Neutral citation [2007] CAT 34

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1082/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

23 November 2007

Before:

MARION SIMMONS QC
(Chairman)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

RAPTURE TELEVISION PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

BRITISH SKY BROADCASTING LIMITED

Intervener

Mr. Michael Bowsher QC and Miss Elisa Holmes (instructed by Orrick, Herrington & Sutcliffe LLP) appeared for the Appellant.

Mr. Christopher Vajda QC and Mr. Phillip Woolfe (instructed by the Office of Communications) appeared for the Respondent.

Mr. Stephen Wisking (of Herbert Smith LLP) appeared for the Intervener.

JUDGMENT ON PERMISSION

(1) TO AMEND THE NOTICE OF APPEAL AND

(2) TO ADDUCE FURTHER EVIDENCE

I. INTRODUCTION

1. We have before us an application by Rapture Television plc ("Rapture") dated 7 August 2007 for permission to amend its notice of appeal. The underlying appeal, filed on 9 May 2007, is an appeal against a decision by the Office of Communications ("OFCOM") which, using its powers under sections 188 and 190 of the Communications Act 2003 (the "2003 Act"), determined a dispute which had arisen between Rapture and British Sky Broadcasting Limited ("Sky") and which Rapture had then referred to OFCOM under section 185 of the 2003 Act for resolution. The dispute concerns the charge for Sky's provision of electronic programming guide listing services to Rapture.

2. Rapture seeks to make amendments to its notice of appeal, which include reference to new witness evidence of Mr David Henry and expert evidence of Mr Leo Borwick. Accordingly, on 7 August 2007 Rapture submitted an application to adduce proposed further evidence in the form of a second witness statement of Mr David Henry (Mr Henry is the Managing Director of Rapture, and his first witness statement was exhibited to the original notice of appeal) and an expert witness statement of Mr Leo Borwick.

3. This judgment addresses both the application for permission to amend the notice of appeal and the application for permission to adduce the proposed further evidence.

II. FACTUAL, PROCEDURAL AND LEGAL BACKGROUND

Factual background to the dispute

4. Rapture operates a free-to-air digital television channel which broadcasts a mixture of music, extreme sports, anime, computer games and films, targeted primarily at a younger audience. Rapture's television channel was broadcast on the Sky television platform from June to August in 2002 and from May 2003 to July 2004. The channel was re-launched on the Sky platform on 14 November 2005 and was subsequently removed by Sky on 19 March 2007 following the dispute and determination referred to above.

5. Sky is a wholly-owned subsidiary of British Sky Broadcasting Group plc ("BSkyB Group"). The BSkyB Group operates a digital satellite television platform (the "Sky Platform") and a retail pay TV business in the UK and Ireland. Sky also broadcasts a number of channels, both on its own platform and on other platforms including cable and digital terrestrial TV.

6. A number of pay-TV and free-to-air television channels (such as Rapture's television channel) are available via the Sky Platform. In order to enable third party channels to be offered over the Sky Platform, Sky provides broadcasters with technical platform services including conditional access (for encrypted channels), channel listings on Sky's electronic programming guide ("EPG") and access control services. The provision of technical platform services, including EPG services, is subject to a number of regulatory conditions.

7. Rapture initially complained to OFCOM about the EPG services offered by Sky in June 2005. That complaint primarily concerned what Rapture considered to be excessive delays in launching Rapture's television channel onto the Sky Platform. OFCOM asked Rapture to provide additional information and evidence to enable OFCOM to investigate. Rapture provided some additional information, but did not or was not able to provide any evidence to support its concerns. OFCOM therefore did not proceed to an investigation. Over the course of the following year, Rapture continued to raise concerns with OFCOM and copied OFCOM in on some of its correspondence with Sky. On 11 September 2006, under section 185(1) of the 2003 Act, Rapture sought to refer to OFCOM a dispute between itself and Sky in relation to what it considered were its failed negotiations with Sky over Sky's charges for its EPG listing. Rapture alleged that Sky's charge to Rapture for the provision of EPG listing services was not made on fair, reasonable and non-discriminatory terms. Rapture argued that the cost of EPG services was far too high for an independent channel and that Sky was acting in an anti-competitive manner by not entering into meaningful commercial negotiations on price.

8. After conducting an initial enquiry, OFCOM accepted the dispute as one falling within the scope of section 185(1) of the 2003 Act and concluded that it had jurisdiction to handle the dispute. On 10 November 2006, OFCOM decided that it was appropriate for it to handle this dispute. On 15 November 2006, OFCOM issued a "Competition

Bulletin" stating that the scope of the dispute was "to determine whether Sky's charges to Rapture for the provision of EPG services between November 2005 and November 2006 are fair, reasonable and non-discriminatory".

9. During the course of OFCOM's handling of this dispute, Rapture made further allegations, including *inter alia* that Sky unreasonably delayed the launch of Rapture's television channel onto the Sky Platform and that Sky's policy of allocation of EPG channel numbers put Rapture at a commercial disadvantage. OFCOM concluded that these were not matters in dispute between the parties at the time that the dispute was referred to OFCOM for resolution. They did not, therefore, in OFCOM's view, fall within the scope of its dispute resolution powers.

10. In its handling of this dispute, OFCOM considered Oftel's guidelines entitled "Terms of supply of conditional access", published on 22 October 2002 ("the 2002 Guidelines").

11. OFCOM published its determination ("the Determination") on 9 March 2007. In that determination OFCOM declared that "the charge for Sky's provision of EPG listing services to Rapture between 14 November 2005 and 10 November 2006 set out in the contract signed by both parties in November 2005 is fair, reasonable and non-discriminatory as those terms apply under the EPG Conditions"[1].

The relevant legal provisions

12. In so far as material, sections 185 and 186 of the 2003 Act provide as follows:

> **185 Reference of disputes to OFCOM**
>
> (1) This section applies in the case of a dispute relating to the provision of network access if it is—
>
> (a) a dispute between different communications providers;
>
> (b) a dispute between a communications provider and a person who makes associated facilities available;

[1] The "EPG Conditions" being defined in the Determination as the conditions set out in the class licence issued under the Telecommunications Act 1984 to run telecommunications systems for the provision of conditional access services for the purposes of the provision of EPG services.

…

(3) Any one or more of the parties to the dispute may refer it to OFCOM.

…

(8) For the purposes of this section—

(a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; and

(b) …

186 Action by OFCOM on dispute reference

(1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.

(2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.

…

13. The procedure which OFCOM must follow in determining disputes is set out in section 188 of the 2003 Act, which, in so far as material, provides as follows:

188 Procedure for resolving disputes

(1) This section applies where—

(a) OFCOM have decided under section 186(2) that it is appropriate for them to handle a dispute; or

…

(2) OFCOM must—

(a) consider the dispute; and

(b) make a determination for resolving it.

(3) The procedure for the consideration and determination of the dispute is to be the procedure that OFCOM consider appropriate.

(4) …

(5) Except in exceptional circumstances and subject to section 187(3), OFCOM must make their determination no more than four months after the following day—

(a) in a case falling within subsection (1)(a), the day of the decision by OFCOM that it is appropriate for them to handle the dispute; and

(b) …

(6) Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable.

(7) OFCOM must—

(a) send a copy of their determination, together with a full statement of their reasons for it, to every party to the dispute; and

(b) publish so much of their determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider it appropriate to publish.

(8) The publication of information under this section must be in such manner as OFCOM consider appropriate for bringing it to the attention, to the extent that they consider appropriate, of members of the public.

14. OFCOM's powers to resolve disputes are set out in section 190 of the 2003 Act, which, in so far as material, provides as follows:

190 Resolution of referred disputes

(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.

(2) Their main power … is to do one or more of the following—

(a) to make a declaration setting out the rights and obligations of the parties to the dispute;

(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;

(c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and

(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.

…

(8) A determination made by OFCOM for resolving a dispute referred or referred back to them under this Chapter binds all the parties to the dispute.

(9) Subsection (8) is subject to section 192.

15. OFCOM's powers to require information in connection with a dispute are set out in section 191 or the 2003 Act, which, in so far as material, provides as follows:

> **191 OFCOM's power to require information in connection with dispute**
>
> (1) Where a dispute has been referred or referred back to OFCOM under this Chapter, they may require any person to whom subsection (2) applies to provide them with all such information as they may require for the purpose of—
>
> (a) deciding whether it is appropriate for them to handle the dispute;
>
> (b) determining whether it is necessary for them to consult the regulatory authorities of another member State; or
>
> (c) considering the dispute and making a determination for resolving it.
>
> (2) This subsection applies to—
>
> (a) a party to the dispute; and
>
> (b) a person who is not a party to the dispute but appears to OFCOM to have information that is relevant to the matters mentioned in subsection (1)(a) to (c).
>
> (3) A person required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by OFCOM.
>
> (4) In fixing the period within which information is to be provided in accordance with a requirement under this section OFCOM must have regard, in particular, to—
>
> (a) their obligation to make a determination for resolving the dispute within the period specified in section 188;
>
> (b) the nature of the dispute; and
>
> (c) the information that is required.
>
> …

16. Section 195(2) of the 2003 Act provides that:

> "The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal."

