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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 June 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
TIM FRAZER
PROFESSOR DAVID ULPH CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ROYAL MAIL PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

WHISTL

Intervener

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HEARING – DAY 10

APPEARANCES

Mr Daniel Beard QC, Ms Ligia Osepciu and Ms Ciar McAndrew (instructed by Ashurst LLP) appeared on behalf of the Appellant.

Mr Josh Holmes QC, Ms Julianne Kerr Morrison and Mr Nikolaus Grubeck (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Jon Turner QC, Mr Alan Bates and Ms Daisy MacKersie (instructed by Towerhouse LLP) appeared on behalf of the Intervener.

Monday, 24 June 2019

(2.00 pm)

Housekeeping

THE CHAIRMAN: Mr Beard, hello again.

MR BEARD: Mr Chairman, hello.

THE CHAIRMAN: I was about to say "Welcome back".

MR BEARD: That would be very rash.

Thank you. There have been various exchanges of documents that the tribunal may have seen during today and over the weekend.

THE CHAIRMAN: I gather things have been going on. We should go away more often.

MR BEARD: Again, I think it would be rash for me to comment really.

I'll come to some of them in a minute. They include some documents from Ofcom following up from a request that we made on Friday, a copy of the GK report that was provided by Whistl, and in addition, although I don't have hard copies here, I believe they have been emailed to the registry, there is a response or responses from our experts in relation to Mr Parker's supplementary report. But I'm going to leave those for the moment.

THE CHAIRMAN: I was going to raise that with you.

MR BEARD: I'm happy to deal with it now, if that's useful.

THE CHAIRMAN: But do I deduce from that you don't have

1 a point to take, or what?

2 MR BEARD: For the purposes of dealing with it in
3 the process of expert consideration, we've set out in
4 those responses what our position is. We do think that
5 putting these points forward late on in the process is
6 inappropriate and we will deal with those matters in
7 submissions in due course. But we have responses to
8 the points that have been raised by Mr Parker and rather
9 than arguing the toss about whether or not they should
10 be considered as corrections, substantial corrections or
11 something more than that, we've simply dealt with them.

12 THE CHAIRMAN: So you have responded to them?

13 MR BEARD: We have responded to them, yes.

14 THE CHAIRMAN: I suppose, would it help if we said we think
15 enough is now enough?

16 MR BEARD: We would be delighted.

17 THE CHAIRMAN: I think there will be no more supplemental
18 opinions from any party, otherwise it makes
19 the examination process rather ridiculous.

20 MR BEARD: Well, we agree and we're not content with the way
21 that matters have been conducted, but in
22 the circumstances, rather than getting into some
23 argument given that we're about to start the expert
24 process we thought it was more efficient to just deal
25 with it.

1 THE CHAIRMAN: I have avoided saying it was wrong, I have
2 just said there should be no more.

3 MR BEARD: Yes. With that, I was going to go back to the
4 cross-examination of Mr Wells.

5 THE CHAIRMAN: Mr Wells, nice to see you again.

6 MR NICHOLAS WELLS (continued)

7 Cross-examination by MR BEARD (continued)

8 MR BEARD: There are just one or two points I wanted to pick
9 up from Friday, if I may. The first, you may not have
10 a copy of the transcript but you may remember, I asked
11 about whether a merger would have an impact on whether
12 or not there was a need for cash on the part of PostNL
13 and you were quite emphatic in your response and that
14 may have been due to the terms of my question. But
15 I just want to ask you again was the failure of a merger
16 material to whether or not PostNL and Whistl needed to
17 secure external funding?

18 A. No.

19 Q. Could you please have a copy of the Ofcom documents that
20 have just been provided today. I think there's a file.
21 I just want to go to tab 8 in this bundle. This is an
22 internal email within Ofcom. It's dated 20 February and
23 it says at the top:

24 "All, we met this morning with Nick Wells ... and
25 Angus Russell ... on TNT's end-to-end operations ...

1 Please note the confidentiality ..."

2 Then the first sentence of the next paragraph:

3 "The impact of the failure of the deal with UPS
4 means there is less cash for business development
5 including for E2E. As a result, TNT will shortly be
6 announced in the PostNL 2012 results on Monday that
7 they're looking for external co-investment ..."

8 Now, that is a report of something you or possibly
9 Mr Russell said to Ofcom, isn't it?

10 A. It is, correct.

11 Q. And when it refers to "the failure of the deal with
12 UPS", what it's referring to is the failure of the
13 proposed acquisition of TNT expressed by UPS, isn't it?

14 A. It is.

15 Q. And what it's referring to there is the fact that
16 PostNL, which was the largest shareholder in
17 TNT Express, was hoping for cash from that deal, wasn't
18 it?

19 A. They were a minority shareholder.

20 Q. They were a significant shareholder?

21 A. Yes.

22 Q. But this were hoping for cash from that deal, weren't
23 they?

24 A. Yes.

25 Q. So in fact what you said at the time was rather

1 different from the answers you've given me. In fact
2 what you said to Ofcom was that the need for cash was
3 a result of the failure of a merger between UPS and TNT,
4 wasn't it?

5 A. What I thought I said was that the demerger of
6 TNT Express from PostNL left PostNL with some
7 significant debt, which is true.

8 Q. But when I asked you again today whether or not a merger
9 was material to the need for cash, you said no again,
10 didn't you, Mr Wells?

11 A. I did.

12 Q. And that's wrong, isn't it, Mr Wells?

13 A. If that deal had gone through, then I accept that there
14 would have been less -- they would have been less cash
15 strapped. So I apologise.

16 Q. Thank you.

17 Another matter we were talking about on Friday was
18 the 6 December announcement of Royal Mail's intention to
19 change its pricing, introduce the price differential,
20 and you referred to having a call with
21 Mr Stuart McIntosh on that day, 6 December.

22 A. Mm-hm.

23 Q. In the course of that call, do you remember him
24 referring to the price differential being aggressive
25 conduct by Royal Mail?

1 A. I don't recall the content.

2 Q. You don't recall the content.

3 Could we just go back to tab 3 in this bundle,
4 please. So this again is an internal email or chain of
5 emails. I'm going to pick it up at the bottom email
6 from Stuart McIntosh, circulated internally. It says:

7 "I spoke to Nick Wells -- he had called me and asked
8 that I get back to him.

9 "They do not know the details yet but consider that
10 the new pricing plan will discriminate against them as
11 an E2E operator in a manner similar to the proposals RM
12 floated around this time last year."

13 Then if we go over the page, picking up two
14 paragraphs from the bottom of this email, it says:

15 "I said that even if there is a potential issue with
16 RM's proposals, our getting involved will not result in
17 an immediate or quick outcome -- we would need [to]
18 consider and assess them which would take time.

19 I suggest that, at the very least, he should have
20 discussions with his legal advisers to assess his
21 options, particularly if the issue is as critical as he
22 suggests."

23 I'm not going to ask you any questions about your
24 contact with your legal advisers, Mr Wells.

25 "I also noted that LDC will have done their due

1 diligence and that they presumably would have considered
2 the possibility that RM would respond quite aggressively
3 at some point -- but that is an issue for them and LDC
4 (provided RM stays within the law and the relevant
5 regulations)."

6 So he's there referring to the price differential,
7 isn't he?

8 A. He is.

9 Q. And he's talking about the price differential being
10 quite an aggressive response by Royal Mail?

11 A. Yes.

12 Q. But you don't remember him saying that?

13 A. I don't remember him saying that, no.

14 Q. Thank you.

15 Now, in any event, as we explored on Friday, you
16 were confident that Ofcom would find in your favour in
17 its investigation and declare the price differential
18 unlawful so it wouldn't be implemented. If we go to
19 your statement at paragraph 74. Do you have your
20 witness statement? Oh, do you have a loose copy of your
21 statement?

22 A. Yes, this is the one I brought in the other day just
23 with the amendments that you allowed me to bring in.

24 Q. Yes. That's fine.

25 A. No other markings.

1 Q. I just was checking which one it was. Thank you,
2 Mr Wells. Yes, 74.

3 I'm just confirming what I've just articulated. You
4 say:

5 "To be clear, throughout 2014 (and even afterwards).
6 I always thought that it was likely that Ofcom would
7 find that the price differential was unlawful. I think
8 that all of the management shared that view."

9 And as we were exploring on Friday, there was no
10 surprise in that position given the reaction you were
11 getting from Ofcom. That's correct, isn't it?

12 A. It's correct that -- that we shared the view that it was
13 wrong. That's true. But we could never be sure.

14 Q. No. And just to be clear, you referred to contact with
15 Ed Richards earlier on in the process. You had another
16 meeting with Ofcom on 20 March with Ed Richards. I'm
17 not actually going to take to that but do you recall
18 that meeting?

19 A. 20 March 2014.

20 Q. 2014, I'm sorry.

21 A. No.

22 Q. I'm going to move on. Now, he stressed at that meeting
23 that he was taking your complaint seriously and was
24 willing to meet LDC and PostNL. Do you recall that at
25 all?

1 A. I -- not -- not specifically, no.

2 Q. Do you know whether Mr Richards did meet with LDC or
3 PostNL thereafter?

4 A. I don't believe so.

5 Q. No, thank you.

6 A. We had a meeting obviously in 2013.

7 Q. Yes, we canvassed that on Friday.

8 If we could just go to paragraph 84 in your
9 statement, you refer to the fact in April 2014 that:

10 "... Ofcom announced that it would investigate our
11 complaint under its competition powers rather than under
12 the regulatory framework, and also carry out a review of
13 the regulatory framework for access pricing."

