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4 record.

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

CaseNo: 1584/5/7/23 (T)

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

12 Tuesday 19th December 2023

13
14 Before:

15
16 Hodge Malek KC

17
18 (Sitting as a Tribunal in England and Wales)

19
20
21 BETWEEN:

22 **Claimant**

23 **Whistl UK Limited**

24
25 And

26 **Defendant**

27
28 **International Distributions Services Plc and Royal**
29 **Mail Group Limited**

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31
32 **A P P E A R A N C E S**

33
34 Alan Bates on behalf of Whistl UK Limited (Instructed by Towerhouse LLP)

35
36 Andrew McIntyre on behalf of International Distributions Services Plc and Royal Mail Group
37 Limited (Instructed by Bryan Cave Leighton Paisner LLP)

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(10.30 am)

Case management conference

THE CHAIR: Some of you are joining us livestream on our website so I must start therefore with the customary 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 a contempt of court.

Yes, Mr Bates.

MR BATES: Sir, at this first case management conference I appear for the claimant Whistl and my learned friend Mr McIntyre appears for the defendants, whom I will refer to together as Royal Mail.

The tribunal has the two bundles for this CMC, which are a main case management conference bundle and a supplementary materials bundle but mainly pleadings. The tribunal also knows that there is an agreed agenda at the beginning of the CMC bundle.

THE CHAIR: Yes.

MR BATES: We are in the tribunal's hands as to the order in which the agenda items are taken.

THE CHAIR: That's absolutely fine. So let's see where I am. So I have read all the pleadings. I have been through the Ofcom decision, the CAT decision, the Court of Appeal judgments. I have been through the CMC bundle. I have been through the skeleton arguments, which are all very helpful. I have read the indicative breakdown, for which thank you very much for that, and the letter of Royal Mail, or rather their solicitors, of 18 December 2023.

1 So what I propose to do is to say where I am provisionally on each of the points for
2 today and if people want to push back, they can push back but, as you know with
3 me, you've had your first level of advocacy through the skeleton argument and now
4 it's for me to ask you questions and see where we go from there.

5 **MR BATES:** That's very helpful.

6 **THE CHAIR:** Forum, I think that's agreed, so we don't need to waste any more time
7 on that.

8 The list of issues, I went through the list of schedules and I thought it was really
9 helpful the way it's been prepared, very easy to follow and the cross-references to
10 where they are dealt with in the pleadings is ideal.

11 One thing I was thinking about is that I don't want this to be a case where Whistl
12 feels it has to re-prove the infringements that have already been found and that
13 I think it's important that at a relatively early stage we know as a tribunal which
14 paragraphs of the Ofcom decision you particularly rely on and then have a response
15 from the defendant as to whether or not they dispute or contest those paragraphs
16 because I don't want to have two ships sailing by at night not knowing what the other
17 side's case is and these cases are expensive enough and there is always
18 a temptation for the claimant to think: well, we've got to re-prove the infringement.

19 Now, that has been found so I will make a direction, and we can talk about the
20 timing, but you should send a letter identifying which paragraphs of the Ofcom
21 decision that you will be relying upon at trial.

22 Now, can you give me an indication as to when you can do that? I was hoping that
23 you'd be able to do it by some time before the end of January.

24 **MR BATES:** Yes, well, perhaps we can say 19 January.

25 **THE CHAIR:** Yes, that's fine. So yours will be 19 January and I will want
26 a response from Royal Mail. How long do you think you'll need?

1 **MR MCINTYRE:** We'd ask for four weeks to respond. I know that may seem
2 generous but on the basis --

3 **THE CHAIR:** No, that's absolutely fine. Give me a precise date. I can never find
4 the calendar, that's why I am asking for a precise date.

5 **MR MCINTYRE:** 16 February.

6 **THE CHAIR:** 16 February, that's fine. So that's that one. Trial listing. There are
7 two questions really. One, should we have a split trial and, two, should we be fixing
8 a hearing? On the question of a split trial, my initial feeling is that there are two
9 problems with that. One is that looking at the pleadings and the way it has all
10 panned out, there may be no bright line between causation and quantum. So they
11 are intertwined in one way. So it's going to be difficult to define the split. That's the
12 first point. If you are really going to have a split, normally traditionally in a case like
13 this I'd say liability omitting causation, causation and quantum as phase 2, but I really
14 don't think this is that type of case because this case has gone on for so long my fear
15 is that if you split into two, we are going to have a lot more delay because you will
16 have the first trial and then you then get up to the second trial and I can't give any
17 guarantee as to how long it's going to take to give judgment on the first trial. So as
18 a judge I would much rather have one trial of all of this.

19 Now, it's up to you as to whether you wish to push for a split trial and then we can
20 deal with it or are you happy to just follow what I think is easier for the tribunal?

21 **MR BATES:** Yes, we have said that we are content with a single trial. We mooted
22 the possibility --

23 **THE CHAIR:** Yes, that was fair, yes, that's absolutely fair.

24 **MR BATES:** I can also indicate that in terms of the length of the trial, I don't think
25 there's any real disagreement between my learned friend and me about the length
26 because his ten weeks factors in reading, et cetera, that we hadn't included in our

1 seven.

2 **THE CHAIR:** Yes, I think that how it's going to be, whether you include it in the time
3 or not, how I think it's going to be is that you will have the tribunal will have some
4 reading in, okay? So we need to have a date for all the submissions and everything
5 to take into account when we are actually going to read in. But the problem is that
6 it's never as simple as to say: well, you are going to read in in week one, okay?
7 Because we've got other cases, other commitments. For me, to have all the
8 submissions and everything ready two weeks before trial gives me at least the
9 opportunity to read all the material and that if you say: well, the lead-in is one week,
10 there's no guarantee in that one week I will physically have the time to do it. I will
11 read it, you know that, but I need to have the time and so it may be that it's
12 two weeks, even three weeks before the actual trial date that we have all the
13 reading-in time.

14 So I don't need to sort of factor in that reading-in week in the estimate, okay? So
15 then you look at how long are the openings going though? Well, the openings will be
16 as long as they are going to be but I am not a great fan of long openings in the
17 context of a tribunal like this where we can read it.

18 Now, I know you have problems. Sometimes you don't know if the chairman is going
19 to read the stuff first and then of course you are going to have to feel that you are
20 going to have to have some grand openings that's going to take days and days. I am
21 not that keen to have very long openings and that I would have thought one and
22 a half days and one and a half days should be enough to open a case of this size.

23 **MR BATES:** Yes.

24 **THE CHAIR:** Then as regards the evidence, I think the evidence could easily take
25 three or four weeks. I don't see it going longer than four weeks. Then at the end of
26 that we'll have to find a time for the oral closing. It may well be that the oral closing

1 | could be one week after, two weeks after, even four weeks after, it all just depends
2 | on where we are at the time, but again the closing is more important and so I would
3 | give both parties two days each for their closing. So where that leaves us is
4 | that I would be inclined to go for a two-month trial window. So in that trial window we
5 | are not including the reading-in, for the reasons I have given you, on the basis that
6 | we have everything, let's say, three weeks before the trial actually starts.

