we are talking about is the application of competition
8 policy principles, and that sort of orthodoxy.

9 THE CHAIRMAN: I will see what point you are going to make
10 and come back on it.

11 MR BEARD: There are two answers. One, if that is the
12 conclusion that is being reached on the basis of
13 the material, then there isn't good reason to diverge
14 from it and afford a different approach to the WMO as
15 compared with what had been done previously.

16 Insofar as it is diverging, it is worth bearing in
17 mind that the reason why, in 2010, there was this
18 extensive consideration of what the state of retail
19 competition was was because, without that sort of
20 assessment, working out what the problem is and what
21 remedy is required is inevitably difficult. Indeed, you
22 need that competition analysis to decide that there is
23 a problem and that a remedy is required.

24 If, on the other hand, at this stage you are saying,
25 "Well, there is a continuing problem with retail

1 competition, but I am not going to carry out the
2 exercise of maintaining the remedy", that is going to
3 need very clear and compelling reasoning. Instead, what
4 we say would be appropriate is that you should review
5 whether or not there have been changes to the conditions
6 of retail competition, and, indeed, we have put in
7 evidence making clear that there have not been material
8 changes to the conditions of retail competition. If you
9 reach the conclusion that there are problems with the
10 conditions of retail competition, then in those
11 circumstances, the rationale that leads you to put in
12 place a remedy informing WMO to those problems remains.

13 That is why we say it was appropriate before you
14 took that away to consider the proper approach to retail
15 competition in all the circumstances, and that is not
16 what was done here. As we have said, you do have
17 evidence, in particular from Dr Padilla, talking about
18 why it is that retail competition hasn't moved on.

19 It might, I suppose, be easily illustrated. We have
20 taken some of the numbers from Ofcom's own statement in
21 the WMO, and one can find this in the second hand-up
22 bundle at tab 13.

23 THE CHAIRMAN: The one that says "Contains confidential
24 information"?

25 MR BEARD: Yes. I am not going to be referring to numbers.

1 We have actually marked it up so that the consistent
2 marking as to confidentiality appears on it. On the
3 first bar chart, the blue lines are indicative -- the
4 blue outline is not part of the bar chart, it is merely
5 an indication of Sky confidentiality.

6 What this is doing is simply taking the numbers in
7 the WMO statements at 3.1 and representing them
8 graphically. In 2010 it is said there is a real problem
9 with retail competition, in 2015 not. Yet the changes
10 we see, even on Ofcom's numbers, are remarkably limited.

11 THE CHAIRMAN: Do they actually say there is not a problem
12 with retail competition or whether they might address it
13 in a different way?

14 MR BEARD: They don't properly grapple with the significance
15 of the fact that they can't avoid the conclusion that
16 there is a continuing problem with retail competition.
17 They then say, "Because we haven't carried out any
18 analysis, we will look at these other bits and pieces",
19 the Virgin and TalkTalk wholesale deals, "and that's
20 enough". The point we are taking is, what you are doing
21 is effectively sidelining what is the fundamental
22 appropriate analysis here, and instead circumventing
23 that analysis, circumventing the approach that was
24 required in 2010 that would lead you to a proper
25 conclusion that you needed a remedy, and grabbing on to

1 fragments of material and saying, "This is enough
2 evidence".

3 This is a homeopathic approach to evidential
4 consideration rather than a substantive one in relation
5 to these sorts of serious competition issues.

6 So you have the Ofcom subscriber numbers and then
7 the second chart is what we have referred to as
8 corrected subscriber numbers, which deal with matters
9 that BT has highlighted as to why it is the numbers in
10 the Ofcom table are not fully and accurately
11 representative.

12 The first variation -- and they are all footnoted
13 here -- is in relation to Sky's numbers, they ensure
14 that it's like for like in relation to the inclusion of
15 Republic of Ireland figures and also dealing with the
16 inclusion of NOW TV, where Sky sells a full package of
17 Sky TV, and then in relation to the TalkTalk numbers,
18 the central difference is that point that I have
19 highlighted already in relation to the difference
20 between subscribers and customers, and the same is true
21 in relation to variation in the BT figures.

22 That just brings home the point about retail
23 competition and the fact that in 2010 the detailed
24 analysis said there was a problem, you needed
25 a solution, the WMO should be applied. In 2015, you

1 have detailed evidence being submitted that there is
2 a continuing problem. You can see that those tables
3 illustrate in rather simple form that there is
4 a continuing problem with retail competition, and yet
5 you decide, nonetheless, that you are going to remove
6 that remedy without carrying out a more substantial
7 analysis of the conditions of competition at all.

8 Ofcom's plea that it didn't have the relevant
9 evidence to carry this out is, of course, somewhat
10 self-serving. It had the powers to ask all of
11 the relevant parties for information on margins and
12 costs. Indeed, it could have done this by incremental
13 stages, asking for certain pieces of information that
14 were not necessarily unduly onerous, either for the
15 parties to provide or for Ofcom to provide, that could
16 then have given it a sense of what sort of further steps
17 it should have taken. It didn't do any of that. So you
18 have the remarkable situation of a pricing analysis with
19 no consideration of pricing and margins. We say that is
20 fundamentally wrong.

21 The one piece of evidence of course that they did
22 have is the BT analysis that has been provided, and we
23 pick that up after our comments at 101 about the
24 differences between BT and other pay TV rivals. We pick
25 that up at paragraph 103 in the skeleton argument.

1 Mr Harman has provided evidence in relation to the BT
2 pricing analysis, and what BT sought to assess was the
3 margin that's necessary in order for a pay TV retailer
4 with a smaller scale than Sky to be able to compete.
5 Not a radical piece of analysis.

6 Indeed, so unimaginative, it was essentially copying
7 what had been done in 2010. It was following the same
8 methodology. But obviously the 2010 methodology was
9 applied by Ofcom, who could ask parties, and in
10 particular Sky, for their numbers, their costs data, and
11 so on. So what BT had was only its own material in
12 relation to that. It doesn't have rivals' costs and
13 margin data, inevitably. So it used the model and what
14 it tried to do was take information that it had and use
15 it as best it could to try and analyse whether or not
16 a pay TV retailer with a smaller scale than Sky would be
17 able to compete, and it was focusing in those
18 circumstances on rate card prices.

19 What Mr Harman does is look at that analysis by BT
20 and says, that was a reasonable starting point. The
21 analysis shows that in the case of a stand-alone pay TV
22 retailer, [Redacted Section].

23 So what BT was trying to do was say, look, [Redacted
24 Section]. We will take the methodology you used
25 previously. We will use the only numbers we possibly

1 can. We will get someone independent to talk about
2 whether or not we are doing something sensible and
3 [Redacted Section]. BT constantly emphasised that it was
4 imperative that Ofcom itself conducted its own detailed
5 financial economic modelling because only Ofcom was in
6 a position to request access to Sky's cost data and, at
7 a smaller scale, pay TV retailers. BT's analysis, as
8 I say, despite its limitations, clearly pointed to the
9 need for that further work.

10 Now, in response, BT have now submitted a statement
11 from Mr Matthew, who tries to put forward all sorts of
12 new arguments critiquing BT's analysis and the work of
13 Mr Harman, but Mr Harman's report explained why these
14 criticisms are both unwarranted and insufficient to
15 dispense with BT's modelling, and we have addressed each
16 of those criticisms in our pleadings and evidence, and
17 we will show in due course by reference to that
18 particular evidence that those criticisms are not well
19 founded. BT's evidence and submissions did support the
20 view that there was a real problem with Sky's wholesale
21 pricing that needed to be properly examined, and so,
22 when we turn back to the WMO and look at how that is
23 dealt with, if we could, that is then, in my version,
24 core bundle 2 at tab V, or the defendant's bundle, if
25 you are using that, starting at paragraph 6.58. We pick

1 it up at 6.58. The preceding paragraphs I tried to
2 cover briefly by reference to the skeleton argument:

3 "We have reviewed the modelling exercise submitted
4 by BT. We note in advance it is difficult to determine
5 what the wholesale price of Sky Sports channels in
6 respect of BT's YouView platform would be in the absence
7 of regulation."

8 We say, yes, absolutely that is true, but that is
9 not a reason for giving up or considering there's not
10 a problem here:

11 "The prices which BT is currently paying result from
12 BT being granted the benefit of the WMO in respect of
13 YouView and it is by no means certain that those
14 wholesale charges would continue in the absence of WMO
15 obligation."

16 Then at 6.59:

17 "We consider there are a number of methodological
18 issues with BT's submission. It has attempted to
19 replicate the approach adopted in the 2010 statement but
20 it then tries to make adjustments for the scale
21 advantage that Sky had which we considered were
22 unmatchable at the time by stand-alone entrants. The
23 approach to those adjustments was informed by market
24 conditions at the time."

25 Well, no criticism of carrying out that sort of

1 analysis:

2 "However, if we were to undertake a new price
3 squeeze analysis, we would need to consider what
4 adjustments were now appropriate in the light of current
5 market circumstances, for example, emergence of
6 competing providers offering triple-play products with
7 their own advantages", it says.

8 If it is saying, "Yes, in order to work out whether
9 there's a pricing problem, you should carry out
10 a pricing analysis", we say, absolutely Amen to that.
11 Would you need to consider how the adjustments are done?
12 We entirely accept that too. We have done the best that
13 we can. This is not a real criticism of BT because BT
14 could do no more in relation to this.

15 6.60:

16 "An evaluation of whether Sky was imposing a price
17 squeeze would likely focus on whether Sky's retail
18 prices were sufficient to cover Sky's retail costs
19 potentially with adjustments."

20 Again, we are not disputing that.

21 If we go over the page to 6.61, this is criticising
22 BT on its own terms:

23 "Even on its own terms and addressing methodological
24 issues, there are reasons to believe that BT's model
25 overstates the scale of any potential price squeeze.

1 BT's modelling focuses on a pay-TV-only customer, but in
2 practice, all of BT's pay TV customers are triple-play."

3 There are two points to make here. The first is
4 that when you are considering a margin squeeze analysis
5 in relation to pay TV competition, what you are doing
6 and what was being done in 2010 was considering the
7 position of a new entrant, because what you are
8 interested in is competition in the pay TV market. So
9 this criticism is in fact unfounded. Yes, BT used its
10 own numbers, but what BT was trying to do was carry out
11 the 2010 methodology focusing on a new entrant pay TV
12 party, not the particular characterisations of BT
13 customers. So that criticism is in fact wrong.

