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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1082/3/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st June 2007

Before:
MARION SIMMONS QC
(Chairman)

PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

RAPTURE TELEVISION PLC

Applicant

- v -

THE OFFICE OF COMMUNICATIONS

Respondent

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Mr. Alastair Gorrie (Partner, Orrick, Herrington & Sutcliffe) appeared for the Applicant.

Mr. Christopher Vajda QC (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Stephen Wisking (Partner, Herbert Smith) appeared for the potential intervener, British Sky Broadcasting Limited.

PROCEEDINGS

1 THE CHAIRMAN: Good afternoon. Before we begin, the Tribunal would like to make some
2 opening remarks, and these of course are made without having heard any submissions today
3 so they must be treated as provisional and rather tentative.

4 The Tribunal has read the papers that have been submitted and it notes that Mr. Henry's
5 witness statement explains the financial position of Rapture. The Tribunal also notes that
6 presently Rapture is off air and Rapture attributes the reason for that to the subject matter of
7 this case. The Tribunal is somewhat puzzled as to why Rapture does not appear to be
8 pushing this case as one of urgency in those circumstances. I will not say any more about
9 that, but just make the comment.

10 In that regard the Tribunal also notes the relief which Rapture is seeking which is, in
11 summary, for the case to be remitted to Ofcom so that they can take a new determination.
12 However s.195 of the Communication Act (which gives us our jurisdiction) provides that
13 this is an appeal on the merits; it is not a judicial review. It does appear to the Tribunal that
14 the notice of appeal seems to have been written with judicial review rather than appeal on
15 the merits in mind. Again, I make the comment and will not say any more.

16 The Tribunal notes BSKyB's concern that the notice of appeal raises matters which may
17 have an effect on other third parties. It does seem to the Tribunal that this case must not be
18 taken out of proportion. It appears to us to be concerned with no more than £78,000 and
19 that that is an important factor when considering how this Appeal should proceed.

20 Accordingly, we have some concern as to how this matter is to proceed so as to deal with
21 the case justly and proportionately, including when dealing with the case proportionately as
22 to the amount of money involved, the importance and the complexity of the issues, and the
23 financial position of each of the parties, including the intervener.

24 The matters raised in the notice of appeal concern a very complex area in which Ofcom and
25 BSKyB have available to them considerable expertise. One of the Tribunal's concerns,
26 having regard to the financial position of the appellant, is as to how the appellant is to
27 present the evidence in support of the notice of appeal. That raises the question of whether
28 Mr. Henry has the knowledge and the experience of the complex issues which the notice of
29 appeal raises which would be necessary for him to have if he was the only witness for the
30 appellant.

31 As to BSKyB's Notice of Intervention, the Tribunal is puzzled as to why BSKyB did not
32 appeal Ofcom's decision that it was appropriate for them to handle the dispute. Subject to
33 submissions today, the Tribunal's initial view is that it would not accede to BSKyB's
34 intervening for the purpose of making submissions on what I think has been termed in

1 B SkyB's letter "a jurisdiction issue". On the other hand, the Tribunal would, subject to any
2 further submissions, be minded to permit intervention by B SkyB for the purpose of making
3 submissions on the grounds of appeal, as set out in the notice of appeal and on the
4 confidentiality issues.

5 Finally, subject to submissions, it seems to the Tribunal that the approach taken by Ofcom
6 on confidentiality is a sensible approach, and should be pursued between the parties in the
7 hope that a workable outcome can be achieved. That would leave timetable and, having
8 regard to what I have said, I am not going to make any comments at the moment on time
9 table.

10 I do not know how you would wish to proceed. Do you want us to rise, having regard to
11 those comments, or Mr. Gorrie, would you like to address us?

12 MR. GORRIE: Thank you, madam. I am happy to respond, particularly on the three issues that
13 were specifically addressed to Rapture. As regards urgency, the position of Rapture is,
14 indeed, as you have described and in fact it does not have the funds to continue to
15 broadcast. It cannot obtain new programming, and cannot pay for satellite services nor can
16 it pay for EPG services. Therefore, Rapture is indeed keen that the Appeal is dealt with
17 expeditiously and once it is dealt with it will be in a much better position to seek new
18 financing. At the moment it's essentially moth-balled; it is in loss mitigation mode. It
19 continues to operate its website and is hoping to do some web casting, but that is the extent
20 of its current activities. So yes, we are keen that it is expeditiously treated, but did not think
21 it appropriate to apply for interim measures.

22 THE CHAIRMAN: When you say "expeditiously" what was your idea of timetable then?

23 MR. GORRIE: Hopefully by September.

24 THE CHAIRMAN: What do you mean "by September"? Decision by September? Hearing by
25 September?

26 MR. GORRIE: No ideally the actual decision by September, if that fits with the Tribunal's
27 programme?

28 THE CHAIRMAN: That would require probably a hearing by the end of July, if not earlier?

29 MR. GORRIE: I appreciate that that may just not be possible particularly with the Tribunal's own
30 commitments.

31 THE CHAIRMAN: The first question is whether or not you are in a position to be able to bring
32 on this Appeal?

33 MR. GORRIE: And indeed we have to have time to consider the Defence and the Intervention.

34 THE CHAIRMAN: So is that a realistic date?

1 MR. GORRIE: With a following wind, yes, madam.

2 THE CHAIRMAN: End of July.

3 MR. GORRIE: For the hearing, yes – at the very earliest. I am not entirely sure whether the
4 Tribunal has ----

5 THE CHAIRMAN: What do you mean “at the very earliest” the end of July.

6 MR. GORRIE: I do not think we could be ready before then.

7 THE CHAIRMAN: Right. If it went off so that it was not the end of July, what would be the
8 position of Rapture? Is it important that there is a hearing at the end of July so that you
9 have a decision in September?

