

Monckton Chambers

1 & 2 Raymond Buildings, Gray's Inn, London, WC1R 5NR

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BSkyB Plc, Virgin Media Inc v Competition Commission, SS for Business Enterprise and Regulatory Reform [2010] EWCA Civ 2

Owain Draper

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Introduction

On 21 January 2010, the Court of Appeal (Rix LJ, Lloyd LJ and Mackay J) dismissed the appeal of British Sky Broadcasting Group plc (“Sky”) against the decision of the Competition Appeal Tribunal (“CAT”) of 29 September 2008 in which the CAT had dismissed Sky’s appeal against the Competition Commission’s and the Secretary of State’s decisions that Sky’s acquisition of a minority shareholding in ITV resulted in a substantial lessening of competition (“SLC”) and that Sky should divest itself of that shareholding to below 7.5 per cent.

The Court of Appeal also held that in respect of a separate public interest consideration, that of media plurality, the CAT had erred in law in its interpretation of a relevant section of the Enterprise Act 2002, and allowed the appeals of Sky, the Competition Commission (“CC”) and the Secretary of State on that issue. The CC had found that, in respect of media plurality, there would be no adverse public interest effects arising from the merger. The Court of Appeal refused Sky’s application for leave to appeal to the Supreme Court. After that refusal, Sky confirmed that it would comply with the Secretary of State’s decision to require the appropriate divestment.

Background

In November 2006, Sky purchased around 17.9% of the share capital in ITV plc (“ITV”) at a price of 135 pence per share (“the Acquisition”). Shortly before the Acquisition, Virgin Media Inc (“Virgin”) had announced an offer for the shares in ITV, which was intended to proceed by way of a scheme of arrangement that required acceptance of Virgin’s offer by the holders of 75% of the shares in ITV and was worth around 122 pence per share. Virgin did not, following the Acquisition, proceed with the scheme of arrangement.

The Competition Commission’s investigation

Following a reference by the Secretary of State under Part 3 of the Act, the Competition Commission (“CC”) carried out an investigation into the Acquisition.

It concluded (i) that the Acquisition created a relevant merger situation (“RMS”), and (ii) that this was expected to result in a substantial lessening of competition (“SLC”) that was expected to operate against the public interest. The CC did not, however, consider that the

specific public interest concern raised by the Secretary of State, namely a material adverse effect on the sufficiency of the plurality of persons with control of media enterprises serving relevant UK audiences, would have justified its conclusion on the public interest if looked at in isolation. (The Court of Appeal joined with the parties in referring to this as the media plurality issue.) Having made those findings, the CC recommended that Sky be required to divest enough of its shares to bring it below a 7.5% shareholding.

The Secretary of State accepted that recommendation, and imposed the partial divestiture remedy.

The review by the CAT under section 120 of the Act

Sky applied for a review by the CAT of the CC's findings and the Secretary of State's direction; Virgin sought a review of the decisions on the media plurality issue and remedy. In such a review, section 120 of the Act provides that the CAT is to apply the same principles as would be applied by a court on an application for judicial review.

The CAT rejected Sky's application for review, holding that the CC had been wrong on the media plurality point, but that this did not affect the Secretary of State's decision as to remedy; Virgin's application for a remittal to the CC of the media plurality point was rejected by the CAT on the ground that such action would be otiose, there being no likelihood that any different remedy would be adopted by the CC or the Secretary of State..

The issues for the Court of Appeal

Sky argued that the CAT had erred in law (that being the only ground on which appeals lie to the Court of Appeal from the CAT) in several respects. The first was as to the content of the obligation to apply judicial review principles and whether this required the CAT to apply a greater intensity of review than would be applied on a normal judicial review application. That underlay three other points taken by Sky: that the CC applied the relevant standard of proof wrongly; that it applied the necessary counterfactual analysis wrongly; and that it was wrong in law in rejecting Sky's alternative remedies, even if there were an SLC.

