

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1246/8/3/16

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

7 July 2016

Before:

**PETER FREEMAN CBE QC (Hon)**  
(Chairman)  
**PROFESSOR COLIN MAYER**  
**CLARE POTTER**

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- and -

**SKY UK LIMITED**

Intervener

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**CASE MANAGEMENT CONFERENCE**

## **A P P E A R A N C E S**

Mr. Daniel Beard QC, Miss Sarah Ford and Mr. Nikolaus Grubeck (instructed by BT Legal) appeared for the Appellant.

Mr. Josh Holmes and Mr. Stefan Kuppen (instructed by Ofcom) appeared for the Respondent.

Mr. James Flynn QC (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Intervener.

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1 THE CHAIRMAN: Welcome to the party, Mr. Beard!

2 MR. BEARD: Thank you. I appear today with Miss Ford and Mr. Grubeck. Mr. Holmes and  
3 Mr. Kuppen appear for Ofcom, and Mr. Flynn is here for Sky, the intervener.

4 I was going to raise issues in the order as per the Tribunal's draft agenda. There is a good  
5 deal of agreement in relation to the five issues and I was going to briefly work through  
6 those, if that would be of assistance.

7 THE CHAIRMAN: You have not got any extra issues?

8 MR. BEARD: Not as far as I am aware, unless someone is going to spring up with a surprise.  
9 We had an exchange of submissions, which I think the Tribunal should have had.

10 THE CHAIRMAN: Yes.

11 MR. BEARD: With that I was going to move on to issue one.

12 THE CHAIRMAN: That is absolutely fine by us, and we are very much in your hands this  
13 morning.

14 MR. BEARD: Issue one was arrangements for transcription and e-bundles. In relation to  
15 transcription, the issue really is having some sort of live transcription. I think all parties, in  
16 principle, think it is useful when we have got live evidence being presented. The question is  
17 one of cost. Quotes have been obtained, and that is being discussed with the other parties.  
18 BT's solicitors have passed quotes across to the others, and hopefully that will be agreed.  
19 Obviously that is a matter between the parties, and I am just alerting the Tribunal to where  
20 we are on that.

21 In relation to e-bundles, given the relatively - comparatively - small volume of documents  
22 that are involved, and I say that advisedly----

23 THE CHAIRMAN: That is comparative to what?

24 MR. BEARD: Comparative to long commercial trials where these interlinked e-bundle systems  
25 are pulled together so that documents are electronically linked to transcripts, and so on. In  
26 the light of Sky's indication that, whilst electronic bundles would be lovely, they would also  
27 want paper bundles, it has been decided that pursuing e-bundles for these purposes is not  
28 going to be cost efficient. So at the moment the intention is that we will stick just with  
29 paper bundles for the moment.

30 THE CHAIRMAN: I do not think we are going to argue with that.

31 MR. BEARD: That really disposes of issue one. It is more an update rather than any particular  
32 decision being required.

33 Then, in relation to issue two, obviously the Tribunal will have by now the defence,  
34 statement of intervention and reply. In summary, none of the grounds of appeal were

1 conceded by Ofcom in its defence and none of the grounds were dropped by BT in its reply.  
2 In terms of heads of argument, nothing has gone away is the headline point.

3 There are, however, as we have identified in outline in our submissions, a range of points  
4 where we have put forward our position and it does not appear that Ofcom really disagree  
5 with us. We think this is going to be helpful in terms of managing the trial and the scope  
6 for any need for cross-examination on various issues, and we have put forward our witness  
7 timings on that basis. We think there is a link with timing.

8 We recognise that Ofcom is not coming forward and specifically admitting particular issues.  
9 This is not a formal response to a notice to admit, but we do think that, in practice, there is  
10 not going to be a real dispute on a number of issues with Ofcom as between the appellant  
11 and Ofcom, but of course that does not necessarily cover Sky's position. We see from some  
12 of Sky's points in its statement of intervention and in its evidence that Sky are seeking to  
13 say, "This is important to us, that is why we are intervening and we want, in the alternative,  
14 to put the case we think Ofcom should have made". We can see, obviously, why they want  
15 to do that, because it goes to weaknesses in Ofcom's position on various key points. That  
16 just is not the role of an intervener here. Our challenge is to the WMO statement, it is not  
17 for Sky to come along and put forward a different account in relation to, for instance,  
18 conditions of retail competition, in relation to whether or not Sky have incentives to disrupt  
19 effective competition.

20 Those are matters that are traversed, for example, in Miss Fyfield's statement, although in  
21 the Rule 16 notice that was put in, it is said that these witness statements are all about data  
22 and sources. Actually, they go far further than that. They make assertions that there is  
23 intense competition at the retail level and that she disagrees with Ofcom's conclusions on  
24 incentives. I can take the Tribunal to those points.

25 All we are saying today is really that, when it comes to consideration of timing and what  
26 needs to be dealt with, we are not trying to take a heavy handed approach, we have not  
27 sought to specifically exclude evidence. We think those sorts of collateral battles are not  
28 particularly productive and helpful. We do think that chunks of that evidence are irrelevant  
29 in the context of an appellate challenge to Ofcom's decision. If we are right in relation to  
30 our grounds or any of them and that this matter then goes back to Ofcom, of course Sky will  
31 be very much free to put forward whatever material it wants to Ofcom on a reconsideration,  
32 but it is not a matter for this Tribunal to be trying essentially to rejig analysis by Ofcom if it  
33 considers that Ofcom's approach was wrong. Indeed, if that were the course that this  
34 Tribunal were to start going down, of course, that opens up the prospect that BT itself

1 would want to be putting in further material and that is where we suggest this sort of appeal  
2 starts to spiral out of control.

3 We are very conscious that at the last CMC, Mr. Chairman, you indicated that you would  
4 keep a 'wary eye' on these sorts of issues, and we just flag them now. It may be in practice  
5 that these are matters that can be dealt with very satisfactorily through the terms of skeleton  
6 argument, but, as I say, I will go through on the witness timing issues and just pick up one  
7 or two points as to where we think essentially Sky is seeking to have more extensive cross-  
8 examination in relation to issues, so far as we can see, that really are not in play in this  
9 appeal.

10 THE CHAIRMAN: Alright, we will take those points when we discuss the timetable. Do you  
11 want me to hear what Ofcom and Sky have to say in response to that now or do you want to  
12 finish what you have to say?

13 MR. BEARD: I wonder whether it is more sensible to move on to the timetable, because with  
14 that marker down, in practice the gap between us on the various timetabling issues is not  
15 necessarily huge.

16 THE CHAIRMAN: I think you can take it that our overall approach to the issues in dispute has  
17 not changed from the last case management conference.