10 MR. GORRIE: The driver behind September, or autumn at least – the main issue, were it
11 broadcasting it would be looking to the September/October timescale for selling its
12 advertising revenue because there is a lot of advertising prior to Christmas.

13 THE CHAIRMAN: Well I am sorry, I do not understand that.

14 MR. GORRIE: No, it is not relevant, madam, you are right.

15 THE CHAIRMAN: The reason why I do not understand it is that what you’re asking for –
16 whether it can be done or not, is for it to be remitted to Ofcom.

17 MR. GORRIE: Indeed, and so there is no material difference whether it is going to be the end of
18 July or some time after that at this stage.

19 THE CHAIRMAN: Sorry, are you retracting the idea that it needs to be dealt with by the end of
20 July?

21 MR. GORRIE: I am, madam, yes.

22 THE CHAIRMAN: You are. So is there any urgency in this?

23 MR. GORRIE: There is urgency – expeditiousness would be welcome. The goodwill of the
24 company is diminishing; its name is not out there and therefore the quicker the better.

25 THE CHAIRMAN: But you have already had numerous months that have passed – are you going
26 to be in any worse situation?

27 MR. GORRIE: It is just getting worse.

28 THE CHAIRMAN: I am sorry, but it is very important that we make sure whether or not it is
29 urgent and needs to be dealt with urgently. If it is important that it is decided as soon as
30 possible, but not urgent, then that is a different matter.

31 MR. GORRIE: It is important that it is decided as soon as possible but not urgent in that technical
32 sense.

33 THE CHAIRMAN: I have tested you on that! You were going to make some other points?

1 MR. GORRIE: The next point was on the issue of the appeal on the merits, or judicial review.
2 My understanding, madam, is that it was essentially a judicial review ----
3 THE CHAIRMAN: Well, if you look at the Act.
4 MR. GORRIE: -- and it was under s.192(1)(a) of the Act.
5 THE CHAIRMAN: If you look at s.195.
6 MR. GORRIE: May I request a copy, please. (Same handed)
7 THE CHAIRMAN: Subsection 2.
8 MR. GORRIE: Yes, madam. On that basis it does not get remitted but you may ----
9 THE CHAIRMAN: Well it is a very complex legislation and, in fact, we do remit at the end, but
10 the appeal is an appeal on the merits; it is not a judicial review. So it is not merely saying
11 that they failed to take something into account, or they were wrong in law – one of those
12 matters – it is actually on the merits, showing that on the law the Decision would be
13 otherwise; otherwise we would not be acting appropriately, probably, if we remit it. That
14 puts a much greater onus on you in one sense, because you have to make out your case.
15 MR. GORRIE: Yes, it does.
16 THE CHAIRMAN: Which is why I alluded to that. It may be that you need to think about that,
17 because possibly you have misunderstood the legislation.
18 MR. GORRIE: On that point, yes, madam. Although that does bring me on to the point that you
19 alluded to and to make the case whether there are the resources available.
20 THE CHAIRMAN: Well it is whether Mr. Henry has the knowledge and the experience, because
21 it is not only factual evidence, it is effectively expert evidence, and in order for the court to
22 accept the evidence it has to be satisfied that, in relation to expert evidence, that the witness
23 has the expertise to give them the information, and that he is an expert in the field. I was
24 just raising the question – I do not know – whether or not Mr. Henry is of that status.
25 MR. GORRIE: He is knowledgeable about his industry, I do not believe he would have the status
26 of expert on a number of the issues that are required to determine this Appeal.
27 THE CHAIRMAN: And, of course, that brings me to our rules, which is that the witnesses’
28 evidence (including the expert witnesses) is supposed to be annexed to the notice of appeal.
29 MR. GORRIE: There is indeed no expert evidence on this, madam. As you may have gathered
30 from the papers this is on a *pro bono* basis under the Law Society scheme, and the resource
31 has not been available to ----
32 THE CHAIRMAN: I very much appreciate that; that is why I am raising it, as to how this is
33 going to be dealt with. The fact that it is a *pro bono* case does not mean that the evidence of
34 the appellant has to bring to a court is any different.

1 MR. GORRIE: Indeed not, madam, but you are right that obtaining that evidence will be
2 difficult.

3 THE CHAIRMAN: And that raises the issue that an appellant should not be unable to bring the
4 case because he cannot afford to; that is inappropriate as well. One understands that side of
5 it as well, but one has to work out how to deal with it.

6 MR. GORRIE: Yes, madam - I don't have the answer today. Thank you.

7 THE CHAIRMAN: I am just wondering what we should deal with next?

8 MR. VAJDA: Perhaps I should say, so far as Mr. Wisking is concerned and indeed the
9 observations of the Tribunal, that I think that has been resolved, subject obviously to the
10 Tribunal. We listened carefully to what you said earlier and, so far as the intervention of
11 BSkyB is concerned, I had a word with Mr. Wisking before we came into the Tribunal and,
12 subject to a point Mr. Wisking would wish to address you on, he is content with what we
13 propose at para.10 of our skeleton which is in line with what I think you, madam Chairman
14 ----

15 THE CHAIRMAN: Well, it is not quite in line, is it?

16 MR. VAJDA: It is not quite in line but what it does ----

17 THE CHAIRMAN: I am not sure it can be put back; I am not sure we can stay the determination
18 of the jurisdiction point because I am not sure at the moment that it is for an intervener to be
19 taking that sort of point.