7 | Now, I have seen that both parties have been floating different dates and I have read
8 | the letter of 18 December 2023 of your solicitors and I have swung around about this
9 | and so I have no fixed view as to when that window should be but I would be much
10 | happier if we fix a window today than just leave it in the ether.

11 | Now, a lot will depend on everyone getting their act together and having a very clear
12 | statement of where the battle lines lie upon both what is their quantum, how are they
13 | going to prove it, what is the methodology, as well as the real fights over disclosure,
14 | and I think that your suggestion of 2026 is rather pessimistic, okay? So it's not going
15 | to be in 2026, it's really a question of 2025 and when within 2025, and that I initially
16 | thought maybe let's look at the first quarter of 2025 but having read your letter I think
17 | that may be too much of a squeeze, particularly given that I will now want everything
18 | ready three weeks before the trial date.

19 | So at the moment I am of the view that we should be having our trial window June
20 | and July 2025. That's where I am at the moment. It may be a bit later than perhaps
21 | you'd hoped but I think it's realistic in the light of the letter from Royal Mail, because
22 | it's very very difficult at the moment to see how long disclosure is going to take, how
23 | long expert evidence is going to take.

24 | So I just have to be realistic but what I don't want to do is to leave it to the next CMC
25 | and then before you know it there's no slot available anyway. I know I have a slot
26 | then. I know I have a slot the first two months of the first quarter of 2025. I would

1 rather that we fix it now, within the trial window of June and July 2025. I think it
2 would be sensible if both parties just check with their solicitors as to whether or not
3 they can live with that.

4 **MR BATES:** Yes.

5 **THE CHAIR:** Yes.

6 **MR BATES:** For our part, primarily because of reasons of availability of the counsel
7 team, our preference on the basis of the indication that you've given would be that
8 we would like to look at October or certainly Michaelmas term 2025 basically
9 because two members of the counsel team, including leading counsel, are not
10 available in the June/July period.

11 **THE CHAIR:** Okay, let's see what Royal Mail say.

12 **MR MCINTYRE:** Sir, as you've seen from our letter, our primary position is that it's
13 premature to fix a date at all.

14 **THE CHAIR:** I understand that.

15 **MR MCINTYRE:** But if we are in the realm of fixing at least a window for the trial,
16 our suggestion, as in the letter, is October 2025. We think a comfortable timetable
17 would be to 2026 but we think you can compress things so there is a world in which
18 you can get to October 2025.

19 **THE CHAIR:** Okay, so we'll have the trial in the window of October/November 2025
20 on the basis that all bundles and skeleton arguments for trial are submitted three
21 weeks before that date. But I want the bundles already three weeks before that date
22 and you can put that in the order. So that's great. That's a very constructive way
23 that you've both dealt with that.

24 The next issue is confidentiality. Now, I presume you've all been through this once
25 already on this case because of the proceedings, the appeals before the CAT and
26 then the Court of Appeal and that no one is asking me to approve an order today but

1 | it's --

2 | **MR BATES:** There is an agreed confidentiality ring order now, which is behind
3 | tab 45 of the bundle.

4 | **THE CHAIR:** Let me have a look then. Let me look at that. Tab?

5 | **MR BATES:** 45.

6 | **THE CHAIR:** Okay, let me just have a look at it then.

7 | **MR BATES:** There are various parts in the bundle, it's not made clear enough it's
8 | agreed.

9 | **THE CHAIR:** Have Ofcom seen this?

10 | **MR BATES:** Ofcom haven't seen this but they have sent a letter where they
11 | essentially set out that they don't have any objection to the Ofcom file being
12 | disclosed but it should be pursuant to an order of the tribunal given the undertaking.

13 | **THE CHAIR:** What about the third party confidentiality?

14 | **MR BATES:** Well --

15 | **THE CHAIR:** Is Ofcom raising that?

16 | **MR BATES:** Ofcom hasn't raised that and without seeing the Ofcom investigation
17 | file we don't know what third party information, if any, is contained within it.

18 | **THE CHAIR:** Yes, and have you got third party information covered in this or not?

19 | **MR BATES:** I don't think there's an express provision for specifically third party
20 | confidential information but if there is confidential information from third parties then
21 | it can be disclosed into the ring and it's a two-tier ring, an inner ring and an outer
22 | ring.

23 | **THE CHAIR:** Yes. Well, I think what we should do is send a copy of the draft order
24 | to Ofcom asking them whether or not they consider this is -- let's say have they got
25 | any comments on the form of the order and in particular do they have any
26 | observations on third party confidentiality, particularly in relation to the Ofcom file

1 and whether they consider it's necessary that any third party should be consulted
2 prior to third party confidential material going into the ring.

3 **MR BATES:** Yes.

4 **THE CHAIR:** So if you write that letter and then send to the tribunal your letter and
5 the response you get from Ofcom, in the light of that we'll finalise the order in the
6 normal way.

7 **MR BATES:** Yes, thank you, sir.

8 **THE CHAIR:** Thank you very much. The next topic is the -- yes?

9 **(Sotto voce discussion)**

10 Part B has internal lawyers involved. Is that something that both parties are happy
11 with?

12 **MR BATES:** Yes, that has been agreed as part of this agreed draft.

13 **THE CHAIR:** Yes, that's fine.

14 **MR BATES:** We can also consult LDC and PostNL if that would be of assistance. If
15 there is any third party material, it's likely to be theirs.

16 **THE CHAIR:** Yes, okay, do it that way, that's fine.

17 **MR BATES:** Of course the information will be 10 years old now in any event.

18 **THE CHAIR:** Yes, I am conscious of that, yes.

19 **MR MCINTYRE:** Sorry, just to add to what my learned friend says, there may well
20 be other third party confidential information. I understand there are references to
21 UK Mail in the decision. We, as in the current legal representatives, don't have the
22 files so we can't say what's in there but there may well be other third party
23 information. So it may be that the process you suggested of writing to Ofcom is still
24 necessary even if letters go to LDC and PostNL .

25 **THE CHAIR:** Yes, that's fine, I agree with that. This has to be sorted out prior to the
26 Ofcom file going into the confidentiality ring and so that may affect the timings.

1 On the RFI, which is the next topic, I have been through the indicative breakdown
2 which covers some of the requests, but not all, under RFI 13. It's only indicative, this
3 case has gone on long enough, we need to go beyond indicative and I don't know
4 how long that process is going to take because until we go beyond indicative it's
5 going to be very difficult to get the experts properly focused and one would have
6 hoped that fairly soon you'll be in a position to be able to say what is your
7 breakdown, how it's reached, what methodology is going to be adopted, who is the
8 expert and all of that. That's where we need to get to.

9 On RFI 13, that will be ordered but that should be answered with a substantive
10 response to all the parts of RFI 13. Of course you can use this document you've
11 produced, which will answer a large proportion of those questions, but I am not keen
12 that we are going to say it's going to go into the long grass.