14 Now, can we just look at the position here. 9 April
15 was the relevant time of announcement, and if you could
16 have volume C4B at tab 109.

17 A. Sorry, tab?

18 Q. 109, Mr Wells.

19 Does the Tribunal have it? Yes.

20 Mr Wells, do you have it? It's a chain of emails
21 that starts from Nick Wells right at the top.

22 A. Mm-hm. Yes.

23 Q. So you say:

24 "Hi chaps."

25 So this is an email going to LDC.

1 "Note from Angus. This really does look positive
2 particularly the comments that Angus received from Ofcom
3 this afternoon which appeared frank and unguarded about
4 sorting out RM abuse of their position.

5 "When you have some time it might be good to catch
6 up for dinner. We might even be able to sign in
7 August!"

8 So here, what you're saying is that on the basis of
9 what you've been told by Mr Russell about Ofcom's
10 position, you're very optimistic about the investment
11 going ahead; that's correct, isn't it?

12 A. We were -- yes, I -- I believe positive about the
13 response that we had from Ofcom, that's correct.

14 Q. Yes. So when in your witness statement you say "I was
15 disappointed", that's not really an accurate approach --
16 summary of the position?

17 A. Yeah, I don't quite frankly know the timing of the two.

18 Q. Well, in your witness statement you say:

19 "In April 2014 Ofcom announced that it would
20 investigate our complaint under its competition powers
21 rather than under the regulatory framework, and also
22 carry out a review of the regulatory framework ... I was
23 disappointed ...", then you say "... because I had been
24 hoping for a decision in August/September ... and
25 I understand that this change would push back that

1 timetable."

2 But that's not what you're saying here, is it?

3 A. No, I'm just reading the context of the memo as well and
4 seeing --

5 Q. Oh, it's fine, Mr Wells, we're coming to that.

6 MR TURNER: Well, if Mr Wells has something to say, maybe
7 I should look at it.

8 MR BEARD: Well, he said he was reading it, Mr Turner. I'm
9 certainly content for him to read it because I'm going
10 to ask him questions about it.

11 Let's look at the email from Mr Russell, this is
12 9 April, to you and others:

13 "Dear all, Ofcom have announced two related actions.
14 This is very good news."

15 This is you.

16 "What have Postcomm done?

17 "First, they will pursue our complaint as
18 a competition law complaint."

19 You understood that to focus on the price
20 differential, did you, Mr Wells?

21 A. I did.

22 Q. "They have concluded that the issues are, essentially,
23 competition law matters and that they are duty bound to
24 investigate in this way.

25 "Second, very pleasingly, they are acutely aware of

1 our timing constraints and so have opened a simultaneous
2 review of the Access Condition."

3 So this was the more general condition about access
4 pricing, is that right, Mr Wells?

5 A. That's right.

6 Q. "By decoupling the processes, this allows them to alter
7 the access condition and give us market and regulatory
8 certainty this calendar year whilst pursuing the
9 competition law breaches.

10 "Why did they do this way?

11 "It would have been too difficult to pursue
12 a complaint for regulatory conditions whilst, at the
13 same time, changing those very conditions. This is
14 a very clever use of their processes which takes account
15 of the proposed investments by and in TNT Post UK. They
16 describe it as 'the best of both worlds'.

17 "They say granting Royal Mail complete freedom has
18 not worked and provisions which are more prescriptive
19 are needed."

20 Then he says:

21 "What happens now?

22 "Ofcom has set up a team ... to carry out these two
23 workflows.

24 "The competition case will get under way and
25 information will be required of Royal Mail. An Ofcom

1 official said (informally) that we [that's presumably
2 Whistl] have demonstrated a clear abuse of dominant
3 position in our complaint."

4 So you were being told by Ofcom at this stage via
5 Mr Russell that in relation to the price differential
6 issue Ofcom considered there was a clear abuse of
7 dominant position. Was that your understanding?

8 A. No, we had a good chance of success.

9 Q. Well, it was an informal indication by the Ofcom
10 official that Mr Russell is conveying that message to
11 you and that's how you understood it, I assume?

12 A. Yes, I also understood that there are no certainties
13 when it comes to regulation law.

14 Q. Understood.

15 "On the Access Condition review, a consultation will
16 be issued in August (possibly July) with details of how
17 to address Ofcom's view that 'under the current
18 structure Royal Mail have too much ability to exclude
19 competition'. The consultation will include [I think]
20 detailed conditions and give 'a clear statement of
21 intent for the control on pricing going forward'. Their
22 specific objective is to establish 'what structure best
23 serves competitive entry but does not unduly
24 disadvantage Royal Mail'.

25 "In other words, we will have more regulatory

1 certainty than currently exists."

2 So what you understood to be being said here was
3 Ofcom were making clear that they thought that
4 Royal Mail needed to be more heavily regulated one way
5 or another; is that correct?

6 A. I don't know about being more heavily regulated. This
7 was one of many updates, I think, that we got from
8 Mr Russell during the course of this year, and of course
9 we were always hoping for a positive outcome so we could
10 secure the investment and continue the roll-out.

11 Q. Just two points there. What was clearly being indicated
12 to you by Mr Russell was that "conditions which are more
13 prescriptive are needed" was what Ofcom was already
14 saying at that stage; is that right?

15 A. Sorry, what paragraph?

16 Q. It's the first full paragraph on the page. It's one of
17 the ones I read to you. But that's what you understood
18 the position to be?

19 A. Paragraph where?

20 Q. Sorry:

21 "They say that 'granting RM complete freedom has not
22 worked and conditions which are more prescriptive are
23 needed'."

24 So that's what you understood to be the position
25 that Ofcom were adopting as at 9 April?

1 A. To be honest, I -- I can't recall what my thoughts were
2 back then, and I can't recall this memo.

3 Q. Understood.

4 And then it goes on below:

5 "What is the timing?

6 "The intended regulatory conditions will be
7 published by August ... this means we will have a very
8 good idea of the future regulatory structure in late
9 summer."

10 So this was part of the reason why you were saying
11 you could be signing by August in your email. Correct?

12 A. We were hoping for some certainty by August, that's
13 true.

14 Q. But you were saying that the certainty by August would
15 be enough for you to sign, that's what you are hopeful
16 of?

17 A. It is, because without signing we don't get the
18 investment.

19 Q. Of course, of course.

20 But what you're saying here is that what matters is
21 the general regulatory certainty that you want, not
22 particularly the competition complaint issues. That's
23 correct, isn't it?

24 A. No.

25 Q. Well, if we go on, it says:

1 "On the competition investigation, this will
2 certainly run into 2015."

3 Do you see that?

4 A. I do.

5 Q. So the competition investigation would not be concluded
6 by August 2014 on the basis of the intelligence from
7 Mr Russell, would it?

8 A. It would appear so, yes.

9 Q. That's right. So that's what you read, and yet you were
10 optimistic that you would be able to sign up in August,
11 so your real concern was about general regulatory
12 certainty, wasn't it, Mr Wells?

13 A. No, it wasn't. It was getting some clarity over
14 the pricing differential.

15 Q. But Mr Wells, that's not consistent with what's written
16 here by your own legal adviser upon which you comment in
17 the subsequent email, is it?

18 A. But Mr Beard, this is one of probably many documents.

19 Q. But I'm just asking you questions about this one,
20 Mr Wells, and your answer isn't consistent, is it,
21 Mr Wells?

22 A. I think I'm being consistent from my memory back then
23 that my overriding concern was getting certainty to
24 the pricing differential which had a hugely negative
25 impact on our business and stopped the roll-out of

1 end-to-end because we couldn't get investment.

2 Q. I'm not going to put the questions further.

3 If I keep going down to the conclusion:

4 "This is a really good result and shows Ofcom's
5 clear intention to encourage competition which is
6 a fundamental part of their regulatory framework. That
7 Ed Richards tipped Nick off about the announcements is,
8 apparently, exceptional. Ofcom remain open to speak to
9 LDC and PostNL whenever helpful."

10 So apart from this email, had you had a quiet call
11 from Ed Richards beforehand tipping you off about this?

12 A. Well, it says that there. I don't remember the exact
13 content of the call with Mr Richards.

14 Q. Was there a prior call with Mr Richards that indicated
15 what the announcement was going to be on 9 April?

16 A. Yes.

17 Q. There was. So you were tipped off about it, Mr Wells?

18 A. I -- I recall a call from Mr Richards, yes.

19 Q. And that was before the announcement was made, wasn't
20 it, Mr Wells?

21 A. It was.

22 Q. So you were tipped off, weren't you, Mr Wells?

23 A. If that's what you call "tipped off", yes.

24 Q. Well, actually, it's Mr Russell's language, Mr Wells.

25 A. Okay.

1 Q. Now, in fact, apart from that call, you had a further
2 meeting with Mr Richards in July 2014. If we go to
3 document 8 in that bundle of additional documents from
4 Ofcom -- I'm sorry, it's at tab 10.

5 THE CHAIRMAN: We leave C4B for now, Mr Beard?

6 MR BEARD: For now. I think we may be come back to it for
7 various documents.

8 So this is a meeting in July of 2014. This is
9 a note, again internal to Ofcom, indicating that
10 Mr Richards and others had met you and others, including
11 from LDC and PostNL, and I'm not going to work through
12 it. Feel free to read it, Mr Wells, but picking it up
13 in the fourth paragraph:

14 "I summarised where we were. On the Competition Act
15 case we had recently published a bulletin entry on our
16 website saying we were currently collecting and
17 analysing information, were planning to take a
18 provisional decision in autumn/winter 2014."