20 MR. VAJDA: When we say "stay", the position of Ofcom is the position of the Tribunal, that in
21 fact this is not something that is properly to be raised by intervention.

22 THE CHAIRMAN: Yes, I find that very helpful, thank you.

23 MR. VAJDA: We could have a hearing on that and that could take up further time. What I am
24 suggesting is that we park all that, because it is unnecessary to go into it – Ofcom's position
25 is as set out there; it is *ad idem* with the position the Tribunal expressed a moment ago, but
26 we are saying it is not necessary and, indeed, in the light of what you, madam Chairman,
27 said about dealing with this case in a proportionate way, it is just a non-issue for the
28 moment, and therefore this is what we propose.

29 THE CHAIRMAN: Is it a non-issue, because if they were right – forgetting about whether you
30 do it as an intervener or party, or however, and assume there wasn't any time problem and
31 everything else, if they were right, that would be the end of the Appeal. So if, at the end of
32 the day, we have spent a whole lot of money, and time and resources in dealing with the
33 main issue and then it turns out that they were right that might be said not to be
34 proportionate?

1 MR. VAJDA: I see that. I am not here to represent BSkyB, I am here to represent the Office, and
2 certainly from the Office's point of view this is a sensible way forward. As I understand it
3 Mr. Wisking also takes the view that this is the sensible way forward. I see what the
4 Tribunal is saying and therefore perhaps the Tribunal actually wants to effectively make a
5 Ruling to the effect that the intervention is only to be permitted in relation to the substance
6 – if I can put it like that ----

7 THE CHAIRMAN: I think the Tribunal is minded to do that at the moment, subject to what you
8 say. Were we to leave this point in the air it would not be in this appeal because you are not
9 going to take it and it is not one of the grounds of Appeal.

10 MR. VAJDA: No.

11 THE CHAIRMAN: I do not know if Mr. Wisking's clients are going to close their eyes to it or
12 whether they are going to do something else, I do not know.

13 MR. VAJDA: Yes, well perhaps we ought to hear from Mr. Wisking?

14 THE CHAIRMAN: I think so.

15 MR. WISKING: Thank you. As I understand the position, it is accepted that BSkyB has a
16 sufficient interest to intervene in these proceedings and therefore the only question is the
17 scope of the intervention.

18 THE CHAIRMAN: We have not heard from Mr. Gorrie, but I assume that you are not going to
19 say anything against that?

20 MR. GORRIE: No.

21 MR. WISKING: Certainly BSkyB wishes to intervene in these proceedings on the merits, if you
22 like, but in doing so it is concerned that it might also be fixed with a Ruling on the legal
23 position, on the jurisdictional position, which is a position which it has resisted in the
24 proceedings before ----

25 THE CHAIRMAN: Can I just ask you – your point is really the meaning of network access, as I
26 understand it?

27 MR. WISKING: And communications provided.

28 THE CHAIRMAN: I do not know if it is possible but I will say it openly and then everybody can
29 see whether it is possible: if this appeal proceeded on the basis that it was clear that those
30 two points were not being dealt with – that we were assuming, for the purposes of this
31 appeal, that it was a good appeal, but left the point over. Are your clients content with that
32 in relation to this appeal, or are they going to raise this question again at some other time in
33 relation to this particular subject matter? Do you understand what I mean?

34 MR. WISKING: I understand perfectly.

1 THE CHAIRMAN: Because if the situation is that what you are saying is: “We just do not want
2 to be bound by anything in relation to this; we don’t want to have a precedent for another
3 case, but actually we do not really want to argue it in this case”, then we can deal with that.

4 MR. WISKING: Perhaps I can explain our position and then it may be necessary for me just to
5 take a moment to take instructions. The position of Sky was that it did not appeal the
6 determination because for Sky such an appeal would be hypothetical, and the Tribunal itself
7 has made observations in that regard in relation to the *Floe* Telecom permission to appeal
8 by Ofcom and T-Mobile. Equally, it wants to intervene in these proceedings on the merits
9 but is concerned at the same time that it not be fixed with a Ruling on jurisdiction which it
10 is unhappy with. So if these proceedings could be dealt with leaving the question open,
11 subject to instructions, that might be satisfactory.

12 THE CHAIRMAN: When I say “dealt with” I mean dealt with finally so that those points would
13 not arise in this case, because that would be very unfair to the appellant.

14 MR. WISKING: Our primary submission is that if the Tribunal upholds Ofcom’s decision on the
15 merits, which we believe it should, then that is the end of the matter, and ----

16 THE CHAIRMAN: What happens if they do not? Put it the other way.

17 MR. WISKING: The only question would arise is as to the relief which the Tribunal would grant,
18 and the Tribunal obviously has to be satisfied it has the jurisdiction to grant the relief (and
19 the appropriate relief) in any event, and we would say that the relief – in the event that the
20 appellant is successful on the merits – is that it should be remitted back to Ofcom to deal
21 with as a complaint rather than a dispute. That is the consequence of the jurisdictional
22 point.

23 THE CHAIRMAN: I do not think we can leave it over on that basis; I do not think that would be
24 appropriate because – and I will have to think about this generally, but it is just what is
25 going through my mind – if what we were doing was at the end of the day to say “Actually,
26 Ofcom got it wrong, and they ought to have considered X, Y and Z, and on the merits it has
27 been shown that had they considered X, Y and Z the result would have been A, B and C
28 and, because our jurisdiction is to remit, we now remit it to Ofcom with a direction that they
29 must take a decision having A, B and C”.

