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

Case No: 1639/7/7/24

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

12 Thursday 12th September 2024

13
14 Before:

15
16 Hodge Malek KC
17 Timothy Sawyer
18 Andrew Taylor

19
20 (Sitting as a Tribunal in England and Wales)

21
22 BETWEEN:

23
24 **Applicant**

25 **Bulk Mail Claim Limited**

26
27 And

28 **Respondent**

29
30
31 **International Distribution Services Plc (formerly Royal
32 Mail Plc)**

33
34 **A P P E A R A N C E S**

35
36 Ben Rayment & Will Perry (Instructed by Lewis Silkin LLP) on behalf of Bulk Mail Claim
37 Limited

38
39 Andrew McIntyre (Instructed by BCLP LLP) on behalf of International Distribution Services
40 Plc (formerly Royal Mail Plc)

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Thursday, 12th September 2024

(10.30 am)

(Proceedings delayed)

(10.44 am)

MR MALEK: Some of you are joining us by 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 contempt of court.

Mr Rayment.

MR RAYMENT: Good morning, sir, and members of the Tribunal. If I could start with the introductions. This morning I appear with Mr Will Perry for Bulk Mail Claim Limited, who I shall refer to as BMCL or the PCR. My learned friend Mr Andrew McIntyre is here for International Distribution Services PLC, whom I am likely to refer to as Royal Mail. The PCR's director, Mr Robin Aaronson, is unable to be here in person but he is joining us via livestream, so remarks you make he will hear.

MR MALEK: That's absolutely fine.

MR RAYMENT: Just on housekeeping matters is the Tribunal working off paper or electronic versions of the bundle or some combination?

MR MALEK: I think it is easier just to work from the hard copy because we are not going to look at many documents today.

MR RAYMENT: I think it is right but it is useful for the advocates to know.

MR MALEK: Obviously we are familiar with the pleadings in the Whistl claim. We are familiar with the decision, the CAT decision and the Court of Appeal decision. We have looked at all the papers. So we are pretty familiar with what the case is and the issues. We will discuss some of those later on today, but I think the most important

1 thing is to get in the diary a date for the hearing of the substantive application and that
2 we work together to figure out what are the only dates in the foreseeable future that
3 can fit all three of us and we have provided that to the parties.

4 I think the first thing is to discuss how long you envisage the hearing taking, because
5 the practice is that, you know, we get the skeleton and the material before the hearing.
6 We obviously read all that stuff in advance so the hearings don't need to be that long.
7 It is not like, you know, sometimes in the High Court the judge picks up the file half
8 an hour before the hearing and then you have to take him through everything.
9 Hearings with me don't tend to be like that, as you probably know. So I think three
10 days is probably too long. I think one day is too risky. This is probably going to take
11 one and a half days, but it does make sense to list it for two days with one day in
12 reserve, so at least if something happens then we've got some room to manoeuvre. If
13 it looks fairly light, then we can always start at 2 o'clock on the first day, which then
14 gives me the opportunity to speak with my colleagues about the case and discuss stuff
15 in advance, which I always find quite helpful. So, you are happy with that estimate of
16 two, possibly three days?

17 **MR RAYMENT:** Yes. I think we were saying certainly one or two, certainly needing
18 a second as a reserve, and my learned friend's side was pushing three, but I think
19 what you proposed shouldn't concern either party.

20 **MR MALEK:** So it is two days with one day in reserve. Mr McIntyre, are you happy
21 with that?

22 **MR McINTYRE:** Sir, we are content with that. Thank you.

23 **MR MALEK:** That's absolutely fine. The question then is of the windows that we have
24 got available that all three of us can make. Is there any date within the windows that
25 both of you can make? Have you been discussing it amongst yourselves or do I just
26 impose it and say this is it -- for us our preferred window is the 3rd to 5th February.

1 That works much better for us but all the other dates are possibilities.

2 **MR RAYMENT:** 3rd to 5th is one of the windows which is fine for our side.

3 **MR MALEK:** So you sit down. We will just hear from Mr McIntyre about that window.

4 **MR McINTYRE:** The window of 3rd to 5th February is theoretically possible but very
5 difficult for us because our currently instructed silk is away until and including Friday
6 31st January. The 3rd February is a Monday. So we would prefer to avoid that for
7 availability reasons. We would also, however, prefer to avoid it for reasons of principle
8 which I think can develop if the Tribunal wants now or save it for later but we prefer
9 a later window, as I have articulated in my skeleton.

10 **MR MALEK:** You prefer later, but the thing is if he is away, is he away on holiday or
11 something?

12 **MR McINTYRE:** Sir, I don't know. I am just told he is away.

13 **MR MALEK:** From what you are saying he is physically available from 3rd to 5th.

14 **MR McINTYRE:** Subject to --

15 **MR MALEK:** And that my expectation is to have the skeleton, the bundles and
16 everything seven days before because I have other things to do as well. So I don't
17 want to get the skeleton and the bundles at the last moment. So everyone has actually
18 got to do work -- once you have done the skeleton, the job is fairly, I am not saying
19 easy, but it is not so difficult. At the moment I am inclined to go with the window that
20 seems best for us and everyone can actually make it. I know it is going to be difficult
21 for the silk, but I was a junior once and I know that often, you know, the bulk of the
22 work on drafting the skeleton is going to be you anyway. That's the reality, that the
23 silk would expect you to do the first draft and prepare it all for him and then he will sort
24 of add his own touch to it. I don't think your silk is going to physically draft it himself.

25 **MR McINTYRE:** Just coming back on the availability point, if the skeletons were due
26 a week in advance, our silk would then be unavailable at the point of filing. I should

1 say that I am also unavailable for almost all of January. So I would be unavailable at
2 the time the skeleton is due. I do appreciate that I am only a junior and therefore more
3 fungible, but that creates problems. I do note that both parties are also available in
4 3rd to 7th March window that the Tribunal has proposed.

5 **MR MALEK:** Then that's pushing it towards the end of the period and probably the
6 sooner the better to get this resolved.

7 **MR McINTYRE:** Well, is this the time to address you on the point of principle and why
8 we think there should be a longer period for Royal Mail to prepare its response?

9 **MR MALEK:** So you've got two points. The first point you have already developed,
10 which is that whilst counsel are free in the window, in January you've both got other
11 commitments or holidays or something. So it's going to be fairly tough for you to do it
12 then. 20th January window to 30th January, you say you can't make at all.

13 **MR McINTYRE:** We can't make it at all.

14 **MR MALEK:** We take that out of the reckoning now. Then the next window after that
15 is 24th February to 27th February. Do you have problems with that window? I am just
16 talking about physical availability.