19 So things had maybe moved back a little bit, had
20 they, by that point, Mr Wells, in your view?

21 A. Yeah, probably it looks as if they've moved back from
22 August to autumn, yes.

23 Q. I see. And they say they're working through as quickly
24 as possible. If we pick it up, the person from PostNL,
25 so third paragraph from the bottom, said:

1 "... they would have to draw a line in the sand at
2 some point, and that they felt the need to make
3 a decision this calendar year on whether to invest
4 further in UK end-to-end roll-out."

5 So what's being said there is so long as that
6 decision is taken as expected by the end of the year,
7 then the investment can go ahead. That was the position
8 being put forward at that point; is that correct?

9 A. At that point in time, as we know, we continued a little
10 further than the end of 2014.

11 Q. Yes. Then if we just go over the page, it's said:

12 "I said [I think this is the author of Ofcom] it
13 would be inappropriate to tell them [that's you and
14 others] what we had been considering and noted that we
15 hadn't yet been through governance. I said that the
16 issues we were considering were clear, ie whether the
17 access pricing rules were too flexible, and particularly
18 given the concerns raised about price differentials and
19 zonal tilt given Ofcom's guidance in 2012."

20 So that was an indication from Ofcom as to their
21 desire at that point to regulate more generally; is that
22 how you understood it, Mr Wells?

23 A. Yes, of course I -- I wasn't privy to these comments at
24 all.

25 Q. You weren't privy to the comments? You were at this

1 meeting, Mr Wells.

2 A. No.

3 Q. Are you sure you weren't privy to --

4 A. Yeah, yeah, yeah. So what is the question? Did my
5 interpretation of that meeting --

6 Q. I just took to you that --

7 A. -- expand on the general regulation, access regulation,
8 is that your question, Mr Beard?

9 Q. Well, I asked you whether you understood that to be an
10 indication from Ofcom as to their desire at that point
11 to regulate more generally, which is something you
12 wanted. Is that how you understood it, Mr Wells?

13 A. I can't honestly remember.

14 Q. I see.

15 A. But what I can remember is being fairly focused on
16 wanting a resolution for the pricing differential. I'm
17 not a regulatory expert, I'm a businessman, and what
18 I wanted was just a solution to the issue that we had.

19 Q. This issue that you had in relation to general
20 regulation is one that you in fact pick up in your
21 witness statement, page 28 of 30. So this is in
22 paragraph 91 and you start the paragraph talking about
23 March 2015, about the formal withdrawal of the CCNs.
24 And you say there, picking it up at the top of 28:
25 "Whatever the reason, however, Royal Mail did not

1 state any intention to give up on the idea of a price
2 differential. On the contrary, they suggested in
3 a statement on their website that they 'would want to
4 reissue the change notices to allow customers a fair and
5 reasonable notice period' given the time that had
6 elapsed. The withdrawal of the CCNs therefore did not
7 give us or LDC certainty about whether a price
8 differential would be implemented in the future."

9 So there you're concerned about the implementation
10 of the price differential, or a price differential --
11 I should be more exact -- aren't you?

12 A. I am.

13 Q. And you're saying that the key issue for you here wasn't
14 the fact of that particular price differential, it was
15 the risk of a price differential between NPP1 and APP2
16 being implemented by Royal Mail. That's what concerned
17 you, wasn't it?

18 A. It was.

19 Q. So, just to be clear there, what you're saying is that
20 the withdrawal of the CCNs didn't remove the uncertainty
21 that you had in relation to pricing concerns?

22 A. The removal of the CCNs, just for clarity, was welcome,
23 but of course it was simultaneously -- a message from
24 Royal Mail simultaneously announced that they would
25 reintroduce them, and that was my concern. And that

1 didn't give us certainty.

2 Q. So can I just go back slightly. I explored with
3 Mr Polglass last week the reaction of Whistl to the
4 6 December announcement -- 6 December 2013, I'm sorry --
5 that Royal Mail was intending to introduce a price
6 differential and I explored with him the steps that you
7 as Whistl took immediately to deal it including planning
8 to delay the roll-out, that's correct, isn't it?

9 A. We planned to delay the roll-out, that is correct.

10 Q. And you continued to develop your delayed roll-out
11 version and in particular you applied what was referred
12 to as Luke scenario 5b; is that correct, Mr Wells?

13 A. That's correct.

14 Q. And as a consequence of that -- and you set it out in
15 your witness statement at paragraph 77 -- in
16 February 2014 you decided to roll out to three more SSCs
17 in 2014, so that's Harrow and Liverpool in Q1 and
18 Edinburgh in Q4. That was the plan, wasn't it,
19 Mr Wells?

20 A. That was the plan.

21 Q. Yes.

22 And that was in line with 5b. Could I just pick up
23 on this bundle C4B, tab 101, please. I want to just
24 look at the email halfway down the page:

25 "Dear [redacted name],

1 "Thank you for your email and further analysis."

2 Do you see that, Mr Wells?

3 A. I do.

4 Q. This is an email from someone at LDC. You'll see
5 the second paragraph:

6 "Our strong preference is for scenario 5b of your
7 two presented scenarios which is the closer case to what
8 we envisaged in the original model. We also concur we
9 should keep the deal the same as what was agreed in
10 the SPA. This would mean completing post the Ofcom
11 ruling once we have clear visibility on the ruling
12 implications."

13 So just really one point in relation to this. This
14 was LDC saying, "You've come up with different roll-out
15 scenarios, delay scenarios, we want to go with the one
16 that is closest to the original plan." That's correct,
17 isn't it?

18 A. Not the original plan, no. I think what this is saying
19 in the second paragraph, if I'm not mistaken, is our
20 strong preference is for scenario 5b.

21 Q. Yes.

22 A. Of your two presented scenarios.

23 Q. Yes, absolutely. Sorry, of the two presented scenarios
24 they wanted to go with the one that was closer to what
25 was envisaged in the original plan. That's correct?

1 A. Yes, it was very different, if I can just clarify, from
2 the original plan. So scenario 5b was the roll-out of
3 Harrow, Liverpool in quarter 1, because they had already
4 been committed, and in -- later in the year, I think
5 quarter 3 or 4, for a further roll-out of an SSC in
6 Edinburgh. That is very different from the original
7 case.

8 Q. Understood.

9 Now, none of these plans, scenario 5b, 4b or any
10 variants, I think as was explored on Friday, assumed
11 that the price differential would be implemented, did
12 they?

13 A. None assumed they would.

14 Q. I want to ask you one or two questions in relation to
15 zonal tilt, if I may. You pick this up in your witness
16 statement at 68 and 69. In broad terms -- and I don't
17 mean to unfairly paraphrase -- you thought the zonal
18 tilt part of the CCNs was wrong but you say there
19 essentially it wasn't your principal concern; is that
20 correct?

21 A. That's correct.

22 Q. But you knew that zonal tilt was one of the things that
23 Royal Mail had indicated previously it might well
24 propose to do; that's correct, isn't it?

25 A. Yes. It was always a possibly.

1 Q. In fact, when you met Royal Mail on 17 December 2013 you
2 specifically asked about zonal tilt, didn't you?

3 A. Quite likely.

4 Q. If I could just take you now to Whistl bundle B10,
5 please. So B10. You should have a slide deck that's
6 entitled "Anti-competitive implications of Royal Mail's
7 Access pricing proposals"?

8 A. Yes.

9 Q. This is one of your presentations. If you pick it up at
10 slide 16, you've got your planned E2E coverage in London
11 and other urban areas.

12 Then on 17 it says:

13 "Price reduction in areas facing E2E competition
14 funded by rural price increases."

15 So this is zonal tilt; is that correct?

16 A. That's correct, yes. This is where they increased the
17 rural and decreased London.

18 Q. So in this slide deck where you're setting out what you
19 say are the concerns, the first concern you're
20 referring to is zonal tilt.

21 If you go over two slides to slide 19, it's headed:

22 "NPP1 discount acts as retroactive rebate and
23 contract terms create de facto exclusivity."

24 So this is the price differential which you're here
25 saying operates as a retroactive rebate; is that

- 1 correct?
- 2 A. Well, slide -- are we referring to slide 19?
- 3 Q. Yes, I'm just clarifying it because the first bullet
4 point says:
- 5 "1.2% discount on NPP1 relative to APP2 is targeted
6 at preventing interest in the end-to-end business."
- 7 So this slide is about the price differential, isn't
8 it?
- 9 A. This slide is about the price differential, slide 19,
10 for sure.
- 11 Q. And if we go on to slide 24, it says:
- 12 "None of Royal Mail's contracts could be used when
13 TNT expands its end-to-end network."
- 14 The first point you make is in relation to APP2:
- 15 "APP2 is not viable due to the distorted level of
16 the zonal price based surcharges and the need to match
17 NPP1 discounts."
- 18 So the first thing you're emphasising is actually
19 the zonal tilt in relation to APP2; that is correct,
20 isn't it?
- 21 A. Are you -- sorry, for clarity, are you asking me is this
22 the first thing I'm asking -- I'm clarifying in this
23 presentation?
- 24 Q. Well, the first thing you clarify here under this slide
25 "none of Royal Mail's contracts could be used" is that

1 APP2 is not viable because of the distorted level of
2 zonal price based surcharges and you also then refer to
3 a need to match NPP1 discounts. But the first thing
4 you're emphasising there is the zonal pricing, isn't it?