30 What you are saying is that that is not where you want us to go, and we cannot leave that
31 open until the end.

32 MR. WISKING: In my submission you could because the direction would still be the same under
33 s.195, it would just be that Ofcom would follow a different process.

1 THE CHAIRMAN: Yes, but that is very unfair because that would reopen the whole thing so
2 then the appellant is in a situation where he has put in a whole lot of resources in order to
3 fight one case and then, at the end, he is told: “Actually you did not need to fight that case
4 there is another case to fight, and you had better start again.”

5 MR. WISKING: So as I understand it, in the event the appellant was successful on the merits in
6 the way you suggest, the Tribunal would give a direction which effectively remits the
7 matter back to Ofcom in a formal sense but Ofcom would make a decision in accordance
8 with the Tribunal’s direction.

9 THE CHAIRMAN: Well that is open to us to do; I am not saying what we are going to do at the
10 end of the day, but it is open to us to do that, and one does not want to be in a position
11 where anybody is under an illusion that that was not open to us to do.

12 MR. WISKING: That would still be available to the Tribunal in our view of the jurisdiction.

13 THE CHAIRMAN: Unless Ofcom take the point; it is not a point that you could take, so the
14 point that you are trying to put before us would never be before us.

15 MR. WISKING: It does go to the relief which the Tribunal could grant.

16 THE CHAIRMAN: No, because certainly what is in my mind, and I may be wrong, is the whole
17 basis of the appeal would have been on the assumption that this was a proper appeal and
18 nobody was challenging it, so therefore it is not a case like in a situation where the Tribunal
19 has no jurisdiction under its rules to do something and therefore has to consider itself
20 whether we can do it. Nobody has challenged the question of what is going on between the
21 parties, and it is a jurisdictional point between the parties – not a jurisdictional point to the
22 Tribunal. So when you get to the end it has been agreed between everybody effectively that
23 this is the way we are proceeding; it is an assumption that it was a good appeal – we are not
24 going into that, that has been agreed, it is an agreed fact effectively subject to it not being
25 binding on another case – and therefore we would proceed from that step, so I am not sure it
26 would be open to anybody at that stage to say “Wait a minute, it should actually go off
27 through another door.”

28 MR. WISKING: I understand. It might be useful if I could have a few minutes to take
29 instructions on that.

30 THE CHAIRMAN: Right. Is there anything else that we need to consider?

31 MR. WISKING: What would be helpful in order to take instructions is one of the points the
32 Tribunal raised earlier about the scope of the appeal; that one of the orders sought by the
33 appellant – and I am at a disadvantage because at this stage I do not have access to the
34 notice of appeal, but from the published notice of appeal – is orders that apply not just to the

1 appellant but to small free-to-air digital channels, such as the appellant. At para. (e) of the
2 published notice the appellant is asking ----

3 THE CHAIRMAN: Well is there any reason why I cannot read out from the notice of appeal the
4 relevant paragraph? Does anybody have any objection to me reading that out?

5 MR. WISKING: My point about this is that ----

6 THE CHAIRMAN: No, so that you would know actually what it says.

7 MR. WISKING: Well, first that I know what it says, but secondly, and this goes back to the
8 Tribunal's earlier point about the significance of this appeal to some extent will turn on this
9 relief and the extent to which the appellant wishes to pursue that, and Mr. Gorrie did not
10 address the Tribunal on that point.

11 THE CHAIRMAN: I think I need to read out what it says – is there any objection?

12 MR. GORRIE: No objection.

13 THE CHAIRMAN: Is there any objection from Ofcom?

14 MR. VAJDA: No.

15 THE CHAIRMAN: What it says is:

16 "In the interests of saving public funds and reducing the potential for future
17 disputes, that Ofcom should prescribe what fair, reasonable and non-discriminatory
18 terms would be in relation to any future EPG agreements between Sky and a small
19 free-to-air digital channel such as Rapture."

20 Now, I am not sure that goes where you are saying it goes, because all it is doing is asking
21 one to remit to determine what is fair, reasonable and non-discriminatory in relation to an
22 EPG agreement between Sky and somebody like Rapture.

23 MR. WISKING: As we set out in our letter to the Tribunal there are potentially 300 other people
24 in that same position.

25 THE CHAIRMAN: I appreciate that, yes. It is not saying that we would do it, and it may be
26 quite inappropriate to do it.

27 MR. WISKING: Indeed, but at the moment it is part of the appeal, it is the relief sought and we
28 have to therefore take it seriously. I understood the Tribunal to be suggesting that the
29 appellant might wish to reconsider whether that was something that they wished to pursue
30 in the context of this particular dispute?

31 THE CHAIRMAN: As Mr. Gorrie was saying that he thought this was a judicial review case, it
32 wasn't an appeal on the merits, so he needs to reconsider that, and how he is going to put it.
33 So it may be premature. I think we have your point about the third parties.

34 MR. WISKING: Yes.

1 THE CHAIRMAN: You have raised it and that is probably enough, unless you have anything
2 else to say about that?

3 MR. WISKING: No.

4 THE CHAIRMAN: And Mr. Gorrie has heard that. Is there anything else?

5 MR. WISKING: No, if I could have a moment to take instructions?

6 THE CHAIRMAN: Yes. Is there anything else that has arisen that one would need to take
7 instructions on that we ought to just add?