The Tribunal rules on amendment of pleadings

17. The procedural rules governing proceedings in the Tribunal are contained in the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I.

No. 2068 of 2004). Amendment to an appellant's notice of appeal is governed by rule 11 of the Tribunal Rules which states as follows:

> 11. - (1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
>
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential direction as may be necessary.
>
> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless –
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include such ground in the notice of appeal; or
>
> (c) the circumstances are exceptional.

18. The Tribunal's Guide to Proceedings[2] provides further guidance on the circumstances in which an appellant may seek permission to amend its notice of appeal. In so far as material, it reads as follows:

> *Amendment of pleadings*
>
> 11.11 Rule 11 provides that a notice of appeal can be amended only with the permission of the Tribunal. Since the form of the notice of appeal is not that of a traditional pleading, such as a statement of case in High Court litigation, but rather a narrative presentation of factual and legal argument, the concept of 'amendment', as traditionally applied to civil proceedings, cannot be directly transposed to proceedings before the Tribunal. Thus it will not normally be necessary to apply formally to 'amend' simply to put into different words the written submissions made in support of a ground of appeal which is already set out in the notice of appeal. Permission to amend will however be necessary where the appellant seeks to raise a new ground of appeal that lies outside the four corners of the original appeal. In that event, the conditions of Rule 11(3) apply to the exercise of the Tribunal's discretion to permit the amendment – which will only be possible where the new ground:
>
> (a) is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include the new ground in the notice of appeal; or
>
> (c) the circumstances are exceptional.

[2] The Guide to Proceedings is available from the Tribunal's website: www.catribunal.org.uk. The requirements of the Tribunal's Guide to Proceedings, dated 20 October 2005, constitute a Practice Direction issued by the President pursuant to Rule 68(2) of the Tribunal Rules.

> 11.12 In this regard see *Floe Telecom v OFCOM* [2004] CAT 7 at [37] where the Tribunal stated that this approach should, in general, be adhered to as regards the notice of appeal, "not least so that the respondent authority may properly plead in its defence to the notice of appeal and that the Tribunal itself may at an early stage begin to read into the case, the basic framework of which is set by the notice of appeal and defence." A skeleton argument should remain within the scope of the notice of appeal: *Albion Water (Bath House) v DGWS* [2005] CAT 23. See also: *Albion Water (Bath House) v DGWS* [2004] CAT 21.
>
> 11.13 …
>
> 11.14 A party who wishes to raise a new ground of appeal or develop an existing ground of appeal in a manner which could not reasonably have been foreseen should seek directions from the Tribunal as soon as possible.

The appeal and the procedural background

19. Rapture lodged an appeal against OFCOM's Determination on 9 May 2007. In its notice of appeal filed on that day ("the original notice of appeal"), Rapture alleged that OFCOM, in coming to its decision, had made various errors of law; had failed properly to exercise its discretion in applying the relevant guidelines; had failed to conduct a sufficiently thorough investigation; and had failed to discharge its statutory duties.

20. A first case management conference took place on 1 June 2007. The Tribunal's Order made at that case management conference stated:

> "Any application and/or submissions by the appellant, including any application for disclosure and/or amendment to the notice of appeal and/or any request for the confidential treatment of any part of the notice of appeal, be filed and served by 5.00pm on 10 July 2007."

21. A second case management conference was listed for 24 July 2007. OFCOM filed its defence on 21 June 2007 and Sky filed its statement of intervention on 3 July 2007.

22. On 10 July 2007, Rapture filed a bundle of documents including a document entitled "Substituted Notice of Appeal" (the "proposed substituted notice"), a second witness statement of Mr David Henry (the first having been annexed to the original notice of appeal) and an expert witness statement of Mr Leo Borwick. However, no application for permission to amend the original notice of appeal was included, and the covering letter from Rapture's solicitors which accompanied the bundle stated simply:

> "Further to the Order of the Tribunal of 1 June 2007, please find enclosed our Substituted Notice of Appeal and Draft Confidentiality Order (at tab 2 of the bundle)".

23. On 20 July 2007, Rapture filed three applications, the first for permission to amend the original notice of appeal, the second for permission to adduce further evidence, and the third for disclosure. On 23 July 2007, Rapture filed its written submissions for the case management conference, together with some further additional documents. At the second case management conference, held on 24 July 2007, since it was unclear from the proposed substituted notice what amendments were proposed to be made to the original notice of appeal, the Tribunal adjourned Rapture's application for permission to amend the original notice of appeal and ordered that Rapture file a draft amended notice of appeal together with a schedule identifying which, if any, of the proposed amendments required the Tribunal's permission pursuant to rule 11 of the Tribunal Rules. In order to avoid further costs being incurred on this application the parties agreed that they would provide written submissions and that, if possible, the Tribunal would decide the matter of permission to amend the original notice of appeal on the papers, without the need for a further hearing.

24. On 7 August 2007 Rapture filed its revised applications to amend the original notice of appeal and to adduce further evidence. The proposed amended notice of appeal ("the proposed amended notice") and a schedule containing the amendments and a commentary were filed with the revised application. The schedule produced by Rapture contained three columns: the text of the original notice of appeal was contained in one column, the marked-up text of the proposed amended notice of appeal was contained in a second column, and the third column contained a commentary on the amendments including whether or not (according to Rapture) they required the Tribunal's permission. The Tribunal found this schedule very useful in deciding the application.

25. OFCOM filed written submissions in respect of those applications on 11 September, 26 September and 9 October 2007. Sky filed written submissions on 18 September, 12 October and 24 October 2007. Rapture filed written submissions in reply on 25 September, 5 October and 22 October 2007.

26. Before turning to the specific amendments proposed by Rapture, we address the submissions of the parties that are of general application to all of the proposed amendments.

III. THE PARTIES' SUBMISSIONS AND THE TRIBUNAL'S APPROACH TO THE PROPOSED AMENDMENTS

Rapture's submissions

27. Rapture submits that, notwithstanding any alleged deficiencies in the original notice of appeal, the parties are where they are now, and Rapture should not be prevented from arguing its case in full through an unnecessarily strict interpretation of the rules of procedure. In its submissions, Rapture repeatedly stresses the point that its advisers are acting on a pro bono basis, and that this affects its ability to pursue its case and puts Rapture at a significant disadvantage to both OFCOM and Sky. It is submitted that Rapture is in a precarious financial situation and that it is only by virtue of the pro bono scheme that Rapture is able to bring the appeal at all. In this regard, Rapture submits that the initial involvement of its solicitors was only on a limited basis, in accordance with the terms and conditions of the "Competition Pro Bono Scheme". Rapture submits that its solicitors did not represent it in the proceedings before OFCOM, other than by attending the final meeting between OFCOM and Rapture on 20 February 2007, and that its solicitors prepared the original notice of appeal without having available to them the detailed input of technical, regulatory or economic experts which would normally be provided in privately funded actions. Furthermore, according to Rapture, it was only after the first case management conference (and the observations articulated by the Chairman of the Tribunal at that case management conference) that Rapture was able to secure the assistance of counsel, also under the pro bono scheme, and the technical expertise of Mr Borwick. Rapture submits that there are limitations on what its professional advisers (lawyers and experts) can provide as compared with what is available to the other parties. Rapture suggests that the Tribunal must take the asymmetry of information and experience, and inequality of arms into account because it submits that otherwise, in many cases, a party in Rapture's position would be better off proceeding unrepresented rather than benefiting from pro bono assistance.

28. Rapture also submits that the Tribunal's approach to amendments is unduly narrow and restrictive. It submits that under the more typical English civil court procedure parties are permitted to develop new points to the extent that justice demands, and that in the current circumstances, refusal of permission to amend may throttle its ability to pursue its case. It is appropriate, therefore, in Rapture's view, for a more flexible approach to be adopted in this case.

29. Rapture submits that to reject its applications would be to disregard strong analytical evidence which supports its case and would cause Rapture serious prejudice. Conversely, however, Rapture submits that the only additional burden on OFCOM and Sky if the applications were granted would be the need to consider and respond to two short additional documents, and that this additional burden is insignificant. The interests of justice being served would in Rapture's submission dictate that the application be granted.

30. Rapture also points out that the proposed amendments include abandoning some of the grounds of appeal previously relied upon and that this ought to be taken into account when considering whether permission should be given to make the proposed amendments which advance new arguments.

