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4 record.

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 Monday 3rd – Wednesday 5th March 2025

13
14 Before:
15 Hodge Malek KC
16 Timothy Sawyer CBE
17 Andrew Taylor

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

20
21
22 BETWEEN:

23
24 **Bulk Mail Claim Limited**

25
26 **Proposed Class Representative**

27
28
29 And

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

33
34 **Proposed Defendant**

35
36 **A P P E A R A N C E S**

37 Paul Harris KC, Nicholas Bacon KC, Ben Rayment, and Reuben Andrews on behalf of Bulk
38 Mail Claim Limited (Instructed by Lewis Silkin LLP)

39
40 Kenneth MacLean KC and Andrew McIntyre on behalf of International Distribution Services
41 Plc (formerly Royal Mail Plc) (Instructed by Bryan Cave Leighton Paisner LLP)

42
43
44 Digital Transcription by Epiq Europe Ltd
45 Lower Ground 46 Chancery Lane WC2A 1JE
46 Tel No: 020 7404 1400

47 Email: ukclient@epiqglobal.co.uk

48 Monday, 3 March 2025

1 (12.00 pm)

2 THE CHAIR: Some of you are joining us by live stream on our website, so I must start,
3 therefore, with the customary warning: an official recording is being made, and
4 an authorised transcript will be produced, but it is strictly prohibited for anyone else to
5 make an unauthorised recording, whether audio or visual, of the proceedings. Breach
6 of that provision is punishable as contempt of court. In the ordinary course of business,
7 there will be a transcript of this hearing, which will be available on the website, and
8 there will be a written judgment.

9 MR HARRIS: Good morning, sir, members of the Tribunal. I appear with Mr Bacon
10 to my right, who will be dealing with any funding issues that may arise, and to my left,
11 Mr Rayment and Mr Andrews.

12 THE CHAIR: Yes.

13 MR HARRIS: My learned friend Mr MacLean, King's Counsel, appears with
14 Mr McIntyre. If the Tribunal is interested, Mr Aaronson, who's the personality behind
15 BMCL, the PCR, is also in court, over my left-hand shoulder.

16 THE CHAIR: I'm sure we'll have questions of him during the hearing. There's no plan
17 at the moment for him to be cross-examined, but if we have questions during the
18 hearing, I'll either put them directly to him, or I'll do it through you, whatever works as
19 we go through the hearing.

20 MR HARRIS: Perhaps if they can be put through me in the first instance.

21 THE CHAIR: Yes, of course. Then, if it is an answer you've got clear instructions
22 already, or you can quickly take instructions, you can do it. If it is a bit more
23 complicated, we can ask him direct. Also, I've got no problem with that, if there's no
24 clear answer now, an answer can be given by way of a letter to any outstanding
25 queries, so we can have at least a written record of what the answers are.

26 Now, we've read all the material, including the inter-solicitor correspondence.

1 Ordinarily, I wouldn't usually read inter-solicitor correspondence, but it actually was
2 worth doing in this case, albeit it would be more helpful to leave out all the chaser
3 letters and stuff. There's probably half a dozen letters in there that's useful, and that
4 we'll probably focus on during the hearing. I think that it'd be helpful that, if we go
5 through things issue by issue, including what the requirements are for certification,
6 because in your skeleton, you go straight to, let's say, the points at issue between you
7 and Mr MacLean, but we have to be satisfied that all the requirements of the rules are
8 satisfied. Now, you purport to do that in respect of some of them in the application
9 notice, so we're going to have to look at that and see how you meet the relevant
10 requirements, and then, once we've gone through the basic requirements, looking at
11 things like funding, the ATE, the litigation plan and the budget, we can then deal with
12 the concrete issues, let's say, which are between you and Mr MacLean on the
13 methodology that's a dispute between the experts.

14 But I'm very conscious that what we're looking at is the case at a very early stage,
15 before you've had disclosure, and that it may well be that, once you've had disclosure,
16 the methodology that's going to be followed could be quite different to the one that's
17 before the Tribunal, because you could do the best that you can on the limited material,
18 and we've seen the model that's been proposed, the DiD model that's been proposed.
19 But that's not going to be the beginning and that's not going to be the end. Because
20 at the end of the day, what you're going to be looking for is that there's only one entrant
21 that we're really talking about. It is Whistl. It is not like Germany where you've got
22 a lot of end-to-end stuff and there's lots and lots of competitors. It is a jurisdiction
23 where there's only one, so far as I can see. There's only two horses. There's Royal
24 Mail and Whistl, and you're going to have to figure out what would have actually
25 happened but for the infringement. Now you are going to have to look and see what
26 pricing is going to be put in by Whistl. Is Royal Mail going to substantially reduce its,

1 | prices in order to meet that competition? And further, even if Whistl managed to get
2 | in the market and get the 42 per cent that they are talking about, it doesn't mean that
3 | they are going to price themselves 11.5 per cent down from what the current price
4 | was. They are going to try and maximise their profits. So it is not an easy task. And
5 | the model that we're looking at may not be the beginning or the end. You probably on
6 | a case like this are going to do a lot of emphasis on the qualitative evidence. And that
7 | may be the key. But clearly you have got an issue on the DiD model here. And we
8 | may decide at the end of the day that that's not you have got to have something that
9 | starts that the race. I can see that. But that may only be the start. And then when we
10 | have our case management conference, we'll want to look at really how you are going
11 | to prove this case in a lot more detail. But you may say, look, let's get the pleadings
12 | done. Once we have got the pleadings done, we will have a full CMC and look at it.
13 | And there may be issues about what disclosure do you get between now and the first
14 | CMC. So you can put forward a clear methodology so we can have a clear plan to the
15 | end of the case.

16 | MR HARRIS: Yes, there is very little in what you just said with which I have any bone
17 | of contention. I think one remark would be: it is of course conceivable, but it will be
18 | subject to evidence and, of course, the burden will be upon my client to establish that
19 | there might have been other entrants as well as Whistl.

20 | So I am not ruling that out, but, for present purposes, obviously, all I need is Whistl,
21 | for certification purposes. I agree, DiD may not be the start, may well not be the end,
22 | but it's, in my respectful submission, good enough for certification purposes, bearing
23 | in mind that that's a low threshold.

24 | THE CHAIR: Yes, I understand that.

25 | MR HARRIS: I'm in your hands, though, as regards all the other requirements. If
26 | I may put it like this: where would you like to start, so I can attempt to address any

1 | issues that you may have?

2 | THE CHAIR: Or I could just take the lead and we just go through it one by one. I really
3 | don't mind which way we do it.

4 | The other thing I'd like to know is, to what extent have you done the analysis of who,
5 | let's say, are going to be the top-20 class members? Because this is very unlike many
6 | of the other ones I have looked at, where you've got a very large number of people,
7 | a massive class, and the losses for each one is relatively low, you know; you have
8 | been charged too much for your freight or something like that, or you have been
9 | charged too much, and when you buy stuff, like in Merricks. This is a case where,
10 | I would hope by now, you have identified who the really big customers are in this
11 | business, because I can see a situation whereby you will find that there may be certain
12 | people that, they have only lost three and fourpence, but there will be other people
13 | who, on your basis, and if prices would have gone down the way that you say they
14 | would have done, have potentially lost out in millions. So I would like to know what
15 | research you have got? Do you know who are the top 20, and how much is the range
16 | we're talking about? What's the biggest claimant? How much are we talking about?
17 | You know, you have got this 800 million figure, and you have got over 200,000 class
18 | members, but I would have thought that there would be a number of class members
19 | with a significant amount of alleged loss and damage.

20 | MR HARRIS: So that must be right, and I will take instructions over the short
21 | adjournment if there are any particular details that I can give you in that regard. My
22 | initial reaction, if I may respectfully put it like that, is that that isn't something we have
23 | come prepared for today in any detail, because that isn't something that we have seen
24 | as necessary in order to get over the certification threshold, but I entirely understand
25 | that, if a CPO is granted, it may well be an immediate focus for the then CR, no longer
26 | PCR, and in the lead up to a first CMC. So you may say to me, okay, well, at that first

1 CMC, I want to hear from you in more detail about the top 20 and, for example, what
2 documents they may be able to produce, or what role they can play in terms of witness
3 evidence, that type of thing.

4 THE CHAIR: But it is a bit more fundamental than that, because you've got
5 Mr Aaronson, you've got the idea you are going to have two advisers, but let's say
6 you've got a bank that's got 4 or 5 million in this; should they be on some sort of
7 consultative group or user group? Are they going to have any input in understanding
8 what's going on in the litigation, the direction of the litigation? Because, if it was me,
9 and my company had 5 million on a case like this, I would want to have some sort of
10 involvement. I would want to have some sort of insight as to what's going on, because
11 you are bringing it on my behalf.

12 You know, this is not the normal type of case, and one of the things we've got to do is
13 to look at your litigation plan, your advisers, who's involved. One of the important
14 things I want to get an understanding is, you know, who are, and how many, and
15 what's the big range? Are there people out there that's got millions in the game? In
16 which case, surely they should at least have the opportunity or some role in the
17 proceedings, at least be consulted. It may be that, if someone's got, let's say, 5 million,
18 they should have the ability to look at what's going on in the proceedings, what advice
19 you are getting and proceedings on their behalf.

20 These are very different from the vast majority of the cases before the Tribunal, and
21 that's why it is material that I do think we need to know. Are there people out there?
22 Have you identified who they are? One option may be, when you have your advisory
23 council or whatever, or you may have a consultative committee or a user committee,
24 that you bring in some of these people so they have a real understanding and
25 participation. Not that they are going to be directing the claim or anything like that, but
26 at least have some sort of role in the whole structure. There should be enough room

1 within this to come up with some role for them. I would be really surprised if the
2 solicitors behind you have not done some research as to who the big people are, and
3 they haven't spoken to some of them. I really do think that the major players, or at
4 least representatives of them, have some sort of input.

5 MR HARRIS: So can I respond in this way. I will take more instructions over the short
6 adjournment, because I don't want to reveal now anything that is privileged. I do know
7 some of the answers to what you have asked me, but I want to check what I can say.
8 That having been said, and I will come back on that after the short adjournment. There
9 is no barrier, in principle, to any member of the class having a fuller role in being
10 consulted and in putting in ideas. One imagines that, let's say there is a bank, and
11 let's say they have got a 5 million part of the pot, and they have got better advisers
12 and more sophisticated, one imagines that they may well be willing to play that role
13 rather than some of the smaller fry. I can't imagine for a minute there is going to be
14 a difficulty in coming up with an arrangement by which further input is solicited and
15 potentially from certain tiers. But, as at today, of course -- these are my initial
16 reactions -- as at today, there isn't a distinction, conceptually, between any class
17 member and any other, because they are all opt-out. It may be that some have some
18 more skin in the game, in the sense --

19 THE CHAIR: Well, we have to consider whether or not it should be opt-in or opt-out,
20 as one of the hurdles to get through --

21 MR HARRIS: I accept that.

22 THE CHAIR: -- and we have to satisfy ourselves that you've got a proper litigation
23 plan and proper arrangements. One of the things is that, given the nature of the
24 case -- I think we have been discussing this amongst ourselves -- we would expect
25 some sort of participation of at least some of the big players, or at least the offer that
26 they can participate. Within that, you know, this case is going to be brought on behalf

1 of a class. Those class members; surely they've got a right to see what's going on
2 and understanding what's going on, subject to confidentiality. So, for example, you
3 know, you do not want your legal opinions to be on the website; I understand that, but
4 you may find that if you've got a big player that you may want to share some of that
5 advice, and have the ability to do that and the structure to do that within a system that
6 doesn't amount to a waiver of LPP, and you maintain that privilege.

7 But these are all issues, I think, that need to be thought out over the next few days,
8 because, look, we are here until Wednesday, and we want to be in a position by
9 Wednesday that we know where we are on all these issues that come up. I am giving
10 you the opportunity now, so you know what's on our mind, so by Wednesday you will
11 have whatever answers that you need to have. It is probably better that, on some of
12 the things, it is by way of a letter. Then at least it is formally on the record, rather than
13 just you saying it, and, as you say, you don't want to waive privilege by mistake, and
14 it is important that you don't.

15 So that's where we are on that. Now, looking at the requirements, if we start off at 79.
16 The first thing is: is this a claim brought on behalf of an identifiable class of persons?
17 Quite clearly; you have identified the class, were satisfied that it is brought on behalf
18 of an identifiable class of persons. There are, I suppose, two sub-issues which come
19 in here or elsewhere. One: what do you do with dissolved companies? Mr MacLean
20 is entirely right; dissolved companies cannot be part of the claim. They are dead, they
21 are not there. You have had a dispute as to whether or not the definition of the class
22 in the order should specifically say, "this excludes dissolved companies". I don't think
23 it needs to be in the order, and I think Mr MacLean has accepted that. But, certainly,
24 when it comes to the ruling, we will say it doesn't include dissolved companies, and
25 when you advertise stuff on the website, you will need to put in, "it does not include
26 dissolved companies".

1 So that bit is being dealt with. The other issue that Mr McLean has raised is the issue
2 about the sort of cut-off date, and that you want a later cut-off date, which is the date
3 of the CPO. Mr MacLean says, no, you have issued a claim form; you can't extend
4 the period. What you need to do is start off with a claim form date; if you are going to
5 amend later to bring in other people, you amend later, and then he'll argue whatever
6 points he wants to argue about the later date. But he is saying, there may be limitation
7 issues, and there may be issues as to whether -- there comes a point where you say
8 that the effects of the infringement are no longer identifiable anymore, and that you
9 can't claim, you know, indefinitely, into infinity, based on what happened in 2014.

10 So, at the moment, subject to anything you may say now, we are inclined to say that
11 the cut-off date is as said by Mr MacLean, unless you want to persuade me otherwise,
12 then you can do that now.

13 MR HARRIS: Well, Sir, first things first. This is not, in the scheme of this case,
14 a hugely important point.

15 THE CHAIR: It isn't, but he's right, technically.

16 MR HARRIS: Well, he's right insofar as there is some case law that says that you
17 have to have an extant claim as at the date of the claim form being issued, and that's
18 obviously right. I obviously don't take issue with that. But the case law, somewhat
19 unsurprisingly, also says that, in a case in which there is a continuing infringement,
20 and I am talking here about people who already have a claim, for whom there is
21 a continuing infringement -- so that would take care of any limitation issues, because
22 I am only talking about people who already have a claim, and then the day after the
23 claim form, they still have a claim, a little bit more damage, and the day after that and
24 the day after that. What that case law says, and indeed, I was arguing just this point
25 two weeks ago in the Tribunal, and the defendants didn't even take issue that, where
26 there is a continuing infringement, it doesn't matter, for any realistic purpose, that you

1 | could then amend so as to bring up to date, if you like, the end date of the infringement
2 | for class definition purposes. So if -- and I'll obviously come back to this -- if you
3 | consider, members of the Tribunal, that there is a realistic and plausible case, bearing
4 | in mind that's the test for today, that there was an infringement that is accepted to have
5 | been continuing beyond the 30-odd days in January 2014 when the CCNs were in
6 | force, it is accepted *ex hypothesi* that that has continued up until the date of the claim
7 | form, which is years and years and years. The question for you is: is it realistic and
8 | plausible that, it having continued for years and years and years -- and there is no
9 | issue about that -- could it, realistically and plausibly, have continued for another
10 | couple of years since the date of the claim form? All we say to you today is, since it
11 | is accepted, and since there is plenty of material in, say, the infringement decision and
12 | in the CAT judgment to suggest that there were continuing infringements, and they
13 | carried on for years and years and years, is it not realistic and plausible to consider
14 | that they might have carried on for another couple of years since the date of the claim
15 | form? My submission is, very simply, for those people who already had a claim, it is
16 | realistic and plausible, as at today, that they have continued, that infringement has
17 | continued its foreclosure effects and any effects on the market. The effects may have
18 | declined over time, but that's for a later dispute.

19 | So, my submission to you today is, we could, in theory, limit it to the date of the claim
20 | form, but what's the point? Because tomorrow, if you were to make that order now, in
21 | five minutes' time, or tomorrow, or on Wednesday, it would be open to me to say -- for
22 | the same people, I am not talking about new people -- it is realistic and plausible to
23 | think that that carried on after the date of the claim form, so please can I now have an
24 | amendment to something that you made yesterday?

25 | THE CHAIR: Look, this is very early days in the proceedings. I envisage that the way
26 | you are going to present your case on damages is going to be very largely dependent

1 on what comes out in disclosure and further enquiries, and I understand the expert
2 evidence you put in so far, but that can be like a litmus test, or whatever, plausibility,
3 but it is going to have to be assessed against the qualitative evidence. I would much
4 rather deal with how long the infringement has taken once we have got a bit further
5 down the line on really how this evidence is going to develop. Because, at the
6 moment, to me, you know, 2014 is quite a long time after the original infringement,
7 and you can say to yourself that, if this business was going to be so profitable for
8 a new entrant to come in, why did Whistl never come back after the Ofcom decision?
9 Why has no one else come back in?

10 So you do get to a position whereby it is very, very early days, and we would
11 prefer -- and then we can hear argument about it -- that we stick with the date of the
12 claim form, and we come back to this later. But we can have the fight now if you want.
13 I am very happy.

14 MR HARRIS: With respect, that argument cuts the other way just as easily. Why not
15 start with the later date and then later on we say, oh, well, the evidence isn't making it
16 out, and what's the point? I don't have to make an amendment with possibly a costs
17 order attached to it. I mean, that's partly -- I mean, if I make an amendment, either
18 tomorrow or in a year, because the evidence has shaped up, then my learned friend
19 will say, oh, well, I want the costs of and occasioned by the amendment, as
20 a minimum, or there may be other disclosure battles with costs. In our respectful
21 submission, is it realistic and plausible today to think that it could have -- is it grounded
22 in the facts of the case to think that it could have extended a couple of years beyond
23 the claim form, given that it already extended -- and there is no dispute -- for ten years?
24 In my respectful submission, yes. But we are realistic. Let's say it turns out that, as
25 we get closer to trial, and/or because of the disclosure, that the Whistl business plans,
26 which seem to talk, on the basis of what I have seen, of their plans up to, say, 2018,

1 2019, and it is going to be pretty clear that there is either no quantum after that, or we
2 can't establish it after that, then we will make that clear. If needs be, we could even
3 amend so we could whittle it down at that point.

4 So really the question is, in my respectful submission, bearing in mind that realistic
5 and plausible is the test for today, it is artificial to constrain it to the happenstance date
6 of the claim form. It would be better to have it as at today, but if we don't make out
7 that period, so be it. That will become clear in due course. That's how I put it, and I
8 am not going to take it any further than that. It is just not an important enough point
9 for today, in my submission.

10 THE CHAIR: Mr MacLean, do you want to say anything on the authorities? I have got
11 your skeleton.

12 MR MACLEAN: Yes. We rest on the authorities. But what I should say, sir, is that
13 we have heard -- and you will see this again when we come to look at the skeleton
14 argument and the various papers put forward in support of this application -- that it is
15 accepted that there was a continuing infringement. That's not accepted at all. So the
16 premise on which a lot of this is based is that: oh, well, there was obviously
17 a continuing infringement. We don't accept that for a moment, for some of the reasons
18 that you have been expressing, sir, that when you come to look at this a bit more
19 carefully, we don't accept that we have accepted, or that this Tribunal must accept,
20 that there were continuing effects of this infringements forever and a day.