8 MR. VAJDA: Well I have a piece of good news – well I hope it is good news – which is just a
9 small point on confidentiality. Mr. Gorrie informed me that so far as what we call the
10 “Rapture confidential determination” is concerned, which is the one that Rapture have been
11 working on, they have no confidentiality concerns about that going to Sky, so that is, if you
12 like, one step down the road, and there are obviously other ----

13 THE CHAIRMAN: Other steps which you will need to sort out?

14 MR. VAJDA: Yes.

15 THE CHAIRMAN: But that looks like it will need to be sorted out because you say it’s not only
16 just Sky, there is a third party?

17 MR. VAJDA: Yes, that is right. Shall we rise for a few moments and see where that takes us?
18 (The hearing adjourned at 2.40 p.m. and resumed at 2.55 p.m.)

19 MR. WISKING: Thank you. I can indicate that we are happy to proceed on the basis that the
20 Tribunal has suggested. I am not quite sure precisely how to formulate what has been
21 suggested, but in essence as I understand it the jurisdictional point would be left open as
22 regards B Sky B ----

23 THE CHAIRMAN: For another case but not in this case.

24 MR. WISKING: -- for any other cases.

25 THE CHAIRMAN: -- but not in this case. They wouldn’t be able to take the point in this case.

26 MR. WISKING: In this case, yes.

27 THE CHAIRMAN: One of my concerns was that we come to the end of this case and then the
28 case goes against B Sky B (we assume for that purpose) and B Sky B is now looking to find
29 what they can do next, and they then try and take the point in this case against.

30 MR. WISKING: To the Court of Appeal.

31 THE CHAIRMAN: Either to the Court of Appeal or by trying to raise an appeal out of time and
32 what would not want is a situation where the time between now and whenever that
33 happened was not taken into account in relation to the delay. So I am not sure how I can

1 put you to your election effectively, and say you either take it now or you do not take it at
2 all, but for the justice of the position that seems to me to be the appropriate approach.

3 MR. WISKING: I understand. I understand also from Ofcom that Ofcom will also not hold Sky
4 to the jurisdictional position in any other case, which is of some comfort.

5 THE CHAIRMAN: So effectively if I put you to your election you are saying: "Well actually,
6 I've elected now?"

7 MR. WISKING: Yes. Thank you.

8 THE CHAIRMAN: Thank you. Whether or not I have jurisdiction to do that I do not know! If
9 that is on the record it would be very difficult for you, I think, on a legitimate expectation
10 point to take the point.

11 MR. WISKING: I understand.

12 THE CHAIRMAN: So B SkyB can intervene on the grounds of appeal, and on the confidentiality
13 questions.

14 MR. WISKING: On that basis I would seek access to a non-confidential version of the notice of
15 appeal and any supporting documents.

16 THE CHAIRMAN: There can't be any objection to that? No. So that can be served on you. I do
17 not know if you have been thinking about what your position is in relation to how we are
18 going to proceed?

19 MR. GORRIE: Thank you, madam. Thinking and still not entirely clear I would seek further
20 clarification from the Tribunal as to what it has in mind. In setting out the leaflet we have
21 requested we have tried to apply s.195 and looking at s.195(4) ----

22 THE CHAIRMAN: I think your problem is that Ofcom reconsidered the dispute. It is an appeal
23 on the merits.

24 MR. GORRIE: Yes, I understand that but s.195(4) does require the Tribunal to remit.

25 THE CHAIRMAN: Yes.

26 MR. GORRIE: And to make ----

27 THE CHAIRMAN: To give effect to its decision. Its decision is an appeal on the merits; it's a
28 decision as to whether or not the determination was correct.

29 MR. GORRIE: Yes. That is what we were seeking to ask for in the section on relief, and in the
30 notice of appeal, where we were asking the Tribunal to direct Ofcom as to how it should
31 make its decision, so I am not entirely sure I understand what you had in mind.

32 THE CHAIRMAN: On a judicial review one says, for example: "You failed to take into account
33 the following facts, therefore we quash your decision, remit it to you for you to reconsider
34 and make a new determination.

1 On an appeal on the merits, we would look at the merits of the case, as put by you and
2 decide whether or not (a) they had failed to take it into account; and (b) had they taken it
3 into account what the result would be, because that's the merits. Having considered what
4 the result would be, if we decided that you were correct and that they should have come to a
5 different decision we would remit it to them and say that on the merits this is the result and
6 therefore we remit it to you to take that decision. So it does not go back to them to
7 reconsider – it might do; it may be there are circumstances where it does go back to them to
8 reconsider, but I am not quite sure where you are because you have to put in enough that it
9 is an appeal on the merits.

10 MR. GORRIE: And it is not just in relation to the relief being sought, it is what we have covered
11 in the notice.

12 THE CHAIRMAN: Yes. You may say that you have done enough; you have enough – I do not
13 know, but I am giving you the opportunity because one would have expected more support
14 for what you are saying.

15 MR. GORRIE: I think the difficulty is we would need to apply to look at in particular the Sky
16 regulatory model, and if we were to deal with the disclosure issue that is something that we
17 probably would be asking to have a sight of.

18 THE CHAIRMAN: Well it may be that what we ought to do is to adjourn this CMC so that you
19 can consider your position. You may come back and say “Actually, we are happy to
20 proceed on the way we are”, or you may come back and say: “We need to amend the notice
21 of application, will you allow us to amend it in the following ways?” Or, you may say: “It
22 is all right but we actually need to put some more evidence in”. I do not know which one it
23 is but it does not look as if you have considered those possibilities.

