Neutral citation [2014] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1152/8/3/10 (IR)

Victoria House
Bloomsbury Place
London WC1A 2EB

5 November 2014

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

B E T W E E N :

BRITISH SKY BROADCASTING LIMITED

Applicant

-v-

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
TOP-UP TV EUROPE LIMITED
EE LIMITED

Interveners

Heard in Victoria House on 23rd July 2014

JUDGMENT (Application to Vary Interim Order)

APPEARANCES

Mr. James Flynn QC, Mr. Meredith Pickford and Mr. David Scannell (instructed by Herbert Smith Freehills LLP) appeared for British Sky Broadcasting Limited.

Mr. Mark Howard QC, Mr. Gerry Facenna and Miss Sarah Ford (instructed by BT Legal) appeared for British Telecommunications PLC.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

EE Limited made written submissions by letter dated 9 May 2014 but did not seek to make oral representations at the hearing.

Note: Excisions in this judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

INTRODUCTION

1. On 31 March 2010, the Office of Communications ("Ofcom") published its "Pay TV Statement." By the Pay TV Statement, Ofcom decided to vary, pursuant to s. 316 of the Communications Act 2003 ("the 2003 Act"), the conditions in the broadcasting licences of British Sky Broadcasting Ltd ("Sky") for what have been referred to as its "core premium sports channels" (or "CPSCs"), Sky Sports 1 and Sky Sports 2 ("SS1&2"). The new conditions require Sky to offer to wholesale its CPSCs to retailers on other broadcasting platforms and, in the case of standard definition ("SD") versions of the channels, offer them at wholesale prices set by Ofcom. The latter condition is referred to as "the wholesale must-offer obligation" or "WMO".

2. On the basis that it would appeal against Ofcom's decision, Sky applied on 16 April 2010 to the Tribunal for urgent interim relief pursuant to rule 61 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) ("the Tribunal Rules"). The application was heard in late April 2010. In the course of the hearing, the parties, including Ofcom and British Telecommunications PLC ("BT"), agreed to a form of interim relief that modified Sky's obligations under the WMO in respect of certain specified platform operators, and otherwise suspended the decision contained in the Pay TV Statement. This was set out in the Interim Relief Order (the "IRO") made by the then President on 29 April 2010. The IRO applies in the usual way until judgment or further order.

3. Sky duly lodged its appeal against the Pay TV Statement on 28 May 2010. BT, Virgin Media, Inc ("Virgin"), and The Football Association Premier League Ltd ("FAPL") also lodged appeals. However, for reasons that I shall explain, those appeal proceedings are far from being concluded and the IRO continues to be in force. BT now applies to vary the IRO so that its customers with "YouView" set-top boxes can receive the SS1&2 channels by means of a technology – internet protocol television ("IPTV") – which is not provided for in the IRO.

THE IRO

4. After reciting various undertakings given, respectively, by Sky and by each of BT, Virgin and Top-Up TV Europe Ltd ("Top –Up TV"), the IRO provides that:

> "1. OFCOM's decision to insert the Conditions contained at §12.14 of the Decision (the wholesale must offer obligation) into the licences referred to at paragraph 12.14 of the Decision is implemented in respect of BT, Top-up TV and Virgin subject to the above undertakings and the attached schedule, but is otherwise suspended until further order.
>
> 2. There be general liberty to apply."

5. The effect of this was to modify and limit Sky's obligations under the WMO. Sky was required to supply SS1&2 to the "Qualifying Platforms" of those three specified operators. "Qualifying Platform" is defined in paragraph 2 of the Schedule to the IRO, as follows:

> "Qualifying platform means via DTT[1] in the case of BT, Virgin and Top-Up TV and via its existing cable platform in the case of Virgin, with all parties having liberty to apply."

6. The "above undertakings," as referred to in the order, include an undertaking by BT, Virgin and Top-Up TV to pay into escrow, pending the determination of Sky's appeal, in respect of each customer supplied with SS1&2, the difference between the price to be paid under the WMO and the price contained in Sky's "rate card" for the same service.[2]

7. On 23 November 2010, following a successful application by Real Digital EPG Services Ltd ("Real") to amend the IRO and be included within its scope, the President made a further order which identified Real's satellite platform as a Qualifying Platform.

THE APPEALS

8. The appeals against Ofcom's decision set out in the Pay TV Statement were heard by the Tribunal between 9 May 2011 and 15 July 2011, and the Tribunal delivered its judgment on 8 August 2012: [2012] CAT 20 ("the 2012 Judgment"). The Tribunal dismissed Sky and FAPL's challenges to Ofcom's jurisdiction to impose the WMO. However, the Tribunal concluded that Ofcom's core competition concern in the Pay TV Statement was

[1] DTT means digital terrestrial television: see further para 15(a) below.
[2] The rate card price is the prevailing price paid by the cable TV companies to Sky for supply of SS1&2.

unfounded and that Sky's appeal should therefore be allowed. For that reason, the Tribunal did not determine Sky's and the other Appellants' grounds of appeal relating to the validity, effectiveness and proportionality of the WMO remedy itself: paras 833-835 of the 2012 Judgment.

