



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1584/5/7/23

BETWEEN:

WHISTL UK LIMITED

Claimant

- v -

(1) INTERNATIONAL DISTRIBUTIONS SERVICES PLC

(2) ROYAL MAIL GROUP LIMITED

Defendants

ORDER (DIRECTIONS TO TRIAL)

UPON hearing Counsel for the Claimant (Mr A Bates) and Counsel for the Defendants (Mr A McIntyre) at a case management conference on 26 April 2024

IT IS ORDERED THAT:

Amendments to pleadings

1. The Claimant shall amend its Particulars of Claim to reflect the striking out of part of paragraph 110.2 of the Particulars of Claim by the Tribunal's Order made on 25 April 2024.
2. Further and in addition to paragraph 1, the Claimant is granted permission to amend its pleadings as follows:

- (a) To amend the Particulars of Claim in the form of the draft Amended Particulars of Claim enclosed with the letter from the solicitors for the Defendants dated 2 May 2024.
 - (b) To amend the Claimant's Response (dated 27 January 2023) to the Defendants' Request for Further Information ("RFI") (dated 25 November 2022) in relation to paragraph 12 of the RFI in the form of the draft Amended Response to RFI enclosed with the letter from the solicitors for the Defendants dated 2 May 2024.
- 3. The Claimant shall file and serve its Amended Particulars of Claim and its Amended Response to RFI, both as amended pursuant to paragraphs 1 and 2 above, by 4pm on 3 May 2024.
- 4. The Defendants have permission to file and serve a consequentially amended Defence, if so advised, by 28 May 2024.
- 5. The Claimant has permission to file and serve a consequentially amended Reply, if so advised, by 11 June 2024.
- 6. The costs of and occasioned by the Claimant's amendments made pursuant to paragraphs 1, 2 and 5 above, including those in respect of (i) the Claimant's application to make such amendments and (ii) any consequential amendments to the Defendants' Defence, shall be paid by the Claimant in any event.

Preliminary Issue: Binding Findings under section 58A and/or section 58 of the Competition Act 1998 and the determination of related disagreements

- 7. The following matters shall be tried as a preliminary issue (the "**Preliminary Issue**"):
 - (a) What, if any, of the findings in the non-redacted version of the decision of the Office of Communications dated 14 August 2018 in case CW/01122/01/14 (the "**Ofcom Decision**"), which:
 - (i) are relied upon and said to be binding by the Claimant;

(ii) are said not to be binding and are put in issue by the Defendants; and

(iii) have otherwise not been admitted by the Defendants,

are binding in these proceedings (pursuant to section 58A and/or section 58 of the Competition Act 1998)¹ (“**Binding Findings**”), and for what purposes are they binding?

(b) As regards Binding Findings which fall within section 58 of the Competition Act 1998 only (“**S58 Findings**”): for which, if any, S58 Findings should the Tribunal exercise its discretion to order that they shall not be binding under section 58, and for what purposes shall such findings not be binding?

8. Following this CMC:

(a) The parties shall liaise with one another to seek to reach agreement as to matters falling within the scope of the Preliminary Issue and, insofar as such matters remain unagreed, to precisely define (within a table) their respective positions in terms of: (i) identifying each Binding Finding that is the subject of the outstanding disagreement; (ii) whether that Binding Finding is alleged to be binding pursuant to section 58A or to be a S58 Finding; and (iii) in the event that the alleged Binding Finding is a S58 Finding, whether the Tribunal should exercise its discretion to order that the finding not have binding effect in these proceedings. Such a table should be produced by no later than 4pm on Friday 17 May 2024.

(b) The parties shall also agree, by Friday 24 May 2024, a table setting out those findings that were listed in the Claimant’s ‘Table of Findings within the Ofcom Decision on which the Claimant Intends to Rely’ dated 29 February 2024 which have been agreed between them (i.e. accepted to be binding and/or not put in issue by the Defendants).

¹ Read with section 371(1)-(3) of the Communications Act 2003.

9. The trial of the Preliminary Issue is listed for **Wednesday 12 June 2024**, with a time estimate of half a day, with a further half a day in reserve, plus a half day's pre-reading. In preparation for the Preliminary Issue trial:
- (a) Evidence (insofar as may be required) shall be filed and served by 4pm on Friday 24 May 2024.
 - (b) Skeleton arguments shall be filed and exchange by 2pm on Tuesday 4 June 2024. The parties' skeleton arguments shall contain cross references to the hearing bundles.
 - (c) The parties shall seek to agree the hearing and authorities bundles. By no later than 2pm on Wednesday 5 June 2024, the Defendants shall lodge five hard copies of the bundles with the Tribunal.