24 MR. GORRIE: I think we need to take a bit more time to indeed consider that option.

25 THE CHAIRMAN: That puts Ofcom in a difficult position because of course if you are going to
26 think about amending then they are not going to want to put in their defence at the moment.
27 Do you want me to rise again so that you can think about it again?

28 MR. GORRIE: Yes, please.

29 THE CHAIRMAN: Very well.

30 (The hearing adjourned at 3.05 p.m. and resumed at 3.20 p.m.)

31 MR. GORRIE: Thank you madam. As I understand it, in order to adduce more evidence to
32 address the merits we will need to have access to more information, documentation from
33 both Ofcom ----

34 THE CHAIRMAN: When you say as you understand it – where do you understand that from?

1 MR. GORRIE: That is my position.

2 THE CHAIRMAN: Right.

3 MR. GORRIE: So in fact we would seek to adduce more evidence but I can only do that once we
4 have been able to examine the confidential version of the determination and have access to
5 certain information at Sky in terms probably of the regulatory model, and also Ofcom's
6 evaluation of that model, whether that is internal documentation at Ofcom or
7 correspondence with Sky. That, in my view, is what I would need to look at in order then to
8 submit further evidence, or opinion on the merits as to whether they have reached the right
9 conclusion that the charges are fair, reasonable and non-discriminatory.

10 THE CHAIRMAN: I see, well shall we hear what Ofcom says about that?

11 MR. VAJDA: Obviously if an application is made we will consider it.

12 THE CHAIRMAN: An application?

13 MR. VAJDA: A specific application for disclosure. There may be an element of the cart before
14 the horse here because we have yet to file our defence and that may ----

15 THE CHAIRMAN: Well, that is what I was thinking, but may be on that basis we should proceed
16 with you filing the defence and then see where we get to.

17 MR. VAJDA: With respect, that is an entirely sensible approach, madam.

18 THE CHAIRMAN: So we are back to your timetable really. We do not know if there is going to
19 be a disclosure application and, if there is a disclosure application, it is very difficult to fix a
20 final hearing date, because we do not know how long it is going to take you because you do
21 not know where you are at the moment. Is that really what you are saying?

22 MR. GORRIE: I think it is very likely that there will be a disclosure application, madam.

23 PROFESSOR STONEMAN: I do not want to make life more difficult for you; it is difficult
24 enough at the moment. The response on more information was basically your belief that
25 Sky or Ofcom have that information somewhere and it is just a matter of accessing it? If we
26 take, for example, one of the main planks of your argument that there is inappropriate delay
27 in the granting of an EPG number to Rapture, what sort of information will you be seeking
28 in order to turn your current appeal document into the sort of appeal document we will want
29 in order to support that proposition, or that point of the appeal?

30 MR. GORRIE: In respect of delay I think that is already covered in the witness statement of Mr.
31 Henry. I think what we will be seeking more information about and disclosure on is on the
32 regulatory model itself and the costs' allocations, and essentially information to enable
33 assessment or evaluation of "fair and reasonable charges" to a free-to-air channel.

1 PROFESSOR STONEMAN: Just to emphasise you are saying the argument with respect to the
2 delay, we have all that there is to say on that, and that there is no further information to be
3 sought or evidence to be put?

4 MR. GORRIE: On that particular point I think that is correct.

5 THE CHAIRMAN: If one looks at paras. 62 to 65 of your notice of application what you are
6 saying there is that Ofcom did not consider the issue. You have not said what you say the
7 right answer to the issue is. I do not see how their model is going to help you.

8 MR. GORRIE: Madam, I think that the model is likely to be of importance to our analysis. I am
9 not saying it is the only thing that we would need to request.

10 THE CHAIRMAN: But you have not got to the first hurdle in order to be able to jump over it.
11 Anyway, I have pointed that out, let us proceed on the basis that we have really got to,
12 which is that Ofcom will put in their defence and effectively we will then have to have
13 another case management conference, and if you are going to make an application for
14 disclosure at that stage then that case management conference will deal with the application
15 for disclosure. If it turns out that the application for disclosure is consented to then we
16 might be able to avoid the hearing, it depends on what it is.

17 MR. WISKING: May I just say, and I am at a disadvantage in that I do not have the notice of
18 appeal, we will happily consider applications for disclosure, and we can consider them in
19 context of their relevance to the notice of appeal, but there has been mention on a number
20 of occasions about the digital satellite platform and I just want to flat now that is a highly
21 confidential document and contains details of revenue costs for the whole digital satellite
22 platform, and it is by no means limited to EPG sets ----

23 THE CHAIRMAN: Can it be amended so that you recuse the ----

24 MR. WISKING: That may well be a possibility and that obviously depends on the request that is
25 made, and how that is relevant to the notice of appeal. We may need to consider additional
26 levels of confidentiality but all I can say at this stage is that we regard it as highly
27 confidential and I do not think it can be assumed that any application for disclosure would
28 be granted.

29 THE CHAIRMAN: On the other hand there may be ways of narrowing the issues – this is going
30 back to proportionality.

31 MR. WISKING: Indeed, and that is something we would have to consider.

32 THE CHAIRMAN: It might be possible with some lateral thinking to be able to deal with it so
33 that we can deal with the appeal without you disclosing matters which would not be
34 necessary to the appeal – that may or may not be possible. It depends how it has all been

1 worked out. It may be so interconnected that that is not possible. So now we have got to
2 the timetable. If I look at the Ofcom submissions which very helpfully dealt with all the
3 points (a) and (b) 21st June and 14 days after that can stand, can it not? Ofcom defence 21st
4 June, Sky statement of intervention 14 days after service of Ofcom's defence.