18 MR. BEARD: I am grateful for that indication.

19 THE CHAIRMAN: The overall approach.

20 MR. BEARD: Yes. It is of concern when an intervener, understandably concerned about these  
21 matters, we are not suggesting otherwise, is treating itself as somehow a respondent, or a  
22 surrogate respondent, or trying to improve the Decision.

23 THE CHAIRMAN: To be fair, they are not just any old intervener, they are the main other party  
24 in the market.

25 MR. BEARD: Sky are special in so many ways, Mr. Chairman, and we recognise that. That is  
26 not the position we take at all.

27 THE CHAIRMAN: I am sure Mr. Flynn will make this point in due course.

28 MR. BEARD: I have no doubt, and we certainly do not want to prevent Mr. Flynn from adding  
29 his lustre to these proceedings, but I am sure he can do it with great brevity and avoid any  
30 duplication of Ofcom's submissions.

31 THE CHAIRMAN: I hope everybody will make their points with great brevity avoiding  
32 duplication.

33 MR. BEARD: Yes. I, standing here alone, will do my very best. Turning then to timetable. If I  
34 may, could I just explain how it is that we put together our timetable and then I will just

1 highlight one or two of the differences with the Ofcom proposed timetable; we have set  
2 those out at p.5 and 6 in our submissions, you will have seen that. Just working through,  
3 opening submissions, our proposal is that there should be two days of opening submissions.  
4 We are conscious that in relation to the grounds of appeal that are being pursued, there are a  
5 number of legal issues that will need to be explored.

6 THE CHAIRMAN: I would, perhaps, just interrupt you to help you on this, and I am sorry if we  
7 have not made this clear before. Not that our own convenience is in any way relevant to  
8 any of this, but it just so happens that one of our members cannot sit on the Tuesday  
9 afternoon, so we have an initial day and a half period and then we are all back wide awake  
10 and lively on the Wednesday morning. I am quite keen to do this timetable planning by  
11 reference to the actual days rather than day one, day two, day three, we are talking about the  
12 Monday.

13 MR. BEARD: Yes, we are, absolutely. If that is the case----

14 THE CHAIRMAN: So that seemed to us, as I say----

15 MR. BEARD: That would constrain the time for openings in practical terms.

16 THE CHAIRMAN: It might be quite good for everybody.

17 MR. BEARD: We think that there is a reasonable extent of opening, but if there is a day and a  
18 half in which they have to be done, they have to be done. We think it would be better to  
19 have longer, but in the circumstances, I think the key thing is that BT is going to need a  
20 reasonable period in which to do its opening. If we are thinking about a day and a half, we  
21 are in effect thinking about just under eight hours. BT will want around four hours of that  
22 time in order to be able to put forward its opening. We anticipate that Ofcom will open  
23 fairly fully in relation to its position. We do not see a need for Sky to have extensive  
24 opening submissions. Obviously they must be entitled to open, but in Ofcom's proposal it  
25 is a half day, half day and half day for openings, and that does not seem appropriate to us.

26 THE CHAIRMAN: But it does come out of the day and a half.

27 MR. BEARD: It does, but I think, as the appellant, setting out the case and laying these matters  
28 out, we are going to need slightly more than that. That is our position.

29 THE CHAIRMAN: We are conscious of your position as an appellant. If you could all live with  
30 a day and a half for openings, that would seem to us to be practical.

31 MR. BEARD: Yes, it is obviously more sensible to have the openings completed within a day  
32 and a half if a member of the Tribunal cannot sit on the second day in the afternoon. In  
33 those circumstances, we will inevitably, quite properly, cut our cloth appropriately. All we

1 say is that sharing it in equal ways, half a day each, is not appropriate as between appellant  
2 and respondent and intervener.

3 THE CHAIRMAN: Is there any chance of you agreeing that between you?

4 MR. HOLMES: Sir, that seems to us eminently sensible. Now that we understand the Tribunal's  
5 constraints in the period available, I am sure we can sort something out between us.

6 THE CHAIRMAN: I am not sure we appreciated it ourselves.

7 MR. BEARD: I have given an indication of what we are going to want in those circumstances.

8 THE CHAIRMAN: Thank you.

9 MR. FLYNN: Mr. Beard would like our lustre to be brief, but nevertheless there is an irreducible  
10 minimum without which the Tribunal will not be enlightened by the lustre.

11 THE CHAIRMAN: Do you think you can fit into what is available for the openings?

12 MR. FLYNN: We did, on the basis of the Ofcom proposal, which just happens to be one and a  
13 half days. We probably would not need all of half a day. I guess we can carve this up, but  
14 if BT is going to say they must have a full day, Ofcom and Sky, with the best will in the  
15 world, are not going to be able to share half a day. I am sure we can come to a reasonable  
16 agreement.

17 MR. BEARD: I have already given an indication if there is a constraint, we will cut our cloth, but  
18 we will need more than half a day.

19 THE CHAIRMAN: Alright.

20 MR. BEARD: That is openings. Then we move on to witnesses and evidence. The timetabling  
21 that we have for evidence which we have got listed as day 3, but on the basis of what we  
22 have just been saying, this will be the Wednesday that we will be starting evidence, we  
23 believe that cross-examination of Mr. Petter should only really take half a day. The  
24 estimate for Mr. Petter from Ofcom was three-quarters of a day. The difficulty we have  
25 here, and this does slightly reflect the point I was flagging, is that in relation to Mr. Petter's  
26 evidence we really see minimal difference between Ofcom and us on this.  
27 If Ofcom are broadly not challenging evidence that is being put forward by the appellant,  
28 we do not think it is appropriate that Sky should be coming in and having essentially a  
29 separate go. Obviously they are entitled, if the Tribunal is so advised, to allow them to  
30 cross-examine as an intervener, but nonetheless the core of cross-examination must  
31 necessarily fall to the respondent in an appeal, and in circumstances where issues between  
32 the respondent and the appellant are minimal, we just do not understand why it is that there  
33 should need to be extensive time for cross-examination of Mr. Petter. That is why we have  
34 earmarked half a day, because we think this is one of those examples where it appears that

1 Sky is wanting to come and test issues, expand issues, going beyond that which Ofcom  
2 wishes to test and expand.

3 If I may, I will just deal with the other factual witnesses. Mr. Williams, I think there is no  
4 disagreement that, although his evidence is extensive and highly relevant, Ofcom and Sky  
5 only want to cross-examine him for a quarter a day.