21 So we do say: let's just stick with what the CAT has said in the past. Let's just stick
22 with the claim form. If they want to come back in due course and make an application
23 to amend, they can do so and we can consider that application on the merits. But the
24 application on the merits will not involve an acceptance, as my learned friend keeps
25 saying, that there has been this continued infringement. We don't accept that for a
26 moment.

1 That's all I want to say.

2 THE CHAIR: Thank you very much.

3

4 Decision

5 THE CHAIR: There is an issue between the parties as to the proposed end date. The
6 proposed class representative says that the proposed end date should be the date of
7 the CPO, whereas Mr MacLean on behalf of the proposed defendant says that the
8 proposed end date should be no later than the date of the claim form. In support of
9 that proposition, Mr MacLean relies on Merricks v Mastercard [2022] CAT 13, and he
10 cites some relevant passages which will be in our ruling when we come out. He also
11 relies on Neill v Sony Interactive Entertainment Europe Limited [2023] CAT 73.

12 It is not accepted on behalf of Royal Mail that there has been a continuing infringement,
13 and there will be real issues as to how long the effects of the infringement occurred.
14 Therefore, the proposed end date is going to be in any CPO the date in the claim form.
15 If there is an application alter in the proceedings to extend that, that will have to be
16 done on the basis of full argument.

17 So we have dealt with that one issue.

18 MR HARRIS: So just for the sake of clarity, the case that we mount is continuing
19 effects of the infringement, not continuing infringement.

20 THE CHAIR: Yes, continuing effect of the infringement.

21 MR HARRIS: I am not reopening this, but just for your note, at 1.24(h) of the
22 infringement decision is where Ofcom says:

23 "... we have found that the suspension did not prevent the price differential from having
24 continuing effects in the ... market."

25 That is just for your note.

26 THE CHAIR: Yes, it is a very important passage, that one. I am certainly aware of

1 that.

2 The next question is: does it raise common issues? It clearly does raise common
3 issues, so there is no -- and then: are suitable to be brought in collective proceedings.
4 We are satisfied that they are suitable to be brought in collective proceedings, not least
5 because there are a very large number of persons within the class. It would be wholly
6 impracticable for each member to bring their own claim. Many of the claims would be
7 relatively small, and this is an effective way of having claims of a large number of
8 people all brought in one proceeding.

9 The next issue is to look at us taking into account all the matters as we think fit. We
10 will come back to that when we give our written ruling.

11 The strength of the claims -- we are now looking at 79(3)(a) -- you have set out in your
12 skeleton argument why you say that the claims have some strength. You have got the
13 Ofcom decision, you have got the decision of the Tribunal, of the Court of Appeal. It
14 is clear that there has been an infringement. That can't be denied. It is clear on the
15 basis of the findings that that infringement led to the plug being pulled by LDC.

16 What I would like to hear from Mr MacLean is to what extent is he going to be arguing
17 in these proceedings -- and I know we have dealt with this in a previous CMC -- to
18 what extent in these proceedings is he going to put in issue that this was the cause of
19 LDC pulling the plug and how are we going to get that resolved? Because that is quite
20 an important factor, and when I have read the decision, there is not a huge amount of
21 evidence that they rely on in support of that, and one of the questions is: whether or
22 not he likes it, is he bound by that finding, or is he able to reopen it?

23 So, Mr MacLean, could you just deal with that now?

24 MR MACLEAN: Certainly. Can I take a step back and look at what Ofcom said. You
25 will have it well --

26 THE CHAIR: Yes, I have read it a couple of times now, but I am very happy to look at

1 | it again, that is fine.

2 | MR MACLEAN: If you are looking in hard copy, it is tab 4 of the bundle.

3 | THE CHAIR: Yes.

4 | MR MACLEAN: Let's start at 1.3. It on page 61 of your bundle, sir.

5 | THE CHAIR: Yes.

6 | MR MACLEAN: Now, there is, of course, a finding of an abuse of dominant position,
7 | which we are not in a position to challenge.

8 | THE CHAIR: Yes. You accept that.

9 | MR MACLEAN: We accept that, and that was by issuing these contract change
10 | notices on 10 January 2014.

11 | THE CHAIR: Yes.

12 | MR MACLEAN: The conclusion was that this infringement lasted, as they put it, until
13 | at least 21 February 2014, when the CCNs were suspended.

14 | So you have got a six-week period unquestionably --

15 | THE CHAIR: Yes, you don't deny that, and you say -- and I have heard you say it
16 | before -- on the back of that, you got hundreds of millions of claims against you, and
17 | that you never actually put them into effect, and the prospect of you actually putting it
18 | ever into effect was very low once you got the Ofcom decision.

19 | MR MACLEAN: Indeed. That was formally withdrawn, as you know, sir, I think in
20 | March 2015.

21 | THE CHAIR: Yes.

22 | MR MACLEAN: Of course, there was a challenge to the finding of Ofcom, which
23 | excited tribunals at various levels.

24 | THE CHAIR: I very much doubt that's an accurate description.

25 | MR MACLEAN: Can I show you a number of important further paragraphs.

26 | THE CHAIR: Yes.

1 MR MACLEAN: Page 289 of the bundle, still within the Ofcom decision,
2 paragraph 7.167, you see that:

3 "As a general principle, competition typically puts downward pressure on prices,
4 encourages quality improvements, efficiency and incentivises investment in the
5 development of new products and processes."

6 Well, that's a statement which is entirely unobjectionable, but isn't going to get them
7 £1 billion in damages.

8 THE CHAIR: You see, what they are saying is the same in the next paragraph, is that
9 ordinarily you expect that when you have got competition, people are going to be more
10 efficient, prices are going to be lower, but it doesn't necessarily mean that was what
11 was going to happen on this case. That is the thing I said at the beginning, which is
12 that we actually really need to look at the records at Royal Mail, Whistl, to see what
13 their intentions -- see what their abilities are, and, you know, it may well be that, at the
14 end of the day, the business is a loss-making business, and that's why no one really
15 wants to do it, and everyone is quite happy to be on the back of your client, because
16 your client does the delivery at the end, which is very expensive, and then they can
17 get the customers and -- you know, I can see how it will work that your business,
18 end-to-end for bulk mail, may not be the most profitable business on Earth.

19 MR MACLEAN: Indeed.

20 THE CHAIR: You know, however hard you try.

21 MR MACLEAN: Absolutely. But the reason I am taking you to these two paragraphs
22 is because 7.168, the next paragraph which you have read, is one which is relied on
23 heavily --

24 THE CHAIR: Yes, of course it is. Yes.

25 MR MACLEAN: -- but it is misquoted, because what you will see when you read their
26 skeleton, their reply document, and indeed Mr Williams's evidence, he says that there

1 was a conclusion that these costs savings would be passed on.

2 Actually, what you find -- not surprisingly, in the light of the discussion we are

3 having -- is that they were much more tentative about this. They said increased

4 competition would tend, for example, to increase pressure on Royal Mail and potential

5 rivals to reduce their costs.

6 Now, there isn't any finding in this document that it actually would have had that effect.

7 THE CHAIR: Well, they never did that exercise.

8 MR MACLEAN: Exactly.

9 THE CHAIR: You know, it is not their function to do that.

10 MR MACLEAN: Exactly.

11 THE CHAIR: The main thing was to figure out whether your clients had committed an

12 infringement --

13 MR MACLEAN: Exactly.

14 THE CHAIR: -- and then put a price on it. It is not to look at a crystal ball. That is

15 a task that we are going to have to do.

16 MR MACLEAN: That is. But the crystal ball, when you come to look at the question

17 as to whether the methodology which has been proffered is a plausible and credible

18 methodology, the important feature which you see in the approach of the potential

19 claimant is that we have got this finding from Ofcom that it would have had this effect.

20 There isn't such a finding.

21 Indeed, if you go on --

22 THE CHAIR: What they are saying -- no, I think the finding is -- if it is a finding, it is

23 a bit woolly -- it would have the tendency to do that, but without actually saying it would

24 and how concrete that is.

25 But I think they recognise that, at the end of the day. That is why they are trying to

26 prove what the loss is, you know.

1 MR MACLEAN: Yes.

2 If you look at 7.171, while we are on this.

3 THE CHAIR: Yes.

4 MR MACLEAN: "As we explain in sub-section F below, it is not now possible to
5 establish for sure what would have happened if the price differential had not been
6 introduced, i.e. whether Whistl would have successfully expanded or would ultimately
7 have exited the market at some point in the future in any event ... we have concluded
8 that, by introducing the price differential, Royal Mail pre-empted the outcome of the
9 competitive process, leveraging its overwhelming dominance ..."

10 THE CHAIR: Yes.

11 MR MACLEAN: So the background to this is there are not any findings that they can
12 leverage on, in our submission, to establish the starting point of the analysis is that
13 there was an overcharge. That is not the starting point.

14 THE CHAIR: But we are going round in circles because we --

15 MR MACLEAN: I am sorry.

16 THE CHAIR: -- established that already, that they are going to have to look at the
17 qualitative evidence to sort of see if they can get to base 1, and that the work that they
18 are producing through the economists actually could be quite useful. On its own, it is
19 not going to get them home, but it can be part of their case, and at the moment we
20 have not dealt with the argument on that. That is going to come later; perhaps
21 tomorrow.

22 MR MACLEAN: Yes.

23 THE CHAIR: What we are trying to do is to just go through the basic requirements.

24 MR MACLEAN: Of course.

25 THE CHAIR: Today, I want to look at things like funding and all that sort of stuff, and
26 maybe tomorrow we can have your analysis of the methodology that has been

1 proposed. But we are just trying to get through on the basics, because just because
2 you have not opposed something doesn't mean we don't need to satisfy ourselves on
3 it.

4 MR MACLEAN: Indeed.

5 THE CHAIR: You have made our job a lot in one way harder, in one way easier, by
6 all the correspondence you have written, because it has raised the sort of questions
7 that we want to ask anyway.

8 MR MACLEAN: I hope I have made life somewhat easier by indicating in the skeleton
9 that we are going to be taking two points of principle, essentially, on the methodology.
10 That is the question of what we call selection bias, and then the question of the VAT.

11 THE CHAIR: Mr MacLean, can we get back to the question though.

12 MR MACLEAN: Of course.

13 THE CHAIR: This is all helpful, but the question was: are you able, as a matter of law,
14 given the findings that are in here, to say that the plug wasn't pulled because of the
15 infringement? Because that is the sort of \$64 million question.

16 If you can't answer now, you don't need to answer now, but you have got until
17 Wednesday to answer that.

18 MR MACLEAN: I will answer on Wednesday, in that case.

19 THE CHAIR: Yes. Well, whenever you are ready. But it is going to help when it
20 comes to case management, because what we are trying to do is we will get through
21 the CPO thing. Assuming we grant it, then we can talk about directions on
22 Wednesday.

23 MR MACLEAN: Yes.

24 THE CHAIR: I do need to have sort of real clarity in my own mind as to what the real
25 issues are between the parties.

26 MR MACLEAN: You will have seen from what we have just read from Ofcom that it

1 considered it was not in a position to, and did not need to decide ultimately, whether
2 Whistl would have stayed or would have gone. So I think, subject to further discussion,
3 tied up with that is the question of the effect of the funders' withdrawal.
4 Anyway, I will sit down now.

5 THE CHAIR: That is fine. Let me just take a note of it, and we will resume.
6 I hope you don't mind us doing it this way.

7 MR MACLEAN: Not at all.

8 THE CHAIR: You are both very experienced advocates, and you both know I have
9 read whatever the material is you have given me. Your skeleton is the starting point.
10 But really, on something like this, we just can be satisfied on all the various criteria,
11 and we will just go through them during the course of the day.

12 MR MACLEAN: We are very happy with that.

13 THE CHAIR: That is fine. Thanks. (Pause)
14 I am sure you would want to know the answer to that question as well, because it will
15 help you plan your evidence, to know whether or not that is an issue as to the reasons
16 why LDC pulled the plug. Because you may say that they are bound by the Ofcom
17 decision on that.

18 MR HARRIS: Absolutely. Unlike my learned friend, I can answer that right now.
19 I could show you a couple of passages in the CAT judgment in particular that identify
20 that there were findings of effect, as well as the multiple findings of the strong likelihood
21 of all kinds of effects.
22 Can I just show you one or two --

23 THE CHAIR: Yes, let's look at that. Yes.

24 MR HARRIS: Yes.
25 So just before I turn to the CAT judgment --

26 THE CHAIR: Yes, just look at Ofcom first.

1 MR HARRIS: -- just looking at Ofcom first.

2 If we were to turn up the helpful summary that is to be found at tab 4, page 64 at the
3 bottom, that's 1.24(d), and then what I am going to identify is in all the subsequent
4 paragraphs, the reference to effects. But just to locate (d), because (d) refers to
5 Royal Mail's contemporaneous internal documents in the second line, and then in (e),
6 it says, second sentence --

7 THE CHAIR: So that is the threat point, okay, but that doesn't quite get you where
8 you are looking.

9 MR HARRIS: No. What I am about to do, sir, members of Tribunal, is I am going to
10 show you (e), (f), (g), (h) and (i), all of which refer to effects, and one or two other
11 passages in the decision, but then I am going to show you what happened after the
12 six-week trial in the CAT, which materially upheld every single one of Ofcom's findings.
13 So I start at (d) just because it locates it in contemporaneous materials. That is what
14 I take from (d).

15 At (e), basing the analysis on what it says, the second sentence:
16 "The material effect of the price differentiation was particularly evident in the case of
17 Whistl ..."

18 So there is a finding -- in the summary, I accept -- of effect. A type of effect; I am not
19 saying it is my whole case, but it is a good start.

20 (f), picking up at the end of the second line:
21 "... such a material impact on profitability was likely to make entry or expansion in bulk
22 mail delivery significantly more difficult."

23 So there is a finding of effect. I accept it is a significant likelihood, but it nevertheless
24 is a finding of effect in that prism.

25 (g), you can see, is talking about penalising through the CCNs, and then picking it up
26 in the final sentence --

1 THE CHAIR: Yes, but what they are talking about is that you can see that the
2 infringement had the effect of making it difficult for Whistl to have expansion plans, but
3 what this decision doesn't really help you with is how that would have translated into
4 lower prices. It doesn't really help you. It doesn't tell you it is going to be a success.
5 It doesn't tell you what is going to happen. That is what you have got to prove in this
6 case.

7 MR HARRIS: At trial.

8 THE CHAIR: At trial.

9 MR HARRIS: At trial. So my response is twofold. There are some other passages I
10 am going to show you.

11 THE CHAIR: Yes, let's have a look.

12 MR HARRIS: I think it would be helpful. But, of course, my test today is: is it
13 a reasonable, plausible and credible prospect that, at trial, I will have a shot at proving
14 the effects that you are debating with me? It must be, on the back of this decision and
15 the CAT judgment, that I have a plausible and credible case that I should be allowed
16 to take to trial.

17 THE CHAIR: I have got -- Mr Harris, if it can help you, subject to the points we are
18 going to be dealing with, perhaps tomorrow or maybe later this afternoon, you have
19 clearly got a plausible case on the back of the Ofcom decision. These follow-on claims
20 are a lot easier to certify when you have got a decision, you know, like this, and there
21 is a lot of detail here. There is a lot to work through. So I --

22 MR HARRIS: Yes. Can I skip those ones then? Can I skip to something a bit more --

23 THE CHAIR: Just take me to whatever passages you think I need to have in mind
24 when I give a decision, and give it to me now, and I will take them into account.

25 MR HARRIS: Well, in that case, I rely upon (g), (h) and (i).

26 THE CHAIR: I am aware of that. I have marked it all, yes.

1 MR HARRIS: Can I show you as well paragraph 4.40 on page 122. This is simply an
2 example, as you turn it up, of Whistl internal materials. This is just an example. It is
3 illustrative of the sort of material which we will be obtaining if we get a CPO, on
4 disclosure.

5 THE CHAIR: Well, we will come to that later.

6 MR HARRIS: Yes.

7 THE CHAIR: We can do that on Wednesday.

8 MR HARRIS: It is talking about an internal description of Whistl's ambition being to
9 achieve a certain degree of roll-out. So when it comes to trial, assuming we get the
10 CPO, we will be seeking to rely upon documents of that type, along with many others.
11 That is just an example.

12 Let me give you another example, which is particularly --

13 THE CHAIR: The thing is, what the report shows is you have got a plausible case that
14 Whistl would have got entry into the market. You have got that as a plausible case
15 because of that.

16 Mr MacLean's point is slightly different. He is saying that that doesn't tell you what the
17 impact on price is going to be. You can talk about -- when you have a competition, it
18 ordinarily will have the result of reducing prices, but there is a lot more to that here
19 that's going to have to be done through not just econometric analysis, but by looking
20 at the qualitative evidence to see exactly how that would have played out.

21 MR HARRIS: Let me give you two examples.

22 THE CHAIR: Yes.

23 MR HARRIS: One is in this Ofcom decision and one is in the witness evidence that
24 has been lodged already in the now settled Whistl proceedings. Let me take that in
25 order.

26 The example I would like to show you is over the page from what Mr MacLean read

1 out before. He was on page 289 of the decision. If you could turn over the page to
2 290.

3 THE CHAIR: Yes, I have got 290.

4 MR HARRIS: That's 7.168.

5 THE CHAIR: I have read all of that.

6 MR HARRIS: Yes.

7 THE CHAIR: You can be sure I have marked that up.

8 MR HARRIS: So (a), of course, is highly pertinent. So we will, amongst other things,
9 seek to employ at trial documents of this type, which is a Royal Mail, no less, report
10 from external advisers, FTI, talking about the discounts that Whistl planned to offer.
11 Now, I accept that, at trial, we will have to prove the sorts of discounts, how long they
12 would have lasted, whether they would have tailed off, whatever.

13 THE CHAIR: That is a very pertinent observation, because they may offer discounts
14 to get into the market initially. The question is: what is going to happen in, let's say,
15 the medium to long term?

16 MR HARRIS: Yes.

17 THE CHAIR: You are right; these are issues that are really suitable for trial.

18 MR HARRIS: Now, it is our understanding -- indeed, it is not contested, and
19 Mr MacLean will tell me if I have misunderstood this, and certainly not contested by
20 Whistl -- that, subject to appropriate confidentiality arrangements being put in place,
21 which are well in hand and subject to your approval --

22 THE CHAIR: Yes.

23 MR HARRIS: -- if we get the CPO, then we will fairly promptly obtain, subject to the
24 Tribunal's order, the witness evidence that has already been filed in the now settled
25 Whistl proceedings.

26 One imagines -- I haven't seen it, of course -- that Whistl would have gone into quite

1 | some considerable detail on this very topic, which we will then rely on.

2 | THE CHAIR: The thing is, we will come to this on Wednesday, but, you know, the
3 | material you have got so far only takes you so far. You really need to get the witness
4 | evidence, probably the expert reports, because that may give you further lines of,
5 | I would have thought, the disclosure.

6 | MR HARRIS: Yes.

7 | THE CHAIR: It should be ready because they have done that exercise already on
8 | disclosure, but then it is going to have to be tailored because there may be stuff that
9 | they are disclosing which has got nothing to do with the issues in this action, and so it
10 | is not simply a question of pressing a button and you having all the disclosure to date.
11 | But, yes, just carry on. Just show me what other passage you want me to look at.

12 | MR HARRIS: So there will be plenty more material of this type. So this one, (a), talks
13 | about material within Royal Mail's files, what it expected to happen and how it analysed
14 | what was going to happen. That will plainly be highly germane. There will be
15 | complementary material from Whistl.