On the entirely separate issue of media plurality, the Commission, the Secretary of State and Sky all argued that on a proper construction of the statute the CC had been right, and that the CAT was wrong to set aside the CC's decision on that issue. Virgin argued that the CAT, rather than the CC, had been right.

The standard and intensity of review

The general point: interpreting section 120(4) of the Act

The words of section 120(4) are plain: the CAT is to apply on an application for review under that section "*the same principles as would be applied by a court on an application for judicial review*".

The Court of Appeal said, at [30], that "*it is well established that courts apply judicial review principles in different ways according to the subject matter under consideration, and that there are some cases in which courts apply a greater intensity of review than others*". The essence of Sky's argument was that the CAT's review jurisdiction under section 120 was another such case, principally because of the specialist nature of the enquiry and of the Tribunal.

The Court of Appeal agreed with the CAT that that argument should be rejected. The CAT had decided that the principles to be applied were those set out and discussed in, principally,

*Tameside*¹ and *IBA*² and which had already been applied in earlier CAT decisions. The Court of Appeal said expressly that Carnwath LJ's judgment in the *IBA* case, in particular the passage at paragraph 100, was fatal to Sky's submissions. The CAT was to apply the normal principles of judicial review, and would apply its own specialised knowledge and experience, which would enable it to perform its task with a better understanding and more efficiently.

The standard of proof and the counterfactual

It was common ground that the correct standard of proof was the balance of probabilities. The argument put by Sky was that the CC did not apply the standard of proof correctly in that it did not apply that test separately to each element in the proposition on which the findings of RMS and SLC depended; it took, instead, an overall view of the likelihood of the result in question occurring. This argument was closely linked to, and presented with, Sky's argument that the CC erred in its application of the counterfactual. The Court of Appeal helpfully defined this concept before describing the CC's approach:

"43 A counterfactual is the hypothesis as regards the facts by reference to which an alleged effect on competition is to be tested. In essence, it involves considering what would have happened in other circumstances, in the present case if the Acquisition had not taken place. The Competition Commission concluded that the appropriate counterfactual in the present case was that ITV would have remained independent, that is to say not acquired by another party (such as Virgin) and, presumably (though the Commission does not say so in terms), not subject to material influence on the part of any other enterprise. At paragraph 3.27, in the section dealing with the counterfactual (paragraphs 3.20 to 3.28), the Commission said: "Nor did we receive any evidence to suggest that a plausible alternative bid for ITV was likely to be made in the foreseeable future."

The CC had made a critically important finding that ITV and Sky were competitors and serious rivals in the all TV market. That finding (and the material on which it was based) was never challenged by Sky. Thus, if the acquisition of the 17.9 per cent had given Sky an ability materially to influence policy, it was the policy of a competitor that was in issue and thus had serious implications for consumers. If that ability existed, the issue was whether there would be incentives and opportunities to use the shareholding to exercise influence. That necessarily involved an evaluation of what ITV was intending to do- in other words, what its policies were- and whether it was likely that opportunities would arise in which the use of the shareholding would prevent or inhibit the implementation of those policies. Moreover, ITV's policies could include the formation of alliances or the opposition to a hostile takeover. A sensible and broad view had to be taken of the counterfactual and of the options open to the company.

The Court of Appeal summarised Sky's submissions on this point as follows:

"51 The essence of Mr Flynn's point on the standard of proof is that each element in the sequence of hypothetical events which leads to a conclusion that there is an ability to exercise material influence has to be established separately on the balance of probability, and the same applies to the analysis on which a finding of SLC is based. Inevitably there is a degree of uncertainty as regards hypothetical future events, and he did not submit that specific examples have to be identified and subjected one by one to the burden of proof, but he did argue that it was necessary to be satisfied on the balance of probability as to each of two matters: first that ITV would need to make a strategic investment of the kind under consideration within the relevant timescale, and also separately that it would wish, and (apart from the question of Sky's influence) be able, to finance it by NPE funding. He argued that, even if there was material on which the first could be held

¹ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

² *Office of Fair Trading v IBA Health Limited* [2004] EWCA Civ 142.

proved, there was no material on which a conclusion adverse to Sky as regards the latter could be reached.