Disclosure by the parties or provision of information for the experts' analyses

10. The parties shall, through their respective solicitors, liaise to seek to resolve any outstanding points of disagreement between them as to their respective disclosure requests set out in their respective Redfern Schedules that were filed in advance of this CMC.
11. If and to the extent that any disclosure request made by one party to another party is not agreed despite reasonable efforts to reach agreement, the party seeking the disclosure may apply to the Tribunal by letter requesting a ruling for resolving the disagreement. The Tribunal may, if appropriate, determine such disagreement on the papers, or may list a short hearing (which may be a remote hearing) for that purpose. Any unresolved disagreements as to disclosure may also be heard and determined on the same day as the Preliminary Issue trial listed for 12 June 2024 if time allows (after giving priority to the determination of the Preliminary Issue).
12. Each party shall provide disclosure by list, together with inspection, of the documents and/or information (as applicable) falling within the categories requested from it and which it has agreed or has been ordered by the Tribunal. This requirement to provide

disclosure and inspection is limited to documents/information that are or have been within that party's possession or control. In respect of categories that had been agreed in full prior to the date of this CMC (set out in Annex 3 and Annex 4 to this order), disclosure and inspection shall be provided by 4pm on 15 July 2024. In respect of categories that are agreed after the date of this CMC, the parties may, at the time of agreeing those categories, also agree a date by which disclosure and inspection of documents falling within that category provided, taking due account of the time taken after the date of this CMC for reaching such agreement. Absent agreement between the parties as to the date for provision of documents within any category, a party may request a determination by the Tribunal in accordance with paragraph 11 above.

13. The documents to be disclosed pursuant to paragraph 12:

- (a) may be confined to the best available evidence about the information which is the subject matter of the listed categories, which may be in the form of electronic databases or other electronic documents, save where (i) the party concerned does not in fact keep any documents in respect of that subject matter in electronic form, or (ii) although it does keep documents in respect of that subject matter in electronic form, the relevant information in those electronic documents is unreliable in view of the way in which it was collected, or (iii) the best available evidence falls instead to be obtained from hard copy documents or a combination of hard copy documents and electronic databases or other electronic documents. In each case, the party disclosing information pursuant to this provision should explain in the disclosure statement to be provided pursuant to paragraph 17 below why the evidence it is providing is the "best available evidence" and why further disclosure is not proportionate, in particular if the excluded information is within an electronic database;
- (b) if contained in the form of an electronic database or extract therefrom, should be provided in their native electronic format, together with a statement in the disclosure statement to be provided pursuant to paragraph 17 below on how the relevant information has been compiled for the database, and, if appropriate, guidance on how it is to be examined;

(c) shall include documents in the public domain.

14. In the event that the disclosure of documents pursuant to the terms of this Order is considered by the party required to provide the disclosure to be disproportionately costly, that party may, in the alternative to giving disclosure, directly provide information on the matters specified (by the relevant disclosure deadline specified in paragraph 12). Where information is provided in lieu of disclosure it shall be verified by a statement of truth and supported by, in the disclosure statement to be provided pursuant to paragraph 17 below, a description of the sources from which the information concerned has been compiled and an explanation as to why the underlying disclosure is disproportionately costly.
15. Where an agreed disclosure request (or a category of disclosure ordered by the Tribunal) provides for a sample of relevant documents to be provided, the basis on which such a sampling approach has been adopted, and an explanation as to why this is reasonable and proportionate in the circumstances, shall be set out in the disclosure statement to be provided pursuant to paragraph 17 below.

Disclosure into the confidentiality rings

16. The parties may choose to disclose documents into the confidentiality rings established by the Tribunal's Order made on 16 January 2024 in accordance with the terms of that Order.

Disclosure statements

17. The parties' disclosure by list, given pursuant to paragraph 12 above, shall be accompanied by disclosure statements from an appropriate person which shall:
 - (a) indicate those documents in respect of which the party claims a right or duty to withhold inspection;
 - (b) indicate those documents which are no longer in the party's control, and what has happened to those documents;

- (c) set out the extent of the search that has been made in order to locate the documents ordered to be disclosed;
- (d) specify the manner in which the search has been limited on reasonableness and proportionality grounds and why; and
- (e) certify to the best of their knowledge and belief that the disclosure ordered has been provided.