16 | Let's not forget that Whistl's business plan was to gain market share by competing
17 | with Royal Mail on price. Who are the people who would have benefited from those
18 | lower prices? I accept that prices may have evolved, but who are the people who
19 | would have benefited? They are my proposed class members.

20 | So what we will need to do at trial is obtain the full relevant disclosure of this type and
21 | others from Royal Mail, obtain the complementary material of the same type from
22 | Whistl, which we know has already -- I don't know the detail, but I know in
23 | principle -- been expanded upon in the relevant parts of the Whistl evidence that was
24 | filed and served, and there is no reason to think, if we get a CPO, that will not be
25 | ordered.

26 | I am told, in a letter from BCLP I think that came on Friday -- that is to say my learned

1 friend's instructing solicitors -- that the expert reports in the Whistl proceedings weren't
2 filed by anybody prior to settlement. I don't know. Obviously I accept what is said in
3 that letter. But that doesn't prevent there potentially having been materials that were
4 received and disseminated between the two sides in that battle before it settled that
5 are capable of being disclosed and therefore being used by my expert.

6 So there is another example --

7 THE CHAIR: So that probably means that they are not going to give you the expert
8 report because, unless and until it has been served, then it is LPP, isn't it?

9 MR HARRIS: Very likely, and who knows, it may not be a total coincidence that the
10 case settled just before the CPO hearing. But it doesn't really matter.

11 THE CHAIR: Yes, it doesn't matter.

12 MR HARRIS: Even if it is right that there is no disclosable actual final expert's report,
13 given that the date for their provision was early part of this year --

14 THE CHAIR: Yes.

15 MR HARRIS: -- there must have been some seriously advanced work. Now, even if
16 some of that is privileged, the data sets that were relevant to it, that must have gone
17 at least in one direction, Royal Mail to Whistl, that's not privileged.

18 THE CHAIR: Well, that will be ordinarily within one of the disclosure lists, one would
19 expect.

20 MR HARRIS: Yes.

21 THE CHAIR: One of the things we are going to have to look at on Wednesday is
22 getting copies of the disclosure lists, sooner rather than later, so we know what we are
23 talking about, the volume of material.

24 But, okay, show me the other reference you wanted --

25 MR HARRIS: Let me show you one other contemporaneous indicative type of material
26 in the decision, and that's at page 313, and it's paragraph 7.241(b). So it's on the

1 right-hand side of the page.

2 Ofcom cites Royal Mail itself taking the view that end-to-end competition was viable,
3 and Royal Mail's own internal analysis suggesting that Whistl was a threat to its market
4 share and profitability.

5 Then if you pick up (i) halfway down, having cited from a Royal Mail document, you
6 could see that the finding is:

7 "In its view, this meant that a large proportion of the UK market was contestable. Royal
8 Mail said its 'analysis shows that around 70% of the addressed letters market by
9 volume is contestable under [Whistl's] current business model.'"

10 That was Royal Mail's own internal assessment, so there will be more disclosure
11 where that came from.

12 Can you see (ii)? That says in a submission to Ofcom, no less -- the irony is not lost
13 on some of us -- in December 2013, that Royal Mail emphasised -- if we turn
14 over -- quoting at the top:

15 "'[Whistl] can afford to charge much lower prices to entice large customers', because
16 its 'likely incremental costs are significantly lower ...'"

17 That led to remarks throughout this decision about the significant likelihood of these
18 sorts of effects.

19 If you pick it up, for example -- perhaps cast your eye over (iii), the indented citation
20 there, another Royal Mail document. But if you look at the bottom of that page, 7.243:
21 "Thus, the contemporaneous evidence suggests that end-to-end entry ..."

22 You can read that. I skip down to the end:

23 "... it cannot now be determined how the competitive process would have played out
24 over the long term if the price differential had not been introduced and it is not
25 necessary for us to do so in the light of our findings on the reasonably likely effects of
26 the price differential."

1 So they haven't done the full job that I would need to do at trial, but you can see exactly
2 the type of contemporaneous disclosure material from both sides of Royal Mail versus
3 Whistl that would lead me in the direction that I want to go to at trial.

4 THE CHAIR: I think, look, we haven't moved the dial a huge amount, but these are
5 very helpful passages to bear in mind. As I said before, you know, you have got
6 a credible case that the infringement did have real effects and that the effect isn't
7 simply limited to what is in the cupboard so far in the report. But one would have to
8 look at actually what would have happened, because it may not be a fair assumption
9 that Royal Mail would have significantly or materially reduced its prices in the light of
10 the threat of entry. It may be they would have been able to come in.

11 MR HARRIS: Maybe, but, of course, who would have been the beneficiary of the lower
12 prices from Royal Mail? None other than my proposed clients.

13 THE CHAIR: But there are so many different scenarios as to how that would have
14 worked out.

15 MR HARRIS: I accept that, but --

16 THE CHAIR: Look, you can't put your case in tramlines until you have got the
17 disclosure. It's far too early, and I take that into account, and we will come to a lot of
18 this in more detail when we deal with Mr MacLean's two big points on the expert
19 evidence approach. But at the moment, I just see your expert evidence so far as the
20 sort of starting point, and it provides a plausible framework, but it may well be it is
21 going to be completely overtaken by other things.

22 What you have always said is that this is only part of the equation and that you will be
23 looking at the qualitative evidence, but you can't deal with it now because you don't
24 have it.

25 MR HARRIS: I can give you another example of exactly the sort of thing that will help,
26 if I may, because I think you asked for examples.

1 THE CHAIR: I am happy to look at examples.

2 MR HARRIS: Well, I said I would take you to the CAT judgment. So those are a few
3 indicative examples from the --

4 THE CHAIR: Yes, yes. CAT judgment. Show me the judgment.

5 MR HARRIS: CAT judgment. That one is to be found in, I think, tab 3 of the authorities
6 bundle.

7 THE CHAIR: Yes.

8 MR HARRIS: If you could turn up, please -- there are many, many that talk about the
9 likelihood of anti-competitive effects, which I don't want to turn up.

10 THE CHAIR: Yes, we know that, yes.

11 MR HARRIS: But can I show you a much more pointed example, which is to be found
12 in paragraph 381, which refers to the evidence that was heard at this six-week
13 contested merits trial before the CAT of a Mr Poleglass and a Mr Wells.

14 THE CHAIR: Yes, yes.

15 MR HARRIS: Perhaps if the Tribunal could just read paragraph 381. (Pause)

16 THE CHAIR: Yes.

17 MR HARRIS: So obviously I rely there --

18 THE CHAIR: Yes.

19 MR HARRIS: These are findings of fact that there was a cause by the CCNs, that's
20 the third line down, and it led to the collapse of Whistl's potential for entry and tipped
21 the balance away from conversion to Whistl. So that's a harder edge finding, in my
22 respectful submission, than just likelihood.

23 THE CHAIR: Yes.

24 What the evidence seems to show, or at least the Ofcom decision and the rulings, is
25 that the immediate effect of the infringement was to lead to Whistl not entering the
26 market to take over this segment.

1 MR HARRIS: With its price reduction plans.

2 THE CHAIR: Yes, and that's the way it was going to get into it. That is there already.

3 Yes.

4 MR HARRIS: Yes, and the last one, because I am anxious not to take up too much

5 time --

6 THE CHAIR: No, don't take up too much time.

7 MR HARRIS: -- if I could just remind you with respect to what Lord Justice Males said

8 in the Court of Appeal. That's at tab 8 of the authorities bundle.

9 THE CHAIR: Yes.

10 MR HARRIS: You may recall that there was a rather highfalutin debate about the

11 nature of the equally efficient competitor test, which detains the Court of Appeal for

12 most of its judgment, very interesting, but if we pick it up at the penultimate page, that

13 is 612, just before the end of tab 8, the end of Lord Justice Males's judgment, he says

14 the AEC --

15 THE CHAIR: Which paragraph?

16 MR HARRIS: It's 89. If you could perhaps just read 89, I would be grateful. (Pause)

17 THE CHAIR: Yes.

18 MR HARRIS: So obviously I rely upon the sentence in the middle. The CAT judgment

19 is understood by the Court of Appeal as making the findings that:

20 "... they did have precisely the anti-competitive effect intended by causing Whistl to

21 suspend its roll out of end-to-end bulk delivery services and causing its financial

22 backers to withdraw their support."

23 THE CHAIR: But, you see, the point is, Mr MacLean is making the point that the

24 decisions take you so far, and they take you to the point that the infringement led to

25 the suspension and the roll-out of the plan. That is what it does. That is part of you

26 getting home on loss and damage, but the other half is what we have got to play for.

1 MR HARRIS: Yes.

2 THE CHAIR: That's very helpful, to take us through those references.

3 MR HARRIS: That's what we have to deal with at trial.

4 THE CHAIR: Yes.

5 MR HARRIS: It may be, sir -- I am conscious of the time -- that I will take some more
6 instructions on the point that you raised with me about the full gamut of consultations
7 and the bigger members of the proposed class, and I will also take instructions at the
8 right moment -- that may not be the short adjournment -- on the degree to which there
9 might be further input from certain class members because, of course, they were
10 present in the market as well.

11 THE CHAIR: Looking at your application, paragraph 95, you look at rule 75(2)(b) and
12 you talk about real prospect of success. We are satisfied that you do have a real
13 prospect of success for the reasons summarised in paragraph 95 when you look at all
14 the cross-references back in your application, and this is all subject to the points that
15 still need to be argued. Obviously, England and Wales is the appropriate forum. You
16 deal with that at paragraph 96.

17 Then what we will do after the short adjournment is we will look at the issues relating
18 to the proposed class representative. On that, we will be looking at funding ATE, the
19 advisers, whether we need to have further input and information, and what I would like
20 to have some understanding of is: what is the financial position, in particular the
21 ratings, of the three insurers backing the ATE? Because I see that they are not all
22 liable for the full sum; they are only liable for the relevant percentages. So I would like
23 to know what the rating is, so I can be satisfied myself that the ATE insurance will be
24 in place.

25 As regards the issue of the funders' own financial position, we are going to have to
26 look at that and see what needs to be done, because there are real issues on that.

1 We just need to be satisfied that the funders have got the financial ability to be there
2 in the end, and what protections we can put in place to do that. I realise that if we
3 require the funders to come up with the money first, that may raise issues as to the
4 cost of that, because they'll be getting their return based on the amount that's drawn
5 down. You will say: well, the things that you have proposed have a financial
6 expenditure because it involves drawing down.

7 What I would like you to consider is what else you could offer which doesn't involve
8 drawing down, such as by means of having some drawdown, or having an obligation
9 on the class representative to get information from the funder as to what the financial
10 position is, to review any accounts when they come out and, if there is any issue as to
11 any concern as to the ability of the funder to come up with continuing money, then
12 you've got to notify the Tribunal. So I would like you to think about what other options
13 there are, apart from the one that you have proposed in correspondence.

14 There is a question of the proposed rates of return, or whatever, for the funder.
15 Mr MacLean's clients have said that they have suggested that you give basic
16 scenarios based on whatever comes in the settlement. I think that would be actually
17 very helpful to have that. I don't think it's going to be particularly difficult, but I would
18 just like to know, what are the likely sums that would go out to different people,
19 depending on how much the settlement would be if you have a settlement?

20 There are also other issues that we will be talking about in the afternoon. When you
21 look at the Epiq plan, for example -- and we will look at that probably in more
22 detail -- does it need any further refinement, in the light of the experience of Epiq since
23 then? Because it's relatively early, you know; they did it in the first half of 2014. I have
24 looked at a number of Epiq reports since then, and obviously I have looked at the
25 Merricks Epiq report, which is obviously looking at the further down the line. But will it
26 need some sort of revision in the light of experience? And, if so, what are those

1 changes? So if you could discuss that with Epiq.

2 The other thing you'll need to do is discuss with your client, and possibly the funders,
3 as to whether or not there's any amendments which are contemplated to the amended
4 LFA in the light of what is coming out in Merricks or whatever, because clearly there
5 are things coming out in that. You have dealt with the Riefa points, and I can see that
6 your clients and the funders sensibly took account of a moving feast. You know, the
7 argument against you says, well, you should have got all this done first time round.
8 Well, I don't really care about first time round. What I care is, what is the position on
9 the day we certify? Is it something that works and is practicable?

10 But just talk through those, because these are issues we are going to come to in the
11 afternoon.

12 Finally, if you can get me the names of the two cases that Mr Aaronson was involved
13 in, before the Copyright Tribunal.

14 MR HARRIS: Certainly.

15 THE CHAIR: You have got a shopping list.

16 MR HARRIS: So Mr Bacon will deal with many of those points this afternoon, and I
17 will deal with Epiq and the Mr Aaronson enquiry. Plus I will update the Tribunal, if
18 I can, on your initial query. Otherwise, that will wait till tomorrow.

19 THE CHAIR: Yes. I am just trying to get through all the things, all the requirements,
20 satisfy ourselves as to where we are, before we hear from Mr MacLean on the two
21 points that he wants to deal with. But I would rather deal with everything else first, and
22 that may take this afternoon.

23 The other thing you are going to need to look at is the budget and, in particular, what
24 is the impact on the budget of the settlement reached with Mr MacLean's clients?
25 Because I do want to be satisfied, by the time, if we decide to give a CPO, that the
26 budget is realistic, it's not going to be exceeded. Because if we are going to have

1 | problems with the budget, then we can have the sort of problems we have seen in
2 | Merricks, which we don't really want in this case. You know, if this case can be
3 | certified, the last thing I want is for it to have problems. If there are potential issues,
4 | try and iron them out now. The budget is a pretty important thing.

5 | The other thing that we will need to discuss, possibly, is how much is everyone
6 | charging on all this, and what check is there going to be? Because, at the end of the
7 | day, your client, the PCR, can agree whatever he wants to agree with the lawyers, or
8 | with the funders, but at the end of the day, if there is a settlement, not a cent is going
9 | to anyone unless it's approved by the Tribunal. What you don't want to happen is have
10 | a situation whereby you are not clear at the beginning, but there is a real -- the
11 | Tribunal's out there to protect the interests of the class members, and that may mean
12 | saying you are going to get an outcome which is not the same as the contractual
13 | outcome that you are intending.

14 | But these are issues we will talk about in the afternoon.

15 | MR HARRIS: Thank you, sir. We have got a note of all of those. When would you
16 | like to start?

17 | THE CHAIR: Well, we will start at 2.00. We've got a lot to go through. Thanks.

18 | (1.09 pm)

19 | (The short adjournment)

20 | (2.00 pm)

21 | THE CHAIR: Yes, Mr Harris. So we basically dealt with the rule 79 issues, although
22 | I would like to get that data we discussed at the beginning about the big class members
23 | and what the sort of range is that we are talking about, because that feeds into other
24 | things that we are going to come to on the issue of the authorisation of the class
25 | representatives, which is rule 78, which we are going to look at now.

26 | As regards Mr Aaronson, we have looked at his credentials, his background, his

1 | experience, both in litigation as well as an expert and his experience. Clearly, he's on
2 | his own. He's suitable to be class representative, subject to points we are going to be
3 | discussing now. It's a big responsibility, as you know, to be class representative, and
4 | that's why it's important that he has what you call - I think it's a consultative panel?

5 | MR HARRIS: Yes, would you like to see the details?

6 | THE CHAIR: Well, I think that --

7 | MR HARRIS: They are present in court.

8 | THE CHAIR: Yes, I have seen that you have Lesley Ainsworth and Roger Witcomb,
9 | and that they have a lot of competition law experience, but the question is: is it going
10 | to be a good idea or not to have someone else on the panel, or maybe more than one
11 | other person, who comes from, let's say, the big class members. I do think that needs
12 | to be explored, because the nature of this action is different from most of the others
13 | we have looked at.

14 | MR HARRIS: Can I address those issues to the degree possible right now and revert
15 | further tomorrow?

16 | THE CHAIR: Yes.

17 | MR HARRIS: There is one concern, but then two, I hope, constructive proposals.

18 | THE CHAIR: Yes.

19 | MR HARRIS: As presently put forward, and indeed this is the CPO that we seek, this
20 | is an opt-out action. Therefore, the claimant company, through Mr Aaronson, has to
21 | behave completely scrupulously, equally as between the members, not act in
22 | a preferential manner, in a discriminatory manner.

23 | THE CHAIR: Of course.

24 | MR HARRIS: So if at this stage, and bearing in mind I have two other points, there
25 | were to be, say, some kind of particular reach-out to particular, hopefully, class
26 | members as at today, proposed class members, there is a danger of infringing that

1 invocation against discriminatory or non-preferential treatment, if it were to happen
2 today. That's not to say that, by means of the notifications which we will doubtless be
3 looking at in due course, if there is any particular class member, whether they be
4 a large bank or hospital or local authority or whatever, that may have more skin in the
5 game, or even a small one, that by means of the notification procedures that are
6 already there, they can already make known their views.

7 So that's as at today. We have just got a slight concern that, if it were a targeted
8 reach-out, for the purposes of obtaining consultation from A and B, rather than C, D,
9 E, F and G, et cetera, that might fall foul of the PCR's obligation to act in
10 a non-discriminatory manner.

11 But, that having been said, the second point is, you will be aware from Dr Williams'
12 proposed methodology that, certainly as things stand, he is proposing to do a survey.
13 The survey comes in to various aspects of his methodology that will necessarily
14 involve more detailed communication with at least some members of the class, the
15 ones that he will require in order to perform his survey. Just by way of footnote to this
16 point, the second point, there is already some analysis in Dr Williams's report, and the
17 work that he's already done, about how broadly 77 per cent of the claim is made up of
18 large companies. I can dig out those details and provide them with you tomorrow.
19 I haven't been able to --

20 THE CHAIR: We can do it tomorrow, yes.

21 MR HARRIS: I can do that. So the second point is, whilst we have a concern about
22 targeted reach-outs at this stage being discriminatory, and people can already let us
23 know what they think; nevertheless, there is going to be contact via the survey with
24 some people, and it may be that there'll have to be a greater degree of preponderance
25 in the survey on large people, because they make up so much --

26 THE CHAIR: I don't think that really addresses it. Look, the propositions are that this

1 is not like a normal class action, like the many ones that we have. This is going to
2 have a number of large players, i.e. people who've got very substantial claims on the
3 basis of the way you are calculating it, and that if you are making decisions that could
4 affect big players like that, and large sums of money, then it may well be appropriate
5 for them to be consulted, not just by way of some sort of survey, but for them to have
6 a bit more input in that.

7 Now, you may say, well, am I going to fall foul of acting fairly between the class
8 members? You can still act fairly between class members, and if the ideas come from
9 the Tribunal, no one is likely -- and I am sure Mr MacLean won't -- complain about it.
10 But I do want something that does involve at least some sort of role or participation of,
11 perhaps, even a range of class members. You may say, well, we can have a user
12 group, and the user group can be selected, if people are interested, at the bottom end
13 of the claims, but including people at the very top. So let's say you have got one big
14 bank which has got a few million in this. They may say, yes, we want one of our people
15 in the user group, or whatever, but I do want some structure. You've got until, you
16 know, before I make the order of the CPO to come up with something that I am
17 satisfied with, because this is a complicated case, and you have got Mr Aaronson, and
18 you have got two people. But I just want more than what we've got on the table at the
19 moment.

