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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1569/5/7/22 (T)

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Friday 17th February 2023

13
14 Before:
15 Ben Tidswell
16 (Sitting as a Tribunal in England and Wales)

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19 **BETWEEN:**

20
21 Instaplanta (Yorkshire) Limited **Claimant**

22
23 v

24
25 Leeds City Council **Defendant**

26
27
28 **A P P E A R A N C E S**

29
30 Daniel Carall-Green (On behalf of Instaplanta (Yorkshire) Limited)

31
32 Michael Bowsher KC and Adam Aldred (On behalf of Leeds City Council)

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(10.30 am)

THE CHAIRMAN: Yes, good morning. We are being live streamed, so I need to read the customary warning.

Some of you are joining us on live stream on our website, so I must start with a warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings; and breach of that provision is punishable as contempt of court.

Thank you.

MR CARALL-GREEN: Good morning, sir. My name is Daniel Carall-Green, I appear on behalf of the claimant. My learned friends Mr Bowsher and Mr Aldred appear on behalf of the defendant.

Can I just check that the tribunal has the bundles in the requisite form. You should have a CMC bundle which contains the skeleton arguments, and there is also an authorities bundle from the claimant and an authorities bundle from the defendant.

THE CHAIRMAN: I do have those, thank you.

MR CARALL-GREEN: I'm grateful. We have half a day and I think we're all agreed that that's sufficient, so I will proceed along the agenda that the tribunal has outlined --

THE CHAIRMAN: What we might do I think is -- maybe it might be helpful if we work out what is and isn't in dispute. I think quite a lot of it is and I suspect there's only going to be one or two things we can get out of the way. I wonder then whether it might be helpful to deal with the fast track application first.

MR CARALL-GREEN: Very happy to do that.

1 **THE CHAIRMAN:** Because I think if we do that then we're going to -- and I'll give
2 you an answer on that. I may not give you the reasons, but I will certainly give
3 you an answer, and then I suspect it will become easier to deal with most
4 things. Indeed, we will cover some of the other things, no doubt, in the course
5 of the fast track discussion. So that's a convenient way to proceed, I suggest
6 we might do that.

7 **MR CARALL-GREEN:** I agree. For example, it will really help on the timetable
8 aspect. The timetable will be quite different depending on the tribunal's
9 decision on the fast track.

10 **THE CHAIRMAN:** Yes, the one that I did identify that was agreed was proceedings
11 in England and Wales, subject to a point about location. If I'm right about that,
12 I think we should make that order, get that out of the way.

13 In terms of things, there were a number of things -- clearly the allocation to the fast
14 track process and the trial timetable were very much not agreed, but there
15 were a number of things which were in discussion. I wondered whether there
16 had been any progress with that. I think we will need to talk about location of
17 the trial, so let's park that and come back to it.

18 The confidentiality ring, I think I have the position that that's not in issue?

19 **MR CARALL-GREEN:** I think that's right, sir, confidentiality has fallen away. I beg
20 your pardon, I didn't catch what you said just a moment ago, sir, about what
21 was still in issue, before confidentiality.

22 **THE CHAIRMAN:** Location of trial.

23 **MR CARALL-GREEN:** Thank you.

24 **THE CHAIRMAN:** Whether we go to Leeds or not.

25 **MR CARALL-GREEN:** Yes. That's right, there is a question about whether or not
26 we should go to Leeds, although the claimant is quite relaxed about that, in

1 the sense that if it's convenient for the tribunal and for the defendant -- we're
2 content either way with London or Leeds, so we don't contend strongly for one
3 or the other.

4 **THE CHAIRMAN:** Let's come back to that. I think probably what we will do is we
5 will come back to all of these points once we've worked out what the fast track
6 position is. I'm just trying to work out what we need to deal with later on.

7 **MR CARALL-GREEN:** Confidentiality has fallen away. Then the third item, which is
8 preliminary issues and split trial, I think needs to be dealt with after fast track.

9 **THE CHAIRMAN:** Absolutely.

10 **MR CARALL-GREEN:** Then there's fast track itself, and of course we'll come back
11 to that.

12 **THE CHAIRMAN:** Cost capping, I think, depends on the outcome of the fast track
13 proposal -- or cost management.

14 **MR CARALL-GREEN:** Yes. Clarification or additional information is something that
15 may bear scrutiny outside the consideration of the fast track, but there's no
16 difficulty in dealing with it subsequently. Then of course the timetable
17 depends on fast track. The further CMC, I think the parties are agreed that
18 a PTR may be listed, and then vacated if it's not needed. Then on AOBs,
19 there's just the defendant's application to adjust the publicity on the website.

20 **THE CHAIRMAN:** Yes, the claim summary. Did you mention disclosure, or have
21 I missed that?

22 **MR CARALL-GREEN:** I beg your pardon, I didn't mention disclosure, because I had
23 in mind that expert evidence, factual witnesses and disclosure would be
24 folded into the fast track discussion. Insofar as we don't cover it in the fast
25 track discussion, we can pick up any remaining issues thereafter.

26 **THE CHAIRMAN:** Good, okay. It does sound as if it's sensible to deal with the fast

1 track process, and I think that is likely to wash out most of the points.

2 Before you get going on that, I wonder if I could just ask you a little bit about your
3 case, and indeed I might ask Mr Bowsher about his case as well. There's
4 a little bit of a sense of ships in the night about this. I may be wrong about
5 that, but there's a sense that you're approaching it from a different way. In
6 order to understand the implications for the fast track, I think I would like to get
7 a fix on what you are actually saying.

8 **MR CARALL-GREEN:** Of course.

9 **THE CHAIRMAN:** Would you mind if we just spent a little bit of time going through
10 the basics of it. As I understand it -- let me try putting a bit to you and you tell
11 me where I'm getting it wrong. I should say, for absolute clarity, none of this is
12 intended to express any view on the merits of any of these points. If I suggest
13 in any way I am, I don't intend to suggest so, so nobody should think that.

14 I think you're saying that the defendant is dominant in a particular market, which is
15 the advertising market -- you call it the green roadside advertising, I'll just call
16 it advertising market for shorthand. I think you're saying that, as a regulator of
17 licences for a third party to install in that market, the defendant exercised that
18 duty improperly, with the effect that it favours the defendant's commercial
19 operation. Do I have that so far?

20 **MR CARALL-GREEN:** Yes, sir, I think that's a fair summary.

21 **THE CHAIRMAN:** So you're not saying that there's a market for the supply of
22 licences, you disavow this idea of two markets?

23 **MR CARALL-GREEN:** I think we approach that somewhat agnostically, in the
24 sense that we didn't allege that. The defendant, I think, has introduced the
25 concept of two markets by way of seeking to break down the refusal to supply
26 abuse, but we say that refusal to supply can take place -- what we actually

1 say is the abuse can be characterised in a variety of different ways and
2 there's no need to posit a market on the upstream. Indeed, it would be quite
3 strange to say that the upstream was a market, because it doesn't operate
4 under market conditions, it's the granting of a licence. There's no money
5 exchanged when that licence is granted, it's not an economic decision in the
6 sense that it's not a paid for service. So it operates in slightly different
7 conditions from a market.

8 **THE CHAIRMAN:** Yes, and that's actually where we then get into what the
9 defendant is saying, because they talk about the question of undertaking and
10 whether there was a commercial activity taking place in that market, if there is
11 one, for the supply of licences. As I understand it, your position on that is
12 none of that really matters because it doesn't matter whether the defendant is
13 carrying on an economic activity for the supply of the licences, that is
14 an ancillary activity which has an impact on a market in which they are
15 dominant and which they control. So therefore, you would say, that fits within
16 the legal framework for abuse.

17 **MR CARALL-GREEN:** Yes, sir, exactly. We say we should just concentrate on the
18 single market in question here, recognise that the defendant is dominant in
19 that market, and then say: how is it dominant? The answer is, as we've
20 pleaded, it has a high market share and it is able to exclude anybody from the
21 market by virtue of its statutory powers.

22 **THE CHAIRMAN:** Then we come to the Highways Act point, and I think you're
23 saying that the non exercise of that, so the unwillingness to grant a licence
24 under it, amounts to a misuse of that responsibility, because of either
25 a deliberate or mistaken position as to whether or not the licences need to
26 be -- or can be granted.

1 **MR CARALL-GREEN:** I think it probably enters the discussion one stage later.

2 I think we probably say that the origin of the abuse is the decision to refuse
3 permission in order to safeguard the defendant's own commercial revenue
4 streams. I think the defendant then comes in and says that under the
5 Highways Act it doesn't have the ability to grant the permissions that we were
6 seeking, and then we reply by saying: that's a wrong reading of the Act, you
7 certainly did have the power to grant the applications that we were making.

8 **THE CHAIRMAN:** Yes, that's helpful, thank you. Would you say that intent matters
9 here? I think in your skeleton you suggest it doesn't, for the purposes of
10 establishing an abuse, but it may be relevant --

11 **MR CARALL-GREEN:** That's correct, sir. I certainly hold to the classical legal
12 position that I don't need to establish intent, but in my case intent will feature
13 prominently because the tribunal will have seen from the reply that we have
14 lots of internal documents that go to the defendant's intention; and we will be
15 asking the tribunal to look at the defendant's intention as a good index of
16 whether or not there was an abuse. So it will feature prominently, but I don't
17 want to be caught out by the defendant in saying something that I don't need
18 to say, which is that it's a necessary ingredient of the abuse.

19 **THE CHAIRMAN:** Yes. I take your point that your starting position is not that the
20 Highways Act is the relevant determinant, but, because of the way it's been
21 introduced, that effectively it's said there was no ability to give you what you
22 wanted.

23 **MR CARALL-GREEN:** Correct.

24 **THE CHAIRMAN:** Is it your position that if the defendant's right about that, your
25 case fails, or do you say that there are further characteristics of the behaviour
26 that allow you to succeed? That may be a question on which you're

1 uncomfortable to commit yourself, but actually just to make -- and perhaps it's
2 unfair of me to put it quite so squarely to you, but just so you understand
3 where I'm coming from. I wonder about whether it's possible to resolve this
4 issue of the Highways Act in some way -- either as a preliminary issue or
5 some other way, which it seems it might be capable of doing. I'm trying to get
6 a sense of what the implications are if the defendant turns out to be right
7 about that point. Maybe that's a more neutral way of putting it.

8 **MR CARALL-GREEN:** Perhaps it is. If it assists, I can tell you a way in which we
9 have discussed a possible division of the issues, if the tribunal were minded to
10 go down the split trial route as per Socrates. It might be possible to have, for
11 example, at the first trial a question of -- to resolve the questions of the
12 undertaking, whether or not the defendant is undertaking, the market and the
13 dominance, and then to resolve the question of whether or not in principle
14 there was an abusive act, particularly taking into account the intention; and
15 then to leave to another stage, or to hive off, the question of whether or not
16 the Highways Act effectively gives the defendant a counterfactual defence,
17 because essentially I think where this goes is they say on the counterfactual,
18 if everybody had been acting lawfully, the permissions would have been
19 refused in any event.

20 **THE CHAIRMAN:** Yes, it could be put in three ways, couldn't it? One is that, one is
21 that it could be objective justification -- which is different, isn't it -- and the third
22 way is it could be that there's no abuse. I suspect Mr Bowsher would start
23 with there's no abuse. That's probably the difficulty with that analysis. It
24 seems to me it needs to come a little bit earlier in the order. I don't want to
25 get into that discussion just yet, I just wanted to make sure I was clear.

26 Perhaps just to come back to my question about the implications of it, again to try

1 and put the question as neutrally as I can at this stage, if we were to resolve
2 that in a preliminary issue, what would the impact of that be on the case?
3 Would that resolve it entirely or do you think there would still be a residual
4 claim that your clients would be seeking to advance?

5 **MR CARALL-GREEN:** It certainly would place me in difficulties if the answer were
6 that if everybody had been acting lawfully, there is simply no way the
7 permission could have been granted.

8 **THE CHAIRMAN:** Yes. You would say that covers just the statutory interpretation
9 point, but it may be also the question of the exercise of the discretion.

10 **MR CARALL-GREEN:** Precisely. We say that the discretion does need to be
11 exercised lawfully, I don't think anybody would quarrel with that.

12 **THE CHAIRMAN:** But there are two different levels to this, aren't there? The first
13 level is that the defendant's position is it can't be exercised lawfully because
14 there is no power to do so. If they were wrong about that, then the question
15 might become: could they have exercised it in a lawful way that wouldn't have
16 given you the answer? So then you're actually in the counterfactual point,
17 aren't you?

18 **MR CARALL-GREEN:** Counterfactual, yes.

19 **THE CHAIRMAN:** Okay, that's helpful, thank you. Then just really I think -- unless
20 there's anything else you think I'm missing, just to fillet out, I think we then get
21 to abuse. I think you're saying that this is a continuing abuse. So there's
22 an incident in 2015, but I think from the reply it's pretty clear that you're saying
23 that from then right through till now there are continued incidents and events
24 which demonstrate a continuing exclusion, because we're talking about
25 exclusionary conduct, aren't we? Do I have that right?

26 **MR CARALL-GREEN:** That's correct, sir, there are a couple of ways one could

1 characterise it. It could be one single and continuous refusal, if one wants to
2 characterise it as a refusal, or it could be repeated events, if one wants to
3 characterise it as a series of linked events, but either way we do say that the
4 abuse is continuing. This is important to our counterfactual, because of
5 course we say not only that the specific permissions should have been
6 granted in 2015 and 2017, but then in our counterfactual we effectively
7 extrapolate outwards a business plan for growth on the part of the claimant
8 which is based on the defendant acting reasonably and lawfully.

9 **THE CHAIRMAN:** Yes, I understand. There are, as I understand it, occasions upon
10 which licences are granted.

11 **MR CARALL-GREEN:** Correct.

12 **THE CHAIRMAN:** Presumably for locations that don't fall within the defendant's
13 interpretation of the Highways Act, but --

14 **MR CARALL-GREEN:** Well, it will be a matter for the evidence to see why they --

15 **THE CHAIRMAN:** However one characterises that, it does happen; and you say,
16 notwithstanding that, there's still a measure of exclusion. So it may not be
17 absolute exclusion, but it wouldn't be the first case in which presumably there
18 was partial and not total exclusion.

19 **MR CARALL-GREEN:** Exactly right, sir --

20 **THE CHAIRMAN:** Okay. That's really helpful. I think I might find it quite helpful if
21 I were to ask Mr Bowsher a few questions. Do you mind if I do that, just so
22 we're all clear about where it lands.

23 Mr Bowsher, hopefully that's helpful for you too in terms of understanding where
24 we're coming from. You do put it a slightly different way with this market for
25 the supply of licence and -- forgive me if it's not a particularly accurate way of
26 describing it, market for the supply of licences and market for the supply of

1 advertising. That's not the case that's being put against you, but that is the
2 position that you're taking?

3 **MR BOWSHER:** We have not yet determined or been advised by our expert as to
4 how we should correctly analyse the market, that's our first point, and in that
5 sense we have reserved our position. Again, it's not the first case in which the
6 defendant comes to court and says: to be honest, we do not have
7 a concluded view about what our market is, how it's properly defined, either as
8 a relevant product or service market or as a relevant geographic market. The
9 definition of market which is put to us, on which the claimant hangs its case, is
10 green roadside advertising market. Now, we have challenged that, we're not
11 clear whether that could possibly be a market. Probably each of the three
12 qualifiers, green -- what counts as green, is that an appropriate market
13 limitation; roadside, is that an appropriate limitation to the market; advertising,
14 well what do we mean by advertising? So just in those terms there is a how
15 broad or narrow is that market, should we be including things which are
16 demonstrably not green, should we be including advertising sites which are
17 demonstrably not roadside?

