Neutral citation [2015] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1156-9/8/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

6 May 2015

Before:

THE HON. MR JUSTICE BARLING
(Chairman)
PROFESSOR JOHN BEATH
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

B E T W E E N:

SKY UK LIMITED
VIRGIN MEDIA, INC.
THE FOOTBALL ASSOCIATON PREMIER LEAGUE
BRITISH TELECOMMUNICATIONS PLC

Appellants/Interveners

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

TOP UP TV EUROPE LIMITED
RFL (GOVERNING BODY) LIMITED
THE FOOTBALL ASSOCIATION LIMITED
FREESAT (UK) LIMITED
RUGBY FOOTBALL UNION
THE FOOTBALL LEAGUE LIMITED
PGA EUROPEAN TOUR
ENGLAND AND WALES CRICKET BOARD

Interveners

Heard at Victoria House on 26 and 27 March 2015

RULING (CONSTITUTION OF TRIBUNAL)

APPEARANCES

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

Mr Jon Turner QC and Ms Sarah Ford (instructed by BT Legal) appeared for British Telecommunications PLC.

Ms Helen Davies QC and Mr Richard Blakeley (instructed by DLA Piper UK LLP) appeared for the Football Association Premier League.

Ms Dinah Rose QC and Mr Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

I. INTRODUCTION

1. This Ruling concerns the constitution of the Tribunal for the purpose of hearing a matter remitted to the Tribunal by the Court of Appeal in its judgment of 17 February 2014 ([2014] EWCA Civ 133) (the "Court of Appeal Judgment"). The latter judgment determined an appeal by British Telecommunications Plc ("BT") against the Tribunal's judgment of 8 August 2012 ([2012] CAT 20) ("the Pay TV Judgment"). The Pay TV judgment concerned several appeals to the Tribunal against a decision of the Office of Communications ("Ofcom") in March 2010 under section 316 of the Communications Act 2003, in which Ofcom decided to vary the conditions in the licences granted to British Sky Broadcasting Limited[1] ("Sky") under the Broadcasting Act 1990 ("Ofcom's Decision"). Ofcom's Decision was appealed by Sky, Virgin Media, Inc., the Football Association Premier League ("FAPL") and BT.

2. The issue which now falls to be determined is whether the matter remitted to the Tribunal by the Court of Appeal should be heard by the present panel, which is the same panel that heard the appeals culminating in the Pay TV Judgment, or by a differently constituted panel. This issue arises in the light of submissions by BT and Ofcom that a new panel should be constituted for this purpose. At the heart of the objections raised by Ofcom and BT are allegations of apparent bias, although their submissions are also made on what has been called, as a convenient shorthand term, a "case management" basis.

3. FAPL and Sky contend that the matter remitted should be heard by the panel that

[1] By letter dated 9 April 2015 the Tribunal was informed that on 5 February 2015 British Sky Broadcasting Limited changed its name to Sky UK Limited.

conducted the original appeals, and that the case management objections to the panel and those based on apparent bias should be rejected. The other parties to these appeals have expressed no views on the constitution of the panel, and they were not represented at the oral hearing on 26 and 27 March 2015. The Court of Appeal was not invited to, and did not, express a view on this matter when BT's appeal was before them.

II. BACKGROUND

4. The full background to these appeals is set out in the Pay TV Judgment, to which reference should be made if necessary. What follows is sufficient for present purposes.

5. The four appeals against Ofcom's decision involved, very broadly, challenges by both Sky and FAPL to Ofcom's jurisdiction to act under section 316 of the Communications Act 2003, a root and branch challenge by Sky to Ofcom's findings about alleged practices by Sky and about other matters on which Ofcom's competition concerns were based, and challenges by each of the four appellants to the validity, effectiveness and proportionality of the Wholesale Must Offer remedy ("WMO") imposed on Sky by Ofcom. The main hearing took place over some 37 days between 9 May 2011 and 15 July 2011. About 35,000 pages of submissions and evidence were filed and the Tribunal heard from 41 witnesses.

6. The Tribunal handed down the Pay TV Judgment, consisting of 336 pages and a further 25 pages of appendix material, on 8 August 2012. The Tribunal dismissed Sky's and FAPL's two grounds of challenge to Ofcom's jurisdiction to take action under section 316, but upheld Sky's challenge to Ofcom's finding that in its

dealings with other retailers who sought access to Sky's core premium sports channels Sky had withheld wholesale supply, preferring to be absent from the platforms in question rather than wholesale the channels to them. The Tribunal also upheld Sky's challenge to Ofcom's findings on other matters representing Ofcom's competition concerns, including a finding that the "rate card" prices charged by Sky for its current wholesale supply of those channels to Virgin Media, Inc. on its cable network prevented fair and effective competition by the latter in the retailing of the channels.

7. Towards the end of the Pay TV Judgment[2] the Tribunal referred to a further issue which had arisen, namely whether other retailers or potential retailers (ie other than Virgin Media, Inc. and its predecessors) would be able to compete effectively at Sky's "rate card" wholesale prices. The Tribunal gave reasons why it had not found it necessary to decide that issue.

8. At the end of the Pay TV Judgment the Tribunal invited the parties to make submissions about the appropriate ruling by the Tribunal in the light of that judgment, including any directions pursuant to subsection 195(3) of the 2003 Act. In due course the parties agreed *inter alia* the appropriate directions to be given by the Tribunal to Ofcom pursuant to that subsection. These included a direction to Ofcom to withdraw its decision to insert the disputed conditions into Sky's licence, and to remove those conditions therefrom. The Tribunal made an order incorporating that direction.

9. In a decision dated 7 February 2013 ([2013] CAT 2) the Tribunal refused BT

[2] At [820]-[821].

permission to appeal against the Pay TV Judgment. In a further decision dated 27 February 2013 ([2013] CAT 4) the Tribunal granted BT's application for a stay of the Tribunal's order pending BT's renewed application for permission to appeal to the Court of Appeal ("the Stay Judgment").

III. THE COURT OF APPEAL JUDGMENT

10. The Court of Appeal Judgment allowed BT's appeal in respect of the ground on which permission to appeal had been granted, namely that the Tribunal had erred in not deciding the further issue to which we have referred at paragraph 7 above, and remitted that matter to the Tribunal to decide. It is sufficient to quote Lord Justice Aikens's summary of his conclusions (with which Lady Justice Arden and Lord Justice Vos agreed):

> "(6) Are these errors of law entitling this court to interfere with the CAT's order and, if so, how?
>
> 100. In summary: (1) I am quite satisfied that in the judgment the CAT misconstrued the Statement by failing to appreciate the importance of Ofcom's conclusion that the rate-card price and the effect of the penetration discounts that were proposed by Sky themselves gave rise to "competition concerns". (2) This issue was before the CAT as is clear from the Notice of Appeal and Defence. Moreover, Miss Rose had made it clear during her submissions to the CAT that this was a separate, if supporting point, that Ofcom was making. (3) Therefore, even if the "crucial finding of fact" was that Sky deliberately withheld wholesale supply of its premium channels, Ofcom had found this independent competition concern and that it had to be dealt with by the CAT on appeal. (4) The failure of the CAT correctly to interpret the Statement or to deal with the rate-card price and penetration discount issues has the consequence that it is unclear whether, despite the findings of fact that the CAT has made in favour of Sky, there remain significant, independent, competition concerns based on the rate-card price and penetration discount, as found by Ofcom in the Statement. (5) The reasons that the CAT gave for not considering that matter further were inadequate.
>
> 101. In my view these amount to errors of law which must mean that the judgment cannot be upheld, for two reasons. First, the CAT has thereby failed to deal with the appeal to it "on the merits". Secondly, its conclusion and order that the WMO remedy must be set aside was based on an incomplete set of conclusions. It had not adequately considered whether that remedy was justified on the basis of Ofcom's "competition concerns" arising out of the rate-card price and the penetration discounts. The only way in which this error can satisfactorily be dealt with is for the order of the CAT of 6

> March 2013 to be set aside and for the matter to be remitted to the CAT for further consideration, findings and conclusions.
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> IX. Disposal
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> 102. For these reasons I would allow BT and Ofcom's appeal on the rate-card issue, but dismiss Sky and FAPL's cross-appeal on the jurisdiction issue. I would propose that the matter be remitted to the CAT for further consideration in order that further findings and conclusions may be made in the light of this judgment."