9. The Tribunal refused permission to appeal but suspended its order on the appeal until an application to the Court of Appeal had been determined. On 26 April 2013, following an oral hearing, Lewison LJ, gave BT permission to appeal on a limited basis. BT's application based on the Tribunal's reversal of Ofcom's principal conclusion on the facts was refused, but BT was allowed to argue that the Tribunal had not addressed a separate competition concern identified by Ofcom in the Pay TV Statement, namely whether retailers could compete with Sky on the basis of Sky's offer to wholesale the sports channels at its rate card price. When granting permission, Lewison LJ extended the suspension of the Tribunal's final order until the determination of BT's substantive appeal or further order. Sky and FAPL were subsequently granted permission to bring a cross-appeal in relation to the Tribunal's finding that Ofcom had no jurisdiction under s.316 of the 2003 Act to impose the WMO remedy.

10. The Court of Appeal handed down its judgment on 17 February 2014: [2014] EWCA Civ 133. The Court dismissed Sky and FAPL's cross-appeal in relation to Ofcom's jurisdiction, but concluded that the Tribunal had failed to appreciate the importance of Ofcom's conclusion that Sky's rate card price and the effect of the penetration discounts that were proposed by Sky gave rise to competition concerns in their own right. The Court therefore remitted to the Tribunal for further consideration, findings and conclusions the question of whether the WMO remedy was justified on the basis of such competition concerns. The effect of the Court of Appeal's order of 25 February 2014 is that the IRO remains in effect, no party having applied to discharge it.

11. The Court of Appeal refused Sky permission to appeal to the Supreme Court but on 25 March 2014, Sky renewed that application in the Supreme Court, seeking to challenge both the Court of Appeal's decision on BT's appeal and its dismissal of Sky's appeal on the jurisdiction ground.

12. Having sought observations from the parties, the Tribunal's Registrar informed them on 27 March 2014 that, in light of Sky's pending application for permission to appeal to the Supreme Court, the Tribunal would not take further steps to determine the question remitted to it by the Court of Appeal until the Supreme Court had determined Sky's application.

13. On 30 October 2014, the Supreme Court finally determined Sky's application and refused permission to appeal.

14. Thus it is that some four and a half years from the date on which the (then) President made the IRO, that order remains in effect. As no application has been made to discharge the IRO, it appears to be envisaged that it will continue to have effect until the status of Ofcom's WMO remedy is finally determined. It is difficult to envisage that this will be before the autumn of 2015, at the earliest. Now that the Supreme Court has refused permission to appeal, the case will have to be relisted before the Tribunal for further argument to determine the matter remitted by the Court of Appeal, and possibly the Tribunal may also need to resolve those aspects of the appeal which it deliberately did not decide: see para 8 above. A yet further appeal to the Court of Appeal cannot be ruled out.

THE TECHNICAL AND COMMERCIAL BACKGROUND

15. It is necessary to describe briefly the technical and commercial background to the IRO. In doing so, I draw on the very helpful Annex to the 2012 Judgment.

16. Television services are distributed either free-to-air ("FTA") or via a subscription or on a pay-per-view basis. The latter two forms of distribution are referred to as Pay TV. Since the so-called "digital switchover" from analogue terrestrial television, there are now four digital technologies through which FTA and Pay TV services can be delivered to consumers:

    (a) Digital terrestrial television ("DTT"): transmission on radio frequencies, using multiplex transmitters to allow reception of multiple channels on a single frequency range. In order to view TV services broadcast via DTT, consumers require a DTT tuner, which is typically either in a set-top box ("STB") or integrated into the TV set. DTT has been predominantly used to broadcast FTA services but Pay TV services can be offered via DTT;

(b) Digital satellite: distribution via satellite. To view TV services broadcast via digital satellite, the consumer requires a STB (or for some services a compatible integrated TV set). Sky was the first to launch in 1998 a digital direct to home satellite platform in the UK. Digital satellite is the most widely used Pay TV platform in the UK;

(c) Digital cable: distribution via cable networks. To view digital cable TV services, the consumer also requires a STB. Virgin is the main cable TV provider in the UK;

(d) Internet protocol television ("IPTV"): streamed linear and on-demand TV can be delivered to subscribers or viewers using internet protocol, the technology that is also used to access the internet. To receive IPTV transmission requires the consumer to have broadband access of reasonable speed.

17. Wholesale channel providers, such as the BBC and Sky, may make some of their own programmes or acquire pre-made programmes from production companies. They purchase content (e.g. sports rights) from content providers, typically for a fixed fee on an exclusive basis for a given period. The wholesale providers perform two primary functions. First, they aggregate content into TV channels or a package of channels, or create non-linear content for use in "on-demand" services. Sky, for example, uses premium sports content acquired from rights holders to create its sports channels. Their second function is to license their channels or non-linear content to retailers on various distribution technologies. However, some wholesalers are also engaged in retail provision direct to consumers.

18. A Pay TV platform is the specific combination of distribution and reception technology that enables consumers to receive encrypted broadcasts. Conditional access ("CA") is a platform service which restricts access to content that has been made available on the platform only to those consumers who have been authorised to receive it. Pay TV channels are broadcast using suitable encryption to prevent non-subscribers obtaining free

access. The STB generally contains a slot where a smart card can be inserted, which allows for the decryption of the encrypted transmission.

19. Pay TV retailers provide consumers with access to Pay TV channels (and video-on-demand ("VOD") services). How much reception technology a Pay TV retailer needs to provide to its customer depends on the retailer's chosen platform. Most of the large Pay TV retailers operate their own platform and provide their customers with the connection equipment needed to view encrypted pay channels. Hence, Sky, Virgin and BT provide their customers with a STB (and in the case of Sky, a satellite dish) and dedicated connections. Some Pay TV retailers do no more than provide a website and password for CA to their customers, who then use their own broadband connection to access content; in such cases the internet can be regarded as the platform.