13 **MR BATES:** No.

14 **THE CHAIR:** So the question is how long do you need to give that type of RFI,
15 ie beyond the indicative to something more concrete so we can actually manage this
16 in a bit more detail? Because I know you've suggested some date in January.

17 **MR BATES:** Yes, 19 January, yes. It may be that, especially as the trial is not now
18 going to be until October, it would be sensible to give us until perhaps the end of
19 February and the reason I say that is that, as the tribunal will have seen, our difficulty
20 is that our forensic accountant is no longer available but we are in the process of
21 identifying an alternative person and we hope to have him or her appointed by the
22 end of this week. But they will be coming into this cold.

23 **THE CHAIR:** Yes, so give me a date then please?

24 **MR BATES:** If we said 29 February?

25 **THE CHAIR:** Royal Mail, do you have any observations on that, because I am
26 giving you what you have asked for, the date?

1 **MR MCINTYRE:** Precisely, sir. The date is fine with us subject to one point, which
2 is that there is a point between us as to the date of the second CMC. We have said
3 it should be after April, my learned friend has said February. Obviously we need to
4 see this before the second CMC.

5 **THE CHAIR:** Of course you do.

6 **MR MCINTYRE:** So if the RFI is coming on 29 February, that would support a later
7 date for the CMC.

8 **THE CHAIR:** Given that we've now fixed the trial for October/November 2025, the
9 date, roughly the date and I will have to look at the diary, that you propose for the
10 second CMC seems fine.

11 **MR MCINTYRE:** I am grateful. On that basis we are fine with the 29th.

12 **THE CHAIR:** So you are fine with the 29th?

13 **MR MCINTYRE:** Yes.

14 **THE CHAIR:** Everyone understands I will want a substantive response. I don't want
15 a response saying you are not entitled or anything like. I want actual answers and
16 presumably you want that as well so I should really be directed at you.

17 **MR BATES:** Understood and we'll do that.

18 **THE CHAIR:** Okay, so I think that's going to be quite a helpful way forward. So that
19 is 11 and 13.

20 So when you write the order, say a full and substantive response to questions 11
21 and 13. So that avoids the risk of someone coming back and saying not entitled.

22 The next one is disclosure. Now, I have obviously thought about disclosure on this
23 and which model to use, et cetera, and my own provisional view is, at least in a case
24 like this, just normal rule 60 disclosure report, electronic documents questionnaire,
25 we get that in first, I am not particularly interested in expert-led disclosure, and that
26 when we get to the next CMC, and there are real issues between you on disclosure,

1 I would like to see a Redfern Schedule. It's so much easier for me to do. Different
2 people like different things. I am a simple person, have one column saying what you
3 want, their column saying what they are going to give and if not why not and then
4 your column in reply and then I can just work through it when we have the hearing
5 and that as and when you resolve issues you shade it a different colour so I know
6 which ones I actually have to decide on the day, all right?

7 So that's how I envisage it broader, we'll come back into the detail, but that's how
8 I envisage it at the moment. So we are not really talking about the Practice Direction
9 for the Business and Property Courts under PD51AD. We are not talking about
10 Part 31. We have our own rules which we can apply and you've seen from the CAT
11 judgment a long time ago and in relation to Trucks the type of process that I expect
12 the parties to follow.

13 Everyone here, you are all regulars so you know what I would be looking for. Let me
14 just see if Royal Mail has any problems with that?

15 **MR MCINTYRE:** No pushback on that.

16 **THE CHAIR:** That's fine. You know how it's done, yes.

17 **MR MCINTYRE:** I just reserve our right to come back on any points of detail once
18 we get into it.

19 **THE CHAIR:** Yes, exactly.

20 **MR MCINTYRE:** Thank you.

21 **THE CHAIR:** I think on this, the first date we need to put in is the date for the rule 60
22 disclosure reports and electronic documents questionnaire. What dates would you
23 propose given that we've now got this trial window in October 2025?

24 **MR BATES:** I would propose the beginning of April. If I can just say something
25 about the disclosure process.

26 **THE CHAIR:** Yes.

1 **MR BATES:** There's certainly no objection from us to having Redfern Schedules.
2 That's just the way of setting things out very conveniently and we --

3 **THE CHAIR:** For the next CMC, so when I have to resolve any issues I have
4 a Redfern schedule and I'll just go through it and give you a ruling on each topic as
5 we go through.

6 **MR BATES:** Yes, and that I think is entirely without prejudice to the approach that
7 should be taken for searches or what should be --

8 **THE CHAIR:** Yes, of course.

9 **MR BATES:** That can be shown in the Redfern Schedule.

10 **THE CHAIR:** exactly if you have a dispute about that but look --

11 **MR BATES:** As far as the expert-led disclosure is concerned, on the quantum
12 issues, the reason why we suggested that is that when you think about the nature of
13 the quantum issues it's actually a very different sort of disclosure exercise from the
14 other two sets of issues and part of the reason for that is it will be driven by the
15 experts' choices as to methodologies that they adopt.

16 For example, there are methodologies that could be adopted that would depend on
17 looking at how Whistl's business has developed and its profitability, not just in sort of
18 2014 to 2018, et cetera, but going perhaps way beyond that, perhaps even up to the
19 present day, to see how mail volumes have moved, how other activities have been
20 profitable or less profitable, and so for that reason it's quite important for the experts
21 to be able to identify the methodologies that they think are appropriate and to
22 request the data that they need in order to do their analysis. So that's what we had
23 in mind.

24 **THE CHAIR:** Yes, but we're able to deal with that without it actually being expert led
25 in the sense that's been mentioned in other cases.

26 **MR BATES:** Yes.

1 **THE CHAIR:** I think that the experts clearly will be involved in the process. The
2 parties are expected to liaise with each other and I am sure there will be meetings
3 between the parties with the experts discussing disclosure. That's what we
4 encourage you to do. Insofar as it's not possible to do that, then of course I will rule
5 on it.

6 **MR BATES:** Yes.

7 **THE CHAIR:** But I don't want this to be an expert-led review where you keep
8 coming back for hearings and stuff like that. Let's just try and do it in the traditional
9 way with the experts being involved but I am not going to make an order this is going
10 to be an expert-led review. But what is really important is that at the next CMC
11 I want to be able to make orders in relation to expert evidence and that's why by the
12 time we get there both parties need to sort out what is their methodology, how are
13 they going to prove it and there will need to be some reports, probably one expert on
14 each side and a solicitor doing a statement as well saying: this is how we intend to
15 do this case, and how you get there is really probably a matter between the solicitors
16 to try and agree but certainly we will want to have it all crystallised one week before
17 the CMC. So you know what the landing should be: to have the Redfern Schedule
18 done, to have the expert reports and solicitors' witness statements in support of
19 disclosure and what expert methodology you want and what issues you want the
20 expert to deal with, we want all that ready at least one week before the CMC so you
21 can then cover anything else in the skeleton argument and it all pulls together for the
22 next CMC.