The submissions of OFCOM and Sky

31. OFCOM refers the Tribunal to the cost to the public purse of allowing amendments late in the day, after the defence has already been filed, and the procedural delay which it submits would follow if the amendments were permitted. OFCOM and Sky both submit that, if the amendments are allowed, they will have to apply to amend their defence and statement of intervention, and may need to appoint technical or economic experts of their own. The knock-on effect would be that these proceedings, which have already been affected by significant delays, would be delayed even further.

32. OFCOM drew the Tribunal's attention to section 188(5) of the 2003 Act, which provides that OFCOM must, except in exceptional circumstances, make a determination resolving a dispute within four months. OFCOM submits that the statutory process is designed to produce a speedy outcome for the parties involved. In this regard, OFCOM

reminds the Tribunal that the overriding objective of the Civil Procedure Rules and of the Tribunal's own rules of procedure is to deal with cases as quickly and as efficiently as possible. OFCOM submits that granting Rapture the permission it seeks to amend the original notice of appeal or adduce further evidence may jeopardise the timetable that has been laid down for the substantive hearing. OFCOM points to Rapture's failure to comply with the Tribunal's procedural rules and directions as a reason not to afford any undue lenient treatment.

33. Sky submits that, regardless of whether the amendments constitute "new grounds" within the meaning of rule 11(3), the Tribunal should refuse permission to amend pursuant to its discretion under rule 11(1) where the proposed amendments would necessitate further factual investigation, the introduction of further factual and expert evidence by OFCOM and Sky, require a longer hearing and delay the determination of the appeal.

34. OFCOM and Sky both rely on the Tribunal's judgment on permission to amend the notice of appeal in *Floe Telecom Limited v OFCOM* [2004] CAT 7, in particular paragraphs [33], [34] and [37], in which the Tribunal explained that:

> "33. …the basic thrust of rule 11 is to limit the possibilities of amendment after an appeal has been introduced. That forms part of the case management system of the Tribunal, which is in general based on the philosophy that an appellant is expected to set out his arguments on appeal as fully as possible in writing at an early stage…
>
> 34. That principle is in turn part of the Tribunal's emphasis on written procedure, which itself is directed to assisting the Tribunal in deciding often complex cases expeditiously and efficiently. It should also be noted, in this connection, that most appeals come before the Tribunal following an administrative procedure in which many points will already have been canvassed.
>
> …
>
> 37. It is important that this approach is in general adhered to as regards the notice of appeal, not least so that the respondent authority may properly plead, in its defence, to the notice of appeal, and that the Tribunal itself may, at an early stage, begin to read into the case, the basic framework of which is set by the notice of appeal and defence."

The Tribunal's analysis

35. The wording of rule 11(1) of the Tribunal Rules is clear and unambiguous. The appellant may amend the notice of appeal *only* with the permission of the Tribunal.

Rapture, in its submissions, seeks to distinguish those amendments which raise new grounds of appeal from others which raise new arguments within existing grounds and submits, relying on the Guide to Proceedings, that permission is not required for amendments which amount to no more than a rewording of existing grounds of appeal. This approach is misguided, and relies upon a misreading of the Guide to Proceedings. The first line of the relevant section of the Guide (set out above) makes it abundantly clear that a notice of appeal can only be amended with the permission of the Tribunal. The Guide draws a distinction between an "amendment" of the notice of appeal and "putting in different words the written submissions made in support of a ground of appeal which is already set out in the notice of appeal". This refers to minor changes which are linguistic or semantic in nature, or are merely presentational such as formatting changes. Accordingly, where the notice of appeal is amended to set out new submissions in support of a ground of appeal, permission is required.

36. Rule 11(3) further provides that where an appellant seeks to introduce a new ground by way of amendment, the Tribunal shall only grant permission for that new ground if one of the pre-requisite conditions of sub-paragraphs (a), (b) or (c) of that rule is met.

37. We therefore have to consider whether the proposed amendments:

    (i) put into different words the written submissions made in support of a ground of appeal;

    (ii) make new submissions in support of an existing ground of appeal; or

    (iii) introduce a new ground of appeal.

38. Where the proposed amendment falls under (ii) above, the Tribunal has a wide discretion as to whether to permit the amendment, which it will exercise in accordance with fairness and justice, having regard to all the circumstances.

39. The procedure in the Tribunal, particularly rules 8 and 11 of the Tribunal Rules concerning the time and manner of commencing proceedings and the amendment of the notice of appeal, differs significantly from the Civil Procedure Rules which apply to actions in the High Court. Accordingly, it is important, when making an application to the Tribunal to amend a notice of appeal, for the proposed amendments to be clearly

identified and for the application to state the reasons relied upon as to why the Tribunal should grant permission to amend the notice of appeal. A substituted notice of appeal which does not identify and set out these matters does not support the requirements which must be met under the Tribunal rules for permission to amend a notice of appeal. In this regard it is relevant to note that in case 1027/2/3/04 *VIP Communications Limited v OFCOM* a proposed substituted notice was also rejected by the Tribunal and the appellant was required to produce a proposed amended notice of appeal identifying the proposed amendments[3].

40. It is also important to note when considering whether to grant permission for an amendment to the notice of appeal that this is an appeal from a determination by OFCOM of a dispute between Rapture and Sky which Rapture referred to OFCOM. Accordingly, save in respect of procedural irregularities by OFCOM which become apparent from the determination itself, the points would ordinarily be known to the appellant since they should already have been canvassed during the administrative procedure.

41. The fact that Rapture is no longer seeking to rely on certain grounds or arguments advanced in the original notice of appeal is a matter for Rapture, and is not relevant to the question of whether the Tribunal should grant permission to amend the notice of appeal as set out in the proposed amended notice of appeal.

42. We have considered the financial amount directly at issue in the dispute (the charge of £76,800 per year for access to Sky's EPG) and the fact that Rapture is not in a position to pay the costs thrown away by its application for permission and the proposed amendments against the importance of the issues at stake, for the parties and more generally. Notwithstanding the relatively small financial amount concerned, this appeal is clearly important for all three parties: Rapture claims that its continued financial viability is at stake; the case raises important questions for OFCOM in relation to how it investigates and determines disputes; and for Sky, the case may have much wider implications in relation to its dealings with other users of its platform, not just Rapture.

[3] In relation to the VIP Communications Limited case, see the transcript of the case management conference on 1 November 2006 and the Ruling of the Tribunal, [2006] CAT 27.

43. We have also considered the submissions made by Rapture concerning its specialist advisers representing it pro bono. Pro bono schemes do not absolve advisers from their duty to carry out the services they provide with reasonable skill and care. However, the service provided may be narrower than would be provided to a privately funded client. If so, the limitation on the services provided, and any consequential difficulties which may result from such limitations, need to be made transparent at the outset so that it is clear what is and what is not being provided by the pro bono advisers. In this case, we note that Rapture's legal advisers signed the original notice of appeal.

44. We now turn to consider the application of rule 11(3)(c).

Analysis of exceptional circumstances within the meaning of rule 11(3)(c)

45. Rapture submits that the proposed amended notice of appeal does not contain any new grounds within the meaning of rule 11(3) of the Tribunal Rules, but that, in the alternative, should the Tribunal conclude that any of its proposed amendments do amount to new grounds of appeal, those amendments should be permitted under rule 11(3)(c) because the circumstances of the case are exceptional. Rapture relies on four factors which it submits amount to exceptional circumstances. Those four factors are: first, that Rapture's legal advisers and experts are acting on a pro bono basis; second, that neither Counsel nor the expert now assisting Rapture were instructed at the time the original notice of an appeal was filed; third, the financial condition of Rapture; and fourth, the complexity of the case.

46. We do not accept that any of these four factors amounts to exceptional circumstances within the meaning of rule 11(3) in the circumstances of this case. The fact that the advisers acting for Rapture are doing so on a pro bono basis is commendable. It is not, however, a reason for the specialist advisers to carry out the services provided by them otherwise than with reasonable skill and care, and it cannot be a reason for relaxing or ignoring the procedural rules of the Tribunal. It is not particularly unusual for new legal or specialist advisers to be instructed during the preparation of a case, or for those new advisers to identify potential new grounds of appeal. This occurs regularly in litigation and is not an exceptional circumstance within the meaning of rule 11(3). The financial condition of Rapture does not seem to us to be relevant. Rapture is receiving

pro bono advice, and was being advised by a specialist law firm who settled the original notice of appeal. Finally, in relation to the complexity of the case, we observe that all competition law cases are complex in nature, involving cross-disciplinary expertise in law, economics, business and accountancy. In our view, and in the circumstances of this appeal, the complexity of the case cannot amount to exceptional circumstances within the meaning of rule 11(3)(c).