17 **MR McINTYRE:** We understand from the correspondence that the PCR's
18 representatives cannot do that period.

19 **MR MALEK:** Can or cannot?

20 **MR McINTYRE:** Cannot.

21 **MR MALEK:** Mr Rayment, does that mean you are in court or something?

22 **MR RAYMENT:** I understand the problem of availability is Mr Harris, King's Counsel.

23 **MR MALEK:** We scrap that week. Then the week of 3rd March to 7th March, what's
24 everyone's availability, I mean physical availability of counsel on those particular
25 dates?

26 **MR RAYMENT:** We are physically available on those dates.

1 **MR MALEK:** You are physically available and you are physically available. So we
2 now have an alternative between the February date and the March date where at the
3 moment the February date is the easiest for the members of the panel, given their
4 other commitments and 3rd March is not the easiest. So we are going to have to
5 balance different things. The fact that we have offered 20th to 30th January is
6 an indication that, you know, to have the skeleton one week before the 3rd March is
7 good for us because we are going to have availability to be reading the skeletons and
8 the bundles in the last bit of January. So that's a positive thing, but I think let's hear
9 from you on this -- apart from the availability issue, because we know you are available
10 physically on those dates but you say it is going to be tough "because we have other
11 things to do in January". Why do you say it is going to make much of a difference of
12 one month between the two, Mr McIntyre? I think that's what we are really talking
13 about. Why is it -- why is this case not going to be ready for hearing on 3rd February,
14 when clearly everyone seems to agree that it would be ready for hearing on
15 3rd March? We are talking about four weeks.

16 **MR McINTYRE:** Sir, as you know from our skeleton, our preference was for an even
17 longer period for preparation. There are three reasons for that.

18 The first is a point of principle I will deal with very shortly, which is that what's put
19 forward in the PCR's skeleton as being the reason for what we see as quite
20 a compressed timetable by reference to the Tribunal's usual practice. What's put
21 forward as the reason is the need for the PCR to be able to participate in the Whistl
22 claim. Now I am sure we will come on to discuss that later on. Our answer would be,
23 first of all, that's not a foregone conclusion, but, secondly, just as a matter of principle
24 any urgency that does arise is entirely a problem of the PCR's own making because --

25 **MR MALEK:** I don't think it is. Let's be fair. When did you serve your bundle on the
26 Tribunal and when did you serve it on Royal Mail?

1 **MR RAYMENT:** It was served on Royal Mail on 20th June.

2 **MR MALEK:** The problem was actually finding a date that we could make. That's
3 why we are having it now. You know, you wanted it to be -- you wanted a CMC I think
4 in July and that just wasn't possible, because I had other things to do, but we have got
5 today because this was the first possible date for a window. So you're saying it has
6 been since 20th June.

7 Presumably, Mr McIntyre, you know, you have already considered this application for
8 certification and that Mr Williams has already started looking at it. You know, Williams
9 is also a very experienced guy. He's got -- sorry. It is the other way round. You
10 haven't got Williams. He's got Williams. Who have you got? Who is your expert?

11 **MR McINTYRE:** We don't have anyone formally instructed for the CPO proceedings
12 yet.

13 **MR MALEK:** Surely won't you use the same person from the other proceedings?

14 **MR McINTYRE:** It is highly likely.

15 **MR MALEK:** It would be crazy to have a different expert. So who is the expert on the
16 other proceedings?

17 **MR McINTYRE:** Mr Hunt of AlixPartners.

18 **MR MALEK:** Okay. Both sides have pretty experienced people who know what they
19 are doing. That is very good.

20 **MR McINTYRE:** Sir, just to clarify on the delay point, it is not about the scheduling of
21 today's hearing. The point is that the Ofcom decision became final in 2022. That's
22 when Whistl pleaded out its claim. We have seen some material in the
23 bundle suggesting, in fact, that that is when the other side's expert began his work.
24 Certainly, we know they incorporated the PCR in July of 2023. So the situation we are
25 in now is the claim was served in June 2024 and the PCR is coming along to this
26 hearing saying "It is all very urgent and we need to compress the timetable for Royal

1 Mail's response because we in effect have left it until a very late stage in the day to
2 bring our claim".

3 It is worth pointing out the compression of the timetable prejudices Royal Mail, not the
4 PCR, who has been thinking about its claim for years. Indeed, it prejudices potential
5 class members because their period for giving objections and observations and so on
6 is also highly compressed.

7 **MR MALEK:** The class members, we will be considering that when we come to the
8 timetable, but your experts on your side have been looking at -- the thing that cuts
9 across both cases is whether or not Whistl has a viable claim for the damages that
10 they seek. They are seeking over 600 million. You are saying, "What is the basis of
11 that?" They are saying, "The basis is that we would have come in. We would have
12 been able to expand. We would have got more business because we could do the
13 whole thing cheaper ourselves and we would have made such big profits that our loss
14 is £600 million". That's what they claim. You say, "We don't actually accept that the
15 fact that we posted this proposed change in terms led to the real withdrawal of the
16 backers of Whistl and that even when the risk of the new terms taking effect was clear,
17 they still didn't resurrect this business, get other funders and push it. If this was going
18 to be so profitable and make £600 million, you don't just walk away at the first hurdle".
19 So that whole big issue you will be focusing on with your team and your experts and
20 both sides, you know, you will be going for third party disclosure, TNT, from I think it
21 is Lloyd's who were the proposed lenders, to figure out what was really going on.
22 That's going to be the real bulk of your case.

23 Now if Whistl win then obviously Bulk Mail are going to be very happy and they will
24 have some real legs. If Whistl fail then it's not going to have that much legs. One of
25 the points that the funders and Bulk Mail is going to have to consider is "How much
26 money do we want to spend on this case at this stage when it is not known whether

1 Whistl are going to win or they're going to lose". Quite frankly I haven't a clue whether
2 Whistl are going to win or going to lose. It all depends on the evidence and when
3 I hear it I will be able to have a pretty clear view did this really have legs? Was it really
4 going to be profitable?

5 So I want to put down a marker at this stage that I would be very reluctant to adjourn
6 the Whistl trial when so much work has been put into it so far. You have your timetable.
7 It was hard enough to get the window that we got for November, December 2025. To
8 find another window to accommodate another party who is not even party to this
9 litigation, it would be a very, very big ask. I am not ruling it out, but it would be a huge
10 ask. So I am very concerned that I do not want to derail your case. If I was Royal
11 Mail, you would want the case to be dealt with because you want certainty. You know,
12 it is not good having a claim of this size and having it up in the air for years and years.
13 You want to get it resolved. So we all want, the Tribunal and I think the parties want
14 the Whistl case to stay on track and I am very concerned about that. What we are
15 really talking about is the practicality of having this hearing on 3rd February or
16 3rd March, and that having considered the points you have made about the
17 unavailability of you and your leader in January, I think I will go for the window of
18 3rd March to 7th March, even though it is more inconvenient. I do think that it is really
19 important for me to have the best quality submissions from your team when you will
20 be fully prepared and I don't want to have a rushed skeleton, have a team where the
21 leader is not fully prepared, he has just come back from holiday doing a hearing like
22 this.