23 But what I want to figure out now is do the parties envisage actual disclosure, actual
24 documents being disclosed by both sides, I am not talking about the Ofcom file
25 because that's a separate topic, by both sides prior to the next CMC? Because that
26 way if we've got the list of documents and then both sides have got the list of

1 documents and the disclosure, you can see what both sides are going to be giving
2 and then there will be outstanding, there is bound to be outstanding and disputed
3 bits which can then be dealt with at the next CMC or are you envisaging actually
4 there be no disclosure apart from the disclosure reports and the electronic
5 documents questionnaire prior to this CMC? I know what I would prefer but I would
6 like to hear from both parties on how far they think we can get to by the end of the
7 last week of April 2024?

8 **MR BATES:** Well --

9 **THE CHAIR:** Do you want to speak to your solicitors for a second on both sides
10 because this has been thrown at you and it's a very important topic. **(Pause)**.

11 So we are not talking at the moment about the Ofcom file and anything else
12 submitted by the parties to Ofcom, the CAT and the Court of Appeal bundles. We
13 are not talking about that at the moment, I am talking about general disclosure.

14 **MR BATES:** Yes. Well, so far as provision of documents by Whistl is concerned,
15 we've already provided the key business planning documents, so disclosure of those
16 has been provided. It may be that there are further business planning documents
17 that we could easily identify and if we can do that without an expensive search
18 exercise then we will disclose further documents. Many of those documents are very
19 likely within the Ofcom investigation file anyway because they may well have been
20 requested by Ofcom.

21 So far as material from Royal Mail is concerned, we have sought in our skeleton
22 argument that if there is any material that Royal Mail provided to Ofcom during the
23 investigation, that isn't in the Ofcom investigation file, for example because it came
24 later --

25 **THE CHAIR:** We can argue all that a bit later.

26 **MR BATES:** Yes.

1 **THE CHAIR:** What I am trying to get from both parties is you are going to have the
2 disclosure reports, you are going to have the electronic documents questionnaire,
3 and when is it envisaged that the parties will be providing substantive disclosure on
4 the issues prior to the next CMC apart from specific categories? The specific
5 categories we can deal with later.

6 **MR BATES:** Yes.

7 **THE CHAIR:** Because I am keen to come back to the points you've raised.

8 **MR BATES:** Yes.

9 **THE CHAIR:** But when is it going to be possible to provide -- I don't want to use the
10 word initial disclosure because it has a particular meaning under the CPR but you
11 know what I mean, the first rounds of substantive disclose on all the issues, when
12 are we envisaging doing that? Are we going to put that all off until after the next
13 CMC? In which case you may be delaying things a bit too much.

14 **MR BATES:** Yes, I have made my suggestions as to the documents that can readily
15 be identified and provided in advance of the next CMC. Those are the things --

16 **THE CHAIR:** Those are fine. I understand. We'll come to those. Because what
17 I am talking about is when do the parties -- you know, they give their disclosure
18 reports and the EDQ but when are they going to say: okay, we will provide a list of
19 documents of what we have available and that we can disclose now and as regards
20 the rest we can argue that at the next CMC if there's a problem? When do you
21 envisage getting to that stage?

22 **MR BATES:** Well, our proposal is to get to it after the next CMC when there's clarity
23 about what documents are to be provided.

24 **THE CHAIR:** That's not a problem, we can then deal with it at the next CMC.

25 **MR BATES:** Principally because of the cost of the search exercise, we would be
26 very reluctant to incur it in a duplicative way.

1 **THE CHAIR:** Okay.

2 Mr McIntyre, you probably don't object to that one?

3 **MR MCINTYRE:** I have few points to make on that. First of all, my learned friend
4 referred to having already provided the key business plan documents. I think what
5 he's referring to is the CPR 31.14 request for documents referred to in the pleadings,
6 which was made back in November of last year but it was declined in part.

7 **THE CHAIR:** I thought that I wrote a letter saying that I wanted to have that
8 identified and they said that they'd got that ready and that it's available. Is that one
9 you are talking about? It is, isn't it?

10 **MR BATES:** Yes, the request for documents was for the business plan, and the
11 tribunal will have seen the way that that is defined in the pleadings. We then
12 provided what appeared to us to be the key documents that were part of the
13 business plan that we could readily identify without significant search costs. So
14 that's what we've done. I am saying if there are further documents that we can
15 easily identify that fall broadly within that category then we'll voluntarily provide them
16 as soon as possible but without incurring significant search costs that will have to be
17 incurred later on as part of electronic disclosure.

18 **THE CHAIR:** Yes, I agree. So what we will do then is that we'll fix a date for the
19 rule 60 disclosure reports, the EDQ and anything else that's specific. So I think in
20 relation to the business plan and the ancillary documents, such of those documents
21 that are reasonably available should be disclosed by the same date as the rule 60
22 disclosure reports and the EDQ and you can make that as part of the order.

23 Mr McIntyre, anything else you wanted to say about --

24 **MR MCINTYRE:** Yes, sir. Can I just flag, it may be helpful if I make this submission
25 by reference to the draft directions we provided, that's tab 24 of the CMC bundle,
26 what we said on disclosure, which I think is consistent with what the tribunal is now

1 endorsing. At page 108 of tab 24.

2 **THE CHAIR:** Yes, look, I am happy with what you proposed at paragraph 7.

3 **MR MCINTYRE:** Yes.

4 **THE CHAIR:** Let's just see if Mr Bates has any problem with the date of 11 March.

5 **MR BATES:** The reason why I suggested the beginning of April is because we very
6 much agree with the tribunal's suggestion that the experts should have proper
7 engagement with the case prior to disclosure requests being formulated and it
8 seemed us to on that basis the beginning of April might allow more time for that to
9 happen but that's a suggestion.

10 **THE CHAIR:** We will make it the 25th. Okay, 25 March. So the disclosure reports
11 and electronic disclosure questionnaires plus that category of documents we've just
12 discussed by 25 March. Paragraph 8 I am happy with, if we can get that done by no
13 later than ten days before the second CMC. What normally happens is you get
14 a Redfern Schedule that's been, let's say, exchanged between the parties and then
15 as you prepare for the CMC more categories get agreed closer to the hearing, it's
16 just human nature.

17 So what I would say is that your completed Redfern schedules should be filed with
18 the tribunal no more than ten days before the second CMC and any varied
19 Redfern Schedule two days before the CMC, so you'll have a bit more time on that,
20 okay?

21 So that is seven and eight of the draft order I am happy with. Anything else at this
22 stage?

23 **MR MCINTYRE:** Sir, I am grateful for that. Just to point out that, as you say, often
24 these categories get agreed as you move closer to the CMC.

25 **THE CHAIR:** Yes, you are both regular and sensible solicitors here, so I don't see
26 anyone is going to be inflexible and there is always an element of give and take in

1 these cases.

2 **MR MCINTYRE:** Sir, you asked about what can be provided before the second
3 CMC; well, we would that suggest if categories can actually be agreed in advance of
4 the second CMC there's no need artificially to wait to start giving the disclosure of
5 those categories or to start carrying out the searches.