11. Thus, the Court of Appeal found that the Tribunal's order was based on an "*incomplete set of conclusions*", there being an independent concern of Ofcom relating to the rate card price and penetration discounts in the context of new entrants with which the Tribunal had not dealt, and which would be remitted to the Tribunal for further consideration and findings.

IV. THE PRESENT ISSUES

12. Following the Court of Appeal Judgment, the Registrar of the Tribunal wrote to the parties on 4 March 2014 inviting observations on how the case should proceed. The Registrar also asked the parties to indicate "*whether they consider that it would be appropriate for the original Tribunal panel to decide the remitted question or whether a new panel should be constituted for this purpose*". The letter pointed out that the former route was complicated by the expiry of the term of appointment of Mr Justice Barling as President, while the latter route would involve the appointment of new panel members who would be starting afresh and who would not have heard the evidence filed in the original appeals.

13. In the course of March 2014 observations were received from Ofcom, Sky, FAPL and BT. Ofcom and BT submitted that a new panel should be constituted for a number of reasons, including that there was a risk the original panel would be

affected by "confirmation bias". Sky and FAPL expressed the view that it was appropriate for the original panel to hear the remitted matter.

14. There was then a hiatus while Sky's application for permission to appeal to the Supreme Court on the jurisdiction issues was pending. By order dated 30 October 2014 the Supreme Court refused Sky permission to appeal. In the meantime, the appointment of Mr Michael Blair QC as a Member of the Tribunal had been extended and Mr Justice Barling had been re-appointed to the Tribunal as a Chairman.

15. Following further correspondence from the parties, by order dated 15 January 2015 Mr Justice Barling, as Chairman, gave directions for a hearing to determine the issues raised by Ofcom and BT as to the constitution of the Tribunal.

16. Since the original correspondence on this question in March 2014, a further issue has been raised which forms the basis of a separate objection on the ground of apparent bias. It arises from a speech made by Mr Justice Barling in June 2013. This objection, raised by Ofcom and adopted by BT, concerns only Mr Justice Barling, and not the other two members of the Tribunal. We will each express our conclusions on it after we have ruled on the submissions which are directed to the panel as a whole.

17. As will appear, our conclusions on both issues are unanimous.

V. OBJECTIONS TO THE PANEL AS A WHOLE

Submissions of BT and Ofcom

18. The parties do not agree on precisely what it is that we are required to decide at this stage. BT and Ofcom submit that the present constitution of the Tribunal is not yet seised of the remitted matter, and so we are not simply determining the binary question whether the present constitution of the Tribunal should recuse itself on the ground of apparent bias and/or confirmation bias (as Sky and FAPL argue), but we also need to determine a wider question, more akin to case management.

19. BT submitted that in the present circumstances the applicable principles on remittal following a successful appeal are those set out by Burton J, sitting as President of the Employment Appeal Tribunal, in *Sinclair Roche & Temperley & Ors v Heard & Ors* [2004] IRLR 763 ("*Sinclair Roche*"). In that case the EAT had allowed appeals and cross-appeals from an employment tribunal and remitted the matter back to the same tribunal panel for reconsideration. The learned judge identified the following considerations as relevant to the question of whether the remittal should be to the same or a fresh panel:

> "46.1 Proportionality must always be a relevant consideration … although we are conscious that ordering a fresh hearing in front of a different Tribunal would add considerably to the cost to parties on both sides who have already invested in solicitors and Counsel, both at the Tribunal and on appeal … sufficient money is at stake that the question of costs would from the one point of view not offend on the grounds of proportionality and from the other not be a decisive, or even an important, factor. …
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> 46.2 Passage of Time. The appellate tribunal must be careful not to send a matter back to the same tribunal if there is a real risk that it will have forgotten about the case. …
>
> 46.3 Bias or Partiality. It would not be appropriate to send the matter back to the same Tribunal where there was a question of bias or the risk of pre−judgment or partiality. This would obviously be so where the basis of the appeal had depended upon bias or misconduct, but is not limited to such a case.
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> 46.4 Totally flawed Decision. It would not ordinarily be appropriate to send the matter back to a tribunal where, in the conclusion of the appellate tribunal, the first hearing was wholly flawed or there has been a complete mishandling of it. …

> 46.5 Second Bite. There must be a very careful consideration of what Lord Phillips in English (at paragraph 24) called "A second bite at the cherry". If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre−judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say "I told you so". …
>
> 46.6 Tribunal Professionalism. In the balance with all the above factors, the appellate tribunal will, in our view, ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission. …"

20. In BT's submission, the application of the principles in *Sinclair Roche* indicates that the appropriate course in the present case would be to constitute a new panel.

21. In relation to apparent bias/pre-judgment/confirmation bias, BT makes a number of points. In BT's submission, although 'confirmation bias' is to be distinguished from conventional bias, nevertheless it is clear from Burton J's reference to "*the very real risk of the appearance of pre-judgment or bias*", that apparent bias encompasses the perception of confirmation bias. In relation to apparent bias BT referred to the well-established test set out by Lord Hope in *Porter v Magill* [2002] 2 AC 357 at [102]-[103]:

> "…whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

22. BT argues that a fair minded and informed observer would conclude that the present circumstances entail a very real risk of confirmation bias (or the perception of it) because there is a "*very real and very human desire to attempt to reach the same result*". The original panel invested a considerable time in producing the Pay TV Judgment which was the subject matter of BT's successful appeal to the Court of Appeal. The Tribunal's conclusions were categorical and uncompromisingly in

favour of Sky. BT pointed to what it considered to be forceful factual findings indicating the Tribunal's perceptions of BT's conduct at paragraphs 29, 338, 389, 401-402 of the Pay TV Judgment.

23. In light of this BT considers that it would be understandable and inevitable that if the original panel were to hear the remittal, there would be a perceived inclination to seek to reach an outcome that was the same as the previous decision that the Tribunal adopted.

24. BT raise a related concern, namely that the Tribunal may have pre-judged the matter which has been remitted. For this BT rely upon a passage in the Stay Judgment (paragraph 9 above) where in granting BT's application for a stay we said at [39] and [41]:

> "…on the basis of the grounds [of appeal] as they stand, it is difficult to see that BT's proposed appeal, even if successful, would be capable of rescuing the WMO."
>
> "Given the view we have taken about the merits and ultimate lack of utility of BT's proposed appeal…."

25. BT argues that we were there expressing a strong view that the WMO remedy was unnecessary and unjustified and that Ofcom was wrong to impose it. Accordingly, if we were considering the matter remitted, there would be perceived to be an unavoidable predisposition to resolve that matter so as to reach the same overall outcome and to place more weight on evidence that supports that outcome. We would also be, or be perceived to be, less inclined to admit new evidence that might support a different outcome.

26. BT also argued that other considerations identified in *Sinclair Roche* were relevant in the present case.

27. *Proportionality*: Given the important issues of public interest which arise in the present appeals, coupled with the scale of the commercial interests at stake, it would not be disproportionate to constitute a new panel. In any event, the consequences of the passage of time mean that remittal to the original Tribunal panel would not entail any material savings in costs.

28. *Passage of time*: The trial of these appeals took place between May and July 2011. The original panel, therefore, cannot be expected to recall the many complex, detailed and technical issues which were addressed in evidence and submissions before it. At best that panel will be no more qualified to hear the remittal than a new panel. At worst, there is a risk that the original panel would have an imperfect or inaccurate recollection or enduring impression which may be detrimental to its determination of the remitted issue.

29. *Totally flawed decision*: BT submitted that, in the light of the Court of Appeal's conclusion that the rate card/penetration discount issues were not, and should have been, addressed, and that as a result there was an error of law in that the appeal was not decided on the merits, this factor further militated in favour of remitting the matter to a fresh constitution of the Tribunal.