23 So I am going to fix this for 3rd March. We will start at 10.00am on 3rd March just to
24 make sure, if possible, we will almost definitely finish on the -- no later than 5th March.
25 I know you have the window of 7th there but it is not the best window for us. So getting
26 it done then is what we are going to do.

1 Mr Rayment, I know this is not a live or die point. It was just one month, but it is all
2 about trying to figure out what works best for the Tribunal. I think I will benefit more
3 from hearing from Mr Turner and his team when they are properly prepared and they
4 are not coming back-to-back from one thing straight into this.

5 **MR RAYMENT:** Mr Turner is for Whistl.

6 **MR MALEK:** Who have you got as your leader, Harris?

7 **MR RAYMENT:** No. Harris is us.

8 **MR MALEK:** Who have you got?

9 **MR McINTYRE:** Our currently instructed silk is Ken MacLean.

10 **MR MALEK:** Oh, good. That's fine. We are where we are. Then can we look at the
11 timetable you have proposed in the draft order? Whereabouts in the bundle is it?

12 **MR RAYMENT:** Tab 2 of volume 1. You should have received an updated --

13 **MR MALEK:** I don't know if we have an updated one but we will figure it out as we go
14 along. Paragraph 1 is straightforward.

15 **MR RAYMENT:** Yes, that's agreed.

16 **MR MALEK:** We treat it England and Wales. The confidentiality is agreed, so that's
17 straightforward.

18 **MR RAYMENT:** Do you have some wording at paragraph 2 because at an earlier
19 stage there was just a place holder.

20 **MR MALEK:** "Pursuant to PCR ..."

21 **MR RAYMENT:** Yes, you have got the updated draft.

22 **MR MALEK:** The rest we will come back to. Let's go to paragraphs 10 to 12. It is all
23 about, so far as I am concerned, about when it arrives on my desk and when it is on
24 my laptop. So I want the direction to be four hard copies, not three, of the agreed
25 hearing bundle by 4.00pm on whatever it is, seven days before 3rd March. So what's
26 that?

1 **MR RAYMENT:** 24th February.

2 **MR MALEK:** So it's 24th February. Okay?

3 On number 10 I want the skeleton arguments at the same time.

4 **MR RAYMENT:** That is number 11 in my order.

5 **MR MALEK:** Sorry. Number 11. I want that at the same time. Obviously that does

6 mean you are going to have to prepare in advance to make sure everything arrives at

7 the same time and this skeleton argument is cross-referenced to the bundle.

8 Finally at 12 again I want that on the same day, 24th February. Does that give anyone

9 any problems, Mr McIntyre?

10 **MR McINTYRE:** None on our side, sir.

11 **MR MALEK:** Obviously the parties need to liaise with each other in advance of the

12 skeleton argument. So it is all going to be seamless for me when it arrives on my

13 desk. I don't like the idea of having it at 4.00pm either. So I am going to put 12.00pm

14 on those, so that will give me the chance of getting the bundles in my room and starting

15 working in the afternoon. So it is all going to be 12.00pm.

16 **MR RAYMENT:** On 10, 11 and 12?

17 **MR MALEK:** Yes. That's what we have now. Those dates are done.

18 Now, knowing what those dates are, it is easier to work backwards, isn't it? Let's go

19 about the timing for the publicity. Is that now agreed, those dates --

20 **MR RAYMENT:** 26th September was agreed.

21 **MR MALEK:** For?

22 **MR RAYMENT:** For 3, 4 and 5.

23 **MR MALEK:** So we can tick those. That's fine. Now the responses to the CPO

24 application. There is a dispute between you as to when that should be.

25 **MR RAYMENT:** That was linked to the dispute about when the hearing should be.

26 **MR MALEK:** Exactly.

1 **MR RAYMENT:** Which was quite significant, January versus April.

2 **MR MALEK:** We are now the beginning of March, aren't we? Can we hear from Mr
3 McIntyre? Mr Rayment, you sit down for a second.

4 Mr McIntyre, what's your proposed date for paragraph 6?

5 **MR McINTYRE:** We suggest moving that forward to 13th December. It is just worth
6 flagging that is obviously a point of real pressure for us and, of course, Royal Mail is
7 engaged in the Whistl claim. I set out in my skeleton all the forthcoming disclosure
8 deadlines, those are reciprocal, so not only are we trying to track down our own
9 documents. We have to review what could potentially be an enormous volume of
10 disclosure from the other side and, of course, we also have our witness evidence
11 deadlines coming up at the end of October as well. Then those will be followed by
12 expert evidence deadlines at the end of the following year. So Royal Mail and its legal
13 team are very, very heavily committed over the next couple of months. We would
14 therefore ask for until 13th December to give us and our expert, who as we said will
15 probably be working on both cases, enough time to analyse the new expert
16 methodology and the new claim that's put forward and then to prepare our own
17 responsive evidence. So 13th December. We would then suggest a reply on
18 31st January. So we think that gives a more than sufficient period for the PCR to
19 consider our evidence.

20 **MR MALEK:** Well, let me just see how that looks. Then the objections, paragraph 8?

21 **MR McINTYRE:** I think in the original timetable it was anticipated by both sides that
22 the objections would come on the same deadline as the reply, as the PCR's reply.
23 Both sides obviously had competing dates, but seemed to agree on that principle. We
24 would be content with that. That would be --

25 **MR MALEK:** Your date is 31st March.

26 **MR McINTYRE:** 31st January.

1 **MR MALEK:** Sorry. January. Yes. Then paragraph 9 is the same, isn't it?

2 **MR McINTYRE:** Yes.

3 **MR MALEK:** It gives you plenty of time to work on the material and the skeletons and
4 all that.

5 **MR McINTYRE:** Yes.

6 **MR MALEK:** Mr Rayment, any observations on those dates?

7 **MR RAYMENT:** Those seem broadly reasonable, but we would like an extra week in
8 order to file our reply. So we would be suggesting filing it on 7th February. I mean,
9 that then --

10 **MR MALEK:** Is that a bit of a squeeze, though?