6 Then we have got the evidence of Miss Fyfield, the Sky witness. Here again, there are  
7 issues as to the relevance of the evidence that she has put forward, and the need or  
8 appropriateness of cross-examination of that material. They arise in particular in relation to  
9 her contentions about the state of the retail market and competition in it, also in relation to  
10 her contentions in part B1 of her statement about the nature of incentives that Sky may  
11 have, which, as I have already adverted to, on both of those counts Miss Fyfield appears to  
12 be going significantly beyond Ofcom's case, in the former suggesting actually that retail  
13 competition is terribly intensive. We say, (a) that is not what Ofcom did, and (b) that is not  
14 what Ofcom found in the Decision, and therefore it is not appropriate for those matters to be  
15 dealt with by Sky by way of evidence, because that is effectively putting forward a new  
16 case.

17 Similarly, her disagreement, she is absolutely candid about her disagreement with Ofcom in  
18 relation to whether or not, in principle, Sky has incentives to adversely affect competition in  
19 relation to the provision of sports channels and indeed sports content. It is something that,  
20 again, is not being appealed by Sky, and it really is not open to them to challenge.

21 The third issue in this regard pertains to the position in relation to the grant-back condition,  
22 where again she is telling a story that is contrary to the position that has been adopted by  
23 Ofcom in relation to these matters.

24 It is for those reasons that we say that, in fact, we anticipate that the need to cross-examine  
25 Miss Fyfield for much beyond a quarter of a day is unlikely. We pencil in longer because if  
26 the Tribunal is minded to allow that sort of approach, obviously we have to put down a  
27 challenge to that sort of evidence.

28 So we do have a difficulty there, but those are the points in relation to the factual evidence.  
29 I do not know whether it is just worth pausing there and letting Mr. Holmes or Mr. Flynn  
30 comment before we go on to experts.

31 THE CHAIRMAN: Yes, please.

32 MR. HOLMES: Sir, three very brief points. I apprehend that it will be difficult for the Tribunal  
33 to form any sensible view today as to the scope of cross-examination that will be required of  
34 particular witnesses.

1 THE CHAIRMAN: It would be quite inappropriate and we are not going to do so.

2 MR. HOLMES: Therefore, we are necessarily in the hands of the parties and their estimates for  
3 cross-examination.

4 As Mr. Beard has noted, the only difference between the timetable proposed by Ofcom,  
5 following discussion with Sky in relation to cross-examination of factual witnesses and BT,  
6 relates to the time allowed for BT's witness, Mr. Petter. In my respectful submission, it  
7 would be sensible at this stage to take the views of those parties that will be conducting  
8 cross-examination as to the period of time that may be required. These are all, of course,  
9 maximum estimates at this stage, but it would be more sensible to allow sufficient time than  
10 to find ourselves at the hearing with over-runs. If we can reduce the length of time needed  
11 between now and the hearing all the better.

12 THE CHAIRMAN: I should have said also that the ten days we allocated to this are not a target,  
13 they are a maximum.

14 MR. HOLMES: I am grateful for that indication. We hear what Mr. Beard says. If he needs less  
15 time for Miss Fyfield I am sure that will be welcomed by all concerned.

16 Allowing the estimate for Mr. Petter which those parties that would be cross-examining him  
17 arrived at, which is the only point of difference between the two proposals, we still  
18 comfortably accommodate the witnesses of fact within two days. In Ofcom's submission,  
19 that is probably the best that we can do at this stage of these proceedings.

20 THE CHAIRMAN: Wednesday and Thursday. Mr. Flynn?

21 MR. FLYNN: Sir, I think I probably do not need to add to that. The difference is over a quarter  
22 of a day for Mr. Petter, and it is for Ofcom and Sky to suggest how long they think they  
23 might need for that witness.

24 As to what Mr. Beard has had to say about Miss Fyfield, he can decide whether or not he  
25 wishes to cross-examine her and on what, and he can make submissions about the relevance  
26 or accuracy of her evidence at the end of the trial.

27 THE CHAIRMAN: So that means that we would be on to the economic experts by Friday at the  
28 latest?

29 MR. BEARD: Yes. It appears that we may be able to start in any event with the first of the  
30 economic experts on Thursday, even with Mr. Petter having been allocated three-quarters of  
31 a day. I mention that because Mr. Harman, the position of Ofcom and Sky is that they only  
32 want to cross-examine him for a quarter of a day, so we can fit that in in any event on the  
33 Thursday.

1 Mr. Matthew is the single Ofcom witness. He is something of a hybrid witness in the sense  
2 that some of his evidence is factual and some of it is opinion evidence; plainly he is not an  
3 independent expert. We have slotted him in there because much of his evidence goes to  
4 pricing issues, which engages with evidence that is provided by Mr. Harman, so we are  
5 slightly taking out of order, so rather than BT coming forward with all of its expert evidence  
6 in a run we thought that was actually more sensible to hear Mr. Harman and then Mr.  
7 Matthew, albeit that there are certain other issues in relation to Mr. Matthew.

8 Then, we would move on----

9 THE CHAIRMAN: Ofcom are happy with that, because it is in your timetable too?

10 MR. HOLMES: Yes, we are happy for Mr. Matthew to go among the experts, we think he is  
11 giving expert opinion evidence. I hear Mr. Beard's----

12 THE CHAIRMAN: There was an issue with Ofcom before.

13 MR. HOLMES: Indeed, sir, and what the Tribunal has universally done is to hear the evidence of  
14 Ofcom's experts and has accorded it the weight that it deserves, and there has been no issue  
15 at all. I have heard appellants line up to say that they are not independent experts, but really  
16 it comes to nought at the hearing.

17 THE CHAIRMAN: Indeed, his evidence is given after Mr. Harman.

18 MR. BEARD: Absolutely. Then we move on to Dr. Padilla.

19 THE CHAIRMAN: Can we maybe help you a little here, in our efforts to be forward thinking  
20 and innovative, it did occur to us when we put this out to you that in relation to Ground 5,  
21 the grant back condition argument and the theoretical discussion about that, this seems an  
22 eminently suitable candidate for a joint examination, i.e. a hot tub.

23 MR. BEARD: If the Tribunal wants to run a hot tub----

24 THE CHAIRMAN: On that part of the evidence, because that seems to us to be where the two  
25 economic experts are either in agreement or they are, maybe, in less disagreement, and it is  
26 very important for us, I think, to see where they agree and where they disagree and it would  
27 be a good opportunity.

28 MR. BEARD: Yes.

29 THE CHAIRMAN: We are very much inclined to go for that, in which case we would want to do  
30 it as the first thing for those witnesses.

31 MR. BEARD: I think there are two issues there. First, we entirely agree that on Ground 5 it is  
32 very sensible that there is a proper process of ascertaining what is and is not in agreement  
33 and disagreement between the two of them, and I think all the parties are agreed that there

1 needs to be an exchange of views coming out with a joint statement from Dr. Padilla and  
2 Dr. Caffarra on the Ground 5 issues.