...

53 Mr Flynn's argument based on the counterfactual analysis is that in considering whether Sky had material influence, so that an RMS existed, and also whether an SLC would result from the Acquisition, the Competition Commission did not apply its chosen counterfactual consistently. In particular, as to material influence it considered the possibility that Sky might block a scheme of arrangement, at paragraph 3.57, which Mr Flynn argued would contradict the chosen counterfactual..."

The Court of Appeal dealt at some length with Sky's assertions as to the likelihood of the hypothesised factual situations arising in the relevant time period, both as regards the creation of a RMS and the resulting of an SLC. And it paid particular attention to the CAT's own analysis:

*"69 Standing back from the detail, the issue is and remains whether the Tribunal should have set aside this aspect of the Commission's decision on judicial review grounds. The Tribunal was not conducting a general review of the facts, and Sky had to show either a misdirection in law on the part of the Commission or that its decision was unreasonable on Wednesbury grounds. It seems to us that there was no error of law on the part of the Tribunal as regards the application of the standard of proof. It is not necessary for the Commission to isolate each step in the analytical process and to apply the balance of probability separately at each stage. **The standard of proof applies to the Commission's conclusion on the points which it has to decide, namely first whether the Acquisition gave Sky the ability materially to influence the policy of ITV, and then whether this would cause an SLC. It does not have to be applied separately to each element in the analysis which is used to reach a conclusion on each of these points.***

70 We add that, even if the standard of proof did have to be applied separately, for example both to the question whether ITV would be likely, in the relevant future period, to wish to raise substantial sums, in excess of those covered by the existing waivers, and also to the question whether, if it did want to do so, it could and would adopt the NPE method of funding, we consider that there was enough material available to the Commission for them to conclude that each element was adequately proved.

71 In essence, this is not really a point of law, but an attempt to re-assess the evidence and to produce a different conclusion. We therefore reject these grounds of appeal." (emphasis added)

The rejection of Sky's alternative remedies

Sky's proposed alternative, and clearly less invasive, remedies were (i) placing all of Sky's voting rights in a voting trust and (ii) an undertaking by Sky not to exercise the entirety of its voting rights.

The principal statutory duty on the CC in selecting a remedy is, under section 47(9) of the Act, to "*in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable*". The CC had concluded that the two remedies proposed by Sky were not sufficiently effective or reliable, especially when compared to partial divestiture, to amount to a comprehensive solution to the SLC and adverse effect on the public interest. The reasons given by the CC included concerns over the monitoring of both arrangements and the potential for Sky's shareholding, even with its voting rights denied, to distort the corporate governance of ITV.

But the CC also recognised that its decision on remedies should be consistent with the principle of proportionality, and that where two equally effective remedies were available the less intrusive should be adopted. It had decided on the basis of these principles to require divestment to below 7.5 per cent rather than, as Virgin argued unsuccessfully in the CAT, divestment to zero per cent (i.e. the status quo ante).

The Court of Appeal found that the CC had been right to reach the conclusions that it did as to the potential for that distortion and, in general, in its concerns over the monitoring and effectiveness of the alternative remedies (although more so with regard to the voting trust). Accordingly, it agreed with the CAT that the decision of the CC to reject the alternative remedies was not irrational.

The media plurality issue

Whereas the statutory provisions to be considered and applied in respect of the SLC issue were well known, the provisions in respect of medial plurality were not only novel but obscure and difficult to interpret so as to infer what Parliament had in mind.

The CC had concluded that it had to consider the reality and ask whether at Sky's level of shareholding it could exert such influence on ITV's policies in respect of broadcasting that there was a risk of a reduction in the plurality of persons having control of media enterprises. It concluded that there was no such risk. The CAT held that the CC was wrong, and that it should have proceeded on the basis that ITV would be wholly controlled by Sky, and that the reason for the different approach followed not only from the construction of the relevant subsection in the statute, but also from policy considerations relating to the fragility of media enterprises.