47. We therefore conclude that none of the factors relied upon by Rapture amount to circumstances that are exceptional. Accordingly, rule 11(3)(c) cannot be relied upon by Rapture.

IV. THE PROPOSED AMENDMENTS

48. We now consider the individual amendments proposed by Rapture. We do so, having regard to the need for parties to have access to justice, the fact that OFCOM and Sky have already filed their defence and statement of intervention and the other factors mentioned in the previous section of this judgment. The paragraph numbers referred to in the sub-headings in this section are those used by Rapture in its proposed amended notice of appeal dated 7 August 2007.

The appropriate rate of return (paragraphs 49 to 53B)

49. In the original notice of appeal, paragraphs 49 to 53 were introduced by the heading

> "Charges should be set between the 'floor' of the incremental cost of providing the service, and the 'ceiling' of the stand-alone cost of the service and returns should not be excessive".

50. In the proposed amended notice of appeal, this has been replaced by a new heading,

> "Ofcom erred in applying the provision of the Guidelines which require Ofcom to consider whether the pricing framework is such that the return on investment is neither adequate nor excessive, taking proper account of risk and uncertainty, and also whether the rate of return is consistent with the appropriate cost of capital."

51. Despite this substantial change to the heading, the corresponding text of the section remains largely unchanged except for the proposed insertion of two new paragraphs, 53A and 53B.

"(53A) The appropriate rate of return is dependent upon each of the factors set out in this Notice, together with an assessment of an appropriate allowance for profit. It is clear that a return can only be appropriate if:

(a) It arises from a price which is fair, reasonable and non-discriminatory, and is in conformity with the other requirements contained in the Guidelines, including those set out above; and

(b) Subject to these restrictions, includes a reasonable rate of return on the investment.

(53B) Paragraphs 57A and 90-92 are also relied on by Rapture in this context."

The Tribunal's analysis

52. The Tribunal does not consider this amendment (paragraph 53A and 53B) to constitute a new ground within the meaning of rule 11(3). In coming to that conclusion, we note that although both OFCOM and Sky submit that Rapture has raised a significant new argument via this amendment, they nonetheless both acknowledge in their written submissions that an argument on the appropriate rate of return was raised in the original notice of appeal. However, Sky also submits that the plea is unnecessary and that Rapture's new argument is irrelevant.

53. We consider that in the exercise of our discretion under rule 11(1), this amendment should be permitted. OFCOM and Sky may, if they so wish, seek to amend their defence and statement of intervention accordingly (or, alternatively, may address the point in their submissions in reply). In the circumstances of this case, we do not think that this will impose a disproportionately heavy burden upon them (particularly if Sky is correct in its submission that the plea is unnecessary and irrelevant in any event).

54. Permission to include paragraphs 53A and 53B (and the related new heading) in the notice of appeal by way of amendment is granted, subject to the deletion of the cross-reference to paragraph 57A (see paragraph [69] below).

The allocation of common costs (paragraphs 54 to 56A)

55. The only substantive amendment to this section of the notice of appeal is the proposed insertion of a new paragraph 56A which reads:

> "In applying the Guidelines, Ofcom was required to consider negotiations were undertaken as would be expected in a competitive market, and, failing such negotiation, to consider the likely price that such negotiations would have resulted in had they been undertaken."

56. Rapture submits that the proposed paragraph 56A is merely a clarificatory amendment.

57. OFCOM submits that this amendment substantially changes the argument presented in this section of the notice of appeal and significantly broadens the scope of the appeal. OFCOM submits that Rapture's case initially was that it had no real ability to negotiate, and that now, Rapture's case appears to be that there was an obligation on OFCOM to investigate whether the negotiations that took place were such as would be expected in a competitive market; and, if not, what the price would have been had such negotiations taken place.

58. Sky submits that paragraph 56A introduces a new ground of appeal which was not raised before OFCOM during the administrative process and should be disallowed.

The Tribunal's analysis

59. Paragraphs 54 to 56, which immediately precede paragraph 56A, set out Rapture's case on negotiation. In broad terms, the plea in the original notice of appeal was that negotiation was a key element in relation to the 2002 Guidelines and in Rapture's case, there was in fact no real opportunity to negotiate with Sky: Sky conducted itself on a "take it or leave it" basis. In paragraph 57 of the original notice of appeal, Rapture stated:

> "In the absence of any real ability to negotiate, OFCOM could not have concluded that the charges were fair, reasonable and non-discriminatory, and should have departed from the Guidelines to do so."

(We note that if the proposed amendments are permitted, paragraph 57 would no longer appear in this form; it has been amended and moved into a new section of the proposed amended notice of appeal. We come on to consider this proposed amendment in the next section of this judgment.)

60. We consider that this proposed amendment goes beyond mere clarification and contains a new argument, albeit one falling within an existing ground of appeal (that being the

ground raised in relation to negotiations over the allocation of common costs) as opposed to a "new ground" within the meaning of rule 11(3). We consider that the first half of the proposed new paragraph is a reasonable extension of the preceding argument (and also reflects the argument presented in paragraphs 39 to 44 of the notice of appeal, that the terms should be consistent with those of a competitive market), and the second half of the proposed new paragraph is a natural corollary of the first half.

61. It is not clear to us that what is contained in paragraph 56A was not within the dispute referred to OFCOM. In those circumstances, we cannot disallow the amendment on that basis. It is nevertheless open to Sky or OFCOM to seek to include by amendment to their defence or statement of intervention (or to include in their reply), as either or both of them considers appropriate, submissions on the question of whether paragraph 56A was within the dispute referred to OFCOM, and if not, as to the consequences for Rapture.

62. Permission is granted to include the proposed new paragraph 56A in the notice of appeal by way of amendment.

Whether the price charged was fair, reasonable and non-discriminatory (paragraphs 57 to 57B)

63. In the original notice of appeal, paragraph 57 (set out above) was the conclusion to the section of the notice of appeal which dealt with negotiation. In the proposed amended notice of appeal, paragraph 57 is now preceded by a new heading, and followed by two newly-inserted paragraphs (57A and 57B). The whole section, as amended, is repeated below (with deleted text struck-through, and proposed new text underlined):

> **"Ofcom erred in determining whether the price charged which fell between the incremental and stand-alone costs was fair, reasonable and non-discriminatory (paragraphs 5.15-5.74)**
>
> (57) ~~In the absence of any real ability to negotiate,~~ Ofcom could not have concluded that the charges being imposed were fair, reasonable and non-discriminatory~~, and should have departed from these Guidelines to do so~~. Ofcom either did not conclude that the price charged by Sky was fair, reasonable and non-discriminatory or, in the alternative, if it did so conclude, it erred in finding that the price was fair, reasonable and non-discriminatory because:
>
> a) There was no evidence before it to support such a conclusion; or

b) Any evidence that there was in fact suggested that the prices were not fair, reasonable and non-discriminatory."

(57A) The central question is whether the price arrived at represents a reasonable contribution towards reasonably incurred common costs as one would expect in a competitive market. The caveat to this approach is that relative contributions might vary between users on account of other considerations, such as size, ability to pay and having identified those common costs from which each broadcaster actually benefits. Within these boundaries, the service provider may receive a reasonable return on its investment made.

(57B) It was necessary for Ofcom to determine what price was fair, reasonable and non-discriminatory"

64. It appears that the heading that introduces this section is in fact intended to cover all of the pleas now contained in paragraphs 57 to 76 of the proposed amended notice of appeal, although within that section there are number of sub-headings covering, for example, the "Duration during which the subsidy should be repaid", the "Costs analysis" and the "Evidence provided by Ofcom, and, evidence relied upon by Ofcom". Rapture submits that this new heading has been transferred from its previous position (between paragraphs 48 and 49 of the original notice of appeal) and has been restated "in a slightly different form".

65. The heading in the original notice of appeal read "Charges should be set between the 'floor' of the incremental cost of providing the service, and the 'ceiling' of the stand-alone cost of the service and returns should not be excessive (paragraphs 5.70-5.102)". The Tribunal notes that not only are these headings markedly different, but that they also refer to quite different sections of OFCOM's determination, with only five paragraphs of overlap (the proposed amended heading refers to paragraphs 5.15 - 5.74 of the Determination, whereas the heading in the original notice of appeal had referred to paragraphs 5.70 - 5.102). The Tribunal considers that Rapture's explanation that this heading has been repeated, albeit "in a slightly different form", is at the very least disingenuous. It seems to us that the question of whether to grant permission to amend the heading stands or falls with whether permission is granted to amend paragraph 57.

66. Rapture submits that the amendments to paragraph 57 and to include the proposed new paragraphs 57A and 57B are made to summarise and clarify the arguments which follow. OFCOM submits that the proposed amendments to paragraph 57 and the proposed new paragraphs 57A and 57B change not only the detail, but the entire thrust

of the argument presented in this section. Paragraph 57 was originally about negotiation, and paragraphs 57A and 57B are new.