14 But it gets worse when you read the confidential
15 material at the end of that. In mine it is in a red
16 box.

17 What we are saying is, there are very serious
18 concerns here, on the best material we can put forward.

19 Then, if you look at the next sentence, that's again
20 confidential but doesn't diverge from the point that we
21 are making. Then the third sentence is really just
22 irrelevant, that final sentence, to these critiques,
23 given what has previously been said and what this
24 exercise is about. I won't say more on it because it is
25 confidential.

1 Then we get to 6.62:

2 "In December 2014 consultation we identified terms
3 of Sky's potential practice of concern and sought
4 evidence to determine whether or not there were
5 indications of a concern with respect to this practice
6 such as to warrant continued regulation."

7 What it should have been saying there is whether or
8 not there were concerns that there would be a prejudice
9 to fair and effective competition such that the
10 condition was being put in place.

11 If we just go on through that paragraph, starting at
12 the top of the next page:

13 "We do not consider that the analysis which BT
14 subsequently provided provides sufficient grounds to
15 demonstrate that Sky's wholesale pricing amounts to
16 a practice which is prejudicial to fair and effective
17 competition, particularly given the context of existing
18 supply arrangements."

19 Just take that first part of the sentence. How on
20 earth could BT ever demonstrate that? Ofcom have set
21 a totally unrealistic and legally incoherent test here.

22 Then, throwing in at the end, "particularly in the
23 context of the current commercial arrangements" doesn't
24 advance matters, because that is not telling you how you
25 should carry out that sort of margin squeeze test.

1 So the problem here is Ofcom's failure to carry out
2 any analysis of its own that would enable it to answer
3 the question it needed to answer 316, and which it had
4 previously, itself, identified as a relevant concern,
5 namely, whether Sky's wholesale pricing now or in the
6 future was at risk of prejudicing fair and effective
7 competition. It was one it wholly failed properly to
8 deal with.

9 With that, I will then move to ground 5. This
10 ground, again, concerns a failure by Ofcom to look
11 properly at terms of supply being offered by Sky in
12 determining whether those terms are or could be
13 prejudicial to fair and effective competition. There
14 has been a certain amount of suggestion that BT has been
15 shifting its ground on this point and Ofcom or Sky have
16 been confused or unclear about what we are complaining
17 about. In reality, the conduct complained about is
18 really quite clear, and it was clear to Ofcom: the
19 conduct in question arises when Sky, which has market
20 power in pay TV at both the wholesale and retail levels,
21 has an input that's essential for other pay TV retailers
22 to compete, its sports channels, and refuses supply of
23 that essential input unless it receives supply of
24 a non-essential input, such as BT's sports channels. It
25 is this element of conditionality or compulsion on the

1 part of the undertaking having market power and
2 possessing the essential input that's so pernicious.

3 Now, as we have said in our skeleton at
4 paragraphs 117 to 118, it leaves the competing pay TV
5 retailer in a wholly invidious position. It must either
6 forgo wholesale supply of an input which is essential,
7 or, in order to obtain that essential input, it must
8 relinquish the benefits of its own investment in sports
9 rights, thereby losing any means by which to
10 differentiate its pay TV offering on this basis or to
11 seek to close the competitive gap over the longer term
12 between itself and the undertaking with market power.
13 There is just nothing surprising about BT's position on
14 this. What is surprising is Ofcom's.

15 If we just take a step back and look at the mischief
16 we have focused on, we are considering here whether
17 there is a real risk that Sky could impose a condition,
18 terms, or is imposing a condition or terms, which could
19 prejudice fair and effective competition. This sort of
20 requirement that -- Ofcom and Sky like to refer to it in
21 the soft terms of reciprocity, because reciprocity is
22 normally a friendly idea, an idea of coming together and
23 sharing, but actually we are dealing with something much
24 more invidious.

25 It is not competition law rocket science. You can

1 look at article 102, abuse of dominance. Dominant
2 undertakings can't impose extraneous requirements on
3 supply deals. So it is very clear that there is a risk
4 of prejudice to competition here. Really, the only
5 answer that Ofcom has is saying this grant-back
6 condition is a form of reciprocity and that BT at times
7 had contemplated reciprocity when it was talking to Sky.

8 But there are two key points here. The fact that BT
9 might contemplate any sort of reciprocity in negotiation
10 doesn't mean that a dominant entity should be entitled
11 to use its key channels as a lever to obtain that deal.
12 So Ofcom haven't focused on the right question again.

13 Secondly, as I say, Ofcom sought to blur the lines
14 here because it knew full well that the reciprocity
15 concern was about the reciprocal supply of sports
16 channels, not some broader notion of reciprocity that we
17 are talking about. One can see that, for example, in
18 the second consultation document of July 2015, in
19 particular at paragraph 2.2. I will provide the bundle
20 reference in just a second. It is core bundle 2 at
21 tab R. If we just go to page 3, and point 2.2, you will
22 see what the nature of the consultation is. There is no
23 real complication here.

24 THE CHAIRMAN: 2.2, "Reciprocal supply of key content"?

25 MR BEARD: Yes:

1 "In this consultation we invite further submissions
2 on whether Sky sitting on a reciprocal supply of key
3 content as a condition of supply for Sky Sports is
4 a term of supply that would prejudice fair and effective
5 competition."

6 So it's focusing there on sports issues. Then it
7 talks about the fact here that the reciprocal supply is
8 referring to, at 2.3, BT and Sky entering into the
9 commercial negotiations and talking about BT wholesaling
10 its BT Sports channels to Sky for retail on Sky
11 satellite platform.

12 But the key issue here is, of course, that what is
13 being asked about is whether or not the existence of, or
14 the prospect of, a requirement of a grant-back condition
15 in relation to sports rights risks prejudicing fair and
16 effective competition. The fact that there could be
17 other deals that might in due course be done, or in fact
18 not done, in relation to other cross-selling between the
19 parties doesn't change the question whether, in relation
20 to these key inputs, in other words, the Sky Sports
21 channels, requiring provision by another party of its
22 sports channels prejudices fair and effective
23 competition. Of course, a properly formulated WMO deals
24 with that problem because it leaves the parties open to
25 have a general discussion about whether or not there

1 should be any cross-selling, but it means that the
2 dominant undertaking can't ever threaten to withhold the
3 key inputs. Of course, this was a matter that was
4 picked up by the president of the tribunal in his
5 judgment in 2014 which can be found in the authorities
6 bundle at tab 7.

7 This is the interim relief application judgment with
8 various of those here involved in it. We turn on to
9 paragraph 35:

10 "In the unsuccessful negotiations between BT and Sky
11 for the supply of Sky Sports 1 and 2, Sky made it
12 condition for agreeing to such supply that BT would
13 reciprocally supply its sports channels by wholesale to
14 Sky. BT refused such a condition."

15 Then if we go on to 67, you will see what is being
16 considered there:

17 "The main argument against making Sky Sports 1 and 2
18 available to BT is that, by reason of BT's acquisition
19 of the valuable football rights, BT has now become
20 a much more formidable competitor."

21 And he considers these factors. Starting at the
22 bottom of the page:

23 "I do not think it is any answer to say that BT
24 could obtain Sky Sports 1 and 2 if only it were prepared
25 to offer reciprocal supply to Sky of BT sport channels.

1 BT spent some 1.5 billion acquiring football
2 broadcasting rights in order to improve its position on
3 the market and I do not see that BT should be required
4 in effect to deprive itself of the competitive gain from
5 that investment in order to achieve the benefit of
6 the WMO remedy ordered by Ofcom."

7 So we are not talking about something that wasn't
8 recognised. We are not talking about something --

9 THE CHAIRMAN: Sorry, what conclusion are you asking us to
10 draw from that?

11 MR BEARD: I'm sorry, there are two things to draw from
12 this. One is the fact that it is clear what reciprocity
13 discussions really were focused on. We have referred to
14 it as the grant-back condition. It is the requirement
15 of supply by BT of key content and, in particular, its
16 key sports rights in order to achieve supply of
17 Sky Sports channels, and it's also notable that here,
18 having considered these matters, Mr Justice Roth was
19 expressing his concern about such an arrangement in
20 circumstances where allowing a dominant entity to insist
21 on such conditions can undermine the position of someone
22 that's effectively entering or trying to develop as
23 a competitor against that dominant entity in the pay TV
24 market and will see the value of its investments
25 essentially being transferred to Sky or substantially

1 mitigated. So there are two points one can take from
2 that.

3 So it is not saying that if Sky and BT do deals
4 where BT provides certain channels to Sky and Sky
5 provides certain channels to BT that there is something
6 inherently wrong with that. What is problematic is
7 allowing Sky to insist, on a competitor providing Sky
8 with wholesale supply of any key sports content, that
9 the competitor manages to acquire as a precondition for
10 supply of Sky Sports, an essential input.

11 THE CHAIRMAN: Your argument is that is because Sky is in
12 a dominant position and therefore the conditionality is,
13 in article 102 terms, an abuse. Is that right?

14 MR BEARD: I don't need to go that far. What I have to say
15 is the grant-back condition, as it has been referred to,
16 allowing Sky to operate a grant-back condition and
17 operate terms of that sort is prejudicial to fair and
18 effective competition in circumstances where Sky has
19 very significant market power and, indeed, if one were
20 to do a 102 analysis, yes, one would find that it was
21 dominant and, indeed, if one was to carry out a 102
22 analysis, one might well find that that was an abuse,
23 but that does not mean it somehow falls outside the
24 purview of section 316. Instead, that simply goes to
25 reinforce why it is that ex ante a condition needs to be

1 put in place to prevent that sort of prejudice to fair
2 and effective competition.

3 THE CHAIRMAN: On your argument, what you characterise as
4 effectively refusal to supply conditionality, that would
5 be reprehensible under the fair and effective
6 competition test even if carried out by a non-dominant
7 company; is that right?

8 MR BEARD: No, because the dynamics of effective competition
9 will depend on the respective positions of people in the
10 market. All I was not taking you, sir, up on in
11 relation to your terminology is that I don't need to use
12 the terms "dominant" or "abuse" in these circumstances
13 because, when we are talking about what constitutes fair
14 and effective competition, one can talk about people
15 with market power using that as a lever and that that
16 can prejudice fair and effective competition and that
17 doesn't mean that it has to be synonymous with abuse of
18 dominance test.

19 THE CHAIRMAN: Then it boils down to an assessment of
20 the relative market power of the two parties to this, so
21 saying, reciprocal deal.

22 MR BEARD: I can see that there may be circumstances where
23 the market definition and the analysis of the respective
24 positions of the participants and their market power,
25 relative market power, do matter, yes. Those sorts of

1 matters are the sorts of matters that behove a regulator
2 considering whether or not terms could prejudice fair
3 and effective competition, or arrangements or practices
4 or agreements could prejudice fair and effective
5 competition, have to carry out that sort of analysis.