5 A. On this slide but may I take you to another part of this
6 from a presentation where -- you know, slide 8, slide 9,
7 slide 10, slide 11, slide 12, slide 13, slide 14, slide
8 15, they're all relating to the impact of the pricing
9 differential --

10 Q. Those are in relation to --

11 A. -- on our customers.

12 Q. -- particular customers, I completely understand that.
13 And just going through, because one might read your
14 statement and think that all that you were really
15 emphasising on all of this was the price differential,
16 but what we see when you come to crystallise what the
17 problems are is emphasis on zonal tilt as well as price
18 differential. I'm not saying you don't deal with
19 the price differential in this slide pack, obviously you
20 do, Mr Wells, but you also emphasise the importance of
21 zonal tilt, don't you?

22 A. We do, and of course in my statement I think I also
23 mention that we complained to Ofcom about both
24 the pricing differential and the zonal tilt.

25 Q. And it made sense for you to be complaining about the

1 zonal tilt because in fact that would have a much bigger
2 impact on your business, wouldn't it? Mr Harman has
3 estimated that when you look at the analysis provided by
4 your economists, Frontier, that the total estimated
5 impact of the CCNs that they look at, just under 20% is
6 attributable to the price differential; over 80% is
7 attributable to the zonal tilt, isn't it?

8 A. It would appear on the face of it that the financial
9 impact of zonal tilt was more damaging than pricing
10 differential, but the reality is that the zonal tilt was
11 a calculation that Whistl did, and our customers didn't
12 realise the impact of the zonal tilt on our business.
13 The most immediate impact on our business was the -- was
14 the price differential of 0.25 that could have
15 a damaging impact, between 25 to 40-odd per cent
16 discount to our customers.

17 Q. But as a rational operator, you were very concerned
18 about zonal tilt which essentially meant that of the
19 overall impact of the CCNs that was being calculated,
20 four-fifths of it came from that zonal tilt. You were
21 concerned about that, weren't you, Mr Wells?

22 A. We were concerned about zonal tilt. We were more
23 concerned because of the immediate impact to
24 the business of pricing differential, because if that
25 had materialised, we would have lost our DSA business.

1 Q. So when you say if it had been materialised, if that had
2 been implemented you were more concerned about the
3 impact of that implementation?

4 A. We were very concerned, yes, about the pricing
5 differential, and it's any future pricing differential.

6 Q. Yes, so further changes apart from the CCNs that could
7 be made were of concern to you?

8 A. Yes.

9 Q. Now, I just want to go back to pick up one or two points
10 about the process of getting a decision in relation to
11 various matters. I think we probably canvassed a number
12 of these issues, and if we go back to your witness
13 statement at 57, when you met with Ofcom on 9 December,
14 I think you say you thought that -- they thought that it
15 would be concluding an investigation in six to nine
16 months and you said that you thought LDC would see this
17 as a relatively short delay and hang around. So what
18 you're saying there is, if you had a decision within six
19 to nine months, LDC would still be there, the delay
20 would stop, LDC would invest and things would roll
21 forward; is that right?

22 A. We were hopeful that if we got clarity on this the
23 investment could still continue in 2014.

24 Q. So this was part of the reason for that email we've seen
25 talking about concluding a process in August was

1 something that Mr Russell thought was good news and you
2 were optimistic about; that's correct, isn't it?

3 A. That's right.

4 Q. If we could just go to the cross-examination bundle,
5 tab 4, please.

6 THE CHAIRMAN: Which is the cross-examination bundle?

7 MR BEARD: I'm so sorry this is Mr Wells' cross-examination
8 bundle. We handed it up at the start of the
9 cross-examination. It's the one that has documents that
10 are not in the files for the witness and one or two
11 others.

12 Internal email again within Ofcom --

13 A. Sorry, I seem to have the wrong bundle.

14 Q. I'm so sorry.

15 A. I've got Citipost.

16 Q. No, it should have the name Ian Strawhorne at the top
17 left. There was another one that was handed up on
18 Friday. I'm sorry.

19 So this is a document -- this is just really my old
20 reference. We've looked at this document already this
21 morning. But here we have the notes of the meeting --
22 internal note of the meeting, and I just wanted to pick
23 up in the first paragraph, you're saying there, apart
24 from the fact that you've clearly been involved in
25 lobbying with one of the Johnson brothers and the number

1 10 policy unit, in the first paragraph, you're
2 emphasising that it's a time-limited investment
3 opportunity.

4 A. I see that.

5 Q. And as I say, we looked at this earlier, and that
6 reference to "time-limited investment opportunity" is
7 emphasised at the end of the note of the meeting as
8 well.

9 A. But of course we wanted to emphasise the urgency
10 required so we could continue our roll-out plans.

11 Q. Yes. And you talk about this in paragraph 90 of your
12 statement and your disappointment that you didn't even
13 get a consultation on access pricing until
14 December 2014.

15 So December 2014 you got a consultation on access
16 pricing, which was the regulatory decision or a step in
17 the regulatory decision-making process that you had
18 wanted, and that was key to your thinking, as we've
19 seen, in April 2014, but you emphasise there it was only
20 a consultation, so that was disappointing?

21 A. But it was only a consultation and we knew that
22 Royal Mail and some of our competitors would resist
23 the proposals.

24 Q. Yes, so it wasn't just Royal Mail, it was others as
25 well, as you fairly say there. Is that correct?

- 1 A. That's correct.
- 2 Q. And in fact you didn't actually get any real progress on
3 the competition decision issues until a statement of
4 objections of some sort was published in July 2015;
5 that's correct, isn't it?
- 6 A. I'm -- I'm not sure about the statement of objections.
7 Can you run that by me again, please?
- 8 Q. Sorry, it's sometimes referred to as the "provisional
9 competition decision" --
- 10 A. Right.
- 11 Q. -- that was in -- the first version of it was provided
12 in July 2015 and then an amended version was provided in
13 October 2015, you remember that?
- 14 A. Okay.
- 15 Q. And overall that competition investigation ended up
16 taking over four years which was a real disappointment
17 to you?
- 18 A. It was.
- 19 Q. And you say that by the time of mid-2015, LDC had had
20 enough, the delay in investment, the pause that had
21 occurred by then, should be a stop, and you say at
22 paragraph 96:
23 "There was no realistic possibility of getting
24 alternative funding by that point in time."
25 Is that correct?

- 1 A. That's also correct, and --
- 2 Q. And -- I'm sorry, I cut across you.
- 3 A. Perhaps I should explain that, I mean, LDC's decision
4 would have largely been influenced by management. They
5 were investors, and professional investors, and they
6 would have taken the advice of management.
- 7 Q. Well, we're going to come on to LDC in a moment. But
8 actually, what I wanted to ask you, the reason there was
9 no realistic possibility of getting alternative funding
10 by the time LDC decided to withdraw was because in fact
11 there wasn't any resolution, in your view, to the
12 various investigations, both the access pricing
13 consultation process and the Competition Act
14 investigation process; is that correct?
- 15 A. That's correct, along with the view that there was --
16 seemed to be a determination of Royal Mail to -- to
17 remove us from the end-to-end market.
- 18 Q. But it was a general sense of uncertainty as to how
19 the regulation of the market would operate that you
20 considered meant there was no realistic possibility of
21 getting alternative funding; that's correct?
- 22 A. No, that's not entirely correct. I think it was the
23 behaviour primarily of Royal Mail and their desire and
24 determination to snuff out end-to-end competition and
25 not having suitable recourse.

1 Q. I'm sorry, just to be clear, that is, you're saying,
2 after they built in the suspension mechanism, the CCNs
3 were suspended and at this point they'd also been
4 withdrawn but you still maintain that position,
5 Mr Wells?

6 A. What I would like to clarify on that position, although
7 the CCNs were withdrawn, Luisa Fulci wrote to us and
8 said, "We're going to reintroduce them", and they only
9 withdrew them because of their price changes in April.
10 Every year Royal Mail have a price change and I think
11 that they withdrew the CCNs because of complexity with
12 that hanging over them. But they made it perfectly
13 clear on their website and in the change notice that
14 they were going to reintroduce them. And it was that
15 level of uncertainty that was partly responsible for us
16 coming, unfortunately, to the conclusion that we
17 couldn't continue to support the end-to-end losses
18 because we didn't have the investment to close down
19 end-to-end.

20 Q. So just to be clear on this, you're saying that because
21 Royal Mail said although the CCNs have been suspended
22 throughout and withdrawn, because they might explore
23 further price changes including some sort of price
24 differential, that, to you, meant you shouldn't carry on
25 with the business. That's what you have said. Am

1 I correctly understanding it?

2 A. Well, there was a number of factors when you make these
3 unfortunate decisions to exit a market that you've been
4 trying to develop for several years, and that was one
5 factor that led us to exit the market: the instability
6 and uncertainty of them reintroducing a price change.

7 Q. And your fear there was that the price change would be
8 permitted; correct?

9 A. There was always a likelihood, but of course we were
10 optimistic that we would get a -- we were the right side
11 of the law and we would get -- we would get this changed
12 through the Regulator or through the competition
13 process, but there's no guarantees.

14 Q. I see, but it was general uncertainty in relation to
15 unknown price differentials or other price changes that
16 gave you those concerns; I'm understanding correctly?

17 A. You are.

18 Q. Thank you.

19 Now, you quite fairly on Friday said you weren't
20 giving evidence for PostNL and you're not giving
21 evidence on behalf of LDC, so when you, for instance,
22 talk about the reasons why LDC put forward a MAC clause,
23 or invoked it, you can't actually speak on behalf of LDC
24 about that, can you?