3 THE CHAIRMAN: We thought this might replace that.

4 MR. BEARD: I think even if the Tribunal were minded to run the hot tub that preliminary  
5 exercise of seeking ascertainment of at least where there was agreement, would be a  
6 sensible step in any event.

7 THE CHAIRMAN: Why is that?

8 MR. BEARD: Because it means that when it comes to the discussion in the hot tub, what it is that  
9 the Tribunal needs to focus on in terms of questioning will be necessarily delineated. The  
10 burden of the hot tub process obviously falls more heavily on the Tribunal than it does in  
11 terms of ordinary cross-examination and we would therefore suggest that if that is what the  
12 Tribunal is minded to do then in those circumstances that process of identifying what it is  
13 that remains and therefore what the Tribunal might want to press the two economists to  
14 comment on in relation to Ground 5 would have been of assistance to the Tribunal.  
15 It will, of course, be of assistance to the parties in terms of preparing skeletons and  
16 submissions in the run-up to the hearing, and I think everyone agrees that this is a sensible  
17 course, so even if this were to be a process of putting forward a hot tub in relation to  
18 Ground 5 I think engagement between the experts would nonetheless be sensible on Ground  
19 5.

20 As to the order in which those matters are dealt with I wonder whether, in fact, it is more  
21 sensible for the hot tub to be run in the final afternoon, if there is to be one run, of the  
22 experts' evidence, because the other evidence of Dr. Padilla goes, as Mr. Chairman, you  
23 rightly anticipate, to the other Grounds upon which you will have heard evidence from other  
24 expert witnesses and factual witnesses and therefore in the run it makes more sense for that  
25 evidence to be heard first, continuous with the other, rather than interposing Ground 5 and  
26 then coming back to Grounds 1 to 4 with Dr. Padilla. All of that is subject to my taking  
27 instructions in relation to what----

28 THE CHAIRMAN: I am sorry to spring this on you and I want to hear what the other parties  
29 think, but if I can just give you an idea of how we came to this. My limited experience of  
30 asking economic experts to set out in writing what it is they agree on and what it is they  
31 disagree on has tended to be that they emphasise what they disagree on, and we get a very  
32 clear idea of that, but that is actually not the purpose of the exercise. The purpose of the  
33 exercise is to encourage agreement. So, I put that as being on the table as an issue.

1 The other point is that the purpose of joint appearance is to encourage professional  
2 agreement. That might be more difficult after a possibly bruising cross-examination of one  
3 of the experts, or both of them on the other grounds, so that is why we are attracted by the  
4 idea of picking Ground 5 out in advance where the disagreement is very clearly delineated  
5 and separated from the other matters. That is why we are thinking of doing it first, before –  
6 how can I say – people’s tempers have a chance to fray. I may be doing grave disservice to  
7 the characters of both, but we are all human.

8 MR. BEARD: I was going to say these are not necessarily unduly tender souls who will be  
9 mortified by cross-examination and unable to----

10 THE CHAIRMAN: A pleasurable experience for some, but not for all I think.

11 MR. BEARD: Is the best thing in relation to this, having heard the Tribunal’s indication of a  
12 desire that there should be a hot tub in relation to Ground 5 that the parties take this away  
13 and consider whether that is something that they are inclined to think would be the best way  
14 of dealing with Ground 5 and what other steps might usefully be taken by the experts in  
15 order to streamline Ground 5 in any event, and then the order in which these matters should  
16 be dealt with, because plainly no one to date has come forward with this suggestion on the  
17 parties’ side, and I think it is only proper that we should have the opportunity to take  
18 instructions in relation to those matters.

19 THE CHAIRMAN: We are trying not to be heavy-handed today – you may have noticed.

20 MR. BEARD: I quite understand.

21 THE CHAIRMAN: Mr. Holmes, do you have any observations?

22 MR. HOLMES: Sir, for our part we would not be opposed to the idea of a hot tub; neither of  
23 these, of course, are our witnesses, so I do not want to intrude on anything that Mr. Flynn  
24 has to say, but my own personal experience of a recent hearing in the High Court in which a  
25 hot tub was used, was that it was a very effective way of getting at the underlying economic  
26 issues.

27 I am conscious of the point that Mr. Beard raised, that this is a burdensome task for the  
28 Tribunal because generally, you, sir, would be leading the first round of questioning and it  
29 may be that the parties could assist by providing, for example, a set of potential topics or  
30 questions which would also minimise the need for subsequent cross-examination.

31 THE CHAIRMAN: Unlike the High Court – news of that has filtered through to us as well – we  
32 do have a Panel here, including an expert in the field and I think the task is slightly easier  
33 for us.

1 The issue that we have been debating is the fact that there is no sort of comprehensive  
2 economic case on one side and a comprehensive economic expert answering every point on  
3 the other side, so you are not going to get to the bottom of the whole case just by having a  
4 hot tub on Ground 5, I think we are conscious of that. But that does seem to be a discrete  
5 argument between two experts as to the weight and validity of the model that is being put  
6 forward, that is why we are interested.

7 MR. HOLMES: We see that, and perhaps an approach would be, as Mr. Beard, suggests----

8 THE CHAIRMAN: To go away and think about it.

9 MR. HOLMES: --and for now to put some time in the timetable on the assumption that there will  
10 either be cross-examination on this topic, or there will be a hot tub, and then a firmer  
11 decision can be reached by the Tribunal.

12 THE CHAIRMAN: We were thinking that if you could allocate a day to that, but if in the end the  
13 hot tub does not run that is going to be the day for Ground 5. That would be our feeling.  
14 Then there is still time for the other issues.

15 MR. BEARD: There are timing issues as well, sir. I think probably the sensible thing is for the  
16 parties to go away and discuss this.

17 THE CHAIRMAN: Can I make it clear, without being heavy handed, if this is adopted, we would  
18 like it as the first item for the experts to consider.

19 MR. BEARD: We hear you, Mr. Chairman.

20 MR. FLYNN: Perhaps I could just say a couple of things about that? The reason we considered  
21 it is because it does involve our witness, and the reason we did not put it forward, the news  
22 having filtered through to us, was because it did not dispose of all the issues. If the Tribunal  
23 considers that a day for a hot tub on the grant-back condition, as BT likes to call it, followed  
24 by some time, and the Ofcom timetable which we commend, on the experts for the same  
25 reason as for the factual, which is that both Ofcom and Sky may have some questions for  
26 Dr. Padilla, those could follow on the second day.

27 It is for the Tribunal as to whether it would be assisted by a statement of agreement and  
28 disagreement. We have at least provisionally agreed that that could happen, despite the  
29 movements of both our economists over the summer period. If the Tribunal does not feel  
30 that is necessary, then presumably we can dispense with it. We are entirely open to going  
31 through that stage.