6 THE CHAIRMAN: Our earlier conversation, does this sort of
7 practice fall into the category of those practices which
8 could be examined both under the Competition Act and
9 under section 316?

10 MR BEARD: I think if the question is examination, then
11 I imagine many practices could fall for examination.
12 Could they be prohibited --

13 THE CHAIRMAN: Could it be condemned --

14 MR BEARD: I don't need to reach a final position on whether
15 or not it has to be condemned as an abuse of dominance.
16 It may well be appropriate to condemn this as an abuse
17 of dominance insisting on this sort of prior
18 conditionality. We know that there are all sorts of
19 dominance cases where prior conditionality being imposed
20 by a dominant undertaking are abusive, but I just don't
21 need to go there because that is not the legal test with
22 which I'm dealing.

23 THE CHAIRMAN: What I'm getting at is, is this in the
24 category of practices where there is a risk of something
25 bad happening or is it a practice on the evidence where

1 you can show that something bad is happening?

2 MR BEARD: That is a slightly different question. We say
3 that the evidence shows that Sky has been insisting on
4 this grant-back condition during the course of
5 negotiation, but we say what is plainly the case is that
6 insisting on conditionality is also something that must
7 be a risk in relation to any future dealings as well.
8 Therefore, it falls within both categories --

9 THE CHAIRMAN: I'm getting a "yes", I think, eventually.

10 MR BEARD: I'm not cavilling with the idea that these sorts
11 of matters can be scrutinised under the Competition Act
12 or under 102 and indeed complaints can be made about
13 those sorts of matters, but that doesn't obviate the
14 need for consideration of them under section 316.

15 THE CHAIRMAN: I'm trying to get at this elusive idea of
16 what section 316 covers that the Competition Act
17 doesn't, which I think you attach some importance to in
18 relation to the earlier discussion.

19 MR BEARD: Yes.

20 THE CHAIRMAN: On this practice, I think what I am hearing
21 from you is, in a sense, the regulator does have
22 a choice.

23 MR BEARD: It may well be a situation where it would be
24 appropriate for a regulator to consider whether or not
25 it exercised its Competition Act powers in relation to

1 existing manifestations of this practice. But in
2 relation to the risk of these matters being the subject
3 of dealings or preventing dealings between parties, then
4 it goes further than that, and it would need to be dealt
5 with under 316 because article 102 and chapter 2
6 wouldn't enable that properly to be dealt with.

7 THE CHAIRMAN: Okay. Go on.

8 MR BEARD: I merely again refer to the terms and scope of
9 316 in this regard.

10 As I say, this isn't just a competition concern that
11 arises in principle, but one that also arises in
12 practice, because such a precondition for supply of an
13 essential input by someone with market power is
14 manifestly, we say, prejudicial to fair and effective
15 competition. That commonsense reaction, as I say, is
16 evidenced by Mr Justice Roth or President Roth's
17 comments, and it is also borne out by BT's commercial
18 experience as evidenced by Mr Petter in particular.

19 The fact that Sky says that there is limited value
20 to Sky in obtaining wholesale access to BT Sport
21 ironically makes these issues all the more remarkable
22 since it's difficult to see why such an insistence on
23 that supply is otherwise required.

24 Of course, we haven't just left these matters in
25 abstract. What we have done is we have gathered

1 detailed analysis and modelling carried out by
2 Dr Padilla in a series of reports, and what that
3 modelling shows is that, using both a static model,
4 which shows that under certain reasonable conditions or
5 consumer preferences Sky's insistence on grant-back
6 condition is tactical, BT is rationally forced to reject
7 that offer and Sky makes greater profits by withholding
8 supply of Sky Sports 1 and 2 than it would do if it
9 granted supply subject to the grant-back condition. The
10 result is that no wholesale supply results thereby
11 limiting BT's ability to compete and resulting in the
12 loss of consumer welfare. We have also carried out
13 dynamic modelling which is not reliant on the static
14 modelling and which assesses the implications of the
15 grant-back condition on BT's incentives to invest in new
16 and superior technologies and on upstream competition
17 for sports rights.

18 The dynamic model, which neither Ofcom nor Sky's
19 expert have criticised, demonstrates that BT has no
20 dynamic incentive to accept the grant-back condition
21 because it would limit BT's ability to grow a sizeable
22 subscriber base with which to effectively monetise any
23 sports rights that it would compete for and therefore
24 undermines its ability to compete in future sports right
25 content auctions and, on the other side, Sky has no

1 dynamic incentive to wholesale content to BT because the
2 status quo is preferable to Sky in the wholesale of
3 content subject to a grant-back condition.

4 There's also been a discrete choice modelling
5 analysis to estimate consumers' actual willingness to
6 pay for sports channels. That report, which again
7 neither Ofcom nor Sky has criticised, demonstrates that
8 the reasonable considerations on consumer preferences on
9 which the static model was based were in fact satisfied
10 in practice. So there were three reports: static,
11 dynamic and the choice modelling exercise. The choice
12 modelling exercise does build and analyse the
13 assumptions in the static model. The dynamic model does
14 something different.

15 You will already have seen the terms of Ofcom's
16 decision in relation to these matters. It's covered in
17 the WMO statement at paragraphs 6.65 through to 6.91.
18 Also, of course, this is another case where Ofcom has
19 sought to rely on its willingness to act in future as
20 a basis on which it considers that it could not act now.
21 But in terms of the errors committed in those
22 paragraphs 6.65 through to 6.91, first of all, what we
23 see is Ofcom being wrong to take the view that the
24 anti-competitive consequences of any insistence by Sky
25 on a grant-back condition have yet to manifest

1 themselves, so it is a misinterpretation of the current
2 and past position, and that the inferences being drawn
3 about how negotiations would turn out are not
4 sustainable, and I refer you to paragraph 6.90 in the
5 WMO on that matter.

6 What is notably absent from Ofcom's analysis is the
7 concern that operators need to have the security to be
8 able to invest in new services and in the acquisition of
9 sports content. Ofcom's approach essentially ignores
10 the fact that such conduct by Sky is a factor calculated
11 to reduce confidence and constrain the competitive
12 behaviour of Sky's rivals.

13 Secondly, it is a common theme that I have picked up
14 since looking at the legal matters: it is wrong in any
15 event to wait until it's satisfied that the potential
16 anti-competitive consequences have actually manifested
17 themselves. As I have already said, 316 is intended to
18 provide for -- I'm going to use the phrase again --
19 ex ante intervention in relation to practices which
20 Ofcom either considers, or would consider, to be
21 prejudicial to fair and effective competition, and it is
22 manifestly erroneous in the exercise of its powers to
23 require that that anti-competitive harm had actually
24 occurred before intervening.

25 It is a clear error of law. The Court of Appeal,

1 when dealing with these matters, expressly warned
2 against placing reliance on the fact that there can be
3 no way -- relying on facts pertaining to negotiations,
4 knowing that there can be no way of knowing the outcome
5 of genuine commercial negotiations and the extent to
6 which they actually dismiss a potential competition
7 concern. This is the approach, however, that's been
8 adopted by Ofcom in its WMO statement and, as I say, the
9 Court of Appeal found that if the outcome of
10 negotiations is unknown, this can't justify simply
11 dismissing a competition concern.

12 As I say, those matters are not properly dealt with
13 in the WMO and Ofcom's response in its defence in
14 particular at paragraph 171 and following rather
15 compound the errors made in the WMO statement. The view
16 that it takes that it was still possible that Sky and BT
17 might reach a mutually beneficial supply deal that was
18 not adverse to consumer interests is simply contradicted
19 by the evidence that has been submitted by BT, in
20 particular by Mr Petter, and Ofcom has simply ignored
21 that and it's based its approach on a highly selective
22 reading of relevant documents.

23 As I say, even if it is true it is irrelevant, the
24 fact that BT or any other competitor might ultimately be
25 forced into a position of accepting a GBC doesn't answer

1 the question of whether Sky's insistence on cross-supply
2 is prejudicial to fair and effective competition or,
3 more exactly, not.

4 Ofcom says it didn't agree with the assertions or
5 conclusions drawn from our various economic models and
6 the evidence suggested there were circumstances in which
7 BT might accept a reciprocal supply agreement. In
8 reality, as Dr Padilla explains, the criticisms made by
9 Ofcom just don't undermine the static model and they
10 don't criticise his dynamic model at all. There is, as
11 the tribunal has noted, a considerable degree of actual
12 agreement between Dr Padilla and Sky's expert,
13 Dr Caffarra, on much of the evidence, but Dr Padilla's
14 evidence which was provided to Ofcom and was clearly
15 explained to them during the WMO review process
16 demonstrates that Sky's insistence on a grant-back
17 condition is and would be a practice which is
18 prejudicial to fair and effective competition both in
19 principle and in practice and that Ofcom should
20 introduce a targeted licence condition in order to
21 preclude it and that would be a proper WMO.

22 Unless I can assist the tribunal further at this
23 stage, those are the opening submissions of BT.

24 THE CHAIRMAN: Thank you very much, Mr Beard. I propose we
25 bash on, for at least half an hour.

1 MR HOLMES: Very good, sir. Can I first of all put in
2 a plea for my junior who is currently enjoying rather
3 too much of the clement weather. Would it be possible
4 to lower the blinds, in order to alleviate her
5 discomfort?

6 THE CHAIRMAN: Let them be lowered. I'm afraid it is not
7 enough for me to just say that.

8 MR HOLMES: I appreciate that, sir.

9 THE CHAIRMAN: Sorry, you should have said earlier.

10 MR HOLMES: I'm grateful.

11 Opening submissions by MR HOLMES

12 MR HOLMES: Sir, let me first of all give you a brief road
13 map of the path I intend to follow in my opening
14 submissions. First, I propose to deal with the
15 statutory framework relevant to the appealed decision.
16 This is of course relevant in particular to BT's
17 ground 1, alleging that Ofcom failed to apply the law
18 properly.

19 Secondly, I shall address the regulatory context of
20 Ofcom's decision. BT's ground 2 contends that Ofcom
21 should have taken its analysis in 2010 as its starting
22 point in 2015. So it is therefore necessary to spend
23 a little time considering what Ofcom found in 2010 and
24 how that was affected by the subsequent appeal
25 proceedings.

1 Thirdly, I shall turn to the appealed decision and
2 to the reasoning and analysis which underpinned it.
3 BT's grounds 3 to 5 allege various errors of substance
4 against Ofcom relating to the treatment of content
5 aggregation, Sky's pricing and what it calls grant-back,
6 and I would like to show the tribunal how Ofcom dealt
7 with those matters in the statements, drawing your
8 attention to certain passages that Mr Beard omitted to
9 show you.