5 MR. WISKING: We are content with that.

6 THE CHAIRMAN: No, I would not have thought that a reply to Sky's statement of intervention
7 is appropriate at that stage, because I think we are then going to have to have the case
8 management conference at which any application for disclosure must be made. So what I
9 suggest we do is fix a CMC, and any application for disclosure or any other application –
10 because you may want permission to amend your notice of application as well – should be
11 made seven days after Sky's statement of intervention. I think that gives you probably
12 enough time.

13 MR. GORRIE: Thank you.

14 THE CHAIRMAN: So that would be 12th July. I think we are going to have to rise in order to
15 look at the diaries to see when we can fix it for possibly the last week in July.

16 MR. VAJDA: For the next CMC. Just so nobody is taken by surprise, it is likely that the Ofcom
17 defence is going to contain quite a lot of material which is confidential to Sky, so in the
18 absence of Sky consenting to that information going to Rapture, so at that stage there will
19 be information asymmetry, which is why ----

20 THE CHAIRMAN: Well is it going to be possible to arrange some sort of confidentiality ring
21 between the lawyers for Rapture in order to deal with that? Any confidentiality ring has to
22 be passed back through us and we are used to that.

23 MR. VAJDA: Yes, and obviously it is a criminal offence for Ofcom to disclose confidentiality
24 without the consent of the party, so ----

25 THE CHAIRMAN: That is why I am suggesting that we try and agree – it is going to be
26 impossible to run this case if we do not have some sort of confidentiality ring.

27 MR. VAJDA: Absolutely.

28 THE CHAIRMAN: Confidentiality will be on the next CMC but hopefully your approach in the
29 submissions was to try and resolve it, and I would have hoped that that was one of the
30 things you would try and resolve.

31 MR. VAJDA: I have actually used the adjournment to mention it to Mr. Wisking, because in a
32 sense the issue on confidentiality is now going to be a Sky issue and not a Rapture issue in
33 light of the fact that Rapture has nothing confidential, so the ball is very much in Mr.
34 Wisking's court and we are hoping that he will come up with some innovative solutions.

1 THE CHAIRMAN: It is not that we have a litigant in person, we do have a firm, and therefore
2 we should be able to organise confidentiality rings.

3 MR. WISKING: Yes, we need to review the confidentiality in the decision in the light of the
4 notice of appeal and I cannot say how we will deal with that, but that is something I will
5 have to take instructions on.

6 THE CHAIRMAN: Right, shall we rise for a moment and see what dates we have for the end of
7 July? It may be that there is going to be quite a number of issues to be determined, so we
8 are going to have to set aside the whole day, although I hope that it would not take the
9 whole day and that everything is sorted out beforehand. We will rise so that the Tribunal
10 members can get their diary and we can get the Tribunal diary. I do not know if you want
11 to look at your diaries but of course we tend not to arrange it to the convenience of the
12 advocates because otherwise it becomes too complicated.

13 MR. VAJDA: Yes, although as I understand it the practice now is that one does take account ----

14 THE CHAIRMAN: I would not say it is the practice but I will take it into account, oh yes. That
15 is why I said that I would take it into account but at the end of the day there is a problem
16 about the Tribunal diary. It is not like in court where it does not matter which Judge you
17 have and therefore it is a listing problem; it is not going to be a listing problem here.

18 MR. VAJDA: Yes, well I am sure we will be able to get a date that will suit everybody.

19 THE CHAIRMAN: Yes, so let us see whether we can fix a date which suits everybody. I would
20 not say there is a practice though.

21 (The hearing adjourned at 3.35 p.m. and resumed at 3.45 p.m.)

22 THE CHAIRMAN: We have come up with two dates: one is Tuesday, 24th July, and the other is
23 Thursday, 16th August.

24 MR. VAJDA: If I may go first, speaking for myself Tuesday, 24th July is fine, and I would prefer
25 that to the date in August.

26 THE CHAIRMAN: I thought you probably would.

27 MR. VAJDA: I hope I would not be alone on that, but I wait to hear.

28 MR. WISKING: Both dates are fine and our preference is for July.

29 THE CHAIRMAN: I think our preference is Tuesday, 24th July, not for the same reason. So is
30 that all right, Tuesday, 24th July?

31 MR. GORRIE: Yes.

32 MR. VAJDA: I suggest half a day, because there is an element of Parkinson's law here, and we
33 have a lot of people here ----

1 THE CHAIRMAN: I think we had better reserve the whole day but nearer the time we will know
2 where we are.

3 MR. VAJDA: Yes. At the moment I cannot see any basis on how this could go beyond half a
4 day.

5 THE CHAIRMAN: Well we have already taken half a day just discussing this. Sometimes these
6 things do go on beyond 2 o'clock if we start at 10.30.

7 MR. VAJDA: Yes, well maybe if we can review it.

8 THE CHAIRMAN: We will review it, because it depends on what applications are made and
9 how much agreement there is, but if there is not a lot of agreement and we have to be in and
10 out because of that sort of thing then it takes time, and sometimes it does go over lunch.

11 MR. VAJDA: Yes.

12 THE CHAIRMAN: It is a question of whether one sits until 2 o'clock, or whether one breaks
13 until 2 o'clock, and at the moment it is unlikely that I will sit over the lunch break.

