

Monday, 10 October 2016

1

2 (10.30 am)

3 THE CHAIRMAN: I gather something has happened over the
4 weekend?

5 MR BEARD: Yes, there has, unfortunately. I hope the
6 tribunal has seen the letter that was sent to the
7 tribunal this morning.

8 THE CHAIRMAN: We have seen the correspondence. To be
9 frank, we haven't had a great deal of time to consider
10 the matter.

11 MR BEARD: No, I understand, sir.

12 Over the weekend, as you will have seen, what
13 happened was that an error was made on Friday. It was
14 picked up around lunchtime on Saturday. I should say
15 that I have asked the witness to remain outside during
16 this discussion.

17 An error was made on Friday that you will have seen
18 in relation to the sending of an email. That error was
19 picked up at lunchtime on Saturday. Steps were then
20 taken to rectify the situation as best as possible. We
21 then communicated what had been done to Ofcom and to Sky
22 in the course of Sunday, and Sky, through its
23 solicitors, wrote raising certain questions. We then
24 replied to those questions on Sunday evening and have
25 provided that chain of exchanges and the details of what

1 has happened to the tribunal in order to draw the
2 tribunal's attention to the error on Friday and what
3 steps have been taken in order to rectify it. On behalf
4 of BT and those instructing me, I can only apologise
5 that this error occurred on Friday.

6 THE CHAIRMAN: The error is drawing the witness's attention
7 to a particular piece of information?

8 MR BEARD: Yes, that is the error. It is a statement that
9 would be entirely proper were it only sent to Mr Harman,
10 who was also on the email, but it was not appropriate
11 for that to be sent to Dr Padilla, and we recognise
12 that.

13 THE CHAIRMAN: They are both independent experts?

14 MR BEARD: Yes.

15 THE CHAIRMAN: So the difference is, what?

16 MR BEARD: Dr Padilla is in the course of providing his
17 evidence.

18 THE CHAIRMAN: And Dr Harman hasn't started yet.

19 MR BEARD: And Dr Harman hasn't started. Therefore,
20 a message to Mr Harman saying, "Please familiarise
21 yourself with certain documents, look at this one", is
22 unimpeachable. There is no issue in relation to that.
23 But we recognise that when a witness is in the course of
24 giving testimony, no such direction should be given,
25 even if it is only in the neutral terms that in fact

1 a statement was given, and that is why we thought it
2 appropriate to inform the parties of that matter and,
3 indeed, what we have done about it. Obviously we can't
4 undo what was sent and we haven't entered into any
5 discussion with Dr Padilla in relation to it. We
6 simply, as I say, sought to recall the email and then
7 asked him to delete it because we are obviously
8 conscious that email recall mechanisms are not by any
9 means foolproof. He replied saying he had done that,
10 but that is the only exchange in relation to this matter
11 that has occurred.

12 THE CHAIRMAN: So you don't actually know whether he read it
13 or not?

14 MR BEARD: We don't know and we didn't think it appropriate
15 for us to raise that with him. So we don't know whether
16 he read it, whether he read that or other material,
17 whether he would have read that or other material over
18 the weekend when he was looking at material that is
19 available to him. So we didn't think it appropriate for
20 us to engage in any further exchanges with him in the
21 circumstances. As I say, that is the error that was
22 made. We recognise it was an error. I am not sure that
23 there is much more, in the circumstances, I can do at
24 this stage. We have tried to answer the questions that
25 have been put to us in relation to these matters.

1 Obviously, if the tribunal has any questions, we will
2 endeavour to deal with those.

3 THE CHAIRMAN: Thank you, Mr Beard. Mr Holmes?

4 MR HOLMES: We think that it is proper that BT should have
5 drawn this to the attention of the tribunal, but we
6 think that it was a trivial slip and we don't see that
7 any importance attaches to it.

8 THE CHAIRMAN: Thank you. Sky?

9 MR PICKFORD: Sir, we do have two concerns which we don't
10 think have quite been answered yet in the
11 correspondence, but I don't want to take up lots of
12 the tribunal's time this morning, just to note we don't
13 actually understand why any emails about documents were
14 sent to Dr Padilla, because there seemed to be an
15 assumption in the response that we got that it was okay
16 to send an email about documents as long as he wasn't
17 pointed to specific documents. But actually, given that
18 he is giving his testimony, there shouldn't actually
19 have been any communication.