The Tribunal's analysis

67. The proposed amendment to paragraph 57 alleges that OFCOM "did not conclude that the price charged by Sky was fair, reasonable and non-discriminatory". This is simply incorrect, as can be seen from paragraph 1.1 of the Determination.

68. The Tribunal considers that either (a) paragraphs 57 to 57B constitute a new ground and, for the reasons we have set out above at paragraphs [45] to [47] of this judgment, rule 11(3) is not satisfied, or (b) if it is not a new ground, it is not clear to us which existing ground these proposed amendments support. It seems to us that these proposed amendments cause confusion rather than clarity. In such circumstances, we do not consider that it would be appropriate to permit them in the exercise of our discretion under rule 11(1).

69. We conclude that permission to amend paragraph 57 (including its related heading) and to insert by way of amendment the proposed new paragraphs 57A and 57B should be refused. Accordingly, permission to include any cross-references in the proposed amended notice of appeal to either paragraph 57A or 57B should also be refused.

Costs analysis and unbundling (paragraphs 69 to 74A)

70. The principal proposed amendments in this section of the notice of appeal are contained in paragraphs 73 and 74 and three proposed new paragraphs, 73A, 73B and 74A. The Tribunal has had particular difficulty understanding and dealing with these amendments. So that the comments below may be better understood, we set out the full text of this section of the proposed amended notice of appeal:

> "(73) Sky provides various types of set-top boxes, including upgraded and more sophisticated set-top boxes. <u>The set top box subsidy should not have been treated as a common cost, since it was not part of the EPG listing services. The Guidelines provide that the set top box subsidy constitutes an externality arising form (*sic*) the subsidy relationship between Sky and its subscribers from which the independent channel providers benefit. The proper way for Ofcom to proceed in the case of an externality is not the same as it would be had they been right in its assumption that the subsidy was a common cost, which Sky would be free to</u>

recover by marking-up the price of its various products to cover that cost. (See paragraph 95.) Rapture submits that, should it have to make a contribution to Sky for its subsidy of the set-top box, which it denies, only the costs associated with basic set-top boxes should be taken into account (see paragraph 32 of David Henry's witness statement).

73A. Regulatory precedent established that Ofcom should investigate properly at least the following:

a) What proportion of the subsidy cost actually leads to benefits to independent channel providers – this means following the chain of causation from the payment of the subsidy, to the numbers of additional subscribers, to the behaviour of those additional subscribers and also evaluating the time over which the causation is effective;

b) What proportion of the cost of the subsidised set top box equipment is relevant;

c) Whether it is indeed appropriate for Sky to receive recompense for the costs if (*sic*) has incurred in this way – in particular what harm would occur if it did not do so;

d) If so, who should pay – should smaller firms, or those who might be discouraged from bringing additional competition and investment bear the same burden as large and established players.

73B Although Ofcom correctly identified that the price charged by Sky to Rapture for EPG services was between the floor of the incremental costs and the ceiling of the standalone costs, it erred in:

a) Failing properly or at all to assess whether the cost was "a reasonable contribution to the common cost" (see paragraph 91 below);

b) Failing properly or at all to assess whether the cost applied should vary between users, and, in particular, whether the cost applied was fairly and reasonably applied to the particular case of Rapture (see paragraph 47)

c) Failing to assess whether the price arrived at between the floor and the ceiling was one which would be expected in a competitive market (see paragraphs 40, 44, 56A and 70)

d) Wrongly including the cost of all set-top boxes in the calculation of the stand-alone cost, including upgrades and replacements (see also paragraph 74);

e) Failing to discount the cost of the set-top box over the correct period of one year (see paragraphs 62-65);

f) Failing to treat the set top box subsidy as an externality instead of a common cost;

g) Relying on the Platform Model for calculating individual contribution to EPG services.

(74) In addition should Rapture have to contribute to Sky's set-top box subsidy, it should only have to contribute towards the costs corresponding to the parts of the set-top box that it actually uses for the EPG service. Indeed, Rapture does not use all of the facilities in the set-top box, as most are for the benefit of those broadcasters taking conditional access or access control services. Rapture, therefore, contests Ofcom's finding at paragraph 5.5.4.1 that it considered it unnecessary to investigate this issue and that "the direct costs associated with conditional access and access control services comprise only a relatively small proportion of total platform costs" (Determination paragraph 5.56)

74A. Ofcom erred, therefore, in including the cost of all set-top boxes in the category of common costs relevant to the service provided by Rapture, rather than ensuring that Rapture contributed only to the common costs from which it benefited. In particular, it failed to apply the provisions of the Guidelines:

a) which required Ofcom to consider whether "the services offered [are], if technically feasible … sufficiently 'unbundled', so that the broadcaster only pays for what it needs" [Guidelines para 2.3]; and

b) which provided that "Oftel would expect that the result of negotiations between providers and the broadcaster is that common costs are likely to be distributed amongst different bundles or single channels at differential levels depending on the overall balance of benefits which could accrue to the provider and the broadcaster"."

71. Rapture submits that the amendments contained in this section of its proposed amended notice of appeal elucidate the arguments already contained therein, and that this is demonstrated by the various cross-references that have been included. Rapture submits that the proposed amendment to paragraph 73 is covered by paragraph 95 of the original notice of appeal, in which Rapture contends that OFCOM has made no use of economic theory. As for the proposed new paragraphs 73A and 73B, Rapture submits that, as can be seen by the cross-references, these additions "further elucidate this Ground of Appeal" and the amendment "ties in arguments elsewhere".

72. The amendments in this section of the proposed amended notice of appeal incorporate many of the points which, in the proposed substituted notice of appeal submitted on 10 July 2007, came under the heading "Unbundling of services and charges". At the case management conference on 24 July 2007 (and also in its written submissions prior to the hearing on 24 July 2007), Rapture acknowledged that its arguments on unbundling in the proposed substituted notice of appeal were "probably new", albeit "only just new". Nevertheless, in its written submissions of 5 October 2007, Rapture submits that paragraphs 73 to 74A, as amended, are part of the overall argument which

has always formed part of the appeal, and that the amendments simply amplify the notice of appeal.

73. OFCOM considers that the argument on unbundling is entirely new. OFCOM objects to the use of the phrase "regulatory precedent" in the proposed new paragraph 73A, which it submits is opaque and can only be understood in conjunction with the witness evidence of Mr Borwick (to which OFCOM also objects). However, OFCOM concedes that, even after a careful reading of this section, it is not possible to ascertain whether it constitutes a new ground within the meaning of the Tribunal Rules, or whether it is simply a summary of Rapture's entire case with a series of other grounds of appeal and/or arguments included within it. In any case, OFCOM considers that the amendments to this section constitute a major change to the framework of Rapture's case.

74. For its part, Sky considers that these amendments represent a substantial change to the original notice of appeal and constitute new grounds. Sky also objects to the reference in paragraph 73A to "regulatory precedent", which it contends is hopelessly vague, and to several of the arguments in paragraphs 73B on the basis that they are matters that were not raised before OFCOM during the administrative process.

The Tribunal's analysis

75. We accept the link that Rapture makes between the proposed amendment to paragraph 73 and paragraph 95 of the original notice of appeal, and consequently we allow the amendment to paragraph 73.

76. In relation to the proposed new paragraph 73A, we note that this paragraph does not contain any cross-references to other paragraphs of the notice of appeal. We have read the original notice of appeal and cannot identify in that notice of appeal the matters set out in paragraph 73A. Accordingly, we conclude that this paragraph constitutes a new ground of appeal which could only be permitted if the requirements of rule 11(3) of the Tribunal Rules were met.

77. Our analysis in respect of exceptional circumstances under rule 11(3)(c) is set out at paragraphs [45] to [47] of this judgment above. Rapture makes no other submissions on exceptional circumstances specific to this amendment or this section of the notice of appeal. In its letter of 20 July 2007, however, Rapture submitted that, in relation to the arguments contained in its proposed substituted notice of appeal "relating to the unbundling of services and charges", permission to amend should be granted pursuant to rule 11(3)(b) because the unbundling of services and charges is "a ground of appeal that has been developed on the basis of the expert evidence of Leo Borwick, only recently available, and, that it was not, therefore, practicable to include in the Original Notice [of appeal]".

78. We do not accept this submission. The set-top box subsidy was addressed in the Determination and there is no reason for this ground not to have been included in the original notice of appeal other than the fact that it did not occur to Rapture or those advising it at that time. As we have held above, the fact that new grounds may occur to specialist advisers instructed during the preparation of the case is not an exceptional circumstance within the meaning of rule 11(3)(c), nor do we consider that it could satisfy the "not practicable" test of rule 11(3)(b). Accordingly, we refuse permission to include the proposed new paragraph 73A in the notice of appeal.