30. Ofcom adopted BT's submissions, including as to the relevance of *Sinclair Roche*. In relation to the precise issues that we are required to determine at this stage, Ofcom submitted that there had as yet been no decision on the questions identified in the Registrar's letter of 4 March 2014, on which the parties' observations had been sought. In those circumstances the panel could not yet have become seised of the remitted matter, and were not engaged on a recusal question alone. Therefore

the wider *Sinclair Roche* considerations were relevant.

31. Like BT, Ofcom identified a number of paragraphs in the Pay TV Judgment containing what it considered to be strongly-worded criticisms of Ofcom and BT. In this regard Ofcom drew particular attention to the Tribunal's conclusion that Ofcom had '*to a significant extent misinterpreted the evidence*' before it, that '*a significant number of Ofcom's pivotal findings of fact*' were inconsistent with the evidence, and that BT's negotiations with Sky had been subject to '*regulatory gaming*'. Ofcom submitted that it might be more difficult for the original Tribunal to take a different view of the competition concerns on remittal, given its commitment to such criticisms. Moreover, in Ofcom's submission, after a lengthy and expensive hearing the Pay TV Judgment was found to be seriously flawed on appeal. The confidence of the public, and of Ofcom, in a re-hearing by the original panel was thereby undermined.

Submissions of Sky and FAPL

32. Sky and FAPL argue that *Sinclair Roche* is not the governing authority in the circumstances of this case; the constitution of the panel is not a matter of convenience or case management. Rather the question is whether this panel should hear the matter remitted or recuse themselves on the ground of apparent bias (there being no submission that the original panel is actually biased). FAPL points out that the considerations discussed by the EAT in *Sinclair Roche* are relevant when an appeal court is considering whether to remit a case to the same or a different constitution of a lower court or decision-making body. That is not the position here, where allocation has already been made to the original panel in accordance with what is the default position, absent some specific direction by the remitting court.

33. Sky and FAPL submit that there is no apparent bias and that the original panel is best placed to ensure that the issue remitted to the Tribunal is dealt with expeditiously, efficiently and fairly.

34. They agree that the test to be applied for apparent bias is that of "a fair-minded and informed observer" as set out in *Porter v Magill.* Reference is also made to the formulation, in *Home Secretary v AF (No 2)* [2008] EWCA Civ 117 at [53], of a perception that:

> "the judge might have been (or be) influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case."

35. Both Sky and FAPL submit that set against the apprehension of bias is the equally compelling principle that judges and decision-making tribunals must not lightly abdicate their decision-making role. Reliance is placed on *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, as indicating that deciding a case adversely to a particular party and/or commenting adversely on a party or a witness does not, without more, amount to pre-judgment or otherwise give rise to apparent bias.

36. Applying these principles, Sky and FAPL contend that it is not sufficient for Ofcom and BT to point to the fact that adverse findings have already been made against them by the Tribunal; that is not 'pre-judging' by reference to extraneous matters or predilections or preferences. It merely represents the proper discharge of their judicial functions by the original panel, as it was duty-bound to do. No appeal has been brought against any of the Tribunal's findings. Nor is there any question of the panel having used vituperative or unjudicial language such as might indicate an inability to approach the matter remitted in a fair and impartial way.

37. Finally, Sky and FAPL contend that even if, contrary to their contentions, the *Sinclair Roche* considerations are relevant here, their application would not assist Ofcom and BT. The factors relating to proportionality and the passage of time point the other way, in that a new panel would clearly have more work to do to learn about the case and consider the evidence for the first time; the original panel is therefore better placed to assess the matter which has been remitted. Nor, they submit, is there is any basis for a submission that the Court of Appeal has held the Pay TV Judgment to be wholly flawed or completely mishandled: there was no appeal against any of the conclusions reached by the original panel (save for an unsuccessful cross-appeal by Sky and FAPL on the jurisdiction point). As to the "second bite" point, the risk that a judge might be inclined to reach the same conclusion on a matter decided below which is found on appeal to have been wrongly decided does not arise here, as the matters arising on remittal are matters upon which the panel has not previously made a determination. To the extent that tribunal professionalism is in issue, Sky points out that in *Sinclair Roche* it was observed at [46.6] that:

> "... the appellate tribunal will ... ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission.

Discussion and conclusions

The nature of the question to be determined

38. It is important to be clear as to the nature of the issue that falls to be decided. In particular, are we determining only whether we, as a panel, ought to recuse ourselves on the ground of apparent bias/confirmation bias? Or is it also necessary to consider as a matter of discretion and/or evaluation, to be exercised on *Sinclair*

Roche principles, whether it is appropriate and convenient for us to hear the remitted matter?

39. The latter, broader, question was raised in correspondence in March 2014 in response to an invitation by the Registrar for the parties to make observations. But it is not clear why that wholly proper invitation (which was taken up by all but one of the appellants) should have the effect of transforming what (in the absence of a direction from the Court of Appeal) is ultimately an internal process for the Tribunal, into something that it is not.

40. We do not accept the arguments of BT and Ofcom on this point. It would not be desirable for judges and other persons exercising a judicial function to be in a position too easily to decline to exercise that function in relation to cases which have been allocated to them by the court or tribunal to which they are attached. Factors such as proportionality (one of the considerations in *Sinclair Roche*) would provide generous scope for the exercise of such a discretion.

41. By the same token it would not be desirable for litigants to be in a position too easily to seek to influence and/or challenge the selection of a judge for their case. This would be likely to lead to satellite litigation and would not generally be in the interests of the fair and efficient administration of justice. That is not to say that there is anything wrong with litigants drawing relevant factors to the attention of a court's administration before an allocation is made. This is not infrequently done, and can be helpful for listing purposes.

42. Further, in our view this panel is now seised of the remitted matter. It is true that it was necessary for the Chairman to be re-appointed to the Tribunal, and for Mr Blair

QC's appointment as a member to be extended. However, it is our understanding that this was done at the initiative of the current President of the Tribunal specifically so that the original panel would be able to deal with the remitted matter. In this connection FAPL drew our attention to the fact that the relevant legislation[3] makes provision for chairmen and members who had been sitting on proceedings instituted before the end of their term of office to be re-appointed to complete those proceedings.

43. Therefore, as far as we are concerned we are seised of the remitted matter, and are under an obligation to hear and determine it, subject to the issues of apparent bias/confirmation bias which have been raised. We do not consider that *Sinclair Roche* is applicable in our situation, save in so far as it provides helpful guidance on apparent bias/confirmation bias. As FAPL pointed out at the hearing, the cases where the *Sinclair Roche* considerations have been applied are cases in which an appeal court was deciding whether to remit to the same or a different panel of the court or other body whose decision had been successfully appealed. No authority was drawn to our attention where that evaluation exercise was carried out by the judge or decision-maker to whom the matter has been allocated on remittal by a higher court.

44. For these reasons we conclude that Sky and FAPL are right as to the nature of the question to be decided at this stage. Nevertheless, in case we are wrong we will also consider the other *Sinclair Roche* factors relied upon.

Apparent bias/confirmation bias/pre-judgment/second bite at the cherry

[3] Enterprise Act 2002, Schedule 2, paragraphs 2(2) and 2(4).

45. The parties are generally in agreement as to the principles we should apply in deciding whether we should recuse ourselves on grounds of apparent bias/confirmation bias and related grounds. By reference to the test in *Porter v Magill* we must ask whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the present panel are biased against BT and/or Ofcom or in favour of Sky/FAPL.