20 Secondly, we are still unclear as to how it really
21 came about that he was asked to look at specific
22 documents. That hasn't yet been explained to us. But
23 that is all I wish to say. I don't wish to take up more
24 of the tribunal's time now.

25 THE CHAIRMAN: Nobody is suggesting that Dr Padilla has to

1 stand down or anything?

2 MR PICKFORD: Certainly not, sir.

3 THE CHAIRMAN: Then I suggest we will take that issue away
4 and think about it. You are not proposing to make any
5 further submissions to us?

6 MR PICKFORD: Not beyond those that I have made, that we
7 have those lingering concerns.

8 MR BEARD: Do you want me to deal with those concerns now,
9 sir?

10 THE CHAIRMAN: Yes, why don't you?

11 MR BEARD: Well, in relation to the first point, as is
12 explained in the response to Sky, what had happened was
13 that all documents provided in the course of these
14 proceedings were made available to both BT's witnesses
15 and its independent experts. It was realised on Friday
16 that certain of the materials weren't on what is
17 referred to as the "extra-net", the website where these
18 documents within the confidentiality ring are kept.
19 Therefore, those documents would not be available to the
20 expert witnesses should they want to look at them over
21 the weekend, both Mr Harman and Dr Padilla. There is no
22 issue that it is entirely appropriate for expert
23 witnesses to have available to them documents that are
24 before the tribunal in advance of giving testimony and
25 when there is a hiatus during their giving testimony.

1 So the correction to that was simply the provision
2 of all documents that had been handed up during the
3 course of the proceedings. In fact, there were four
4 bundles of material that were emailed -- H1 to 3 and P1.
5 So it was actually a very large amount of material. Had
6 that been provided without any indication or direction
7 as to documents to focus on, there is no suggestion, so
8 far as we understand, from any authority that that is
9 inappropriate or somehow in breach of the requirements
10 of witness sequestration. After all, one has to be
11 conscious that, for instance, transcripts are provided
12 to witnesses, and indeed a transcript was provided to
13 the witness, as we indicated in the correspondence. We
14 see no issue there that gives rise to any concern in
15 relation to witness sequestration. So that, I think, is
16 Mr Pickford's first concern.

17 As to the second, how the error came about. I am
18 concerned not to trespass into the territory of legally
19 privileged exchanges, because it would not be
20 appropriate for me inadvertently to waive any privilege.
21 I think the best I can do is perhaps provide something
22 of an analogy from my understanding of what has
23 happened.

24 There are occasions when people either misunderstand
25 sentences or misread sentences and omit a critical

1 qualifier, like, for example, a "not". On occasion,
2 those misunderstandings lead to radical errors in
3 a particular proceeding. I think that that may be the
4 best analogy I can provide as to how the error came to
5 pass, without trespassing into particular exchanges that
6 may amount to --

7 THE CHAIRMAN: So it is that, rather than a Thomas a Beckett
8 moment.

9 MR BEARD: Yes, there were no "turbulent priests" to be rid
10 of here, sir.

11 THE CHAIRMAN: As I say, we will take that away and think
12 about it. Clearly, it is the sort of thing we are not
13 very happy about.

14 Can we then go on?

15 MR BEARD: If we could ask Dr Padilla to join us.

16 DR JORGE PADILLA (continued)

17 THE CHAIRMAN: Dr Padilla, good morning.

18 A. Good morning.

19 THE CHAIRMAN: I trust you had a good weekend?

20 A. Yes, indeed.

21 THE CHAIRMAN: An uneventful weekend?

22 A. Indeed.

23 THE CHAIRMAN: We will resume exactly where we left off on
24 Friday evening. May I remind you that you are still
25 under oath.

1 A. Thank you.

2 Cross-examination by MR PICKFORD (continued)

3 MR PICKFORD: Good morning, Dr Padilla.

4 A. Good morning.

5 Q. If I could ask you, please, to take out two bundles --
6 one we are going to look at immediately, and one we will
7 come on to, potentially shortly. The first of those is
8 R1, the BT reply bundle which has your third statement
9 in it, and then also we may as well have to hand, whilst
10 we are turning around and finding bundles, G1.