18 **THE CHAIRMAN:** Undoubtedly there's going to be some discussion about -- let's
19 just call it the advertising market, and assume it will be subject to some
20 discussion about what the product is.

21 **MR BOWSHER:** Yes. At that level there's a product debate, just pure breadth.

22 **THE CHAIRMAN:** Can I stop you there for a minute, just before you move on to the
23 other market. One of the things I'm not sure about is whether your
24 undertaking point is a point that applies to the defendant's participation in that
25 market. So assuming, just for argument's sake, there is some form of
26 advertising market here, are you saying that the defendant is not

1 an undertaking in its participation in that market, whatever it happens to be, or
2 are you accepting it is an undertaking for that purpose but you reserve your
3 position in relation to the other market?

4 **MR BOWSHER:** We are saying we are not an undertaking for the purpose of both
5 markets. Obviously the analysis works differently, because -- without
6 unpacking all of the authorities for the moment, which no doubt we will have to
7 do at some point. The first line would be: is this simply an exercise of public
8 power? And then there is the: is this something which is ancillary to the
9 exercise of that public power? The case law does draw a distinction between
10 those two matters. It may well be that in the -- I'm slightly reluctant to get into
11 the downstream/upstream debate, but let's call it the purer advertising market,
12 if that exists. That would probably be ancillary, we would say, to the public
13 power to the extent that we're involved in it. But we'll have to look at what it is
14 that we are doing in that market, were it to exist.

15 **THE CHAIRMAN:** Just so I'm clear about that, when you're talking about (Inaudible)
16 with public power, you don't mean just the public power of granting a licence,
17 you mean the public power of running parks and amenities and so on?

18 **MR BOWSHER:** For example, at the risk of going off into a slight red herring, there's
19 a lot in the pleadings about the Leeds In Bloom programme, which is about
20 members of the community getting together to make Leeds -- again, I'm doing
21 this without clear and full instructions.

22 **THE CHAIRMAN:** No, I hear what you're saying.

23 **MR BOWSHER:** It's a community value point.

24 **THE CHAIRMAN:** Yes, exactly. So you're saying, if we take an example, to the
25 extent that if you were to -- I can't remember the villages, Otley I think. If
26 Otley does Leeds In Bloom and the residents or the local parish council wants

1 to put up planters, or whatever it is, then you're saying that that exercise is
2 a public exercise -- a public body, public duty exercise, and that the
3 sponsorship that comes with it is ancillary to that. Whereas I think
4 Mr Carall-Green's client would be saying that has the incidence of economic
5 activity, and therefore it takes you, at least in that respect, into being
6 an undertaking. So that's the fault line, isn't it?

7 **MR BOWSHER:** I'm sure that is the frontier, but we would say as a local authority
8 we have local authority obligations to develop and promote the -- there are
9 a number of obligations about developing the community and so on and so
10 forth, and we are acting within those obligations in doing that.

11 **THE CHAIRMAN:** Yes.

12 **MR BOWSHER:** It operates differently at different levels. In terms of how you
13 define those different levels of market, just going back to the slightly earlier
14 debate, in our defence, our first essay into trying to split those out is in, I don't
15 think you need to pull it out, 26(d) of the defence. It's page 151 of the bundle,
16 just for the reference. We say the definition is not coherent. It appears to
17 conflate markets for the provision of spaces for the placing of advertising by
18 a roadside, et cetera, et cetera, with a market for the placing of
19 advertisements for reward on such a location. There is no such composite
20 market, et cetera, et cetera.

21 That's not necessarily our positive case as to what the market is, but it is our first
22 attempt to try and identify that there is an obvious logical separation there
23 between two different activities. The provision of the spaces is going to be in
24 the area covered by the Highways Act, probably. There may be other issues
25 about what you can and can't advertise in that location, that may be
26 a separate issue.

1 **THE CHAIRMAN:** Yes. We've drifted a little bit into what I've been thinking about
2 as the second -- or actually probably the first, the market for supply. But
3 I think you're saying be careful, it's not necessarily just a rigid distinction. It's
4 not like a commercial supply arrangement with different levels in the market.
5 You're saying there are ancillary characteristics to things that the Council are
6 doing which falls -- well, I suppose I'm not clear about whether you are
7 asserting that there is effectively a market for the -- I call it the supply of
8 licences, I think that's probably not the right description, but whether the
9 exercise of granting the licences amounts to something which is a product,
10 and therefore gives rise to a market definition and potentially is dominant.

11 I understand the point you're making about undertaking in relation to advertising, if
12 there's a market in whatever it is. The significance of this of course is just
13 how big this point is from an expert point of view. It just seems a little bit odd
14 to me if we are -- putting it very simplistically, I'm sure, if you want to go and
15 identify a market for the supply of licences, which the claimant is not
16 asserting, and then you're actually going to answer that question by saying:
17 we're not an undertaking and so therefore it doesn't matter. I just wonder
18 whether we need to go round that loop if that's not what is being put to you.
19 I think you're saying it is a bit more complicated than that.

20 **MR BOWSHER:** I suspect you probably do have to go round the loop in the sense
21 that whether or not we are an undertaking will have to be answered. We
22 could --

23 **THE CHAIRMAN:** It could be an undertaking --

24 **MR BOWSHER:** -- at one level and not another.

25 **THE CHAIRMAN:** Well the functional approach. So the position in relation to
26 sponsorship, under the functional approach, could characterise you as

1 an undertaking whereas the granting of licences, and indeed all sorts of other
2 things, wouldn't. So I think that is clear, isn't it?

3 **MR BOWSHER:** So I think we probably do need to look at the two together,
4 because they're the two -- probably at each level, you need to work out what
5 the levels are and then work out whether we are or are not an undertaking at
6 that level.

7 **THE CHAIRMAN:** But he's not saying you're either an undertaking nor dominant,
8 nor indeed in a market, at the level of the ancillary activity of regulating
9 licences. It's still not clearly clear to me whether we need to get into it.

10 **MR BOWSHER:** That may be right. It may be that one can narrow the field of
11 inquiry to those markets where the claimant, as it were, is pressing its case
12 that we are dominant. So it may be that we don't need to go into every one of
13 those markets. But it becomes relevant if, for example -- and I'm not going to
14 try and answer this question now, but let me pose the question. If we were
15 not an undertaking at one level -- sorry, if we were dominant at one level but
16 not an undertaking at another level, could an abuse that has an effect in
17 a market in which we were not an undertaking actually constitute an abuse of
18 dominant position?

19 **THE CHAIRMAN:** Of course, I see that's an issue. But perhaps it's better, if we
20 come back to the functional approach, to talk about function. It may be that
21 there is more than one market here, and I'm certainly not excluding that as
22 a possibility. But the centrepiece of the case that's made against you is that
23 there is a market for advertising, and the case that's put against you, as
24 I understand it, and I think as Mr Carall-Green has confirmed, is that the
25 ancillary activity of regulating the licences -- which he doesn't assert as either
26 a market or in which you are dominant. It's a gate keeper point, you have that

1 power. It allows the defendant as an entity to reinforce its market power in
2 a market in which it does have economic activity and is dominant, that's
3 advertising. Whether or not that amounts to an abuse, and whether it does in
4 this case, clearly matters for later argument. But if that's the construct, then it
5 is a simpler proposition I think.

6 **MR BOWSER:** That could be simpler, but I think it's still going to be difficult to
7 unpick the status of the defendant at any given level and the market --

8 **THE CHAIRMAN:** Or different functions, if we talk about functions.

9 **MR BOWSER:** If you're going to talk about the function -- if you're going to ask the
10 question what is the function of the defendant, you're going to have to identify
11 which part of its activity you're actually dealing with, otherwise there's not
12 going to be a meaningful question.

13 **THE CHAIRMAN:** That's entirely clear, I absolutely accept that. Even if one was
14 taking it to the narrowest proposition I'm trying to push you towards, you're
15 absolutely saying that, for the purpose of the advertising market, the activity
16 the defendant carries out there is not economic and is ancillary to its public
17 duty and you would say is therefore not an undertaking. At the very least
18 we're going to have to work through the whole process of identifying what
19 those other duties are and how they relate to this. I absolutely get that point.
20 I won't push you any further.

21 I think it's been a helpful discussion. It does seem to me that we might want to come
22 back to it when we talk about the experts and precisely what it is they are
23 going to do -- whichever stream we're in, that we end up. I am anxious that
24 we don't end up expending a lot of time on things that aren't being alleged and
25 may not actually make any difference at the end. But I absolutely take the
26 point that the analysis of the different functions, under the functional

1 approach, will be necessary, whatever happens.

2 That's very helpful. Perhaps we can move on. In relation to the Highways Act, it's
3 really to ask you the same question, what you think the implications are. If it
4 were to turn out that the claimants were right about their interpretation of the
5 Highways Act, what difference does that make to the shape of the case? To
6 put the question perhaps more pointedly, is it something that if we were to
7 determine it either as a preliminary issue or earlier in the proceedings saves
8 us from resolving a lot of issues or does it still leave lots of things open and
9 does it lead into other things that are necessary to consider at the same time?

10 **MR BOWSHER:** I don't think it's a quick fix, as it were, because I think there's
11 a difference in the way we frame the issues and the way my learned friend
12 framed the issues in one of his lists, I think in the skeleton. We've headed up
13 our list not by saying: is section 115E the right or the wrong thing? I don't
14 think we are going to be ... I hope we are not going to be requiring the tribunal
15 to decide what a footway and a carriageway actually is.

16 **THE CHAIRMAN:** Are we going to have to do that? As I understand it there is no
17 way of avoiding it, is there?

18 **MR BOWSHER:** We say as long as we acted properly in the scope of the public
19 powers, and we have a number of powers under the Highways Act, and we
20 dealt with the applications properly -- there's an issue between us as to
21 whether or not the decisions we took could or should have been challenged
22 earlier. If they were going to be challenged in terms of whether or not we
23 were acting in breach of the Highways Act, whether or not that challenge
24 should have happened in a different tribunal in a different way is an issue on
25 the pleadings. We're not saying -- there are a number of provisions under the
26 Highways Act under which one can operate. As you know, we took advice at

1 a point in the saga that section 115E was indeed the correct route to use.

2 As long as we were acting properly within the general framework that is provided,
3 our answer to abuse -- that at least, as I think you've already anticipated, will
4 be part of our answer to there's no abuse, we are simply doing what we have
5 to do within our general public powers and obligations.

6 **THE CHAIRMAN:** Putting aside the question of intent, if you got the law wrong and
7 actually what you were doing was not correct, and therefore you are under
8 an obligation to grant them licences, and let's just say, for argument's sake
9 only, that their counterfactuals suggest you would have done so or should
10 have done so, because that would have been a sensible thing to do, then
11 aren't you -- and again I'm not expressing a view on whether this is right or
12 not, but certainly on the claimant's case, as I understand it, they're saying that
13 amounts to you excluding, whether deliberately or inadvertently, competition
14 in a market in which you are dominant and that gives rise to an abuse.

15 I appreciate that all might be for argument, but I'm not quite sure why you seem to be
16 saying it doesn't make any difference whether you were right or you were
17 wrong, which just strikes me as being a bit odd.

18 **MR BOWSHER:** With respect, sir, if we were wrong and that made a difference to
19 the outcome, then the right answer would be they should have challenged that
20 in judicial review or by using some other route many years ago.

21 **THE CHAIRMAN:** Are you saying that excludes them from bringing this case?

22 **MR BOWSHER:** Let's say hypothetically we took a series of decisions which
23 involved a breach of our obligations under the Highways Act -- or some other
24 legislation, there's any number of legislation we might or might not be in
25 breach of. Just because we are in breach of one or other piece of legislation
26 does not mean we're in breach of competition law.

1 **THE CHAIRMAN:** No, of course doesn't, but if the consequence of being in breach
2 was that you created conditions in which a market was not properly
3 competitive, in which you happened to be dominant, then that would start to
4 get us back into that, that would least play a platform for that argument,
5 wouldn't it?

6 **MR BOWSHER:** Certainly if we knowingly -- and this perhaps comes back to
7 intention. If we knowingly took a decision in breach of law so as to, as it were,
8 provide a fig leaf for an anti-competitive act, that might be relevant.

9 **THE CHAIRMAN:** There are lots of people who committed acts without necessarily
10 appreciating -- intent is not a necessary ingredient, is it? We know lots of
11 cases where people have got themselves on the wrong side of this because
12 they've done things without realising what they were doing was
13 anti-competitive. Think about Ping, for example, where they thought they had
14 legal advice they could do it and they thought they weren't breaking the law. It
15 doesn't make any difference if it's some other bit of legislation apart from the
16 Competition Act.

17 **MR BOWSHER:** Two points though, sir. Firstly, in this case the claimant has put
18 intent front and centre in its case. I can state that briefly, but it is an important
19 point. They have, for a number of reasons, put that at the core of their case.

20 Sorry, I'm being ...

21 **THE CHAIRMAN:** I appreciate I'm catching you on -- it's very unfair of me. I don't
22 want you to feel rushed at all.

23 **MR BOWSHER:** A very important point is being pressed upon me.

24 **THE CHAIRMAN:** Yes, of course. **(Pause)**

25 **MR BOWSHER:** I haven't talked about objective justification, but that's another
26 aspect.

1 **THE CHAIRMAN:** Yes, I understand.

2 **MR BOWSHER:** But I'm parking that point.

3 **THE CHAIRMAN:** We're at the front end of this at the moment.

4 **MR BOWSHER:** Exactly. It is clear, when one looks at the way the facts are set out
5 in the pleadings, that one of the points, certainly, that the claimant is going to
6 focus on is an internal debate within the Council between some groups and
7 what -- I'll loosely call them Parks and Countryside.

8 **THE CHAIRMAN:** Yes.

9 **MR BOWSHER:** I'm going to park for the moment various points about intent, save
10 to note that a democratically accountable public body will often have more
11 than one view being vigorously expressed within it. Just because one group
12 says one thing doesn't mean that's what the body's intent is. But if those who
13 are responsible for dealing with this matter understand that they have
14 a number of obligations to deal with, they have to deal with the specific
15 highways issue, they have to deal with community obligations, they have to
16 deal with a range of other issues, taking all those matters into account, they
17 may -- they can deal with that properly, it might be that they are using the
18 wrong provision of the Highways Act, for example, but that does not mean
19 that their proper action suddenly becomes -- they are acting in a way which is
20 not abusive because they are trying properly to discharge the various
21 obligations they have in accordance with the various constraints upon them.
22 The characterisation of abuse may turn out to be rather complex here.

23 **THE CHAIRMAN:** Yes. You're saying that they could have got it wrong entirely
24 legitimately -- indeed, having had a look at the Highways Act, it doesn't strike
25 me as being the easiest statutory instrument to follow and I can see why there
26 might be some ambiguity. So if one were to say they have done their best but

1 they may have got some of it wrong, or part of it wrong, you're saying that
2 doesn't amount to an abuse; that's the basic point.

3 **MR BOWSHER:** That's our basic point.

4 **THE CHAIRMAN:** That is very helpful, and the reason really for pressing you a bit
5 on it is I am still slightly unsure as to why neither of you express more
6 enthusiasm for trying to get this point out of the way. It does seem to me what
7 flows from the exchange we've just had is that resolving the question of
8 whether the Council didn't act in accordance with the Highways Act, in favour
9 of the Council I think probably affects the claimant's case quite significantly
10 from what Mr Carall-Green seems to be saying. Maybe it doesn't, but that's
11 certainly the implication of it. It seems to me you make a number of
12 arguments about the Highways Act, whether a breach of it could amount to
13 an abuse per se, which is potentially a point of law, and also what the
14 consequences are if you have breached it.