79. Rapture provides in its schedule and commentary on the proposed amendments a more detailed explanation of how each of the various points it raises in the proposed new paragraph 73B is related to points already made elsewhere in the original notice of appeal. We accept Rapture's submissions that sub-paragraphs (a), (b), (c), (d) and (e) of paragraph 73B elucidate, respectively, the arguments advanced in paragraphs 91, 47, 40-44, 74 and 62-65 of the original notice of appeal and do not, therefore, amount to new grounds of appeal.

80. No specific explanation is given by Rapture for sub-paragraphs (f) and (g) of 73B, nor has Rapture provided any specific cross-reference to other paragraphs of the notice of appeal. The complaint in (f) is that OFCOM erred by failing to treat the set top box subsidy as an externality instead of a common cost. We consider that this point ties in with the argument in paragraph 95 of the original notice of appeal, that OFCOM has

made no use of economic theory in this case, and we allow the amendment on that basis.

81. The complaint in paragraph (g) is that OFCOM erred in relying on Sky's platform model for calculating individual contributions to EPG services. OFCOM acknowledges that this point has been made in response to arguments made in its defence and Sky's statement of intervention. It seems to the Tribunal that this point could properly be made in Rapture's reply, and since it could properly be so made, it would be pedantic in our view for the Tribunal not to permit this point to be included now by way of amendment to the notice of appeal.

82. We conclude that the proposed amendment to paragraph 74 and the inclusion of the new paragraph 74A elucidate matters already contained in paragraphs 73 and 74 of the original notice of appeal and so do not amount to new grounds. We consider that in the exercise of our discretion under rule 11(1) it is appropriate in the circumstances to accept these proposed amendments.

83. Accordingly, permission to amend paragraphs 73 and 74 and to include paragraph 74A by way of amendment is granted. Permission to include paragraph 73A by way of amendment is refused.

Rapture's willingness to pay (paragraphs 76A to 79)

84. In the original notice of appeal, paragraphs 77 to 79 came under the heading "Financial figures used by Ofcom". In the proposed amended notice of appeal, this heading has been replaced by a new heading which reads, "Ofcom erred in failing properly to consider Rapture's willingness to pay for the relevant services (paragraph 5.172-5.193)". Immediately after this heading is a new paragraph 76A, which reads as follows:

> "76A. In particular, Ofcom:
>
> a) failed adequately to consider whether there was a close linkage between Rapture' (*sic*) retail revenues and the access charge, as required by the Guidelines. See paragraph 78 below. [See Guidelines paras 3.7, 3.14 and 3.15]

b) erred in concluding that "Sky had no grounds on which to justify a reduced EPG listing charge to Rapture" [Determination para 5.193]

c) erred in concluding that any business plan of financial projections submitted by Rapture "would not have provided a compelling case for Sky to reduce its EPG listing charges in Rapture's case" [Determination para 5.193]

d) wrongly took into account the fact that "Ofcom is not currently aware … of any comparable broadcasters being priced off the Sky Platform due to the level of the rate card EPG listing charge" [Determination para 5.203]

e) erred in concluding that the indicative rate card charge for an EPG listing was not set at a level which would price Rapture off the Sky Platform and was clearly "affordable" and that Sky's EPG listing charge was not at a level which could have plausibly priced Rapture off the Sky Platform [Determination para 5.204]"

85. In the schedule filed on 7 August 2007 explaining its proposed amendments, Rapture refers to paragraphs 3.14 and 3.15 of the 2002 Guidelines and states that it is clear that this ground was already present in the original notice of appeal. Rapture submits that the proposed additions have been made only "for the sake of clarity".

86. OFCOM submits that paragraph 76A significantly changes Rapture's case on these issues, that previously, Rapture was simply arguing that OFCOM's investigation was insufficiently thorough by reason of the financial figures it chose to rely upon. OFCOM submits that paragraph 76A introduces a whole host of alleged errors of assessment relating to Rapture's willingness to pay which were not included in the original notice of appeal.

87. Sky submits that the allegations contained in the proposed new paragraph 76A either add nothing or are new, are unclear or are doomed to fail, and should not be permitted.

The Tribunal's analysis

88. The Tribunal does not consider that paragraph 76A clarifies the paragraphs below it, but instead makes the pleading more confusing and adds to the overall confusion of the notice of appeal. Furthermore, the alleged errors contained in paragraph 76A are insufficiently particularised. We have sympathy with OFCOM's view that the proposed amendments significantly change Rapture's case on these issues. Without it

being necessary to decide whether or not these amendments constitute a new ground within the meaning of rule 11(3), we conclude that they should not be allowed in any event because they are lacking in clarity and are insufficiently particularised.

89. Accordingly, the insertion by way of amendment of paragraph 76A (and the amendment to the heading immediately preceding it) is refused.

Discrimination (paragraphs 97A to 97C)

90. Rapture seeks to include in the proposed amended notice of appeal a new section heading and three new paragraphs as follows:

> "**Ofcom erred in failing to ensure that Rapture was not discriminated against (paragraphs 5.205 – 5.249)**
>
> 97A Ofcom were obliged to ensure that the price and terms and conditions of access were not discriminatory:
>
> a) As between a provider who is a broadcaster itself and other broadcasters; and
>
> b) Between broadcasters generally.
>
> 97B Ofcom's obligation to ensure non-discrimination between broadcasters generally included the obligation to ensure not only that irrelevant distinctions were not made, but also that relevant distinctions were made. In particular, Ofcom should have ensured that:
>
> a) Small broadcasters were treated differently than large broadcasters in determining a fair and reasonable price for access; and
>
> b) Free-to-air broadcasters were required only to contribute to the common costs in relation to which they benefited.
>
> 97C. See paragraphs 46-48, 56, 57-60, 70, 72-74A, 76A and 91 above."

91. In the commentary section of its schedule of proposed amendments, Rapture states that:

> "This Ground was represented throughout the Original Notice of Appeal as indicated by the cross-references. It is elucidated in one place by this change for the sake of clarity."

92. OFCOM submits that this is a new ground of appeal based on discrimination, which clearly does not appear at any point in the original notice of appeal. Sky submits that it

is manifestly a new ground of appeal. Sky points to paragraphs 37 and 38 of the original notice of appeal. Paragraph 37 lists six components of the 2002 Guidelines identified by OFCOM as requiring analysis, one of which was the issue of non-discrimination. Paragraph 38 of the original notice of appeal alleges that five of these six components have not been properly analysed. However, no error is alleged in respect of OFCOM's analysis of the sixth component, that of non-discrimination.

The Tribunal's analysis

93. The Tribunal has had regard to paragraphs 37 and 38 of the original notice of appeal, from which it is clear that the ground of discrimination contained in paragraphs 97A to 97C of the proposed amended notice of appeal is plainly a new ground within the meaning of rule 11(3). However, it is equally clear that the issue of discrimination is and has always been central to the issues in dispute: OFCOM's determination was that the price charged was "fair, reasonable and *non-discriminatory*" (emphasis added).

94. The words "non-discriminatory" appear in several places in the original notice of appeal. In addition to the cross-references mentioned above, Rapture's counsel referred us, at the second case management conference, to paragraphs 16, 57, 78 and 97 of the original notice of appeal. Rapture's contention is that because the term "non-discriminatory" appears scattered throughout the original notice of appeal, this ground of appeal was contained in the original notice of appeal.

95. If and to the extent that the "non-discriminatory" element of "fair, reasonable and non-discriminatory" is included in the arguments contained in the various paragraphs cross-referred to, Rapture can make those pleas, including, in so far as relevant, the issue of discrimination, on the basis set out in those paragraphs without the need for amendment of the original notice of appeal. We accept, to some extent, that parts of the reasoning now encompassed by the proposed new paragraphs 97A to 97C reflect or complement points raised elsewhere in the original notice of appeal. By way of example, the argument in the proposed paragraph 97B(b), that free-to-air broadcasters should only have to contribute to the common costs of those parts of the set-top box of which they benefited, is broadly similar to that in paragraph 74 of the original notice of appeal. However, in paragraph 74, this argument is raised in the context of the allegation that

OFCOM failed to conduct a sufficiently thorough investigation and failed to discharge its statutory duties because of errors in its costs analysis methodology, and not in support of a general claim of unfair discrimination.

96. Having regard to paragraph 37 of the original notice of appeal, the only reasonable conclusion that the Tribunal can draw is that the stand-alone ground of discrimination set out in paragraphs 97A to 97C goes well beyond the points previously raised in the original notice of appeal and introduces a new ground of appeal. It therefore would require permission under rule 11(3).