11 A. I have them.

12 Q. If you could please turn to R1 to tab G, where you
13 should find your third witness statement, and within
14 that to paragraphs 3.9 to 10. This is dealing with the
15 issue of the relevant geographic market.

16 A. Okay, I am there.

17 Q. You note that Ms Fyfield refers to the Republic of
18 Ireland as somewhere that has no WMO obligation in place
19 and where Sky has been willing to enter into wholesale
20 supply arrangements. You understand why she makes that
21 point, don't you, because BT say that one cannot have
22 regard to the deals that Sky did in the UK because there
23 was a WMO obligation in place that conditioned Sky's
24 conduct. So you understand the context of why she
25 raises Republic of Ireland, don't you?

1 A. I believe so.

2 Q. But what you say is that one cannot have regard to deals
3 that Sky did outside the UK because they are not in the
4 UK and, therefore, they are a different market. That's
5 your view?

6 A. That's correct.

7 Q. In particular, you say that pay TV markets are national
8 or even regional and so "no evidential weight should be
9 placed on these examples"?

10 A. That's correct.

11 Q. We saw on Friday your formal model of premium content
12 auctions. We went to tab G, tab 19, on a few occasions.
13 The appendix, I believe, to that report contains the
14 mathematical model that underpins your "vicious circle"?

15 A. The appendix of which document?

16 Q. Appendix A to your report that you authored with
17 Mr Dryden. We can go to it if it would assist. It is
18 tab 19 in G1.

19 A. No, I think if you're referring to -- there is an
20 appendix to my report that includes a model, formal
21 model, of the vicious circle, that's correct.

22 Q. That's right. My question is, which assumptions in that
23 appendix are particular to the UK market and wouldn't
24 apply to the Irish market?

25 A. Right. I think that I need to clarify, then, in which

1 sense I am saying that the evidence about Ireland is not
2 relevant for the UK.

3 The formal model deals with competitors, competitors
4 in a short-term sense, in a static sense, in a dynamic
5 sense. Therefore, those competitors have to be located
6 in a relevant geographic market. The competitors that
7 I model in the formal model that Mr Pickford refers to
8 were competitors in the UK. I don't think that
9 companies operating in the Republic of Ireland exert
10 a competitive constraint on pay TV operators competing
11 in the United Kingdom.

12 Q. Thank you. But if Sky had incentives in the UK as
13 a result of your vicious circle model, they would
14 equally, according to the model because there is nothing
15 specific about your assumptions there, have the same
16 sorts of incentives in the Republic of Ireland, wouldn't
17 they?

18 A. No, not really, and there are two reasons -- well,
19 actually, if we are focusing exclusively on the vicious
20 circle, there is one reason, and that is that, as far as
21 I understand, the players, the pay TV operators other
22 than Sky in the Republic of Ireland have no interest in
23 bidding for the content that is at stake, the core
24 premium sports channels that have been -- that motivated
25 the WMO intervention. Therefore, it would be logical to

1 assume that Sky, therefore, has no incentives whatsoever
2 to behave in any way strategically as to affect the
3 incentives of those competitors in the Republic of
4 Ireland to bid for the content, because they don't have
5 that incentive in the first place, they don't pose
6 a dynamic competitive threat and, therefore, they would
7 not affect Sky's dynamic incentives.

8 Q. How do you know what the private motivations of Sky's
9 rivals in the Republic of Ireland are?

10 A. I don't know the private motivations, but I can make an
11 inference based on the nature of the business, the scale
12 of the operations and the costs of those rights, and,
13 therefore, it seems to me obvious that they wouldn't
14 engage in a bidding competition with Sky to win rights
15 which can be mainly monetised in the United Kingdom,
16 which are very expensive and can be mainly monetised in
17 the United Kingdom.

18 Q. I would like to go on to look at the topic of effects on
19 consumers, which was something that strongly motivated
20 Ofcom when it took its original decision in 2010. We
21 had some of this in opening from Mr Holmes, but you
22 obviously weren't here for the opening, so I would like
23 to give you the opportunity to have a look at some of
24 these matters.