15 I'm still not entirely sure why there's not more enthusiasm to grasp those upfront and
16 get them out of the way, because it may be dispositive of quite a lot of the
17 case. I understand entirely that these things are more complicated than they
18 look, so the last thing I want to do is to force you into some form of preliminary
19 issue which doesn't work because it has lots of other bits attached to it. But
20 I am quite keen just to make sure that at least I've asked you to think very
21 hard about it.

22 Mr Carall-Green, do you mind if we just finish this, because I would like to come back
23 to that point. We're certainly going to come back to it, don't worry. I think it
24 flows naturally out of -- when one starts to talk about what actually this case is
25 going to look like. I'm just very keen to make sure that I have, and I'm
26 certainly getting, a clear understanding of where everybody is on it. I'm

1 finding it very helpful and I hope you're finding it helpful as well, not too
2 unhelpful.

3 Just moving on, I think the last point then I wanted to pick up was this point about
4 continuing infringement. I think you're saying that there were events in 2017
5 and 2021, and indeed other decisions that are made internally, that mean that
6 if, contrary to your case, there was any infringement in 2015, that position has
7 been resolved or at least clarified. You say also that in relation to those
8 events in 2015 there is a limitation point to this, if any damage was suffered, if
9 there was an abuse contrary to your case.

10 **MR BOWSHER:** Yes.

11 **THE CHAIRMAN:** And there is a limitation point, I think we might come back to this
12 as well. I'm not sure I entirely understand the pleading point about the
13 limitation as well, so we might park that. But it's certainly said against you that
14 you haven't pleaded it properly and you're saying you have.

15 **MR BOWSHER:** You've seen what we said in the letter, I can certainly develop that.

16 **THE CHAIRMAN:** There's no need to do that at the moment, but I just want to make
17 sure I've got the landscape. Is there anything I've missed in that, just in terms
18 of the shape of the case and the points we've been talking about?

19 It's not your last opportunity to make submissions in this case. I just want to make
20 sure I've understood things properly.

21 **MR BOWSHER:** We've obviously focussed in this discussion on what I might
22 loosely call liability questions, if I risk --

23 **THE CHAIRMAN:** Yes, of course, and that has been my intention. I fully
24 understand there's a lot of things downstream as well.

25 **MR BOWSHER:** Yes. Apologies if I'm getting ahead of myself, but as it were the
26 kite has been flown as to why not deal with some of this material now. This

1 perhaps does go to the difference between the way in which we see the case.
2 It may be that what the claimant is saying -- I don't want to put words in my
3 learned friend's mouth. It may be what the claimant is saying is you had to be
4 right or wrong under the Highways Act, and if you are wrong then things
5 follow, or some version of that, which is a relatively crisp point.

6 **THE CHAIRMAN:** I think he's saying a little bit more than that, but I think certainly
7 the weight of his argument is that if you had it wrong under the Highways Act,
8 and that had the consequence of creating an exclusion, then you have
9 a liability for that, regardless of whether you intended it or not. I think that's
10 what he's saying, which may or may not be right of course. I think he would
11 probably also say there were other characteristics, as I understand it, of
12 exclusionary behaviour that might survive or might somehow find their way
13 into the equation. But broadly speaking I think the bulk of his argument sits
14 on that.

15 In a funny sort of the way, I'm not quite sure -- when you say the differences in the
16 way you see the case, I'm not entirely sure why there are differences between
17 the way you see the case.

18 **MR BOWSHER:** Just in terms of the practicality of it, of dealing with the matter at
19 a hearing, the decision or decisions, and they probably are -- once we unpick
20 it, it's probably more than one moment at which the claimant is going to say
21 we failed to do what we should have done. I'm not quite sure how many
22 moments and when those will have been. But those decisions, whether
23 expressly taken or taken, as it were, without any formal decision -- this is not
24 that easy case where you have a nice decision of the CMA which you can
25 unpack and work out what the decision is.

26 There are a number of people involved. We started by thinking six or seven. My

1 learned friend in his reply has come back and identified documents from other
2 individuals. To work out what actually goes into that decision, whether intent
3 is actually relevant or what the reasoning for that decision at the base of that
4 decision was, may involve looking at the expressed views of more than one
5 person. So it's going to be at least potentially wasteful to look at it once from
6 the purpose of a purely legal perspective, and then looking at, well, that may
7 in theory be the right answer as a matter of law, but what did they actually do,
8 you may end up having to hear from a number of witnesses, some from parks
9 and countryside, and some from other groups, as to what they thought should
10 or should not be done with that application.

11 **THE CHAIRMAN:** I am sure there are other things where factual evidence may well
12 come in, and it is clear that it is not just a one shot point, which is based on
13 the Highways Act, but it is a pretty significant part of the case, I think, and I do
14 wonder. Anyway, we'll come back to it. That's been helpful.

15 Mr Carall-Green, I'm sorry, I've now probably exhausted my curiosity. Why don't I let
16 you have a go and open up your application in relation to the fast track.

17 **MR CARALL-GREEN:** Yes, certainly. Would it be all right if I raised one additional
18 issue that might elucidate the conversation?

19 **THE CHAIRMAN:** Yes, please do.

20 **MR CARALL-GREEN:** It relates to the question of whether or not the Highways Act
21 and the counterfactual points are capable of being dealt with effectively as
22 a preliminary issue, or up front somehow. I just wanted to add that we do
23 have an estoppel point about the Highways Act. That may give rise to a need
24 to look at the evidence, and so that may take it outside the category of being
25 a pure legal point. I suppose it would be in theory possible to say what is the
26 correct interpretation and leave over whether or not the estoppel arises to

1 a later date.

2 **THE CHAIRMAN:** I can absolutely see, I'm happy to be told by you -- well not
3 happy, but I will certainly be content to be told by you that it's too difficult to try
4 and compartmentalise it and deal with it. I'm still somewhat tempted by it as
5 a proposition, because it does seem to me to drive quite a significant left or
6 right turn in the case, and it might be helpful to everybody to have some
7 understanding as to what the answer to that is. But I can appreciate that
8 there maybe questions as to how easily it's detached from everything else,
9 and also questions of duplication to resolve.

10 **MR CARALL-GREEN:** It may be I should have discussion with my learned friend.

11 **THE CHAIRMAN:** Absolutely. Having raised it sort of firmly, it would be unfair of me
12 not to give you an opportunity to think about it. Let's come to it in due course.
13 The reason for raising it at this juncture, and not when we get to the question
14 and the agenda, is it does seem to me to have a potential material impact on
15 the decision about the fast track process. If one were to see a little bit of
16 segmentation of this case, it might be easier to fit it into some of the
17 expectations for qualification. It struck me that actually if you were to deal
18 with the Highways Act point early on, and it was capable of being dealt with in
19 that way, it might actually reduce, or possibly eliminate, some of the things
20 that need to be dealt with later. That is just one factor, of course, when
21 considering the fast track process. That was the reason really for getting
22 excited about it now.

23 **MR CARALL-GREEN:** You will have seen from my skeleton argument that the
24 whole possibility of some kind of preliminary issue or split trial we've
25 tentatively put forward as a way of assisting with the fast track analysis. So
26 we are open to these suggestions, and perhaps if we have a short

1 adjournment at some point I can check in with my instructing solicitors and
2 clients about that.

3 **THE CHAIRMAN:** Yes.

4 **MR CARALL-GREEN:** Would it be helpful to get into the fast track generally now?

5 **THE CHAIRMAN:** Yes, please do.

6 **MR CARALL-GREEN:** I should say I'm at page 6 and paragraph 17 of my skeleton
7 argument. My starting point with the fast track is paragraph 5140 of the CAT
8 Guide to Proceedings, which says that the FTP is a particular procedure
9 intended to enable less complex claims to be brought in particularly by
10 individuals and small businesses and decided quickly with limited risk as to
11 costs. Then it goes on to say that the tribunal has a power to expedite
12 proceedings, and the fact that a procedure is not subject to FTP does not
13 preclude urgency and robust case management and all the rest of it.

14 So I do want to say upfront that my primary application is for the case to be allocated
15 to the fast track, but insofar as the tribunal feels, for example, that the case
16 just simply couldn't be heard this side of the August vacation, or for some
17 other reason slips out of cracks of the rigours of the fast track procedure, my
18 application is for robust and expeditious case management.

19 What I will do is go through the issues that the tribunal has suggested in its letter are
20 important for the determination of the fast track application, but, before I get
21 onto that, I think I ought to make six short scene setting submissions.

22 The first is this: the point of the fast track procedure is to enable small excluded
23 businesses to have access to justice. The reason that the tribunal has this
24 procedure is for cases such as this, where a small claimant -- and this
25 claimant is two to four people, as we've said in our fast track application, with
26 a very modest turnover. This is a small claimant that's seeking access to

1 justice because it says it's been excluded from the market by a dominant
2 undertaking, and we say that the fast track procedure is the form of access to
3 justice that this tribunal gives the claimant.

4 The second scene setting submission is this: a hearing is like an accordion, it can
5 expand or contract and the air will fill the available space. The defendant
6 says that this needs to be tried in seven days, and we've suggested
7 a three-day timetable. The tribunal will know that the reality of the situation is
8 that the submissions and the evidence will fill the time available, and a short
9 trial allows the tribunal focus on just the important facts.

10 I do add to that my third submission, which is that because this is the Competition
11 Appeal Tribunal, where the strict rules of evidence don't apply, it's no good for
12 the defendant to say that we need to cross-examine up hill and down dale on
13 all aspects of our case. The tribunal has the power to control evidence, to
14 limit the time for oral evidence, and to keep the hearing within reasonable time
15 boundaries.

16 **THE CHAIRMAN:** That of course has to sit with the entitlement to have a fair
17 hearing.

18 **MR CARALL-GREEN:** Of course, always subject to fairness. The tribunal will not
19 allow the hearing to run so short that the issues aren't properly ventilated. My
20 point is that whereas if we were in the Chancery Division the court might feel
21 beholden to some of the strict rules of evidence, meaning that, for example,
22 I would have to put all aspects of my case to the witnesses. But the strict
23 rules of evidence don't apply here and the tribunal can control that.

24 The fourth scene setting submission is that the point is taken against me in my
25 learned friend's skeleton argument that allegations of misconduct may be
26 made against certain individuals who need to turn up at the tribunal in order to

1 answer the case against them. But that of course is not the case that is being
2 put. This is an abuse of dominance case. It is not a case about the
3 misconduct of individuals. I suspect the tribunal wouldn't take kindly to my
4 accusing individuals of wrongdoing that isn't pleaded. It's an abuse by the
5 City Council. So it's not a case where individuals have to turn up to answer
6 a case. There is no case against them, the case is against the Council.

7 The fifth scene setting submission I'd like to make is that the guide and the rules both
8 encourage the cases of the parties to be set out in writing and for hearings to
9 be short.

10 The final scene setting submission is about costs. This is related to the first one, that
11 if this is supposed to be a procedure which is supposed to allow access to
12 justice for small excluded business, then it must be a procedure, as the guide
13 says, that allows cases to be decided with limited risk as to costs.

14 We are already concerned about the approach to costs that the other side is taking.
15 It is of course a great pleasure to appear against counsel of such standing as
16 my opponents, but we do say that it's already an indicator of
17 a disproportionate approach to costs, that we have against me two counsel
18 who are much my senior. We are concerned that the approach of the
19 defendant is to make this a very expensive, long and difficult fight. The fast
20 track procedure allows a tribunal to control that risk and to make sure that
21 costs are not incurred that would be disproportionate or unreasonable.

22 Those are the scene setting submissions. With those, I would like to move on to the
23 four topics that the tribunal has indicated it would like to understand in order to
24 make a determination on the fast track procedure. Those come from the
25 tribunal's letter of 31 January.

26 The first of those topics is: what are the main issues for determination? Of course,

1 sir, we've already had some discussion about this, but the tribunal will see that
2 I have set out at paragraph 17 of my skeleton argument what those issues are
3 likely to be.

4 **THE CHAIRMAN:** I think the time we spent earlier was useful and might have
5 helped us to understand how those fit together and, indeed, the extent to
6 which there's a difference between you.

7 **MR CARALL-GREEN:** Quite right. Perhaps if I skip through them. The first is
8 obviously the undertaking point. We do say that this is going to be the kind of
9 point that can be resolved largely through submissions. We don't accept that
10 a large volume of evidence is going to be required. Indeed my learned friend
11 in his submissions just now, when he explained why there was going to be
12 a discussion about undertaking, really referred to the Council's duties and
13 powers under its statutory framework. So that, it seems to me, is really
14 a question of submissions.

15 **THE CHAIRMAN:** If the defendant's case is that we need to understand, shall we
16 call it the functional landscape, and I suspect that some of that can be done
17 on submission, but I also rather suspect that some of it will need to be done
18 by way of evidence, but I don't know --

19 **MR CARALL-GREEN:** My question would be: what evidence is required on that?

20 **THE CHAIRMAN:** Well the example I think was given of the In Bloom campaigns
21 and how they fulfil a community need, and what the relationship between
22 those is and the activity, which you say is an economic activity. I may be
23 wrong about that, but I think that's what Mr Bowsher is saying.

24 **MR CARALL-GREEN:** I do accept that some evidence on what the In Bloom group
25 is and what it does is going to be required. That's seems fairly limited in my
26 submission. I don't see this being an issue which will require a large volume

1 of evidence. Certainly I don't think that expert evidence is going to be
2 required on the question of undertaking, because it is of course a question of
3 whether or not the law characterises the activity as economic. The MOTOE
4 test that I have cited in my skeleton argument asks the question essentially is
5 the defendant getting involved -- is it playing on the economic playing field.

6 **THE CHAIRMAN:** Yes.

7 **MR CARALL-GREEN:** So we do say that that will not be particularly difficult to
8 resolve.

9 We then have issue two, which is dominance, but of course that resolves into market
10 and then dominance. On the question of the market, this is the first issue that
11 I accept is going to require some volume of evidence, principally economic
12 evidence. But I do feel I should say at this point, sir, that I also do not
13 understand why evidence on more than one market is required, because it
14 seems to be the case that my learned friend is advocating for the possibility
15 that there might be an upstream market on which there is only one
16 undertaking, which is not in fact an undertaking. So we, on this side of the
17 room, are at a loss as to what evidence will actually be required in relation to
18 that supposed market.

19 **THE CHAIRMAN:** I think that's the point I put to Mr Bowsher, and I think his answer
20 to it was, actually, it's about understanding the functional aspect, and so it
21 may be that it's more relevant to -- it may be that it turns out to be a point
22 that's more relevant to the question of undertaking than it is actually to market.
23 I certainly wouldn't want Mr Bowsher to feel that he'd had that door shut to
24 him if he wants to try to make a market argument, just to be clear.

25 **MR CARALL-GREEN:** Quite. As I understood it, sir, the point being made was
26 indeed that this was a question of the Council's functions, but again that's

1 a question of submission. Maybe we could look at the statute or we could
2 look at some learned commentary on what the functions of the Council are,
3 but I don't see why that means we need any evidence from an economist on
4 what the market is.

5 **THE CHAIRMAN:** Yes.

6 **MR CARALL-GREEN:** So we do say that the relevant market is a singular question.

7 Then of course we have the question of dominance. Now on this we say that again
8 comparatively little evidence will be required, because if the market is as we
9 say it is, or similar to what we say it is, then we say it will be fairly obvious that
10 the defendant is dominant, because it enjoys a very high market share and is
11 the gate keeper. Clearly the tribunal will want to see some evidence of that
12 market share, I don't shy away from that, but on our case it is going to be
13 quite straightforward to resolve the question of dominance.