20 MR HARRIS: I understand entirely, sir. I am confident that we can do that within the
21 time available.

22 Can I just make the third point so that you know of it?

23 THE CHAIR: Yes.

24 MR HARRIS: Because it's relevant to this context. It is possible -- I can't say today,
25 I haven't even got a CPO yet -- that some of the either representative and/or large
26 victims will be invited as we go forward by my team to provide evidence at trial. They

1 are market participants, of course, and what we were talking about before the short
2 adjournment is how the market evolves. So it is far from impossible to think that
3 somebody with the most skin in the game might turn up as a witness, or at least
4 provide some disclosure or something like that. So I wouldn't want you to think that,
5 even absent a user group -- although we will address that, and we will do it in the time
6 that you have said, something like that -- I wouldn't want you to think that there is going
7 to be an absence of these people, both because of the survey -- my second
8 point -- and because there may be a need for witnesses, unlike some other opt-out
9 action where you don't get any witnesses.

10 THE CHAIR: Okay.

11 MR HARRIS: Then one other thing. I appreciate a lot of your queries were about
12 funding, and Mr Bacon will deal with them, but you asked before about the two
13 copyright cases that Mr Aaronson has appeared in.

14 THE CHAIR: Oh, yes.

15 MR HARRIS: They were quite a long time ago; we will dig out relevant details. But
16 can I inform the Tribunal that I have had the pleasure, as part of a team of
17 instructing -- at least being the barrister member of a team that instructed Mr Aaronson
18 before, in his capacity as expert economist, and we can provide you with that judgment
19 in which his evidence was commented upon favourably. It's in the VAT Tribunal, back
20 in the days when I used to be a VAT practitioner with Mr Rayment.

21 THE CHAIR: Well, send that in and we will look at it overnight, that's fine. If you give
22 me a hard copy overnight then I can look at it.

23 MR HARRIS: Exactly so.

24 Unless there are any other matters you want to deal with, with me -- you asked about
25 Epiq. We are making enquiries of Epiq, and if there's lessons to be learned and they
26 should update what is currently in the bundle from them, then I can find out and report

1 back. I think all of your others might be for Mr Bacon.

2 THE CHAIR: No, no, we haven't come to Mr Bacon yet. No, that's fine. Mr Bacon,
3 stand down for a minute, okay, we've still got things to do.

4 I want to know who selected who, okay. So you've got three wheels here; you've got
5 the PCR, you've got the lawyers and you've got the funders. So who instructed who?
6 Who approached who originally? Where has it come from? Is this the lawyers who
7 said, we think this is a good claim and hence we go and find funders? Or is it funders
8 saying we think it's a good claim, we find lawyers? Also, how did Ms Ainsworth get
9 selected? All basic stuff, I would have thought, that we need to see. But I do want to
10 know who's selecting whom, and how it relates to -- it becomes relevant for issues of
11 conflicts of interest, but it also becomes relevant when it comes to terms of
12 remuneration and benefit, because, for example, if this is completely different from the
13 normal way that people are instructed -- I have a dispute, I choose my lawyer, I don't
14 have any prior background with them, I'm the boss, I negotiate prices, and it's all under
15 my direction -- you can have these collective proceedings where it's inverted. You
16 often have the lawyers find the class representative who's most grateful for being
17 made class representative, for which he's going to get paid some money, and then
18 he's the one who's meant to be negotiating fees and stuff like that.

19 So I do need to know the order of who found whom, and how. So that's something
20 that you do need to address. You probably know the answer already. It's a very
21 simple question. If you don't know, you can ask Mr Aaronson now.

22 MR HARRIS: Well, sir, I am wondering whether, on this one, the thing to do to make
23 sure that this is dealt with accurately is we write you a letter, which will probably be
24 overnight.

25 THE CHAIR: Oh, that's fine. That's absolutely fine.

26 MR HARRIS: If not overnight, then certainly before the hearing is over. I don't want

1 to misspeak, and there were a few questions in there.

2 THE CHAIR: Okay.

3 The other thing is on the remuneration for the class representative, is that figure
4 confidential or not?

5 MR HARRIS: Do you mean the hourly rate or the -- I think it's a --

6 THE CHAIR: No, no, I know what it is. It's a figure per month.

7 MR HARRIS: Per month. That's right. That's what I had in mind.

8 THE CHAIR: Is that figure confidential or not?

9 MR HARRIS: I don't --

10 THE CHAIR: No, no. So it's £3,000 per month.

11 MR HARRIS: At a cap, I believe.

12 THE CHAIR: Yes. Yes. That's exactly my question: is that a cap, and how is it
13 calculated within that cap? So, for example, is he being paid, let's say, an hourly rate,
14 with a cap of £3,000 per month, or is he being paid £3,000 a month, irrespective of
15 what happens in that month? So if, for example, he does no work in a month, he gets
16 £3,000; if he does 500 hours in a month, he still gets £3,000? I just need to know.
17 Put that in the letter, so we know what we are doing.

18 MR HARRIS: We will put that in the letter, yes, exactly.

19 THE CHAIR: As regards the lawyers and stuff also, can you put in the sort of hourly
20 rates and everything.

21 MR HARRIS: Yes. I think they are in the budget.

22 THE CHAIR: They are in the budget, so we will come to that when we deal with the
23 budget.

24 MR HARRIS: It is rather small print.

25 THE CHAIR: That's fine. We will deal with that in the budget.

26 But insofar as I ask you questions, I am very happy to have the answers in writing.

1 That way, I know it's all going to be properly considered.

2 But subject to any outstanding questions, we are quite satisfied that Mr Aaronson is

3 eminently qualified to be class representative. You can see his background and that,

4 you know, he clearly knows what he's doing.

5 We will now turn to the issues --

6 MR HARRIS: If you want the reference to the hourly rates: tab 18, page 911.

7 THE CHAIR: Yes. Say that again?

8 MR HARRIS: Tab 18, page 911.

9 THE CHAIR: Let me look at that.

10 MR HARRIS: The second column.

11 THE CHAIR: Are you talking about in this?

12 MR HARRIS: In the budget, yes.

13 THE CHAIR: In the budget. Can you tell me where it is?

14 MR HARRIS: I am afraid it is rather small type.

15 Yes, it's the second column, "Rate". So the first column has names of solicitors and

16 counsel and experts, and the second column has the rate. That's the hourly rate.

17 THE CHAIR: Yes. (Pause)

18 Yes, having looked at the hourly rates for -- there would be an uplift under a CFA,

19 won't there, if --

20 MR HARRIS: For the solicitors.

21 THE CHAIR: For the solicitors.

22 MR HARRIS: Yes.

23 THE CHAIR: What is the uplift? (Pause)

24 MR HARRIS: Can we confirm that, because I think there might be an issue about the

25 degree to which it's confidential, because it reveals things like prospects of success

26 analysis.

1 THE CHAIR: If it's not on the paperwork, just put it in a separate letter and then that's
2 fine. But subject to the uplift, I am satisfied that the hourly rates that have been agreed,
3 both for solicitors and counsel, fall within a reasonable range. Of course, at the end
4 of the day, when it comes to distribution, then the rates and the amounts in question
5 can be looked at again. But looking at it from the certification stage, there is nothing,
6 let's say, out of the ordinary in the rates which are in the budget. So we have dealt
7 with that.

8 Going back to -- let's see, we have still got rule 78(3)(c) to look at, the litigation
9 plan -- Mr Bacon, do you mind if we deal with that first and come to your bit later?

10 Because I think we need to look at the budget a bit --

11 MR BACON: I will rise and fall as I am required.

12 THE CHAIR: That's absolutely brilliant. We just want to get through everything and
13 get it right as we go along.

14 So, look, we are looking at rule 78(3)(c), and whether the proposed class
15 representative prepared a plan for the collective proceedings.

16 Now, there are sort of three things in that: you have got Epiq's notice and
17 administration plan; you have got the proposed timetable, which we are going to come
18 to in a minute; and we have got the cost budget, which I am not sure whether you or
19 Mr Bacon are going to deal with, but it will feed into the next topic, which will be
20 funding.

21 Looking at the notice and administration plan, we have all been through that, and the
22 only thing that has raised any interest by us is really that it represents the sort of
23 learning as at the first half of 2024, and then when you look at the subsequent reports
24 that Epiq has been preparing for the purposes of distribution, there is a lot more detail
25 and there are additional things that they have done.

26 So what I would ask you to do in relation to the administration plan, can Epiq look at

1 the administration plan and say: are there any things that we would probably do
2 differently, or anything else that they can say over and above what they have got to
3 show it's, let's say, a 2025 version, rather than a 2024 version, because I do think that
4 the work they have been doing has actually been quite encouraging and they are, as
5 they are getting more experience on how these things pan out before the Tribunal and
6 on distribution, coming up with further things. But looking at what they have come up
7 with, we are broadly happy, subject to any update.

8 The next thing is the proposed timetable. We will need to look at that because things
9 have changed, because Mr MacLean's clients have settled, and there may be some
10 issues. If we can't get that one right, we are not going to get the budget right.

11 So let's have a look at your proposed timetable.

12 MR HARRIS: Tab 17, starting on page 908.

13 THE CHAIR: Is that the one to work with or is it the one at tab 22?

14 MR HARRIS: Yes, I may stand corrected, because it was updated.

15 THE CHAIR: Because I asked for an updated one at the CMC.

16 MR HARRIS: No, you are quite right, I stand corrected, and I am very grateful.

17 THE CHAIR: Okay. Well, shall we look at that and see where we are, because I would
18 like, at the end of today, to have a different version which is updated to reflect the
19 settlement that Mr MacLean's clients have had, so if we are going to make a CPO, it's
20 on the back of a different timetable to the one -- I want to have the actual timetable
21 before us when the decision is made on Wednesday.

22 The first page is fine. We have got the CPO hearing. You will have a ruling, hopefully,
23 on Wednesday. Whether it's a sort of polished version -- it probably won't be
24 a polished version, but it'll be something, and then we will get the transcript back and
25 then we can just put it in better format.

26 I am very conscious that I do not want these hearings to turn into mini trials. We have

1 got the guidance of the Court of Appeal that they don't expect War and Peace when it
2 comes to any rulings. If this Tribunal is going to be able to deal with things efficiently,
3 it doesn't help anyone if you don't have a ruling for months on end after this. This is
4 not too difficult a hearing. It's relatively straightforward. There are a number of boxes
5 to be ticked -- and I don't mean that in a derogatory sense -- and we do shake the tree
6 and we do make sure we are satisfied, even if Mr MacLean's not complaining about
7 certain things.

8 So let's look at this timetable.

9 Now, you are hoping to get the disclosure of evidence in the Whistl claim in
10 March 2025. I don't know how realistic that is, because we have already identified the
11 expert issue, that you are not going to get the expert reports at this stage.

12 As regards the pleadings, I presume you have got all the pleadings already, haven't
13 you?

14 MR HARRIS: Yes, although it's conceivable they may have some redactions in, and
15 that would be --

16 THE CHAIR: Okay.

17 MR HARRIS: Yes.

18 THE CHAIR: What you are looking for is really two things, then: (1) is the factual
19 witness statements and (2) is disclosure. Disclosure takes a number of forms. I have
20 seen the Ofcom correspondence in relation to the Ofcom decision, and so, when we
21 deal with that on Wednesday, you have got a reasonable prospect of getting
22 something on that fairly quickly.

23 As regards the other stuff, which is the disclosure that's been prepared by the parties,
24 I don't know whether Mr MacLean is going to be ready on Wednesday afternoon to
25 argue disclosure. Obviously, he's got time to sort of see what there is and what can
26 be agreed and what can't be agreed. But hopefully everyone's going to be

1 constructive. But I do think that, as a minimum, you should get very quickly the lists
2 of documents filed by the parties, as long as there is no issue with Whistl.

3 Has Whistl indicated that they have no objection to you having the list of documents?

4 Because the list of documents of Whistl in the hands of Royal Mail is subject to the
5 restrictions in part 31. So there is a limit on use for anything other than the
6 proceedings in which they have been disclosed. That includes the list itself as well as
7 the documents. However, if Whistl are content that you can have that list, I need to
8 know that.

9 MR HARRIS: Yes. We have made some progress. I will be able to give you --

10 THE CHAIR: Because I have seen the correspondence, but is that a clear indication
11 that, yes, you can at least have the list of documents?

12 MR HARRIS: So the position, as I understand it -- and it has been moving over the
13 weekend and this morning -- is that subject to the establishment of a confidentiality
14 ring order with which all parties are content, which is work in progress as we speak,
15 so good, substantive progress has already been made on that, I think it is going to
16 look somewhat like, with appropriate tweaks, the CRO that was already in place in the
17 proceedings now settled between Royal Mail and Whistl.

18 THE CHAIR: Okay. That's fair enough.

19 MR HARRIS: So Whistl broadly -- this is in the correspondence -- said subject to
20 a proper CRO with which they are happy, then, as I understand it, they would not take
21 any objection to an order for disclosure into these proceedings of the confidential
22 version of the Ofcom decision, which Ofcom has also --

23 THE CHAIR: Ofcom is happy.

24 MR HARRIS: -- obviously also said; the pleadings, which we have, save possibly for
25 some redactions; and the witness statements of fact that were served by both parties.

26 My understanding -- Mr MacLean will obviously correct me if I have misunderstood

1 this, because it has been moving, including this morning -- is that, again, subject to
2 a CRO that is ordered and/or by consent, then similarly, Royal Mail doesn't object to
3 those three types of disclosure coming, and pretty promptly. Pretty promptly.

4 THE CHAIR: Is that right, Mr MacLean?

5 MR MACLEAN: That is right, but I --

6 THE CHAIR: That's very constructive of you.

7 MR MACLEAN: But I have to say that Whistl hasn't actually been questioned about
8 the list, hasn't actually been --

9 THE CHAIR: I haven't come to that, but he hasn't dealt with that point. Let's see what
10 he's got to say.

11 MR MACLEAN: No. Whistl haven't been asked that, I think, is the answer.

12 MR HARRIS: No, that's quite right. So the draft order that I have that's in evolution in
13 front of me doesn't mention the list of documents, but given the clear indication and
14 given that we have been in recent communication and ongoing communication with
15 Whistl -- and for all I know, they are listening as we speak, somebody -- then we can
16 make that enquiry overnight.

17 THE CHAIR: Yes. We are not going to make the case management decisions today.
18 We can do that on Wednesday. But if we can line that up, if you can consult with
19 Whistl and obviously with Mr MacLean's clients about the list of documents being
20 disclosed. They obviously can't consent to Whistl's list of documents being provided
21 and going into the ring. They can consent as regards their own.

22 Mr MacLean, have you got any problem with that or not, the list of documents?

23 MR MACLEAN: Not that I am aware of.

24 THE CHAIR: No, and if there is a problem, you can tell me later.

25 MR MACLEAN: I am not aware of one at the moment, but if there is, you will hear
26 from me.

1 THE CHAIR: I certainly will, won't I? Okay.

2 So if we can get a letter from Whistl confirming what their position is in relation to their

3 list of documents.

4 MR HARRIS: Yes, sir.

5 THE CHAIR: So you will get some disclosure hopefully this month. So that deals with

6 March.

7 But then you have got the additional issue, which is: when do you envisage getting

8 disclosure of the documents disclosed in the Whistl proceedings? Won't we need to

9 deal with that at a subsequent CMC.

10 MR HARRIS: Likely, yes.

11 THE CHAIR: Yes. I think that's what I would prefer to do, because you will have the

12 list of documents of both parties, you will be able to see what the parameters are, what

13 you are looking for. So that's fine.

14 Now, you will also need to consider, in formulating your claim and proceeding it, what

15 orders for non-party disclosure you are going to go for. Because when you look at it,

16 where are the likely repositories of evidence?

17 Well, there is going to be LDC, if that's going to be an issue. Mr MacLean is going to

18 help us on whether or not it is going to be a real issue. But you are going to have to

19 get documents from LDC, and it may be that it is going to be additional documents

20 over and above what Whistl has disclosed in the current actions.

21 There may be other documents that you want from Whistl, and then you have got the

22 additional problem that it may be that there are documents held by TNT, and TNT are

23 outside the jurisdiction. So, you will need to figure out how you are going to get the

24 documents from TNT.

25 We can come back to that later, but I can see that getting all the disclosure you need

26 is going to take time, and you envisage that you are going to have disclosure from the

1 defendant by May 2026. That's what we have got in your timetable. On the other
2 hand, it may be that we are going to get disclosure in advance of that date when we
3 look at, for example -- once you have looked at those lists of documents, you might be
4 able to say, "Well, we don't need to wait until May 2026, we want it earlier", particularly
5 given the points I said at the beginning of this hearing as to how you may wish to try
6 and prove your case on loss and causation, that you would want to look at the
7 documents.

8 Because at the moment, as I said, I have looked at your proposed methodology. To
9 me, it's not tramlines, and you need to do a lot more than that to get home on damages
10 and causation, et cetera. You know that, but you have always recognised that. But
11 the sooner we can come up with a clear plan as to how you are going to prove your
12 loss and damage, the better, then we can engage, and it may be that leaving it until
13 May 2026 is rather late.

14 So I want you to be in a position to have, you know, what your best case is on proving
15 it and loss and damage, at least a proper framework, much earlier than May 2026, and
16 the question is: how do you get there?

17 MR HARRIS: Yes.

18 THE CHAIR: So I don't know whether you can put something in the timetable as to
19 when you envisage you getting different tranches of evidence and, if so, from whom.
20 But for the moment, I do think that here indicating, you know, disclosure by the
21 defendant: May 2026, doesn't seem to be enough. This needs to be more detailed.

22 Because all you have got now is you have got:

23 "March 2025 ... obtain disclosure of evidence in the Whistl Claim from the Defendant,
24 Whistl and Ofcom."

25 Then you move up to:

26 "May 2026: Disclosure by Defendant."

1 Whereas I think you need to think a lot more proactively, because I do expect to be
2 able to engage properly with exactly how you are going to put your claim, and it's only
3 fair to Mr MacLean that his clients know sooner rather than later. So that's on the
4 disclosure bit.

5 The CMC, your April 2025, all that goes, yes, because you haven't got the overlapping
6 claim.

7 Now, Mr MacLean's clients are saying, "Well, we haven't engaged with you on some
8 of these issues because (a) we don't know if you are going to get your CPO and it's
9 premature". Now, there comes a point where we just have to get engaged on these
10 issues and move forward, and I know your requests were really premised on getting
11 the material early for the purpose of you participating in the Whistl trial, which was
12 fixed for the autumn of this year. But I do think that you probably need the that sort of
13 material now, or sooner rather than later, than waiting until May 2026. So let's deal
14 with that.

15 Serving the defence in June 2025. Subject to anything that Mr MacLean may say, that
16 seems within a reasonable range. At least it's suitable for a litigation plan. It's not
17 going to bind us, but I think it's suitable for that.

18 The deadline for class members to opt out.

19 MR HARRIS: Can I give an update on the pleadings point and then --

20 THE CHAIR: Yes, yes.

21 MR HARRIS: So I am happy to say there has been some engagement between
22 Royal Mail and us in anticipation of what he hopes won't be a CPO, and that is that,
23 subject to a very minor dispute about exactly how many weeks should be allowed, it
24 is suggested that the defendant should file and serve its defence by 4.00 pm either
25 eight weeks after the CPO is made or 11 weeks. We say eight, they say 11, but I don't
26 think that's going to detain anyone too long. That's for the defence. So that would be

1 | slightly over -- well, it would need to be written in. We can produce an amended
2 | version of this.

3 | THE CHAIR: But, look, you are going to give me an updated proposed litigation
4 | timetable tomorrow.