25 You understand in general terms what motivated Ofcom

1 in its decision to intervene in 2010 was whether
2 competition in pay TV at large was delivering positive
3 outcomes for consumers?

4 A. Yes, I think that my understanding from, I guess,
5 paragraph 9.300 of the 2010 pay TV statement is that
6 Ofcom, having determined that Sky had market power,
7 wanted to limit Sky's ability to act on that market
8 power in order to promote fair and effective competition
9 in pay TV.

10 Q. If we could take the G1 bundle, please, and go to tab 1
11 of that, that's where we find the 2010 statement
12 located.

13 A. Excuse me, which tab?

14 Q. Tab 1. If you could please go to section 8, this is the
15 section of the statement where Ofcom dealt with what its
16 concerns were about consumer effects, and we see at
17 paragraph 8.4 it sets out criteria for judging whether
18 competition in pay TV was delivering positive outcomes
19 for consumers. Do you see that?

20 A. I see that.

21 Q. It sets out the criteria firstly of choice:

22 "Consumers should have a choice of platform and
23 a choice of content on each platform.

24 "Switching between retailers and platforms should
25 not be artificially difficult.

1 "A broad range of high-quality content should
2 continue to be generated and made available to consumers
3 on all platforms."

4 We then have "Innovation":

5 "In platform services, for example, in terms of
6 interactivity, set-top box functionality such as DVR
7 capabilities or VoD options."

8 "In retail service packaging and pricing", and then
9 finally also some concerns about pricing.

10 If we then turn over the page, we see that in 2010
11 Ofcom had considerable concerns in this regard, and it
12 goes on at paragraph 8.5:

13 "We conclude that restricted access to key TV
14 content means that competition in pay TV is not fair and
15 effective. This has a negative impact on choice,
16 innovation and price."

17 Then, if you would like, please, to read to yourself
18 paragraphs 8.6 and 8.7, we can see the concerns that
19 Ofcom is articulating in relation to choice in 2010.

20 A. Yes.

21 Q. One of the key concerns there was that it perceived Sky
22 restricting supply of the CPSCs and, therefore,
23 consumers had very restricted means of getting hold of
24 those channels. In particular, there was no choice of
25 retailer if you were within the 50 per cent of the UK

1 that was outside a Virgin Media area. That was one of
2 their key concerns.

3 A. I understand that.

4 Q. By contrast, today, there are now two competitors to Sky
5 in non-cable areas rather than none, aren't there?

6 A. I believe so.

7 Q. Sky Sports channels are available, therefore, not only
8 on BT's, TalkTalk's and Virgin's platforms, but also on
9 a whole host of other devices via OTT delivery. We have
10 had quite a bit of evidence in these proceedings so far
11 about that, but just to remind you, for example, they
12 are available by EE TV?

13 A. You refer that they are available through NOW TV.

14 Q. They are available through NOW TV as well.

15 A. But through EE.

16 Q. And also through EE TV. You are aware of that?

17 A. I am aware that there is distribution through OTT, yes.

18 Q. We could go on: Windows PCs, Apple products,
19 Google Chrome books, Android tablets, et cetera. There
20 is a wide variety of means of getting access to the core
21 premium sports channels?

22 A. I have no objection to that -- those assertions.

23 Q. If we could look at the next point, which concerns
24 innovation. So the concern of Ofcom in relation to
25 innovation in 8.9 to 8.10 is:

1 "In coming years, we shall see numerous
2 opportunities for innovation in how TV is packaged and
3 delivered through developing technologies such as IPTV
4 and DTT."

5 Then if you could continue to read, please, to the
6 end of paragraph 8.10.

7 A. Yes.

8 Q. Again, the same facts that I just took you to. They
9 show that there has been substantial innovation, or
10 growth in innovation, since 2010, don't they?

11 A. I don't dispute that.

12 Q. In particular, there is innovative packaging and pricing
13 of products for Sky Sports channels. Because, for
14 example, today, something that you couldn't get at all
15 in 2010 you can subscribe just to one big match, if that
16 is what interests you. You don't have to take out
17 a whole package to Sky Basics and then buy through to
18 the sports channels, as you used to have to do?