25 A. For clarity, we recommended that there was a MAC clause

1 inserted.

2 Q. Yes, and we saw that on Friday, absolutely.

3 A. Yes.

4 Q. Yes.

5 So I just want to look at one or two points in
6 relation to the withdrawal of investment. I think we
7 probably only have two documentary pieces of evidence.
8 The first I want to pick up is in bundle C4C at 143.
9 I don't know if you've seen this email chain before. If
10 you read it from the bottom, it's someone at Citypress.
11 Do you know who they are?

12 A. I'm guessing it's a PR or media relations.

13 Q. That's what we understand to be the position as well.

14 Thank you, Mr Wells.

15 And they were advising LDC, I think; is that
16 correct?

17 A. I couldn't -- it looks like it, for sure.

18 Q. Have you seen this exchange before?

19 A. No.

20 Q. No.

21 So when at the end of it it's said in an email from
22 an individual we've seen an awful lot of being referred
23 to, albeit not so much material from him:

24 "If they want us to say we stop the discussions we
25 can include a full list of reasons of why but not sure

1 they will like the list."

2 So that's someone at LDC communicating back to
3 people in relation to PostNL's position; is that
4 correct? Is that your understanding, but it may be you
5 can't comment?

6 A. It would seem, I agree with you, to be an exchange of
7 comments between one of our main contacts at LDC and
8 the press office.

9 Q. Could I just go on to tab 153 in this bundle. This is
10 a document from LDC to Ofcom. It's 2017, because Ofcom
11 decided to, with some prompting from Royal Mail, ask
12 some questions from LDC. 21 April 2017. Have you seen
13 this document before, Mr Wells?

14 A. No, I haven't. Not at all, no.

15 Q. I'm not going to ask you questions then about that
16 document, which talks about LDC's reasons for its
17 withdrawal of investment.

18 I'm about to move on to some new topics. I'm
19 conscious of the time. Would now be a useful moment to
20 have five minutes?

21 THE CHAIRMAN: Are you planning to conclude this this
22 afternoon?

23 MR BEARD: Most certainly, yes.

24 THE CHAIRMAN: Then I think we'll pause for five minutes.

25 MR BEARD: I'm grateful.

1 (3.02 pm)

2 (A short break)

3 (3.08 pm)

4 MR BEARD: You very fairly before the short break emphasised
5 that your concern in relation to the price differential
6 was the price differential materialising, and that was
7 the essence of your complaint to Ofcom in January 2014,
8 wasn't it, your concern that this price differential
9 could materialise; is that correct?

10 A. I think we complained on two levels, didn't we: pricing
11 differential and zonal tilt.

12 Q. And either of those -- or both of them materialising
13 with what you were really concerned about, correct?

14 A. Yes, more concerned about the pricing because of its
15 immediate impact, but we were obviously concerned about
16 both.

17 Q. Just a couple more topics that I wanted to pick up. In
18 your witness statement at paragraph 67, if you would.
19 Paragraph 67, you talk about your belief there that
20 Whistl wouldn't be eligible for NPP1, and we've seen in
21 passing on some of the slide decks that that was the
22 position you were adopting in relation to your planning
23 and submissions. So your belief at the time was that
24 Whistl was not eligible for NPP1; is that correct?

25 A. That's correct.

1 Q. Now, you met with Royal Mail on 17 December.
2 Bundle C4B at 72, if you would. Tab 72, I'm sorry.
3 We've already been to this document previously, but if
4 you recall, it's a meeting you attended with Royal Mail.

5 If we just go over the page to -- internal page
6 numbering -- 2, you'll see the fourth paragraph, so it's
7 Mr Agar, said:

8 "They considered the revenue from each customer and
9 the price plans. They would look at the impact on each
10 customer and assess where some customers have a possible
11 mitigating effect."

12 And further down the page -- well, you then say:

13 "It was blindingly obvious what happens to TNT if
14 they're staying on national price plan too."

15 And then you ask for details of the proposals, and
16 then Mr Agar fairly says:

17 "Stock exchange compliance perspective got to give
18 everyone simultaneously."

19 Was that what he said to you?

20 A. At that stage we didn't know what the pricing
21 differential was, that's true.

22 Q. Yes.

23 A. That didn't become obvious until January.

24 Q. And then at the bottom of the page:

25 "SA said that the prices would be cost-reflective

1 and TNT Post has options to mitigate the effect."

2 And he said that:

3 "... TNT Post currently satisfied the conditions of
4 NPP1."

5 So at that time you were being told that you were
6 eligible for NPP1; is that correct?

7 A. This is just -- can you point me to --

8 Q. I'm sorry, it's right at the bottom. It's the final --

9 A. On page?

10 Q. -- two lines on page 2. I'm sorry, Mr Wells. It says:

11 "SA said that the prices would be cost-reflective
12 ..."

13 Do you see that? And then the second sentence --

14 A. "... options to mitigate the effect".

15 Q. Yes, but then in the second sentence:

16 "SA said that TNT Post currently satisfied the
17 conditions of NPP1."

18 A. I think that's true, we did currently satisfy them.

19 Would you like me to expand on why, and why we wouldn't
20 continue to satisfy them?

21 Q. Well, I wanted to just clarify, because you say in --
22 you're obviously going to be able to answer that and set
23 this out, but what I wanted to clarify was whether or
24 not you were saying at the time in December that you
25 weren't eligible for NPP1 and you're saying you accept

1 you were eligible for NPPI?

2 A. Theoretically we were eligible, Mr Beard, and I feel for
3 the benefit of the tribunal I perhaps ought to explain
4 this.

5 Q. Please.

6 A. At the time we rolled out to five SSCs and we were
7 planning to roll out to more. On what we call
8 the national spread benchmark, that meant that we could
9 fail I believe at the time six SSCs, and on the basis
10 that our plans were to roll out more in the first
11 quarter, we would have been immediately in breach of
12 that contract. That was obvious.

13 Q. Well, we will leave the obviousness of that for
14 the moment, Mr Wells.

15 THE CHAIRMAN: It does rather depend on what you mean
16 by "eligibility", doesn't it?

17 MR BEARD: Yes, it may well depend on what the contractual
18 terms mean in these circumstances.

19 A. Well, I think the contractual terms, if I may, said that
20 we had reasonable likelihood of meeting the terms, which
21 we wouldn't have done.

22 Q. Well, Mr Wells, I think we will be coming back to that.
23 I'm not going to ask you questions about contractual
24 interpretation, you may well be very pleased about that,
25 those are legal matters for due course, but it's

1 Royal Mail's case that you were eligible and that once
2 you were on NPP1, the terms on which you would be
3 required to leave NPP1 were governed by a set of
4 specific terms.

5 But let's just stick with the document for a moment.
6 On page 3, just at the second paragraph, you'll see
7 Mr Agar said that:

8 "Customers could switch from NPP1 to NPP2 if
9 the customer failed to meet the criteria of NPP1 and
10 offered to help TNT Post to model the outcomes to enable
11 it to make the best choice for its business."

12 So Royal Mail was there offering to assist in
13 relation to how TNT Post would best deal with any of
14 these changes; that's correct, isn't it?

15 A. To say Royal Mail were there to help us model I think is
16 bordering on ludicrous.

17 Q. Well, that's what's being offered there, isn't it?

18 A. Yeah, it won't surprise you that we wouldn't take them
19 up on their modelling. We can do our own modelling and
20 our own modelling said that we weren't definitely
21 compliant.

22 Q. So you refused to engage with Royal Mail in relation to
23 that modelling exercise and took your own view about how
24 the eligibility criteria should work, didn't you?

25 A. We took our own view on the eligibility, that's true,

1 Mr Beard. To say that we did not or would not want to
2 engage in Royal Mail is absolutely not true. That's why
3 we came to this meeting.

4 Q. I didn't say not engage, I said you didn't want to
5 engage with what they had offered in terms of modelling,
6 did you?

7 A. We didn't believe the output would be meaningful.

8 Q. But you didn't ask, did you?

9 A. It's a bit like somebody has shot you and then you're
10 going to ask them to then sort of take you to hospital
11 and do the surgery.

12 Q. Well, it may well be very noble to die, but if they're
13 offering, wouldn't that be a more prudent way of dealing
14 with matters, Mr Wells?

15 A. I honestly don't think that Royal Mail were in
16 a position to help us do the modelling, Mr Beard.

17 Q. I see.

18 A. We had experts in our business and I had advice that was
19 given to me that said we were ineligible to shift to
20 NPP1 for a number of criteria.

21 Q. Right. If you go over the page to page 4, picking up
22 the third comment down, so the second SA comment,
23 Mr Agar repeated that mitigation strategies are
24 possible. And you work further down the page to page 4,
25 so five from the bottom -- six from the bottom, you say

1 you asked if Mr Agar considered E2E to be a form of
2 arbitrage and Mr Agar said that there were "mitigation
3 strategies available by using NPP1 for some mail and
4 using a zonal contract for the rest". That's what he
5 said to you, wasn't it, Mr Wells?

6 A. He did say that.

7 Q. So he is there saying that you can have arbitrage
8 between the two price plans, can't you, Mr Wells?

9 A. He's suggesting that we could do that. But do remember
10 that arbitrage did not exist back then.

11 Q. Oh, Mr Wells, we're going to come to that. But he is
12 there saying you could engage in arbitrage, isn't he?

13 A. He's saying that we could utilise NPP1 and a zonal
14 contract.

15 Q. That's arbitrage, isn't it, Mr Wells?

16 A. That is arbitrage as long as you can comply with the
17 tolerances.

18 Q. But it is arbitrage, isn't it?

19 A. Using two price plans I guess is a definition of
20 arbitrage.

21 Q. And you actually specifically asked him whether or not
22 you could engage in arbitrage and he said yes, didn't
23 he?