5 | MR HARRIS: Yes.

6 | THE CHAIR: That's the one I am going to approve --

7 | MR HARRIS: Yes.

8 | THE CHAIR: -- subject to any decisions as part of case management, at the time
9 | I -- and so if you can put as much detail as you can, that's brilliant.

10 | MR HARRIS: Would you prefer I just do that overnight in writing, or I can tell you two
11 | other elements now, if it assists?

12 | THE CHAIR: Tell me the two other elements, yes.

13 | MR HARRIS: Well, it's just that then eight weeks after that, we would put in the reply,
14 | but that these would be preceded by seven days, the current -- seven or 14 days after
15 | the amended CRO is made, so the CRO that takes care of us, Whistl and Royal Mail,
16 | the disclosure of the three varieties that I named before, namely the Ofcom decision,
17 | the pleadings and the witness statements, would be provided. In other words, they
18 | would be provided well in advance of these pleadings being finished off.

19 | THE CHAIR: Yes.

20 | MR HARRIS: So that's constructive, and we will now take on board your point about
21 | the list of documents.

22 | THE CHAIR: The list of documents. Put that in as well.

23 | MR HARRIS: Yes, exactly.

24 | So there has been some engagement. I can't criticise Mr MacLean's clients on that
25 | front.

26 | THE CHAIR: Yes.

1 | Why do you need until September for your reply?

2 | MR HARRIS: Well, that may have been overtaken now. I haven't done the maths in
3 | my head. But, as I say, it would be eight weeks from the CPO or 12 for the defence
4 | from my learned friends. Those are the options that we are presenting. You may say,
5 | "No, four weeks", or whatever you may say, and then it would be another --

6 | THE CHAIR: For all these things, just put the month. Don't put the precise date.

7 | MR HARRIS: Yes.

8 | THE CHAIR: Okay. The next column on page 1034 -- sorry, Mr Rayment.

9 | MR HARRIS: I am so sorry. It was just that this has obviously been overtaken
10 | because it was created prior to the Whistl claim being settled.

11 | THE CHAIR: I know. Yes, yes.

12 | MR HARRIS: So we will update it overnight.

13 | THE CHAIR: Yes, exactly. So we delete the first entry on 1034. (Pause)

14 | It all depends on when you are going to get the material, because if you are going to
15 | get -- we are going to need to have a CMC to deal with the disclosure of the documents
16 | in the list of documents of Whistl and Royal Mail in their proceedings. You are going
17 | to need to have that sorted out.

18 | I would prefer to have a CMC relatively soon after the replies being served, because
19 | hopefully by then -- but it may be that if the parties are able to be constructive, you will
20 | get some of the disclosure before that, but obviously you will need an order for any
21 | disclosure. So if you can carry on talking.

22 | But I do think that leaving the next CMC until March 2026 is too late, and that what we
23 | should probably be looking for is a CMC in September of this year. Whether we can
24 | find a date or not, but I think we should try and find -- if there is a date that Mr MacLean
25 | can make and a date that you can make and a date that I can make and that the
26 | Tribunal can make, then we should be looking for a date in September, whatever

1 happens, because a case like this, there are always things to be done.

2 MR HARRIS: Sir, we agree.

3 THE CHAIR: Okay. So that will put a CMC in September 2025.

4 (Pause)

5 Yes, I agree, the last entries are fine. You have got to be quite general about that
6 because we can't be particularly precise, and fixing the trial date, we probably won't
7 do that until the next CMC. It may be too early to fix the trial date now, but I would like
8 to fix that in the CMC in September 2026.

9 MR HARRIS: Perhaps overnight we can just put "Trial date to be confirmed" in the
10 version we produce overnight.

11 THE CHAIR: Yes.

12 Now, this is your ideal, and it's only your litigation plan, but it may be that there are two
13 more things to talk about. One is: what is the estimate of the trial? Is it any different
14 now, given that you have got the Whistl settlement? So I would like to know what the
15 impact of the Whistl settlement is. Obviously Mr Bacon's going to deal with it when it
16 comes to the budget, because I presume you are going to be dealing with the budget,
17 Mr Bacon, because we need to see if the budget holds in the light of the fact that you
18 are not going to have this big trial in advance. If you had had that big trial in advance,
19 your trial would be shorter. So we'd like to hear you later on the impact.

20 MR BACON: Also, I would say that there is a reduction potentially in the nature of
21 what is required as a consequence of the Whistl settlement.

22 THE CHAIR: Yes, we will come to that later, but we will need to look at the budget in
23 more detail. You are going to have to take me through it, and we will discuss what the
24 impact of this is and all of that.

25 But one issue that I do want to discuss with all three of you -- because now there is
26 two on one side and there is one on the other now talking -- is: are there going to be

1 any issues that any party wants to be tried in advance of the final trial?

2 Mr Harris, do you envisage any issues that you say should be determined ahead of
3 the trial? So are we talking about a split trial or not? Because at the moment you
4 envisage it all in one go, and if that's right, how many weeks do you think it is going to
5 take?

6 MR HARRIS: Let me reflect on that and come back to you tomorrow, because as
7 I stand here, I hadn't been envisaging any kind of preliminary issues or split trial.

8 THE CHAIR: Clearly you don't, and I can see that, but Mr MacLean might, and so if
9 he is contemplating, we need to know that, because that can have an effect on the
10 timetable and it can have an effect on the budget. So if you sit down.

11 Mr MacLean, do you envisage any possible --

12 MR MACLEAN: Not as presently advised.

13 One thing I say about that is this: it's slightly premature to be thinking about preliminary
14 issues when we haven't actually filed a defence yet.

15 THE CHAIR: No, of course it is, but as we have to have a litigation plan, I need to
16 know whether --

17 MR MACLEAN: Of course. At the moment --

18 THE CHAIR: -- we need to factor in -- yes.

19 MR MACLEAN: At the moment, unless I am told otherwise, we are not contemplating
20 that, but it is possible.

21 THE CHAIR: Of course it's possible.

22 MR MACLEAN: I mean, the thought had crossed my mind when we start looking at
23 some of the issues about methodology, et cetera, et cetera.

24 THE CHAIR: Yes.

25 MR MACLEAN: I am not ruling it out, but I am not inviting you to rule it in at this stage.

26 THE CHAIR: Yes. Everything is up for grabs. All we are doing, Mr MacLean, is just

1 | looking at whether or not they have got a credible litigation plan that I can approve --

2 | MR MACLEAN: Of course.

3 | THE CHAIR: -- subject to how the case develops as it goes in. This is not going to

4 | be cast in stone, but I do want to have a document on the basis of which I may or may

5 | not grant a CPO.

6 | MR MACLEAN: Yes, I understand that.

7 | THE CHAIR: That's what I am trying to get at.

8 | MR MACLEAN: At the moment, I am not in a position to say yea or nay to the question

9 | of a preliminary issue.

10 | THE CHAIR: Okay. That's absolutely fine.

11 | Mr Harris, so subject to that, you will give us a revised version, and that deals with the

12 | timetable.

13 | Now, the next one, I suspect, is Mr Bacon. So we are now looking at the third element.

14 | The first element, we have looked at Epiq. We have got enquiries to be done with

15 | that, and if we can get a letter from Epiq as to any changes or updates they would like

16 | to have.

17 | Then we have got the proposed timetable. We have dealt with that, subject to you

18 | producing it.

19 | Now we are looking at the cost budget, and Mr Bacon's going to take us through that.

20 | MR BACON: Yes. Good afternoon, sir. Good afternoon to your colleagues.

21 | As I say, I am here to give as much assistance to the Tribunal as possible in relation

22 | to all the funding issues.

23 | MR MACLEAN: Yes.

24 | MR BACON: Because, if I may say so, the approach that the Tribunal has taken thus

25 | far today is a helpful one, going through each topic in the order that you prefer for me

26 | to respond and, if necessary, with the luxury of tomorrow to come back with further

1 | answers.

2 | THE CHAIR: It only works with experienced counsel like you three.

3 | MR BACON: Yes.

4 | THE CHAIR: Because if it was more junior people, I certainly wouldn't do it this way.

5 | MR BACON: No, it's helpful. In fact, over lunch, I think we have managed to

6 | come -- well, we will see, it depends how the Tribunal receives them, but we have

7 | already started work in seeking to answer some of the concerns that the Tribunal has.

8 | Just before I come to the main topics --

9 | THE CHAIR: Yes.

10 | MR BACON: -- just so it's on the record, obviously you have, respectively, our

11 | submissions, you have had the skeleton from my learned friend, you have had our

12 | written response, and we have got to the point where there is no formal objection to

13 | the CPO being granted on funding grounds, but there are points that have been

14 | developed in correspondence to which you have already referred which have been

15 | brought to the Tribunal's attention, and under the gatekeeper, sort of supervisory

16 | jurisdiction, I entirely accept these are matters that you wish --

17 | THE CHAIR: Yes. You have got to --

18 | MR BACON: -- to deal with them. But it's against the background, if I may say so,

19 | respectfully, subject to the Tribunal's position, I am very much of the view that they are

20 | all capable of being resolved to the satisfaction of the Tribunal, and --

21 | THE CHAIR: Well, we just have to see. Look, we've got until the end of today to deal

22 | with the non-MacLean issues, okay? The aim is, once we get to 5, that we would have

23 | dealt with everything apart from the issues being raised by Mr MacLean.

24 | MR BACON: Yes.

25 | THE CHAIR: But I must say that the points he's raised about funding are all points

26 | which we need to be satisfied with, and the approach he's taken is very sensible. You

1 know, it's not for him to say we should pull the plug because of funding. It's for us to
2 say that, and that we just need to be satisfied that the funding arrangements are fine.
3 But what we are looking at first is purely the budget, okay? We just want to make sure
4 we've got the right budget, because if the budget's not right, then everything else
5 doesn't quite fit. We really don't want to have a case that, for one reason or another,
6 that there's not enough money to take this case to trial. I don't want to have a situation
7 where the budget is unrealistic. I am not saying it should be high, I am not saying it
8 should be low; I just need to be satisfied that this is a realistic budget in the
9 circumstances. We have looked at the hourly rates, and I have already said what
10 I have said about the hourly rates, so you don't need to take me through that, but what
11 you do need to say, or consider, is: is this a budget that is realistic? Now, we know in
12 Merricks there was a budget, and we know what happened to that budget. But
13 Merricks was a very different case, and there were lots of interlocutories. There were
14 something like 34 judgments or whatever. Hopefully, this is not going to be that type
15 of case, because I don't want this to be War and Peace. This is not an unduly
16 complicated case.

17 MR BACON: No, indeed.

18 THE CHAIR: So you should be able, with your experience, to come up with a budget
19 that you think is realistic without it being a straitjacket.

20 MR BACON: Yes. Well, absolutely. I have taken instructions in respect of this, as
21 you would imagine. The legal team are confident that the budget that you have at 911,
22 I think, of the bundle does accommodate --

23 THE CHAIR: Yes, I am looking at it.

24 MR BACON: It does accommodate sufficiently the case through to trial. I mean, the
25 budget was drafted on the assumption that we would need to prove our case without
26 the benefit of the judgment in the Whistl case, without the benefit of judgment in that

1 case. So that's on the assumption that we would need to prove, in the usual way, the
2 case. The settlement has a consequence, obviously, on the budget, but it can swing
3 both ways. Mr Harris has advised and indicated to me his budget, for example, would
4 have included time in taking into account what was going on in the Whistl claim as it
5 went through its course. That cost and that expense is no longer going to be incurred,
6 and so that can be mopped up and added to, or maintained within the existing budget,
7 to cater for the additional work that might be required as a consequence.

8 So, taking all these matters into account, having spoken to the team, they are
9 confident, as matters currently stand, that it's a budget that can withstand proper
10 scrutiny going forward, on the current timetable.

11 THE CHAIR: And that, presumably, this has no allowance for distribution?

12 MR BACON: Correct. As I understand it, that's the position, yes.

13 THE CHAIR: Because one thing we are learning is that distribution can be quite
14 expensive.

15 MR BACON: It can, very much so. But that is the position; it doesn't include --

16 THE CHAIR: Because once you get to the distribution stage, then obviously there is
17 a pot of money that's available for --

18 MR BACON: Well, the Merricks case, obviously you were intimately involved in that,
19 and I am very, very familiar with the issues that occurred on that Friday. There is
20 a huge scope for potential issues to arise on distribution, which, to some extent, are
21 potentially broadly predictable, but they are not actually capable of being put into
22 a budget. It depends so much on the facts and circumstances at that point. So it
23 would be literally finger in the air to budget for that, and probably not of utility for the
24 budget.

25 THE CHAIR: And if there is a settlement, it's likely to come out of the settlement sums,
26 rather than directly out of the funders' pocket.

1 MR BACON: Indeed. Yes.

2 THE CHAIR: So you are saying that we should be satisfied that this is a realistic
3 budget?

4 MR BACON: Those are my instructions. That's the position that --

5 THE CHAIR: Have you personally been through this and satisfied yourself that this is
6 a realistic --

7 MR BACON: I have not.

8 THE CHAIR: So who has done that?

9 MR BACON: I have relied upon others who prepared this budget. I wasn't involved
10 in the process of preparing the budget. It has been prepared by the solicitor team
11 alongside counsel team, discussing with their clerks in the usual way.

12 THE CHAIR: Okay, then you had better sit down for a minute, then.

13 MR BACON: Thank you.

14 THE CHAIR: Mr Harris, I've got this budget in front of me. Have you been through
15 the budget and satisfied yourself that this is a realistic budget that is likely to be
16 sufficient to take this case to the conclusion, up to judgment, but not dealing with
17 distribution?

18 MR HARRIS: I have to refresh my memory.

19 THE CHAIR: Okay, that's fine.

20 MR HARRIS: I must have been consulted. Let me check. What is more, not only can
21 I check historically, but I can also go through it, in any event, again.

22 THE CHAIR: Okay, so if you can do that, and then see whether it's the same, taking
23 into account the fact that the Whistl proceedings against Royal Mail have settled.

24 MR HARRIS: Yes.

25 THE CHAIR: But, subject to that exercise, it does seem to me that the budget certainly
26 doesn't seem excessive to me. I can say that from the -- I can easily say that. It does

1 not seem excessive to me, at the moment, based on the information I've got.
2 Obviously that's not binding for when it comes to later on, but it does seem to be not
3 excessive. But you need to check that this is a budget that you think is realistic.

4 MR HARRIS: So can I only add, before I sit back down, that my experience on both
5 sides of the fence in these cases, whether PCR, CR, or for many sets of defendants,
6 is that budgets do evolve just in the course of things, and that in some other cases,
7 through no fault of anybody's, in particular, they evolve. Things happen. It can't
8 necessarily be foreseen. My experience to date, if it's of any assistance, has been
9 that, provided the PCR/CR is fully upfront about that, informs the Tribunal what is going
10 on so that appropriate steps can be taken at that stage, then that is the way in which
11 some other actions have proceeded.

12 What is difficult, certainly at least in my experience, for what it's worth, is that if there
13 is a big change in the budget, for whatever reason, and then that's not made clear,
14 including to the Tribunal, fairly promptly -- obviously, the defendants have a degree of
15 interest, not complete interest, but a degree of interest, that they
16 (inaudible - microphone off) as appropriate. What I would certainly be happy to do is
17 make sure that the PCR/CR keep the Tribunal informed. But I will do the other two
18 things as well; check what I did (inaudible - microphone off).

19 THE CHAIR: Yes. So what I think that we should deal with, at least for now, is that at
20 the next CMC, I will want to see where we are on the budget, how much has been
21 spent, how much has been drawn down under the facility, so we can keep an eye on
22 that. So Mr Rayment is doing the draft order, but when he does the draft order, if he
23 can have a provision in there that says, you know, at the next CMC, a further budget
24 will be submitted, and that will indicate the extent to which the budget has changed or
25 not, and it will confirm the amount that's been drawn down from the funder, and how
26 much fees is still outstanding and for how long. So that means we are keeping an eye

1 on costs, we know where we are. Because I am thinking a bit further forward with
2 issues I am going to talk to with Mr Bacon, which is, you know, do we need any, let's
3 say, further protections, given the points that have been made about the funder? It
4 may not be necessary to have funds drawn down. If we are getting the information,
5 we can see it's working fine, then there is going to be less of a concern. But if you can
6 think about the wording for the order, that would be very helpful.

7 MR HARRIS: Yes. Can I give you an illustrative example, I hope that helps? In
8 another case that I am involved in, albeit on the other side of the fence, there have
9 been evolutions, perfectly proper evolutions in the nature of the expert evidence, and
10 because it has evolved, it has had extensive implications, the budget has had to move,
11 and the Tribunal has to be kept informed. This is a case in which it is at least
12 conceivable, with the nature of the expert evidence, because, as you said a moment
13 ago, it's not in fixed tramlines as at today, but it's not all one-way traffic. It's
14 conceivable that expense may go down.

15 THE CHAIR: Yes, but what I would like to have is details of any agreements on the
16 budget at the next CMC. So if, for example, the budget has been exceeded, has the
17 funder agreed to that excess and a revised budget in the light of that? We just want
18 to keep an eye on it.

19 MR BACON: If I may say so, sir, that is a very good idea. I think a lot of the work,
20 respectfully, on behalf of all of us in respect of putting in steps now, which can, at the
21 end of the case, be looked back on, and reassure the Tribunal that the class
22 representative has done everything he or she is able to do, or it has been able to do,
23 will assist, I think, on distribution in these cases, where there has been at least some
24 approval of steps, as the case has progressed.

25 There is always the option -- we discussed this in the early days of Merricks in the first
26 instance hearings with Mr Justice Roth, the chair of the Tribunal -- that it could draw

1 on the experience of the Commercial Court in budgeting big cases, as it is obviously
2 familiar, but that's a fairly tiresome exercise and can be expensive.

3 THE CHAIR: It costs money.

4 MR BACON: It costs -- indeed, it is expensive. The Tribunal in this jurisdiction has
5 landed, I would submit, on a fair middle line where costs budgets are prepared. They
6 have a form of approval at the stage of the grant and the CPO, and with your additional
7 bells and whistles, if I may say so, are reviewed sensibly at appropriate stages, so that
8 track can be kept of the expenses.

9 THE CHAIR: I don't want, you know, hours and hours spent at the CMC on cost
10 budgets. I know other people like doing that, but it's not --

11 MR BACON: I am sure that's welcome news to us.

12 THE CHAIR: I know you make a fortune out of doing that, but you know, what I would
13 like is just the basic data; proper cost budgets, where we are, and we can read that to
14 ourselves. Then, if we've got any queries, then we can hear from you and sort of iron
15 out those issues. But I am sure there's nothing that's too fundamental on that.

16 On the budget, under the funding arrangements, what happens if the budget's going
17 to be exceeded? As I understand it, you go back to the funder and say, look, we need
18 more money, and then the funder has the option of providing that or not?

19 MR BACON: Correct. That's essentially a summary of the position.

20 THE CHAIR: Yes.

21 MR BACON: If there is a dispute about that, then it can be resolved within the confines
22 of the LFA arrangement.

23 THE CHAIR: There is a KC clause, you mean?

24 MR BACON: I need to check whether it extends to (inaudible) of a budget. I will do
25 that in a moment.

26 THE CHAIR: Yes.

1 MR BACON: But there is there isn't any reason why it couldn't and shouldn't. But,
2 obviously, one would expect, upon being presented with a reasonable outline as to the
3 reasons for the increase, together with the Tribunal's own approval of additional
4 budgeting requirements, that the funder would provide them. I have no reason to
5 believe that Asertis wouldn't.