10 Finally, I will give you, in a nutshell, Ofcom's
11 case on each of the grounds of appeal.

12 To begin with the strategy framework, could I ask
13 you to turn up the relevant provisions again? I know
14 that you have seen them now many times and that you are
15 already familiar with them, but it sometimes helps to
16 have them in front of one. This is authorities bundle
17 and I will start at tab 13A, the provision pursuant to
18 which Ofcom first adopted the WMO obligation and which
19 informed its decision to withdraw it in 2013.

20 Section 316(1) provides in material part that
21 a regulatory regime for every licensed service includes
22 the conditions, if any, that Ofcom consider appropriate
23 for ensuring fair and effective competition.

24 Subsection 2 expands upon this by explaining that the
25 conditions must include the conditions, if any, that

1 Ofcom consider appropriate for securing that the
2 provider of the service does not either enter into or
3 maintain any arrangements or engage in any practice
4 which Ofcom would consider to be prejudicial to fair and
5 effective competition.

6 The first point to note is that section 316 requires
7 the imposition of licence conditions for ensuring fair
8 and effective competition only if and insofar as is
9 appropriate. It does not require the imposition of
10 licence conditions in all cases of actual or threatened
11 anti-competitive conduct. Subsection 2 makes clear that
12 there is no automatic requirement to impose a licence
13 condition, even in cases where a service provider is
14 already acting in a manner prejudicial to fair and
15 effective competition.

16 It is common ground that subsection 2 encompasses
17 interventions to address conduct already eventuating in
18 the market, and one sees that from subsection 2(a),
19 which refers to a situation in which a service provider
20 is maintaining arrangements which it has already entered
21 into and which are prejudicial to fair and effective
22 competition, and the application of the subsection to
23 existing anti-competitive conduct is also clear from the
24 words "consider or would consider" in the latter part of
25 subsection 2.

1 The subsection applies to arrangements or practices
2 which Ofcom already considers prejudicial as well as to
3 arrangements or practices which Ofcom would consider
4 prejudicial if they arose.

5 So notwithstanding the focus on actual as well as
6 potential conduct, the legislature expressly recognises
7 that Ofcom may consider no condition to be appropriate.
8 The conditions under section 316, including in the case
9 of actual conduct, are to include those, if any, that
10 Ofcom consider appropriate.

11 There may, in my submission, be a number of reasons
12 why a licence condition is not the appropriate way to
13 deal with currently prejudicial arrangements or
14 practices, for example, an arrangement may be coming to
15 the end of its term so that a licence condition would be
16 disproportionate; the prejudicial effect of
17 the arrangement or practice may be de minimis or likely
18 to dissipate given foreseeable market developments;
19 equally, there may be other ways of addressing the
20 arrangement or practice which appear more appropriate,
21 and it is therefore readily understandable why
22 section 316 does not impose an inflexible requirement to
23 address present conduct by means of licence conditions
24 imposed under that section.

25 Still less is there any requirement under

1 section 316 to address the mere future risk of
2 prejudicial conduct in the market. The extent of any
3 such risk may be unclear. The prejudicial effects of
4 conduct may be too uncertain to merit intervention.
5 There may be other, better ways of intervening or it may
6 be better to wait before intervening under section 316
7 to see how matters develop.

8 As with actual conduct in the market, section 316
9 therefore does not require intervention wherever there
10 is a risk that a service provider might engage in
11 conduct prejudicial to fair and effective competition.

12 If the legislature had wished to impose such
13 a requirement, it would have been easy to draft the
14 provision in that way, but that was not the intention of
15 the legislature. Indeed, section 316 does not refer to
16 "risk" on its face at all. We accept that the risk of
17 future prejudicial conduct is plainly a relevant
18 consideration. It is plainly relevant when considering
19 whether to intervene to address future conduct. But
20 there might in theory be circumstances in which Ofcom
21 considered it appropriate to intervene under section 316
22 even in the absence of any clear or immediate risk of
23 anti-competitive conduct. The identification of risk is
24 therefore not part of the legal test under section 316.

25 My second submission follows logically from the

1 first. Section 316 confers a clear and express
2 discretion upon Ofcom to assess the appropriateness of
3 intervention in a given case. The conditions to be
4 imposed under subsections 1 and 2 are those, if any,
5 that Ofcom considers appropriate for ensuring fair and
6 effective competition and for ensuring that a provider
7 does not engage in a practice prejudicial to fair and
8 effective competition.

9 Thus, although section 316 is expressed in mandatory
10 terms, it in fact leaves Ofcom a latitude to determine
11 whether to intervene in the market at all by means of
12 section 316, what type of intervention, what type of
13 condition to impose in the event of intervention, and at
14 what point in time it would be appropriate to intervene
15 in order to address actual or potential competition
16 problems in the broadcasting market.

17 THE CHAIRMAN: Mr Holmes, the disagreement between you and
18 BT is about the mandatory nature or otherwise of
19 section 316? You are not disputing that section 316
20 could cover the sorts of things that BT have complained
21 about?

22 MR HOLMES: No, sir.

23 THE CHAIRMAN: You are just saying that you are not obliged
24 to apply section 316?

25 MR HOLMES: That's correct, sir. As I understood Mr Beard's

1 submission, it was that, wherever there is a real risk
2 which is more than fanciful that a provider might engage
3 in conduct prejudicial to fair and effective
4 competition, in that case, it is necessary for Ofcom to
5 impose a condition under section 316; that Ofcom's
6 discretion is limited to determining the form that that
7 condition should take. In my submission, that is an
8 incorrect construction of section 316. Section 316
9 leaves to Ofcom a discretion as to whether to intervene
10 under section 316, even in the event of actual conduct
11 or a risk of conduct prejudicial to fair and effective
12 competition.

13 MS POTTER: Can I just ask whether you do consider that the
14 mandatory wording in the condition, which is perhaps
15 slightly unexpected, does have an impact, or, rather,
16 what is the impact of having mandatory wording there?

17 MR HOLMES: The use of the mandatory wording, in my
18 submission, confirms that Ofcom must apply its mind to
19 the question set for it in section 316 and must consider
20 the appropriateness of intervening by means of
21 section 316 in order to ensure fair and effective
22 competition, having regard to conduct in the market or
23 the risk of conduct. It is correct that Ofcom must
24 apply itself to that question. But the answer to that
25 question does not follow from the identification either

1 of conduct or of the risk of conduct.

2 MS POTTER: Just to carry on with that, in what
3 circumstances is it required to apply its mind? At the
4 time of granting a licence and otherwise when a practice
5 is brought to its attention or when it -- if we are
6 saying it must apply its mind, that sort of implies
7 a trigger for that.

8 MR HOLMES: Certainly when granting a licence and, in the
9 event that concerns are brought to its attention, it
10 must consider those conscientiously in order to
11 determine whether it would be appropriate to intervene
12 under section 316. It must also apply its mind under
13 section 316 when it is performing the review which it is
14 required to undertake under section 318. So there is
15 a standing requirement upon Ofcom. As to when that
16 requirement is triggered, it will obviously depend upon
17 the circumstances. Ofcom could act ex officio or it
18 could act in the event that concerns were drawn to its
19 attention. Does that address your question? I'm
20 grateful.

21 The third submission is that the legislation has
22 expressly stipulated one particular reason why Ofcom may
23 find it inappropriate to intervene by means of
24 section 316. If you turn to the next tab, you see there
25 section 317, which governs Ofcom's exercise of

1 Broadcasting Act powers for a competition purpose. You
2 were shown this by Mr Beard this morning.

3 Pursuant to subsection 1(a), Ofcom's
4 Broadcasting Act powers include its powers under this
5 part, to impose or vary the conditions of the licence.
6 Subsection 9, over the page, provides that a power is
7 exercised by Ofcom for a competition purpose if the only
8 or main reason for exercising it is to secure that the
9 holder of a Broadcasting Act licence does not enter into
10 or maintain arrangements or engage in a practice that
11 Ofcom consider is, or would be, prejudicial to fair and
12 effective competition. In other words, as you observed,
13 sir, it is the exercise of a power to impose or withdraw
14 a condition for the reasons specified in section 316.

15 Subsection 2 provides that before exercising
16 broadcasting power for such a purpose, Ofcom must
17 consider whether a more appropriate way of proceeding in
18 relation to some or all of the matters in question would
19 be under the Competition Act 1998 and, pursuant to
20 subsection 3, if that is the case, Ofcom is not to
21 exercise its broadcasting powers.

22 So there are three points to make about this.
23 First, I understood Mr Beard at one point this morning
24 to make the submission that section 317 was relevant
25 only to existing conduct on the basis that ex post

1 competition law requires an existing practice in the
2 market.

3 In our submission, if that is BT's position, it is
4 incorrect.

5 Section 317 requires Ofcom to consider, in relation
6 to future conduct, whether ex post competition law would
7 be a more appropriate way of proceeding if such conduct
8 were to arise. This construction is available, given
9 the use of the conditional in section 317(2), and it is
10 confirmed by the reference to practices that Ofcom would
11 consider prejudicial to fair and effective competition
12 in section 317(9).

13 THE CHAIRMAN: So Ofcom can think about something that has
14 been drawn to its attention that might happen and
15 conduct an intellectual exercise as to whether at some
16 point in the future it would be more appropriate to rely
17 on the Competition Act rather than section 316. Is that
18 right?

19 MR HOLMES: Yes, sir. So imagine, for example, that Ofcom
20 identified a real risk that an industry party might
21 engage in a practice which affected only one other
22 party, it wasn't an industry-wide problem which Ofcom
23 had identified, but a problem affecting two parties in
24 which the specific context or circumstances would be
25 important to Ofcom's appraisal. In those circumstances,

1 it might conclude that, rather than imposing now
2 a requirement in a licence condition to preclude such
3 conduct, it would be more appropriate to wait and see
4 how the conduct actually crystallised and how it
5 affected the counterparty at that point in time.
6 Section 317 would require it, if it found that ex post
7 competition law was more appropriate, not to intervene
8 to address the risk of future conduct.

9 The second submission regarding section 317 is that
10 it provides further confirmation, if any were needed,
11 that Ofcom is not required to act under section 316
12 wherever there is conduct or a risk of conduct
13 prejudicial to fair and effective competition. It needs
14 to consider at least one potential alternative, namely,
15 ex post competition law, and that is the submission to
16 which Mr Beard referred you at paragraph 30(c) of
17 Ofcom's skeleton argument.