11 **MR RAYMENT:** That might be a bit of a squeeze. It seems to us that there wouldn't
12 be any major objection in moving Mr McIntyre's proposed date for the response
13 forward a week, so 6th December. That would be our proposal. Then we could
14 maintain 31st January, which would make more sense.

15 **MR MALEK:** I am just trying to think about the objections from other people. We don't
16 want to change that. 31st January 2025 is sensible. So we have made the order
17 on -- 8 and 9 is 31st January 2025. So we are now playing with 6 as to whether or not
18 we are going to require Royal Mail's response a week ahead of the date that has been
19 proposed by Mr McIntyre. That's all we are playing with.

20 **MR RAYMENT:** That's right. In terms of the practical technical issues with the
21 timetable, we don't think that the timetable we originally proposed for a hearing at the
22 end of January was in any way out of the ordinary in a follow-on claim, especially
23 where the respondent is --

24 **MR MALEK:** I know, but, look, it is sort of driven by --

25 **MR RAYMENT:** Sir, all I am saying --

26 **MR MALEK:** -- availability rather than anything else. I would have been quite happy

1 to have this dealt with --

2 **MR RAYMENT:** Sir, you misunderstand me. I was not trying to go over old ground
3 on the hearing date. I was just saying if you look at the original proposal, even that
4 we say was a perfectly acceptable timetable. It wasn't highly expedited or whatever
5 the phrase my learned friend used in his skeleton. It was a pretty standard sort of
6 timetable for a CPO, especially bearing in mind, you know, the comments you made
7 about it.

8 **MR MALEK:** I want to get the CPO determined as soon as reasonably practicable
9 bearing in mind everyone's availability and the fact that other people have other things
10 to do.

11 **MR RAYMENT:** Sir, to cut a long story short, we would like 6th December.

12 **MR MALEK:** I understand that. Let's see what Mr McIntyre says.

13 **MR McINTYRE:** Sir, I have already made my submissions on why we are heavily
14 committed. We are in the kind of world where it would actually make a substantive
15 difference to Royal Mail and its legal team, who, as I say, are heavily engaged in
16 disclosure. I should also flag there is at least a possibility that we will need
17 an interlocutory hearing on disclosure in the Whistl claim, which would, of course, be
18 coming in the same period, so that will --

19 **MR MALEK:** There is a potential for another hearing in that frame?

20 **MR McINTYRE:** All I can say at this point is that there is a possibility that the Tribunal's
21 assistance will be required on disclosure. That hearing would then fall in the period
22 when we are preparing for the CPO application. That's why I say the week to
23 13th December would actually make a difference for us.

24 **MR MALEK:** What day of the week is 13th?

25 **MR RAYMENT:** It is a Friday, I understand.

26 **MR MALEK:** It is a Friday. So if we put that back to the Tuesday of that week, will

1 that give me --

2 **MR RAYMENT:** Sorry. It is a Monday.

3 **MR MALEK:** We put that back, say, to the Thursday the week before. What will that
4 be?

5 **MR RAYMENT:** Thursday, did you say?

6 **MR MALEK:** Yes.

7 **MR RAYMENT:** That's the 9th.

8 **MR MALEK:** Okay. It is going to be 9th December for paragraph 6 and 31st January
9 for 7, 8 and 9. So that deals with the directions and the hearing we have set -- got the
10 date for the hearing. Time estimate of -- well, it is one and a half to two days with one
11 day in reserve. So that's what it is. One and a half to two days, plus one in reserve.
12 It is listed for 10 o'clock on that day.

13 Right.

14 **MR RAYMENT:** I am so sorry. I was just trying to assist you with which days of the
15 week particular dates fell on and I don't think I heard your ruling on the date for Royal
16 Mail's response.

17 **MR MALEK:** Royal Mail's response, it is the one at paragraph 6 is now 9th December.

18 **MR RAYMENT:** I am grateful. That's the one I didn't hear. Thank you.

19 **MR MALEK:** Yes. Okay. Just a couple of things. I see that Chris Williams has done
20 work previously for Royal Mail and TNT, when you look at page 454. Is that going to
21 lead to any difficulties, because everyone has read the Trucks judgment about what
22 a mess experts can have if they have had prior dealings for either of the parties or
23 people related. Is there a potential issue there or not?

24 **MR RAYMENT:** I don't understand there to be.

25 **MR MALEK:** It is probably not for you really, is it? It is for the other side. If there is
26 a potential issue, please identify it sooner rather than later. That's all I am saying. I

1 am not going to rule on it. You don't need to say there is or isn't. Just look at it, satisfy
2 yourself there isn't a potential issue and then if there is an issue, then we'll obviously
3 have to deal with it. That's fine.

4 On the proposed class representatives' claim, outside the classes the access
5 operators who may have their own losses and that the question is would they have
6 passed those losses or all of it or part of it to the retail customers? That may be
7 something that's going to feature presumably further down the line when it comes to
8 expert evidence, but it is certainly something worth looking at carefully.

9 Now the overlapping --

10 **MR RAYMENT:** Sir, of course, Whistl in a sense is an access operator as well.

11 **MR MALEK:** It is.

12 **MR RAYMENT:** Albeit it is one that then was trying to develop the full service, as it
13 were.

14 **MR MALEK:** It is, yes.

15 **MR RAYMENT:** That is a question as to how the impact on Whistl then fed through
16 to prices for customers and that's precisely --

17 **MR MALEK:** That's the big issue -- one of the big issues. When you look at it, that's
18 where --

19 **MR RAYMENT:** That's a common issue.

20 **MR MALEK:** Well, there is a common issue, but your interests and Whistl's interests
21 are not 100% aligned, because if they say they were going to make £600 million on
22 this, it may be that they will not -- let's say them coming on the market may not have
23 led to such a significant reduction in prices. Let's say they are aiming --

24 **MR RAYMENT:** That is not an unknown issue in these types of cases where you have
25 parties who operate at different levels of the supply chain.

26 **MR MALEK:** Exactly. That's going to be an issue that you are going to have

1 an interest in as to, you know, how this would have been fed through into pricing and
2 what -- and they may have an interest going the other way to say "Actually we would
3 have been able to get a big profit out of this business" and you don't necessarily get
4 that big profit by cost cutting. It is actually quite a complicated issue.

5 **MR RAYMENT:** It is. It also depends on the response that Royal Mail may or may
6 not have adopted in a counterfactual way.