19 A. That's through NOW TV, correct.

20 Q. Finally, in terms of consumer effects, we see at
21 paragraph 8.11 that Ofcom had a concern about price, and
22 they say:

23 "Based on our assessment of competition and
24 profitability, we have concluded that the wholesale and
25 retail prices of premium sports and movie channels are

1 above competitive levels. Clearly, this had a negative
2 effect on consumers."

3 Now, you're aware, I presume, from your previous
4 involvement in this case, that Ofcom never pursued the
5 allegation of excessive prices at the 2011 trial?

6 A. I seem to recall that, yes.

7 THE CHAIRMAN: You refer to this case as if it is one
8 continuous piece of litigation, Mr Pickford.

9 MR PICKFORD: Sometimes it can feel a little like that.

10 THE CHAIRMAN: A Freudian slip, perhaps.

11 MR PICKFORD: Having looked at those considerations that
12 motivated Ofcom in 2010, far from outcomes for consumers
13 being no different today, as regards what concerned
14 Ofcom then about consumers, things have moved on
15 significantly?

16 A. Things seem to have changed somewhat, but I think that
17 Mr Pickford is missing the point. What you are telling
18 me through all these questions, or you are asking me, is
19 to confirm that, in terms of outcomes for consumers, the
20 situation in 2015 may be somewhat better than in 2010.
21 But none of that points in the direction of saying that
22 the WMO remedy should be phased out.

23 If the remedy imposed by Ofcom was delivering, you
24 would see more choice, more innovation and lower prices,
25 although let me say that the analysis of pricing in the

1 2015 statement is missing.

2 But that doesn't mean that --

3 THE CHAIRMAN: Sorry, I didn't hear that?

4 A. Is missing, it's missing. But that doesn't mean that
5 the WMO remedy is no longer necessary. Again, if we
6 look at this document and go to paragraph 9.300, what
7 that is telling us is that the objective of the WMO
8 remedy is to remove Sky's ability to act on its
9 incentives and effect fair and effective competition.
10 If it did remove that ability while it was in place,
11 then you would expect better outcomes. But if Sky's
12 market power has not disappeared, has not been changed,
13 as a result of these three years of WMO remedy, Sky
14 continues to have the ability to restrict fair and
15 effective competition and, therefore, continuation of
16 the WMO remedy obligation would be necessary in order to
17 remove that ability to act.

18 So I want to clarify, therefore, in my opinion there
19 are two different propositions. One is, has the remedy
20 worked somewhat well for consumers? I wouldn't dispute
21 that the remedy has done something positive for
22 consumers. Has the remedy condition affected the nature
23 of competition in the pay TV market in a way that we can
24 be certain that, without the remedy, Sky would not have
25 the ability to effect fair and effective competition?

1 No, it hasn't. My analysis in Padilla 1 shows the
2 market power is still there and, therefore, the
3 implication is that, without the remedy, Sky would have
4 the ability to condition fair and effective competition.

5 MR PICKFORD: I would like to examine some of the aspects of
6 that in more detail. In order to do so, I fear we are
7 about to get drawn into confidential numbers, so I'm
8 afraid we will be limited for, I think, the rest of
9 Dr Padilla's cross-examination to the confidentiality
10 ring only. So that means excusing Sky and BT.

11 THE CHAIRMAN: How long do you expect to go on, Mr Pickford,
12 on this?

13 MR PICKFORD: I expect we certainly should be done within
14 the hour.

15 THE CHAIRMAN: Right. Because Mr Padilla is down for
16 three-quarters of a day in the provisional timetable.

17 MR PICKFORD: Yes. He certainly will not need to be here,
18 on my account, for more than about -- I mean, I can't
19 guarantee, obviously, quite how long he will be, but
20 that is my rough estimate.

21 THE CHAIRMAN: You are not going to have a lengthy
22 re-examination?

23 MR BEARD: No.

24 THE CHAIRMAN: In that case, I think we had better clear the
25 court down to the confidential ring.

1 (10.59 am)

2 (In camera session)

3 (4.31 pm)

4 (The hearing was adjourned until
5 Tuesday, 11 October 2016 at 10.30 am)

6 I N D E X

7

8 DR JORGE PADILLA (continued)7

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10 Cross-examination by MR PICKFORD8
11 (continued)

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