6 THE CHAIR: Yes, okay. So, look, on the budget, if overnight someone could do the
7 wording for what is required for budgeting at the next CMC, and what is going to be
8 provided, that'd be good, and we can play around with that tomorrow morning.

9 Before we look at the actual litigation funding agreement, the bills under the LFA that
10 are being delivered in the course of the proceedings.

11 MR BACON: Yes.

12 THE CHAIR: Are they going to be interim bills or final bills? Because I don't need to
13 explain to you the significance of that.

14 MR BACON: No, I understand the point.

15 I think the answer -- I suspect the position is that they are going to be, as a matter of
16 law, interim, not statutory bills, because the nature of the solicitors' invoices are they
17 contain a conditional element, and there is authority, a High Court authority, that has
18 made it clear that a bill rendered in the course of a conditional fee agreement
19 arrangement isn't, even if it's said to be under the terms of the agreement a final
20 statutory interim bill, it isn't, because it's not final by reason of the fact there is still an
21 element --

22 THE CHAIR: There is the CFA bit.

23 MR BACON: Quite.

24 In fairness to those instructing me, this isn't something that they and I have discussed,
25 but I am assisting the Tribunal. That is the current state of the law, and it does, as the
26 Tribunal fully appreciates, make a difference, because if at the end of the case there

1 has been a delivery of simply what are effectively our request for payment on account,
2 albeit they are treated as invoices, the class representative's ability to challenge them
3 is greater because there won't be time limits that are running in the course of the
4 proceedings, whereas if they are interim statute bills, the statutory remedies available
5 to the class representative are very much reduced.

6 THE CHAIR: You can see what the concern is.

7 MR BACON: Yes.

8 THE CHAIR: Let's say you have got a settlement sum and the cake isn't that huge,
9 okay?

10 MR BACON: Yes.

11 THE CHAIR: Then you have got to see what is going to be fair between the class
12 members and the funders and the other stakeholders.

13 MR BACON: Yes.

14 THE CHAIR: You don't want anyone in particular holding the baby.

15 Now, if fees have been unreasonably incurred, then certain consequences should
16 follow, and that shouldn't come out of a cake for class members if they have been
17 unreasonably incurred.

18 MR BACON: Yes.

19 THE CHAIR: But if there is no mechanism for resolving that between the parties, you
20 don't want to have a situation where, somehow, the funder is left holding the baby and
21 told, "Well, look, okay, you are trying to get your return and get your money back, but
22 why should the class members have taken out of the pie unreasonable costs?" So if
23 you can have a situation whereby it is agreed between the funders and the lawyers
24 that the bills will be interim bills, then it might be something that is, you know --

25 MR BACON: Well, it might or might not.

26 THE CHAIR: It may or may not have an attraction.

1 Obviously, you are more experienced than anyone on this. You are going to have to
2 figure out what is best --

3 MR BACON: Yes.

4 THE CHAIR: -- knowing what the different moving parts can be.

5 MR BACON: So I am familiar with the issues and a lot of -- well, it may be a lot of this
6 is going to be resolved in three or four weeks' time with the Merricks judgment. But
7 the fact of the nature of the bills is an element, an important element, but it's not the
8 critical one, because you can have a right to assessment, but it may be meaningless
9 in circumstances where the clients have actually approved the fees as they have gone
10 along. Broadly, the law says that if a client approves costs on a solicitor-and-client
11 basis expressly or implicitly, then they are presumed to be reasonable. So there is
12 a presumption against them being unreasonable. Clients have to take a very careful
13 view about whether or not they are going to then challenge them in those
14 circumstances because of the cost implications of doing so, and that the costs of the
15 exercise will rest on them, or here a class representative, if they don't recover
16 a 20 per cent deduction. So the status of the invoice is a factor.

17 To my mind, respectfully, the real key to this, I think, is ensuring that there is
18 agreement, genuine objective agreement, as to the fees that are being incurred, so
19 that when the Tribunal comes to the end of the case, it can say with some -- because
20 it's obviously required to take into account the legal costs and expenses, but it can in
21 so doing say, "Well, I take them into account and I take into account the fact that they
22 were, you know, carefully considered by the funder before paying them, they were
23 carefully considered by the class representative and approved", and on that basis then
24 approves them as being reasonable, so you don't have the complication or the
25 potential hypothesis of them being unreasonably incurred at the end, which is not --

26 THE CHAIR: The problem you have got, though, is that whatever happens, everyone

1 recognises that when it comes to costs, fees and disbursements, it's all subject to the
2 authority of the Tribunal. Obviously, we have got to deal with it following principles
3 and stuff like that, but at the end of the day, no one should assume, just because you
4 have agreed something, in to say that binds the class members in the sense that we
5 are bound to sort of ratify it at the end of the day.

6 MR BACON: No. My point was made in the context of the legal remedies that are
7 available.

8 THE CHAIR: The legal remedies, yes.

9 MR BACON: I accept that the approach the Tribunal is going to take on distribution --

10 THE CHAIR: Yes.

11 MR BACON: -- at the moment is fairly open-textured, and we will see how the
12 jurisprudence develops. But I can see the point that the Tribunal is making, that
13 whatever the legal rights of the parties under the agreements, the Tribunal has
14 indicated it may well take the view that it can effectively do what it wants, as long as
15 it's in the interests and priorities of the class, but respecting the interests of all the
16 parties. It is a bit of a blancmange, but I do see where the Tribunal is heading.

17 All I was addressing was to deal with the statutory rights that the class representative
18 may have. The status of the invoice is a factor, but I am not entirely convinced it's the
19 answer. Really the question is whether they are approved or not. If they are, then it
20 is going to present difficulties for the class representative to challenge fees, whether
21 or not they are statute bills.

22 THE CHAIR: But what you are trying to do, though, is to minimise that risk --

23 MR BACON: Indeed.

24 THE CHAIR: -- by having a budget that we can see, that is transparent.

25 MR BACON: Budgets, approvals, so that when the Tribunal comes to distribution, it
26 can say, "Well, the only issue for us now is how we distribute".

1 THE CHAIR: Yes, but what Mr Aaronson needs to understand is that when the bills
2 come in, he needs to go through them carefully --

3 MR BACON: Yes, he does.

4 THE CHAIR: -- to satisfy himself that they are reasonable in the circumstances --

5 MR BACON: Yes.

6 THE CHAIR: -- and that if he's not, then he needs to say it. Presumably, within that,
7 you will have the input of the funders as well, because --

8 MR BACON: Well, quite.

9 THE CHAIR: -- at the end of the day, they are paying for it.

10 But, you know, there is that tension that if you are going to seek, let's say, a return
11 based on the amount of fees that you actually pay for, you may not, on one view, have
12 the greatest incentive to keep it down.

13 On the other hand, these cases are so inherently uncertain, you can never be sure
14 that you are going to win or lose and, if so, what the results are going to be.

15 MR BACON: Quite. I think that is all part of the point, with respect.

16 Also, in relation to the first point, it's only as a consequence of PACCAR that one sees
17 multiple arrangements. I mean, under the simpler approach to the litigation funding
18 market, as you know full well, that had been adopted, it was a percentage, and that's
19 not then dependent on --

20 THE CHAIR: I know.

21 MR BACON: So there is a --

22 THE CHAIR: I know. That's the problem, yes.

23 MR BACON: But the LFA at clause 8.5 makes it clear that the funder is to review the
24 invoices as to whether they are reasonable or not.

25 THE CHAIR: That is 8.51, isn't it?

26 MR BACON: Indeed. That's an important check. I know what the Tribunal has just

1 | said about the fact there is multiple, but it's an unrealistic, if I may say so, concern to
2 | overlay that clause, because these funders, as you know, there have been big cases
3 | that have failed, and it's in the interests of the funders to ensure that they only fund
4 | reasonable costs and not unreasonable costs.

5 | THE CHAIR: Yes, okay.

6 | MR BACON: But that's the driving force.

7 | THE CHAIR: Look, we have got --

8 | MR BACON: So Mr Aaronson has that understanding, and he will, in a sense through
9 | me, seek to ensure that he does consider the invoices.

10 | I mean, he's not an expert in legal costs, and one of the problems, if I may say so, with
11 | the system, the regime, is that there are requirements imposed on class
12 | representatives when it's not their skill or discipline to be met.

13 | THE CHAIR: When it comes --

14 | MR BACON: So they have a panel.

15 | THE CHAIR: Yes, but the panel he's got, the consultative panel, those two people,
16 | are not going to be the ones who are going to be expert in costs.

17 | MR BACON: No.

18 | THE CHAIR: So who is going to be advising Mr Aaronson, when the bills start coming
19 | in and when you have got the budget, to sit down with him and say, "Look, let's look
20 | at this"?

21 | MR BACON: Well, this was my rhetorical point that I was seeking to develop.

22 | Now, he has appointed an independent KC, a cost specialist -- obviously not me; I am
23 | representing the class and him -- he could call upon that individual. But he could
24 | potentially appoint a cost lawyer or somebody to help him look at them. These are
25 | matters that I float with the Tribunal.

26 | Obviously, there is expense to all of this, which one has to be acutely aware of. I don't

1 think he needs, I wouldn't have thought, KC advice at this level.

2 THE CHAIR: He doesn't.

3 MR BACON: But somebody with some cost experience that he could call upon, I could
4 see the force of, but it would have to be built into the budget.

5 I am sure if any of us were a class representative, any assistance of that kind would
6 probably be welcome because, as you say, it relieves the tension at the end. It assists
7 the Tribunal to know that the costs have been incurred, not only obviously by
8 responsible legal teams, but they have also been reviewed by people that know what
9 they are doing. We can certainly go think about that and whether we can build in
10 some --

11 THE CHAIR: Can you think about it overnight --

12 MR BACON: -- system --

13 THE CHAIR: -- and put it in the letter, because it's the only residual question on the
14 costs. We are waiting for Mr Harris to give his confirmation about the budget, that he's
15 reviewed it and he's happy with it.

16 MR BACON: Yes.

17 THE CHAIR: So that can come hopefully overnight.

18 Your bit, which is on the costs, I am satisfied that at the moment you have got two,
19 let's say, control mechanisms over and above the budget itself, which is clearly very
20 important.

21 MR BACON: Yes.

22 THE CHAIR: Because I have already said, I think at the moment the rates seem
23 reasonable. You have got Mr Aaronson and you have got the funder.

24 The funders are clearly very sophisticated people, and they can have their own input.

25 MR BACON: Yes.

26 THE CHAIR: But I am keen that Mr Aaronson does have someone who has got

1 nothing to do with the solicitors and the funders helping him on the costs issues,
2 because he might not know from Mr Bacon whether this is a reasonable amount for
3 a particular legal job, and people can debate about any fee.
4 So if you can think of something and a mechanism whereby he does have someone
5 to help him on approving the costs, it makes everything a lot more safe for everyone --
6 MR BACON: Yes.
7 THE CHAIR: -- that we can say we have got that second limb.
8 We are now looking at -- so having done that, within the funding agreements, can you
9 show me the clause that deals with settlements? Because what I want to do is to be
10 satisfied -- and control the litigation -- that under the terms of the amended or revised
11 LFA, it is Mr Aaronson who has conducted the proceedings and all the decisions.
12 Of course, the funders have got a financial interest, and they will want to have some
13 input, but I do need to be satisfied that, under the LFA, it is his decision.
14 So if, for example, he decides it's in the best interests of the members to settle on
15 particular terms, he can settle on particular terms. Obviously, you may have a KC
16 clause to try and resolve disputes, but at the end of the day, I need to see that,
17 ultimately, it's his decision, even if the funders are not happy with it.
18 MR BACON: So it's --
19 THE CHAIR: Let's have a look at that.
20 MR BACON: Yes, indeed. It's dealt with, sir -- it starts at clause 10 --
21 THE CHAIR: Well --
22 MR BACON: -- generally.
23 THE CHAIR: It is tab 23, isn't it?
24 MR BACON: Yes. I am just working from the electronic bundle.
25 THE CHAIR: I have got tab 23, yes.
26 MR BACON: 119. Yes, tab 23.

1 THE CHAIR: Yes. Well, mine is 1039 at the bottom, but just give me the clause
2 number and then we will look at it.

3 MR BACON: Clause 10.

4 Yes, I think you are looking at the same LFA, but it's attached to a letter.

5 THE CHAIR: Yes, I have got it.

6 MR BACON: That's fine. Clause 10 --

7 THE CHAIR: Yes. Yes.

8 MR BACON: -- is "Settlement (including Reasonable Offers)", and there are specific
9 provisions in relation to this topic, as you would imagine.

10 So at clause 10.1, the claimant -- well, shall I suggest that the Tribunal just reads
11 through 10.1 --

12 THE CHAIR: Yes.

13 MR BACON: -- down to including the disputes resolution point, which is 10.7.

14 THE CHAIR: Yes, let me read it.

15 MR BACON: Through to ... (Pause)

16 THE CHAIR: Yes.

17 MR BACON: So it's an independent KC.

18 THE CHAIR: I am just looking for a provision that makes it clear that any decision is
19 a matter for the class representative.

20 MR BACON: My understanding of it is that it's the independent KC determination
21 which dictates the outcome, but that's a form of settlement approval, so to speak, that
22 has been approved by the Tribunal.

23 There have been a couple of lines of authorities at first instance where tribunals have
24 in some cases said the ultimate decision needs to rest entirely with the class
25 representative, but other lines of authority say: well, what is wrong with having
26 independent KC advice?

1 THE CHAIR: No, no, if you have got an independent KC, that's enough of a control
2 mechanism.

3 MR BACON: That ought to be.

4 THE CHAIR: Yes.

5 MR BACON: Yes.

6 THE CHAIR: On 10.4 -- I would like to make it clear that on 10.4 -- let me read it:

7 "If a Defendant proposes a Settlement, the Claimant must request that the Law Firm
8 provides the Claimant with an opinion on the reasonableness of that Settlement unless
9 the Law Firm is satisfied that the proposed Settlement is wholly unreasonable."

10 I would expect, and I am sure my colleagues would expect, that if there is going to be
11 a settlement that is accepted, there is a written opinion setting out the pros and cons
12 and the rationale for accepting that settlement on the terms.

13 I don't know whether that is something that needs to be put in writing, but I would hope
14 that's what will happen, and it may be that if the funder is listening, then the funder and
15 the class representative may want to have a side letter or something that deals with
16 that eventuality, because I am uncomfortable in having a situation whereby a decision
17 of this importance is not made on the basis of the absence of a proper memo going
18 through all the pros and cons, because --

19 MR BACON: Well, I am sure nobody would disagree with that and I suspect the point
20 is --

21 THE CHAIR: No, you are wrong about that. People may disagree. They disagreed
22 about that a couple of weeks ago. I am saying that if I am going to approve this CPO,
23 I would want to have something that deals with what I have just said in writing between
24 the funder and the class representative. If it's just by way of an exchange of letters,
25 then I am satisfied with that.

26 So you have got until Wednesday to cover that, unless you are going to object.

1 MR BACON: Can I just be clear on -- it may be my -- so just be clear on what -- so, of
2 course, the -- well, I say "of course" --

3 THE CHAIR: In relation to clause 10.4 --

4 MR BACON: Yes.

5 THE CHAIR: -- what would be ideal is to have a letter between the class
6 representative and the funder --

7 MR BACON: Yes.

8 THE CHAIR: -- that, in relation to 10.4, it is understood that, in the event that he
9 proposes to accept a settlement, he will obtain a written opinion on the merits of the
10 settlement, setting out the pros and cons and the reasons why particular provisions
11 have been covered.

12 You will get it on the transcript, but something along that way, then I would be more
13 comfortable with what we have than what is on there now.

14 MR BACON: Very good. Yes.

15 THE CHAIR: Okay. So that deals with 10.4.

16 We are still waiting about who found whom and all that sort of stuff, but that's going
17 to --

18 MR BACON: Just on that if I may, sir, 10.5, it does impose -- I mean, it's implicit that
19 there would be an advice, but we take --

20 THE CHAIR: No, but I want written advice. It's a written advice so I can have a written
21 trail of the pros and cons.

22 MR BACON: Written advice. I am with you. I understand. Yes. Thank you.

23 THE CHAIR: Okay.

24 The next thing is to look at if you can explain -- and I don't know whether this is
25 confidential -- about the return, let's say, for the funder.

26 So clearly you have got one element, which is basically simply getting your investment

1 back, money back. Over and above that, show me the clauses which I can clearly
2 understand --

3 MR BACON: Yes.

4 THE CHAIR: -- what the funder is going to get, because I am not planning to say this
5 is fine or not fine, because that's going to be the issue at the end of the day.

6 MR BACON: No, I understand.

7 THE CHAIR: I need to know what it is --

8 MR BACON: Of course.

9 THE CHAIR: -- and I do need to have the sort of scenarios which will explain,
10 depending on this level of recovery, what is going to go to who. You know, so you will
11 say: well, you have got the lawyers' cost, but there is going to be an uplift for the
12 solicitors, and looking at the budget, it is going to be roughly X if we get to this stage,
13 or whatever. Then on the funders, you are going to say: well, the funders are going to
14 get their rate of return, and how is that calculated, and what the figures are likely to
15 be, depending on different scenarios.

16 MR BACON: Just so you know -- well, I am sure you do, having helpfully read into the
17 correspondence -- certainly I think it's my experience that this particular class
18 representative has availed himself of a forensic accountant to assist in the operation
19 of the LFA, to his credit, if I may say so.

20 THE CHAIR: Yes, yes.

21 MR BACON: We have referred to that in correspondence. It is privileged, but it's
22 important that I make that point; that this isn't a class representative who simply, you
23 know, signed an agreement or agrees to sign proposals without thinking about their
24 ramifications very seriously.

25 So far as an answer to your two questions --

26 THE CHAIR: Sorry, what is the name of the person advising him?

1 MR BACON: I don't have it to hand. I can give you it in a second.

2 THE CHAIR: What is the profession of the person?

3 MR BACON: A forensic accountant.

4 THE CHAIR: He can tell you who it is.

5 MR BACON: Forensic Risk, they are called. I can get the name of the individual.

6 I have seen the product of some of that, but, as I say, it's privileged.

7 THE CHAIR: Yes. If you get me the CV of the chap who has done it.

8 MR BACON: Yes.

9 THE CHAIR: Yes. So get the Forensic Risk name (overspeaking) --

10 MR BACON: But I should also say, if I may say so, sir, that the class representative

11 also had the benefit of a senior KC who specialises in funding, in addition, who has

12 looked at the amended agreement that is put before the Tribunal. As a consequence

13 of that, the class representative is satisfied that it's a fair and reasonable agreement.

14 THE CHAIR: Who is the KC? That can't be privileged.

15 MR BACON: That's not privileged, is it? Mr Williams KC.

16 THE CHAIR: Yes, okay.

17 MR BACON: Benjamin Williams KC.

18 As you already observed earlier this morning, sir, the original terms of the funding

19 agreement have been quite substantially changed for the benefit of the class.

20 THE CHAIR: Yes.

21 MR BACON: A point taken against me, but you have already indicated your thinking

22 on that, and that's to reflect the developments in the jurisprudence in what is

23 a relatively short period.

24 THE CHAIR: You would be damned whichever you do --

25 MR BACON: Indeed.

26 THE CHAIR: -- because they will say it's clearly deficient because you have changed

1 it, and then if you don't change it, they will say it's clearly deficient because you haven't
2 taken account of Riefa.