7 **MR MALEK:** That's a really fascinating issue because there's always been questions
8 about efficiency with Royal Mail and what they should be doing (inaudible) and is it
9 really a profitable business at the end of the day. Is it really a profitable business for
10 anyone at the end of the day, but the fact is that how Royal Mail would have responded
11 is going to be critical, a critical issue for you because, you know, your case is going to
12 be they would have responded by effectively cutting prices themselves and that you
13 also have the advantage of saying well, "Even if they didn't cut prices we would be
14 able to go to Whistl, who would have offered a lower price in any event and so we
15 would have made a saving that way". It becomes quite complicated on that issue.

16 **MR RAYMENT:** Sir, given you have raised the issue of common issues, I wonder if
17 I could just make some remarks about that issue. Obviously at this stage Whistl are
18 not here.

19 **MR MALEK:** Of course. We are not going to make any rulings but it is important to
20 understand that.

21 **MR RAYMENT:** We all understand that and have made that absolutely clear in our
22 skeletons. You have rightly just been concentrating on the inter-relationship between
23 the Whistl claim on the one hand and the PCR's claim on the other as regards prices
24 from Whistl and that layer of the market to the customers who constitute the proposed
25 class members. That, as we flagged in paragraph 10(b) of our skeleton, is
26 an important common issue and it is one where there is significant potential for

1 a conflict of views between the PCR and Whistl.
2 There are obviously other common issues where it may be expected that the PCR's
3 position and that of Whistl are going to be aligned, and, of course, you have mentioned
4 the question of the infringement and, you know, the effects of the infringement.
5 Obviously both the Whistl claim and our claim depend on Whistl having been
6 successful in the absence of the infringing conduct, but the point I just wanted to flag
7 at this stage is it is not as if the only issue is the one we have just been talking about,
8 about the relationship between prices at the different levels of the market. There are
9 also issues in relation to infringement that do critically affect the interests of the PCR's
10 claim because, as Mr McIntyre flagged in his skeleton argument, the nature of the
11 infringement, if you like, in the Whistl claim and in the PCR's claim is not entirely on all
12 fours. Yes, both rely on the decision by way of a follow-on claim, but there is an added
13 dimension to the Whistl claim that is a standalone aspect of the infringement.
14 **MR MALEK:** Which you are not running.
15 **MR RAYMENT:** Which we are not running, but obviously because Whistl doesn't
16 necessarily have to rest its claim just on the decision, there is a potential for
17 a difference of views and the possibility that Whistl might take a different stance at
18 trial, all of which is simply to emphasise the fact that, you know, there are some other
19 important common issues between these cases where it would be most regrettable if
20 the Tribunal were to determine those issues without, you know, the PCR having
21 a meaningful opportunity to make -- you know, to participate in the determination of
22 those issues. I am just putting it as neutrally as I can without at this stage saying
23 exactly what would be involved, because, of course, because we are on the outside,
24 because there is limited information in the public domain at this stage, I can't give you
25 an estimate of exactly what would be required in order for us to meaningfully
26 participate.

1 **MR MALEK:** I understand that. Your funders will obviously have to undertake with
2 you a cost benefit analysis, because if --

3 **MR RAYMENT:** Yes, that's understood.

4 **MR MALEK:** The real bulk of the work in the Whistl trial is going to be done by Whistl
5 and if they are successful, then the prospects of your case are much higher obviously.
6 If they are not successful, then the prospects of your case are pretty bleak, let's be
7 honest. Your funders may take the view that "Let Whistl take the burden. Let them
8 fight it. Let's see what the result is and we pick up from there". These cases are very
9 expensive to fund. It is down to your people to identify exactly why you want to
10 intervene, what you want to do on what issues.

11 You are going to have a great deal more detail and you are going to have to have
12 some sort of liaison with the other parties before you come back to the Tribunal with
13 any sort of proposal. I am not saying now you can't appear at trial. I am not saying
14 that now, because I just don't know. I need to have something a lot more concrete
15 and something that everyone has participated and debated amongst themselves.
16 Then you come to the Tribunal and say "This is what we want" and then we argue it.

17 **MR RAYMENT:** I am grateful for those remarks, but there is a small chicken and egg
18 problem, because we want to -- we want to protect the interests of the class.

19 **MR MALEK:** Yes.

20 **MR RAYMENT:** That depends on the stance being taken by the other parties within
21 the litigation. One can -- it is quite easy to -- it is relatively easy to identify at a fairly
22 broad level what the common issues are. What is difficult for us to identify at the
23 moment is the different stances that are being taken in relation to the resolution of
24 those issues and whether or not, you know, we need to put our distinct perspective,
25 as it were, in relation to those issues.

26 **MR MALEK:** I am not saying that's right or wrong, but we need as a tribunal (a) for

1 Whistl to be involved in the whole discussion.

2 **MR RAYMENT:** That's understood.

3 **MR MALEK:** But, (b), we want something pretty concrete about exactly what you want
4 to do and what participation and how necessary and then we can do the analysis as
5 to whether we should let you do that.

6 **MR RAYMENT:** We are aware of the need to cooperate with the other parties. We
7 don't wish to disrupt the Whistl trial any more than is possibly necessary.

8 **MR MALEK:** Exactly.

9 **MR RAYMENT:** Do I understand from your remarks that you would encourage us to
10 be able to liaise with Whistl and to obtain relevant information from Whistl about the
11 particular issues which are likely to be of concern to the PCR, because that's the way
12 we are going to make progress being able to present you with more detailed
13 proposals?

14 **MR MALEK:** I fully understand that and the chicken and egg situation is that if you
15 get certification and let's say you'll know the result hopefully in March, then clearly we
16 would encourage that to take place, but whether I'm going to encourage that now prior
17 to seeing what the response is of Royal Mail, I am not sure if I am comfortable in doing
18 that. I think it is too premature for me to make any comments on that particular point
19 without having heard Whistl, but I do think it is important that, for example, you have
20 a full copy of all the pleadings in the proceedings, including particulars, but you
21 probably already have that.

22 **MR RAYMENT:** We do.

23 **MR MALEK:** Yes.

24 **MR RAYMENT:** It is the expert issues that are likely to be more critical.

25 **MR MALEK:** I can see that.

26 **MR RAYMENT:** The problem is -- I entirely understand the reservations you have just

1 expressed about saying anything one way or the other, but the fact is that, as we were
2 completely upfront about in our skeleton argument, our concern about the original
3 proposal for an April date was that by the time the Tribunal has heard the CPO
4 application in April, by the time the Tribunal has taken time to consider its judgment
5 and deliver it, we are really heading very close towards the start of the Whistl trial.

6 As I have tried to explain, we think the common issues could be really quite significant
7 and there would be a real issue if they can't be properly decided in both the PCR claim
8 and the Whistl claim at the Whistl trial.

9 **MR MALEK:** I am not sure. I think that --

10 **MR RAYMENT:** But it is a significant possibility would be our point.