24 A. But we're back to the same point that we didn't feel
25 that we were eligible for NPP1.

- 1 Q. If we go on to page 6, top of the page:
- 2 "Mr Agar repeated his offer to help TNT Post to look
3 at the impact of moving to an NPP1 contract."
- 4 So at the end of the meeting he is re-emphasising
5 that they would help you with the move to an NPP1
6 contract because you were currently on NPP2. You
7 understood that, didn't you, Mr Wells?
- 8 A. We understood if we'd have moved to NPP1 we would have
9 had to stop our end-to-end roll-out.
- 10 Q. That's not what's being said here, is it, Mr Wells?
11 Mr Wells, what you had here was a meeting that you
12 sought with Royal Mail and you went into it with
13 a closed mind, didn't you, Mr Wells?
- 14 A. Absolutely not.
- 15 Q. They were offering to you to help with ensuring that you
16 could be on NPP1 and that you could engage in arbitrage.
17 That was what was being said to you, wasn't it,
18 Mr Wells?
- 19 A. That's not my idea of help.
- 20 Q. I understand, but that was what was being offered to you
21 and you were simply rejecting that out of hand, weren't
22 you, Mr Wells?
- 23 A. I don't think that they meant help. I think that they
24 meant that you could move to NPP1 and stop your
25 roll-out, and I agree, if that was the case, we would

1 have been compliant, but then, if we'd have moved to
2 NPP1, continued the roll-out, and if the question is do
3 I honestly think that Royal Mail would not do everything
4 in their power to breach -- say we're in breach of the
5 terms and conditions, I think our collective
6 understanding was that they were determined to do that.

7 Q. So nothing that they could have said would have made any
8 difference to you, could it, Mr Wells?

9 A. That's not true either. If they'd have said, "Will we
10 reduce the -- we'll withdrew the pricing differential
11 because we understand the impact on your business", then
12 that would have been helpful.

13 Q. But in terms of the differential pricing that they were
14 putting forward, no offers of help, no commitments as to
15 eligibility, no undertakings that arbitrage was
16 permissible and appropriate would have been of use to
17 you, you say; is that correct?

18 A. No, that's -- that's not correct, because arbitrage, as
19 I've said, Mr Beard, didn't really exist. It was in its
20 infancy, and possibly most importantly again I think
21 Mr Polglass referenced this in his witness statement,
22 that we delivered 4 -- or carried about 4 billion items
23 upstream, and out of that there was probably 80 million
24 items generated, most of which were zonal, and
25 legitimate zonal contracts. So this element of

- 1 arbitrage didn't exist; nobody understood it
2 particularly.
- 3 Q. Let's just have a test of that. You've moved from "it
4 didn't exist" to "it was in its infancy" in your answer.
5 Now, when did you sign the new access letters contract,
6 Mr Wells?
- 7 A. Could you remind me?
- 8 Q. Yes, March 2013. And you know that you opted to be able
9 to operate on a national price plan and a zonal price
10 plan?
- 11 A. Yes.
- 12 Q. So your intention at the time you signed the contract
13 was to be able to engage in arbitrage between a national
14 plan and a zonal plan; that's correct?
- 15 A. There is some element where clients genuinely want zonal
16 postings. Peterborough City Council, for example, who
17 go mainly to urban or cable companies, or somebody like
18 Thames Water, would legitimately -- I use those as
19 examples -- would legitimately use a zonal contract
20 because they want the cheapest price.
- 21 Q. But the point I'm making is that you, as Whistl,
22 contracting with Royal Mail, set up an access letters
23 contract to enable arbitrage on your part in March 2013;
24 that's correct, isn't it?
- 25 A. I think that we set up the contract to enable some

1 selective clients to use the zonal contract.

2 Q. Are you suggesting the contract was specifically limited
3 to particular types of client, Mr Wells?

4 A. Mainly, yes.

5 Q. Was it, Mr Wells? If we go to the contract, are we
6 going to see any specification of any particular types
7 of contract?

8 A. You'll see an APP2 contract and a zonal contract.

9 Q. No, your contract with Royal Mail. Are we going to see
10 any specification of what sorts of people can use NPP2
11 and ZPP3 with you?

12 A. No, probably not.

13 Q. No. You're not, are you, because it was built by you to
14 enable arbitrage. And in fact you engaged in arbitrage
15 right from 2013 onwards, didn't you, Mr Wells? You used
16 both national mail postings and zonal mail postings as
17 Whistl right from 2013, didn't you?

18 A. Again, for the purposes of clarity, we had, as
19 I mentioned, 4 billion items. I think 80 million of
20 those items were either -- were either zonally based or
21 there were three clients at the time that posted
22 a national price and then posted on a zonal basis. We
23 weren't beneficiaries of that. One was Scotts of Stow,
24 one was M and M and the other was a mailing house.
25 Three clients. This is small volume, extremely small

1 volume. We weren't beneficiaries from the -- from those
2 clients using two different price plans.

3 Q. Well, we will be able -- the question about
4 beneficiary -- the nature of the beneficiary here we can
5 come back to and it will be a matter for submission, but
6 in particular, these were your clients, weren't they?

7 A. They were our clients, yes.

8 Q. And so in order to make sure that you maintained
9 compliance with the national criteria for NPP2, you
10 posted the mail from those clients you're referring to
11 on zonal plans, didn't you?

12 A. We placed a very tiny amount on a zonal contract in
13 2013.

14 Q. Well, let's -- I'm going to pass up -- we've had a look
15 at what we understand to be Whistl's national and zonal
16 mail profiling over the years.

17 (Handed).

18 Now, you won't have seen this table previously, and
19 obviously those acting for Whistl will be able to look
20 at the numbers in it, because obviously this is
21 Royal Mail's understanding of the supply of national and
22 zonal mail to Royal Mail by Whistl over years. So
23 the top chart is national and the bottom chart is zonal.

24 A. Mm-hm.

25 Q. And what you'll see is, in relation to 2013 and 2014,

1 it's not -- it wasn't possible to break out volumes by
2 zone, so that's why it says "no split available", but in
3 broad terms -- and I'm not going to refer to the
4 specific numbers just in case there are confidentiality
5 concerns, albeit I think you've given this broadly --
6 the number you see for 2013/2014 broadly reflects
7 the numbers you've already indicated, I think, Mr Wells;
8 is that about right?

9 A. If we're talking about the brown bar chart --

10 Q. Yes.

11 A. -- I think I said 80 million and that looks about --
12 like 80 million.

13 Q. I think you said 80 million and three other customers,
14 but we can go back to the transcript, but I agree with
15 you that's broadly in that ballpark, yes.

16 A. It included those three customers.

17 Q. So what we see here is over time a substantial growth in
18 use of zonal mailing and a decline in national mailing,
19 but throughout the period and right back to 2013 we see
20 arbitrage, don't we, Mr Wells?

21 A. At the time that we're talking, '13 and '14, I still
22 maintain that arbitrage didn't really exist, and I think
23 I'm going to restate my point, which is that three
24 companies were using arbitrage, the ones that
25 I mentioned previously. And the other 40 million items

1 out of the 80 million were genuine zonal places and
2 that's why I reinforced the point that arbitrage didn't
3 really exist back then.

4 Q. Well, Mr Wells, what we see is that you had customers
5 who you carried out posting for using zonal plans at the
6 same time as you were posting on national plans. So you
7 knew back in 2013/2014 that you could engage in
8 arbitrage, didn't you?

9 A. We knew that we could post on a national and zonal
10 basis --

11 Q. And -- I'm sorry.

12 A. -- and that was a very basic understanding.

13 Q. So you're saying that you knew that you could engage in
14 arbitrage but you didn't explore the possibilities for
15 arbitrage in 2013 fully; is that your evidence?

16 A. We didn't look at the opportunities for arbitrage
17 because the level of sophistication required was beyond
18 us and anybody else quite frankly, and we thought, to
19 restate my point, that we would have broken on that
20 contract the tolerances of the national spread because
21 of our roll-out plans, and we would not have been able
22 to practically, even if it was possible, we wouldn't
23 have practically been able to deal with arbitrage,
24 Mr Beard.

25 Q. Well, what this shows is that you did engage in

1 arbitrage, it grew over time over 2013 and that you
2 didn't explore the possibilities for arbitrage that
3 Royal Mail had specifically indicated to you existed in
4 the 17 December meeting, did you?

5 A. No, I disagree.

6 Q. Thank you.

7 Just one more question, I think. If we could go
8 back to paragraph 32 in your witness statement. So just
9 in paragraph 32, you refer to:

10 "The E2E roll outs in London in 2012 acted like
11 a trial. They allowed us to test E2E with limited risk.
12 If it hadn't worked, we would have pulled E2E and
13 accepted the sunk costs. But it did work. Our first
14 E2E roll outs in London were a success. I know that
15 Royal Mail has suggested that we had operational
16 problems but that isn't true. Of course, there were
17 some teething problems, which is inevitable with any
18 start-up but, as Mr Polglass explains, we dealt with
19 those quickly."

20 So there you're talking about the teething problems
21 you had as an early start-up in 2012. Am
22 I understanding correctly?