18 But in our submission, section 317 is not exhaustive
19 of the alternative regulatory options that it is open to
20 Ofcom to consider when deciding whether to exercise its
21 discretion to impose a condition. You, sir, raised the
22 possibility of a market investigation reference as
23 another alternative, and in our submission, in answer to
24 the question you posed to Mr Beard, it would indeed be
25 permissible for Ofcom to decide in an appropriate case,

1 having identified a risk of future conduct, or indeed
2 actual conduct in the market, that it would be
3 preferable to proceed by way of a market investigation
4 reference, for example, because the practice partly
5 touched on matters that are within the scope of
6 section 316 and partly related to other markets not
7 covered by licensed services or connected services which
8 the Competition and Markets Authority would have its
9 wider jurisdiction to deal with.

10 THE CHAIRMAN: Do you think the legal test of adverse effect
11 on competition overlaps with fair and effective
12 competition neatly, completely, randomly or what?

13 MR HOLMES: Sir, that is a question I might want to give
14 a little more thought to.

15 THE CHAIRMAN: Let me ask you another one: the remedies that
16 the Competition and Markets Authority can impose under
17 a market investigation regime situation include positive
18 stipulations, whereas section 316 seems to me to
19 concentrate on licence conditions that stop things being
20 done, stop agreements being entered into. Would that be
21 a consideration for Ofcom?

22 MR HOLMES: Yes, sir. The scope of the remedial powers
23 available --

24 THE CHAIRMAN: Wider.

25 MR HOLMES: -- to the CMA on the one hand and Ofcom on the

1 other would certainly be a relevant consideration when
2 deciding whether to exercise its discretion.

3 THE CHAIRMAN: But your position is that Ofcom has a number
4 of options.

5 MR HOLMES: Yes.

6 THE CHAIRMAN: The Competition Act is one, section 316 is
7 another, market investigation reference is a third. I'm
8 struggling to think of anything else. You have covered
9 the universe, haven't you? Writing to the
10 European Commission? I don't know.

11 MR HOLMES: Yes. There may be others. I hesitate to say
12 that there are no others, but I agree those are --

13 THE CHAIRMAN: The major options.

14 MR HOLMES: Indeed. Those are certainly on the table.

15 THE CHAIRMAN: I think what I am hearing you say is there
16 isn't really much scope for saying it can't be a future
17 risk. It can be a competition issue identified, actual
18 practice or perceived possible future practice.

19 MR HOLMES: Yes, sir.

20 THE CHAIRMAN: You're in the arena for all three
21 possibilities?

22 MR HOLMES: Yes, sir. Absolutely. We agree that it is both
23 forward looking and backward looking, just as the
24 Competition Act context, while one needs the trigger of
25 current conduct in the market, of course a regulator is

1 concerned to consider competition going forward and to
2 ensure that competition operates effectively for the
3 future.

4 The fourth submission is that the availability of
5 other regulatory instruments to address any actual or
6 potential problems is only one of the relevant matters
7 for Ofcom to take into account when deciding whether to
8 pursue regulation under section 316. Ofcom must weigh
9 all of the circumstances, and in doing so, it must act
10 in accordance with its statutory duties. In that
11 respect, Ofcom and BT agree.

12 The duties are in section 3, which is at tab 10.
13 Again, at the risk of taking you back over ground we
14 have already traversed, can I ask you to turn back to
15 that tab? Mr Beard referred you to Ofcom's general
16 duty -- principal duty under section 3(1)(b) to further
17 the interests of consumers in relevant markets where
18 appropriate by promoting competition, and he also
19 referred you to the things under subsection 2 to which
20 Ofcom -- which Ofcom are required to secure in the
21 carrying out of their functions, including the various
22 matters there set out.

23 Then he referred you to subsection 3, and the other
24 matters which Ofcom must have regard to in performing
25 their duties, including the desirability of promoting

1 competition in relevant markets.

2 THE CHAIRMAN: I think we established that there was nothing
3 in subsection 2 that was actually germane to this
4 dispute.

5 MR HOLMES: Yes, sir, I agree. I did understand Mr Beard to
6 submit by reference to section 3(1) and section 3(3)(b)
7 that Ofcom was required to intervene under section 316
8 where there is a risk of conduct prejudicial to fair and
9 effective competition. He saw these duties as
10 confirming the automatic requirement to intervene where
11 a risk existed.

12 Ofcom disagrees with that submission.

13 It is clear from section 3(1)(b) that Ofcom must
14 first of all determine whether it is appropriate to
15 further the consumer interest by the specific means of
16 promoting competition, and also, if so, by what methods
17 it is to promote competition. So we say it takes the
18 matter no further. It doesn't lead to an invariable
19 requirement to regulate where a risk exists under
20 section 316. The same point applies to section 3(4)(b).
21 Ofcom is required to have regard to the desirability of
22 promoting competition, but, again, the general duty and
23 that consideration are not determinative of how this
24 should be done in a given case.

25 We then come to subsection 3(a), which provides that

1 in performing its duties under subsection 1 Ofcom must
2 have regard in all cases to the principles under which
3 regulatory activities should be transparent,
4 accountable, proportionate, consistent and targeted only
5 at cases in which action is needed. The references to
6 "targeted" and "proportionate regulation" reflect
7 a wider legislative purpose apparent in the
8 Communications Act as a whole. It runs like a seam
9 through the legislation.

10 Turning to tab 11, one finds section 6, and one sees
11 from the heading that the legislature has also specified
12 duties on Ofcom to review regulatory burdens.

13 Mr Beard took you to subsection 2. We don't place
14 any reliance on subsection 2, which appears to us to
15 deal with a different question. But we do rely on
16 subsection 1. Ofcom must keep the carrying out of their
17 functions under review with a view to securing that
18 regulation by Ofcom does not involve the imposition of
19 burdens which are unnecessary or the maintenance of
20 burdens which have become unnecessary.

21 The policy is explained in the government's policy
22 statement preceding the enactment of the Communications
23 Act, which was in BT's original appeal bundle and is
24 partially exhibited to Mr Williams' statement but which
25 hasn't found its way into the trial bundle.

1 We have brought copies, and I would be grateful if
2 they could be inserted at a convenient place and tab in
3 bundle H3, if I could hand those up. It is a short
4 point which won't take long. (Handed).

5 Sir, for my part, I am now in H3. I don't know if
6 that is also the case for the tribunal, in terms of
7 available space for inserts.

8 THE CHAIRMAN: Lots of space, Mr Holmes.

9 MR HOLMES: I'm grateful, sir. Tab 16 I think is currently
10 empty -- I will be corrected if I am wrong. Tab 15 as
11 well, I am told. So tab 15 may be the appropriate place
12 to put it.

13 MS POTTER: Actually, in our case, everything from 8 onwards
14 is empty.

15 MR HOLMES: I think some inserts may have gone into H2,
16 which extend as far as tab 15. H2 and H3 continue. In
17 any event, you have the document.

18 If you could turn, sir, to page 27, do you see there
19 the heading "Light touch regulation", and then the
20 statement which I am more used, I must say, to hearing
21 appellants cite to the tribunal than Ofcom, so it comes
22 as a refreshing change for me to refer the tribunal to
23 it, the relevant passage is in 5.2.1, and if I could ask
24 you, sir, to review that.

25 THE CHAIRMAN: 5.2.1?

1 MR HOLMES: 5.2.1.

2 THE CHAIRMAN: I was going to say "light touch regulation"
3 is a fairly discredited term these days --

4 MR HOLMES: It was the intention which underlay the
5 legislation.

6 THE CHAIRMAN: -- in other sectors, not in communications;
7 financial services.

8 MR HOLMES: The bankers have perhaps taken --

9 THE CHAIRMAN: Taken it literally.

10 MR HOLMES: -- rather more advantage of light touch
11 regulation than telecommunication providers are able.

12 THE CHAIRMAN: Light touch paper regulation. This is like
13 a view back to an old world.

14 MR HOLMES: There's been a lot of water under the bridge.

15 THE CHAIRMAN: The legislative contention is a valid
16 concern, yes.

17 MR HOLMES: This is baked into the legislation. I am simply
18 showing the importance that was attached to it at the
19 time when the legislation was tabled.

20 Just to make that point good, at the top of -- the
21 start of 5.2.2, we need to go further:

22 "Ofcom will be subject to a duty to secure light
23 touch regulation requiring it to carry out regular
24 reviews of its functions."

25 That is the provision which I have shown you.

1 Section 3.18, in my submission, is a further
2 reflection of the need to keep matters under review. It
3 is a specific application of section 6 in relation to
4 conditions imposed under section 3.16. It requires
5 Ofcom -- section 3.18 is at tab 13C of the authorities
6 bundle:

7 "It shall be the duty of Ofcom at such intervals as
8 they consider appropriate to carry out a review of so
9 much of each of the following as has effect for
10 a competition purpose: codes, guidance, directions,
11 matters imposed in relation to the exercise of
12 Broadcasting Act powers for competition purposes."

13 THE CHAIRMAN: The review was carried out under this
14 section; is that right?

15 MR HOLMES: I am hearing assent from behind me, sir.

16 THE CHAIRMAN: I seem to remember we found some difficulty
17 in finding section 318 mentioned but I'm sure that's my
18 mistake and it's there.

19 MR HOLMES: Ofcom had, in any event, indicated that it would
20 conduct a review. Whether or not this particular review
21 was required under section 318 -- my only cause for
22 hesitation is I don't see a reference to "conditions",
23 but rather to the other things that can be done pursuant
24 to section 316 or conditions set under section 316. It
25 is, in our submission, nonetheless an indication of

1 Ofcom's wider duty to keep matters under review, and in
2 conducting a review under section 318, or the review
3 that was conducted in the WMO statement, Ofcom must have
4 regard to the need to roll back regulation where it is
5 no longer needed.

6 THE CHAIRMAN: Nothing may turn on it, but if you are able
7 to clarify whether the December statement was pursuant
8 to section 318 or pursuant to some wider wish to keep
9 matters light touch, could you let us know?

10 MR HOLMES: Certainly, sir. I shall take that home as
11 homework for this evening and update you tomorrow.

12 Now, BT relies on another of Ofcom's duties under
13 section 3(1)(a), namely, the duty to act consistently.
14 Ofcom agrees that it is bound to act consistently, but
15 disagrees with BT about what that requirement amounts
16 to, and as to how it applies in the present case.

17 In its written materials, BT has put the allegation
18 of inconsistency in two ways. The first is to say that
19 Ofcom was inconsistent in its approach as between the
20 2010 statement and the 2015 statement in breach of
21 section 3(1)(a). There are three short answers to that
22 point. First, the facts as Ofcom perceived them were
23 different in 2015 to 2010. As I shall show you shortly,
24 Ofcom thought in 2010 that Sky was deliberately
25 withholding supply of Sky Sports channels for strategic

1 reasons. In 2015, it found that Sky was supplying
2 Sky Sports widely on commercial terms, and that informed
3 its assessment of the risk of anti-competitive conduct
4 going forward.