14 Then we have the third issue, which is abuse. I have divided that into three
15 sub-issues: the Highways Act, the Competition Act and then the defendant's
16 intention.

17 We have discussed the Highways Act at some length, and I accept that there will be
18 some submissions about that. We then have the question of the Competition
19 Act, and whether or not the defendant's conduct amounts to an abuse for the
20 purposes of that Act. But we have said that that question is almost not its own
21 question but collapses into the question of the counterfactuals. What I've said
22 in my skeleton argument is really what you're asking yourself there, as the
23 tribunal, is: if the defendant had been acting properly, would it have refused
24 this application or would it have granted it?

25 **THE CHAIRMAN:** Once you've reached the conclusion that the fact pattern is
26 capable of giving rise to an abuse, which again is a point that Mr Bowsher

1 hasn't considered, but once you get past that.

2 **MR CARALL-GREEN:** Once you get past that, yes. On that, sir, I think we would
3 say that, if this is a market, the idea that excluding somebody from that market
4 is not capable of restricting competition is rather an ambitious submission. I'll
5 leave it there --

6 **THE CHAIRMAN:** You will have plenty of opportunity to develop that, I'm sure.

7 **MR CARALL-GREEN:** I will take that opportunity.

8 Then we come to the defendant's intention, and, as I've said before, I don't want it
9 ever to be said that I set this up as something that I have to prove, because
10 I don't. That will go to the question of how much time needs to be spent
11 looking at intention, because it's not a fundamental pillar of my case. What it
12 does is enriches and assists in my case and it acts as a pointer for the tribunal
13 to whether or not there has been an abuse.

14 Moving on then to the fourth issue, which is the effect on trade --

15 **THE CHAIRMAN:** Just before you do that, I think it probably comes into this
16 question of abuse, the continuing infringement point pops up somewhere,
17 doesn't it? To slightly cut to the chase a bit on it, the biggest hurdle I think in
18 relation to fast track process here is the suggestion we might need quite a lot
19 of factual evidence, which largely covers the period from 2015 to 2021 and
20 involves various different iterations of the interactions between the parties.
21 I think I'm right in say, aren't I, that this has to be dealt with in the question of
22 abuse, what was the particular condition of the particular point in time as to
23 exclusion. That is one of the greatest difficulties you have, if I may say so, in
24 convincing me to put this into the fast track, because there is quite a lot of
25 factual material there, isn't there?

26 **MR CARALL-GREEN:** It depends on how one assesses that factual material. We

1 do put forward a lot of documentary evidence in our reply, but the question is
2 then: how is the tribunal to assess the documentary evidence? We say that
3 the modern practice of the court, certainly post Gestmin, is that we don't need
4 witnesses to talk us through all of these documents. It's a perfectly legitimate
5 exercise of the tribunal's fact finding power to just read the documents and
6 see what they say. That is consistent with the practice in the Commercial
7 Court and indeed consistent with the practice that the CMA would adopt. The
8 CMA would have no hesitation, provided that the evidence was there, in
9 finding an abuse and finding intention on the basis of a largely paper process.

10 **THE CHAIRMAN:** In some ways it is in your hands, isn't it? As you indicated
11 earlier, if the defendant were to produce witness statements from seven or
12 eight or ten people, whatever they are, that's not goes to take up court time to
13 the extent that you decide to cross-examine them. How do we get ourselves
14 to the position where we're confident about that, are you prepared to commit
15 to anything -- how do I satisfy myself that you're going to be able to restrain
16 yourself? There's the uncertainty that you don't know what you're going to
17 get, and I'm sure you don't want to commit to --

18 **MR CARALL-GREEN:** Quite right, it's very difficult for me to promise anything now.

19 **THE CHAIRMAN:** That's the knotty point here, isn't it? If I may say so, I think that's
20 the really tricky bit in all of this. If it is indeed going to be seven witnesses and
21 you're going to want to cross-examine, even for a short period time, all those
22 witnesses, we aren't talking about three days. I can't tell from the material
23 I have whether this is the case or not, but if we're able to piece the case
24 together from just a set of documents, and actually there's not going to be
25 much that the witnesses can say and therefore not much that you want to ask
26 them about, then it's a totally different game, isn't it?

1 **MR CARALL-GREEN:** It is. The only tool I have at my disposal to manage that is to
2 ask the tribunal to compress the time for the hearing, because, as the tribunal
3 has already pointed out, I am somewhat at the mercy of what the defendant
4 decides to deploy. We can constrain that, but I think the only way we can do
5 that is by effectively saying to the defendant: this is the time you have, so you
6 have to make your case within that period of time.

7 **THE CHAIRMAN:** It's a combination of your points two and three, isn't it? Okay,
8 thank you.

9 **MR CARALL-GREEN:** I think I'm on my fourth issue, which is page 10,
10 paragraph 17.4 of my skeleton argument, which is effect on trade. This is
11 another of those where I say it is of course a conceptual issue that the tribunal
12 needs to consider, because it's part of the test in the statute, but functionally,
13 ie for the purposes of submission in evidence, it actually collapses into the
14 causation question, because if I can show that absent the infringement such
15 and such would have happened, that would be an indicator of what the effect
16 on trade actually was.

17 So then we have the fifth issue, which is causation and counterfactual. I've divided
18 this into what would each party have done on the counterfactual where the
19 abuse was purged. 5.1 is what would the defendant have done if it was acting
20 lawfully. In a sense, we've discussed that when talking about the
21 Highways Act and the Competition Act. 5.2 is what the claimant would have
22 done. Again, this is an area where I accept there's going to be some measure
23 of evidence that will be required, because the claimant will want to put
24 somebody up to explain what the business plan was and what the plan was
25 for growing the business and making applications and compounding the
26 revenue up through the years; and the claimant will also want to put on some

1 economic evidence which will effectively do the maths on the quantum for the
2 tribunal.

3 **THE CHAIRMAN:** Is that a convenient point to ask you about splitting the trial?

4 **MR CARALL-GREEN:** It may well be sir.

5 **THE CHAIRMAN:** Splitting quantum off, and your view is that is feasible?

6 **MR CARALL-GREEN:** We say that there are ways of doing it. I think I've
7 suggested one. I can recap that if that would be helpful.

8 **THE CHAIRMAN:** Yes.

9 **MR CARALL-GREEN:** I think the one that I suggested earlier was that we could
10 resolve undertaking, market, dominance, so that's 1 and 2, and then we could
11 take effectively 3.2. Which would to be say that -- and it would effectively be
12 on an assumption.

13 **THE CHAIRMAN:** Why would you not do 3.1, if it's just a legal point?

14 **MR CARALL-GREEN:** We could well do 3.1, I was going for a particularly economic
15 formulation, but we could certainly do --

16 **THE CHAIRMAN:** I think -- yes, sorry, carry on.

17 **MR CARALL-GREEN:** And then we could leave aside all of the counterfactual
18 materials.

19 **THE CHAIRMAN:** That's quite difficult, though, isn't it? Separating a counterfactual
20 from the discussion about abuse I suspect is not --

21 **MR CARALL-GREEN:** It's not entirely straightforward, but that's one of the reasons
22 that I suggested that, if we were going to split off something, the Highways Act
23 might go into the latter half. It would be possible to say, well, let's assume for
24 these purposes that the power existed under the Highways Act, and then
25 allow the defendant to say at the second trial, well, actually if I had been
26 acting lawfully, the Highways Act would have required me to refuse anyway.

1 **THE CHAIRMAN:** Yes. The alternative is to just chop off 5.2, effectively, get to the
2 point where you know where --

3 **MR CARALL-GREEN:** Yes.

4 **THE CHAIRMAN:** And that of course has merits in lots of cases, doesn't it, because
5 it allows that whole quantum piece to be formulated by reference to what the
6 abuse is and the counterfactual, but I suspect your concern is that doesn't
7 save that much time.

8 **MR CARALL-GREEN:** It doesn't save that much time. It depends on how the case
9 is argued, but there's a risk that what that does is that brings into the first
10 hearing an analysis of each and every one of the applications. So the
11 defendant says that -- of the 40 applications that were made, we have to go
12 through each one and explain why that would have been refused.

13 **THE CHAIRMAN:** But I think you might be facing that anyway in relation to the
14 abuse argument, might you not?

15 **MR CARALL-GREEN:** We might. If the tribunal is looking for a way to frame
16 a helpful first trial that is quick, it might be sensible to leave that checklist of 20
17 or 40, or whatever it is, over to a second trial, when we can -- a second trial
18 that we can go into having established the principles of, for example, the
19 defendant is an undertaking, there is such and such a market that it's
20 dominant in, and that in principle it would be abusive to refuse on the basis of
21 protecting its own revenue stream.

22 **THE CHAIRMAN:** Isn't the difficulty with that that, if we're going to look at the
23 exclusionary behaviour and decide whether or not it's abuse, we are going to
24 have to look at the activities that were part of the granting or not granting of
25 licences, and that's all tied up together?

26 **MR CARALL-GREEN:** There is some artificiality to it, of course I can see that.

1 I think, as I've already said, it would involve making effectively some
2 assumptions that we would have to make clear so as not to prejudice the
3 defendant's ability to raise those issues in the acted trial. But I do say that it's
4 workable.

5 **THE CHAIRMAN:** Yes, okay.

6 **MR CARALL-GREEN:** Although I perfectly well accept that there is some
7 complexity that arises.

8 **THE CHAIRMAN:** Okay. Let's keep moving, then. I think you were up to defences,
9 and I think ...

10 **MR CARALL-GREEN:** Yes, sir, I'm up to defences. Defences in fact are not
11 a particularly onerous issue to deal with, because first of all we have objective
12 justification. The objective justification defence is said to arise under the
13 Highways Act, so we've effectively already discussed that, and because the
14 Council was following counsel's advice. We just say it would be a matter of
15 submissions as to whether that amounts to an objective justification defence.
16 We say it just clearly doesn't. So we don't say that objective justification
17 would need to take up an enormous amount of time at the hearing.

18 Now of course that's already been explored a little bit, because I believe the tribunal
19 in an exchange with my learned friend earlier was asking about what would
20 happen if we established that the defendant got the law wrong. My learned
21 friend said -- there are two things I think he said. They say that if we were
22 wrong they should have challenged by way of judicial review, and I think that
23 comes on to the abuse of process defence in 6.2. Then he said it couldn't be
24 an abuse because effectively the Council was doing its best, honestly trying to
25 do what it should have done under the statutory framework.

26 We don't really understand that defence, because Purple Parking is authority for the

1 proposition that all the unlawfulness needs to be purged. So if the Council
2 was wrong, that wrongness effectively needs to be purged for the purposes of
3 the counterfactual. So we don't see that there's much going on here in terms
4 of objective justification.

5 If I now turn to abuse of process, therefore, which is 6.2. That defence it had
6 appeared to me to fall away in my learned friend's skeleton, and apologies if
7 I missed it, but I didn't see it in their list of issues. It has perhaps been
8 resurrected orally in that when the tribunal asked, as I said a moment ago, my
9 learned friend said we should have challenged this by way of judicial review.
10 I don't fully know whether --

11 **THE CHAIRMAN:** It may well be he wants to put it as an abuse of process. I think
12 he was putting it as whether it was capable of being abuse for somebody to
13 have made a mistake of law in application of their duties which is capable of
14 judicial review. I think that's the point that he was making. I don't think we
15 need to dwell on it, Mr Carall-Green.

16 In a way that's been very helpful, but we sort of keep coming back I think to the same
17 point, which is that there's a chunk of evidence here which is largely driven by
18 the factual evidence. There may be some differences of opinion about some
19 of the economic analysis that's required, but it is not so much that that is
20 causing the problem here. What's causing the problem in relation to fitting
21 this into a fast track is the factual evidence.

22 Whichever way you look at it, it's not just one thing that happened, it's a bunch of
23 things that happened over a period of time. Clearly the defendant needs to be
24 able to run the case it wants to run, which may well involve getting into the
25 detail of, for example, the licence applications that have been made, the
26 outcomes, and indeed other licence applications.

1 I'm just conscious that we should take a break for the shorthand writer. I'm just a bit
2 conscious of time too. How long do you think you're going to be?

3 **MR CARALL-GREEN:** In terms of fast track, I think I need to address you on the
4 factual witnesses, the expert evidence, and the types and extent of
5 documents to be disclosed. In order to be true to my own words, I will fit that
6 within whatever time I'm given.

7 **THE CHAIRMAN:** We've spent quite a bit of time talking about factual witnesses
8 and the economic expert evidence, and I have read your skeletons and think
9 I have the points you have made. If there's anything else you want to draw
10 out as a result of those discussions we've had, you should do so.

11 And then the documents, I think the document position is reasonably clear, I think it
12 would be quite helpful to hear from Mr Bowsher about the documents,
13 because he has most of them.

14 **MR CARALL-GREEN:** In that case I will limit myself to making a few observations
15 on what they have put forward in terms of their list of witnesses.

16 **THE CHAIRMAN:** Yes, I think that might be helpful. Would it be sensible to take the
17 break now, allow you to take instructions if you wish to in relation to my
18 question, which I suspect I know the answer to, but I'll let you have a go at it,
19 and then maybe if we came back at 11.55, I could ask you to wrap up fairly
20 quickly at that stage. Is that convenient?

21 **MR CARALL-GREEN:** That's convenient, thank you, sir.

22 **THE CHAIRMAN:** Okay.

23 **(11.47 am)**

24 **(A short break)**

25 **(11.59 am)**

26 **THE CHAIRMAN:** Yes.

1 **MR CARALL-GREEN:** Sir, I was going to addresses you on the defendant's list of
2 witnesses.

3 **THE CHAIRMAN:** Yes.

4 **MR CARALL-GREEN:** Three big picture points. The first is that we're faced with
5 a list of some eight or nine witnesses, and we do say that in any case of this
6 magnitude that is a disproportionate approach. I've already made the point
7 that the practice of the modern court is not to expect every witness to talk
8 through every document that he or she has ever written.

9 The other big picture point that I make is that, despite the list being very long, it is in
10 fact missing what we would regard as the key witness, because, and this is
11 publicly available information, Mr Gary Bartlett is the head of Highways and
12 Transportation who we understand is in fact the decision maker on
13 applications of this nature. So, despite the fact the list is rather long, it's not
14 proposed that we would have evidence from the person who is empowered to
15 make the relevant decisions under 115E.

16 If I can then address on you the list as it stands --

17 **THE CHAIRMAN:** Just on that point, does it matter? Your position on that is if he
18 made a decision, he made it for the wrong reasons, because he had a power
19 he didn't think he had. Actually isn't your case really much more about what
20 influence the left hand had on the right hand? If he's the right hand making
21 the decision, what influence did the parks people have on that decision? Isn't
22 that really more about the communications between the parks people and
23 some of the people on this list?

24 **MR CARALL-GREEN:** Sir, it is, and those communications are in writing, as you
25 can see.

26 **THE CHAIRMAN:** Obviously there are a number of them and they come from

1 different people. You can see the possibility that you might want, particularly
2 the defendant might want, to produce a short witness statement from
3 somebody putting some of this in context, but it would be a short witness
4 statement, one would assume.

5 **MR CARALL-GREEN:** One would expect it to be. If, for example, there was
6 something in the email that was a bit garbled, and we didn't know what it
7 meant, then a short witness statement might say: what I meant by this was
8 such and such.

9 **THE CHAIRMAN:** And you may or may not choose to cross-examine them
10 depending on whether you thought that added anything?

11 **MR CARALL-GREEN:** Precisely.