32 I think, so long as time is reserved to cover the other matters in Dr. Padilla's now four  
33 reports, including an attempt to provide what I think might be described as expert factual  
34 evidence, to trump the inexpert and biased factual evidence from Sky, we will need a bit of

1 time for that. There are two days in the Ofcom timetable and I think they could be used in  
2 that way.

3 MR. BEARD: As I say, I am happy to go away and---

4 THE CHAIRMAN: I am sorry, I have interrupted your smooth exposition.

5 MR. BEARD: Dealing with the practicalities of these matters, there is nothing smooth about the  
6 practicalities of trials, as far as I have experienced it.

7 I think we will go away and revisit timing. The one thing, if there were to be a whole day  
8 dealing with Ground 5, then what would cause concern is this: we thought it was sensible  
9 and will be of benefit, we hope, to the Tribunal, to put in a day's gap for preparation of  
10 written closing submissions.

11 THE CHAIRMAN: We agree with that.

12 MR. BEARD: That gap would begin to become closed if we are extending Mr. Petter and then  
13 doing two days of Dr. Padilla and hot tub.

14 THE CHAIRMAN: Hang on, I have got to the end of Monday the 10<sup>th</sup>.

15 MR. BEARD: At the moment we have got Friday, three-quarters of a day, Mr. Matthew.

16 THE CHAIRMAN: You have got quite a lot for Mr. Matthew.

17 MR. BEARD: It may be that we can cut down, we can see that. Since he is Ofcom's only  
18 witness, we thought it was sensible at this stage to provide for a reasonable amount of time.

19 THE CHAIRMAN: We are still operating within an envelope of two and a half days for expert  
20 witnesses.

21 MR. BEARD: I am sorry?

22 THE CHAIRMAN: Two and a half days is the sort of envelope, so it may be that it takes us  
23 through to Tuesday lunch time. We do take the point that it is really for the cross-  
24 examining party to say how long they need, or they think they need.

25 MR. BEARD: We recognise that primarily it is. We do not take issue with Mr. Holmes. The  
26 reason we raised the issue in relation to Mr. Petter was because of the broader issues that  
27 arise in relation to it. Of course, that is inevitably the case.

28 If we are through to Tuesday lunchtime, I think then we would be looking at starting  
29 closings on Wednesday afternoon, and giving two and a half days for closings.

30 THE CHAIRMAN: Yes, we want to come back on that, I think. Do you really need two and a  
31 half days for closings?

32 MR. BEARD: There is obviously a difference of view about what is useful. We are concerned  
33 that - although for the purposes of e-bundles it is said that there are not that many  
34 documents in this case - there is going to need to be a proper opportunity for BT to, in

1 addition to the written submissions, have the opportunity to take the Tribunal to key  
2 elements of the WMO Statement, explain why it is that the grounds and the evidence that  
3 you have heard mean that on each of the grounds Ofcom has failed to make out its case.  
4 We are concerned that the estimate put forward by Ofcom of two hours for BT's closing is  
5 just not reasonable in relation to this matter. If one were to strip out all of the factual  
6 evidence here and just deal with this as a documentary case, one would expect the  
7 submissions that would be made by the appellant party would probably take in total around  
8 two days. That is, in broad terms, what we had put forward as the cumulative estimate of  
9 opening and closing. We have already discussed curtailing the opening. It is  
10 understandable in the circumstances.

11 THE CHAIRMAN: Modestly.

12 MR. BEARD: Modestly, but we are concerned that when it comes to summing up, referring to  
13 the relevant evidence, drawing the threads together for the purposes of closing submissions,  
14 it is plainly not going to be feasible, even with the best written closing notes, to deal with  
15 that in two hours. It is for that reason that we suggest a substantially longer period than two  
16 hours is going to be required for closings.

17 If the Tribunal considers that actually it would be better to try and compress the closings  
18 into two days then those closings will need to be dealt with on the basis that BT has a  
19 substantial chunk of time at the start of those two days, and has time to reply. Of course,  
20 BT properly does need the last word in relation to these issues. Again, if the Tribunal is to  
21 direct that, in fact, two days would be more appropriate for closing then I think it is  
22 probably sensible that the parties go away and proceed on that basis. If that were to be the  
23 case, and I quite recognise, Mr. Chairman, your comment earlier that ten days is not a  
24 target, nonetheless if it were to be two days closing, I think it is more sensible to start that  
25 on the Thursday and finish on the Friday than it is to start it sooner, and that may well aid  
26 the process of ensuring that - I was going to say "fuller" written closings, but I think to take  
27 the Blaise Pascal motto, 'if we had longer they would be shorter', is probably what applies  
28 in relation to written closings.

29 THE CHAIRMAN: I thought it was Groucho Marx, but Pascal is much more learned!

30 MR. HOLMES: I thought it was Mark Twain, sir!

31 MR. BEARD: That would be the way we would suggest dealing with it, but we are concerned  
32 that two hours for closing is just not a sensible measure in relation to the volume of material  
33 that needs to be dealt with in this case.

34 THE CHAIRMAN: Mr. Holmes?

1 MR. HOLMES: Sir, briefly on the experts, may I just take stock to make sure that I have  
2 understand because I have slightly lost track of the position. As I understand the position, at  
3 least by Thursday close of play we will have finished the factual evidence. There is some  
4 debate about whether there may be a quarter of a day left over, but, subject to your views, if  
5 we are beginning with the hot tub then it would be more sensible to start afresh on the  
6 Friday and to deal with hot tubbing issues first. Was that your thinking, sir?

7 THE CHAIRMAN: No, that is not right. I think we thought that we should begin with the  
8 Harman and Matthew evidence.

9 MR. HOLMES: I see, sir, yes.

10 THE CHAIRMAN: Then we get on to Padilla and Caffarra, at that point we should begin with  
11 the hot tub on Ground 5.

12 MR. HOLMES: Understood, sir, so the aim then would be to finish Harman and Matthew by  
13 close of play on Friday.

14 THE CHAIRMAN: I thought close of play on Thursday, but that depends how you go. As I say,  
15 we are rather in your hands.

16 MR. HOLMES: So Monday and Tuesday are opening. Wednesday and Thursday are largely  
17 fact, with possibly a quarter of a day----

18 THE CHAIRMAN: We thought a day and a half might well do that, and then the half day might  
19 be Harman and Matthew on the matters to which they speak.

20 MR. HOLMES: I understand, sir.

21 THE CHAIRMAN: Then Friday would be into the hot tub, as it were.

22 MR. HOLMES: Yes, sir, with Monday for any----

23 THE CHAIRMAN: I quite accept that we may not get to that, and we are speculating at this stage  
24 because we cannot know how we will do, but that is what we had in mind.