20. Sky, Virgin and BT are the three largest Pay TV retailers in the UK. Each of them enters into contracts (subscriptions) with consumers and offers bundles of Pay TV channels in a variety of packages, often for commercial and logistical reasons. Alongside the distribution of such channels, Pay TV retailers are typically responsible for various aspects of customer service, such as billing. Pay TV retailers also offer bundles including non-Pay TV services, in particular mobile and fixed line telecommunications and broadband access.

21. Where a Pay TV operator (X) is both a wholesale content provider and a retailer, such as Sky, if another retailer (Y) wishes its customers to have direct access to any of X's encrypted channels, it must either seek agreement with X for the wholesale supply of the channel or it may agree to X retailing the channel directly on Y's own retail platform. In the former case, the channel is then provided as part of the Y's offering to its subscribers. In the latter case, X will enter into a direct relationship with Y's customer, but the customer will be able to receive the channel without the need to acquire a second STB. This is referred to as "self-retailing" by X.

TECHNICAL AND COMMERCIAL DEVELOPMENTS

22. At the time of the IRO, BT's customers were provided with a "Cardinal" STB which contained both a DTT tuner and IPTV technology. However, at the time, BT was using IPTV technology only to provide customers with access to VOD content. Pay TV services were being provided using DTT. Mr John Petter, the CEO of BT's Consumer Division, explains the position in his first witness statement in support of the present application:

> "At the time of the IRO BT could retail only [VOD] content via IPTV, but was still in the course of developing its multicast capability, which permits broadcasting of linear TV channels over IPTV. BT therefore necessarily prioritised obtaining supply of Sky Sports 1 and Sky Sports 2 over DTT, because it had the ability to retail linear channels only over DTT at that stage. BT also had some concerns at the time about the potential limitations of multicast technology and so took the view that DTT would continue to play an important role in channel distribution for the foreseeable future."

23. The definition of Qualifying Platform in the IRO provided that Sky was to supply SS1&2 to BT via DTT. Since BT's Cardinal STB incorporates a DTT tuner and also CA technology that permits decryption of an encrypted DTT signal, BT customers with the Cardinal STB were able to receive and view the SS1&2 channels pursuant to the terms of the IRO.

24. The "YouView" STB and technology was developed as part of a joint venture ("JV") initiative between BT, TalkTalk Group ("TalkTalk"), Arqiva, BBC, ITV, Channel 4 and Channel 5. However, BT and TalkTalk have produced their own variants and operate their own YouView platforms, on which each supplies its distinct offerings, making the STB available to its customers with broadband packages. BT launched its YouView platform on 26 October 2012. Like the Cardinal STB, the YouView STB is a hybrid that incorporates both DTT and IPTV technology. But unlike the Cardinal, the YouView STB has CA capabilities only for IPTV and not for DTT. That means that YouView STBs have no means to decrypt an encrypted DTT signal. The YouView platform is currently enabled only for multicast, and not unicast, delivery.

25. BT states that its YouView platform is significantly better than Cardinal from the viewer's perspective, an assertion that Sky does not seek to challenge. The YouView platform is more up-to-date and sophisticated, with a STB of higher specification that BT says works

better for viewers. It also offers a wider range of content, including additional high definition channels and third party content. Further, YouView has certain technical and commercial benefits for BT. […][□✂] YouView has therefore become BT’s strategic platform whereas it now regards Cardinal as its legacy platform and is seeking to migrate its Cardinal customers over to YouView.

26. Although BT at the time of the IRO had anticipated making multicast transmission via IPTV in 2011 and the JV project that became YouView was being developed, it was only in 2013 that BT actually launched multicast transmission. BT began delivery via IPTV to its Cardinal platform in January 2013 and to its YouView platform in August 2013. It has been able to deploy the newer technology rapidly, due both to the speed of rollout of BT’s fibre network and, more recently, to the ability to transmit by multicast over copper wire. IPTV is now the means by which BT mainly broadcasts and I was told […][□✂] BT will substantially cease using DTT for Pay TV broadcasts altogether.

27. BT came to a commercial wholesale arrangement with Sky in December 2012, outside the scope of the IRO, for supply of SS1&2 via IPTV to customers using BT’s Cardinal STB. As a consequence of this arrangement, BT ceased delivering SS1&2 via DTT to customers on its Cardinal platform in July 2013, using the liberated DTT capacity to deliver its own sports channels instead.

28. Accordingly, BT now does not receive wholesale supply of SS1&2 from Sky pursuant to the IRO but pursuant to its separate commercial arrangement with Sky for its customers with a Cardinal STB. Since BT and Sky have failed to come to a commercial arrangement for the supply of via IPTV to the YouView platform, and the current terms of the IRO cover only DTT supply, BT customers with a YouView STB are not able to receive SS1&2.

29. Since the 2012 Judgment, BT has built its own portfolio of sports channels. The 2012 Judgment noted[3] the outcome of the 2012 FAPL auction of live audio-visual rights, covering the three seasons from 2013/14 to 2015/16. In that auction, BT acquired the rights to screen 38 live matches per season, including almost half the “first picks”, at a cost of some £246 million per season. Sky acquired the rights to screen the remaining 116 such

[3] At para 835.

live matches, but is precluded from obtaining the remaining FAPL rights by reason of the commitments offered to the European Commission by the FAPL described at para 141 of the 2012 Judgment.