23 A. Sorry, can you just repeat the question?

24 Q. Yes, I'm just referring to that paragraph.

25 A. Yes.

1 Q. And you're saying there -- you're referring to
2 the roll-outs in 2012 and you're saying there were some
3 teething problems that were solved and what you're
4 referring to are the teething problems in 2012 as part
5 of that roll-out there, aren't you?

6 A. I'm suggesting that there were some teething problems
7 but overall it did work.

8 Q. Yes, in 2012?

9 A. Mm-hm.

10 MR BEARD: I have no further questions for the witness.

11 Thank you, Mr Wells. The tribunal may have some
12 questions and Mr Holmes may have some questions.

13 THE CHAIRMAN: We'll wait a little to ask our questions.
14 Mr Holmes?

15 Cross-examination by MR HOLMES

16 MR HOLMES: Thank you, sir.

17 So I have a few questions arising from the questions
18 Mr Beard asked about Whistl's meetings with Ofcom in the
19 course of December 2013.

20 On Friday, you were asked by Mr Beard about your
21 meeting on 9 December; do you recall that?

22 A. I do.

23 Q. And I think this is the meeting you describe at
24 paragraph 55 of your witness statement where you explain
25 that the meeting was at Ofcom's office and that you and

1 Mr Angus Russell attended; that's correct, isn't it?

2 A. That's correct.

3 Q. Mr Beard asked you if there were any notes of the

4 meeting. Ofcom has since located its note of

5 the meeting, which is in the Ofcom additional documents

6 bundle. If the witness could be handed that, please.

7 It's at tab 4. You see that this document contains two

8 meeting notes, one at the top of a call between Angus

9 Russell and Mr Chris Rowsell of Ofcom, and then in

10 the middle of the page a record of a meeting between

11 Mr Rowsell from Ofcom and yourself and Mr Angus Russell;

12 do you see that?

13 A. I do.

14 Q. And --

15 MR BEARD: Just to be absolutely clear -- and I'm not going

16 to object to Mr Holmes proceeding -- this is a document

17 that I haven't put to the witness, so for the purpose of

18 re-examination it's an interesting course.

19 MR HOLMES: This isn't re-examination, sir, so --

20 THE CHAIRMAN: I was just going to ask, you're

21 cross-examining presumably. And you did ask if there

22 was a note of this meeting.

23 MR BEARD: Yes, I absolutely did.

24 THE CHAIRMAN: Now you've got it and now you're not happy

25 that there is one, is that right?

1 MR BEARD: No, I'm always happy.

2 THE CHAIRMAN: You're very happy that there is a note
3 produced and you're not objecting to Mr Holmes?

4 MR BEARD: No.

5 MR HOLMES: Thank you sir.

6 You see the note records several key points that
7 were made by Whistl at the time. The first we need not
8 dwell on, the value of end-to-end entry, employment
9 growth, competition efficiency incentives and so on.

10 I'd like to consider the second with you. It states
11 that:

12 "Even a 0.3p differential between the National Price
13 Plans would have a c.£10m per annum impact on TNT, ie
14 greater than TNT's 2012 operating profit."

15 Pausing there, that was one of the points you made
16 at this meeting, is that correct?

17 A. That's correct.

18 Q. And you're here describing the additional access costs
19 that the differential would impose on Whistl if it
20 stayed on APP2 in order to be able to roll out its own
21 delivery network; is that right?

22 A. That's right.

23 Q. Was this financial impact on the current operating
24 profits of the business at the start of the roll-out
25 a commercial consideration which you took into account

1 when considering whether or not to proceed with
2 end-to-end roll-out?

3 A. It -- it was almost certainly a commercial
4 consideration, but it was also a consideration on the
5 impact of the -- of the business going forward. So
6 clearly there was a -- an impact of 10 million, say,
7 which would have effectively wiped out of our profits,
8 but clearly there were other more strategic impacts if
9 this pricing differential had been allowed.

10 Q. And do you want to elaborate on those?

11 A. Well, clearly in terms of the customer base there was
12 a huge -- although 0.3 seems like a tiny amount, that
13 had a huge impact in terms of 25% to 40% discount on
14 some of our clients. So you could imagine going along
15 to Tesco with that type of discount of 0.25. They would
16 be able to save on 200 million items half a million
17 pounds.

18 In a very price-sensitive market, although our
19 service was good and our account management was good and
20 the clients were -- trusted us, price was particularly
21 important, and the impact of the pricing differential
22 would have had a huge impact on our downstream access
23 business, and of course without customers, without
24 volume and without the downstream access business, we
25 wouldn't have end-to-end.

1 Q. Thank you.

2 If I could consider now the next two bullets with
3 you. You go on to say at the meeting:

4 "They were going to have to ..."

5 That you were going to have to disclose Royal Mail's
6 letter to LDC and you were concerned that this could
7 scupper LDC's investment and that without LDC's
8 investment, your end-to-end operation was not viable.

9 So two questions. First, if LDC had not invested,
10 did you consider at the time that Whistl could proceed
11 realistically by obtaining an alternative source of
12 investment, or by funding the roll-out itself?

13 A. It's probably easier to answer the second question,
14 which is did we consider the ability to fund
15 the roll-out ourselves, bearing in mind, at the time we
16 talked about the potential deal structure here was 40%
17 PostNL, 40% LDC, 20% management.

18 The benefit that LDC brought to this was investment
19 money to enable the roll-out. PostNL made it clear that
20 they didn't have the strategic priority because they had
21 retrenched to provide that funding, and management
22 clearly couldn't afford it, although it's important to
23 say that management here just weren't corporate
24 managers, we put money on the line ourselves, because we
25 had belief in the business plan and belief that

1 end-to-end could provide a viable alternative long term.

2 Q. And secondly -- apologies, I cut you off.

3 A. Yeah, I think I've answered the second bullet.

4 Q. Yes.

5 A. The first one was did we consider alternative

6 investments.

7 Q. Yes, did you consider at the time that Whistl could

8 realistically proceed by obtaining an alternative source

9 of investment?

10 A. Well, I think what we'd been through is a process where

11 we'd established that there was funding there from LDC,

12 but to go through the whole process again would have

13 taken quite a long time and I think trying to establish

14 new funding without certainty would have made it nigh on

15 impossible, which of course is why we weren't rolling

16 out anyway. So imagine saying to another bunch of

17 institutional funders, "We have failed with this

18 investment because of pricing differential and

19 the regulatory environment, but please back us for

20 another set of funding". It -- it wouldn't have

21 happened.

22 Q. And the second question, based on your experience

23 dealing with LDC at the time, do you consider it likely

24 that LDC or any alternative investor would have been

25 prepared to lend twice the amount provisionally agreed

1 in order to cover the additional cost imposed by the
2 price differential over the five-year roll-out period
3 running to 2018?

4 A. No, I don't think that would be feasible. They'd got
5 their own metrics, their own return models, and that's
6 what they'd -- that's what had been agreed with their
7 Investment Committee. And those returns were favourable
8 and they still were, you know, with some of
9 the alternatives. But to change the plan like that
10 without the certainty was difficult.

11 Q. And a further question arising out of your last answer.
12 In deciding whether to proceed with the roll-out, did
13 you take into account in your commercial decision-making
14 the additional costs that would be imposed on your
15 business specifically during the five-year roll-out
16 period to 2018?

17 A. So the -- the question, Mr Holmes, is did we take
18 the extension in terms of the time plan?

19 Q. No, it's a simpler question. For the period from 2014
20 to 2018 the business would have been rolling out its
21 end-to-end network, is that correct?

22 A. Yes, that's correct.

23 Q. Did you specifically consider in your commercial
24 decision-making the additional costs that would be
25 imposed during that roll-out period on the business as

1 a result of the price differential?

2 A. No, we did not.

3 Q. Can you elaborate on why not?

4 A. Because the reason that we didn't -- we knew the impact
5 of the pricing differential, but we needed to get
6 certainty on the pricing differential because if we
7 didn't have the pricing differential removed and
8 a guarantee that this was going to be an environment
9 that we could roll out without abusive behaviour from
10 Royal Mail, there was no point modelling it, because
11 the environment wasn't receptive.

12 Q. Yes, I see. So your point is that you didn't in fact
13 model it in any quantified sense because you didn't need
14 to, you had already factored it into your commercial
15 decision-making and you knew the consequences; is that
16 correct?

17 A. We knew very clearly the consequences.

18 Q. I'm grateful.

19 Then just finally in relation to arbitrage, Mr Beard
20 suggested that at your meeting with Royal Mail on 17
21 December 2013, Mr Agar of Royal Mail suggested you could
22 mitigate the impact of the price differential by means
23 of arbitrage and that he offered to help you with that.

24 Did you at any subsequent stage receive any written
25 communication from Royal Mail suggesting that you pursue

1 arbitrage as a means of avoiding the effects of
2 the price differential while rolling out an end-to-end
3 network?

4 A. No, nothing, from my memory, was forthcoming from
5 Royal Mail.

6 Q. And what was Royal Mail's attitude towards arbitrage at
7 the time, in your experience?

8 A. Negative.

9 Q. And based on your experience of the industry at the
10 time, do you consider that a viable entry strategy could
11 have been based on -- to the direct delivery market
12 could have been based on extensive arbitrage?

13 A. It would have been completely foolhardy to base your
14 business plan and roll-out plan based upon something
15 that Royal Mail could effectively close very quickly
16 through changing tolerances.