6 **THE CHAIR:** Yes. Look, I think that is probably right, that insofar as categories are
7 agreed, you can start doing the process before, but I am not going to make an order.
8 But both parties understand that we want to get as much as possible done by the
9 next CMC and if they are documents that are readily available and that the
10 categories are agreed, you might as well both get on with it and give disclosure. But
11 we'll come back to disclosure in more detail at the second CMC but I do want to deal
12 with the specific categories that anyone wants an order on now.

13 So let me go back to Whistl and see what specific categories you are looking for
14 documents on now rather than later.

15 **MR BATES:** It's simply any submissions or --

16 **THE CHAIR:** Shall we start off with the Ofcom file then?

17 **MR BATES:** The Ofcom file, we would ask that it simply be disclosed as it is, the full
18 Ofcom file.

19 **THE CHAIR:** I think there may be -- look, unless everyone agrees -- if both parties
20 agree then that's fine. But Royal Mail and indeed Ofcom might be entitled to say if
21 there is stuff in there that's wholly irrelevant to the pleaded issues it doesn't need to
22 be disclosed. That is the point. So normally I would say that the relevant material
23 from the Ofcom file should be produced plus the index because I think that is quite
24 important because if you've got the index it's a good discipline on the other side that
25 they give you, let's say, more rather than less and then if there is any issue, we can
26 deal with that at the next CMC. But I think you should get the Ofcom file --

1 **MR BATES:** Yes.

2 **THE CHAIR:** -- the relevant parts of the Ofcom file. If it's something completely
3 irrelevant then you don't need to have it.

4 **MR BATES:** So the test of relevance would be what, that it's relevant to any
5 pleaded issue?

6 **THE CHAIR:** Yes, normal test for relevant, relevant to the pleaded issues in the
7 case and that you'll get the index and they will give you whatever is relevant and if
8 there is a dispute then we can deal with that at the next CMC.

9 **MR BATES:** Yes.

10 **THE CHAIR:** I understand it's really important that you get the Ofcom file plus we
11 have a clear understanding of which paragraphs of the Ofcom report are in issue and
12 being relied upon by the next CMC.

13 **MR BATES:** Yes.

14 **THE CHAIR:** It's such an important element. So what is the timing for this then?

15 **MR BATES:** Well, that's perhaps a matter for Royal Mail.

16 **THE CHAIR:** Let's hear from Mr McIntyre as to when.

17 **MR MCINTYRE:** We agree on relevance, we'll need a chance to have a look
18 through.

19 **THE CHAIR:** Yes, of course you will.

20 **MR MCINTYRE:** As I say, my solicitors still haven't even seen the confidential file.
21 We suggest two months for disclosure and that would run from the date of the
22 tribunal's sealed order today because it's not until that order is made.

23 **THE CHAIR:** Can't we just deal with it at the same date as exchanging disclosure
24 reports? So you think perhaps it may be better to have it a bit earlier than that?
25 Because it's so important.

26 **MR BATES:** It's so important to have this --

1 **THE CHAIR:** So I think that we should aim to have it with a February date rather
2 than a March date, so can you give us a February date?

3 **MR MCINTYRE:** If we could run it, sir, as I say, from the date of the sealed order,
4 please, because it's not until we get that order that we can take it to our previous
5 solicitors and say: hand over the confidential material. So, in effect, two months from
6 the date of the sealed order if the order can be sealed, you know, within the next
7 week or at the beginning of January.

8 **THE CHAIR:** Yes, but I would like to have a date. I think we are going to have to
9 put a date on it. So I am going to have date on it. I don't like it from the date of the
10 sealed order, that always leads to problems in practice. So just give me a date and
11 we'll put that on.

12 **MR MCINTYRE:** Sir, in that case, we ask for 25 March, the same date that has
13 already been given on --

14 **THE CHAIR:** No, a February date. I am telling you I want a February date.

15 **MR MCINTYRE:** In that case, 29 February, sir. We want to leave as much time as
16 possible to get these orders sealed and finalised.

17 **THE CHAIR:** Okay, 29 February, Ofcom file. So it will be the relevant parts of the
18 Ofcom file. Okay, so that is that.

19 The next one is they are asking for anything else submitted by Royal Mail to Ofcom.
20 I suppose that there are two issues with that. One is that it may well be that that
21 material is not relevant at all anyway. It has to be look at to see what it is. Two, it's
22 going to be both sides. You have been submitting stuff to Ofcom yourself.

23 **MR BATES:** Yes.

24 **THE CHAIR:** And you can't expect to get an order against them unless you disclose
25 anything else that you've submitted to Ofcom at the same time.

26 **MR BATES:** We are entirely content with that. It's very likely of course that all of the

1 material we have submitted will be in the Ofcom file so Royal Mail would be
2 responding to the file that had been provided to them. But we of course
3 acknowledge that Royal Mail's material provided to Ofcom should be subject to the
4 same relevance review as the file itself.

5 **THE CHAIR:** So for that I would propose 25 March 2024 unless Mr McIntyre has
6 any further observations.

7 **MR MCINTYRE:** Sir, we do object to the idea that we should be required to disclose
8 this material as a category. We are willing to give the Ofcom file, we have also
9 volunteered to give the confidential decision, which has not been asked for. Our
10 suggestion is what should take place is there should be a review of the file and the
11 decision and then there can be targeted requests via the Redfern Schedule process
12 for any further disclosure if there are perceived to be gaps in what has already been
13 given, but the idea that we should hand over this entire category of material --

14 **THE CHAIR:** I am not saying that. What I am saying is that if it's going to be
15 pursued, it has to be both parties and it's only relevant documents from it and so
16 I don't see, if you've got a proper document system, and clearly you would have
17 done because solicitors would have been involved, this material is probably not that
18 difficult to get on both sides and that I am not saying that anything in there is going to
19 be relevant, because it may well be that the vast majority of that stuff, if it didn't make
20 its way into the Ofcom file, is not going to assist anyone in this case.

21 But if there is stuff in there that is relevant, I think it should be disclosed and it's just
22 a question of when is it going to be disclosed. So that's what I am focusing on and
23 my inclination at the moment is to say both sides have to submit that material by
24 25 March. It's not a big topic. It is manageable and it is targeted because you will be
25 looking at it and it's not going to take long to figure out whether or not stuff has been
26 submitted, let alone whether or not it's relevant. But I suspect, but I may be wrong,

1 | you are not going to be disclosing a huge amounts of document on it. I really don't
2 | think this is going to be files and files of stuff and so I am going to order that for
3 | 25 March, both sides.

4 | Okay, anything else? The CAT bundle and the Court of Appeal bundles, again both
5 | sides presumably have those, haven't they?

6 | **MR BATES:** No, the CAT bundle was subject to undertakings --

7 | **THE CHAIR:** I understand that point.