5 The second point is one to which you adverted, sir,
6 this morning: central aspects of the 2010 statement have
7 been found to be wrong by the tribunal in the subsequent
8 appeal proceedings, factual findings which were not
9 disturbed by the subsequent outing in the Court of
10 Appeal. What remained undisturbed following the Court
11 of Appeal's judgment was hotly contested in appeal
12 proceedings that were not resolved but which were
13 withdrawn without concession.

14 THE CHAIRMAN: In this very courtroom, I seem to remember.

15 MR HOLMES: Yes, sir.

16 Third, and in any event, in relation to questions of
17 policy, such as the circumstances in which it might be
18 appropriate for Ofcom to withdraw the WMO remedy, Ofcom
19 was not bound in 2015 to follow the approach that it had
20 outlined in 2010 whether the facts were different or
21 remained the same. It is trite law that a public
22 decision maker may not fetter its discretion for the
23 future.

24 Sir, we say that the allegation of inconsistency
25 between the 2010 statement and the 2015 decision is

1 a hopeless one. The facts were not the same. The 2010
2 statement had been significantly changed. But, in any
3 event, if the facts remained the same and there had been
4 no subsequent success by Sky on appeal, Ofcom would
5 still have needed to approach its exercise of discretion
6 afresh under section 316.

7 The other way --

8 THE CHAIRMAN: You are saying it can be inconsistent, but
9 you have a discretion to be inconsistent?

10 MR HOLMES: Yes, sir, that is necessary so that, for
11 example, an indication in 2010 that Ofcom would expect
12 to withdraw the remedy only if Sky had lost market power
13 cannot possibly constrain its exercise of its discretion
14 applying section 316, even a year later, if it required
15 to conduct a review there.

16 MS POTTER: I'm just wondering whether you would also
17 consider that it is trite law that such a departure
18 would need to be explained, or is that going too far?

19 MR HOLMES: I think -- Ofcom is under a duty to motivate its
20 decisions, both under the specific statutory rules and
21 under general public law duties, and you have seen the
22 duty of transparency, for example. So it is, therefore,
23 beholden on Ofcom to explain how it has reached the
24 decision it has.

25 The sooner after a decision that Ofcom approaches

1 matters afresh and takes a different view of things, the
2 more detailed an explanation one would expect to see.
3 In this case, of course, I rely on all three points, and
4 that is relevant when one considers the degree of detail
5 that one would expect to see in explaining the
6 conclusion which Ofcom has now reached. So I wouldn't
7 want to tie myself to a suggestion that Ofcom needs
8 exhaustively to explain everything that has changed from
9 2010 to 2015. But Ofcom does require to explain the
10 reasons for its decision and, to that extent, it needs
11 to explain why it no longer considers a measure which it
12 considered necessary in 2010 should no longer be needed
13 in 2015. My submission, of course, when we come to
14 consider the two measures, the two decisions, is that
15 Ofcom did adequately justify the approach that it's
16 taken.

17 THE CHAIRMAN: Would it be fair to say, Mr Holmes, there is
18 rather more in your pleadings about the effect of
19 the CAT judgment than in the WMO statement itself?

20 MR HOLMES: Yes, sir.

21 THE CHAIRMAN: Quite considerably more.

22 MR HOLMES: That would be fair, yes.

23 THE CHAIRMAN: I think that underlies my colleague's
24 question.

25 MR HOLMES: Although the private grief or public grief that

1 Ofcom may have felt at the outcome of the appeal
2 proceedings in 2010 may have been a feature of its own
3 internal thinking at the time, that did not, I think,
4 affect the adequacy of the reasons which it gave.

5 THE CHAIRMAN: Ofcom is not allowed to grieve.

6 MR HOLMES: When we come to the decision, sir, I hope to
7 show you our reasoning was adequate. It was in places
8 compressed but Ofcom is often faulted for drafting very
9 lengthy decision documents and this one has the
10 advantage of being a relatively straightforward read
11 from cover to cover, and we say that all that needs to
12 be in there is in there. But that is probably
13 a submission which is best made when I come to show you
14 the specific contents of the decision.

15 THE CHAIRMAN: You might like to break now for five minutes.

16 MR HOLMES: I'm grateful, sir.

17 (3.35 pm)

18 (A short break)

19 (3.45 pm)

20 MR HOLMES: When you rose, sir, I was considering the two
21 ways in which BT advances its case that Ofcom has acted
22 inconsistently. I have dealt with the alleged
23 inconsistency between the 2010 and 2015 statements. The
24 other allegation of inconsistency is between Ofcom's
25 approach to regulation in the WMO statement and its

1 regulation of BT's pricing practices in the provision of
2 its wholesale superfast broadband input, the virtual
3 unbundled local access product, known as VULA for short.

4 The short answer to this is that the two measures
5 were adopted under different statutory regimes in which
6 Ofcom was subject to different duties and had to apply
7 different tests when deciding how to regulate.

8 Mr Beard, in his submissions this morning, appeared to
9 accept Ofcom's submission that that is so. So subject
10 to any questions that the tribunal may have, I wouldn't
11 propose to make further submissions about it now. But
12 I am very happy to address it briefly if it would be
13 helpful for you to have chapter and verse on the point.

14 THE CHAIRMAN: I think he was making a slightly different
15 point, but no doubt in due course he will come back and
16 tell us what point he was making. Perhaps not now.

17 MR BEARD: I can certainly say I recognise they're different
18 regimes. I'm not sure how much that sort of concession,
19 or otherwise, is taking matters forward, I have to say.

20 MR HOLMES: Sir, I will wait to hear how he puts his case
21 and address it in closing submission, if I may.

22 Mr Beard made two further legal submissions which
23 I should address at this point. First, he suggested
24 that section 316 embodied a precautionary approach. If
25 by that he meant simply that it can be used to address

1 future as well as current prejudicial conduct in the
2 market, we can agree. If, however, he meant to suggest
3 that section 316 reflects either a requirement or
4 a presumption in favour of regulating to address any
5 potential risk, that is, with respect, incorrect. On
6 the contrary, the Communications Act favours light touch
7 regulation by Ofcom, as we have seen.

8 The second submission that Mr Beard made concerned
9 the requirement to undertake an orthodox competition
10 analysis under section 316. On this point, Ofcom
11 continues to rely on paragraph 155 of the tribunal's
12 judgment to which Mr Beard took you, and we would also
13 refer the tribunal to paragraph 145 of the judgment in
14 which the tribunal made clear that there is no
15 requirement on Ofcom to analyse dominance. That is no
16 feature of the test.

17 What is important is the substance of Ofcom's
18 analysis, and what analysis is required will depend upon
19 the findings at each stage of Ofcom's consideration.
20 This is, in our submission, familiar from other
21 competition law contexts, so one sees in an ex post
22 setting that regulators frequently do not define the
23 precise scope of a relevant product market where that is
24 not relevant to an infringement which they have
25 identified, as in the case, for example, of a cartel

1 decision. It may make no difference where the product
2 market starts and where it stops. In that case,
3 regulators will say as much.

4 Similarly, in merger review cases, it is often
5 unnecessary to determine the precise parameters of
6 the market where there is clearly no problem however the
7 market is drawn. So the degree of analysis which is
8 required depends upon the overall assessment which is
9 undertaken. In this case, Ofcom found that Sky had
10 a strong market position, and Mr Beard did not cavil at
11 that vocabulary. There was no semantic objection taken,
12 that Sky Sports content is important, and that if that
13 content were withheld, that could have a prejudicial
14 effect on competition.

15 There were arguments on each side as to the scope of
16 the relevant market, as to where you stopped in defining
17 the focal product, and as to the precise extent of Sky's
18 strength both at the wholesale and the retail level.
19 But Ofcom did not need to come to detailed or precise
20 findings about that, given its wider conclusion, as
21 I described it.

22 The reason for withdrawing the WMO remedy was
23 neither that Sky lacked market power nor did it turn on
24 the scope of the relevant product market. It turned, as
25 we shall see, on the assessment that the remedy was no

1 longer needed, given the inconclusive analysis of
2 incentives confined with Sky's current arrangements and
3 the light they shed upon the risk of Sky acting upon
4 those strategic incentives for the future.

5 That concludes my consideration of the statutory
6 scheme and the law.

7 THE CHAIRMAN: Mr Beard's point, as I understood it, was
8 that Ofcom would be in a better position to judge
9 whether removing the WMO remedy was right in regulatory
10 terms if it had conducted a full competition analysis,
11 including market definition and the analysis that
12 follows from that, and done it in that particular way.

13 You are saying that is just not right?

14 MR HOLMES: Yes, sir, that's not correct.

15 THE CHAIRMAN: And that Ofcom had enough analysis at its
16 disposal to decide whether the WMO remedy remained
17 appropriate or not?

18 MR HOLMES: That's my submission, sir.

19 THE CHAIRMAN: I'm not putting words in your mouth. I am
20 just trying to understand it.

21 MR HOLMES: No. You have correctly grasped the point that
22 I was seeking to make.

23 The WMO statement is a decision to remove regulation
24 that Ofcom judged no longer to be needed, and the
25 regulation was imposed by the pay TV statement in 2010.

1 There are a number of aspects of the decision which in
2 my submission are relevant to the way that Mr Beard puts
3 his case against me. If I may, although 2010 seems like
4 a long time ago, I will take the tribunal on a short
5 whistlestop tour of Ofcom's --

6 THE CHAIRMAN: We have been back to 2003. We can go back to
7 2010 quite happily.

8 MR HOLMES: Sir, the pay TV statement is in bundle G1 at
9 tab 1. This is extracts from BT's electronic bundle.

10 THE CHAIRMAN: You call that G?

11 MR HOLMES: I will describe the point and then I will take
12 you to the paragraphs which make it good, if I may.

13 The first point is that the competition concern
14 which the WMO obligation sought to address involved
15 actual anti-competitive conduct which Ofcom believed was
16 already occurring in the market. Specifically, Ofcom
17 found that Sky had been deliberately limiting the supply
18 of its premium channels on an industry-wide basis over
19 a number of years. The concern is crisply stated in
20 paragraph 1.6 in the summary at the front of
21 the statement. Ofcom's view at the time was that Sky
22 exploits its market power by limiting the wholesale
23 distribution of its premium channels with the effect of
24 restricting competition from retailers on other
25 channels -- on other platforms. This is prejudicial to

1 fair and effective competition, reducing consumer choice
2 and holding back innovation by companies other than Sky.