17 MR HOLMES: Thank you. I have no further questions.

18 THE CHAIRMAN: Thank you, Mr Holmes.

19 Mr Turner, do you wish to re-examine?

20 Re-examination by MR TURNER

21 MR TURNER: Very short, I have five questions, Mr Wells.

22 You were asked on Friday about discussions of
23 the suspension clause which was introduced into
24 Royal Mail's contracts in 2012; do you remember that?

25 A. I do.

1 Q. And you were shown a note of the meeting that you
2 attended in December 2012 with Royal Mail. I'm not
3 going to ask you to go back to that. It was put to you
4 that a suspension clause was, in the words of
5 Royal Mail's counsel, a safeguard for you in relation to
6 changes that might be made by Royal Mail. Do you
7 remember that?

8 A. I do.

9 Q. You disagreed with Royal Mail's counsel, but you weren't
10 then asked by him to explain your thinking. Can you now
11 explain your thinking?

12 A. In terms of -- sorry, in terms of the -- I disagreed
13 about the suspension clause.

14 Q. Why you disagreed that it was a safeguard.

15 A. Yeah, I mean, the -- the whole premise of the -- of
16 the introduction in 2012 is what we're talking. We
17 needed them to withdraw that to give us certainty, and
18 that is what our -- that is what we were pursuing, and
19 ultimately that's what Royal Mail withdrew.

20 Q. Second question. You were asked about a letter you
21 wrote to Royal Mail's chief executive in January 2014,
22 and it was put to you that it was clear from that letter
23 that even before the contract changes were notified,
24 Whistl was going to complain. You weren't taken to
25 the letter, and I'd like you to look at it now, please.

1 It's at C4B, if you could have that given to you, at
2 tab 83.

3 PROFESSOR ULPH: Which tab?

4 MR TURNER: C4B, 83. This is the letter from which it was
5 said to be clear that even before the CCNs were
6 notified, you were going to complain.

7 I'd ask you please, Mr Wells, to look at that
8 letter, all of it, including the last sentence.

9 A. Sorry ...

10 Q. 83.

11 A. I have it now, yes.

12 Q. If you could scan it, read all of it to the end, and
13 once you have done so, I'd like to ask if there's
14 anything you'd like to add about your thinking at that
15 time in January 2014 and Royal Mail counsel's
16 proposition that it was clear you were going to
17 complain.

18 (Pause)

19 A. Yes, I -- I recall the letter that -- that was sent, and
20 clearly this was our attempt to strongly point out the
21 impact of the pricing differential to our business, to
22 our roll-out, the impact to the viability of providing
23 an alternative end-to-end solution, and also the fact
24 that we considered it to be anti-competitive, and also
25 the fact that we would pursue a claim against Royal Mail

1 should they not withdraw it.

2 Q. Third question. You were also asked on Friday about the
3 fact that notice would have to be given by Royal Mail in
4 January 2014 for any contract changes to happen to take
5 effect in April, and it was put to you by Royal Mail's
6 counsel that the timing of notification of the price
7 differential in January would not have come as a shock
8 to you because -- and I quote -- "you knew what timing
9 would apply in relation to those changes". You said you
10 disagreed. You weren't asked why you disagreed. Can
11 you explain your thinking?

12 A. Yeah. I think, Mr Turner, that the -- we weren't privy
13 to Royal Mail's internal timetable, and there was no
14 guarantee when they would publish. The one thing that
15 we did know was if they introduced price changes, it's
16 in April. But personally, I'm not privy to when they
17 start and consult on their own internal price amendments
18 and pricing plans. That's what I disagreed on.
19 I wasn't privy to the knowledge of Royal Mail's internal
20 plans. We only know when they announce those plans.

21 Q. Thank you.

22 Then two questions from today. The first is this:
23 you were asked about the note of the meeting that you
24 had on 17 December 2013, and that is, if you still have
25 the bundle there, at tab 72 in bundle C4B.

- 1 A. I have it here.
- 2 Q. If you remember, there was a discussion focusing on what
3 was on page 4 concerning arbitration.
- 4 A. Mm.
- 5 Q. If you look at page 4.
- 6 A. Yes.
- 7 Q. And Royal Mail's counsel said to you:
8 "You ... asked him [that was Mr Agar] whether ...
9 you could engage in arbitration and he said yes."
10 Now, I would ask you on that page just to read up
11 above the words that Mr Beard took you to. Do you see
12 halfway down:
13 "AG [which is Mr Goddard] raised the issue of
14 arbitration"?
- 15 A. Mm-hm.
- 16 Q. Do you see that?
- 17 A. I do. "Asked about the proposal".
- 18 Q. So if you could read what he said, and in particular
19 Mr Agar's response below it:
20 "SA said he was not suggesting ..."
- 21 A. "[Andrew Goddard] raised the issue of arbitration. He
22 said that TNT Post had been surprised at the profile of
23 the mail posted under the zonal contract."
- 24 Q. And then Mr Agar's response, please?
- 25 A. "... said he was not suggesting that TNT Post was

1 deliberately trying to arbitrage in the way that other
2 access customers may be."

3 Q. And in relation to that sentence, what do you understand
4 was meant by Mr Agar and what was the point he was
5 making?

6 A. Well, as we talked about earlier, I -- the point that
7 I was saying is that arbitrage, from our perspective,
8 didn't really exist. We only posted a very small number
9 of mailings on a zonal basis. Arbitrage, I think
10 Mr Agar is referring to here, was -- there are a couple
11 of companies like Citipost and Onepost who -- who did do
12 some arbitrage using price plans but that TNT Post did
13 not in the same way that some of these other smaller
14 operators did.

15 Q. My final question is a related question. Royal Mail's
16 counsel also put to you that you engaged in arbitrage
17 and it grew over time in 2013. In your answer, you said
18 it would not have been possible practically to deal with
19 arbitrage.

20 A. Mm-hm.

21 Q. Mr Beard didn't follow up on what you meant. What did
22 you mean?

23 A. The practical impact of even if we were allowed on
24 the price plan to arbitrage would have meant, for
25 example, going to our customers, not -- instead of

1 having two files, which was an end-to-end file, and
2 a DSA file, having a third file based upon zonal, we
3 would have had to go through a lot of software changes,
4 customers would have had to change their main frame.

5 It took us 14 months to persuade BT to move to
6 end-to-end. Imagine going back to BT and say, "Oh, we
7 now need to change all the systems again". It would
8 have meant putting zonal indicators on the post that
9 required zonal postings, it would have meant talking to
10 mailing houses who weren't geared up for split mailing,
11 software changes, to do all these elaborate and at the
12 time implausible splits.

13 So it was practically impossible because of the
14 supply chain and because of the complexity to do that.

15 MR TURNER: I have no further questions.

16 Questions from THE TRIBUNAL

17 THE CHAIRMAN: I've just got one question for you, Mr Wells.

18 You've told us about the uncertainties in post and why
19 you eventually withdrew from end-to-end. Ofcom has now
20 made it fairly clear what their view of the price
21 differential is. Does that mean that you might come
22 back as an end-to-end competitor, or have you given up
23 all thought of doing so?

24 A. It's -- I think it's a good question, and of course had
25 the decision not taken so long, we may well have

1 re-entered the market. But I think where we are now is
2 that we have a different business model. We are still
3 the market leader in downstream access. We've expanded
4 our plans in terms of parcels and E-commerce fulfilment.
5 I think that we have moved on from being able to
6 deliver. Unfortunately, as much as we wanted to be
7 the product of liberalisation and providing an
8 end-to-end delivery network, six years on I think we
9 have also unfortunately moved on.

10 THE CHAIRMAN: And if someone else appeared on the scene
11 with an E2E plan, what would your attitude be then?

12 A. I think that's also highly -- highly unlikely.

13 THE CHAIRMAN: Not quite what I asked, Mr Wells.

14 A. I don't think that would change.

15 THE CHAIRMAN: You would remain of the view that it wouldn't
16 affect Whistl's attitude and Whistl's current business
17 plan?

18 A. No. No, it wouldn't.

19 THE CHAIRMAN: You wouldn't seek to oppose it, you would
20 just stay away from it?

21 A. I think we would continue to do what we're doing.

22 THE CHAIRMAN: Right.

23 A. We wouldn't oppose it, no.

24 THE CHAIRMAN: Thank you.

25 Right, I think that concludes the evidence of this

1 witness, is that correct?

2 MR BEARD: I think so. I think that concludes all of the --

3 THE CHAIRMAN: In which case you may stand down. You are
4 discharged.

5 A. Thank you.

6 (The witness withdrew)

7 THE CHAIRMAN: It's 4 o'clock, Mr Beard. Where are we now?

8 MR BEARD: We begin tomorrow morning with the concurrent
9 evidence process the guidelines for which have been set
10 out by the tribunal and discussed at the CMC. So in
11 the circumstances we're anticipating that Mr Dryden,
12 Mr Matthew and indeed also Mr Parker will be sat here
13 tomorrow and we will make sure that arrangements are
14 made so that they can properly be accommodated and
15 the questioning will be led by the tribunal in
16 accordance with the guidelines that have been set.

17 THE CHAIRMAN: I can't guarantee that we're going to keep
18 exactly to the order of the questions, but the
19 questioning will be as set out. I don't think --

20 MR BEARD: I don't think anyone is holding the tribunal to
21 precisely that framework.

22 THE CHAIRMAN: We're not going to issue a script in advance.

23 MR BEARD: No.

24 THE CHAIRMAN: Everybody happy then? In which case thank
25 you very much, we'll meet tomorrow at 10.30.

1 (4.01 pm)

2 (The hearing adjourned until 10.30 am on Tuesday,

3 25 June 2019)

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