11 **MR MALEK:** There are issues which arise in these proceedings which don't arise in
12 the Whistl claim, and whichever way it cuts I do think that those issues may not be
13 determined in these proceedings. You are clearly going to have to have a separate
14 trial dealing with some of those issues where you diverge from Whistl. I think that is
15 almost inevitable.

16 **MR RAYMENT:** That is true.

17 **MR MALEK:** The trial is going to be a lot shorter once you have the Whistl judgment,
18 but what you are worried about -- I fully understand that -- is us making findings which
19 would prejudice you when it comes to your trial.

20 **MR RAYMENT:** That's right.

21 **MR MALEK:** I understand what you are worried about.

22 **MR RAYMENT:** It is not for me to speak for Mr McIntyre, but it raises some significant
23 issues for Royal Mail too because if there are findings made against Royal Mail in the
24 Whistl proceedings as to the basis on which damages are payable by Royal Mail to
25 Whistl and then there is a second trial at which a different basis on which damages
26 are calculated is put forward by a different class of person one can see, you know,

1 potential problems. That's why it needs to be joined up.

2 As I say, we are not taking -- as you've read in our skeleton, we are not taking
3 an absolutist position about what could or couldn't be possible in terms of when we
4 get the ruling on the CPO and assuming it is favourable, whether we could properly
5 participate in the trial beginning in November. We are not in a position to say
6 absolutely one way or the other whether that would be possible or not.

7 Hence why I was raising the issue of trying to get the cooperation ball rolling now within
8 all the constraints of a PCR who is only a PCR and not a CR at this stage.

9 **MR MALEK:** Exactly. We were not saying you can't liaise with anyone. That makes
10 sense.

11 **MR RAYMENT:** No, I understand that.

12 **MR MALEK:** What we can't do is mandate anything that may affect people who are
13 not in this room now.

14 **MR RAYMENT:** That's absolutely understood.

15 **MR MALEK:** I can say that I don't see anything improper in you liaising with the
16 parties at this stage. Whether they want to respond to that is really up to them. They
17 may say "It is not sensible to have any discussion with you until we have the
18 certification. We think you are not going to get certified so we are not going to waste
19 our time and money on it". That is up to them.

20 **MR RAYMENT:** It is up to them. I have flagged the point as much as I can. If that
21 position is taken at this stage, then what things look like after the CPO judgment and
22 what can practically be achieved in the run-up to the Whistl trial or not will have to be
23 considered in the light of decisions that were taken now.

24 **MR MALEK:** Yes, but the thing is no-one has asked to make any decisions now from
25 us. When you talk about decisions, you are talking about how other people may be
26 responding to your presence. The Tribunal is expressing no views at all on this.

1 **MR RAYMENT:** I understand that.

2 **MR MALEK:** It is always useful, Mr Rayment, to discuss these things openly.

3 **MR RAYMENT:** That's what we thought.

4 **MR MALEK:** Then we get the right outcome for everyone concerned, but it is pretty
5 early days for your claim and the sooner I get the response of Royal Mail, I will
6 understand where things are going but, you know, we will be getting that on
7 9th December and then I will have a much better feel for where we are and where we
8 are going, because at the moment when I look at the checklist of things that you need
9 to cover for certification, you know, you have ticked the boxes and I need to see which
10 ones are live and which are not alive, because it may be that there are certain things
11 I think should be an issue are not going to be an issue, or things I think shouldn't be
12 an issue are going to be an issue. Until I see what they put on their papers, I think
13 everyone in these certification cases needs to be constructive and not take a kitchen
14 sink type approach as if it is fighting to the death.

15 If there are things that can be sensibly taken out of contention for the purposes of
16 ruling certification, that's what we should do. There's always a few key points that are
17 worth focusing on and there's others which are just sort of makeweights and saying
18 "Well, you know, it fails for this reason, that reason and that reason" and all that. Just
19 focus on what really matters but I am sure that is what Royal Mail will do anyway.
20 They are not going to waste our time on points which are just not -- they are not going
21 to win on or it is not really constructive.

22 Mr McIntyre, is there anything you would like to say at this stage on what Mr Rayment
23 has been saying? I know it is a bit of -- it is just like he is setting out a position rather
24 than asking me to rule on anything and I am saying I have already indicated I am
25 not -- it is going to be a very, very big ask. It is unlikely to succeed, but I can't exclude
26 it, to have anything that prejudices the trial date because if it is not going to be

1 November, December of next year, I don't know when there is going to be an available
2 slot and that's not satisfactory.

3 I have also noticed that when I look at the litigation plan of Bulk Mail, they clearly
4 envisage that their trial will be in something like 2027, which is significantly after that.
5 So we are talking about them coming into -- having their full trial or whatever some
6 time after this case has finished, because it makes a lot of sense to have a judgment
7 on this case before we deal with the details of the next case, but there will be issues
8 which overlap. There will be issues where people have different interests. That
9 everyone is going to think about what's the best way of resolving those. Is it best to
10 just leave everything to the second trial or do we deal with them in part in this trial, and
11 bearing in mind what is being said by Bulk Mail is that "We just want to make sure that
12 if there are issues which you decide in this case which could have an adverse impact
13 on our case, particularly on issues where we diverge, we might want to be heard".

14 Now let's look at one example. It is important for Whistl to show that they would have
15 gone ahead but for the alleged breach of competition law and you say and you put it
16 in your defence and we have debated this before, that it is not a likely scenario for the
17 reasons that you have given. We are not going to be assisted, I don't think, by hearing
18 Mr Rayment's team on that issue. That's the issue that Whistl need to fight on, but
19 there may be issues particularly where the interests of Whistl and Bulk Mail diverge
20 which are different, but I don't envisage Mr Rayment saying "We want to be able to
21 make submissions on let's say the common issues".

22 It is really the issues where they diverge from Whistl that they want to be able to, for
23 example, cross-examine Whistl's witnesses on those points. I just don't know, but he
24 is going to have to figure out exactly what he wants. It is too early to be saying much
25 without knowing exactly what they want. He is saying "We don't know exactly what
26 we want until we see the shape or a bit more of the shape of what's going on in the

1 Whistl trial". I have said "I think you will have a pretty good idea of the shape of the
2 case from the pleadings" and he is saying "I understand that, but what I really want to
3 look at is to see how it is going to be dealt with by the experts, because that's quite
4 an important matter in the case". So I understand where Mr Rayment is coming from.
5 Mr McIntyre, you don't need to say anything on this. I am just saying this is
6 summarising where I think we are on that.