3 Ofcom regarded the perceived restriction of supply
4 as problematic because of the importance of the content
5 in question, and that can be seen -- I'm afraid I am
6 going to dart back and forward a little bit to draw your
7 attention to particular paragraphs. The paragraph
8 I want you to turn to now is 7.38 on page 326. This is
9 in the section of the statement which identifies the
10 competition issues of concern to Ofcom. You will see
11 there that Ofcom states:

12 "Sports and movies are genres which stand out as
13 being amongst the most valued genres by consumers and
14 also having a high degree of exclusivity to pay TV. On
15 this basis alone, we would expect them to be key drivers
16 of pay TV subscriptions".

17 So the content was of concern, because it drove the
18 subscription decisions of a significant number of
19 consumers.

20 Ofcom identified a particular subset of sports
21 channels which it referred to as core premium sports
22 channels, in relation to which it found that Sky had
23 market power. Ofcom's conclusions on that are briefly
24 summarised in paragraph 1.21 on page 5, and 1.22. There
25 Ofcom states that in sports Sky has market power in the

1 wholesale and retail market of packages for packages
2 including Sky Sports 1 and 2 and ESPN. These channels
3 contain a distinctively large amount of the most
4 attractive live sports shown regularly through the year,
5 the most significant of these is live coverage of
6 Premier League football, but a number of other important
7 events are also shown on these channels.

8 Ofcom identified two distinct respects in which it
9 considered that Sky was restricting supply of channels
10 to other pay TV retailers. On the one hand, Ofcom found
11 that Sky had refused to supply its channels at all to
12 a number of new entrant retailers. One sees that
13 conclusion at paragraph 1.24 and following. At 1.24:

14 "Sky restricts distribution of its core premium
15 sports channels to potential new retailers in a way
16 which is prejudicial to fair and effective competition.
17 A number of companies have tried and failed over an
18 extended period of time to negotiate terms with Sky
19 which would allow them to retail premium channels to
20 their customers."

21 Over the page at 1.25:

22 "Our review of these negotiations reveals lengthy
23 and ultimately fruitless discussions over a number of
24 years between Sky and other pay TV operators over
25 possible wholesale of Sky's premium channels. On the

1 other hand, Ofcom considered that the price at which Sky
2 was prepared to supply its core sports channels also
3 amounted to limited distribution. There were
4 longstanding wholesale supply arrangements in place
5 between Sky and the cable operators, in particular
6 Virgin Media, but Ofcom found that the rate card price
7 charged by Sky to Virgin had the effect of restricting
8 supply. The point is developed in section 7, and if you
9 turn to 7.270, you see that Virgin Media had told Ofcom
10 that it made an incremental negative margin on
11 Sky Sports. Do you see that at the end of
12 paragraph 7.270, page 373 in my bundle? So 7.270:

13 "Virgin Media told us that as a result of Sky's high
14 wholesale prices, it made a negative margin on
15 Sky Sports reducing the value of a base offer subscriber
16 by around 17 per cent."

17 In other words, Virgin Media made less of a margin
18 by selling a TV package including Sky Sports than in
19 selling a basic TV package alone without Sky Sports.

20 The conclusion which Ofcom drew from this is at
21 paragraph 7.290 on page 378:

22 "We conclude that the high wholesale prices
23 Virgin Media pays limit its incentive and ability to
24 compete effectively with Sky in selling premium channels
25 and that this contributes to its low penetration of

1 premium subscribers."

2 As regards other potential retailers, Ofcom found
3 that the price offered by Sky for its sports channels
4 was the rate card. Ofcom found that this would not
5 enable retailers to compete effectively. One can see
6 this most crisply put at paragraph 1.30 of the statement
7 back in the introduction on page 7:

8 "To the limited extent that Sky enters into any
9 discussions about wholesale pricing with any other
10 retailer, these discussions centre on the prices which
11 Sky currently sets to Virgin Media via the rate card.
12 We do not believe it to be a reasonable expectation for
13 retailers other than Sky to be prepared to pay the rate
14 card price for Sky Sports channels as these prices would
15 not allow them to compete effectively."

16 Pausing there, Ofcom perceived an enduring problem
17 of restricted supply which affected the industry as
18 a whole. It was the industry-wide character of
19 the problem which led Ofcom to conclude that it should
20 act under section 316 by way of a licence condition
21 rather than under its ex post Competition Act powers.
22 One sees this at paragraph 9.8 of the statement, which
23 is at page 456. You see in the middle of that
24 paragraph:

25 "Under section 317 we must consider whether it would

1 be more appropriate to proceed under the Competition Act
2 1998 before proceeding under section 316. We have
3 decided that it would not be more appropriate to proceed
4 under the Competition Act because of the need for
5 a comprehensive solution to a general problem affecting
6 the relevant markets."

7 Do you have that, sir?

8 THE CHAIRMAN: Yes.

9 MR HOLMES: The second notable feature of Ofcom's analysis
10 in the 2010 statement was its finding that Sky's conduct
11 of restricting supply, as Ofcom perceived it, was giving
12 rise to harm to consumers in various concrete respects.
13 Those are summarised at paragraph 1.31 of the statement
14 at page 7. So Ofcom acknowledges that pay TV has
15 developed, delivered substantial benefits:

16 "However, in a well-functioning market it is fair
17 and effective competition that drives consumer benefits.
18 The current restricted distribution of key content
19 prejudices fair and effective competition reducing
20 choice of platforms and retail packages and dampening
21 innovation."

22 Then a number of concrete instances are identified,
23 which I won't ask you to review now, given the time, but
24 very briefly to summarise them, first, the
25 nonavailability of premium content on certain types of

1 platform, and at that time Ofcom's focus was on digital
2 terrestrial television, so some premium content not
3 available on some types of platform.

4 Second, nonavailability of HD and interactive on
5 cable.

6 Third, not enough price points for different types
7 of package. In particular, a concern that consumers had
8 to buy a big mix of basic and premium content -- this is
9 described as buy through -- and couldn't go for
10 a smaller or more focused offer. They couldn't take
11 sport on its own, they had to take a whole lot of
12 channels.

13 Fourth, a concern about distortions in competition
14 over triple-play bundles. That is, arrangements whereby
15 a single retailer supplies consumers with telephone,
16 internet and pay television in one combined package.

17 Fifth, innovation focused on Sky's satellite
18 platform, less focus on innovation on other platforms,
19 and a more concrete expression of this concern for your
20 note can be seen in paragraph 1.6 where Ofcom refers to
21 a lack of video-on-demand distribution of movies.

22 Sixth, a concern that without the availability of
23 premium content on IPTV, there might not be sufficient
24 investment in the new superfast broadband networks which
25 are used to carry internet protocol TV, IPTV.

1 So Ofcom's decision to intervene was therefore
2 motivated by its belief not only that Sky was engaging
3 in anti-competitive conduct, but that this was being
4 manifested in harm to consumers of various specific
5 kinds.

6 The fourth point is that the WMO remedy was
7 specifically designed to address the conduct which Ofcom
8 had identified. It required Sky to offer its channels
9 for supply to other pay TV retailers and it set
10 a regulated price for such supply which was calibrated
11 to enable an efficient competitor to compete
12 effectively.

13 Ofcom considered various possible interventions, and
14 these are explained in paragraphs 9.1 to 9.5 of
15 the statement, if you could turn there briefly. This is
16 at page 455 of the statement. At paragraph 9.2, you see
17 that BT and the other four parties suggested operational
18 separation of Sky as a way of removing incentives.
19 Ofcom concluded that would be a disproportionate, costly
20 and highly interventionist form of remedy.

21 At 9.3, we have also -- Ofcom also set aside the
22 possibility of a substantial intervention in the way
23 sports rights are sold. That is explained at 9.5:

24 "Our current view is that a remedy which addressed
25 our competition concerns by placing severe limits on

1 content aggregation in order to eliminate market power
2 at source would be disproportionate."

3 But Ofcom noted that it might need to revisit that
4 question.

5 Instead, as set out at 9.7, Ofcom opted for
6 a behavioural remedy in the form of the WMO, which, as
7 set out in the first bullet of 9.7, would directly
8 target the restricted distribution of Sky Sports which
9 it considered to be taking place.

10 So to use the language of ex post competition law,
11 the remedy was addressed to preventing abusive conduct
12 and not at eliminating dominance. If you turn to 9.21
13 on page 460, you see in the final sentence a clear
14 expression of that:

15 "Our analysis indicates that Sky's market power
16 appears to be enduring and the remedy is not designed to
17 remove the market power."

18 So Ofcom was not seeking by the WMO statement to
19 remove market power. It was seeking to address
20 a particular form of conduct which it had found had been
21 eventuating in the market for a number of years on an
22 industry-wide basis.

23 THE CHAIRMAN: That paragraph talks -- I remember this --
24 about "If we saw a major change in the market, we would
25 carry out a full review".

1 MR HOLMES: Yes, sir.

2 THE CHAIRMAN: We haven't seen a major change in the market,
3 so we haven't carried out a full review?

4 MR HOLMES: It is correct, sir, that Sky still has a strong
5 market position according to the findings --

6 THE CHAIRMAN: So what is the review we have carried out?
7 A less than full review?

8 MR HOLMES: Ofcom has carried out the review which in 2014
9 it considered appropriate for the purposes of applying
10 section 316. My submission on 9.21, which BT relies on
11 against me, is that, whatever view Ofcom may have taken
12 in 2010 about the circumstances in which it would be
13 appropriate to withdraw the WMO remedy, that cannot be
14 binding upon Ofcom's exercise of its discretion in 2015.
15 Ofcom couldn't fetter its discretion as to the proper
16 approach to take.

17 But you're right, sir, that there has not been
18 a change in the market in the form of an end to Sky's
19 strong market position, or, as it was referred to in
20 2010, its market power.

21 THE CHAIRMAN: One might speculate that removal of
22 the remedy would come after a full review, not after
23 a less-than-full review, but that is just speculation.

24 MR HOLMES: The review that Ofcom undertook in 2014 was not
25 conditioned by the policy expectation expressed in 9.21.

1 THE CHAIRMAN: So you're saying they didn't follow this.

2 They looked at matters afresh, as they are entitled to
3 do?

4 MR HOLMES: Indeed, sir. Ofcom conducted the review which
5 it considered appropriate in 2014 for the purposes of
6 reaching the decision that it did.

7 The point which I wanted to draw to your attention
8 in 9.21 is that the remedy was never addressed to market
9 power, to Sky's market power. It was addressed to
10 a concern about conduct. Ofcom, as we will see, made
11 quite different findings about the conduct in the market
12 in 2014.