8 | **MR BATES:** -- to destroy the confidential material when the case was over, so we
9 | don't have them and that's the reason why we are requesting them because we
10 | understand that Ashursts do still have them and the repositories that we were
11 | familiar with and can easily be provided would be of assistance to us.

12 | **THE CHAIR:** But do any undertakings to the court or anyone need to be varied in
13 | order to do that exercise?

14 | **MR BATES:** There would have to be an order from this tribunal providing that these
15 | bundles can be used for the purposes of the present proceedings because that
16 | would then effectively vary the constraints that the tribunal placed on the use of the
17 | confidential material in the --

18 | **THE CHAIR:** You say that but then initially will it go into the confidentiality ring?

19 | **MR BATES:** Yes, it would be provided into the inner confidentiality ring. It's really
20 | only the Whistl lawyers who want to have those bundles because they are bundles
21 | that we worked with some years ago.

22 | **THE CHAIR:** Let's see what Mr McIntyre says but what your proposal is that the
23 | bundles from the CAT and the Court of Appeal --

24 | **MR BATES:** Just from the CAT stage.

25 | **THE CHAIR:** Just from the CAT, go into the inner confidentiality ring. Let's see what
26 | Mr McIntyre says about that.

1 **MR MCINTYRE:** Sir, again, we resist disclosure of this entire category of documents
2 on the basis that first of all we don't have the confidential bundles, that is
3 Royal Mail's current solicitors don't have access to them because of the
4 confidentiality restriction. We do have an index. The index itself runs to 117 pages.

5 **THE CHAIR:** Yes, I saw that.

6 **MR MCINTYRE:** It makes clear that there is a large amount of material in the
7 bundles that is plainly irrelevant, so inter partes correspondence in the litigation,
8 statutory material, regulatory guidance. So large swathes of material here are plainly
9 irrelevant. But also insofar as material is relevant, it is likely to be highly duplicative
10 of the Ofcom file. Again, we can't be certain because we don't have access.

11 **THE CHAIR:** Yes, I can see that.

12 **MR MCINTYRE:** There are thousands of pages of chronological core
13 contemporaneous documents, is how they are described, which we assume overlap
14 substantially with the Ofcom file, so again we say the proportionate approach would
15 be --

16 **THE CHAIR:** The thing is that the burden of disclosure is not going to be huge, but
17 I am not going to order you to disclose irrelevant documents, okay, so the thing is
18 that whichever way it goes you are not going to be obliged to give disclosure of stuff
19 that's wholly irrelevant, as you say, the statutory material and all that sort of stuff.
20 There may be something in the inter partes correspondence, I really don't know.
21 Someone would have to look at it but most of it is going to be irrelevant on the issues
22 but there may be some points in there that will be of assistance. So there is going to
23 have to be some sort of disclosure from it and the first step is for you to get copies of
24 the bundles. So how are you going to get that?

25 **MR MCINTYRE:** Sir, we are content to try and get copies of the bundles but that is
26 subject to the burden being the other way round. We say the correct approach

1 would be for Whistl to look at the Ofcom file and then having reviewed that to look at
2 the index to the bundles and say: yes, we want this, we want this, we want this, to fill
3 in gaps in the disclosure. Because if it's other way around then what we have to do
4 is look at the whole category and do a category-based relevance review of material,
5 which may end up, as I say, being duplicative or pointless or not needed. So the
6 burden should be on Whistl to request what it wants from the appeal bundles, and
7 I accept that as a first step we'll need to deal with the confidentiality restrictions, but
8 that's the process that we propose. It may not lead to a significantly different
9 outcome in terms of what Whistl actually ends up with but it's really a question about
10 where the initial burden lies.

11 **THE CHAIR:** Yes, okay. So I would be inclined to order that you get copies of the
12 bundle and that you supply the index to the bundle on 29 February 2024.

13 **MR MCINTYRE:** We are content with that. Can I just raise one point in addition to
14 what my learned friend said about the confidentiality issues --

15 **THE CHAIR:** I have not finished yet.

16 **MR MCINTYRE:** I am sorry.

17 **THE CHAIR:** At that stage Whistl will look at the index and if they've got any specific
18 requests in relation to that then they make those specific requests and if there is
19 anything outstanding then that can be dealt with at the second CMC. I want that
20 somehow phrased into the order so everyone knows what the process is. But given
21 that the Ofcom file has to come first, you can factor that into the timing, but I will
22 leave that between you and if there's a dispute between you on timing I can resolve
23 that administratively.

24 So you'll get the material at the end of the day but it may take a bit longer and I think
25 he's right that there's going to be a lot of irrelevant stuff and the relevant stuff is likely
26 to be in the Ofcom file. It's really a question of identifying what's in there that's over

1 and above that and that shouldn't be a too difficult task if the index itself is that
2 detailed.

3 **MR BATES:** It's undoubtedly right that most of the relevant material will be in the
4 Ofcom file. If I can just lay down a marker though about fairness given that
5 Royal Mail then on this model that is now being discussed would then have access
6 to Whistl's material that we provided for the tribunal which is in those bundles but
7 Whistl's access to the material in those bundles would be a subject to a relevance
8 review and in my submission that isn't a fair balance between the parties because
9 either the material in those files should be available to both parties given we've all
10 had it before anyway. Obviously correspondence, et cetera, it's not going to be
11 relevant to anything but the evidence that was in those bundles, both
12 contemporaneous material and the experts reports, et cetera, that were in those
13 bundles, should either be accessible to both parties on the same basis or not.

14 **THE CHAIR:** There are certain things which are going to be very easy to determine:
15 the witness statements, the experts reports would need to be disclosed and I think
16 that's it's probably worth making that as part of the order now, that out of the bundle
17 that you do get the witness statements and the expert reports because I think that's
18 probably the key areas that you're looking for over and above the contemporaneous
19 documents. So I think that's a very fair point.

20 **MR BATES:** I am grateful for that.

21 **THE CHAIR:** Thank you. Anything else that we are now looking at?

22 **MR MCINTYRE:** Sir, can I just raise one brief point on the appeal bundles? As
23 we've noted, there is a separate confidentiality regime in place for those, so the letter
24 that we discussed to Ofcom earlier won't necessarily cover this. There is, I think,
25 based on the indexes to the appeal bundle, third party confidential material in there
26 as well.

1 **THE CHAIR:** Yes.

2 **MR MCINTYRE:** So there may need to be a process, I just flag this now, of writing
3 to the third parties to get that consent.

4 **THE CHAIR:** Exactly. Go through that process if you need to and obviously liaise
5 with Ofcom on that. That's quite important but hopefully we'll get that done.