25 MR. HOLMES: Yes, that is very helpful. On Monday then there would be any mop-up cross-  
26 examination of Padilla and Caffarra.

27 THE CHAIRMAN: Yes, it might not be mop-up, it might be very significant.

28 MR. BEARD: The only concern is that I think trying to conclude the factual witnesses by  
29 Thursday, at the moment we have got three-quarters of a day on Wednesday on Petter and  
30 then Williams a quarter day, so that is all of Wednesday. Then we have got Fyfield on  
31 Thursday with Harman, then we have got Matthew on Friday, and I do not think we can  
32 assume that Matthew is simply going to be a quarter of a day in relation to this. As I say, it  
33 may be that we can cut things down below three-quarters of a day, but I do not think we

1 could work on the basis that we can start afresh on the Padilla and Caffarra evidence,  
2 whether it was hot tub or otherwise, on Friday morning. It does look as if----

3 THE CHAIRMAN: It is too tight, is it?

4 MR. BEARD: I think that does look too tight, and I think it is more realistic to be looking at  
5 either Friday afternoon for the start of Padilla and/or Caffarra if the hot tub is going to be  
6 the way of proceeding, or dealing with that on Monday and Tuesday. That does seem to me  
7 more realistic. Otherwise I think there is a danger that we are going to get squashed, and  
8 the last thing we want is to be timetabling people who then have to go away. We would be  
9 better off having short gaps than we would queuing people and then there being undue----

10 THE CHAIRMAN: We are not very keen on splitting the hot tub over the weekend.

11 MR. BEARD: If that is the way forward then it should be started on Monday morning, I think.

12 MISS POTTER: The only thing, looking at the outline timetable really, is probably how long you  
13 are allowing for Miss Fyfield, because that is a witness that you are planning to cross-  
14 examine. There is a reasonably generous allocation at the moment.

15 MR. BEARD: Yes, there is. As Mr. Holmes has already adverted to, we are not pretending that  
16 we have done a preparation of draft cross-examination or our skeleton argument. The team  
17 has been rather preoccupied with making sure that the reply was in, and we are sorry if we  
18 were slightly late but it has been something of an exercise. Beyond that we have not yet  
19 gone. Therefore, we recognise that there may be scope for cutting it down. We cannot say  
20 right now that that is the position.

21 MISS POTTER: It then comes down to whether we want to fix a specific day for the hot tub,  
22 namely Monday, or whether we still want to leave the timings slightly at large to give you  
23 all time to think a bit more about how long you are likely to need.

24 THE CHAIRMAN: I think we want a full day starting at the beginning of the day. If you are all  
25 doing brilliantly well and you finish the other by the end of Thursday, we can start on  
26 Friday. If not, we can start on Monday.

27 MR. HOLMES: That is well understood. We will take that away and we will discuss the  
28 allocations of time.

29 THE CHAIRMAN: Then we have four days in the following week for the rest, including the  
30 closings and including your day of preparation and reading, which we are quite happy to go  
31 along with.

32 MR. BEARD: I am grateful.

33 MR. HOLMES: Yes, sir, and in relation to closing, if I might address this, for our part we agree  
34 that written closing submissions are likely to be of assistance to the Tribunal, and will also

1 ensure that the parties can marshal their thoughts. They should also allow, in our  
2 submission, briefer and more focused oral closing submissions.

3 THE CHAIRMAN: I was going to make that point, but I forebore to do it.

4 MR. HOLMES: With that in mind, sir, you have obviously had previous experience of recent  
5 regulatory appeals in the Tribunal, two days already appears to us a lengthy allocation for  
6 closings, particularly if they follow written closing submissions. We have no desire to  
7 prevent Mr. Beard or his client developing the submissions that they feel necessary in  
8 closing, but we are equally conscious of the cost, both public and private, of the hearing  
9 running longer than is necessary. We do urge the Tribunal to consider whether closing  
10 submissions after written closings could be accommodated within a day, or at most a day  
11 and a half, along the lines of Ofcom's original proposal.

12 THE CHAIRMAN: I think a day and a half is what we are working on. By that stage of the trial  
13 I think you can assume that we shall be quite familiar with the material, and there is a great  
14 premium on covering the ground succinctly. You have a day to prepare your written  
15 closings, we do not have a day to read them, but we will read them, and they will be helpful.  
16 If we set an overall target, I think if you work with that, that is what we would like.

17 MR. BEARD: I have given the indication of the position of BT in relation to written closing, so it  
18 was our suggestion that a day should be put in so that written closings should come forward,  
19 but with that suggestion in mind, recognising, of course, that they are documents that can be  
20 referred to and should assist in elucidating any oral submissions that are made, it is still with  
21 that in mind that the suggestion, the timing of closings was put forward. If the Tribunal is  
22 minded to require a tighter timetable, obviously we will seek to cut our cloth in relation to  
23 those matters. I should say that in relation to a matter of this scale that whether or not we  
24 use all of the 10 days, or we save one of the days in these circumstances seems to us to be of  
25 limited importance if it transpires that, in fact, more time is required in relation to closing.

26 THE CHAIRMAN: We are not seeking to save a day. I am concerned not to spill over beyond  
27 the 10 days because that causes quite a lot of administrative difficulty. The 10 days are  
28 there, nine and a half, I should say, as a maximum, and you are free to arrange things within  
29 that, but there is the overriding principle that the more succinct, clear and brief you can be,  
30 the more likely you are to command the attention of those you are trying to address. It is  
31 not rocket science.

32 MR. BEARD: We do our best.

33 MR. FLYNN: Perhaps I could just make a couple of points, if we run short on factual evidence in  
34 week one, it does not really matter because then people can scurry back to chambers and

1 offices and be working on these helpful closing submissions, so I think it is sensible, as it  
2 were, to bolt in now that the hot tub should start on the Monday morning, not least as both  
3 experts are pretty international people, so it would be good for them to know just when they  
4 have to turn up. If I could just repeat that I think the appropriate thing would be for the hot  
5 tub of Dr. Padilla and Dr. Caffarra then to be followed by cross-examination of Dr. Padilla  
6 on other aspects of his various reports.

7 Without locking it in it is very likely that we would have some space for further work on  
8 closing submissions and those could be accommodated not least giving the Tribunal some  
9 time to read it by starting the oral presentation of those closing submissions on the Thursday  
10 afternoon, and then you could have them in a day and a half, probably with a morning to  
11 read.