12 On the list itself, in my submission we can see a number of problems. The first
13 witness that's proposed to be called is Phil Mitchell. We understand that
14 Phil Mitchell left the Council in 2020, so it's not clear to us whether or not
15 Mr Mitchell would choose to give evidence.

16 **THE CHAIRMAN:** We're not really going to be able to speculate on that, are we?

17 **MR CARALL-GREEN:** We're not able to speculate, but the point that I make is that
18 the list includes persons that the Council cannot say with confidence are
19 going to give evidence. We then have a number of individuals who are in line
20 management relationships. So we understand that James Rogers, who is
21 person B, manages Sean Flesher, who is person C, Richard Gill, who is
22 person G, and Light Addaquay, who is person D. So we say that this is
23 clearly unnecessary duplication.

24 Of course, if there is an ambiguous email from Mr Gill, for example, then, as I have
25 just said, a short witness statement to clarify what that email might have
26 meant is potentially appropriate. Insofar as we are being told the story about

1 why certain decisions have been made, we don't understand why we need
2 a witness statement from a manager, that person's managee and then that
3 person's managee as well. So we say that the list clearly is duplicative.

4 The last thing I would say, sir, is that the thrust of the discussions today have been
5 that witness evidence is going to be required because we're all going to have
6 to get into what the right hand said to the left hand, and what the intention was
7 and what have you. But that of course is not actually what is said in my
8 learned friend's skeleton argument. What my learned friend says in his
9 skeleton argument is that we're going to have evidence on things like the
10 practicalities of implementing section 115, which is an issue that's not
11 pleaded, person's observations on floral planters, which is inadmissible and
12 opinion evidence, and I don't see why it's relevant. We have evidence of
13 meetings in February 2021 that aren't pleaded. We have evidence from Kate
14 Morris, indeed, of a meeting in February 2021, which is rather startling given
15 that we understand she joined the Council in June 2021.

16 The list is full of irrelevance and duplication, and, to add to that, in correspondence
17 this week we're being told that the Council wants to add potentially eight more
18 witnesses, or is considering whether or not they should give evidence.

19 So, standing back, sir, my submission is that a disproportionate approach to
20 evidence is being taken here, and the tribunal should feel at liberty to exercise
21 its robust powers of case management to confine the defendant to what is
22 going to be strictly necessary.

23 I think that's all I should say on the witnesses.

24 **THE CHAIRMAN:** There is a question, isn't there, about -- on any view, this looks
25 like it's a bit of a stretch to enter the fast track process. I don't think I'm putting
26 it unkindly in that respect. There is a question as to how much it really

1 matters. If I were to take the view that, firstly, the case should be moved on
2 fairly quickly -- I'm not sure it can be tried in July, but I think it certainly could
3 be tried in October.

4 **MR CARALL-GREEN:** Yes.

5 **THE CHAIRMAN:** And if there was a firm approach to case management and to
6 costs management, does that put your clients in a particularly different
7 position? I think if you take as given that, for a case of this type, the tribunal
8 will do everything it can to manage so that all the steps and the costs are
9 proportionate. I suppose my question is, are we not at risk of creating
10 a problem for ourselves by trying to shoehorn it into something which it might
11 not fit into, when it might be better to leave it as a four to five day hearing, get
12 everything done, not split anything up, but just make sure we get on as quickly
13 as possible and keep it as cheap as possible.

14 **MR CARALL-GREEN:** Sir, yes, and I refer back to the statements that I made at the
15 beginning of the application.

16 **THE CHAIRMAN:** Your fallback position, yes.

17 **MR CARALL-GREEN:** I'm trying to protect my client's position on costs, on the
18 burden. The burden of proceedings of this nature is very great on a two-man
19 team. I'm not talking purely about monetary costs, I'm talking about time
20 costs. It is potentially crushing for a two-man business to have to deal with
21 litigation of this nature. So my overriding objective, if I can put it that way, is
22 just to make sure that the proceedings are dealt with in an expeditious,
23 reasonable and tightly controlled way; and if that means we leak outside of
24 FTP, it may be that the damage done is not so great.

25 I wouldn't want FTP to be seen as a straitjacket, and, as the tribunal has said, we
26 can create problems for ourselves if we think, well, FTP requires us to try it by

1 July, but for whatever reason that's just very inconvenient and we want to go
2 to the other side of the vacation.

3 **THE CHAIRMAN:** Well, that's my concern and I just have this anxiety that we're
4 going to end up doing it before it's really ready, and finding that that means
5 that there are things that could actually have been done better and should
6 have been done better and indeed should have been managed better,
7 because it will happen pretty quickly between now and July and that would
8 probably also increase costs as well; and also facing ourselves with the risk
9 that we're trying to fit into an inappropriate time period, a matter which, for
10 an extra day or so, would feel more comfortable. That's my concern.

11 **MR CARALL-GREEN:** I can well understand that, sir. I should say I don't want it to
12 be said against me that I'm somehow conceding or abandoning the
13 application, because I am not.

14 **THE CHAIRMAN:** No, I understand entirely. I put the question to you and
15 I absolutely understand what your primary position is. I'm not at this stage
16 resolving the application, because of course I will hear from Mr Bowsher as
17 well. But that's very helpful to understand that, thank you.

18 **MR CARALL-GREEN:** I'm grateful.

19 **THE CHAIRMAN:** Mr Bowsher.

20 **MR BOWSHER:** Thank you, sir. Bearing in mind the time, I'll try and take this as
21 swiftly as I can, as it were, and deal with it maybe in some places by
22 reference to points which are already in writing without necessarily exhuming
23 all of those points.

24 **THE CHAIRMAN:** I think it would be helpful, and that indication I've given, I think
25 you --

26 **MR BOWSHER:** I can see where we're heading. I may press on the soft spots, as it

1 were.

2 **THE CHAIRMAN:** Even then, I suspect pressing on the soft spots is somewhat
3 unnecessary. I am a bit concerned about time. How long do you think you
4 will --

5 **MR BOWSHER:** Let's see if I can cover this in 25 minutes, half an hour.

6 **THE CHAIRMAN:** Yes. I don't want to rush you, because, obviously you have
7 things to say, you have things to say. But I'm conscious we have quite a bit to
8 get through and I'm not sure we're going to do that by 1 o'clock if we're still
9 going on this.

10 From my point of view what is really helpful is just understanding what your position
11 is in relation to preliminary issues, which we've discussed to some extent, and
12 split trial, which has been canvassed by the claimant. Mr Carall-Green didn't
13 come back with anything -- you have nothing you particularly want to add in
14 relation to preliminary issue, which is the reason why you haven't raised it. So
15 I'm not expecting you to tell me you think it's a wonderful idea and we're going
16 to do it, I just want to make sure I'm clear about understanding where you are
17 with it. I would be keen to hear from you about the shape of the trial.

18 I don't think I need to hear from you about -- the points made about your witnesses,
19 you don't need to answer those. At the end of the day it seems to me pretty
20 clear that there is a period of time on which you are going to have to call some
21 witnesses, which I suspect is not going to make this feasible for a three-day
22 trial. I don't think there's much point in trying hard on that.

23 I think if you have anything to say about the management of the case outside of the
24 fast track process, then you ought to say that. Certainly my starting point is to
25 say it's going to be pretty vigorously managed from the tribunal, so it would
26 helpful to hear from you on that.

1 I don't want to dissuade you from anything else you feel you need to say, but that's
2 hopefully an indication of where I am.

3 **MR BOWSHER:** I may cover various points to make sure they're at least ticked off,
4 but I will deal with them swiftly, if I may.

5 If I can do it a little telegraphically then, firstly, the FTP application has, at least to
6 an extent, morphed into what has become a discussion around split trial or not
7 split trial, whether that's a split or a preliminary issue. I won't say a great deal
8 more about preliminary issues because we've discussed it in detail, but it
9 seems to us that most issues that one tries to carve out are either difficult to
10 carve out or potentially pointless.

11 **THE CHAIRMAN:** There's nothing you're keen on --

12 **MR BOWSHER:** There's nothing that's a knockout blow. Even if you were to take
13 what -- it would be relevant to get to grips with what section 115E and other
14 parts of the Highways Act means, but it doesn't bring the case to a juddering
15 halt if the tribunal decides the answer is this is a footway and this is not
16 a footway.

17 **THE CHAIRMAN:** Both of you seem to be saying that and I'm not going to push you
18 any further.

19 **MR BOWSHER:** At some point the tribunal may have to get to grips with that point.

20 **THE CHAIRMAN:** Yes.

21 **MR BOWSHER:** In terms of the -- and my learned friend fairly noted this point at
22 least in passing in his submissions, even on those points there are some
23 evidential issues, because you couldn't really deal with them without grappling
24 with his estoppel point. In fact it's not just his estoppel point, because there's
25 also an agreement point which goes to the same point. Again I don't think you
26 need to dig it up, but if you look at paragraph 93.4 at page 438 of the reply,

1 and paragraph 136.5.3 at page 453 of the reply, one is framed as an estoppel
2 and one is framed as an agreement. Let's not spend time unpicking the
3 exciting difference between that. There are evidential issues about even if we
4 were right we somehow made statements upon which they were entitled to
5 rely, et cetera, et cetera.

6 I think it's very hard to pull those points apart.

7 Split trial. If one simply compares the timetables attached to our respective
8 skeletons, my learned friend's is at 383, ours is at 401. You'll recall that we
9 have trial timetables attached. Maybe I can come and look at the trial
10 timetables. Our concern is simply this -- and to this extent we're with the
11 claimant in wanting to get this to a resolution. The practical problem is that
12 any split we come up with, whether it ends up being -- I would suggest that
13 aiming for a 26 July date for a trial start is pretty brave. Whenever that trial
14 happens, we're not going to start getting to grips with quantum and so forth
15 and counterfactuals and all of that stuff until we have a judgment, whereas in
16 our version we have a timetable -- we can debate the mechanics of how we
17 get that. But broadly speaking we get to a point where the trial is completed,
18 including quantum, well before Christmas, and again, depending on how long,
19 one would guess that that means that the claimant and the defendant are
20 going to have a conclusive answer quicker on our route than on a split route.

21 **THE CHAIRMAN:** Yes, I understand the point.

22 **MR BOWSHER:** It's a simple practical -- we can debate that in any number of ways,
23 but it's a simple chronological point.

24 I think it is important to make this point, and I've made the point to my learned friend,
25 that if this case is settleable -- and I don't know whether it is, but if it is
26 settleable, those on our side would need to see more in terms of numbers

1 than we currently have in the pleadings. I won't pull up the references, but
2 you will have seen that the pleadings are fairly sparse on numbers at the
3 moment, and we've commented on that. I don't need to take that point
4 further. No doubt that's a further debate, but you'll understand --

5 **THE CHAIRMAN:** Yes.

6 **MR BOWSHER:** So there's actually a positive incentive in, as it were, getting further
7 forward and getting to grips with the entirety of the case so that it can reach
8 a conclusion one way or another.

9 In a sense, I would suggest that's more or less the end of the matter, from our
10 perspective, as to why we've reached the conclusion we have done. This is
11 not a huge case, but there is a lot of fine detail. I'm not going to deal now with
12 all of the interactions between the different witnesses. We have put forward
13 the people who dealt with the relevant internal interactions, as we understood
14 them, to tell the story. For example, one of the points is Leeds In Bloom. It
15 may be right, as my learned friend says, that that person answers to someone
16 else we also have as a witness, but if explaining Leeds In Bloom is an issue,
17 the right way of dealing with it would be to have a witness statement from that
18 person. To be blunt, it's not for my learned friend to dictate to us who would
19 best explain these points. It may be the tribunal wants to manage these
20 things --

21 **THE CHAIRMAN:** On documents, just to get a sense of it, and actually it's probably
22 a discussion for a little bit later anyway, I think you have said that you have
23 4,000 pages of documents which refer particularly to communications with or
24 about the claimants. How many documents is that roughly? 4,000 pages is
25 obviously ... just a ballpark.

26 **MR BOWSHER:** Can we come back to that?

1 **THE CHAIRMAN:** I think it would be quite helpful when we come back to that
2 discussion about how we're going to manage disclosure as well, I would just
3 like to have a sense of what you really have there. There is this point there
4 about all the other applications that might have been granted. You talk about
5 an audit, and again, I'd just like to understand if we're going to embark on
6 exercises like that, what the position is and where it goes. But again for later
7 rather than now.

8 **MR BOWSHER:** It's the nature of these things that there will be a large number of
9 documents which are -- the curse of email is that a large amount of it is
10 overlapping, and 4,000 documents boils down to not necessarily 4,000
11 separate messages. Also of course some of it is relevant but not crucial, so
12 whether -- as is often said, in reality in these cases, if you knew where you
13 were going to end up, there are only ever 40 or 50 pages that everybody
14 looks at again and again.

15 **THE CHAIRMAN:** Of course, but you will have to do a proper search --

16 **MR BOWSHER:** I'll come back to documents in a moment if I may.

17 **THE CHAIRMAN:** Absolutely.

18 **MR BOWSHER:** There were some context points I should respond to very briefly.

19 I'm not going to deal with all of my learned friend's context points, but it is
20 important to note also in terms of the context of the FTP that urgency is
21 a factor. We referred in our skeleton to Belle Lingerie, I'm not going to pull it
22 up now because it's not a big point. We simply say it is evidently not urgent.

23 Costs. We have differently structured legal teams. We are dealing with the matter,
24 we're not using outside solicitors. We have a differently structured legal team.
25 Where that comes out in the wash on costs we're not yet in a position to deal
26 with, but that's just the way it is. It is not the case that we are somehow

1 instructing a magic circle firm, or my clients, in the style of the dominant
2 incumbent sometimes characterised I think by Roger Penrose, in one of his
3 Evidence, the enormous incumbent behemoth. That is not this case, we are
4 just simply trying to deal with this matter effectively.

5 Cross-examination and rules of evidence. I take the point that the rules of evidence
6 do not necessarily apply in quite the same way, but *Browne v Dunn* is still law.
7 The requirement for the hearing to be fair is still incumbent on the tribunal.
8 The reality is that findings of abuse of dominant position by a local authority
9 can have very serious effects on the careers of those involved in it. My
10 learned friend and I were involved in a case where exactly that happened; the
11 day of after the judgment of the tribunal where a finding was made against
12 a local authority, the chief executive of that group had to resign.

13 **THE CHAIRMAN:** Yes, I understand that point, and I'm sure that we're all sensitive
14 to it. There is of course a difference between -- well, the case is largely
15 premised, as we've discussed, on what need not be characterised as
16 intentional. Whether it's a mistake or not is to be determined, but if there was
17 an error in relation to the application of the Highways Act, then that is not
18 something which involves, I would have thought, the culpability of anybody,
19 particularly in circumstances where your client had sought legal advice on it.
20 So if that's where it ends up, I would hope that nobody would feel the need for
21 anybody depart as a result, put it that way.

22 I'm not pushing back on the point, I would say that there is a difference between
23 allegations which are made and directed at individuals and which might result
24 in the tribunal making a finding about that, and people who are aggrieved
25 because things might have been said about things that they have done which
26 are not really operative. That's just an observation for you to think about.

1 We will come back to this, won't we, because, whatever we do with management of
2 witness statements, we are going to have to exercise some control over the
3 scope of the factual evidence. That will need to be done by reference to
4 issues, and that's the way I think to manage this point.

5 **MR BOWSHER:** Just to take as an example, it might be that someone -- I've
6 forgotten his name, my learned friend just mentioned his name -- explains
7 Leeds In Bloom and it's a beautiful witness statement and everyone accepts
8 that, and that becomes the description that we proceed on: done, no need for
9 time at trial.