46. Reference has been made to other authorities containing further elaboration of these principles.

47. Lord Hope in *Helow v S/S Home Department* [2008] UKHL 62 at [1]-[3], expanded on the characteristics to be attributed to the informed observer:

> "... the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.
>
> 2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3 Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical

> context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

48. In *Arab Monetary Fund v Hashim (No 8)* (1994) 6 Admin LR 348 (CA), Sir Thomas Bingham MR added:

> "... the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried."[4]

49. In relation to the risk of apparent bias and/or pre-judging, we were referred to the well-known decision of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA). In that case Lord Bingham gave the oft-quoted guidance at [25] (p.479) that a real risk of bias might be thought to arise:

> "… if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

50. In *Sengupta v Holmes* [2002] EWCA Civ 1104, Laws LJ delivered the judgment of the Court of Appeal in a case which concerned whether a judge who had refused permission to appeal "on the papers" should recuse himself from sitting on the substantive appeal on the basis of apparent bias (permission to appeal having later

[4] At pp 354-355.

been given by different judges at an oral hearing). Laws LJ returned to the attributes of the informed and fair-minded observer, and said at [37]-[39]:

> "37. Our fair-minded and informed observer must surely have these matters in mind. That does not turn him into a notional lawyer. It merely reflects his fair-mindedness. However much we may in the name of public confidence be prepared to clothe our observer with a veil of ignorance, surely we should not attribute to him so pessimistic a view of his fellow-man's own fair-mindedness as to make him suppose that the latter cannot or may not change his mind when faced with a rational basis for doing so. That is, I think, what this case involves: not merely the ascription to the notional bystander of a putative opinion about the thought-processes of a judge, but the ascription of a view about how any thinking, reasonable person might conduct himself or herself when, in a professional setting, he or she is asked to depart from an earlier expressed opinion. The view which Miss O'Rourke submits should be ascribed to the bystander does much less than justice, I think, to the ordinary capacities of such a person. In my judgment, therefore, it is not a view which the fair-minded and informed observer would entertain.
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> ***(7) The Adversarial System and the Legal Culture***
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> 38. As I have indicated (paragraph 9) Miss O'Rourke accepts that the bystander may be taken to possess "some knowledge of legal culture". He would know of the central place accorded to oral argument in our common law adversarial system. This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. Knowledge of it should, in my judgment, be attributed to the fair-minded and informed observer; otherwise the test for apparent bias is too far distant from reality. It is a commonplace for a hearing to start with a clear expression of view by the judge or judges, which may strongly favour one side; it would not cross the mind of counsel on the other side then to suggest that the judge should recuse himself; rather, he knows where he is, and the position he has to meet. He often meets it.
>
> 39. Another aspect of our legal culture is the expectations which the judges have of each other. Far from supposing that his fellow-judge would or might stand by an earlier view for no other reason that he had formed it, any judge would positively expect that his fellow would without cavil alter his view if he were objectively persuaded that it ought to be altered; and, to be blunt, would think much the worse of him if he would not. This too, it seems to me, would be known to the bystander."

51. Laws LJ also referred to the following statement of principle made by Mason J of the Australian High Court in *Re JRL ex parte CJL:*[5]

[5] (1986) 161 CLR 342.

> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established'."[6]

52. We now apply these principles to the objections made in respect of the panel as a whole.

53. We deal first with the submission relating to the appearance of apparent/confirmation bias and prejudging. In summary, BT and Ofcom point to: (1) the time and effort the panel invested in producing the Pay TV Judgment; (2) observations the panel made in the Stay Judgment as to the ultimate outcome of BT's appeal; and (3) the fact that some of the panel's findings as to BT's conduct in the negotiations with Sky, and as to Ofcom's interpretation of the evidence relating to those negotiations, were expressed in categorical and forceful terms. They submit that these factors render it inevitable that there would be a perceived inclination on our part to seek to reach the same conclusion as before, to place greater weight on evidence which would support that outcome, and to place less weight on new evidence which would support a different outcome, and that they therefore lead to a conclusion of the panel's apparent bias against BT/Ofcom or in favour of Sky/FAPL.

54. However, this submission does not take account of the fact that the remitted issue is

[6] At [25].

a separate matter, which was not decided in the Pay TV Judgment. We expressed no views and reached no conclusions about it, which was the reason why BT's appeal succeeded and the matter was remitted to be decided by the Tribunal. The findings we made in the Pay TV Judgment have not been the subject of any appeal, save for the unsuccessful cross-appeal by Sky and FAPL on the jurisdiction point. We are not therefore in the position of having to re-consider a finding which has been overturned on appeal.

55. BT's reliance on our comments in the Stay Judgment (see paragraph 24 above) as an indication that we were pre-judging the remitted issue, is misconceived for two reasons.

56. First, it is important to understand what the Tribunal was engaged in at that stage. BT had applied for a stay of the Tribunal's order pending appeal, and it was necessary for us to weigh the balance of justice/injustice in order to determine whether to grant or refuse a stay. In coming to a decision we examined a number of factors, one of which was what would in practice be likely to happen to the WMO if BT's appeal was ultimately successful before the Court of Appeal in circumstances where a stay was not granted, alternatively where a stay was granted. This was clearly a relevant consideration for the purpose of BT's application.

57. It was common ground that in the absence of a stay the WMO would be terminated and would not automatically be revived in the event of a successful appeal, because Ofcom would first have to revisit the investigation, consultation and assessment process before they could re-impose the same or a similar licence obligation on Sky (see the Stay Judgment at [35]). In the passages in that judgment now relied on by

BT (see paragraph 24 above) we were postulating that the same might be the case even *with* a stay if "the primary decision-maker, namely Ofcom" would still need to carry out a re-assessment as to whether the WMO (or similar remedy) was justified in the light of those findings of the Tribunal which had not been appealed (see the Stay Judgment at [39]).

58. We are satisfied that the fair-minded and informed observer, reading the passages in question in the light of the Stay Judgment as a whole, and being familiar with the history of the proceedings and the appropriate considerations in an application for a stay (see the description of her attributes at paragraphs 47, 48 and 50 above), would understand that that is what our reference to the difficulty in the way of a successful appeal rescuing the WMO and the "lack of utility" of such appeal meant. She would not on this basis consider that there was a real possibility that we were making any finding as to what the substantive outcome of any such re-assessment by the decision-maker would or should be, or making any finding which could conceivably form the basis of apparent bias against BT/Ofcom.

59. There is a second reason why we do not consider that the Stay Judgment assists BT and Ofcom's submission. Even if (which is not the case) the point we were making in the Stay Judgment must be understood to be substantive rather than procedural, so that we are to be taken as stating that no re-assessment of the position by the decision-maker after a successful appeal would be likely to justify the WMO or any similar remedy, that would not result in apparent bias. Any such view, in the context of a stay application, could not be regarded as other than provisional. The principles described and applied by the Court of Appeal in *Sengupta* (see paragraph 50 above) would apply, and the fair-minded and informed observer would

understand that judges can and do change their minds where appropriate when full argument is presented (which on any view has not yet been presented on this question). This consideration, too, would be fatal to the objection based on the Stay Judgment.

60. The same consideration is also in point in so far as BT and Ofcom rely upon our view as to the merits of BT's appeal itself, which we were obliged to consider when dealing with BT's application for permission to appeal. We do not see that this could possibly give rise to a perception on the part of the informed observer of a real possibility of bias or pre-judgment. It is part of the core judicial function to take a view of the merits of a proposed appeal in order to deal with an application for permission. Such a view is, by its nature, provisional, and it is well-established that a judge who refuses permission to appeal is not thereby precluded from hearing the appeal itself if permission is later granted by another judge. As already seen, this was the issue facing the Court of Appeal in *Sengupta* (above).

61. Furthermore, the issue before the Court of Appeal in the present case (ie whether the rate card price question should have been determined by the Tribunal) is a separate question from the issue whether BT or another potential retailer could compete effectively at the rate card price. Whereas in the main judgment we expressed a view (which the Court of Appeal held to be erroneous) as to the former, we did not at any stage express even a provisional view as to the latter.

62. Another element of BT and Ofcom's objections to the panel under the head of apparent bias is that some of the findings in the Pay TV Judgment amount to strongly-worded criticisms of BT's conduct in the negotiations with Sky and of

Ofcom's interpretation of the evidence concerning those negotiations.

63. We have reviewed the paragraphs in the Pay TV Judgment to which we were referred by BT and Ofcom. While it is true that those passages contain findings which are adverse to BT and/or Ofcom, we consider that the language that is used is measured and appropriate in the context of those findings. It could not conceivably be construed as "vituperative" or unjudicial, or expressed in such "outspoken" or "extreme and unbalanced terms as to throw doubt on" our ability to try the remitted issue with "an objective judicial mind." (See *Sengupta* (above), per Lord Justice Laws at [34], and *Locabail*, per Lord Bingham, at paragraph 49 above.) We are satisfied that the passages in question, whether individually or in combination, would not lead the fair-minded and informed observer to conclude that there is a real possibility that the panel is or would be biased against BT or Ofcom or in favour of Sky/FAPL in respect of the remitted matter or generally.