30. In February 2013, BT announced its acquisition of the sports channel business of ESPN, which brought BT the rights to screen live coverage of certain FA Cup, UEFA Europa League and German Bundesliga football matches.

31. On 1 August 2013, BT launched its two “BT Sport” branded channels, BT Sport 1 and BT Sport 2, which accompanied an ESPN-branded channel in BT’s portfolio.

32. In November 2013, BT acquired for over €1 billion the exclusive live broadcast rights to all matches from the UEFA Champions League and UEFA Europa League for three seasons from 2015/16.

33. It is not altogether accurate to describe the BT Sport channels as “Pay TV” channels, since over half the 5 million subscribers to the channels receive them at no additional cost on the basis that they are subscribers to BT broadband services. However, those channels are not FTA, and certain customers do indeed pay to receive them. BT wholesales the channels to Virgin, and Virgin cable customers on certain lower-tier packages pay an extra amount (currently £15 a month) directly to Virgin to add BT Sport to their package. BT also self-retails its BT Sport channels to Sky satellite customers. Such customers can contract directly with BT to add BT Sport to the channels they receive by satellite through their Sky STB, making a payment (currently £12 a month) to BT, although a significant number are also BT broadband customers in which case they can receive BT Sport without additional charge.

34. Sky supplies by wholesale its full portfolio of premium sports channels (with the exception of Sky Sports News) to Virgin and other smaller cable operators for distribution via cable. Therefore, Virgin customers are able to view all FAPL live matches as Virgin receives SS1&2 from Sky and the BT Sport channels from BT.

35. In the unsuccessful negotiations between BT and Sky for the wholesale supply of SS1&2 to BT’s YouView platform, Sky made it a condition for agreeing to such supply that BT

would reciprocally supply its BT Sport channels by wholesale to Sky. BT refused to accept such a condition.

THE POSITION OF OFCOM

36. A further development since the 2012 Judgment is the initiation by Ofcom of two investigations concerned with Sky's supply of its CPSCs.

37. On 24 May 2013, BT submitted a complaint to Ofcom under the Competition Act 1998 ("the 1998 Act") regarding the terms on which Sky offered wholesale supply of SS1&2 to BT's YouView platform. The substance of BT's complaint is that the position adopted by Sky in making the wholesale supply of SS1&2 to BT's YouView platform conditional upon BT agreeing to wholesale the BT Sport channels to Sky for retail to customers on Sky's satellite platform, constitutes the abuse of a dominant position. On 14 June 2013, Ofcom opened an investigation of this complaint.

38. At an early stage in that investigation, BT applied to Ofcom for interim measures pursuant to s.35 of the 1998 Act either to restrain Sky from insisting on reciprocal supply of the BT Sport channels, or to mandate Sky to provide BT with wholesale access to SS1&2 for its YouView platform on equivalent terms to those which Sky had already agreed for other platforms.

39. Ofcom published its final decision on interim measures on 31 July 2013, concluding that it was not satisfied, on the basis of the evidence before it, that it was necessary to grant the interim measures requested by BT as a matter of urgency in order to prevent serious, irreparable damage to BT or to protect the public interest.

40. Ofcom's investigation under the 1998 Act is continuing, and at the hearing of the present application, Mr Holmes (appearing for Ofcom) informed the Tribunal that Ofcom anticipates that it will decide whether to issue a statement of objections in the autumn of 2014.

41. Secondly, on 16 April 2014 Ofcom announced that it is undertaking a review of the WMO. This "forward looking" review is intended to take account of any changes in the market

since 2010 and their implications for the WMO. Such a review was contemplated in the Pay TV Statement but postponed while the judicial proceedings described above were on foot. Mr Holmes explained that a team had already been assembled within Ofcom to conduct the review, that initial meetings had taken place with key industry parties, and that Ofcom intends to publish a consultation statement by the end of the year. Thereafter, Ofcom will consider the responses to its consultation and determine how to proceed.

42. Accordingly, there is an obvious connection between the substance of BT's present application and Ofcom's ongoing regulatory investigations. If BT's complaint under the 1998 Act is upheld, Ofcom might require Sky to wholesale SS1&2 to BT without any condition of reciprocal supply (although Ofcom was not prepared to order such a supply by way of interim measures), which is effectively what BT is seeking from the Tribunal in its present application, albeit on an interim basis only. Ofcom's separate review of the WMO will bring a wide range of evidence to bear in considering the broader issue of whether the WMO continues to be a suitable remedy, no doubt having regard to the acquisition of significant football media rights by BT.

43. However, Ofcom expressly did not adopt any position regarding the determination of BT's present application. I shall refer below to the letter it sent the Tribunal, and its attendance at the hearing was purely in order to assist the Tribunal insofar as necessary.

BT'S APPLICATION

44. BT applies to vary the IRO by amending the definition of "Qualifying Platform" in para 2 of the Schedule so as to include distribution via IPTV to both BT's Cardinal and YouView platforms. However, the essence of the application concerns YouView. As explained above, BT currently receives wholesale supply of SS1&2 from Sky via IPTV to its Cardinal platform pursuant to a commercial arrangement they have reached; and, in any event, Cardinal is now a legacy platform and BT's future development in the supply of Pay TV is concentrated on YouView.

45. The application is made pursuant to rule 61(4) of the Tribunal Rules, and BT also relies on the specific liberty to apply set out in para 2 of the Schedule to the IRO.