10 **THE CHAIRMAN:** Yes, and one would hope there might be quite a lot of that. One
11 would hope that a lot of the material about the functional aspects of the
12 Council and things about like Leeds In Bloom could be done in a very
13 uncontroversial way, and I would hope that your clients would try to do that.

14 **MR BOWSHER:** When we come into abuse, one of the things which might arise,
15 which might need more explanation and might be challenged, one can
16 anticipate, would be the interaction between the straightforward, is it in
17 principle possible to put a planter on that traffic island, and how do you take
18 account of sight lines, highway safety, et cetera, et cetera, other community
19 factors. Leaving aside the sponsorship and the Parks and Countryside point,
20 how in fact do you or did you take account of those other things? Now those
21 may be more controversial, and so there may need to be more than one
22 person dealing with that sort of point and that may need to be canvassed.

23 **THE CHAIRMAN:** I think probably what I would like to see I think in relation to both
24 the factual and the expert evidence is -- and we are jumping way ahead now,
25 but just to put the point down so you can all think about it. I would like to see
26 a clear reflection of relationship back to the pleadings, and that ought to drive

1 the shape of the documents and therefore the shape of the witness
2 statements and number of witnesses, and indeed no doubt the decisions
3 about whether they need to be cross-examined or not. So I think we need to
4 bring some discipline into it whatever we do here.

5 **MR BOWSHER:** The other point my learned friend mentioned -- yes, we mentioned
6 the possibility of other witnesses. That is not saying we're doubling the
7 number of witnesses, it was simply that a number of other individuals are now
8 mentioned in the reply. When did we get the reply? Monday, Friday? I can't
9 remember. We haven't even started to go back and think about how we deal
10 with that person now mentioned in the reply.

11 **THE CHAIRMAN:** Of course it doesn't follow that because they're mentioned there's
12 going to be a witness statement.

13 **MR BOWSHER:** Absolutely. All we're saying is the cast of individuals has suddenly
14 increased as a result of the reply. We have to talk to these people.

15 **THE CHAIRMAN:** No, you have to be able to run your case, I understand.

16 **MR BOWSHER:** I'm not promising that 15 people are going to have to give
17 evidence.

18 **THE CHAIRMAN:** Yes, I understand.

19 **MR BOWSHER:** Going back to those timetables that we had, and when you go to
20 the second version -- we each did our appendix B trial schedule. If one
21 accepts the premise that that this is a case that might be dealt with by a trial in
22 one piece before Christmas, if I can loosely use that as a shorthand, our trial
23 schedule, which is at page 402, is at least the beginnings of a working trial
24 schedule. It may be that there's debate about that, but that is a workable trial
25 schedule. We would have to debate further how that panned out.

26 **THE CHAIRMAN:** Yes.

1 **MR BOWSHER:** Sorry, can I help?

2 **THE CHAIRMAN:** I'm lost somehow. I have a hard copy and I appear to have
3 mislaid the page. Let me pull it up. It's in the bundle?

4 **MR BOWSHER:** It's in the bundle, page 402.

5 **THE CHAIRMAN:** It's probably quicker than me doing that. Yes, thank you.

6 **MR BOWSHER:** It's 384 versus 402.

7 **THE CHAIRMAN:** Yes, I have it now. Okay, I have the point.

8 **MR BOWSHER:** I don't think I need to say any more about it, but in our submission
9 the quickest, most effective way of getting to a conclusion of this case is to
10 follow something like that. That comes up with seven days, and, as you have
11 indicated, one would hope that after looking at the list of witnesses, as it were,
12 the current menu of 15, one way or another we would be able to get them
13 down to significantly less than 15, and find ways of -- you know, some
14 witnesses don't need to be cross-examined and so on and so forth.

15 **THE CHAIRMAN:** This is no more than instinct, and we can all play this game, but
16 really it feels like a five-day case, and one would hope you could contain it
17 into that. It's perhaps not possible, but certainly one would hope.

18 **MR BOWSHER:** My own guess would be that this might be a five-day case at
19 a push, with a break, being maybe no more than a weekend and a day, and
20 then closing commissions on day 6.

21 **THE CHAIRMAN:** Yes, of course that all depends on where we get to with the
22 discussions we've just had on witnesses. We're both finger in the air,
23 because it depends with where we get to with the witnesses. You don't know
24 the answer to that and I certainly don't know.

25 **MR BOWSHER:** When we looked at witness availability with that menu and those
26 dates, it worked when we last asked, but who knows what's happened in the

1 meantime. Obviously we only canvassed our witness availability, not anybody
2 else's.

3 There are a number of other points that have been made about the issues and how
4 they might interact. I'm not sure, given the way the discussion is going, do
5 they assist the tribunal very much?

6 **THE CHAIRMAN:** Not particularly.

7 **MR BOWSHER:** I'm sure we will have to come back to them at some point.

8 **THE CHAIRMAN:** We are going to come back to most of these things, but hopefully
9 with some speed because I think we've canvassed a lot of it. If there's
10 anything you think is critical you should let me know, but I've given my
11 indication.

12 **MR BOWSHER:** What we haven't dealt with, which I had on the menu under issues
13 and witnesses, is the various pleading points that we have between us.
14 I have a suggestion as to how to deal with that, because we obviously do not
15 want the trial to be bunged up -- technical term -- with each of us saying: you
16 can't say that, you can't say that.

17 **THE CHAIRMAN:** Let's come back to that.

18 **MR BOWSHER:** That's the quickest way of ensuring that a six-day trial becomes
19 a ten-day trial.

20 **THE CHAIRMAN:** Let's come back to that.

21 **MR BOWSHER:** I'm not sure there's much more to be said about expert evidence at
22 this stage. Factual witnesses we've talked about. Quantum I've mentioned.
23 Then there's documents. I don't know if it helps to talk about documents now.

24 **THE CHAIRMAN:** We've had a brief discussion.

25 **MR BOWSHER:** Apparently we think there's about 400 documents in total on our
26 side.

1 **THE CHAIRMAN:** On any view we hope this is a relatively light exercise on
2 documents.

3 **MR BOWSHER:** They want some more documents which apparently we've referred
4 to in our defence. We need to sort out how we deal with that. I think we've
5 said we'd like a list. What we don't want to get into is one of those boring
6 arguments about what a document refers to.

7 **THE CHAIRMAN:** I'm hoping this isn't going to be a case where there is going to be
8 an argument about anything in relation to documents. Let's come back to that
9 when we come to the agenda.

10 **MR BOWSHER:** I think that's all -- in terms of leading up to the fast track question
11 and asking the tribunal's questions, I think I've probably covered as much as
12 I need to. That's not that I've said all that I could have said, I'm trying to keep
13 things short.

14 **THE CHAIRMAN:** That's very helpful. You've kept your commitment.

15 Mr Carall-Green, is there anything you wanted to add as a result of that?

16 **MR CARALL-GREEN:** Sir, no, I don't think so, provided that we are -- I think we're
17 still on fast track?

18 **THE CHAIRMAN:** We are still on fast track. I hope we're going to move very quickly
19 through a bunch of other things as well, which I hope we've canvassed in
20 some detail.

21 What I planned, unless you have anything to add to that, what I'll do is give you the
22 answer now and give some reasons in writing. The answer, as I think you've
23 guessed already, is that I am not going to order this to be a fast track process,
24 and I'll explain in proper detail why, but fundamentally as you will have picked
25 up I think, there is a risk that we're going to try and shoe horn too much in too
26 quickly, which would be counterproductive. But the tribunal absolutely does

1 intend to manage this case very firmly, certainly in terms of speed and cost
2 and indeed just general discipline about how it's done.

3 What I'd like to do now is move on and run through how we're going to do that and
4 pick up the different points of the agenda. I hope we can do that quite quickly,
5 because we have covered most of these things one way or another already.
6 Why don't you take me through the agenda and work through the things we
7 need to pick up. What I might do is just make sure that Mr Bowsher's happy
8 as we go along. I'd rather do it that way, point by point, rather than --

9 **MR CARALL-GREEN:** Certainly.

10 **THE CHAIRMAN:** The first thing to pick up, which is not strictly on the agenda, is
11 this question of the location of the trial. I have actually made some inquiries
12 about that, about courtroom availability, and broadly speaking it is possible to
13 do it in Leeds. The judge in charge of court availability would help us do that.
14 We won't have a live stream facility there, I would think. I'm told it's not
15 necessarily a particularly substantial courtroom, so it's not a sort of -- I don't
16 know what that means --

17 **MR CARALL-GREEN:** We don't know where it is?

18 **THE CHAIRMAN:** In Leeds, but apart from that, nothing more than that do I know.
19 But just to indicate to you that we have made some inquiries. I'm certainly
20 open to it. What I would want to do is just to be sure that we weren't creating
21 a lot of extra expense as a result of that, so I'm not sure we need necessarily
22 make a decision about it now, and it may well be that the timing of the trial will
23 have some bearing on that, because there may be constraints here as well
24 which drive us somewhere else, in which case the question is do we go
25 across the road or do we go to Leeds.

26 I'm just perhaps trying to avoid that decision at the moment, other than to leave it on

1 the table as a possibility, and indeed I wouldn't put it as high as a preference,
2 but there's an inclination to do it if we can make it work, unless it turns out that
3 it's going to cause logistical or financial difficulty.

4 **MR CARALL-GREEN:** I think we would be content with that.

5 **THE CHAIRMAN:** Good. Well let's park that and we can pick that up when we start
6 to work out where the trial's going to be and the logistics of that. We don't
7 need to deal with confidentiality. I think we've dealt with preliminary issue and
8 split trial.

9 **MR CARALL-GREEN:** I beg your pardon, sir, can I just break in on confidentiality,
10 because there's a question I've raised in my skeleton argument about
11 privilege.

12 **THE CHAIRMAN:** Yes, absolutely. I've put that somewhere else, I've put that under
13 disclosure, can we pick it up there?

14 **MR CARALL-GREEN:** Perfect.

15 **THE CHAIRMAN:** I don't think there's anything more to say about preliminary issue
16 and split trial. It seems to me that the only obvious split would be to split
17 quantum off, and I don't get the sense that anybody thinks that's going to help
18 very much, and if we're not in the fast track then actually let's get it all done
19 and try and squeeze it into one hearing.

20 Witnesses, we've covered this in some detail as well. In relation to factual
21 witnesses, as I indicated just now, what I would like to see is some more
22 detail about, Mr Bowsher, your witnesses, and why you're calling them, in the
23 form of an abstract. I don't want chapter and verse about what they're going
24 to say, I'd just like some reference back to the pleadings to satisfy me that you
25 do need to call them and that they're covering issues that can't be covered by
26 someone else who's already being called. I'm sure you have the point about

1 duplication and about jamming up this case with unnecessary witnesses,
2 which I'm sure you wouldn't be inclined to do, but I would like to just have
3 a framework for some discipline about that.

4 **MR BOWSHER:** Yes. I have a thought about how we might do that. I'll tie it in to
5 what I was going to suggest about pleadings when we come to it.

6 **THE CHAIRMAN:** Yes.

7 Experts, the same point. I would like to see, on an issues basis, a description of
8 what the experts are going to cover before they start work on their reports,
9 and that applies to both parties.

10 Is there anything else we need to cover in relation to witnesses?

11 **MR CARALL-GREEN:** I don't think so. There's a small housekeeping point that I
12 have been asked to raise which comes up in relation to the expert witnesses,
13 and that is that -- I don't mean this as any criticism of any individual, but we
14 have had three occasions now where the defendant has written directly to the
15 tribunal on issues where we say it's appropriate to approach the claimant first.
16 I do want to raise now that the claimant is concerned that a dialogue between
17 the parties is not being properly established, and we would appreciate it if the
18 tribunal could give some gentle guidance on the fact that it's appropriate for
19 the parties to discuss inter partes before referring matters to the tribunal.

20 **THE CHAIRMAN:** I don't want to get into the whys and wherefores, so let's not have
21 a debate about any particular incident, but just to be absolutely clear, that is
22 the tribunal's expectation, that the parties will cooperate and try to reach
23 agreement on anything that is outstanding before it comes here.

24 I was a little dismayed to find that I don't think we even have as of today any sense
25 of an agreed timetable, even with the variants that are in place. Maybe that's
26 understandable because of the fast track application, but I certainly do expect

1 the parties to consult with each other before applications are made or issues
2 are raised. I would hope that's uncontentious. I'm sure, Mr Bowsher, you
3 would expect your clients to do that as well.

4 Okay. Costs. I will expect to exert control over costs. I think the way to do that is by
5 supervision of budgets rather than capping, and I had in mind, and this is
6 really for comment and pushback if you don't think it works, but I had in mind
7 budgets from each party by phase of the litigation, an obligation to notify the
8 tribunal of as and when you expect you might exceed a budget for a phase,
9 a presumption that amounts in excess of budgets won't be recoverable when
10 we come to determine costs, which of course can be displaced if there are
11 particular reasons for the successful party to recover. I would like to see the
12 budgets soon, and if need be we might need to have a virtual hearing to
13 discuss the content of them. But I would like that framework to be put in
14 place, or something like it. Does that sound like a sensible way to proceed?

15 **MR BOWSHER:** Practically, yes. I do have in mind that we use effectively
16 Precedent H, or some close variant thereof.

17 **THE CHAIRMAN:** Yes, I don't want anybody to reinvent any wheels here, let's just
18 do the normal budgeting process. But I would like it to be clear, there needs
19 to be a facility for people to realise that they've spent too much on a particular
20 set of tasks and to be able to self-report that.

21 **MR BOWSHER:** I should just make this qualification, I've made it before, but
22 I should just make it clear that we are -- there's still an exchange to be had
23 between us, we don't want to engage the tribunal with it yet, but we still see
24 the possibility of having to make a security for costs application, because
25 there is an inherent unfairness in costs budgeting. If you're being held to
26 a budget which in fact you're never going to recover because there's no

1 means of recovering costs, it's in fact a completely pointless exercise.

2 **THE CHAIRMAN:** If we had a full panel, our economist will no doubt in due course
3 be telling us that that provides an incentive for you to keep them low. But
4 putting that point aside, I completely understand your position on that. Can
5 we come back to that in relation to the further management of the case,
6 because I think that begs a question as to whether that needs a further CMC,
7 if you're going to make that application. You may decide not to do it.

8 **MR BOWSHER:** We're not yet at the point where we know whether we have to do it.

9 **THE CHAIRMAN:** But in terms of that regime I've described, are you comfortable
10 with that?

11 **MR BOWSHER:** That's fine.

12 **MR CARALL-GREEN:** Yes, sir.

13 **THE CHAIRMAN:** And is there anything that's not in there that you feel needs be in
14 order to manage the costs?

15 **MR CARALL-GREEN:** No, sir, I think that's probably sufficient. Just to repeat back
16 what you've said; got budgets, got notification obligation, a presumption of
17 irrecoverability in excess of budget, and then a possibility of a hearing to flush
18 out any issues that arise.

19 **THE CHAIRMAN:** Once we get the budgets, and of course the point about the
20 notification is it's not just to name and shame, it is actually to deal with the
21 situation and ask the question as to whether the budget should be changed.
22 Then of course once it's changed it would become, by presumption,
23 recoverable rather than irrecoverable, but that would be the point at which we
24 would work out why it had happened and whether it was proper to allow the
25 budget to be expanded.

26 **MR CARALL-GREEN:** In a court that would be a Precedent T situation. But I'm not

1 suggesting that we apply all of the strict rules.

2 **THE CHAIRMAN:** I would much prefer to keep it very simple. All I'd like to see is a
3 budget. By all means use those, that's fine, do it the way you normally do it,
4 but let's just keep it really simple. Good, that's costs.