12 MR. HOLMES: Sir, for our part, that sounds eminently sensible.

13 THE CHAIRMAN: It is very sensible. We do not only read in daylight hours, may I say, but yes,  
14 indeed. (Laughter)

15 MR. FLYNN: It may depend on the colour coding of some of the passages, I think.

16 THE CHAIRMAN: I am proposing we have a short break now and come back in 10 minutes'  
17 time, and it gives you a chance to discuss these things we have inflicted on you, and then we  
18 will see what else we agree.

19 (Short break)

20 THE CHAIRMAN: Was that helpful?

21 MR. BEARD: Sir, yes. I still need to finally confirm the proposal in relation to the hot tub. In  
22 relation to timings we have had a brief discussion. I think the best thing is for us to come  
23 back with a proposal in the light of the various indications by the Tribunal. One of the  
24 things that we do need to clarify, and we were not able to clarify during the break is actually  
25 when precisely Dr. Padilla and Dr. Caffarra would be available in case there is a difficulty  
26 with meshing timing for instance in relation to the hot tub being on the Monday. Those are  
27 the things that we want to take away.

28 The other point that we have raised is that it will be sensible to put those experts on notice,  
29 not only on the date that might be programmed for the start of their evidence but the day  
30 before in case the factual and other evidence goes short, so that we can go into it directly.

31 We do anticipate that if we are going to go with the hot tub process, and it is thought that a  
32 day might be allocated to it, we would want that just to be a single day rather than spread  
33 across two days, and certainly not spread across the weekend, and we all agree about that.

34 In concrete terms it would only be if the factual and other evidence, and openings, had been

1 done and concluded by the end of Thursday that we start the hot tub putatively on the  
2 Friday, otherwise, if that is going to be the process, we start it on the Monday.

3 In terms of timings for closing we hear the Tribunal suggesting short appearance for  
4 closing, we will go away and have a look at that in the light of a rigid timetable, and  
5 consider the allocation of timing accordingly.

6 THE CHAIRMAN: When could you come back to us on that?

7 MR. BEARD: I would like to say “tomorrow”, but I think it is more sensible to look at coming  
8 back early next week in relation to those.

9 THE CHAIRMAN: That is helpful, we were going to give you longer than that, if there were  
10 other things to wrap up.

11 MR. BEARD: I will deal with the other matters, because I think it is relatively short. I imagine  
12 the process will put something together and pass it to the others and we will see whether or  
13 not we can reach agreement in relation to it, but we may not be able to do that until  
14 Monday.

15 THE CHAIRMAN: Everything by the end of next week would be wonderful. We could even  
16 give you another week, but we would rather not.

17 MR. BEARD: I think everyone here would probably rather not, and try and clear this out of the  
18 way once it is still fresh in people’s minds.

19 MR. HOLMES: It should be possible to agree within seven days, if there is a problem then  
20 obviously we will have to come back but we will do our level best to avoid that.

21 THE CHAIRMAN: Alright.

22 MR. BEARD: That deals with the timing issues, taking into account the Tribunal’s observations  
23 and having a process for dealing with it. That, I think takes us to issue four on the draft  
24 agenda unless the Tribunal has other points in relation to timing of the hearing.

25 THE CHAIRMAN: Issue four.

26 MR. BEARD: That is just confidentiality.

27 THE CHAIRMAN: Before we get on to that, we were talking about other ways of elucidating  
28 economic expert agreement. We have had a discussion about this. Whether it is the Friday  
29 or the Monday for the hearing, I think about two weeks before we would very much  
30 appreciate you letting us have your collective or individual view on topics to inform the hot  
31 tub process. We will obviously have our own views, but we would need a fortnight, I think,  
32 to assimilate them and build them into our own thinking. Is that a reasonable target?

33 MR. BEARD: That would mean that it is----

1 THE CHAIRMAN: September 16<sup>th</sup>, that is the day of the Sky skeleton. That seems a good focal  
2 point----

3 MR. BEARD: I can see the force----

4 THE CHAIRMAN: --and building on that, I think maybe we were a little bit dismissive of the  
5 idea of exploring in advance of the hot tub what area of agreement might be possible. It  
6 would be quite helpful to have an idea of the areas of agreement, I think all limited to  
7 Ground 5, because----

8 MR. BEARD: That is all there is between Dr. Caffarra and Dr. Padilla.

9 THE CHAIRMAN: That is right, and we do not really see any other aspects of Grounds 2, 3 or 4,  
10 or even Ground 1, where there is an array of experts on one side and an array of experts on  
11 the other side, they are obviously big points in dispute, but they are matters of assessment,  
12 judgment, fact – am I right?

13 MR. BEARD: Yes, broadly, that is right. The only caveat, I suppose, is there is obviously a  
14 dispute between Mr. Harman and Mr. Matthew in relation to certain of the pricing issues,  
15 but as between Dr. Padilla and Dr. Caffarra the issues are only in relation to----

16 THE CHAIRMAN: Mr. Matthew and Mr. Harman can tell us what they agree on, that is helpful,  
17 but we are not insisting on that.

18 MR. BEARD: I was going to raise as a further issue whether the Tribunal was actually  
19 suggesting that Dr. Caffarra and Dr. Padilla should not speak, because I think if that was not  
20 being suggested----

21 THE CHAIRMAN: That was the misunderstanding I wanted to clear up. We are very pleased if  
22 they----

23 MR. BEARD: I think all of us will benefit from that, so we will leave that process to go on.

24 THE CHAIRMAN: If you concentrate on the agreement rather than the disagreement.

25 MR. BEARD: I am sure that they will endeavour to find harmony.

26 THE CHAIRMAN: A lovely idea! That date of 16<sup>th</sup> September would be the sort of cut-off,  
27 because that would then give us a fortnight to think about it.

28 MR. BEARD: In relation to the skeleton argument I come at this late, but I do know that at the  
29 moment the skeleton arguments, I understand that because we are starting 3<sup>rd</sup> October and  
30 the Tribunal wants to have reading time in advance of the hearing and ensure that the  
31 bundles are with the Tribunal in relation to the hearing in reasonable time in advance, but  
32 we were looking again at 2<sup>nd</sup> September as the date on which we are intended to serve our  
33 skeleton argument, and we did wonder, whether or not in relation to that there might be any  
34 leeway of a couple of days, simply because in terms of availability – people who are

1 intended to review and sign-off on these things not being available at relevant points at the  
2 end of August. We are slightly concerned that there may transpire to be some difficulties.  
3 What I am talking about is possibly moving it to 6<sup>th</sup> September rather than 2<sup>nd</sup> September,  
4 the 2<sup>nd</sup> being Friday. I just raise it now given, sir, that you are talking about dates relating  
5 to Sky skeleton, and we recognise that this would have a knock-on impact. The 6<sup>th</sup> is a  
6 Tuesday, we were wondering if we could move on that basis.