46. Rule 61 provides:

> **"Power to make interim orders and to take interim measures**
>
> **61. -** (1) The Tribunal may make an order on an interim basis –
>
> (a) suspending in whole or part the effect of any decision which is the subject matter of proceedings before it;
>
> (b) in the case of an appeal under section 46 or 47 of the 1998 Act, varying the conditions or obligations attached to an exemption;
>
> (c) granting any remedy which the Tribunal would have the power to grant in its final decision.
>
> (2) Without prejudice to the generality of the foregoing, if the Tribunal considers that it is necessary as a matter of urgency for the purpose of –
>
> (a) preventing serious, irreparable damage to a particular person or category of person, or
>
> (b) protecting the public interest,
>
> the Tribunal may give such directions as it considers appropriate for that purpose.
>
> (3) The Tribunal shall exercise its power under this rule taking into account all the relevant circumstances, including –
>
> (a) the urgency of the matter;
>
> (b) the effect on the party making the request if the relief sought is not granted; and
>
> (c) the effect on competition if the relief is granted.
>
> (4) Any order or direction under this rule is subject to the Tribunal's further order, direction or final decision."

47. BT submitted that it is not seeking to re-open the IRO but simply to bring the definition of "Qualifying Platform" up-to-date as expressly envisaged by the specific liberty to apply in the definition itself, which was over and above the general liberty to apply in para 2 of the main body of the IRO. Accordingly, there was no need for BT to surmount a legal threshold of demonstrating a significant change of circumstances. Moreover, to resist such a variation, Sky would need to show that it would suffer damage as envisaged by rule 61(2) as it is Sky that has sought to suspend the decision of Ofcom by restricting the WMO. Insofar as Sky sought to rely on the effect of BT's subsequent acquisition of FAPL media rights, that involved questioning the principle of the IRO itself, but Sky had not applied to set the IRO aside. That is a matter for consideration in the ongoing Ofcom

review; it is irrelevant to BT's application which involved only enabling the IRO to remain effective in providing it with supply of SS1&2 for inclusion in its Pay TV broadcasting.

48. Sky stressed that the IRO was a consent order. It said that IPTV had consciously been omitted, although everyone was aware at the time that what became the YouView platform was being established. Hence in applying to vary the IRO, BT must satisfy the test of a significant change of circumstances set out by the Court of Appeal in *Chanel Ltd v Woolworth & Co* [1981] 1 WLR 485, which BT could not do in this case. On the contrary, BT was in reality seeking to have a "second bite of the cherry." Further, it was for BT to demonstrate that the conditions of rule 61(2) were satisfied, and in any event the Tribunal must take into account the matters set out in rule 61(3). There was no particular urgency: BT had delayed making this application long after the launch of its YouView platform, and it was notable that Ofcom had taken a reasoned decision denying BT interim relief on its complaint under the 1998 Act. BT would not suffer hardship since it could secure the wholesale supply of SS1&2 to its YouView platform if only it agreed to reciprocal supply of its BT Sport channels. Instead, the result of BT having secured the exclusive right to a significant proportion of the FAPL matches was that if BT obtained this amendment to the IRO, BT would gain an unfair competitive advantage since it would be broadcasting all the FAPL matches to its subscribers although it had made only about a third of the investment in such rights as Sky, which would be able to broadcast only 75 per cent of the matches. Accordingly, this would significantly affect Sky's ability to retain its existing subscribers and attract new ones.

49. EE Ltd ("EE") submitted observations as a major investor in superfast broadband services. EE considered that the IRO already conferred a competitive advantage on BT over other superfast broadband providers like itself, who are not specified in the Schedule to the IRO. However, that impact was neutralised by the fact that so far as BT is concerned the IRO is now essentially a 'dead letter' since YouView had become BT's strategic platform. EE was concerned that the proposed amendment to a Qualifying Platform, to bring YouView within its scope, would confer an additional competitive advantage on BT, which is using its ability to distribute high quality content through via IPTV as a means of competing in the supply of superfast broadband services.

THE APPLICABLE TEST

50. On the question of what test should be applied for the making of the amendment, I consider that neither of the extreme positions adopted by, respectively, BT and Sky is correct. Since the present application does not seek to suspend the WMO remedy, in my judgment neither BT nor Sky needs to satisfy the threshold of rule 61(2) of the Tribunal Rules. Those conditions applied to Sky's original application for the grant of interim relief. This application to amend seeks, to a specific and limited extent, to narrow the suspension of the WMO. It is made under the express liberty to apply in the IRO and rule 61(4). I consider that rule 61(3) therefore applies to the present application, so that the matters there specified, along with all other relevant circumstances, have to be taken into account.

51. Moreover, on the facts here I think that it does not make a material difference whether or not the *Chanel Ltd v Woolworth* test applies. *Chanel* was a trademark infringement case where, when the claimant's motion for an interlocutory injunction came on for hearing in April 1979, the defendants gave undertakings "until judgment or further order" not to deal in the goods bearing the claimant's mark that were not the claimant's goods. The second defendants applied to be discharged from that undertaking on the basis that a few months later the Court of Appeal held in another case (*Revlon*) that marks can be distinctive of a whole group of companies, such that every company in the group was taken to consent to their use by every other company in the group, and that the defendants had discovered evidence of organisational links between the claimant and the companies from whom the goods that were the subject of the infringement had been acquired. The Court of Appeal dismissed an application for permission to appeal from the judge's refusal to discharge the undertakings, and in setting out his reasons Buckley LJ (with whom Shaw and Oliver LJJ agreed) stated (at 492D):

> "In my judgment, an order or an undertaking to the court expressed to be until further order by implication gives a right to the party bound by the order or undertaking to apply to the court to have the order or undertaking discharged or modified if good grounds for doing so are shown. Such an application is not an application to set aside or modify any contract implicit in the order or undertaking. It is an application in accordance with such contract, being an exercise of a right reserved by the contract to the party bound by the terms of the order or undertaking."