5 Additional information and clarification. This is the pleading point, I think. As
6 I understand it, there was some agreement that I think you both want to seek
7 further information, and you had more or less agreed on a timetable for that.
8 Does it go beyond that, are there pleading points beyond that?

9 **MR CARALL-GREEN:** I think we want to make clear at this stage that we will of
10 course be using requests for further information where we consider that that
11 assists our case, but insofar as we have identified pleading defects in the
12 defence, we don't consider that we're under an obligation to let the defendant
13 have another go. So insofar as there are defective pleadings, we say that
14 we're perfectly entitled to let those stand, because we've been very clear
15 about the fact that we think that they're defective.

16 So we do want to make clear that where for example we have raised a pleading
17 defect, and the reply has come in, "Well you should simply ask for further
18 information," the answer to that is no, that's not actually the fair way round.
19 The fair way round is that we've identified a problem, if you wish to seek to
20 amend, fine, we'll of course be sensible and reasonable when it comes to
21 consenting to amendments, but then pay our costs of responding in the
22 normal way.

23 **THE CHAIRMAN:** Yes. There doesn't seem to me to be much difference in
24 substance between you pointing out your concerns about defects in the
25 pleadings and you putting in requests for information. I can't see --

26 **MR CARALL-GREEN:** It's really the costs point which is the key practical

1 difference. As far as we're concerned, we think that we have -- we've tried to
2 be very clear in the reply to clearly identify every instance where we say that
3 there are pleading difficulties, and so we say that the defendant is perfectly
4 well on notice of where we say that. But when it comes to our decision about
5 whether or not we RFI all 24 of those instances, that's got to be driven by our
6 duty to advance our client's case, not by any kind of --

7 **THE CHAIRMAN:** That must be right, Mr Bowsher. He's not obliged to fix your
8 pleading with RFIs, it's your choice as to whether or not you think there's any
9 substance in them and change them.

10 **MR BOWSHER:** Yes, sorry, there's two or three points. Can I wheel back.

11 **THE CHAIRMAN:** Yes.

12 **MR BOWSHER:** I'll answer your questions by developing what our proposal would
13 be.

14 **THE CHAIRMAN:** Yes, of course.

15 **MR BOWSHER:** Without engaging today with the detail of each of the points made.
16 We would propose that, I think at the same time, I don't think it needs
17 sequencing, that the first thing that happens is that we each submit requests
18 for further information of each other. We both have questions to ask of each
19 other's pleadings in different places. We each then answer those requests for
20 further information, or not, if we choose to say not entitled, or whatever, it may
21 be that leads to a battle. At the same time as producing the further
22 information, we produce, if so advised, a draft amendment for which we seek
23 permission. We would be seeking permission on the basis that we don't
24 contend that the amendment is necessary, but just simply an elaboration to
25 meet the points made so as to prevent this creating a tank trap at trial, and
26 that it's not necessarily that the usual rule as to costs should flow.

1 It may be that we can deal with that without that having to be fought out, it may be
2 that we have to put that to the tribunal, to be dealt with in writing I would
3 imagine, say, "There are three points, the tribunal needs to decide should we
4 be allowed to make this development in our pleading, and if so should the
5 usual rule as to costs flow or not?" I wouldn't expect that needs a hearing, but
6 that could all be wrapped up, one would have thought, before the end
7 of March.

8 **THE CHAIRMAN:** Yes, I don't think there can be any established position that
9 displaces that normal rule. If you want to amend your pleading, then it's
10 because you've decided you want to do it, and you take the consequences of
11 that. If you think it's clear then obviously you're entitled to say so.
12 I understand the point you're getting at, I understand the intention to remove
13 these issues from the table if you can, but I don't think we can legislate in
14 advance for things like that.

15 **MR BOWSHER:** Okay, but just to make this point: if what we say is we are simply
16 doing this to prevent time being wasted at trial, so that this is in fact a waste of
17 time, there's sufficient pleading, but we're doing this now so there simply is
18 not the opportunity to waste time at trial, then we would say the usual costs
19 rule apply.

20 **THE CHAIRMAN:** The point I'm making is we can't anticipate the outcome of that
21 argument. That's the only point I'm making. If you want to make that
22 argument, you're very welcome to.

23 **MR BOWSHER:** I'm not proposing to develop that argument now, I'm just flagging
24 up that that may nor may not be a point we make on some of these points.
25 One would expect that therefore much of what needs to be dealt with on the
26 pleadings could therefore be swept up by a date ... certainly by Easter. I think

1 we have a date in our schedule.

2 **THE CHAIRMAN:** Yes, I was looking at your timetable. It talked about the RFI
3 process.

4 **MR BOWSHER:** Yes, by the end of March.

5 **THE CHAIRMAN:** Yes, the RFI process finishes --

6 **MR BOWSHER:** 24 March.

7 **THE CHAIRMAN:** Exactly. So one would hope that within a couple of weeks of that
8 you would have a final --

9 **MR BOWSHER:** Our amendment could be in on the same date. Any application
10 could be dealt with at or around that period.

11 **THE CHAIRMAN:** Yes, and once the amendments are done, and obviously the
12 application may determine whether or not they proceed, but at least
13 everybody's on notice then and they can get on with things.

14 **MR BOWSHER:** And the question that you raised about witnesses and issues could
15 be dealt with, I'm going to suggest probably best by way of a schedule or
16 some such, a week or two later.

17 **THE CHAIRMAN:** Certainly around about that time, on the basis that if you're going
18 to produce them, and I'm just looking at your timetable, perhaps it's helpful to
19 come back to the timing when we've -- I think we need to work backwards
20 a little bit from the trial.

21 **MR BOWSHER:** We do. But all I'm saying is just using that as a hypothetical
22 timetable, probably a couple of weeks later, because there's probably some
23 practical issues about talking to witnesses and these other people, who
24 actually is going to deal best with one issue or another, we would then match
25 up witnesses to issues on the pleadings.

26 Can I make one other very small point, which is that on the two points which I

1 mentioned earlier, which is the estoppel and the agreement referenced at,
2 and I gave you the references earlier which I now can't see ... paragraphs
3 93.4 and 136.5.3 of the reply, I think strictly speaking we have to respond to
4 those, and strictly speaking that response should be by way of rejoinder. It's
5 a terrifying moment when one uses that word, but I suspect the answer is
6 we're going to have to serve a rejoinder and seek permission to put in
7 a rejoinder on those points then, because I believe that's the correct way of
8 dealing with those issues, them having been raised by way of reply.

9 **MR CARALL-GREEN:** If they want to set out their case in a further statement, then
10 I can't see any downside to that.

11 **THE CHAIRMAN:** It's helpful, not unhelpful, yes. Okay. So that's the pleading
12 points then.

13 **MR BOWSHER:** Does that cover everything up until disclosure?

14 **THE CHAIRMAN:** Yes, so while you're on your feet let's deal with disclosure. The
15 issue here as I understand it is it's accepted that the claimant will provide
16 standard disclosure, that's agreed between both parties, am I right? Is that
17 not necessarily ...

18 **MR CARALL-GREEN:** We're happy to give standard disclosure.

19 **THE CHAIRMAN:** Presumably you don't have very much.

20 **MR CARALL-GREEN:** Precisely, that's one of the key drivers here, small business,
21 a couple of email inboxes, it's not a big job.

22 **THE CHAIRMAN:** Okay, fine. So that's easy. Then the question really, as
23 I understand it, Mr Bowsher, is what is the ambit of your disclosure
24 obligations. Now we're not in the context of a fast track application, where
25 there might be some incentives to distort the way one looks at this,
26 presumably you have quite a strong inducement to keep that as narrow as

1 possible.

2 **MR BOWSHER:** Yes.

3 **THE CHAIRMAN:** It doesn't sound like you have a huge amount of immediately
4 responsive documents, but there are going to be other categories no doubt
5 that you want to get into.

6 **MR BOWSHER:** There are other categories, particularly in the quantum area and
7 the market definition area, which are highlighted in the --

8 **THE CHAIRMAN:** Quantum, things that you want?

9 **MR BOWSHER:** Things that we may want from them.

10 **THE CHAIRMAN:** Yes, of course, one would assume that they would come out of
11 the standard disclosure.

12 **MR BOWSHER:** Indeed, but it may be that that's a discussion we will have to have
13 just to identify what needs to be put forward.

14 **THE CHAIRMAN:** I think, just to be clear, I'm not -- I can understand there may well
15 be specific requests for disclosure that need to be made, and obviously we'll
16 deal with those if they can't be agreed, but I'm hopeful that we're talking about
17 a small pool of documents on both sides, a little bit larger on yours, and
18 I understand there may be some things that fall outside the obvious that need
19 to be dealt with, but I'm just keen to establish a regime that makes this as
20 painless as possible for everybody.

21 **MR BOWSHER:** The basic point is standard disclosure for everybody. The one
22 practical point that has been debated between the two parties, I will canvas it
23 now, I'm not sure this is a point the tribunal needs to spend too long on, there
24 are obviously a lot of documents which were produced under the Freedom of
25 Information Act over a long period. I think there are four separate requests.
26 There's certainly thousands of documents I think covered by those requests.

1 The claimant says to us, "We don't need to tell you what we have because
2 you gave them to us." Unfortunately, it should not be assumed that we know
3 what we gave them.

4 **THE CHAIRMAN:** Okay.

5 **MR CARALL-GREEN:** I'm afraid that the converse is also true, which is that it
6 should be not assumed that we know what they gave us. The reason for that
7 is that some of it was delivered in hard copy, and so insofar as somebody has
8 done something sensible with the hard copy documents like put them all in
9 chronological order with something else that we already have, I'm not saying
10 that that's been done but one can imagine.

11 **THE CHAIRMAN:** Do you anticipate that they will be part of your standard
12 disclosure exercise?

13 **MR CARALL-GREEN:** I think what we had suggested is that we wouldn't need to
14 give them back what we already have.

15 **THE CHAIRMAN:** We're talking about listing them, aren't we? In the first instance
16 we're just talking about identifying what these documents are, and I think
17 probably that is going to have to be done in some way, isn't it? I'm not
18 suggesting it needs to -- well, if we don't have a record of what documents
19 you have, and there's no facility for Mr Bowsher's client to reconcile with what
20 they have, then we have a bit of a problem, don't we?

21 **MR CARALL-GREEN:** We are in some difficulty. May I take a moment to speak to
22 some of those behind me.

23 **THE CHAIRMAN:** We don't have to resolve this now.

24 **MR BOWSHER:** There may be a short practical solution, which I would suggest we
25 try and discuss offline. That's why I raised it hesitantly, but I thought the
26 tribunal should be aware. A lot of these documents are of course core

1 documents -- well, no, a lot of the core documents will be somewhere in the
2 middle of this bundle of documents. That's not to say that all of them are
3 relevant.

4 **THE CHAIRMAN:** There are a number of different ways you could deal with it.
5 Somebody could list them, which is obviously a bit painful, but that may be the
6 easiest thing to do. As I think you were suggesting, perhaps if you have them,
7 then you just give them to the defendant and then they have them as well,
8 they have them back. I don't know what the answer is, but I think the one
9 thing we are going to have to be able to do is for both sides to have an
10 assurance that they know what each of them has and therefore what is the
11 pool of documents that's going to find its way --

12 **MR CARALL-GREEN:** A universe of documents.

13 **THE CHAIRMAN:** We need a universe of documents, and therefore be confident
14 that from that universe we are able to satisfy inclusion in the bundles and so
15 on. I think it's better to leave to you how you work that out. By all means
16 come back if you have problems. But the premise is standard disclosure on
17 both sides.

18 **MR CARALL-GREEN:** I was going to raise that, because I think that we had
19 actually set out with more limited ambitions, partially because we were trying
20 to work within the fast track timetable, so I think it's fair to say that in our
21 skeleton and in the correspondence we have suggested something
22 approximating to disclosure by request. Given that we are now proceeding on
23 a slightly more elongated timetable, I think it lies ill in my mouth to say I don't
24 want the information that you're prepared to give me, but I am slightly aware
25 of the risk of being buried in disclosure.

26 **THE CHAIRMAN:** Absolutely. I think the practical question may be is it easier, and

1 therefore more efficient, to give you what they have and are looking at, but
2 I am absolutely live to the point, and I am sure Mr Bowsher is thoughtful about
3 this point, that it has to be proportional, disclosure has to be justified.

4 **MR CARALL-GREEN:** They've helpfully said today that they're looking at the
5 moment at having identified about 400 documents. If they're saying that the
6 scope of their standard disclosure is roughly in that region, that doesn't feel to
7 me to be disproportionate. So if we're staying in that region, then I would
8 have thought that standard disclosure would work. I would ask though that if
9 it appears on reflection that their standard disclosure obligations are going to
10 require them to disclose thousands of documents, that they tell us so we can
11 revisit this.

12 **THE CHAIRMAN:** Quite. I think we're talking about a list of documents of some
13 sort, aren't we, so it's always open for your clients not to --

14 **MR CARALL-GREEN:** Not to inspect.

15 **THE CHAIRMAN:** And if you have difficulty in understanding what it is you're being
16 offered, then you can ask --

17 **MR CARALL-GREEN:** That is always the difficulty with the lists. "A thousands
18 emails with so and so".

19 **THE CHAIRMAN:** Quite, and maybe you might bear in mind, Mr Bowsher, the list
20 might be most helpfully done by reference to what the 400 are and why they
21 are, and indeed anything else you feel the need to put into it. You might bear
22 that in mind. Okay. At the moment I don't think I need to make any further
23 order other than standard disclosure, and obviously liberty to apply if there are
24 any issues with that.

25 That then takes us on to timetable.

26 **MR CARALL-GREEN:** Sir, do you want to deal with the privilege point?

1 **THE CHAIRMAN:** I'm so sorry, yes, I do. Well, to the extent that you want me to
2 deal with it.

3 **MR CARALL-GREEN:** I think what I'm asking for is just something quite modest,
4 which is just a requirement that we flush these issues out before we start
5 putting bundles together for trial, because it does seem to us -- we know that
6 we are in possession of materials that in one possible universe somebody
7 might have said were privileged, we know that. We've also tried to raise it
8 with the defendant, but I think we've been ignored. Again, that's not
9 a criticism of anybody, but I just want to make sure that these issues are
10 flushed out well in advance of trial.

11 **THE CHAIRMAN:** There are two different things, aren't there. One is the
12 documents you already have, and you want assurance that there's no point
13 taken as to waiver of privilege on those, and then there's a second point which
14 is, as I understand it, are there any other documents where there might be
15 further waiver as a result of what's been disclosed?

16 **MR CARALL-GREEN:** That might arise, it depends. We'll need to see their list first,
17 because if their list says, "We don't assert privilege over any of these things,"
18 then fine. What I'm really focussed on is the fact that we have received
19 a bunch of documents and we have considered whether or not we have a
20 case on the basis of what we already have. So I do need to know before we
21 get towards putting together bundles and openings speeches whether they're
22 going to say, "Oh no, he can't rely on those."

23 **THE CHAIRMAN:** Mr Bowsher, if you did have a point about documents, provided
24 you actually know you've given them to them, then it would be incumbent on
25 you to raise it timely, and you haven't, to the extent you do know they have
26 them. Is there any issue here?

1 **MR BOWSER:** I don't think so. There was a debate in my learned friend's
2 skeleton about what the significance of some of these documents are, but
3 I don't think there's any point in ventilating that today. They exist. There are
4 more than one counsel's opinion, for example, that they have. We can debate
5 later what the significance is.

6 **THE CHAIRMAN:** Yes, of course. I think that's clear, isn't it?

7 **MR CARALL-GREEN:** I think that's satisfactory.