3 MR BACON: Yes.

4 THE CHAIR: But, at the end of the day, we are where we are, and the correspondence
5 from Mr MacLean's side was really sensible and measured. I didn't get the impression
6 from the correspondence that they are taking a Luddite approach; they are just being
7 realistic and asking some fairly basic questions. So there are no points either way,
8 you know.

9 MR BACON: As a consequence of that, we have got the proposal before the Tribunal,
10 in terms of the returns.

11 So the LFA has a key term, schedule 1.

12 THE CHAIR: Yes, I looked at that. That's at page 1079, and it's page -- is it 34?

13 MR BACON: Yes. I am working from the electronic bundle, which I think is 1132,
14 but --

15 THE CHAIR: And that's schedule 1.

16 MR BACON: Yes. Page 1079 --

17 THE CHAIR: Yes, I have got that open.

18 MR BACON: -- is another --

19 THE CHAIR: That deals with the success fee.

20 MR BACON: The success fee so-called, the funder's return. As you say, the drawn
21 funds are to be repaid, which nobody would fairly dispute, plus a multiplier, and the
22 multiplier is comprised of two elements: a priority multiplier and a balancing multiplier.
23 Effectively, it's a multiplier, but split into two, as I see it. They are specified in the
24 boxed schedule: a priority multiplier of 1.5 times the funding, and a balancing multiplier
25 of 0.5 on top for the first 12 months. So two times funding.

26 Then there is a small, I would submit -- "modest" may be a better word -- increase in

1 the funding returns of 0.1875 per every quarter, capped at 5.75 overall, which I would
2 submit is the key point here for the Tribunal. Obviously, as you indicated, this isn't
3 a place where we can sort of assess, as it were.

4 THE CHAIR: Yes.

5 MR BACON: But it gives you a sense of what is likely to happen. Something less
6 than 5.75 per cent if it settles before --

7 THE CHAIR: Well, 5.75 multiplier.

8 MR BACON: 5.75 multiplier, sorry, my apologies.

9 THE CHAIR: So if the costs -- and the multiplier, does that go on the figure prior to
10 VAT? How does VAT fit in on all of this?

11 MR BACON: It's the drawn funds --

12 THE CHAIR: Yes.

13 MR BACON: -- plus the multipliers, and --

14 THE CHAIR: Will there be VAT on top of that?

15 MR BACON: There will be VAT on top, because the budget, I think, is exclusive of
16 VAT.

17 THE CHAIR: Correct, the budget --

18 MR BACON: I need to check the VAT position, actually.

19 Yes, the budget does include VAT. Right.

20 THE CHAIR: Say that again?

21 MR BACON: The budget does include VAT, the overall budget. Apparently there is
22 a net figure and a gross figure.

23 THE CHAIR: Yes, we have got both.

24 MR BACON: Yes.

25 So far as --

26 THE CHAIR: What you are saying is the multiplier is going to apply on the

1 8.374 million.

2 MR BACON: It's the drawn funds.

3 THE CHAIR: Assuming that you have gone to trial and you spent 8.74 million, the
4 maximum they can get is a multiplier of 5.75.

5 MR BACON: Correct, yes.

6 THE CHAIR: But what you are going to have to do is -- this is why we have done it
7 the way we have done it. We look at the timetable.

8 MR BACON: Yes, and I --

9 THE CHAIR: You are going to -- yes, so if you can come up with some scenarios.

10 MR BACON: We will do that. We have already started -- well, over lunch I was told
11 that work has already been engaged to try and produce for the Tribunal some
12 scenarios.

13 THE CHAIR: Exactly.

14 MR BACON: They are very speculative, but there will be points in the course of the
15 proceedings where you will see what would be the funding charges if X amount was
16 spent at that point in time compared to the end or the middle.

17 THE CHAIR: Exactly. So we will want to see -- let's say you settle halfway through or
18 a quarter of the way through or three-quarters of the way through, or let's say you get
19 to judgment, and so we can just -- if we can have maybe three or four points in time
20 as to -- you know, so you will know roughly how much hopefully you spent by that
21 stage, what is the figure if you settle then, and then the next date, what happens if you
22 settle then, and the next is -- the final date will be the anticipated date of trial, which,
23 you know, on one view, may not be until 2028.

24 MR BACON: 2028.

25 THE CHAIR: But we don't want it too far down the line in 2028, so we probably want
26 it in the first half of 2028, depending on people's diaries, because I am reluctant to

1 have a trial that both silks can't make, and I know both silks are quite busy and it may
2 be difficult to find a date when they are both free.

3 But when the timetable comes back, we are going to have an estimate in there for the
4 length of the trial, and counsel will need at some stage to sort of pencil in -- indicate
5 when they think they can do a trial of that length, albeit we probably won't physically
6 fix the trial date until the September CMC. But we can always pencil something in if
7 we can find a window that both Mr Harris and Mr MacLean can make.

8 Okay.

9 MR BACON: May I just turn my back for one moment just to answer --

10 THE CHAIR: Yes, yes. (Pause)

11 MR BACON: Yes, sir. That's my understanding. The multiplier is applied to whatever
12 is effectively funded by the funder. They pay the invoices. If they include VAT, they
13 include that sum, and that is the subject of what is then multiplied.

14 Drawn funds -- I was just looking, and the definition of drawn funds on page 5 of the
15 LFA makes that clear: it's the amount of the claim funding which has been used to pay
16 invoices.

17 THE CHAIR: Yes.

18 MR BACON: Sometimes you see these agreements where the multiple is applied to
19 the committed capital as opposed to the drawn funds. This is an example of a drawn
20 funds case, and so it might be said with some force more preferable to the Tribunal,
21 and I see one of your colleagues --

22 THE CHAIR: It depends on what the gap --

23 MR BACON: It depends on the gap, but --

24 THE CHAIR: How prompt they pay them.

25 MR BACON: But I hope that's helpful.

26 We will do what we can in terms of modelling for the Tribunal.

1 THE CHAIR: Yes. So we want some modelling. Okay.

2 Yes, we will have a break now. I am conscious that we are already at 3.30. I am

3 afraid the only other issues relate to what you are dealing with today. Your issues are

4 the last issues.

5 MR BACON: Yes, indeed.

6 THE CHAIR: Mr MacLean, can you think about whether or not you are happy with the

7 terms of the ATE and that there are no exclusions that leave you holding the baby if

8 you win? Because that's always a problem sometimes, that --

9 MR MACLEAN: I may not be able to assist you on that this afternoon.

10 THE CHAIR: I know, but you need to check, because I don't want to have a situation

11 whereby something goes wrong and then you find the ATE is not effective.

12 MR MACLEAN: Yes.

13 THE CHAIR: If you can do what you can to satisfy yourself whether or not you have

14 got any concerns about the three insurers, in which case we may need to look at it.

15 We know that the other side are going to give us the ratings of the three companies,

16 and you may be satisfied with that. Let's just see what happens there.

17 MR BACON: They are A-rated. We checked over lunch. I can give you that

18 information now.

19 THE CHAIR: Yes. So they are A-rated?

20 MR BACON: Yes.

21 THE CHAIR: By who?

22 MR BACON: So Arcadian Risk Capital on behalf of --

23 THE CHAIR: Well, do it later.

24 MR BACON: Yes.

25 THE CHAIR: We can do it after the break. I want to know which rating agency.

26 MR BACON: Yes.

1 THE CHAIR: Okay. We will rise for ten minutes.
2 Thank you.
3 (3.27 pm)
4 THE CHAIR: Mr Bacon, subject to seeing the table --
5 MR BACON: Yes.
6 THE CHAIR: -- the different scenarios, I think we have dealt with that part. We now
7 need to deal with the position of the funder itself, the financial position of the funder.
8 I have seen the correspondence --
9 MR BACON: Yes.
10 THE CHAIR: -- where concerns have been raised by BCLP on behalf of the proposed
11 defendant. We have looked at those concerns, and certainly the concerns they raise
12 first time round seem to all of us to be fairly legitimate. We may not agree with all the
13 points, but there were concerns which were clearly appropriate.
14 But your clients have reacted to the Riefa decision by having an amended LFA, and
15 you say that your client took advice from Forensic Risks and from
16 Benjamin Williams KC --
17 MR BACON: Correct.
18 THE CHAIR: -- and satisfied himself that those amended terms were appropriate, and
19 we can see, subject to looking at the scenarios, that the LFA is, in itself, an appropriate
20 one in the facts of the case, subject to whatever happens on distribution, where all
21 bets are off, and you understand that, at the end of the day, what is success can have
22 a number of scenarios, as explained in the decision earlier on in the year, where
23 merely because you have got success for the purpose of the LFA doesn't mean the
24 proceedings overall have been a success.
25 MR BACON: Yes.
26 THE CHAIR: You have a range of different outcomes. You can have an outcome

1 | where you win hands down, with lots of money to share, and where you may find that
2 | the Tribunal is fairly relaxed. You can have an outcome where you lose completely,
3 | in which case the answer is clear, the fund is always --
4 | MR BACON: A slightly easier one, that one.
5 | THE CHAIR: Yes, and you have an outcome whereby it's not a real success in real
6 | terms, and that probably is the most difficult one to deal with.
7 | MR BACON: It is.
8 | THE CHAIR: But we are all developing this, and I don't think we are going to find that
9 | there is one answer that fits every scenario. It is going to be very fact-specific.
10 | MR BACON: No, I think that must be right.
11 | THE CHAIR: But I am keen to emphasise, as we have already done in previous
12 | decisions, that we understand the importance of funders and that they do need to
13 | make a rate of return, and that without them, these proceedings cannot really go very
14 | far.
15 | MR BACON: Yes.
16 | THE CHAIR: But at the same time, we don't want to have a scenario whereby
17 | proceedings are brought almost primarily for the benefit of stakeholders and not class
18 | members. So I think everyone understands where --
19 | MR BACON: Certainly on our side, that's absolutely --
20 | THE CHAIR: -- the parameters are.
21 | But let's look at the correspondence that's been raised.
22 | MR BACON: Yes. I think the key letter is probably our response in January 2025,
23 | which, sir, you will find at page 1421, where we deal with --
24 | THE CHAIR: Yes, the one you deal with the --
25 | MR BACON: -- the case --
26 | THE CHAIR: -- (overspeaking) financials.

1 MR BACON: That's right.

2 THE CHAIR: Yes, let's look at that one. Let me just make sure that there is nothing
3 else I wanted to discuss prior to that.

4 MR BACON: You asked about the rating.

5 THE CHAIR: No, let me just check. One second. (Pause)

6 So let's look at tab 48 first, and we can see there we have got the Riefa points, if you
7 see what I mean, and I have already indicated -- and I don't think Mr MacLean is
8 pushing it -- that this is not a Riefa situation in relation to Mr Aaronson. If I have got
9 questions, he will be asked directly or through Mr Harris, and so he's not going to be
10 cross-examined, but he does need to be, insofar as he can overnight, working with
11 Mr Harris with the answers that we have raised, because if it's not answered in writing
12 by tomorrow morning, he's going to have to give an explanation himself. So let's try
13 and encourage him to do that.

14 So I don't think there is -- it's basically -- on 48, I don't think we need to deal with
15 anything further on that.

16 As regards the confidentiality, which is the point at tab 49 --

17 MR BACON: Yes, that's fallen away, as I understand it. So just to be clear
18 (inaudible) -- well, I hope --

19 THE CHAIR: No, no, it may be fallen away between you and him. I want to know
20 what the position is of confidentiality of the terms of the LFA --

21 MR BACON: Yes.

22 THE CHAIR: -- vis-a-vis class members.

23 MR BACON: So the position is that all class members have access to the LFA.

24 THE CHAIR: In full terms, no blanking out?

25 MR BACON: They have to ask for both. So currently on the website, as I understand
26 it -- although I haven't seen myself -- I am told that there is a space on the website for

1 the class representative to see the litigation funding agreement. That generates
2 a request -- it requires a request from the particular class member, none of whom have
3 yet sought, but that's just by the way, to see the agreement. The agreement will be
4 provided if they want to see it.

5 If they want to see the confidential version, likewise, that as I understand it can be
6 provided, but ... (Pause)

7 THE CHAIR: Mr MacLean, is there anything that you would like to say?

8 MR MACLEAN: I will let Mr Bacon --

9 MR BACON: So they can ask to see the redacted version that is currently in the
10 bundle. At the moment, they are not permitted to -- or there isn't a landing point,
11 a decision, on what should happen if an individual class member wishes to see the
12 confidential version. That's because it does contain, by necessary implication,
13 confidential information, and the Tribunal made an order to that effect, as doubtless
14 you recall.

15 So they will get to see everything except some -- as you know, the redacted elements
16 relate to the success fee elements of the deferred fees, how much of the deferred fees
17 for solicitors, which, pursuant to your order, do remain confidential; the total cost of the
18 insurance premiums that have been incurred; I think some of the terms of the CFAs
19 and so on. But they get to see everything else.

20 Now, if the Tribunal considers that to fall short, then we will go away and think about
21 it, but there has to be some --

22 THE CHAIR: Let's break it down, okay?

23 MR BACON: Can I just say one thing: it's an opt out -- you know, the idea that a class
24 member sort of specifically identified could secure, through this mechanism,
25 confidential information is not something that we would encourage, clearly.

26 THE CHAIR: Let's break it down. Let's look at two basic legal principles. As between

1 a company and shareholders, there is no LPP.

2 MR BACON: Yes.

3 THE CHAIR: So generally, unless the advice relates to a dispute with the shareholder
4 itself, the shareholder can ask for it. It may not get it, but it can ask for it. But if there
5 is a case between the shareholder and the company, the company can't assert LPP
6 unless the LPP relates specifically to the purpose of that dispute.

7 When you have a situation with the trustee and beneficiary, ordinarily -- obviously
8 there is Schmidt and all those other cases -- there is no LPP between the trustee and
9 the beneficiary, unless it relates to a dispute with the beneficiary.

10 MR BACON: Yes, there could be --

11 THE CHAIR: You have a situation whereby you are a class representative, and who
12 are you representing? The class members. So there may be an issue as to whether
13 or not you can assert privilege and stuff like that, and confidentiality, against the people
14 whom you represent in those proceedings. I am not going to put it any higher than
15 that, but I think that what one would do in practice would be if someone was a class
16 member and said, "Look, I would like to see X or Y", that they could come into the
17 solicitor's office and the solicitor can show them whatever needs to be shown, and
18 confidentiality undertakings being given, because I understand when you have got
19 couple of hundred thousand people, you do not want sensitive information to get into
20 the public domain, and certainly not in the hands of people who shouldn't be allowed
21 to see it.

22 But you may have to think these issues through more than previous cases, because
23 you have got some big players with large stakes in it, who may take a more active
24 interest than someone who has got £35 to play. But that's something you are going
25 to have to work out, get advice on.

26 But I am quite happy to rule on -- if any class member seeks any information and it's

1 not being provided, then it should be clear that they can come to the Tribunal and have
2 that issue resolved one way or another. It's not going to be a free-for-all of confidential
3 information just being passed out to anyone who wants it, but it will have to be on
4 some sort of controlled basis that does preserve the confidentiality and privileged
5 material for the benefit of the class members as a whole.

6 MR BACON: That's very helpful.

7 So can I just say, the genesis of this point was the Riefa case. It was as
8 a consequence of that --

9 THE CHAIR: Yes.

10 MR BACON: -- that my learned friend's clients wrote to us about confidentiality. In
11 that case, the Tribunal wanted to understand why the LFA prevented the class from
12 receiving basic information regarding the funder's level of return and the obligations
13 assumed by the PCR in the LFA. Now --

14 THE CHAIR: We are not in that scenario anymore.

15 MR BACON: We are not in that scenario because that isn't an issue, and the
16 correspondence got a little bit sort of pithy now, but there is an argument about the
17 dispute about what was meant, or what the interpretation of the confidentiality clauses
18 in Riefa meant, when those terms are the same as the terms of this case, which they
19 are. Our position is, as I stated in our skeleton, subject to the redactions, any member
20 of the class is freely able to apply to see the LFA, and --

21 THE CHAIR: I am satisfied -- I have set my position out --

22 MR BACON: Yes.

23 THE CHAIR: -- which is that any redaction should be the absolute minimum --

24 MR BACON: Yes.

25 THE CHAIR: -- and class members should have it. There may be issues about certain
26 provisions, and that may be something that will have to be worked out further down

1 the line, but bearing in mind this is a very different case from most of the ones that
2 have been done. All I can say is that if I had 5 million on this case, I would probably
3 want to know what the advice is and what the actual provisions are compared to
4 someone who has got £30/£35 into it.

5 But this is one of the reasons why I think you need to think about having a user
6 committee, so there is someone who represents people with substantial sums of
7 money at stake in these proceedings who has visibility as to what is going on.

8 MR BACON: I know that thought is being given to that.

9 THE CHAIR: Hopefully we will have some formulated arguments and proposals for
10 that for tomorrow morning, when we deal with it.

11 MR BACON: It also helps, if I may say so tangentially on that point, with the issue that
12 you are grappling with in relation to costs, because if you have got a committee that's
13 also got a real client, in the sense that somebody who has got a --

14 THE CHAIR: No, let's say you have got a big player and they have got a legal
15 department. If --

16 MR BACON: If they approved the invoices, then --

17 THE CHAIR: No, but I would hope that they wouldn't have a director from the board
18 of that company; they will have someone from the legal department or something like
19 that representing their views or whatever. You know, it's not the legal entity that
20 necessarily has to be a member of the user group; someone representing that legal
21 entity with some experience and understanding of some of these issues.

22 Okay, we have dealt with that for now.

23 Yes, Mr MacLean.

24 MR MACLEAN: Can I just put my oar in, to the extent --

25 THE CHAIR: Of course you can.

26 MR MACLEAN: It may or may not be helpful.

1 In paragraph 54.3 of our skeleton --

2 THE CHAIR: Yes.

3 MR MACLEAN: -- we set out what we understood the position to be. Now, it may be
4 that our understanding is imperfect.

5 THE CHAIR: Well, I don't know about that. Let me just find your skeleton.

6 MR MACLEAN: Paragraph 54.3.

7 The PCR continues to assert confidentiality over certain provisions, including solicitors'
8 uplifts, success fee, figures relating to conditional fees vis-a-vis members, and we cite
9 what the learned Tribunal had to say in the Riefa case.

10 Now, if the position is that you are being told -- and it may be, as I say, my
11 misunderstanding -- that all the information in relation to how much it is going to cost
12 the class is going to be provided by the PCR, then that's fine. But the
13 correspondence -- and I don't want to go through the correspondence at this stage in
14 the evening -- left in our mind some doubt as to precisely what it was or was not being
15 said.

16 Now, as I say, if the information about how much it is going to cost the class is
17 something which is going to be made available -- and there is a question as to whether
18 it's consistent with Riefa to say, "Oh, well, you have got to come and ask for that", and
19 put the onus on the class rather than tell them -- that might or might not be consistent
20 with Riefa. But as I say, I am not interested in the issue of legal professional privilege.
21 Obviously, if it's privileged, there is an issue, as you have identified, sir, as to whether
22 that is privileged vis-a-vis the individual or not, but it's a question of how much is it
23 costing the class at the end of the day, and there ought not to be a debate about
24 whether that is or is not going to be provided.

25 THE CHAIR: But one way of dealing with that, to a certain extent, is to have -- well, is
26 the budget going to be available on the website or not?