64. We recognise that if apparent bias arises, the only option is for the judge to recuse him or herself; there is no discretion. This is so regardless of the fact that it would be more efficient for that judge to hear the matter because he or she is familiar with the case: see *JSC BTA Bank v Ablyazov (No 9)* [2012] EWCA Civ 1551, at [65]. We also bear in mind the advice of Lord Bingham in *Locabail* (above) that *"if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."* In the same decision he also stated that a judge would be "*as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance"* (see [21] thereof).

65. We do not characterise the objections to the panel as frivolous, but they are in our

view tenuous. We are satisfied that the fair-minded and informed observer would not on these grounds whether taken collectively or singly entertain as a real possibility the perception that the panel would hear and determine the remitted issue other than impartially, judicially and without any predisposition to or against one side, or one outcome. We unanimously conclude (subject, in the case of the Chairman, to the separate issue to which we have referred at paragraph 16 above) that there are no grounds upon which we are obliged or entitled to recuse ourselves in respect of the remitted matter.

Other factors

66. In case we are wrong in our conclusion that the question before us is the binary one of whether to recuse ourselves or not, and we are entitled to decline to hear the remitted matter in the light of other factors identified in *Sinclair Roche*, we now briefly consider the additional matters relied upon by BT/Ofcom.

67. *Proportionality*: The argument by BT that the public interest involved in the present appeals, together with the commercial interests at stake, would justify the involvement of a fresh panel, needs to be weighed against Ofcom's observation through leading counsel that the regulator considers that the question whether a WMO was appropriate in 2010 is a matter of purely historical interest and its written submission that it doubts whether it would be proportionate for the proceedings to continue given that Ofcom is now engaged in a forward-looking review of the WMO. It seems to us that the proportionality factor is neutral.

68. *Passage of time*: We do not agree that the passage of time since the original hearing in 2011 militates in favour of the constitution of a fresh panel. As has been pointed

out earlier, the panel delivered its main judgment in the summer of 2012 and was concerned with consequential issues thereafter, its most recent judgment (on costs) being in May 2013. Whilst we agree with BT/Ofcom that the panel cannot be expected to recall all the detailed matters which were addressed in evidence and submissions without memories being refreshed, we are likely to remember a good deal of the material and to be able to pick the matter up more easily and quickly than a new panel. In so far as it is suggested that a risk exists that the original panel would have an entrenched inaccurate recollection or impression which may be detrimental to its determination of the remitted issue, that appears to be at least in part a re-run of the apparent bias/confirmation bias argument. Further, it again fails to take account of the fact that the panel did not determine or express any view on the matter remitted.

69. *Totally flawed decision*: Characterisation of the Pay TV Judgment as having been found by the Court of Appeal to be a 'totally flawed decision' is inconsistent with the facts. In the Pay TV Judgment the Tribunal dismissed the challenges by Sky and FAPL to Ofcom's jurisdiction to take action under section 316 of the Communications Act 2003. This finding was subject to appeal but that appeal was dismissed. None of the other substantive findings of the Tribunal in the Pay TV Judgment were appealed. The matter that has been remitted by the Court of Appeal concerns a separate question that has not yet been determined by the Tribunal.

70. In the light of these considerations, even if (*quod non*) we had a discretion based on the factors identified in *Sinclair Roche,* we unanimously conclude that it would not be appropriate to decline to hear the remitted matter on this basis.

VI. OBJECTION TO THE CHAIRMAN

71. We turn now to the separate objection to the Chairman on the ground of apparent bias. This objection is raised by Ofcom and adopted by BT. It is based on particular passages in a speech to a gathering of anti-trust lawyers made by the Chairman when still President of the Tribunal, on 19 June 2013.[7]

72. The core of the speech was devoted to developments and proposed developments in the law and practice relating to the private enforcement of the competition rules at the UK and EU level. Towards the end of the speech the Chairman referred to the Government's consultation paper, published that same day, entitled "*Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform*".[8] The Chairman commented that some of the proposals consulted upon in the paper were very positive, and others were less so. He identified two examples in the latter category, namely: (1) whether the standard of review in competition infringement decisions should remain as a full appeal "on the merits" or should be changed to some lesser standard; and (2) whether statutory restrictions should be imposed on the Tribunal's power to admit new evidence on appeal. The Chairman explained why changes in these areas could give cause for concern.[9]

73. After that section of the speech was a section entitled "CAT and judicial independence" in which the Chairman reflected upon the position of the Tribunal as "*a small cottage industry*" hearing cases to which very large entities, both public and private, including the Secretary of State, were often party, and upon the

[7] The occasion was the First Annual David Vaughan CBE, QC/Clifford Chance Lecture on Anti-Trust Litigation, entitled "*Competition litigation: what the next few years may hold*."
[8] BIS/13/876.
[9] See Annex 1 to this judgment, where this section of the speech and the sections immediately following it are set out in full.

importance of maintaining judicial independence in that context. The section is set out in full in Annex 1 to this judgment, but the passages to which objection has been taken are contained in the following extract:

> "However, it would be troubling if the risk of a regulatory or enforcement decision being overturned on appeal were to lead to a desire to protect decisions from an appropriate level of scrutiny by an independent judicial body. In the present regulatory climate, where very significant and commercially intrusive powers are given to regulators, acting in the public interest, it is all the more important that the exercise of those powers should be subject to proper judicial oversight……
>
> ….[I]t is equally important that the powers of a tribunal such as the CAT properly to examine and adjudicate upon a reasonable ground of challenge to a regulatory decision should not be overly circumscribed by artificial and restrictive rules as to, for example, the evidence which may or may not be admitted and considered by the court, or other matters which are normally within the scope of a court's discretion when seeking justly to resolve disputes which fall within its jurisdiction.
>
> And it would be of even greater concern if pressures for changes of that kind were seen as a response to judgments of a court. All courts can and do go wrong. The proper way of addressing perceived errors of adjudication is by appeal to, in the CAT's case, the Court of Appeal, not by seeking to undermine the effectiveness of judicial oversight by spurious suggestions for reform of the appeal process.
>
> We must also be wary of the consequences which could arise, albeit unintentionally, from constant pressures for review and change. Judicial independence is vital to all our well-being. It is in the public interest that it should be jealously safeguarded at all times. Our democracy and our freedom depend upon it. This applies no less in the competition and regulatory field where infringement decisions and regulatory initiatives can have very real and sometimes adverse consequences for individuals and companies. It is crucially important that courts, particularly small specialist ones, whose judicial personnel are few in number and well-known to their users, should not have to expect that giving a judgment to this or that effect might well lead to intense lobbying for jurisdictional and procedural changes, with the aim of lessening the scrutiny to which certain decisions would be subject in the future. To achieve such aims would do nothing at all to improve the quality of regulatory decision-making, and would create unwholesome pressure on the courts concerned.
>
> I emphasise that I am not here speaking of proposals for reform where the need for reform is properly and fully evidenced by examples of where things have gone awry, or where genuine procedural improvements to the system can be made."

74. Ofcom submits that it would appear to a fair-minded and informed observer that these passages referred to Ofcom and to these proceedings. Ofcom states that it was at the time of the speech engaged in the Government consultation on the appropriate standard of review in Communications Act 2003 appeals to the Tribunal, and had in

good faith put forward its view that the judicial review standard rather than a full merits appeal ought to be adopted for such appeals. Ofcom states that the Pay TV case was the only case in which the Chairman had made a finding against Ofcom. In Ofcom's submission the speech implies that Ofcom's position on the consultation about the standard of review was "spurious", that it might undermine the independence of the CAT, and that it was a reaction to the Pay TV Judgment, in that being dissatisfied with the outcome of this case, instead of appealing it, Ofcom sought to change the standard of review, and by such lobbying insulate its decisions from legal challenge. Therefore, in Ofcom's submission the fair-minded observer would conclude that the Chairman would approach the remitted matter with a closed mind and/or with a predisposition against Ofcom, and ought not to preside over the remitted matter.