14 MR. VAJDA: No, no, we are certainly not asking anybody to sit over lunch.

15 THE CHAIRMAN: Well normally I would do that but at the moment I am not doing that, so I
16 think we would have to break I am afraid.

17 MR. VAJDA: Maybe we can have provision that we can then notify the Tribunal perhaps seven
18 days before whether we think actually a day ----

19 THE CHAIRMAN: Yes, with a time estimate.

20 MR. VAJDA: Yes, the time estimate.

21 THE CHAIRMAN: Let us just work out our timetable and what needs to go into the order. The
22 forum is England and Wales. Defence and witness statements in support of defence, and
23 any documents that you are going to annex to that voluntarily and any voluntary disclosure
24 – 21st June. Sky statement in intervention would be 5th July. Then any applications by
25 appellant, including applications for disclosure and/or amendment of notice of application
26 would be 19th July. It is not giving us very much time. Mr. Wisking, could you bring that
27 back a bit – would you mind – 5th July?

28 MR. WISKING: My difficulty is I have no information whatsoever, so I do not know what is in
29 the notice of appeal, I do not know what is in ----

30 THE CHAIRMAN: But you will know that because that is going to be served on you
31 immediately.

32 MR. WISKING: Thank you, I was going to ask for an order.

33 THE CHAIRMAN: Yes, and we will put that in in a moment.

34 MR. WISKING: I am reluctant to do so only because ----

1 THE CHAIRMAN: Can we bring it back to the Monday, 3rd.

2 MR. WISKING: That is Tuesday, the 3rd. I know this is unsatisfactory but perhaps we can do it
3 on the basis that we move it to the 3rd, but if for some reason ----

4 THE CHAIRMAN: There is always that possibility. If we say that is the 3rd, then we can bring
5 back to the 10th July any applications you are going to make, including application for
6 disclosure and/or amendment to notice of application – I do not think there is anything else
7 that you might have, but any applications you are going to make. Then that gives us 24th is
8 Tuesday, the Friday would be the 19th July, any response by Ofcom or Sky to any
9 applications, and any further submissions for CMC by all parties 19th July. I do not think
10 we have time for any exchange there, which leaves us the 24th July for CMC.
11 Confidentiality needs to be sorted out as well.

12 MR. VAJDA: One also needs an order formally allowing Sky to intervene.

13 THE CHAIRMAN: Yes but what about the confidentiality? “... to any applications, and any
14 further submissions for CMC by all parties, including on confidentiality ...” would be 19th
15 July. Sky permission to intervene on condition limited to grounds of appeal in notice of
16 appeal, and confidentiality. Is there anything else? We should look at our agenda. (After a
17 pause) I think that is it.

18 MR. GORRIE: Madam, if I may raise one issue which you raised in your introductory remarks
19 and seek any further thoughts that you might have on resource. You rightly pointed out that
20 this will be an issue, and particularly if we are looking to seek expert input. Again, I don’t
21 have an answer at this stage but whether the Tribunal has any further thoughts on ----

22 THE CHAIRMAN: I think it is a matter for you.

23 MR. GORRIE: Okay, thank you.

24 THE CHAIRMAN: Does anybody have anything that we have overlooked? So the order is going
25 to be: (i) Forum England and Wales, (ii) Permission to intervene by Sky; and
26 (iii) Timetable: defence and witness statements in support and any voluntary
27 disclosure by 21st June. Sky statement of intervention by 3rd July. Any application by the
28 appellant, including any application for disclosure and/or amended notice of application and
29 any submissions on it, by 10th July and any response by Ofcom and BskyB by 19th July,
30 which allows us to have a CMC on 24th July.

31 MR. WISKING: And my notice of appeal – if I can be served with a notice of appeal.

32 THE CHAIRMAN: Yes, I knew there was something else, thank you. (iv) Sky to be served with
33 a non-confidential version ----

34 MR. VAJDA: No, I think subject to what Mr. Gorrie says ----

1 THE CHAIRMAN: I think it is the whole notice of appeal now, is it? There is no problem. (iv)
2 Sky to be served with notice of appeal. Are you saying that you are not raising any question
3 of confidentiality in this Tribunal, or only that you are not raising any confidentiality
4 between now, B Sky B and you and Ofcom?
5 MR. GORRIE: Only between Rapture, B Sky B and Ofcom.
6 THE CHAIRMAN: In other words that it is not a public document?
7 MR. GORRIE: I understand that.
8 THE CHAIRMAN: You understand that?
9 MR. WISKING: Yes, that is fine.
10 THE CHAIRMAN: So it will be: notice of appeal confidential version – I am going to write
11 down: “to be kept confidential by Sky.”
12 MR. WISKING: One question – this may become relevant when we get to the hearings – that
13 evidence and the notice of appeal, what falls into that category because presumably then
14 those matters would have to be dealt with in camera?
15 THE CHAIRMAN: No, I do not think it does. There is no urgency in that, is there?
16 MR. WISKING: No.
17 THE CHAIRMAN: So by 10th July – if the appellants do everything on the same date it is easier
18 – can you identify anything that is confidential, any confidentiality in the notice of
19 application? I think you will see in our guidance to proceedings how to do that.
20 MR. GORRIE: Thank you.
21 THE CHAIRMAN: Then we can consider that at the next hearing. Anything else? I knew there
22 was another point which I had not written down, so that was it. Thank you very much. I
23 think we probably will all see each other on 24th July and you need really to consider how
24 you are going to approach this case. One appreciates that there is a tremendous
25 proportionality problem here. Thank you very much.
26 (The hearing concluded at 4 p.m.)