Disclosure from third parties

- 18. By no later than 4pm on 8 May 2024, the Defendants shall send to the Claimant a list of requests for disclosure from LDC and PostNL.
- 19. By no later than 4pm on 10 May 2024, the Claimant shall send the Defendants draft letters to LDC and PostNL including the Claimant's and Defendants' requests for disclosure from LDC and PostNL.
- 20. By no later than 4pm on 15 May 2024, the parties shall agree the terms of the draft letters and the Claimant shall then send the same to LDC and PostNL immediately thereafter.
- 21. Any applications for third-party disclosure by LDC and/or PostNL, in default of voluntary provision of the requested documents, shall be filed by 4pm on 14 June 2024 and determined as soon as reasonably practicable thereafter.

Factual evidence

- 22. By no later than 4pm on 31 July 2024, the parties shall exchange lists of: (a) their proposed trial witnesses of fact from whom they intend to serve witness statements; and (b) other trial witnesses of fact, if any, in respect of whom they intend to seek a witness summons from the Tribunal.
- 23. By no later than 4pm on 20 September 2024, the parties shall file and exchange statements of witnesses of fact and hearsay notices where required.

24. By no later than 4pm on 15 November 2024, the parties shall, if so advised, file and exchange statements of witnesses of fact in reply and hearsay notices where required .

Expert evidence

Expert permissions

25. Permission is granted to the parties as further specified in paragraph 26 to adduce written and oral expert evidence in the field of economics which addresses:
- (a) From an economics perspective, the scope of the Defendants’ conduct, including:
 - (i) whether the Defendants’ notification of proposed changes to the zonal tilt on 10 January 2014 (“**Zonal Tilt**”) was abusive whether by itself or in conjunction with the introduction of the price differential;
 - (ii) its duration; and
 - (iii) the ability of the Defendants’ conduct to produce effects on competition beyond the period of its duration.
 - (b) From an economics perspective, what the Defendants' competitive response to actual or potential entry by the Claimant in the counterfactual is likely to have been and the likely impact of this on the Claimant.
 - (c) The potential for and likelihood of regulatory intervention by Ofcom in the counterfactual, including potential intervention by Ofcom in relation to the Universal Service Obligation and/or any potential imposition of enhanced obligations and regulation on the Claimant.
 - (d) The economic effect of the price differential by itself, or both the price differential and the Zonal Tilt taken together on:

- (i) the profitability and risks of the Claimant's plans to compete in bulk mail delivery;
- (ii) the volumes of retail bulk mail services the Claimant would have provided and/or the Claimant expanding in the packets, parcels and unaddressed mail markets;
- (iii) whether or not the Claimant would have entered the bulk mail market profitably; and
- (iv) the attractiveness of the Claimant's plans to a potential investor.

26. Subject to paragraph 25:

- (a) the Claimant is permitted to adduce expert evidence from David Parker of Berkeley Research Group (the "**Claimant's Economic Expert**"); and
- (b) the Defendants are permitted to adduce expert evidence from Matt Hunt and Derek Holt of AlixPartners (the "**Defendants' Economic Experts**"), dividing the relevant issues between themselves as they see fit and avoiding any unnecessary duplication.

27. Permission is granted to the parties as further specified in paragraph 28 to adduce written and oral expert evidence in the field of forensic accountancy which addresses:

- (a) The extent to which Royal Mail's conduct is likely to have affected LDC's investment decisions, or (to the extent relevant) other potential investors' investment decisions.
- (b) The extent to which Royal Mail's competitive conduct in the counterfactual and/or potential regulatory intervention by Ofcom is likely to have affected LDC's investment decisions, or other potential investors' investment decisions.
- (c) Royal Mail's relevant costs, as necessary, to support the economic expert analysis.

- (d) The quantification of the losses allegedly suffered by the Claimant, if any, including in respect of:
- (i) profits the Claimant alleges it would have made in the counterfactual in supplying bulk mail delivery services and additional retail bulk mail services and through expansion in the parcels and unaddressed delivery markets;
 - (ii) relatedly, the key drivers underlying the Claimant's business plans (such as conversion of customers or the development of mail volumes) and how those factors actually evolved and would have been expected to evolve in the counterfactual and consequently the financial impact on the Claimant's business plan;
 - (iii) costs that the Claimant would have incurred in the counterfactual;
 - (iv) the appropriate accounting for costs that the Claimant would have incurred in the counterfactual;
 - (v) wasted sunk costs;
 - (vi) financing costs, including the Claimant's compound interest claim articulated at paragraph 112 of the Claimant's Particulars of Claim; and
 - (vii) taxation.