7 **MR McINTYRE:** Sir, I am grateful for that. There is very little for me to say. I was
8 a little concerned by the PCR's attempt to procure some words of encouragement from
9 the Tribunal but I don't think that was an entirely successful attempt, so I don't think
10 I need to address it.

11 I would just say, as the Tribunal points out, we don't yet have a concrete proposal as
12 to what the participation would look like. We also have not even ventilated this in
13 correspondence between the PCR and Royal Mail. At this point, Royal Mail simply
14 reserves its position as to whether participation is appropriate at all and, if so, what it
15 would actually look like.

16 **MR MALEK:** I think that the best use of Royal Mail's time at least is to concentrate on
17 filing your response on 9th December. Then once we have had that we will know
18 much better what the shape of this case is and then at that point the parties can start
19 writing to each other and getting a better idea what Mr Rayment is looking for, but
20 I don't think now is the time to start that correspondence, but I think once we have got
21 your response, which will probably have expert evidence with it, that things will be
22 much clearer. So you don't really need to say anything else.

23 **MR McINTYRE:** Very well, sir.

24 **MR RAYMENT:** Sir, you mentioned our litigation plan. Obviously that was prepared
25 on a standalone basis but recognised there was the potential for the proceedings to
26 be case managed with the Whistl claim. Obviously if there are common issues that

1 are resolved in the Whistl claim, then that has implications for the timing and length of
2 the trial of any subsequent PCR, solely PCR issues that might be required down the
3 line, but that is I accept some way away.

4 The only other point just before I sit down and shut up is that the Tribunal has rightly
5 drawn attention to the question of Whistl needing to establish that they could have
6 successfully entered, or had entered, so it is really about more whether they could
7 have successfully expanded being a sort of pre-condition to the success of the PCR's
8 claim.

9 **MR MALEK:** Yes.

10 **MR RAYMENT:** Of course, that is absolutely right, and the PCR has no interest in
11 trying to sort of duplicate or improve on what Whistl have to say on a lot of those issues
12 because, practically speaking, it wouldn't be able to, but nevertheless there are, as
13 flagged in our skeleton at paragraph 10(a), there are potential issues even in relation
14 to the nature of the infringement which would significantly concern the interests of the
15 PCR claim, because they are not on all fours with Whistl, but I just wanted to flag that
16 point. You have made clear that although discussion is useful, there is a limit as to
17 how far it can be taken at this stage, and we understand that, but I just want to flag
18 that point.

19 **MR MALEK:** Yes. The other thing is I am saying I would not recommend trying to
20 start those discussions until we have got the response of Royal Mail and you will have
21 that hopefully on 9th December 2024.

22 **MR RAYMENT:** Thank you. It is worth saying we have heard what you have said.

23 **MR MALEK:** That's fine. You are not claiming any consequential losses for any class
24 member, are you, so that's out of the window?

25 **MR RAYMENT:** Correct. They are not claiming any loss of profits.

26 **MR MALEK:** Exactly. Really it is all about the price differential. Is limitation an issue

1 anywhere? That is really for Mr McIntyre. Do you think limitation is going to be
2 an issue at all?

3 **MR McINTYRE:** Sir, it is too early for us to have a formal position on that. I think the
4 limitation period for bringing a standalone claim would have expired, but no standalone
5 claim is pursued. It is purely follow-on.

6 **MR MALEK:** Exactly. I didn't think there was going to be. Can we just look at the
7 litigation plan? Let me have a look at that. Which bundle do I look for that?

8 **MR RAYMENT:** Bundle 2, tab 11, sir. In particular I was wondering, sir, whether you
9 would be assisted by looking at the provisions relating to the publicity around the CPO
10 claim, which obviously you have made directions about the timing of?

11 **MR MALEK:** Yes. The only thing that would help is can you -- in the light of what has
12 happened today can you just file another litigation timetable just for us?

13 **MR RAYMENT:** Yes.

14 **MR MALEK:** Because this is superseded already. So just prepare another one.

15 **MR RAYMENT:** Yes.

16 **MR MALEK:** When it comes to -- when you serve your skeleton, I always like
17 a chronology. So if you split it into two, chronology of events and then chronology of
18 the proceedings and then if you refer to an event, then you cross-refer to where it's
19 dealt with elsewhere in the bundle so I know where that is. Is that okay? I always find
20 that quite helpful.

21 **MR RAYMENT:** That is absolutely fine. That's an exercise for all concerned.

22 **MR MALEK:** When you are filing your skeleton, if you add to the directions that you
23 serve, hopefully, let's say, an agreed chronology so both parties can have some input
24 in it. I always find it really helpful during the hearing. I then can find any document,
25 because it is on the chronology. Yes.

26 On the question of the timing of the judgment and such like it may well be unless it is

1 really complicated I will either give an ex tempore judgment there and then, or if I am
2 not able to do that, I may just say what the result is so everyone knows where they are
3 at the beginning of March, because there is no point in you waiting for four weeks or
4 even eight weeks before you start acting on whatever the result is going to be.

5 That's fine. You will send us a new one of that.

6 **MR RAYMENT:** Is there a date by which you wanted the updated litigation plan?

7 **MR MALEK:** No. As long as I have it at the same time as I get the reply.

8 **MR RAYMENT:** Oh, the reply, yes.

9 **MR MALEK:** Of the response. It is 9th December. I am sure that's fine. As long as
10 I get it at the same time because I don't want to keep looking at this case. When bits
11 of paper come in, I tend to do things in blocks. So when Royal Mail deliver their file,
12 the Registry will then send it to me. Then I will look at it and have any comments
13 I need. So it is just natural that if your thing comes in at the same time, I will look at it
14 all at the same time.

15 **MR RAYMENT:** Very good, sir.

16 **MR MALEK:** Just looking at page 559 now. Mr McIntyre, can you remind me what is
17 the timetable for expert evidence in the Whistl trial?

18 **MR McINTYRE:** Sir, yes. The exchange of expert reports is sequential. Whistl is filing
19 its reports on 9th December and 11th December, so economic expert report two days
20 before the forensic accounting report and then Royal Mail is filing its reports on 3rd and
21 5th March.

22 **MR MALEK:** Because, if the CPO -- if we do certify at the beginning of March, subject
23 to what everyone says, it would probably make sense for them to be provided with the
24 witness statements and expert reports for the purposes of both sides, for the purposes
25 of it being able to be really specific as to what participation they want, what issues that
26 they want. So I think that timetable is really helpful. So at least by the time we have

1 determined the issue of certification, the witness statements and the expert reports will
2 be ready. We will hear debate as to whether or not they should be able to have a copy,
3 but at least I know all that would have been done, and if we do decide that they should
4 get disclosure, (inaudible) a short period of that to determine whether disclosure is
5 (inaudible).