He proceeded to hold that the grounds being put forward could not constitute a basis for varying the undertakings:

> "The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position. The *Revlon* point was open to the defendants in April 1979, notwithstanding that this court had not then decided that case. Some at least of the new evidence was readily available to them at that time."

52. The *Chanel* approach was considered further by Sir Donald Nicholls V-C (as he then was) in *Gantenbrink v BBC* [1995] FSR 162. There, the court had to decide whether to permit the defendant to apply to vary undertakings which it had given at the outset of a copyright infringement claim, although it did not seek to show any change in circumstances. After referring to the "classic exposition" in the *Chanel* case, the Vice-Chancellor continued (at 165):

> "On the other hand, if an interlocutory injunction is granted by consent, or an undertaking is given, in circumstances where the parties envisaged that under the liberty to apply an application could be made to vary the injunction or undertaking even in the absence of changed circumstances, the court will give effect to that intention."

Noting a subsequent decision of the Court of Appeal which had explained Buckley LJ's observations in *Chanel* as very much related to the circumstances of that case itself, Sir Donald Nicholls stated:

> "In other words, the court will give effect to the explicitly evinced intention of the parties when dealing with an application made pursuant to a liberty to apply. In my view that must equally be so whether the liberty to apply is expressed in the order or is implicit in the order."

53. The circumstances here are, in my view, very different from those in *Chanel*. In this case, BT is not applying only pursuant to the general liberty to apply in the IRO but pursuant to the express liberty to apply in para 2 of the Schedule. The parties agreed by their consent order to define "Qualifying Platform" in terms which expressly envisaged the potential for subsequent reconsideration of what platforms should be appropriately included.

Accordingly, I do not think that a condition for variation applies which imposes particular "significance" in terms of a threshold of new circumstances. Nonetheless, I consider that the obvious interpretation of the express liberty to apply in para 2 of the Schedule is that there must be *some* further development or change on which the application would be based; it should not be read as simply enabling a party to come back to the Tribunal and seek to vary the definition because it had second thoughts.

54. I am reinforced in this view of what was envisaged by the brief submission, by way of letter to the Tribunal, from Ofcom. Ofcom was of course a party to the IRO and states that it considered that the liberty to apply:

> "would offer protection to the parties in relation to future platform developments in the event that these progressed faster than expected or (as has in fact eventuated) the appeals took longer than expected."

55. However, in the end I think it is unnecessary to determine conclusively whether a party would be entitled to seek to vary the definition of Qualifying Platform absent any change in circumstances. That is because I have no doubt that there has been a material change on the facts in this case. First, although use by BT of IPTV for broadcast of its channels and what became the YouView platform were envisaged in 2010 as future developments, they were precisely that. They were not at that time of immediate relevance. IPTV is a more advanced and efficient technology, and in 2010 the prospect of BT switching entirely to IPTV and ceasing to broadcast on DTT lay well into the future. Secondly, I do not think that it could have been seriously contemplated, at the time the IRO was made, that over four years later the case would be far from concluded. The effect of these two factors is interrelated, in that the extended duration of the IRO has heightened the importance in practice of the technical developments. I was told that one of the most significant developments is the ability to multicast (and thus broadcast to an IPTV platform) over an existing copper wire connection whereas previously it was thought that it was essential to have an optical fibre connection.

56. Accordingly, I am satisfied that BT is entitled to seek to vary the IRO under the express liberty to apply in the light of subsequent developments. It is therefore neither necessary nor relevant to explore the position adopted by the parties in the discussions that led to the IRO, which was the subject of some of the evidence now placed before the Tribunal.

SHOULD THE IRO BE VARIED?

57. Part of the difficulty of the present case flows from the fact that the IRO was a consent order, so that the Tribunal did not have to articulate in 2010 the basis on which a suspension of the WMO was justified or determine whether and to what extent the suspension should be circumscribed. However, the Tribunal now has to consider a strongly contested amendment to the IRO, which brings those issues into focus four years later, when the surrounding circumstances have significantly changed.

58. Although Mr Howard for BT argued forcefully that once grounds for a variation were shown in terms of, as he put it, bringing the IRO up-to-date, any changes in the competitive position in the market were irrelevant, I do not think that can be right. The WMO obligation was imposed under the Pay TV Statement in the public interest. Similarly, the terms of any suspension of the obligation must have regard to the public interest and in assessing a variation of the suspension to reflect certain developments, the Tribunal cannot approach the matter in blinkers, shielding its eyes from other changes that have taken place over the intervening period. This remains an order for *interim* relief, pending the final outcome of this case. Accordingly, the Tribunal should not disregard the potential effect of its order in the event that, when the case is finally determined, the WMO remedy is upheld or, conversely, set aside. That involves consideration of the effect on the parties. But in my judgment, although both BT and Sky advanced extensive and contrasting submissions as to the prejudice, or lack of it, caused to each other, this is not private litigation but the challenge by Sky to a regulatory remedy imposed to ensure "fair and effective competition". The Tribunal must therefore be concerned also with the effect on such competition in the public interest.