97. The issue of non-discrimination was addressed by OFCOM in its investigation and Determination. It cannot be claimed that this ground is based on matters of law or fact which have come to light since the appeal was made, or that it was not practicable to include the ground in the original notice of appeal. Indeed Rapture does not seek to make any such argument under (a) or (b) of rule 11(3) in relation to this ground, but relies on its general submissions in respect of exceptional circumstances under rule 11(3)(c) which we have considered and rejected at paragraphs [45] to [47] above. The original notice of appeal was settled and signed by experienced legal advisers who appreciated the complexity of the case. They clearly considered the question of discrimination, as is evident from paragraphs 37 and 38, and expressly excluded it from the subject matter of the appeal.

98. Accordingly, the insertion by way of amendment of paragraphs 97A, 97B and 97C (and the new heading immediately preceding paragraph 97A) is refused.

Other amendments

99. In the original notice of appeal, Rapture advanced two additional grounds relating to the scope of the dispute and the time within which OFCOM must handle a dispute. Rapture no longer advances these two grounds, and has deleted paragraphs 16, 18 to 33, 37 to 38, 61 and 66 to 68 accordingly.

100. The proposed amendments to paragraphs 45, 54, 63, 78 and 95 to incorporate footnotes from the original notice of appeal into the main text of the proposed amended notice of appeal are permitted, as are the proposed amendments to insert cross-references into

paragraphs 75, 76 and 87 and to add new paragraphs 44A, 48A, which provide further cross-references to other sections of the notice of appeal.

101. OFCOM and Sky have not objected to Rapture's proposed amendments to paragraphs 1-9, 10A-15A and 17A or the proposed new paragraph 81A. We do not consider that any of these proposed amendments raises a new ground, and in the exercise of our general discretion, we see no reason to refuse permission to amend these paragraphs as proposed. Accordingly, we allow the proposed amendments to these paragraphs. Paragraph 10, which introduces the evidence on which Rapture seeks to rely, is considered separately below.

102. Paragraph 17 contains a summary of Rapture's grounds of appeal, as amended. Having disallowed the proposed amendments in respect of 'whether the price charged was fair, reasonable and non-discriminatory' (paragraphs 57 to 57B), 'willingness to pay' (76A) and 'discrimination' (97A to 97C), the corresponding sections of the summary, namely (d), (f) and (h) of the proposed paragraph 17, must also be refused. Otherwise, the proposed amendments to paragraph 17 are permitted.

The relief sought (paragraph 98A)

103. The appellant has deleted paragraphs 98 to 104 of its original notice of appeal (which dealt with costs and relief) and replaced it with a new paragraph on relief: paragraph 98A. Within that new paragraph, sub-paragraphs (a) to (d) (3) appear to reflect the proposed amended notice of appeal, in respect of which permission is being granted. However, the proposed sub-paragraph (d) (4) corresponds to paragraph 76A of the proposed amended notice of appeal. The proposed inclusion of that paragraph has been refused, accordingly sub-paragraph (d) (4) of paragraphs 98A is also refused.

104. The proposed sub-paragraph (d) (5) is concerned with OFCOM's alleged failure to discharge its statutory duties under the 2003 Act. Sub-paragraph (d) (5) requests the Tribunal to direct OFCOM, in re-determining the matter, to:

> "5. Take into account its duties contained in sections 3 and 4 of the Communications Act 2003, including its duties to secure a sufficient plurality of providers of different television services, its duty to have regard to the interests of consumers in respect of choice and its duty to promote competition."

The words of this proposed paragraph, up to and including "Communications Act 2003" are unobjectionable. We do not consider that the word "including" is appropriate, since any order must either refer to specific duties or to all of the duties under sections 3 and 4 of the 2003 Act. We therefore allow this proposed amendment, limited as follows:

> "5. Take into account its duties contained in sections 3 and 4 of the Communications Act 2003."

V. RAPTURE'S APPLICATION TO ADDUCE FURTHER EVIDENCE

105. In addition to its application for permission to amend the notice of appeal, Rapture also seeks permission to adduce (a) a second witness statement of Mr David Henry, the managing director of Rapture, and (b) expert evidence in the form of a witness statement of Mr Leo Borwick, and seeks permission to call Mr Borwick as an expert witness. Both new witness statements are dated 10 July 2007. Mr Henry's first witness statement was filed with the original notice of appeal on 9 May 2007.

106. Rule 8(6) of the Tribunal Rules, provides as follows:

> (6) There shall be annexed to the notice of appeal -
>
> (a) a copy of the disputed decision; and
>
> (b) as far as practicable a copy of every document on which the appellant relies including the written statements of all witnesses of fact, or expert witnesses, if any.

107. Guidance is provided by paragraphs 6.41 to 6.44 and 12.8 to 12.11 of the Tribunal's Guide to Proceedings:

> 6.41 As regards witness statements on issues of primary fact (eg as to whether a particular agreement or conduct took place or not) statements by witnesses on whose evidence the appellant will rely should be furnished, wherever possible, with the notice of appeal. The Tribunal will require an explanation if this is not done, particularly if the factual issues in question have already been raised in the procedure before the OFT.
>
> 6.42 Similarly, any experts' reports or other documents relied on relating to market and similar issues (eg market surveys, consumer research, trade statistics, price studies etc) or to technical questions, should also be annexed to the application. The Tribunal may request certain documents and any underlying calculations (eg spreadsheets) to be supplied on disk.

6.43 All relevant annexes should be filed with the notice of appeal.

6.44 **Having regard to the timetable for the determination of the appeal, and the very limited possibilities of introducing new issues, the Tribunal may be obliged to exclude from consideration material which could reasonably have been included with the notice of appeal, but which was not.**

(Emphasis in original.)

…

Expert evidence

12.8 As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings. It may be appropriate to organise, prior to, or at some stage during the hearing, a structured discussion, in the presence of the Tribunal, between the parties and their experts, in an endeavour to focus on the main points of dispute – see for example *Genzyme v OFT* [2005] CAT 32 and the transcript of the hearing on 13 October 2004. Informal statements by experts may be permitted: see *Claymore v OFT* [2005] CAT 30 and the transcript of the final hearing on 14 January 2005. Other procedures, including putting written questions to the experts, discussions between experts, the appointment of a single joint expert, or of the Tribunal's own expert, can equally be envisaged.

12.9 The Tribunal considers that, as under Part 35 of the CPR, it is the duty of the expert to help the Tribunal on matters within his expertise: that duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. Expert evidence presented to the Tribunal should be, and should be seen to be the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion. Where necessary, the expert must make it clear if a particular question or issue falls outside his expertise.

12.10 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received his instructions. An expert's report should, in particular, set out the material facts, and the substance of all material instructions on the basis of which it was written. The expert should make it clear which, if any, of the facts stated are within his own direct knowledge. If a stated assumption is, in the opinion of the expert witness, unreasonable or unlikely that should be stated clearly. If an expert's opinion is not properly researched because the expert considers that insufficient data is available this must be stated in the report with an indication that the opinion is no more than a provisional one. The report should contain, at the end:

– a statement that the expert understands his duty to the Tribunal and has complied with that duty; and

– a statement that the expert believes that the facts stated in the report are true, and his belief that the opinions expressed are correct.

> 12.11 If the expert wishes, at any stage, to ask the Tribunal for directions then this should be mentioned to the Registrar who will raise the matter with the Tribunal.

Rapture's submissions

108. Rapture submits that the objective of the proposed evidence of Mr Henry is to assist the Tribunal by providing it with further important commercial and technical information regarding Rapture and its choice of the Sky Platform. Rapture submits that, although the information contained in the second witness statement of Mr Henry does not relate directly to the grounds of appeal, the two categories of information, namely Rapture's financial status and an explanation of EPG systems, are clearly relevant background information for the Tribunal.

109. The objective of the proposed evidence of Mr Borwick is to provide expertise as to industry and regulatory practice. Rapture submits that the matters addressed in the witness statement of Mr Borwick are clearly related to the proposed amended grounds of appeal.

110. Rapture submits that the proposed further evidence was submitted after the Tribunal had offered Rapture the opportunity to adduce evidence in support of its case, and that the Tribunal should not retract the opportunity held open by its statements and directions at the first case management conference on 1 June 2007, as this would produce an unjust outcome for Rapture.

111. Rapture submits that, even if permission were refused in respect of its proposed amendments to the notice of appeal, the proposed further evidence should still be allowed on the basis of exceptional circumstances as prescribed by rule 11(3) of the Tribunal Rules.