6 **MR RAYMENT:** Sir, as you were speaking it was going through our mind if it were the
7 case that the Tribunal was in a position to give its decision, if not its reasons at the
8 beginning of March, then the issues that you have just been referring to would become
9 sort of live very, very quickly. I don't know that the Tribunal would necessarily be in
10 a position to give any of those sorts of directions at the end of the CPO hearing.

11 **MR MALEK:** No, and then --

12 **MR RAYMENT:** But shortly after is what you are talking about.

13 **MR MALEK:** I would have thought if I am going to give directions in these proceedings
14 that involve disclosure of statements and reports filed in another proceeding I would
15 have to hear from Whistl.

16 **MR RAYMENT:** That's absolutely clear.

17 **MR MALEK:** By then you would have liaised with Whistl and given them notice of
18 what you are likely to want at least initially, and I presume you would have done that
19 already with Royal Mail, but I am thinking -- I am trying to be practical. What do you
20 really need in order to formulate a sensible proposal? It is probably the witness
21 statements and the experts' reports, bearing in mind, you know, there are the normal
22 restrictions on use, only for the purpose of those proceedings. (inaudible) I am just
23 looking at (inaudible) at 11.16, we can deal with that as well at the same time, can't
24 we?

25 **MR RAYMENT:** I would have thought so.

26 **MR MALEK:** What I am envisaging is if we are going to make -- if we are going to

1 certify, then I would want to determine pretty soon after that the issue of disclosure to
2 you, the witness statements, the expert reports and the confidential versions of the
3 Ofcom decision and the CAT judgment as well as you are asking for all documents in
4 Ofcom's case file for the Ofcom decision.

5 I think that probably Ofcom may have something to say about that. You would need
6 to liaise with them to know what their stance is. (Inaudible) I think we have a sort of
7 plan, which means we will be able to resolve issues in the first week of March and at
8 least give you -- put you in a position relatively soon after that. You can be a bit more
9 concrete about what role, if any, you are going to have at trial.

10 **MR RAYMENT:** Yes.

11 **MR MALEK:** Thank you very much. Let me just look at my list, if there is anything
12 else on my list. Have you given evidence as to what -- is there anything that I can see
13 from the documents I have been given as to the amount of funding that you actually
14 have?

15 **MR RAYMENT:** Yes.

16 **MR MALEK:** Obviously that's confidential. Just tell me what page it is.

17 **MR RAYMENT:** The easiest way, if you will just forgive me for a moment, if I could
18 ask you to go to volume 2 and turn to -- it is slightly confusing but it is tab 11C. It is in
19 the litigation plan.

20 **MR MALEK:** Yes.

21 **MR RAYMENT:** You have the budget at page 724.

22 **MR MALEK:** 724 that is too small for me.

23 **MR RAYMENT:** It is not confidential.

24 **MR MALEK:** Tell me what the figure is.

25 **MR RAYMENT:** It is £6 million -- just shy of £7 million.

26 **MR MALEK:** I will say almost £7 million. The amount of the ATE? The Tribunal can

1 find out what it is. It is just ...

2 **MR RAYMENT:** Sorry. There is a slight confusion about what you are asking for.

3 The premiums we have paid are obviously confidential.

4 **MR MALEK:** Not premiums. The amount of cover.

5 **MR RAYMENT:** That should be available.

6 **MR MALEK:** Mr Rayment, you don't need to go to it now. Just write it in a letter to
7 the Registry and then I will have it on my notes.

8 **MR RAYMENT:** Do you have the confidential bundle there?

9 **MR MALEK:** I do, yes.

10 **MR RAYMENT:** If you turn to the second tab --

11 **MR MALEK:** Yes.

12 **MR RAYMENT:** -- at page 94, you can see there is a table. If you cast your eye down
13 the left-hand column, you get to the limit of indemnity.

14 **MR MALEK:** Okay. So that's not likely to be an issue.

15 Right. Anything else anyone wants to cover?

16 **RULING**

17 **MR MALEK:** The Tribunal has directed this is going to be heard with an estimate of
18 one and a half to two days starting at 10 o'clock on 3rd March, and I have given
19 directions as to the service of bundles and skeletons, etc. I would like to emphasise
20 that it is really important for the Tribunal that we have all the material properly
21 cross-referenced seven days before the hearing to give us the opportunity to prepare
22 the case properly.

23 As regards the issues of what participation, if any, Bulk Mail should have in the
24 upcoming trial of the claim brought by Whistl against Royal Mail, which starts on
25 3rd November 2025, we are not making any orders or directions now, but we do think
26 that it should be open to Bulk Mail to start at least corresponding with the parties on

1 the potential overlap and those issues on which they may wish to contribute after the
2 response has been filed by Royal Mail on 9th December 2024. There will be issues
3 of disclosure of witness statements and expert reports in the Whistl trial for the
4 purposes of the claim brought by Bulk Mail, and we will deal with that either at or
5 shortly after we have made our ruling whether or not we are going to certify, but if we
6 are going to certify, then we do think it is sensible that Bulk Mail is going to be provided
7 with the witness statements and the expert reports, obviously subject to anything that
8 Royal Mail or Whistl may wish to say on the subject.

9 As regards access to the case file of Ofcom, we do think it is sensible that prior to the
10 hearing on 3rd March 2025, Bulk Mail do liaise with both the parties and Ofcom as to
11 whether or not there's any objections or any difficulties in that regard, and it would be
12 very helpful to have Ofcom's response in writing for the purposes of the hearing on
13 3rd March 2025.

14 We would like to point out that it was difficult enough to get a window that everyone
15 could make in the Whistl trial, which is 3rd November 2025 to 19th December 2025,
16 with one week in reserve from 12th January 2026, that we will be very reluctant to do
17 anything that prejudices that trial date. There's a lot of work that needs to be done in
18 the Whistl trial and obviously Whistl and Royal Mail will want to focus on those
19 proceedings. It is in no-one's interests that, when we are talking about an infringement
20 that occurred so long ago, that there is any further delay in that trial.

21 Insofar as the participation, if any, of Bulk Mail in that trial, Mr Rayment has made it
22 clear that in respect of common issues where he has common cause -- his clients
23 have common cause with Whistl, he does not intend, at least at this moment, to
24 participate and try to give further evidence or cross-examine people on those issues,
25 but there are issues where there is a degree of divergence where the position may be
26 different. We do want to have properly formulated proposals before we make any

1 decision on the extent, if any, that Bulk Mail will participate at that trial.

2 That's it for today. Thank you very much.

3 **(12.05 pm)**

4 **(Hearing concluded)**

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