75. At the hearing, in response to a question from Mr Blair QC, Ofcom produced details of meetings with government and consultations at which Ofcom had expressed support for a change in the standard of review in Communications Act 2003 appeals. Ofcom also produced two Guardian articles referring to such support, one of which was published on the same day as the Chairman's speech and made specific reference to the Pay TV case (see Annex 2 to this judgment). Ofcom placed reliance on the timing of the latter article as supporting the implication that the Chairman was referring to this case, in that the fair minded observer must be taken to have understood the article, and to be likely to see the speech as a response to it.

76. Sky and FAPL take issue with the implication which Ofcom and BT draw from the speech, and submit that there is nothing in it which would lead the fair-minded and informed observer to consider that there was a real possibility of bias against

Ofcom.

77. In support of this submission Sky and FAPL make a number of points, including the following: (1) The speech makes no direct reference to Ofcom or to the present case. Ofcom is only one of the many regulatory bodies that appear regularly before the Tribunal. Pay TV is not unique in being a high profile case that had recently gone against a regulator. Other decisions of the Tribunal had recently gone against other regulators. In this connection Sky and FAPL referred to certain cases in that category. (2) Other regulators were engaged in responding to the government consultation on the standard of review. (3) Sky and FAPL point out that the section of the speech complained of concerned the importance of judicial independence; that concept involves the ability to decide cases impartially, fairly, and without fear or favour; the implication that would have to be drawn by the fair-minded observer in order to arrive at a real possibility of bias is that those references to judicial independence were "essentially hypocritical", and that the judge making those references might reasonably be expected to decide a subsequent case involving Ofcom other than objectively and impartially. They submitted that that is not an inference which the well informed observer would draw. (4) They submitted that the speech was a balanced commentary on a legal issue that was live at the time and that, as such, casts no doubt on the Chairman's ability to try the remitted matter with an objective judicial mind. The decision in *Helow* makes clear that the fair-minded and informed observer puts whatever he or she has read or seen into its overall social, political or geographical context.

78. Sky and FAPL submitted that in these circumstances the fair-minded observer could not possibly conclude from the speech that there was a real risk that in a subsequent

case involving Ofcom, the Chairman would decide that case otherwise than by reference to its legal and factual merits.

Discussion and conclusions

THE CHAIRMAN:

79. The principles by which this issue falls to be decided have already been canvassed in relation to the objections taken against the panel as a whole. They are not in dispute. In addition to the authorities already mentioned, we were referred to the Presidential Address to the Holdsworth Club given by Lord Hope of Craighead,[10] and to the Guide to Judicial Conduct, (March 2013 edition). The latter refers, at paragraph 8.1, to a speech by Lord Woolf CJ in the House of Lords in 2003 in which he referred to the "*very important convention that judges do not discuss individual cases*." The Guide later states that "*The risk of expressing views that will give rise to issues of bias or pre-judgment in cases that later come before the judge must also be considered*" (paragraph 8.2). In his Holdsworth address Lord Hope stated:

> "The guiding principle is, of course, that judges should not engage in any activity which would compromise their impartiality. But, so long as that line is not crossed, they have quite a lot of freedom to discuss in public general issues of current interest. They may do so in lectures or on the radio. Clive Anderson's series on BBC Radio 4, which he calls *Unreliable Evidence*, is a good example. Judges from all levels within the judiciary have taken part in it, discussing the approach that courts take to matters of general interest on which they are equipped to comment such as youth justice, ancillary relief in family cases and relations between our domestic courts and the European Court of Justice. This has been described as institutional information, informing the public about the nature and importance of judicial independence and how courts function and why they function as they do. Experience has shown that they can discuss issues of that kind in a sensible and informative way without falling into the trap of compromising their impartiality. As Lord Philips's interview with the press shows, there is still a need to be careful. The closer one gets to an issue of

[10] "*What happens when the Judge speaks out?*", 19 February 2010 at the University of Birmingham.

> current controversy, the greater the need for care. And the golden rule is that judges do not discuss individual cases." (pages 11-12) (footnote omitted)

80. The authorities emphasise that in the end, no matter how similar previous examples of such cases may appear, the issue of recusal is pre-eminently one which is highly dependent on the particular facts. The essential question here is whether the fair-minded and informed observer would draw from my speech the implication that I had broken "the golden rule" in that I was referring to Ofcom and to the present case in the passages complained of, and if so whether she would conclude that there is a real possibility that I would be biased against Ofcom in hearing and determining the remitted matter.

81. I consider that the observer would be aware that the Pay TV Judgment was delivered nearly a year prior to the speech, which itself was given nearly two years ago, that while I was President the Tribunal heard cases involving several regulators and had made a good many decisions both adverse and favourable to regulatory bodies. The observer would know that the Pay TV Judgment had in fact been appealed by BT. She would also have read the whole speech and would have noted that in a preceding passage my criticism of government proposals to reduce the standard of review on appeals to the Tribunal was directed specifically to appeals against infringement decisions (ie penal decisions under the Competition Act 1998 and/or the EU Treaty) – the section being headed "Standard of review in competition appeals". The observer would know from that title, and from the content, that appeals under the Communications Act 2003, and therefore the present appeal, were not the subject of the comments in that preceding passage. The observer would probably conclude that the next section entitled "New evidence" was also directed to infringement appeals, which are the only category specifically

referred to there.

82. On the other hand, it is true, as Ofcom points out, that the following section of the speech on "CAT and judicial independence" is couched in less specific terms, and contains references to "regulatory decisions" as well as infringement decisions and would also encompass *ex ante* regulation, including decisions by Ofcom under the Communications Act 2003. Even so it is quite possible, and perhaps probable, that the observer would read the references in these passages to the standard of review on appeal and to the admission of evidence as referring back to the earlier detailed criticism of proposals on those issues, and therefore as having nothing to do with the Pay TV case.

83. However, I agree with Ofcom that the fair-minded observer must be taken to be aware of the Guardian article published on the very same day as the speech, which discussed Ofcom's support for a change to the standard of review in Communications Act 2003 appeals, and also specifically referred to the Pay TV proceedings. This co-incidence might cause her to draw the implication relied upon by Ofcom (see paragraph 74 above). I consider that *if* she drew that inference, then the "real possibility" test for apparent bias would be satisfied. It is irrelevant for this purpose whether the implication is accurate or not, or whether I had seen or been aware of the Guardian article. Similarly my own view of whether I would deal with the remitted matter impartially and in accordance with my judicial oath is not relevant: it is the appearance which is important in this context.

84. As well as the other authorities drawn to our attention, I bear in mind the Court of Appeal's decision in *Otkriti International Investment Management Ltd v Urumov*

[2014] EWCA Civ 1315. The judgment of Lord Justice Longmore, with which the other members of the court agreed, states at [13] the general rule that a judge should not recuse himself:

> "… unless he either considers that he genuinely cannot give one or other party a fair hearing, or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so."

85. The learned Lord Justice goes on to say that:

> "… there must be substantial evidence of actual or imputed bias before the general rule can be overcome …"

86. I also note the remarks of Lord Justice Chadwick in *Triodos Bank v Dobbs* [2005] EWCA Civ 468 at [7] to which we were taken by Sky:

> "It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so."

87. Although I do certainly feel more comfortable recusing myself, that is not the reason for my conclusion that it would be right to do so in the circumstances of the present case. Given my finding that the observer might draw the implication in question, not least in view of the article published in the Guardian the same day, this seems to me to be a borderline case such as Lord Bingham had in mind in *Locabail* (above), where he stated that in most cases the answer, one way or the other, will be obvious, but if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal (see paragraph 49 above).

88. I therefore consider that, notwithstanding the passage of time and the other factors

urged by Sky and FAPL, I should recuse myself from determination of the remitted matter.