112. Rapture submits that the key consideration for the Tribunal is how to deal with the matter justly pursuant to rule 1.1(1) of the Civil Procedural Rules 1998. Furthermore, Rapture submits that it would be subject to far greater prejudice should the proposed further evidence be rejected by the Tribunal than the prejudice which would be faced by either OFCOM or Sky should the Tribunal allow the proposed further evidence. Rapture submits that the prejudice caused to it would be that strong supporting

analytical evidence would be disregarded, which could potentially affect the outcome of the entire case. Conversely, in Rapture's submission, the prejudice to OFCOM would be that it would have to review two short additional documents which, Rapture submits, would be an insignificant additional burden set against the substantial resources that OFCOM has at its disposal to deal with possible appeals against its decisions. Rapture also submits that any prejudice to Sky would be insignificant and would not cause Sky to incur any substantial additional expense.

The submissions of OFCOM and Sky

113. OFCOM refers to rule 8(6) of the Tribunal Rules and paragraph 6.44 of the Guide to Proceedings, and submits that Rapture has not provided sufficient reasons why it should be permitted to introduce new witness and expert evidence at this stage. OFCOM submits that both the European Court of Human Rights and the English High Court have held that the right of access to justice is a right which of its nature must be regulated and that the strict application of time limits does not itself mean that a person's right of access to justice has been breached. In this regard, OFCOM relies on *J & PM Dockeray (a Firm) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 420 (Admin) at [15] – [22], and the case law cited therein. OFCOM submits that it would not be unjust to refuse Rapture permission to serve additional evidence in this case, that the Tribunal Rules strike the correct balance in that regard, and that Rule 1.1(2) of the Civil Procedure Rules specifically requires the Tribunal to ensure that the case is dealt with proportionately.

114. OFCOM submits that the prejudice caused to it by allowing the proposed amendments and admitting the proposed additional evidence would be significant. OFCOM has already allocated its resources, funded by public money, on the understanding that its defence in this case was already pleaded and that no expert evidence would be required. OFCOM submits that if Rapture is granted permission to amend, as requested, OFCOM will have to amend its defence accordingly and adduce new expert evidence. OFCOM notes that Mr Borwick's witness statement, being 28 pages long, is longer than the proposed amended notice of appeal. OFCOM does not, therefore, agree with Rapture's submission that this is a short additional document, or that reviewing and pleading to it would be an insignificant additional burden.

115. In respect of Rapture's submission that the Tribunal should not retract the opportunity that it gave to Rapture to adduce further evidence, OFCOM submits that Rapture has either misunderstood or distorted what the Tribunal said at the first case management conference.

116. Sky submits that it is disingenuous for Rapture to suggest that the introduction of the proposed further evidence represents an insignificant burden. If Rapture is granted permission to adduce this evidence, then both Sky and OFCOM will seek to amend their pleadings and adduce expert (economic, and possibly accounting) evidence in response. Sky submits that the need to instruct experts and the preparation of their reports will inevitably have a knock-on effect on the duration, and potentially the timing, of the hearing.

117. In relation to the second witness statement of Mr Henry, OFCOM submits that, so far as it can tell, this witness statement simply provides background information to the Tribunal concerning different broadcasting platforms and Rapture's financial position. OFCOM and Sky both submit that this witness statement does not appear to relate to any of the grounds of appeal in the original or the proposed amended notice of appeal. Sky submits that if permission to adduce the second witness statement of Mr Henry is granted, Sky will need to consider whether it will be necessary to put in further evidence of fact on the matters which it addresses. Relying on paragraph 6.41 of the Tribunal's Guide to Proceedings, Sky submits that witness statements on issues of primary fact should be provided, wherever possible, with the notice of appeal and that Rapture has not explained why it was not practicable for it to include the proposed further evidence with the original notice of appeal. OFCOM submits that it is content to leave the question of its admissibility to the wisdom of the Tribunal.

118. In relation to the proposed expert evidence of Mr Borwick, OFCOM and Sky both submit that if the proposed amendments to the notice of appeal are refused, it follows that Mr Borwick's evidence is irrelevant and unnecessary.

119. Sky submits that Mr Borwick's witness statement purports to be an expert report, but that it fails to meet the requirements for expert evidence contained in Part 35 of the Civil Procedure Rules and paragraphs 12.8 to 12.11 of the Tribunal's Guide to

Proceedings. In particular, there is no statement that Mr Borwick understands his duty to the Tribunal as an expert. OFCOM makes similar submissions in this regard. Sky further submits that the expert's declaration of independence should not be seen as a ritual incantation that can simply be tagged on as a postscript: it is of fundamental importance and should affect the whole approach of the expert and the preparation of his report from the outset. Sky submits that much of Mr Borwick's evidence is drafted as submission, rather than expert evidence as such. In this regard, Sky refers to paragraph 12.9 of the Guide to Proceedings which states that an expert witness should never assume the role of an advocate. Furthermore, in Sky's submission, it is unclear how this evidence relates to the grounds of appeal or the field of expertise being relied upon. Sky submits that, to the extent the Tribunal permits Rapture to adduce the evidence of Mr Borwick and to treat such evidence as expert evidence, Sky should have the opportunity to adduce expert economic evidence to address the points raised in Mr Borwick's evidence.

120. In response to these points, Rapture submits that it accepts that, if permission to adduce this evidence is granted, the final expert report will need to comply with paragraphs 12.9 and 12.10 of the Tribunal's Guide to Proceedings.

The Tribunal's analysis in relation to the proposed further evidence

(i) the second witness statement of Mr Henry

121. It seems to us that the objections raised by OFCOM and Sky to the second witness statement of Mr Henry are not compelling. Both OFCOM and Sky have submitted that the evidence contained in Mr Henry's second witness statement does not relate to any of the grounds of appeal. If and in so far as they are correct on that point, it follows that there is no need for them to respond to the points raised in that evidence.

122. In the circumstances, and having carefully considered all of the parties' submissions, it seems to us that the fairest approach is to grant permission for the second witness statement of Mr Henry to be adduced. Accordingly, we grant permission for the proposed amendment to paragraph 10(b) of the notice of appeal, which introduces this evidence.

(ii) the proposed expert evidence of Mr Borwick

123. In so far as the proposed expert evidence of Mr Borwick is concerned, we have sympathy with the submissions of OFCOM and Sky. We also agree with Sky's submission that the content of the report is more akin to submissions of an advocate in support of the notice of appeal, rather than the opinion of an independent expert as to the subject matter of the appeal.

124. Furthermore, Rapture has accepted that, if permission were granted to adduce the evidence of Mr Borwick as an expert witness, his expert report would need to be perfected to comply with paragraphs 12.9 and 12.10 of the Guide to Proceedings. It is not appropriate for Rapture to have sought permission to adduce expert evidence by way of an expert's report which is not in a final and proper form.

125. Accordingly, for the reasons set out above, Rapture's application to adduce the witness statement of Mr Borwick and to call him as an expert witness is refused; and the proposed amendment to paragraph 10(c) of the notice of appeal, which introduces this evidence, is also refused.

126. Paragraph 6.44 of the Tribunal's Guide to Proceedings states that "Having regard to the timetable for the determination of the appeal, …the Tribunal may be obliged to exclude from consideration material which could reasonably have been included with the notice of appeal, but which was not". Paragraphs 12.9 and 12.10 of the Guide to Proceedings set out the requirements applicable to expert evidence. If Rapture were minded to renew its application having addressed the concerns set out above, any renewed application would have to be considered having regard to those rules and guidelines, fairness to all parties in the proceedings and the need to consider the case proportionately.

VI. THE TRIBUNAL'S CONCLUSIONS ON PERMISSION

127. With reference to the paragraph numbering of the proposed amended notice of appeal dated 7 August 2007, Rapture's application for permission to amend the original notice of appeal is granted subject to the following:

(i) Permission to amend paragraph 57 (including the related proposed new heading inserted immediately before paragraph 57) is refused.

(ii) Permission to include the following proposed new paragraphs is refused:

a. sub-paragraph (c) of paragraph 10;

b. sub-paragraphs (d), (f) and (h) of paragraph 17;

c. paragraphs 57A and 57B,

d. paragraph 73A,

e. paragraph 76A (including the related proposed new heading);

f. paragraphs 97A, 97B and 97C (including the related proposed new heading); and

g. sub-paragraph (d)(4) of paragraph 98A.

(iii) Any cross-references in the proposed amended notice of appeal to any of the paragraphs specified in (ii) above are to be removed.

(iv) The proposed amendment to sub-paragraph (d)(5) of paragraph 98A is allowed, provided it is limited to:

> "5. Take into account its duties contained in sections 3 and 4 of the Communications Act 2003."

128. The appellant's application for permission to adduce the second witness statement of Mr Henry is granted.

129. The appellant's application for permission to adduce the witness statement of Mr Borwick and to call Mr Borwick as an expert witness to speak to his statement is refused.

130. The decision of the Tribunal on these applications is unanimous.

Marion Simmons Paul Stoneman David Summers

Charles Dhanowa
Registrar Date: 23 November 2007