28. Subject to paragraph 27:

- (a) the Claimant is permitted to adduce expert evidence from Frank Ilett of Kroll (the "**Claimant's Forensic Accountancy Expert**"); and
- (b) the Defendants are permitted to adduce expert evidence from Andrew Grantham of AlixPartners (the "**Defendants' Forensic Accountancy Expert**").

Without prejudice discussions prior to exchanging reports

29. By no later than 4pm on 18 October 2024, the experts of like discipline shall hold without prejudice discussions in the absence of legal representatives for the purpose of:
- (a) identifying the issues, if any, between them;
 - (b) explaining their respective proposed approach and methodology in relation to addressing the issues; and
 - (c) where possible, reaching agreement on those issues.

Expert reports

30. The experts referred to at paragraphs 26 and 28 above shall exchange signed reports sequentially as follows:
- (a) By no later than 4pm on 9 December 2024, the Claimant's Economic Expert shall file and serve his expert report.
 - (b) By no later than 4pm on 11 December 2024, the Claimant's Forensic Accounting Expert shall file and serve his expert report.
 - (c) By no later than 4pm on 3 March 2025, the Defendants' Economic Experts shall file and serve their expert report(s) in reply.
 - (d) By no later than 4pm on 5 March 2025, the Defendants' Forensic Accounting Expert shall file and serve his expert report in reply.
 - (e) By no later than 4pm on 16 May 2025, the Claimant's Experts shall file any supplementary expert report(s) in response to the reports of the Defendants' Experts, if they consider it appropriate.
 - (f) By no later than 4pm on 20 June 2025, the Defendants' Experts shall file any supplementary expert report(s) in response to the supplementary report(s) of the

Claimant's Experts (if any), if they consider it appropriate. In respect of each of (i) the supplementary report(s) of the Defendants' experts in competition economics, and (ii) the supplementary report of the Defendants' expert in forensic accounting, the length of the supplementary report(s) shall not exceed 25 pages save with the Tribunal's permission.

Further without prejudice discussions and joint statements

31. By no later than 4pm on 27 June 2025, the experts of like discipline shall hold without prejudice discussions in the absence of legal representatives for the purpose of:
 - (a) identifying the issues, if any, between them; and
 - (b) where possible, reaching agreement on those issues.

32. By no later than 4pm on 25 July 2025, the experts of like discipline shall prepare and file a joint statement for the Tribunal summarising their position on each of the issues addressed in the expert reports and setting out:
 - (a) those issues on which they are agreed; and
 - (b) those issues on which they disagree and a summary of their reasons.

Pre-Trial Review

33. A pre-trial review hearing (the "PTR") shall be listed to take place on **15 September 2025**, before the start of the trial window, with a provisional time estimate of one day (the parties are to notify the Tribunal in advance of the hearing if a lesser time estimate would be sufficient).

34. By 4pm on 8 September 2025, the parties shall provide the Tribunal with an agreed draft agenda for, and list of any issues for determination at, the PTR.

Trial bundle

35. The parties are to liaise and seek to agree the content of the trial bundle by 8 September 2025.
36. By 4pm on 13 October 2025, the Claimant shall:
 - (a) lodge five hardcopies of the trial bundle with the Tribunal and provide a single hardcopy to the Defendants; and
 - (b) make available to the Tribunal and the Claimant (if it has not already done so) an electronic version of the trial bundle.

Opening submissions

37. By no later than 4pm on 29 September 2025, the Claimant shall file and serve written opening submissions for trial (of no more than 75 pages, size 12 font, 1.5 line spacing).
38. By no later than 4pm on 13 October 2025, the Defendants shall file and serve written opening submissions for trial (of no more than 75 pages, size 12 font, 1.5 line spacing).

Trial date

39. The first sitting date of the trial will be **3 November 2025**.
40. The trial shall conclude by 19 December 2025. The week commencing 12 January 2026 shall be held in reserve in case it is not possible to conclude the trial by 19 December 2025.
41. Consideration shall be given at the PTR to whether it is necessary for the Tribunal to sit on some Fridays and whether the reserved week of 12 January 2026 is required.

Miscellaneous

42. The parties may agree to extend any time period or deadline in this Order without further order, provided that this does not affect the date of the trial, the pre-trial review, any listed case management conference or any other hearing. The parties shall notify the Tribunal in writing in advance of the expiry of the relevant deadline of any such agreed extension.
43. Costs in the case.
44. There be liberty to apply.

Hodge Malek KC
Chair of the Competition Appeal Tribunal

Made: 26 April 2024
Drawn: 14 May 2024