89. I have read, and confirm, what Professor Beath and Mr Blair QC have said about the absence of any discussion with them of my speech or its content prior to the matter being raised by Ofcom in the context of the matter currently under consideration. I also agree with the conclusions of Professor Beath and Mr Blair QC that there is no question of their being "tainted" in the circumstances of this case.

PROFESSOR JOHN BEATH:

90. In relation to the reasons for the decision of the Chairman to recuse himself I should add that it was not until I read Ofcom's skeleton argument in March 2015 that I became aware that, as President, he had delivered a lecture in June 2013 entitled "*Competition litigation: what the next few years may hold*". At no point have he and I discussed its content, either during its preparation, since its delivery or before the hearing. All discussion of it has been in the context of the application to recuse ourselves.

91. In light of this, and the jurisprudence on the issue of "tainting" referred to by Mr Blair QC in paragraphs 95-97 below, I consider that it would not be appropriate to recuse myself on that basis.

MICHAEL BLAIR QC:

92. In relation to the decision of the Chairman to recuse himself for the reasons set out at paragraphs 79 - 88 above, I have to say, with considerable regret, that I agree

with the reasons there stated and the Chairman's decision.

93. I need to add, in relation to that personal decision, that I was not myself aware, until I read Ofcom's skeleton argument in mid-March 2015, that the Chairman, as President of the Tribunal, had made the speech in June 2013 on which Ofcom has based its objection. There had been no prior communication between the then President and me about his intention to make such a speech or of its possible content, and I do not recall ever having been sent a copy, or having myself obtained a copy, of the speech after its delivery.

94. Subject, therefore, to the point in the following paragraphs, the jurisprudence relating to the duty to continue to sit applies to me with full force, and I am not at liberty to recuse myself.

95. I have considered whether it would, in the circumstances of this case, nevertheless be right for me to stand down, on the basis that there was a risk of "tainting" or "infecting" the panel if I were to stay on it. Infection of other members of a tribunal, on the facts of the case, was the conclusion of the Court of Appeal in *In re Medicaments and Related Classes of Goods* (No 2) [2000] EWCA Civ 350. There, a member of the Restrictive Practices Court was found on appeal to have been wrong not to have recused herself, and the Court went on to say (at [99]):

> "Having reached this decision, we then had to consider the position of the other two members of the Court. The trial had reached an advanced stage by the time that it was interrupted by the Appellants' application [that is to invite recusal of Dr Rowlatt and of the other Members]. Dr Rowlatt must have discussed the economic issues with the other members of the Court. We concluded that it was inevitable that the decision that Dr Rowlatt should be disqualified carried with it the consequence that the other two members of the Court should stand down."

96. A different result was reached in *Competition Commission v BAA Limited* [2010]

EWCA Civ 1097. The Court of Appeal, reversing this Tribunal, considered in that case the issue of contamination in relation to a Panel of the Competition Commission carrying out a market investigation into the supply of airport services. The CAT's finding that there was apparent bias in relation to a member of the panel during a three month period at a late but not final stage during the deliberations of the Panel was upheld, but the CAT's decision that the other four members of the panel were contaminated during and following that time was reversed. Maurice Kay LJ agreed ([34] – [35]) with a quotation, from an earlier High Court case of 2007 involving tainting of an arbitral panel, that there was no invariable rule that;

> "where one member of a tribunal is tainted by apparent bias the whole tribunal is affected second-hand by apparent bias." "Cases of this kind are necessarily fact-sensitive."

97. In this case, the facts point firmly against any element of tainting. First, the lack of any contact between the Chairman and myself in relation to the speech (see paragraph 93 above) is pivotal. Further, the remittal decision of the Court of Appeal in this case is based on the conclusion that we, as the original Tribunal, failed to consider on its merits an independent competition concern. That task will have to be carried out on the basis of a fresh start, which was not the position in *Medicaments*. Lastly, I do not see how the fair-minded and informed observer would consider that merely having participated in the proceedings leading to the Chairman's decision to recuse himself can lead to any form of tainting.

98. It follows that it would not be appropriate for me to recuse myself from continuing to act as a member of the panel for this appeal.

VII. CONCLUSIONS

99. In light of the above, it is our unanimous conclusion that the objections made by BT and Ofcom to the panel as a whole provide no grounds on which it would be appropriate for the panel to recuse themselves from hearing and determining the remitted matter (or otherwise to decline to hear and determine that matter).

100. The Chairman recuses himself from hearing and determining the remitted matter in light of the specific objections in respect of the Chairman alone made by Ofcom, supported by BT. The other two members of the panel, Professor Beath and Mr Blair QC, are in agreement with the Chairman's conclusion.

101. It is also our unanimous conclusion that the specific objections in respect of the Chairman alone provide no basis for the recusal of Professor Beath or Mr Blair QC.

The Hon. Mr Justice Barling Prof. John Beath Michael Blair QC

Charles Dhanowa O.B.E., Q.C.
(*Hon*)
Registrar Date: 6 May 2015

Annex 1

Extract

The David Vaughan CBE, QC / Clifford Chance Annual Lecture on Anti-Trust Litigation,
"Competition litigation: what the next few years may hold"
Mr Justice Barling, 19 June 2013

Regulatory appeals consultation

This important document was published by BIS today, and I have not really had much time to take stock of it in its final form. The key questions about which views are being sought include the following:

- Whether the standard of review and permitted grounds of appeal in appeals against infringement decisions under the Competition Act and some regulatory decisions, should be scaled back to a judicial review standard or to more closely defined grounds than at present.

- Whether on appeal before the CAT the introduction of material and evidence which was not put to the competition authority or regulator during the administrative procedure should be subject to greater restriction than at present.

- Whether decisions of the authority taken in the course of a Competition Act investigation, but which are currently not open to review in the Tribunal, should be brought within the Tribunal's jurisdiction, instead of having to proceed in the Administrative Court.

- Whether a consistent standard of review should be introduced in other regulated sectors, including aviation, energy, postal services, water and rail, and whether appeals from these bodies should be rationalised in other respects, including the appeal body.

- Whether there are other possible improvements to regulatory investigations and decision-making, and to the operation of the Tribunal itself.

There are some very positive aspects to the consultation, whatever the original impetus for it may have been. For example, few would argue that the current patchwork of appeal or judicial review routes in respect of ex ante regulatory decisions from the various utility regulators, is anything other than a complete mess, and could not usefully be rationalised. Also to be welcomed are a number of proposals relating to the CAT. These include the introduction of a mechanism for Court of Session judges in Scotland, and High Court judges in Northern Ireland, also to sit in the CAT, and the suggestion that the CAT rather than the Administrative Court should hear interlocutory disputes which arise in the course of a Competition Act investigation.

However, some aspects of the paper are less obviously positive. Time does not allow me to highlight more than a couple.

Standard of review in competition appeals

Revisiting the question whether to constrain the grounds upon which the liability element of competition infringement decisions can be challenged, is a cause for concern. Leaving aside the issue of compliance with Article 6 ECHR, a finding of infringement of the competition rules has a number of very serious reputational and financial consequences for a company and for the executives involved. It can result in huge penalties, including an uplift in penalty in the event of any recividism by the company. Further, such a finding can be used as a binding base for a follow-on damages action.

When the Government recently decided not to introduce a prosecutorial system for these cases with the advent of the new CMA, but to stick with the current administrative system, it was on the basis that appeals against infringement decisions of the CMA would be subject to an appeal on the merits, as now. In its March 2012 response to consultation paper the Government said this:

> "The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and therefore intends that full merits appeal would be maintained in any strengthened administrative system."

It is therefore puzzling to say the least that these apparent second thoughts should have arisen so soon. Any change of the kind envisaged would be ironic, given the current lively debate in Europe about the adequacy of the General Court's jurisdiction to review the Commission's infringement decisions. Of course, this is a consultation not a decision, and it is possible that no change in this regard will ultimately be made.

New evidence

Another cause for concern relates to the possibility of significantly restricting the introduction, on appeal, of what the consultation paper calls "new evidence".