7 MR. HOLMES: We would not object if we were to be allowed a similar extension for our  
8 skeleton argument.

9 THE CHAIRMAN: That puts Sky back to 20<sup>th</sup>.

10 MR. BEARD: Yes, and I think we can still aim for the bundles on 23<sup>rd</sup>.

11 THE CHAIRMAN: Right, provided you are up and ready for the hearing, and it does not  
12 interfere with that and we still have a reasonable time to look at what you say, I am not  
13 going to insist on---

14 MR. BEARD: I would be grateful for that. Just one issue in relation to the points of agreement  
15 and disagreement. The Tribunal wanted two weeks beforehand, and I do not know whether  
16 the intention is for that to stay on the 16<sup>th</sup>?

17 THE CHAIRMAN: That is quite important.

18 MR. BEARD: May I just have one moment. (After a pause) No, sorry, I just wanted to check  
19 that.

20 THE CHAIRMAN: That would help us quite a lot.

21 PROFESSOR MAYER: Could I just emphasise, it is areas of agreement, rather than areas of  
22 agreement and disagreement, as far as possible at least, areas of agreement?

23 MR. BEARD: Yes, we understand, want harmony, not discord set down on paper, we take that.

24 THE CHAIRMAN: I have had cases where experts disagree on what they disagree on, and we do  
25 not want that.

26 MR. BEARD: Yes.

27 MR. FLYNN: Might I just interject, would it be appropriate for the parties' suggestions for  
28 topics, which I think is separate from the statement of harmony, to be included in the  
29 respective skeletons?

30 THE CHAIRMAN: If you can do that that would be helpful. We do see a connection, but I really  
31 do not want to micro-manage your---

32 MR. FLYNN: Especially as we are playing with the timing a bit, I think that would be more  
33 achievable for us than to be, as it were, working on two things at once. So if we can put that  
34 in our skeleton---

1 THE CHAIRMAN: We do need the topics by 16<sup>th</sup>.

2 MR. FLYNN: That was the point I was----

3 THE CHAIRMAN: We really do.

4 MR. FLYNN: I see.

5 THE CHAIRMAN: What we are saying is we could flex a bit on the skeleton. We have said how  
6 difficult it is for us, and we have taken the point.

7 MR. BEARD: I think it would be difficult to set these things out in skeletons whilst that harmony  
8 is being refined; we do not want to pre-empt that process in the skeletons. What we will try  
9 and do is get the terms of agreement as soon as we can, but if we commit to providing the  
10 topics and, by that stage, before putting in our skeleton there needs to have been the  
11 harmony paper provided so that for all of the preparation of skeletons we know that, and in  
12 relation to topics we will then move on from that for the 16<sup>th</sup>.

13 I do not think the Tribunal needs to give a direction at this stage in relation to the production  
14 of the harmony paper, we are conscious that it needs to be done before the end of August so  
15 that it can be fed into our skeleton argument.

16 THE CHAIRMAN: Yes. On the basis of what I have heard, I do not think we are going to give a  
17 directions order as a result of that.

18 MR. BEARD: No, it is not my intention to ask for one. Unless the Tribunal has other points in  
19 relation to timing, etc, I think that would take us to issue four on confidentiality where our  
20 submissions are very brief, in the sense that we all agree that there are going to be  
21 confidentiality issues. Trying to manage how we deal with that now is simply not feasible.  
22 It seems to us that there are a couple of principles: (a) we try and do as much as possible in  
23 open; and (b) when we have to do things under confidentiality ring conditions, we try to fit  
24 it in so that there not a constant going backwards and forwards in relation to witnesses, but  
25 precisely how we engineer that I think is something that we could spend an awful lot of  
26 time trying to timetable this now, and it is just not productive. I think there is a consensus  
27 amongst the parties on this.

28 THE CHAIRMAN: That is helpful, and we are very conscious that there may even be some  
29 matters that cannot even be mentioned within the confidentiality ring, they are so  
30 confidential.

31 MR. BEARD: That is always true.

32 THE CHAIRMAN: Yes. We have that point very much in mind. I think one of our members has  
33 a slight issue with the depth of colouring of the confidentiality barring – dark blue, dark red.

1 Dark blue certainly can make it illegible under certain lighting conditions. Can I ask you to  
2 treat us kindly?

3 MR. BEARD: We will look at the tones.

4 THE CHAIRMAN: Yes, adopt the right tone!

5 MR. BEARD: That then takes us to the fifth issue, which is anything else. The only two issues  
6 that we had under this head were the issue of harmony and also timing of skeleton, but I  
7 think we have dealt with both of those. So, unless I can assist the Tribunal – I will just  
8 check behind me in case there is anything else.

9 THE CHAIRMAN: I just emphasise what we always say, which is that we are not aware of the  
10 commercial imperatives governing this litigation, I am sure there are some, we would  
11 encourage the parties to resolve their differences if they possibly can. We are here as a  
12 backstop, we do not want to be pushing people into disputes they would not otherwise  
13 engage in, and if there are any commercial developments – I appreciate that is a very  
14 sensitive issue – I take it that you will keep us informed.

15 MR. BEARD: Certainly, insofar as any potential commercial developments that might affect the  
16 need for any hearing or further proceedings in relation to this matter, or condition the extent  
17 of these proceedings, then obviously that is the case. In relation more generally to  
18 commercial issues, obviously----

19 THE CHAIRMAN: In a sense, we do not want to know. Unless there is anything else? Mr.  
20 Flynn?

21 MR. FLYNN: Just a very small point. The Tribunal's existing direction calls for the preparation  
22 of a hearing bundle. Our suggestion would be, given that the papers are relatively light, that  
23 we can, as it were, re-brand the existing bundles in a trial bundle numbering, rather than  
24 create a whole new bundle of what you already have, and that is possibly something we  
25 could also agree amongst ourselves.

26 MR. BEARD: The obligation is to make sure that the Tribunal has hearing bundles by 23<sup>rd</sup>. If  
27 that exercise is not new printing but finding new stickers for the back of existing bundles  
28 then all the better, and we are very happy to listen to Sky's terribly conscientious recycling  
29 proposals.

30 MR. HOLMES: That sounds extremely sensible. I am conscious, though, sir, that you mentioned  
31 difficulties of legibility in relation to some of the documents already provided. Would it  
32 assist the Tribunal if we were to at least provide copies of the pleadings and the Decision,  
33 which were re-coloured to ensure that the confidential passages were legible?

1 THE CHAIRMAN: It would be very helpful, and they could then be inserted into what we have  
2 got.

3 MR. HOLMES: I am grateful, sir.

4 THE CHAIRMAN: We are interested in anything that cuts down waste and delay. Anything  
5 else anybody? In which case, thank you very much, and see you in October.

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