6 The other thing that I have been thinking about, which is further disclosure from
7 Royal Mail, which is that what Whistl are saying is that they don't expect your
8 disclosure to be vast, but I am not sure whether -- I am not saying it's going to be
9 vast but I am not sure if it's going to be as simple as that because when you look at
10 the way the indicative breakdown of Whistl's heads of loss have been framed, the
11 vast majority is loss of profits and that you may or may not wish to give disclose of
12 your own documents to say: well, look, you are claiming you would have made some
13 vast profit out of this business; well, we have been running this business for God
14 knows how long and we haven't been able to make that sort of level of profit, it's just
15 wholly unrealistic. So you may want to be giving your own disclosure on issues like
16 that, but that's up to you. You need to think about it, whether or not your own
17 profitability experience is in any way comparable or relevant to the issue because
18 this claim is a substantial claim and I know what you say about the loss of profits:
19 you say it's grossly inflated, it's never going to be anything like that. They say: no,
20 this all done on the basis of projections we did at the time, the lenders looked at it,
21 LDC were happy with it and we did all our business plans all based on that and it
22 was a proper basis. I can see there is a big gap between you on this issue. But you
23 may want to give disclosure from your own records but it's a matter for you but I am
24 just flagging it because the other side seem to think that you are not going to be
25 giving much disclosure over and above but that may not be right. But by the time we
26 get to the second CMC and probably by the time you do your disclosure report, you

1 | would have figured out which way you are going to go on that.

2 | Okay, so I think that deals with disclosure unless anyone else wants to raise
3 | anything else on disclosure.

4 | Yes, Mr McIntyre?

5 | **MR MCINTYRE:** I am sorry, I am just looking through my notes to check we've
6 | covered off all the points.

7 | **THE CHAIR:** Yes, please look at your notes, that's fine.

8 | **MR MCINTYRE:** I think there is a minor point between us. We've dealt with the
9 | procedure generally and we've dealt with the question of experts-led disclosure.
10 | There is a suggestion in the correspondence and again in my learned friend's
11 | skeleton that insofar as EDQs and disclose reports are exchanged, they would be
12 | limited to infringement and causation.

13 | **THE CHAIR:** No, they are not going to be.

14 | **MR MCINTYRE:** I'm grateful. It would have made some sense if we are going to
15 | have a split trial but we are not going to have a split trial. So I don't think Whistl are
16 | pushing for that, that was only really on the basis --

17 | **MR BATES:** Yes.

18 | **THE CHAIR:** That's fine.

19 | **MR MCINTYRE:** I am grateful, sir.

20 | **THE CHAIR:** Witness statements, we can deal with that at the next CMC but surely
21 | they should just be governed by the normal CAT Practice Direction. So we don't
22 | need to put it in any order now but insofar as the CAT has its own rules and
23 | procedures, we should try and follow those unless there's good reason to depart
24 | from them. So witness statements we'll deal with at the next CMC and they are
25 | going be governed by the CAT Practice Direction 2021.

26 | Expert evidence. Now, we are not in a position to deal with expert evidence because

1 you need to have fully particularised quantum, you need to have the experts
2 discussing amongst themselves and the parties what the methodology is and
3 identification of the issues because when it comes to asking us to make an order at
4 the next CMC I will want to see exactly what each expert is going to cover and in
5 order to do that I need to understand their proposed methodologies.

6 So before the next CMC I think we should direct that the parties shall exchange their
7 proposals for expert evidence, including the issues and methodology, by let's say
8 two weeks before the next CMC. But that is a crystallisation. I expect before that
9 there are going to be meetings and discussions between the parties but I want
10 something more or less crystallised two weeks before the next CMC and that once
11 we've got the date of the next CMC, just put this date in that is two weeks before
12 that. That's expert evidence.

13 Cost budgeting. The problem with cost budgeting is this is a large claim and cost
14 budgeting can take up a lot of time and energy. I would rather have a direction, at
15 least for now, that at the next CMC we have the costs to date of each party since the
16 proceedings were commenced and the anticipated costs of disclosure. That's all
17 I am asking for. So put that in the order. I very much doubt that we are going to
18 have the full Form H type cost budgeting in this case, just because of the size, but
19 I do like to know how much disclosure costs in these cases because that helps me to
20 make an order and so when there's an issue, and I am not going to put this in the
21 order but where there's an issue about the proportionality of a category of loss, it's
22 really helpful for me in deciding whether or not to order it if at the same time the party
23 opposing it can say what their anticipated costs of doing that particular step are
24 because sometimes it's relatively modest and so it's easier to order disclosure, other
25 times it's so large we've got to do a cost benefit analysis as to whether that's really
26 necessary.

1 The next item is the date for the next CMC. Let's get our diaries out.

2 Also, a lot may depend on whether we are going to be dealing with the Royal Mail
3 strike-out application in relation to the costs at the same time. Given that we may
4 have quite a lot of stuff to go through, I would be inclined to put the CMC for one and
5 a half days. So we can perhaps have half a day, let's say an afternoon, on day 1 for
6 the strike-out application and then one day for day 2 for the CMC. Ideally, if we can,
7 I will give a ruling on the strike-out application at the beginning of day 2 or maybe at
8 the end of day 1, depending on how long it takes.

9 So I would say the strike-out application be heard at 2 o'clock on Friday -- now let's
10 just see what date that will be. No, Thursday. Is it Thursday, the 25th? Is that right?
11 Yes. So 2 pm on Thursday, the 25th, the strike-out application -- and we'll look at
12 the timetable for that in a second -- and then for the CMC itself, the 26th at 10.30.

13 We don't need the cast of thousands. If the leaders aren't available, then you are
14 two both pretty senior juniors who know what you are doing, so it's not absolutely
15 necessary to have the silks here. But if you do have the silks, that's fine. It's always
16 good to see juniors arguing cases because one of the problems at the competition
17 bar is that cases tend to be so large that I tend only to hear the silks and the juniors
18 do need to get on their feet.

19 I think that both applications, the CMC and the strike out, could be done by juniors.
20 If the parties want silks, that's fine, but I am not going to fix a date by reference to the
21 convenience of counsel. This is the dates that we can make.

22 All right.

23 **MR MCINTYRE:** We are content for that. That just leaves, and you may have been
24 coming to this, some directions in the lead up to the strike-out application.

25 **THE CHAIR:** That's fine. We will want in the order -- so we have the first part, what
26 disclosure and Redfern schedules prior to the CMC, we've done that. Expert

1 material and issues for that, that's fine. We will want an agenda and a list of issues
2 for determination, and that could be at the same date as the other date I have
3 already given you. We have already agreed expert reports with proposals as to
4 quantification and methodologies and precise issues.

5 The strike-out application, you've dealt with that in your skeleton argument for
6 a timetable. Let's just have a look at that.

7 **MR MCINTYRE:** Sir, yes, that was on the basis that it would be heard after 6 May,
8 so we may need to just adjust that timetable a little bit.

9 **THE CHAIR:** We can do that now, can't we?

10 **MR MCINTYRE:** Sir, yes, it's in our draft directions.

11 **THE CHAIR:** Let's look at your skeleton first.

12 **MR MCINTYRE:** Yes, it's in our draft directions, not in the skeleton.

13 **THE CHAIR:** Draft tab?

14 **MR MCINTYRE:** Tab 24.

15 **THE CHAIR:** Let's have a look.

16 **MR MCINTYRE:** Page 108.