The first point to note is that what is being spoken of as "new evidence" is nothing of the kind. In the administrative procedure, evidence is not placed before an impartial court or tribunal: this first happens on appeal to the CAT. So it is somewhat misleading to confuse that with the *Ladd v Marshall* situation, where a matter has been decided by a lower court and a party seeks to adduce new evidence on appeal to a higher court. In competition appeals the CAT is, in practice, a court of first instance. Further, there is simply no evidence that material which could have been adduced at the administrative stage is somehow being withheld in order to be deployed on appeal. The CAT's current rules are perfectly adequate to enable it to exclude or limit evidence where the interests of justice so require.

If restrictions of the kind set out in the paper are imposed on the CAT then, far from streamlining appeals, which is the ostensible object of this whole exercise, it will almost certainly lead to additional and/or longer appeals both in the CAT and in the

Court of Appeal, as the parties dispute the CAT's admission or exclusion of material by reference to the proposed statutory criteria.

Other aspects

There are several other issues raised by the consultation which require comment, and the CAT will make a considered response in due course.

CAT and judicial independence

Finally, as I near the end of my time as its President, perhaps I might be allowed one or two reflections on the position of the CAT, situated as it is between some big beasts, in the form of very powerful regulatory bodies and huge industry players. Equally, the Secretary of State for BIS, the CAT's sponsor department, is also on occasions a party to judicial review proceedings before the CAT, as in the *HBOS/Lloyds TSB* merger case.[25]

Compared to these institutions and companies the CAT is tiny in budgetary and personnel terms, comprising only 1 more or less full-time judge (the President), a registrar and a staff of about a dozen. In addition there are currently 6 (soon to be 5) fee-paid chairmen, 15 or so inaptly named "ordinary members" – they are far from ordinary and are vastly distinguished. Plus we have the valuable ability to call on the Chancery Division judges for additional judicial assistance. Our annual budget is about £3.7 million, and a large part of that is the rent of our premises in Victoria House. In comparison with the regulators and companies who form the bulk of our litigants, the CAT is a small cottage industry.

On the other hand the cases we deal with, as well as being factually, technically and legally complex, are often extremely sensitive and of great importance to the immediate litigants and others – sometimes a whole sector may be affected.

Sensitivity and importance also exist from the point of view of the regulatory decision-maker. The authority or regulator may have been investigating for a long time, and may feel, rightly or wrongly, that its credibility is to some extent at stake in an appeal from its decision. In some cases a set-back in the CAT may be much harder for the decision-maker to swallow than it is for a losing appellant, who may be more likely to adopt a philosophical attitude of "you win some, you lose some", even where the commercial consequences of losing an appeal are significant. Such differences in reaction are understandable, given the very different interests at stake.

However, it would be troubling if the risk of a regulatory or enforcement decision being overturned on appeal were to lead to a desire to protect decisions from an appropriate level of scrutiny by an independent judicial body. In the present regulatory climate, where very significant and commercially intrusive powers are given to regulators, acting in the public interest, it is all the more important that the exercise of those powers should be subject to proper judicial oversight. It is not now appropriate, if it ever was, to speak of judicial deference to specialist regulators, if by deference is meant that there should be judicial "no go" areas where a rubber stamp

[25] Case No. 1107/4/10/08.

will, in effect, be applied by a court. This would be to place a virtually untrammelled power of commercial life and death into the hands of an administrative agency.

Few, if any, would openly argue for such a situation. But it is equally important that the powers of a tribunal such as the CAT properly to examine and adjudicate upon a reasonable ground of challenge to a regulatory decision should not be overly circumscribed by artificial and restrictive rules as to, for example, the evidence which may or may not be admitted and considered by the court, or other matters which are normally within the scope of a court's discretion when seeking justly to resolve disputes which fall within its jurisdiction.

And it would be of even greater concern if pressures for changes of that kind were seen as a response to judgments of a court. All courts can and do go wrong. The proper way of addressing perceived errors of adjudication is by appeal to, in the CAT's case, the Court of Appeal, not by seeking to undermine the effectiveness of judicial oversight by spurious suggestions for reform of the appeal process.

We must also be wary of the consequences which could arise, albeit unintentionally, from constant pressures for review and change. Judicial independence is vital to all our well-being. It is in the public interest that it should be jealously safeguarded at all times. Our democracy and our freedom depend upon it. This applies no less in the competition and regulatory field where infringement decisions and regulatory initiatives can have very real and sometimes adverse consequences for individuals and companies. It is crucially important that courts, particularly small specialist ones, whose judicial personnel are few in number and well-known to their users, should not have to expect that giving a judgment to this or that effect might well lead to intense lobbying for jurisdictional and procedural changes, with the aim of lessening the scrutiny to which certain decisions would be subject in the future. To achieve such aims would do nothing at all to improve the quality of regulatory decision-making, and would create unwholesome pressure on the courts concerned.

I emphasise that I am not here speaking of proposals for reform where the need for reform is properly and fully evidenced by examples of where things have gone awry, or where genuine procedural improvements to the system can be made.

In a recent address to the Commonwealth Law Conference, the present Lord Chief Justice referred to the need for "eternal vigilance" in matters of judicial independence, and to the importance of avoiding "the first small, even tiny, steps" that might lead to something clearly unacceptable.

By way of example he described how, in the context of the Control Orders issued under the Prevention of Terrorism Act, a former Home Secretary was moved publicly to criticise the "total refusal" of the Law Lords to discuss the issues of principle involved in these matters, and to suggest that it was time for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances. The former Home Secretary suggested some "proper discussion" between the then Home Secretary and the Law Lords with a view to the latter, in effect, providing guidance about what kind of measure would not be liable to be struck down. Surely, he said, the idea that such discussions would compromise the independence of the members of the court was "risible".

In his speech the LCJ observed that, had they taken place, such discussions between the members of the court and the executive would have represented one of those tiny first steps of which we should eternally beware.

We cannot afford to be complacent. A cautionary tale of where “first tiny steps” can end up is that of Judge Maria Afiuni, a Venezuelan judge who granted bail to a banker connected with the political opposition. The banker jumped bail and fled the country. The late President Chavez then had Judge Afiuni jailed, announcing on TV that in another era she might have been brought before a firing squad. He did not say whether this would have been preceded by a trial!

Just as we need fearless judges, so we also need fearless lawyers and advocates. This brings me back to where I began, when I mentioned David Vaughan’s tireless efforts in representing ……

Annex 2

Text of an article by Juliette Garside published in The Guardian on 19 June 2013

Available at: www.theguardian.com/business/2013/jun/19/swinson-business-appeals-system-legal

“The ability of big business to deploy armies of lawyers to prevent regulators from introducing consumer-friendly measures will be curbed under proposals published by the government on Wednesday.

The Business minister, Jo Swinson, is proposing a streamlined appeals system for challenging decisions by the UK's economic regulators, which include Ofcom, the Competition Commission, Ofwat and the Office of the Rail Regulator.

Over the last five years there have been more than 50 appeals of regulatory and competition decisions.Legal challenges have caused delays to the 4G telecoms auction, tied up Welsh utility Albion Water in five years of appeals, and dragged Ofcom and BSkyB into a five year battle over pay-TV pricing.

"Under the current system, every penny one of the incumbent companies spends on lawyers and delaying change is money well spent," said a telecoms industry source. "There is a massive incentive to unpick decisions through technicalities."

Ofcom's battle to loosen Sky's grip on film and sports broadcasting, which had seen the issue pass to the Competition Appeal Tribunal and eventually the Competition Commission, took five years and ended in a defeat for the regulator.

The case involved over 35,000 pages of submissions and evidence, and 41 witnesses of whom 25 gave oral evidence. The appeal was brought in 2011 and lasted around two years in total.

Ed Richards, the Ofcom chief executive, said earlier this year that the UK system was "too legalistic and too open to gaming" by companies able to pay for large legal teams, and that "everything we do now is subject to the huge shadow of threat of litigation."

The government believes the appeals process allows firms to submit "burdensome and unnecessary" documents in appeals, according to a briefing note. A consultation on the proposals to eliminate spurious challenges and shorten the appeals process will run for 12 weeks.

"It is only right that firms can hold regulators and competition authorities to account when they think the wrong decision has been reached," said Swinson. "But it is in nobody's interest that appeals end up being unnecessarily lengthy and costly."