8 **THE CHAIRMAN:** I think it really very much is a situation where if no objection has
9 been raised when the defendant is on absolutely clear notice -- and obviously
10 it is on absolutely clear notice, if not before it certainly is now -- then I think
11 you're entitled to proceed on the basis that the documents that you have you
12 can use, obviously in accordance with your 102 and the basis of disclosure.

13 **MR CARALL-GREEN:** Of course.

14 **THE CHAIRMAN:** Although I suppose some were disclosed outwith the tribunal's
15 proceedings.

16 **MR CARALL-GREEN:** They were. There is a slightly difficult question about what
17 happens when they're disclosed outside the proceedings but then used within
18 the proceedings. I don't really want to get into that.

19 **THE CHAIRMAN:** I'd rather not get into that.

20 **MR CARALL-GREEN:** I don't think we need to. I'm happy to leave that there. I'm
21 sorry for interrupting your flow.

22 **THE CHAIRMAN:** No, that was on my list and I missed it.

23 So if we come to the question of trial date, maybe, and then try and work backwards.
24 I think a realistic time to look for a trial window is October of this year. I don't
25 think we're going to be able to manage it in July. I have reasonably good
26 flexibility. Obviously we have yet to empanel a full panel, and I'm sure you will

1 need to look at your diaries as well, but I wonder if from a working point of
2 view for now we should aim for a trial within an October window and see if we
3 can find five days that suits everybody. I appreciate you might need to talk to
4 some witnesses about that as well. If we're happy to work on that as
5 a working assumption --

6 **MR CARALL-GREEN:** May I just have a quick huddle, because I'm aware of one
7 issue that might arise.

8 **THE CHAIRMAN:** Yes, of course. **(Pause)**

9 **MR CARALL-GREEN:** Yes, sir, we're happy to aim for that.

10 **THE CHAIRMAN:** Good, and obviously we may find that there are reasons why it
11 doesn't happen, but I would like, Mr Bowsher, to try and squeeze into October
12 if we can.

13 **MR BOWSHER:** Those in the room, I believe, are happy with October, but there are
14 obviously --

15 **THE CHAIRMAN:** Understood.

16 **MR BOWSHER:** There are other variables.

17 **THE CHAIRMAN:** Absolutely, and of course October is quite a big target, so
18 hopefully --

19 **MR BOWSHER:** It's a big target. I'm conscious that there are a number of other
20 moving targets in this building as we speak, and I'm not sure whether some of
21 them are landing.

22 **THE CHAIRMAN:** Absolutely understood. Just for the purposes of working
23 backwards on that, and what I'd rather do is let you take this away and come
24 back with a timetable that works for you for October. It seems to me there
25 wasn't an awful lot of difference, when I looked at your case timetables, they
26 didn't seem to me to present a great deal of difference in the time taken for

1 any of the particular steps. I'm rather hopeful that if we know we're going to
2 trial in October, you can work backwards from that and deliver something.
3 Can I leave that to you?

4 **MR BOWSHER:** We will work backwards and probably interpolate -- I will propose
5 interpolations to our timetable, and add some of the suggestions we've made
6 in the last half hour or so, whether my learned friend is happy with them or
7 not, and the tribunal can decide whether that is suitable or not.

8 **THE CHAIRMAN:** Yes, and if there are any issues I'm perfectly happy to receive
9 any particular disputes about how long anything will take, by all means leave it
10 with me. What I would like to see is a composite timetable from both of you
11 with any variances you can't agree identified so I can resolve those if need be.

12 **MR CARALL-GREEN:** There's just possibly two issues on that. The line items that
13 should be in there that are identified as variances, the first variance was
14 whether or not there should be a time limit to raise any dispute about
15 disclosure. I think I would propose that that not be restricted.

16 **THE CHAIRMAN:** First of all, I don't think it's possible to restrict it, because there
17 may well be circumstances which cause you to make an application for
18 disclosure at any time.

19 **MR CARALL-GREEN:** Precisely.

20 **THE CHAIRMAN:** What I'd like to know is that you have resolved all -- I'd like to
21 know that you have had the opportunity to consider the disclosure approaches
22 and you have resolved all the outstanding issues so they're not dragging on.
23 I don't care how you put that, really. What I don't want to find is you're still
24 having arguments about disclosure in July.

25 **MR CARALL-GREEN:** It could be that that line item is merely a mandatory update
26 to the tribunal.

1 **THE CHAIRMAN:** That would be helpful, and it does slightly play into this question
2 of another CMC. I do wonder whether it might be helpful to put a short virtual
3 CMC in the diary for May or early June, just to hold the date and make sure
4 we're on track. If we don't need it we don't need it, but if there are any issues
5 with updating -- and we have the disclosure I hope unlikely to cause
6 problems, we have the witness and expert processes which may well. It may
7 need to be a bit earlier if we're going to deal with witnesses. Anyway, I'll leave
8 that with you. I think I would prefer a date just to check in, that we don't have
9 to use if there's nothing to --

10 **MR CARALL-GREEN:** We certainly have no objection to holding a date on a just in
11 case basis.

12 **THE CHAIRMAN:** I'm alive to the point that dates often drive unnecessary hearings,
13 so we'll be really clear that we're not going to use it unless we need to.

14 **MR BOWSHER:** I'm always a fan of putting a CMC date in, particularly as, we're not
15 on a fast track procedure here, but we are moving with deliberate pace and
16 there is a danger that if things go off track then we will miss the date
17 completely.

18 **MR CARALL-GREEN:** The only other point of variance on line items is exactly how
19 the expert reports are dealt with, because we had proposed sequential
20 exchange of report, response report and then reply report.

21 **THE CHAIRMAN:** Yes.

22 **MR CARALL-GREEN:** Whereas my learned friend had proposed the perhaps more
23 familiar version from the Queen's Bench, where one might have two reports,
24 and then a meeting and a joint statement. We're largely in the tribunal's
25 hands about which formulation would be preferred.

26 **THE CHAIRMAN:** First of all, I can see the benefit at least to some degree of

1 sequential. It does seem to make sense if you start and then they respond,
2 because it would keep the issues narrower one would hope. But we are
3 obviously going to follow the tribunal's process in relation to the need for
4 meetings of experts and a statement of the expert issues. So that's the bit
5 that I am really most interested in making sure fits in with the usual practice of
6 the tribunal.

7 I don't know, Mr Bowsher, do you have anything to add to that? Do you care about
8 sequential?

9 **MR BOWSHER:** I think sequential makes sense. How long the rally has to go on
10 thereafter is a different matter.

11 **THE CHAIRMAN:** Exactly. I think the point of the expert meeting rather obviates
12 the need for the rally, I hope.

13 **MR BOWSHER:** I would hope so. That certainly was our intention, because in a
14 sense the whole point of the meeting should surely be insofar as there are
15 points about which the experts are -- I was about to say entrenched, that
16 doesn't feel like the right word to use -- committed to their point, that will be
17 reflected in the joint statement.

18 **THE CHAIRMAN:** Yes, one would hope so. And if the claimant feels the need to
19 serve a response to your report in order to clarify something then of course
20 they can.

21 **MR BOWSHER:** They can always put that in then.

22 **THE CHAIRMAN:** Exactly. Okay.

23 **MR CARALL-GREEN:** I didn't want to say anything else about that.

24 **THE CHAIRMAN:** Good. And then the PTR, of course. I think again we ought to
25 pencil in a PTR. We may not need it, but I suspect we will need it. Good.

26 I think, subject to one point which I think is your observations about the summary on

1 the website.

2 **MR BOWSHER:** I think that's the only point I had left.

3 **THE CHAIRMAN:** I think we're done, are we?

4 **MR CARALL-GREEN:** I think so, I would like an opportunity just to check.

5 **THE CHAIRMAN:** Yes, of course. Shall we do that and then we'll tidy that point up.

6 (Pause)

7 **MR CARALL-GREEN:** Nothing else from us, sir.

8 **THE CHAIRMAN:** What would be helpful I think is if you could give us a draft order
9 which has all that in, and indeed everything else we've dealt with today,
10 obviously dealing with the fast track process. If I could ask the parties to send
11 that in and then obviously I'll let you have, as part of that exercise, any
12 comments on the date. I suspect you will probably be offering some options
13 in relation to some of the dates like the CMC and PTR and so on, and I'll need
14 to check diaries and resources here. So if you could do that in the draft order
15 and then we can finalise it.

16 **MR CARALL-GREEN:** Windows, or something like that.

17 **THE CHAIRMAN:** Excellent, okay. Thank you.

18 Mr Bowsher.

19 **MR BOWSHER:** I hope I can take this fairly shortly. The concern we had was that
20 the summary of the claim that's currently on the tribunal website uses
21 language which might be regarded as somewhat loaded, and it is important
22 because of course people will read what is said there as if it were as it were
23 a formal statement of what had happened. In particular ...

24 **THE CHAIRMAN:** I have it in front of me.

25 **MR BOWSHER:** Our alternative version is at annex B to our skeleton, pages 403
26 and 404.

1 **THE CHAIRMAN:** Yes, I have it.

2 **MR BOWSHER:** Obviously it's not for us to tell the tribunal how to do this, and
3 we've simply made an alternative proposal, but if I can focus on the two
4 points. Firstly, in the paragraph that starts, "In January 2016", the description
5 which is taken -- I'm not sure it is actually quite taken from the claim form, but
6 it just says, "the 27 locations are designated carriageway". That isn't quite
7 what was said. We actually have the document in the bundle, it's at
8 page 345.

9 **THE CHAIRMAN:** In some ways I think -- I mean, I'm happy to look at it, but I'm not
10 sure that's really what we're trying to do here. I think it does actually, the
11 wording in the summary does actually track exactly the wording in the claim
12 form. So there's a bit of a point of principle here, and the difficulty -- sorry, I'm
13 pre-empting your submissions on this -- but the difficulty, Mr Bowsher, is that
14 we're not in a position, once we have the claim form, before we have the
15 defence, to anticipate what might or might not be sensitive, and obviously
16 there may well be a point in a case where what's said is so egregious that it
17 shouldn't be permitted to be left unchecked, but it's quite difficult to see that
18 this is this case, and we have recorded quite accurately here what is said in
19 the claim form.

20 I think it's quite a difficult proposition to try and manage that, albeit by reference to
21 documents that might be elsewhere in the claim, but this is what the
22 claimant's actually saying, and that's the point of the document. The point of
23 the document is to tell the world that there has been a claim and this is what is
24 said, and that has consequences, perhaps not so much in this case, but
25 certainly in some cases, for those who might want to intervene or might
26 otherwise want to know about it.

1 **MR BOWSHER:** The problem here, and it may be it is a delicate point of principle,
2 and I don't want to take up a great deal of time about it, but it is perhaps
3 a broader point of principle: my client is a public body. It still has to deal with
4 decision under the Highways Act. This is currently a record by the tribunal of
5 what was said by a public authority responsible for taking decisions under
6 statute --

7 **THE CHAIRMAN:** No, I don't think it is. It's a record by the tribunal of what
8 a claimant says the Council has done, and that is precisely the point of the
9 exercise. This is not the view of the tribunal, it's the view of the claimant, and
10 it's plain, I think, from the document that that's the case.

11 I appreciate, I can absolutely understand that if there was a case where the --
12 I wouldn't want to exclude the possibility that there was a case where the
13 claimant had mischaracterised things egregiously and that reflected so badly
14 that it was unfair to leave it there, but it doesn't strike me from looking at this
15 that that was this case.

16 **MR BOWSHER:** There's that, and then there's the point made in the next two
17 paragraphs about the downgrading of the whistleblowing to a general
18 complaint, which is -- and I take the point that you would say well that's what
19 comes from the claim form, but it is an important point that a public authority is
20 recorded in a public document by this tribunal, that is the record, as having
21 done something which more than arguably it ought not to have done.

22 **THE CHAIRMAN:** Well again, no, I don't think it is, I think the tribunal is recording
23 that that's what the claimant says. And the claimant does say that, and so the
24 tribunal has done it accurately.

25 **MR BOWSHER:** With respect, sir --

26 **THE CHAIRMAN:** I'm not saying that it's right, I'm just saying that --

1 **MR BOWSHER:** I see that. With respect, I think the introduction to the notice needs
2 to be clearer, because it is not clear enough, I would suggest, at the beginning
3 that this is what the claimant says. I take the points you make, but if you
4 simply -- I mean, it's all fair and unarguable, but there is nowhere actually
5 which says, "This is what the claimant says".

6 **THE CHAIRMAN:** Well, it does say in the middle of the page, "according to the
7 claim form", but if you're saying it's not plain that that applies to the rest of the
8 document ...

9 **MR BOWSHER:** Again, this isn't just a journalist writing something, this is put out by
10 the tribunal as a formal statement of record of something, and what it says is
11 that it gives notice of a receipt of the claim for damages, so it's received that
12 claim, that's what it says in the first, and then it identifies the representation,
13 and then it goes on to state facts.

14 **THE CHAIRMAN:** Well hang on, it goes on to state facts after saying, "according to
15 the claim form" in the middle of the page, plainly as can be. And then it goes
16 on in a number of places to say, "according to the claimant," "the claimant
17 submits," "the claimant submits". It may well that be there are ways of making
18 it clearer, but I wouldn't accept the submission that it's not clear, Mr Bowsher.
19 I think it's abundantly clear that this is a record of what the claimant has said.

20 **MR BOWSHER:** Maybe not yet in this case, I have had other cases where these
21 things have been read back to me as being statements of what -- I don't want
22 to get into other --

23 **THE CHAIRMAN:** If it's helpful, I would be very happy to raise with the registrar the
24 general point of the importance of making it plain that these documents are
25 a summary of what the claimant has said, but I suspect that's not really what
26 your client's concerned about. I don't have any inclination to ask the registrar

1 to change the wording of this, because I think it is an accurate recollection of
2 what the claim says, and as a matter of principle that is the purpose of what
3 the summary is.

4 **MR BOWSHER:** In which case I would suggest, sir, that that clarification should be
5 in the first paragraph. Putting it as the preliminary to a fourth paragraph does
6 not make it clear whether or not, is that related to the fourth paragraph or
7 everything thereafter?

8 **THE CHAIRMAN:** Well I think it relates to everything that follows thereafter, I think
9 that's pretty plain. But if you wish I will ask the registrar to review it with that in
10 mind, but I think that's the best -- that's the high point of your argument,
11 I think, Mr Bowsher, that's about as far as it goes.

12 **MR BOWSHER:** I think it is an important point that it be made clear that all is not the
13 statement of the tribunal rather than anyone else.

14 **THE CHAIRMAN:** I think it is plain, if you look at the rules, it is plain what the
15 purpose of this document is, it is not the view of the tribunal. If it wasn't plain
16 from the document itself -- but in this case I think it is plain -- certainly the
17 purpose of the document is set out in the rules.

18 **MR BOWSHER:** Again, not everyone who reads these notices has read the rules.

19 **THE CHAIRMAN:** No, I understand. Okay.

20 I'm not going to change the document in the way that's suggested, Mr Bowsher. So,
21 I'm sorry, I'm afraid your client will have to understand this is an accurate
22 reflection of what the claim form says, and that's the tribunal doing what it
23 should be doing in this process. I'll take away your point about whether it
24 could be clearer that all of the material follows, I have to say I'm not convinced
25 you're right about that, but I'll raise it with the registrar and see if he's minded
26 to do anything about it.

1 **MR BOWSHER:** Okay.

2 **THE CHAIRMAN:** Anything else? Good. Okay, well thank you very much. That's

3 all been very helpful. I'm quite surprised to find that we've finished almost on

4 time in spite of all those different issues.

5 Thank you all for your help.

6 **(1.18 pm)**

7 **(The hearing concluded)**

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