59. That is also made clear by rule 61(3) of the Tribunal Rules which prescribes that the relevant circumstances include not only the urgency of the request and the effect on the party making the request if it is not granted, but also the effect on competition if relief is granted. In that regard, I do not think it is appropriate to focus critically on the prejudice to BT – as the party now requesting a variation – if its request for a variation is not granted, or alternatively on the prejudice to Sky – as the party that originally requested a suspension of the WMO remedy – if the scope of that suspension were narrowed. In the

circumstances here, I consider that it is relevant and necessary to look at the position in the round.

60. Accordingly, I consider that the starting point is that the WMO remedy was imposed by Ofcom in order to ensure fair and effective competition pursuant to s.316 of the 2003 Act, in the public interest. Unless suspended, the WMO remedy covers any form of delivery of Sky's CPSCs, including via IPTV.

61. A decision by Ofcom under s.316 regarding a licence condition will very often, if not always, be adverse to the commercial interest of the party on whom the condition is imposed.

62. If such a decision is appealed, the decision is only suspended if the CAT so orders. Such decisions by Ofcom are usually complex, and an appeal is therefore likely to involve complex issues and will frequently involve several parties, as was the case here. Although it is hoped that such appeals would not usually take anything like as long as the present case, final resolution of such an appeal may often take at least a year, and longer if the case proceeds to a second level appeal.

63. The complexity of such appeals means that it will usually be impossible for the Tribunal on an interim hearing to arrive at even a provisional view as to the prospect of the appeal succeeding. Certainly in the present case, it would be wholly inappropriate for me to reach any view as to the likely outcome of remittal to the Tribunal, as ordered by the Court of Appeal.

64. Accordingly, although there will no doubt be appropriate cases for suspension, the Tribunal should be cautious before suspending a decision regarding a licence condition pending appeal. Broadcasting markets, like telecommunications markets, are developing rapidly so that any suspension will potentially impair the effectiveness of the decision, and if such a decision could readily be suspended there would be an incentive to appeal simply to secure the benefit of delay.

65. In the present case, although the WMO remedy has been suspended by consent, I consider that the terms of the IRO, with the incorporated undertakings, were designed to ensure that

meaningful use of SS1&2 could be made by other parties supplying Pay TV services in the interim. This is supported by the submission from Ofcom on the present appeal, stating as follows:

> "Ofcom consented to the terms of the IRO, which exclude distribution of CPSCs by IPTV, because it was Ofcom's understanding in April 2010 that none of the parties present intended to distribute Sky's channels by IPTV in the short to medium term. Ofcom considered that the main parties would not therefore be prevented by the IRO from making meaningful use of the WMO Remedy during the expected currency of the appeals."

As the Tribunal observed in its judgment on Real's application to amend the IRO (see para 7 above), the terms of the IRO meant that Sky would suffer the commercial disadvantage that it apprehended from the WMO:

> "By agreeing to these terms Sky was prepared to, and almost certainly will, suffer the very adverse effects which formed the main foundation for its application for interim relief should its appeal succeed and the supply of the channels to those companies be withdrawn."
>
> [2010] CAT 29 at [24].

66. The technical developments that have occurred over the wholly exceptional time that this appeal is taking have rendered the IRO largely ineffective as regards BT. It is not realistic to suggest that BT should maintain use of the Cardinal STB and deprive its customers of the improved technology and service of the YouView box simply to retain the delivery of SS1&2. This would frustrate the development of BT as a competitor on the Pay TV market and cannot, in my view, be regarded as being in the public interest.

67. The main argument against making SS1&2 available to BT is that by reason of BT's acquisition of valuable football broadcasting rights, BT has now become a much more formidable competitor to Sky so that the addition of the SS1&2 channels would give BT an unfair advantage. I recognise that this development means that if Sky's appeal eventually succeeds, the obligation to supply BT with its CPSCs by IPTV over YouView may cause commercial damage in terms of the loss of actual or potential subscribers, for the various reasons articulated in Sky's evidence. But conversely, if the WMO remedy is eventually upheld, to deny BT access to those channels for it to supply on its YouView platform is likely to cause it commercial damage. I do not think it is any answer to say

that BT could obtain SS1&2 if only it were prepared to offer reciprocal supply to Sky of the BT Sport channels. BT has spent some £1.5 billion acquiring football broadcasting rights in order to improve its position on the market and I do not see that BT should be required, in effect, to deprive itself of the competitive gain from that investment in order to achieve the benefit of the WMO remedy ordered by Ofcom.

68. In its interim measures decision of July 2013, Ofcom records Sky as having opposed that application by BT on the basis that BT's claims that it would suffer significant loss without access to SS1&2 were exaggerated: para 5.10. Sky asserted that "all the available evidence" indicated that "in the short term" significant numbers of Sky Sports subscribers would not move to BT's YouView even if YouView included SS1&2. After I pointed this out in the course of the hearing, Sky sent the Tribunal a full copy of its representations to Ofcom of June 2013, submitting that its comments to that effect were confined to the likely position in the following "few months." Having read those representations, I do not regard them as limited to that extent: although some of the points made were in terms of the next few months, in particular as regards the under-development of the YouView platform, others related at least to the following year. I acknowledge that the situation is no longer the same, due particularly to the roll-out by BT of its fibre network and, significantly, the ability to deliver by multicast over copper wire. But this demonstrates the difficulty of predicting the likely commercial impact of a decision to grant an extension of the IRO to cover IPTV, to which both BT and Sky would doubtless respond in terms of their marketing efforts and strategies. It is striking that some six months before it made those representations to Ofcom, Sky had been prepared to enter into an agreement with BT for wholesale supply of SS1&2 to BT via IPTV for its Cardinal platform. Sky would hardly have done so if it felt this would cause it a significant commercial disadvantage. Sky subscribers continue to have the benefit of its other sports channels, in particular Sky Sports 3 and 4 and F1, which are outside the scope of the WMO remedy and which a BT customer cannot access. And Virgin customers can view all FAPL live matches, since Sky is supplying by wholesale to Virgin, so BT would be in no better position in that regard than the third major competitor in the Pay TV market.