13 There is a further point which I would also like to
14 draw to your attention about the remedy that Ofcom
15 imposed, and one sees that point at 11.165 and 11.166 of
16 the statement. One of Mr Beard's points this morning
17 was that the WMO remedy should remain in place because
18 BT was not in a position to contest Sky at the wholesale
19 level in relation to the acquisition of content rights.

20 If his point is simply that one should consider
21 Sky's market position now when deciding whether there is
22 a risk of particular conduct in relation to the
23 downstream level, we would accept his point. But
24 insofar as he perceives the WMO statement as a mechanism
25 to enable upstream entry, some care needs to be taken.

1 One can see from these paragraphs that, if anything,
2 Ofcom's concern was that, by imposing a remedy, that
3 might in principle weaken incentives to bid for content
4 by providing an alternative mechanism for retailers to
5 access that content. However, it was satisfied that
6 that problem did not arise because of the demanding
7 level at which it had set the price which ensured that
8 one could not make a profit simply from the resale of
9 sports rights.

10 THE CHAIRMAN: "Demanding" means high? The price level not
11 too low, in other words.

12 MR HOLMES: Yes, sir.

13 PROFESSOR MAYER: Could I just clarify: are you then saying
14 that the impact on the upstream market is largely
15 irrelevant or that this was just a factor that was not
16 considered here?

17 MR HOLMES: In the 2010 statement, Ofcom considered
18 carefully the impact of its intervention on conditions
19 on the upstream market. Its concern was not to
20 undermine incentives of competitors at the retail level
21 to go upstream and to bid for rights. The conclusion
22 which it arrived at was that the remedy which it imposed
23 in 2010 would not dampen incentives to go upstream
24 because the retail competitors would, over the long run,
25 earn a return of zero, if efficient, at the prices set

1 under the WMO remedy. So their incentives to go and get
2 either the content supplied by the WMO remedy or other
3 content would remain intact because they might then have
4 the opportunity to earn a higher margin, either by
5 differentiating their product with other content, or by
6 earning the wholesale margin which Sky enjoyed as itself
7 being the provider of the WMO remedy channels.

8 Ofcom did carefully consider, therefore, the impact
9 upstream. My point is simply that it is not a criticism
10 of the withdrawal of the WMO remedy to say that BT has
11 not yet supplanted Sky as the supplier of core premium
12 sports channels. That was not the intention of
13 the remedy which was put in place.

14 The remedy was put in place to enable competition in
15 pay TV generally by ensuring that an important input was
16 available to all pay TV retailers which they could then
17 differentiate around or innovate around in a way which
18 would give them competitive advantage.

19 PROFESSOR MAYER: I understand that point. But you are not
20 then saying that the impact on the upstream is
21 irrelevant to a consideration of the elimination of
22 the WMO now?

23 MR HOLMES: No, sir, it is relevant to consider the position
24 upstream and I wouldn't suggest otherwise.

25 THE CHAIRMAN: Can you take us to the equivalent passage in

1 the 2015 --

2 MR HOLMES: Sir, you anticipate my submissions. I do
3 propose, after I have finished dealing with the 2010
4 statement, to run through each of these points and
5 address them in 2015. But this is a point that
6 I understand the tribunal would particularly like
7 comfort on and I shall endeavour to give it.

8 THE CHAIRMAN: Yes. Carry on with your discussion of this
9 document before we get back to 2015. That's fine.

10 MR HOLMES: I'm grateful, sir. Indeed, I have actually
11 concluded now my consideration of the pay TV statement,
12 the tribunal may be pleased to hear, but before I come
13 to the 2015 statement, and in the short time remaining,
14 I propose to consider the appeal process, if I may, and
15 its implications for the findings contained in the 2010
16 statement.

17 The tribunal's judgment is to be found in what
18 I have as bundle H1 -- this is the first of
19 the additional -- of the hand-up. Sorry, I have given
20 you a wrong reference. It is tab 5. H1/5.

21 The first point, at paragraph 8, is that the hearing
22 lasted 37 days.

23 At paragraph 9, the tribunal heard evidence from
24 a total of 25 witnesses, oral evidence which Ofcom had
25 not had the benefit of when it arrived at the pay TV

1 statement.

2 At paragraphs 27 to 31, the tribunal deals with
3 Ofcom's central concern that Sky was deliberately
4 withholding its premium sports channels from competing
5 retailers.

6 At paragraph 27, the tribunal states that it has
7 examined the evidence in considerable detail, it then
8 considers the evidence, documentary and witness evidence
9 which is reviewed, and then its conclusion upon that
10 evidence. In the fourth line:

11 "The tribunal has concluded that Ofcom's core
12 competition concern is unfounded."

13 At paragraph 28:

14 "The tribunal is of the view that Ofcom has, to
15 a significant extent, misinterpreted the evidence of
16 these negotiations which does not support Ofcom's
17 conclusion. We have found a significant number of
18 Ofcom's pivotal findings of fact in the statement to be
19 inconsistent with the evidence."

20 As explained at paragraph 29, the tribunal differed
21 in particular in relation to the respective conduct and
22 motivation of Sky and its counterparties in the various
23 commercial negotiations for access to the channels. For
24 example, while acknowledging the existence of some
25 regulatory gaming on the part of other retailers, Ofcom

1 has attributed responsibility for the failure to reach
2 agreement largely to Sky's failure to engage
3 constructively with its counterparties. However, the
4 evidence shows that Sky did, on the whole, engage
5 constructively. On the other hand, its counterparties
6 by no means always did so, and in our view regulatory
7 gaming on the part of some of Sky's counterparties
8 played a much more important role in the commercial
9 negotiations and their progress or lack of it than Ofcom
10 has recognised."

11 Then again, towards the end of paragraph 30:

12 "The tribunal finds that contrary to Ofcom's
13 findings in the 2010 statement, Sky has no theological
14 objection to wholesale supply of its premium channels
15 and is in principle willing to do so where self-retail
16 is open to it."

17 So after hearing extensive evidence, the tribunal's
18 conclusion was that Sky was a willing wholesaler and
19 that negotiations had partly floundered because of
20 regulatory gaming on the part of Sky's counterparties.
21 The tribunal also found error, to address a point that
22 you raised, sir, this morning, in Ofcom's analysis of
23 the impact of the rate card prices on Virgin Media. Its
24 conclusions are summarised in paragraphs 33 to 35 of
25 the judgment:

1 "As for the current terms of supply to Virgin Media
2 and in particular the level of the rate card prices
3 charged by Sky, in the light of the evidence placed
4 before the tribunal, the price level in question does
5 not obstruct or contribute to the obstruction of fair
6 and effective competition in the retail of these
7 channels by Virgin Media. No doubt a lower wholesale
8 price and a higher margin on packages which contain the
9 Sky channels in question would be welcomed by
10 Virgin Media. However, the small negative incremental
11 margin which results when one of Virgin Media's
12 subscribers to a package with only basic pay TV channels
13 upgrades to one which includes the core premium channels
14 is not such as to affect to any significant extent
15 Virgin Media's incentives to market the latter
16 packages."

17 The reasoning is then set out in the following
18 paragraph:

19 "The evidence makes clear that Virgin Media has
20 a strong commercial and financial incentive to win and
21 retain all customers who are interested in the CPSCs in
22 competition with Sky and others. In other words, Virgin
23 has an incentive to serve as many profitable customers
24 as it can. If a customer wants premium core sports
25 channels as part of its bundle, Virgin Media will not be

1 deterred from supplying them because it makes slightly
2 less than when serving a customer who wants only basic
3 channels. Both customers are a profitable proposition
4 and Virgin Media would like to supply both."

5 Then continuing:

6 "Ofcom found there is no margin squeeze and on the
7 evidence we conclude that any cost advantage which Sky
8 enjoys over Virgin Media by reason of Sky's larger
9 pay TV subscriber base is relatively small. Nor does
10 the evidence justify a finding that the level of
11 the rate card is a significant cause of the persistently
12 lower premium sport channel penetration on cable."

13 By that the tribunal meant the proportion of
14 Virgin Media's overall pay TV subscriber base who take
15 the premium channels:

16 "Other factors unrelated to rate card levels are at
17 least as likely to be at the root of this phenomenon."

18 There was evidence before the tribunal, for example,
19 that Virgin Media had been going through various
20 developments and had focused on its broadband offer. So
21 in paragraph 35 the tribunal's conclusion:

22 "Virgin Media is rightly regarded by Sky as
23 a serious, well-established rival capable of
24 constraining Sky's actions in the market and that it
25 does in fact compete effectively with Sky in the retail

1 supply of packages which include core premium sports.
2 We therefore conclude that Ofcom's findings as to the
3 effect of the rate card prices on Virgin Media's
4 incentives and competitive effort is not justified. Nor
5 indeed is consumer choice likely to be adversely
6 affected to any real extent. Existing customers of
7 Virgin Media who wish to take core sports channels can
8 do so without switching and at prices which are
9 comparable to those on Sky's satellite platform."

10 As we know, the tribunal's judgment was also not the
11 last word in relation to Ofcom's WMO remedy. BT
12 appealed against the tribunal's judgment and was given
13 permission to pursue one relatively narrow ground of
14 appeal in relation to the tribunal's conclusion on
15 whether Sky's rate card prices amounted to a practice
16 prejudicial to fair and effective competition with
17 respect to other potential new entrant retailer.

18 The tribunal dealt with this at paragraph 821 of
19 the judgment, which is at page 330. You see in the
20 second line:

21 "The tribunal has not found it necessary or
22 appropriate to reach a specific conclusion about the
23 ability of BT and others to compete effectively on the
24 basis of Sky's rate card price."

25 There was, therefore, an omission, as you pointed

1 out, sir, which was what the Court of Appeal concluded
2 amounted to an error, and there was, therefore,
3 a remittal to address that specific point.

4 I should briefly take you to the Court of Appeal's
5 judgment, although I may, I think, sir, need to do so
6 tomorrow. It is simply to address the submission of
7 Mr Beard's that Ofcom has fallen into the error which
8 the Court of Appeal has identified in the case of --
9 shall I take that now, sir?

10 THE CHAIRMAN: I think we will break until tomorrow. We
11 need more than 30 seconds to absorb that point.

12 MR HOLMES: Indeed, sir, I'm grateful.

13 THE CHAIRMAN: We will take up with the Court of Appeal
14 tomorrow morning.

15 MR HOLMES: I'm correct, sir, that we are commencing at
16 10.00 am tomorrow?

17 THE CHAIRMAN: 10.00 am.

18 (4.31 pm)

19 (The hearing was adjourned until
20 Tuesday, 4 October 2016 at 10.00 am)

21 Opening submissions by MR BEARD2
22 Opening submissions by MR HOLMES134
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