The Court of Appeal, recognising the difficulties associated with the constructions adopted by each side, nevertheless came down in favour of the construction favoured by the CC. The statute should be construed so as to conform with the realities of the situation; and if Parliament wished a different result, based on deeming things to be the case when they were not, it should have said so and made the position clear. Before reaching this conclusion, the Court set out clearly the difficulty in construing the provisions:

“82 The puzzle presented by the two sections is this. On the one hand, section 58(2C)(a) requires an assessment of whether, following the merger, there is or would be sufficient plurality of persons in control of relevant media enterprises. This suggests that one should look at the actual position as regards the extent of control. On the other hand, section 58A(5) provides that where there is any degree of control over one such enterprise by another, both of them have to be treated as under the control of only one person. This seems to impose an overriding assumption of 100% control, regardless of the actual facts. The Competition Commission favoured the former view, and considered that section 58A(5) did not prevent it from having regard to the actual level of control. The Tribunal on the other hand felt unable to reconcile this reading with section 58A(5), and therefore held that the latter view was correct.”

Hansard threw no relevant light on the question, and the Explanatory Notes to the Act were also of little assistance. The Court was provided with detailed submissions from counsel for the CC, the Secretary of State and Sky in support of a reading that permitted the CC to take into account the *actual* degree of control when assessing media plurality. It sets out these submissions with care in its judgment.

As stated above, the Court of Appeal came down on the side of the CC's reading of section 58(2C)(a), reasoning in key part that:

“..the clear requirement for a detailed and realistic analysis which is inherent in the statute as a whole should not readily be overturned by a deeming provision which is not manifestly intended to have that effect.” [120]

It followed that the CC was entitled to take into account when assessing the plurality of the aggregate number of media enterprises (as determined by deeming two or more to be under the control of the same person) the actual extent of the control exercised and exercisable over a relevant enterprise by another.

The Court concluded on this point by saying, at [123], that it was unsatisfactory for the terms of the Act to be open to the conflicting interpretations placed on it by the CC and the CAT.

The result and comments

The overall result was, therefore, that the appeal was dismissed on the competition points (RMS, SLC and remedy) and allowed with respect to the media plurality issue; Virgin's contingent appeal on remedy did not arise.

It remains to be seen whether Parliament will take up the Court of Appeal's invitation to amend the legislation should it consider that the plurality of media enterprises is so sensitive that the deeming of control should bite harder upon the CC's assessment than it will under the Court's reading.

As regards the nature of review under section 120, the Court of Appeal has clarified beyond any doubt that the CAT is not required to adopt a more intensive standard of review than that of the Administrative Court and that the CC is not required to establish the probability of every future decision that an enterprise may make, provided that on the evidence it may reasonably come to the conclusion that there is a RMS or an SLC (as the case may be). The decisions of the CAT in *Sky* and in the subsequent cases of *Tesco*, *PPI* and *BAA*³, all on appeal from the CC, show clearly that the standard of review engaged in by the CAT is intensive, and that the CAT is scrupulous in looking for the evidence on which the CC makes its evaluations of the future conduct of enterprises in the market place.

John Swift QC, Daniel Beard and Rob Williams represented the Competition Commission.

Paul Lasok QC and Elisa Holmes represented the Secretary of State (now, for Business Innovation and Skills).

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For more information on **Paul Lasok QC**, **John Swift QC**, **Daniel Beard**, **Rob Williams**, **Elisa Holmes** and **Owain Draper** please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' section at www.monckton.com.

³ *Tesco plc v Competition Commission* [2009] CAT 6; *Barclays Bank plc and others v Competition Commission* [2009] CAT 27; and *BAA Ltd v Competition Commission* [2009] CAT 35.