17 **THE CHAIR:** Yes. So we are going to have to change that, aren't we? So
18 number 6 we have now determined, that's half a day at 2 o'clock on whatever date it
19 was, 25 April.

20 Then we need to go back as to when any evidence -- yes, let's go back. So the first
21 application should probably be ...

22 **MR MCINTYRE:** I mean if I may suggest, sir --

23 **THE CHAIR:** You make a suggestion, yes.

24 **MR MCINTYRE:** It's unlikely to be an evidence heavy strike-out application.

25 **THE CHAIR:** I don't think it will be.

26 **MR MCINTYRE:** So it may be that we just compress the deadlines for evidence in

1 response and then the evidence in reply. So if we said if we moved the evidence in
2 response to the preceding week, which I think would be around 25 March or so.

3 **THE CHAIR:** Yes, and the evidence in reply, then we need to put that maybe one
4 week after that.

5 **MR MCINTYRE:** So that would be 25 March. We could put the evidence in reply on
6 15 April, that would be two weeks, or 8 April.

7 **THE CHAIR:** Yes, that seems fine to me. Let's just make sure Whistl are happy
8 with that timetable.

9 **MR BATES:** I would ask for a little bit longer than 25 March because I think
10 25 March we also specified as a date for other --

11 **THE CHAIR:** Exactly.

12 **MR BATES:** -- (inaudible due to overspeaking) particularly given the indication my
13 learned friend has given as to wanting two weeks for his reply evidence, it would
14 seem fair for us to have until, say, the end of March. I don't know if that's a weekday
15 or not.

16 **THE CHAIR:** Yes, well, we'll work it out. So you are saying -- let's get someone to
17 give me a precise date and then --

18 **MR BATES:** Let's say by Monday, 1 April for Whistl's --

19 **THE CHAIR:** That's what we've already got. We want it a bit before that. Unless
20 we move back the first -- 11 March by a week to 4 March.

21 **MR BATES:** Yes.

22 **THE CHAIR:** Let's see if we can do that. So, look, the application will be 4 March
23 and your evidence in reply on that can be two weeks after that so 18 March.

24 **MR BATES:** Yes.

25 **THE CHAIR:** Then evidence in reply can be, what, 25 March? Then there's plenty
26 of time for the parties to do their skeletons and anything like that. Because I don't

1 think this is going to be evidence heavy; you look at the pleadings and you look at
2 the points of principle.

3 I understand where both parties are coming from and in the scheme of things this
4 isn't the largest part of the case. So it may be that, I don't know, whether both
5 parties -- well, your side will have to think about it in the light of the application as to
6 what you are going to do.

7 **MR BATES:** Yes, but it's essentially a legal point.

8 **THE CHAIR:** It's a legal point and whether it's a good legal point or not isn't going to
9 be very hard to determine. Yes.

10 **MR MCINTYRE:** Sir, can I just ask for two weeks for the reply evidence, on the
11 basis that --

12 **THE CHAIR:** Yes, so what --

13 **MR MCINTYRE:** I think that would take us -- so 18 March would be for Whistl's
14 responsive evidence. Two weeks after that would take us to 1 April for our reply
15 evidence.

16 **THE CHAIR:** Yes, that's fine. So we've got 4 March for paragraph 3, 18 March for
17 paragraph 4, 1 April for paragraph 5.

18 **MR MCINTYRE:** I am grateful.

19 **THE CHAIR:** It's no big deal because it's largely going to be on submissions. Then
20 we'll want skeleton arguments and bundles of authorities, et cetera, all filed and
21 again if that -- if the skeleton arguments can be done ...

22 Let me look at my diary. It's just a question of the more time I have the more I am
23 likely to read it and digest it before the hearing. The bundle with skeleton
24 arguments, let's just see when we are going to get that. The hearing we've said is
25 the 25th. So I'll want that one week before. That takes us to 18 April. Skeleton
26 arguments and bundle, including bundle of authorities, both electronic and hard

1 | copy, five copies, yes, by 18 April 2024.

2 | As regards the bundles and the skeleton argument for the CMC, I think that ideally
3 | we want those -- let me have a look. Because you need to have a bit more time to
4 | try and negotiate stuff than that, and so I would probably want that by the 22nd.
5 | Let's say by 2 pm on the 22nd I'll want the skeleton arguments, the authorities and
6 | the bundles and all that all ready for the CMC. Right.

7 | **MR BATES:** Can I raise one point with regard to the strike-out application?

8 | **THE CHAIR:** Yes.

9 | **MR BATES:** The tribunal will have seen from the correspondence that Whistl has
10 | agreed to remove the reference to the costs of the UK Supreme Court stage. That's
11 | really very little.

12 | **THE CHAIR:** I know. It's not really worth arguing about, yes.

13 | **MR BATES:** I can of course file an application to amend the particulars of claim and
14 | deal with it separately if necessary, but it is literally just deleting the words "UK
15 | Supreme Court" from paragraph 110.2 of the particulars of claim.

16 | **THE CHAIR:** Yes.

17 | **MR BATES:** Is it possible for me to simply ask for permission now to do that, or we
18 | can just proceed on the basis of an understanding that we are not pursuing that
19 | element?

20 | **THE CHAIR:** The thing is, look, if the strike out is successful --

21 | **MR BATES:** Yes.

22 | **THE CHAIR:** -- more is going to be struck out in any event.

23 | **MR BATES:** Precisely.

24 | **THE CHAIR:** So I wouldn't encourage you to amend now, but everyone understands
25 | that you are no longer pursuing that part of the claim.

26 | **MR BATES:** I am very grateful.

1 **THE CHAIR:** It may be that you can put that in the recital to the order that we are
2 making and so it's there as part of the order --

3 **MR BATES:** Thank you.

4 **THE CHAIR:** -- of the CMC. Now how long is it going to take to get a draft order?
5 It's up to you two to really do some work, but if I can have the draft order --

6 **MR BATES:** The end of tomorrow?

7 **THE CHAIR:** The end of tomorrow is absolutely fine. Insofar as there is anything
8 that's not agreed, you just put it in -- you highlight what is not agreed and then you
9 put the alternative dates or the alternative wording in a way that I know who is saying
10 what and then I will just quickly go through the order and make an executive decision
11 as to which one I am going to go with. But both of you just be flexible and sensible
12 and I don't think there will be a problem on the order.

13 On the confidentiality ring order, we've got the process already agreed as to how we
14 are going to get the comments of Ofcom. Once you've got all of that, you may need
15 to revise the draft wording of the confidentiality ring order, but once all that is
16 resolved send it into the CAT and again if there is an issue just do it by way of
17 highlighting.

18 All right. Anything else that we need to deal with?

19 **MR MCINTYRE:** Nothing from me, sir, thank you.

20 **THE CHAIR:** Thank you very much, gentlemen. As ever, it has been a really well
21 prepared CMC and it was really helpful to have the skeleton arguments; it makes my
22 job much easier.

23 Okay, I will rise now.

24 **(11.46 am)**

25 **(The tribunal adjourned)**

26