1 MR BACON: Well, yes, because -- can I just remind -- sir, you made an order on
2 12 September, drawn on 19 September of last year, dealing with --

3 THE CHAIR: What is going to be in the notice, yes.

4 MR BACON: Yes, and what is confidential so far as the LFA is concerned. There was
5 a redacted version appended to the order.

6 THE CHAIR: That's right, yes.

7 MR BACON: The budget itself that we have been through today doesn't form part of
8 that redaction. The issue, as my learned friend knows, is that we can't reveal the total
9 committed funded sum, because if you have the budget sum plus the sums that have
10 been incurred to purchase the ATE insurance, you get to know the cost of the ATE
11 insurance and then get to know the risk associated with the case. That's the thinking
12 behind the order.

13 So to reassure my learned friend, the budget that we are going to be looking at or have
14 looked at today and tomorrow is part of the material that forms part of the LFA, and so
15 would be available to a class member.

16 THE CHAIR: Yes. The scenarios that you are going to give us tomorrow morning,
17 are they going to be available?

18 MR BACON: Speaking for myself, I don't see why not. I am getting approval from
19 behind.

20 THE CHAIR: Okay. Thanks.

21 MR BACON: The contest originally between us was that nothing was available. In
22 Riefa, the learned Tribunal took the view that a proper interpretation of the
23 confidentiality provisions prevented any disclosure of the LFA terms to the class. Now,
24 that was the decision in Riefa. It's not, in our submission, a fair reflection of the terms
25 of the confidentiality provisions in the LFA. But I wasn't appearing in Riefa at the time
26 and would have argued against it. But that's what the chair found.

1 In this case, we submit that the interpretation we have applied to the terms of the
2 confidentiality provisions in the LFA are such that of course the class can see them if
3 a class member asks for them.

4 THE CHAIR: Well, I think, look, in Riefa v Apple, you have got the observations at
5 paragraph 112, and that related to the fact that there is no justification for withholding
6 any of the terms of the LFA from the scrutiny of the public and, in particular, the
7 potential class members.

8 On the facts of the present case, a great deal of the LFA is publicly available and is
9 going to be on the website. If any particular class members want to see more, then
10 arrangements can be made for them to see that, subject to the approval of the Tribunal
11 in the event that there is any dispute about that, and that also the overall budget will
12 be on the claim website. Okay. So that deals with that issue.

13 Let's move on.

14 Now, the financial position you have set out in your letter of, as you said, 31 January,
15 and we are now looking at tab 51, and you deal with the various structures. Having
16 looked at that, I was satisfied by the responses that you have given, subject to
17 a number of points.

18 The first point is that Asertis should provide -- as and when its audited accounts are
19 prepared, they should be provided to the class representative, and they should be
20 made available to the Tribunal at the next CMC if they are ready by then, because we
21 are talking about the figures as at 31 December 2023. So whenever they are ready,
22 the next CMC will look at those, just to make sure that things are on the right track.

23 MR BACON: Yes.

24 THE CHAIR: The other protections we have already dealt with. Mr Rayment's going
25 to come up with a wording about the other protections in relation to Asertis about the
26 budget being exceeded, and if there are any concerns about the financial position of

1 Asertis and ability to come up with continued funding, if there are delays in paying
2 invoices, that should be notified to the Tribunal.

3 In particular, if Mr Aaronson has any concern about the funder's ability to continue
4 funding the proceedings, he has a duty to notify the Tribunal forthwith, as well as the
5 proposed defendant.

6 MR BACON: Yes, and there is absolutely no doubt that he's aware of that obligation,
7 and that's part of the irony of all this, of course, that the principal challenge in respect
8 of this aspect of the funding issues is about the ability of the class representative to
9 fund his own side's costs, not Royal Mail.

10 THE CHAIR: Yes.

11 MR BACON: Of course, any class representative wants to be satisfied that he can
12 fund the case he's pursuing.

13 THE CHAIR: Now, in paragraph 11 of the letter dated 31 January 2025, you put
14 a proposal about maintaining the security of funds. At the moment, I don't think it's
15 necessary for that, in the light of the additional points that we have discussed today.

16 MR BACON: I am very grateful, because that was going to be my submission. This
17 was very much a --

18 THE CHAIR: No, but we will keep it under review. We will look at it and see where
19 we are at the next CMC and we will look at this at every CMC. But what I don't want
20 is unnecessary drawing down of funds, which increases the costs of the litigation and
21 inconveniences Asertis unnecessarily. You know, if there is a concern, there is
22 a concern and we can deal with it.

23 I fully understand where Mr MacLean's clients have come from because of the
24 judgment in Asertis Limited v Bloch --

25 MR BACON: Yes, it was a rather unfortunate (overspeaking).

26 THE CHAIR: You can understand why the judge made that decision, because he can

1 only be as good as the information that was placed before him.

2 MR BACON: He wasn't provided with the information he wanted.

3 THE CHAIR: But you have given us the information, and I would like Lewis Silkin to
4 confirm that it has satisfied itself, through looking at the relevant documents and
5 agreements between the entities named in the letter of 31 January 2025, that what it
6 says in paragraphs 1 to 5 of its letter is correct. So we need a letter from Lewis Silkin
7 to say, "We have actually reviewed the underlying documents, and so where we refer
8 to facilities and stuff like that, we have seen those and we satisfied ourselves that they
9 are in place".

10 MR BACON: Yes, very good.

11 THE CHAIR: Because it's one thing to write something on instructions. It's worthless.
12 What I need to do is to make sure that someone at Lewis Silkin has looked at, seen
13 the underlying documents and satisfied himself as to the accuracy. If we can have
14 that letter, then that deals with that issue.

15 MR BACON: I am grateful. Thank you, sir.

16 THE CHAIR: That sorts out that one.

17 MR BACON: I think that may be it in terms of the principal objections that were raised
18 in correspondence. So it's whether there is anything else that the Tribunal --

19 THE CHAIR: There may be. I am just looking at my notes.

20 (Pause)

21 We are now ready to look at the ATE insurance, because that's one of the
22 requirements, your inability to pay the costs of the adverse party.

23 MR BACON: Indeed.

24 THE CHAIR: The amount of the ATE insurance is how much?

25 MR BACON: So there are two parts to it. It's split into 13 million for adverse costs
26 after the -- assuming a CPO is granted, and for the period currently underpinning these

1 | proceedings, there is a -- just getting the right figure. Just checking the figure. (Pause)

2 | So in the bundle, you will see the schedule to -- if I can just take you to it -- the ATE.

3 | THE CHAIR: I have got that, yes. I have got the limits of indemnity. We have got

4 | a total figure of 15 million.

5 | MR BACON: Yes. It's split. So you have got on page 1012, there is a limit of

6 | indemnity of 15 million post-CPO --

7 | THE CHAIR: Let me look --

8 | MR BACON: -- and a sub-limit of 3 --

9 | THE CHAIR: Where are we? So the limit indemnity is --

10 | MR BACON: Page 1012.

11 | THE CHAIR: Yes, is 15 million.

12 | MR BACON: Correct, split into two: the sub-limit of indemnity of 3 million --

13 | THE CHAIR: Yes.

14 | MR BACON: -- for opponents' costs, that's in respect of the period up to the granting

15 | of the CPO.

16 | THE CHAIR: But let's say that that amount is 1 million.

17 | MR BACON: Yes.

18 | THE CHAIR: How much is available after that for the steps after the CPO? Is it going

19 | to be 14 million or is it going to be 12 million?

20 | MR BACON: Just bear with me one second. So it's the aggregate. So 15 million is

21 | the limit of indemnity, so it would be 14 million.

22 | THE CHAIR: Exactly.

23 | MR BACON: Yes.

24 | THE CHAIR: So subject to anything that Mr MacLean says, it appears to me that the

25 | ATE provides up to £15 million of cover, which should be more than enough to cover

26 | the costs of Royal Mail.

1 MR BACON: Yes.

2 THE CHAIR: But obviously we are going to have to see how the proceedings go, and
3 if, Mr MacLean, your costs exceed that sum, then you will come back to the Tribunal
4 and we will look and see, you know, what we can do and what needs to be done to
5 make sure you are secured.

6 But the next issue is that if this is avoided, does it have the normal provision that if it's
7 avoided, it doesn't stop a claim being made in favour of the proposed defendant?
8 Because if we look at it, for example, you have got rights to terminate for various
9 reasons. You have got policy exclusions.

10 MR BACON: Yes.

11 THE CHAIR: So let's look at paragraph 3.2. It says:
12 "3.2 Lack of funding
13 "If the Legal Action is abandoned, discontinued, stayed or dismissed as a result of the
14 Insured not having the funds to continue after the Costs Budget per the Litigation
15 Funding Agreement has been expended."
16 Yes?

17 MR BACON: Yes.

18 THE CHAIR: Then what happens then?

19 MR BACON: So --

20 THE CHAIR: So the proposed defendant will come forward and say, "Look, this action
21 has been abandoned; we want our costs".

22 MR BACON: Yes. I am very confident -- I am just trying to find it.
23 I mean, I don't mind at all, of course, assisting as much as I can with the Tribunal,
24 but --

25 THE CHAIR: Yes.

26 MR BACON: -- if I may say so, the defendants had the opportunity to sort of pore over

1 this and haven't taken a single issue with it.

2 But I think the answer to it is that any cost orders that have been made prior to the
3 termination of the policy are obviously covered. The issue that sometimes arises is
4 whether cost orders made after termination, but for a period covering costs up to
5 termination are covered, and I would like to think they would be covered.

6 THE CHAIR: Yes, okay.

7 MR BACON: Because what happens -- you know, if, for example, the case collapsed
8 and there was an order for discontinuance, it may be that that postdates the policy, in
9 which case my learned friend's client would say, "Well, pay us our costs", and --

10 THE CHAIR: Let's just hear Mr MacLean.

11 Mr MacLean, have you got any observations you would like to make on the ATE?

12 MR MACLEAN: No.

13 THE CHAIR: No, because my view is that the ATE cover is adequate both in amount
14 and the terms, and there are sort of anti-avoidance provisions in your client's favour,
15 and if they pull the plug, you still can get your money back.

16 MR MACLEAN: That's my understanding. The only caveat I would make is it may be,
17 as you say, sir, we have to revisit this at some later stage in the future. If the amount,
18 15 million, god forbid, is not enough. But --

19 THE CHAIR: You never know because, you know, you get all sorts of things that
20 happen.

21 MR MACLEAN: Indeed.

22 THE CHAIR: You get appeals and stuff like that.

23 MR MACLEAN: All I am saying is as presently advised, no, we are not taking issue
24 with any of --

25 THE CHAIR: Okay, so the ATE insurance is fine.

26 MR BACON: I am correct in my -- paragraph 4.8.3 does say that the policy responds

1 to effectively indemnify all costs incurred up to the point of the cancellation of the
2 policy, so that would -- in other words, it's not dependent on a cost --

3 THE CHAIR: I have marked that already. Yes. It's fine. Yes.

4 So that's the ATE. That's funding, subject to any further stuff that you are going to do
5 overnight.

6 We have got another three minutes, so if you can sit down, we will get back to you,
7 Mr Harris.

8 MR BACON: Thank you.

9 THE CHAIR: Mr Harris, so hopefully you will get everything done overnight, and we
10 will look at where we are at 10.30 tomorrow morning. If you need more time on certain
11 things, then you take whatever time you need. But I know that when you are standing
12 on your feet here, there is always someone doing some work on this, and hopefully
13 you don't have to sort of do everything yourself. But you obviously need to approve
14 any letters that go out to make sure they are accurate.

15 Now, tomorrow we will be looking at the expert evidence points. I do expect the
16 experts to be here, so if there are any questions, we can just deal with them there.

17 I know that, Mr Taylor, you have got one point that you would like them to consider
18 overnight.

19 MR TAYLOR: Sure, sure.

20 I guess this is just about the qualitative evidence that's talked about in the Williams
21 reports, and kind of getting a bit of a better understanding about how that is going to
22 be used and its relationship with the econometric modelling.

23 Is it something that is an input into the econometric modelling, or is it something that
24 helps us understand how to interpret the results of the econometric modelling, and if
25 so, how that's going to all work?

26 THE CHAIR: So what is on the menu for tomorrow is we will deal with the two big

1 | points of principle that have been raised by Mr MacLean.

2 | Is there anything else that we need to deal with tomorrow apart -- and obviously we
3 | have got to deal with all the information that you have been getting overnight, but is
4 | there anything else that we need to deal with on the menu for tomorrow?

5 | MR HARRIS: Well, it may not take all day to deal with Mr MacLean's two points, and
6 | then there would be potentially some more interchange about any post-hearing
7 | directions going forward, assuming that would be of assistance.

8 | THE CHAIR: Yes. What we will do is we will give our ruling on Wednesday, and then
9 | after we give the ruling, we will deal with the directions as to where we go from there.

10 | MR HARRIS: Oh, I see.

11 | THE CHAIR: That's on the menu for Wednesday. So Wednesday: ruling plus where
12 | we go from there. But I can't get to the position of giving a ruling unless I have all the
13 | information that we have asked for. So you need to get things like the litigation plan
14 | sorted out, and there is a list of things. Someone can go through the transcript, tick
15 | through the transcript, and make sure that we have tomorrow covered all the things.
16 | Then I will be in a position to give a ruling.

17 | We don't want to waste any time, because if I can't give a ruling, then it just means
18 | you go to the back of the queue, and I've got a million and one other things to do, and
19 | then you might not get a ruling for a month or two.

20 | So you have just got to try and do your best to get the information together.

21 | MR HARRIS: I understand. So, in summary, then, we have a long list of homework,
22 | and it's very much in our interest to get it all done overnight.

23 | THE CHAIR: No, no, because some of it can be done during the daytime. As long as
24 | I have everything in place by Wednesday morning, then it's fine. But I do need to have
25 | anything that needs to be in place before any ruling is given on the CPO, because it
26 | is going to be on the basis of, for example, you know, the budgets confirmed. I need

1 to know which budget is going to be -- what litigation plan. Are there any amendments
2 to Epiq's work? All that needs to be done in place, so I know and everyone knows on
3 what basis you have got a CPO.

4 MR HARRIS: I understand.

5 I used my turn of phrase about (inaudible) tomorrow. It's just that it might not take all
6 day to deal with Mr MacLean's two points and, therefore, if I have managed to get back
7 to the Tribunal everything that were required overnight, at least from our
8 perspective -- and we are in the Tribunal's hands -- it is conceivable that we then may
9 be able to deal with all the stuff that comes in overnight in time for a ruling tomorrow,
10 were that to suit the Tribunal.

11 I entirely understand that may not suit the Tribunal for different reasons. It's just I don't
12 want you to be under any misapprehension that it's necessarily going to take all day
13 in order to deal with Mr MacLean's two points. That's my --

14 THE CHAIR: I don't know. He's got some pretty important, fundamental points to go
15 through. I know he's not long-winded, but the thing is that we do need to go through
16 it properly.

17 MR HARRIS: I entirely accept that, and that takes me on to my next point, which is
18 you made a remark earlier today -- I may have misheard or misunderstood -- that
19 Mr MacLean would be presenting his two points tomorrow. Of course, it's my
20 application. Ordinarily, subject to your counterview, I would make my application
21 explaining why his points are misconceived.

22 THE CHAIR: You could do it that way. Yes, absolutely.

23 MR HARRIS: I am in your hands.

24 THE CHAIR: Look, it's absolutely fine. You have got all the points from today to deal
25 with, okay. Now, you may be, at 10.30, ready to take us through what you have done
26 so far, and that would be very useful. If there are other points you are still waiting to

1 get instructions on, hopefully by the afternoon, they will be in place. But the ideal for
2 all of us is to deal with filling all the gaps and the arguments of Mr MacLean to get
3 those ready for tomorrow.

4 But his arguments are sufficiently important that I wouldn't want to give detailed
5 reasons, whether it is right or wrong, without looking at it and thinking about it overnight
6 on Tuesday. But he certainly raised issues about comparators where I can see where
7 he's coming from, but I think that the possible answer is the stage we are at and how
8 much you can realistically do at this stage and what the qualitative evidence is going
9 to be and how you intend to review it.

10 Now, Mr Taylor has raised that. I have raised that this morning. We need to have an
11 understanding of how you envisage going from where you are now to where we are
12 going further in the case.

13 You may say, "Look, Malek, it's a question of chicken and egg. Without having the
14 material, I can't do that". But I still think we need more than we have actually got, and
15 you need to take us to the evidence tomorrow as to what you intend to do with the
16 interrelationship between this econometric evidence and us coming to a decision at
17 the end of the day as to: what is the overcharge?

18 MR HARRIS: I understand.

19 THE CHAIR: So that's really for tomorrow.

20 MR HARRIS: If it suits the Tribunal, it would be my proposal to begin tomorrow at
21 10.30, if that's the time we start, with an update on everything I have been able to do
22 overnight with those assisting me --

23 THE CHAIR: Yes.

24 MR HARRIS: -- followed by me explaining, subject to the Tribunal telling me, "No
25 more", why Mr MacLean's two points don't work, and that would include how our
26 methodology works, including the relationship between qualitative --

1 THE CHAIR: That's really important, that bit, yes.

2 MR HARRIS: Yes, I understand that. Then it would be for Mr MacLean to say, no,
3 I misunderstood the point, all subject, of course --

4 THE CHAIR: You may need to look at the test, because it's a relatively low bar, but
5 I think you can address us on that and take us to the --

6 MR HARRIS: Very briefly.

7 THE CHAIR: -- very briefly on what you say are the relevant authorities and how we
8 should deal with it.

9 MR HARRIS: Well, if it assists, sir, I can just -- I would be taking --

10 THE CHAIR: No, no, don't worry. No, we will do it tomorrow, because it's 4.20.

11 MR HARRIS: Can I just give you two references then. There is some case law in our
12 reply for the CPO, which is tab 8, para 3. That refers to both Pro-Sys and Stellantis.
13 Then if you could very briefly, it may save time -- it is a matter of you; I can do it if
14 not -- in our skeleton at 8(b), we refer to some more Canadian case law, including
15 Hewitt in the British Columbia Court of Appeal. It may save you some time.

16 THE CHAIR: Yes. I haven't looked at that, the Hewitt case. I looked at the others,
17 but is there a passage in that --

18 MR HARRIS: Yes, it is cited in our --

19 THE CHAIR: If you give me the passage, I will know what paragraph.

20 MR HARRIS: Indeed, you don't even have to turn it up. It's written out in the footnote.
21 There is one called -- I am tempted to say "Mancini", but I think it's more like
22 Mancinelli, which is also cited in the -- it's in the bundle.

23 THE CHAIR: Yes.

24 MR HARRIS: But they essentially made the point that you are familiar with, which is
25 it's not a battleground of the experts, not a mini trial. It's very hard for this Tribunal at
26 this stage, absent disclosure and absent all those other things, to engage in any kind

1 of calibrated assessment of the merits or otherwise, indeed to the point where one of
2 those cases says, for the purpose of certification, the Tribunal may form the view that
3 both experts are both talking perfect sense at this stage. That doesn't mean that it
4 can't be certified because there is a perfectly reasonable and plausible, credible case.

5 THE CHAIR: Yes. Yes. Yes. But we will deal with that tomorrow.

6 Mr MacLean, is there anything else you would like to have on the menu for tomorrow?

7 MR MACLEAN: No, that sounds like a full day.

8 THE CHAIR: Okay.

9 Thank you very much.

10 (4.20 pm)

11 (The hearing adjourned until 10.30 am on Tuesday, 4 March 2025)

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