69. It is not for the Tribunal on this application to consider whether, by reason of the change in commercial conditions as a result of BT's acquisition of football broadcasting rights, the WMO remedy continues to be appropriate, going forward. That will be under examination

in the review announced by Ofcom, which I cannot prejudge. I note that as regards the FAPL rights, Sky has no less a share of the total number of games than it had at the time of the Pay TV Statement, when the balance of those rights was held by ESPN, although I appreciate that the rights acquired by BT significantly include the valuable rights to 'first pick' matches which ESPN had not enjoyed.

70. I note also that whilst Sky is unable to offer all FAPL matches as a single package, BT provides the BT Sport channels on the Sky STB by self-retail, and indeed free to those Sky subscribers who are customers of BT Broadband. That is commercially much less attractive for Sky than being able to broadcast BT Sport itself, since it results in its customers having a direct contractual relationship with BT, with all the marketing opportunities that result. Nonetheless, the consequence is that many Sky customers can access all FAPL matches through their Sky STB whereas BT customers with a YouView STB cannot access any of the Sky Sports channels, including of course SS1&2. I would be concerned if it were open to BT at any time to decide to cease self-retail in this way on the Sky STB. However, BT has offered an undertaking that if the amendment now sought is granted, it will maintain BT Sport on Sky's platform while the IRO remains in effect. There is nothing to suggest that there is likely to be a significant change in the terms on which BT offers its sports channels to Sky subscribers, but if BT did change the terms in material respects, that may well constitute a change in circumstances that would entitle Sky to apply to vary the IRO under the continuing liberty to apply.

71. As regards the submissions of EE, they appear to me to concern the WMO remedy itself and its effect on competition in the market for superfast broadband services, rather than the justification for amending the IRO. EE is concerned because the amendment sought by BT would have the consequence of restoring the effective operation of the IRO, which had in the meantime become obsolete, at least for BT, and thus enable BT to take advantage of the WMO remedy compared to other operators who are not beneficiaries of the order. However, I consider that in reality that raises a very different issue, namely the appropriateness of the WMO, and not the justification for amending the IRO which is all that is before the Tribunal.

72. As regards the urgency of the matter, for the purpose of rule 61(3)(a), although BT now say that its application is urgent because of its focus on the YouView platform and, most

immediately, the start of the 2014/15 football season, I note that BT withdrew an application to vary the IRO in similar terms that it made before the Court of Appeal in March 2013. Further, even when BT issued its present application before this Tribunal on 11 April 2014, it did not ask that it be heard urgently, which is why it came on for hearing only near the end of July. Therefore I do not consider that the circumstances indicate a high level of urgency, and that is a factor against BT's application. Nonetheless, the likely timescale until the case is finally determined means that delaying the potential supply of SS1&2 via IPTV to BT until then may cause it significant prejudice.

73. Ultimately, the present case is very different from private litigation. Not only are there no cross-undertakings in damages, which in any event would be very hard to quantify, but such undertakings would not serve to protect the public interest in achieving a competitive market which the WMO remedy was designed to secure. If BT had not acquired significant football broadcasting rights, and in particular the FAPL rights, its case for variation of the IRO to include supply via IPTV would be very strong. Indeed, given Sky's evidence, I wonder whether such variation would have even been resisted. In my judgment, it would be wrong to refuse to extend the definition of Qualifying Platform in an interim remedy to reflect the change in BT's primary broadcasting platform over the long period that this remedy remains effective, only because BT has itself spent a substantial sum acquiring valuable football broadcasting rights in order to improve its competitive position on this market.

74. Finally, I should say that I regard Ofcom's decision refusing BT interim relief on its complaint of abuse of dominance as being of very limited relevance. Since BT was there the applicant for interim measures, the test applied by Ofcom was whether BT had shown that it was necessary for Ofcom to grant relief at the outset of its investigation so as to prevent BT suffering "serious, irreparable damage" or to protect the public interest.[4] Here, it is Sky that obtained interim measures suspending Ofcom's WMO remedy. Although I have held that the likely prejudice to BT if the IRO is not amended is very relevant to the present application, BT does not have to satisfy such a high threshold. Further, the interim measures decision was taken in July 2013 when it appeared that BT would have to continue to sell Cardinal STBs so as to maintain delivery of BT Sport over DTT, on the basis that multicast transmission was feasible only over fibre and BT's fibre network

[4] That was the test under s.35(2) of the 1998 Act as then in force. It has subsequently been amended.

covered only about 60% of total UK homes. As I have observed, it has since become practicable to deliver multicast services over copper wire so that BT will substantially cease DTT transmission of its Pay TV channels […][□✂].

CONCLUSION

75. For all the reasons I have set out, and upon BT undertaking to maintain BT Sport on Sky's platform until the conclusion of Sky's appeal or further order, BT's application to amend the IRO is accordingly granted.