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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 3<sup>rd</sup> – Wednesday 5<sup>th</sup> 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)

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48 **Tuesday, 4 March 2025**

1 (10.33 am)

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 an  
4 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, and  
6 breach of that provision is punishable as contempt of court. In the usual way, there  
7 will be a transcript that will be on the site of the CAT, and there will be a written  
8 judgment.

9

10 Submissions by MR HARRIS

11 MR HARRIS: So may I begin with the transcript. We haven't received one, but we did  
12 take a careful note, a list of what - we've got 15 points.

13 THE CHAIR: Yes, there's probably about 15. Look, what we are trying to do is, if we  
14 are going to make a CPO, we need to make it on a proper basis, and that all the criteria  
15 are satisfied, and that's what we are trying to work through.

16 MR HARRIS: Absolutely.

17 THE CHAIR: It's helpful that everyone's being as flexible as possible, and it is  
18 important in hearings like this that people like the funders are available, because there  
19 are always queries for them, and that the experts are available, and also that the  
20 proposed class representative is available, so we can react to where we are. The  
21 other way of doing it is that you have a hearing, then at the end of the hearing I say,  
22 I am not happy about these things that need to be done, and then you won't have  
23 a hearing for another two or three months. So I am trying to compress everything, so  
24 at the end of these three days, everyone knows where they stand. That's what we are  
25 trying to do.

26 MR HARRIS: We are very grateful. I am delighted to report that we have made

1 constructive progress on all 15 points. Can I give you an overview?

2 THE CHAIR: Give me an overview of where we are. Yes, okay.

3 MR HARRIS: You asked me, personally, to go through the cost budget. I have done  
4 that. I can give you the update right now if you like, or I can run through the other  
5 14 points to tell you --

6 THE CHAIR: No, let's do the cost budget, because it was important to me. When  
7 I looked at the cost budget, it seemed sensible, but I did not have enough of a feel of  
8 the case as to how realistic the total sum was, and I don't want to have a situation  
9 whereby there is an issue when you get to the top of the cost budget and there is  
10 a problem.

11 MR HARRIS: So the overview there -- I will happily turn it up if you like, though it's not  
12 necessary for my purposes -- is that both Mr Rayment and I did go through it when it  
13 was first put together back in 2021, and it struck us as reasonable at that stage.  
14 I myself have now been through it again. Obviously I have a closer connection with  
15 those lines in it that are about counsel's fees.

16 THE CHAIR: Of course, yes.

17 MR HARRIS: And they still continue to strike me as reasonable at this stage. I am  
18 going to mention the obvious usual caveats at this stage, at the end of what I say. So,  
19 I should just note, for the sake of good order, that those entries don't include  
20 Mr Bacon's fees, because when it was first put together, that didn't appear, but that  
21 his fees, such as they are, are agreed to be covered by the funder. If you would like  
22 us to, we can produce another version, an updated version, promptly, that includes  
23 those entries, though what I would suggest is that we are going to be giving  
24 you -- assuming we are certified, which I hope is not too presumptuous -- then, come  
25 the September CMC, we will be giving you a rundown of what we propose to do, and  
26 one of the other items is the form of the undertaking to do this, to give the Tribunal

1 a more detailed explanation of where we are in terms of expenditure by the September  
2 CMC, by reference to the budget that you've currently got. So that would be, in my  
3 respectful submission, the opportune moment to update it for Mr Bacon's fees.

4 THE CHAIR: Yes, that's fine. I am happy with the budget, and presumably your junior  
5 is working on the draft order anyway, as to what is going to be in the draft order, on  
6 what we expect to have at the CMC in September, and we will expect to have updated  
7 budgets, confirmation as to the amounts that have actually been drawn down, that sort  
8 of stuff.

9 MR HARRIS: That's exactly what we had in mind. Indeed, during the course of this  
10 morning, both you and my learned friend's team will be receiving a letter with some  
11 proposed wording for that part of the order.

12 THE CHAIR: Yes, that's fine.

13 MR HARRIS: That's in progress. So that's another one of the items.

14 For the sake of completeness, the solicitor's fees and the other disbursements,  
15 including expert fees on the budget, where I have less of a directly close connection,  
16 I have looked at them and I am happy with them, and I have received confirmations  
17 that those who are closer, namely the solicitors and the experts, are happy with them  
18 at the moment. They are reasonable at the moment.

19 Two further remarks on budget. The first is that, overall, it is consistent with other  
20 budgets that I have seen for claimant entities, where they are proceeding towards what  
21 they currently envisage to be approximately a six-week trial, which, at the moment,  
22 seems again, to me personally, to be a reasonable assumption. Of course I have seen  
23 larger budgets, but I have equally seen lower budgets.

24 Then just the normal sorts of caveats that you would expect from somebody like me.  
25 It is put together at a very early stage, not knowing precisely how the case will develop,  
26 and it could increase, but obviously we will tell you. It could decrease in certain

1 respects.

2 THE CHAIR: No, but it doesn't tend to go that way. But it's important that every  
3 hearing we have, there is going to be an updated budget, so we know where we are.  
4 That's fine, that's absolutely fine.

5 MR HARRIS: And I am told, and I don't have the precise detail, but I am told that we  
6 are slightly over budget for the certification stage so far. You will obviously get  
7 an update on this.

8 THE CHAIR: Yes.

9 MR HARRIS: But you will be pleased to hear, perhaps, that, at least on the counsel  
10 fees, they are slightly under budget for the certification stage, so it's a little bit swings  
11 and roundabouts. Some numbers have gone up; some have gone down.

12 THE CHAIR: No, but the certification stage, you've got to get past certification, you've  
13 got to comply with all the requirements, and that's what you are endeavouring to do.

14 MR HARRIS: Last point, just for completeness, is of course, as we will come on to,  
15 certain of the ideas and proposals that we are pursuing in light of the interchange with  
16 the Tribunal yesterday, they will add a measure of expense compared to the existing  
17 budget. For example, if there is a costs draftsman who liaises with Mr Aaronson, and  
18 the claimant company liaises with, that wasn't budgeted for, that will add a modicum  
19 of expense. If there is a customer user group -- I am coming on to that, which there  
20 now will be -- that adds a modicum of expense -- but we will update you on all of these  
21 things, assuming we are certified and we head to a September CMC.

22 THE CHAIR: That's fine.

23 MR HARRIS: So that's item number 1. Item number 2, you will be receiving, later this  
24 morning, an updated litigation timetable, taking on board the points that we liaised  
25 about yesterday. So that's on its way.

26 THE CHAIR: On that, the non-party disclosure; who are you envisaging it against at

1 the moment?

2 MR HARRIS: Well, at the moment the entry for that, in the draft that I saw last night,  
3 inserts possible third-party disclosure during the course of 2026, and that's all it says  
4 at the moment.

5 THE CHAIR: So you haven't identified the third parties yet?

6 MR HARRIS: But it does seem to us very likely that at least a possible one will be  
7 LDC, just as you identified yesterday.

8 THE CHAIR: Yes.

9 MR HARRIS: It may be that there will be other people like TNT Post, who you also  
10 identified and, if necessary, we will have to identify any jurisdictional points. One thing  
11 I would just say about --

12 THE CHAIR: We're talking about non-party disclosure, yes?

13 MR HARRIS: Yes, that's right. But our perspective is that we ought to see what people  
14 these days call the off-the-shelf disclosure, like the unredacted Ofcom decision, the  
15 Whistl evidence from the --

16 THE CHAIR: That's fine.

17 MR HARRIS: And then we'll have a much better idea, and we can come to the next  
18 CMC, if there is one, and say, having looked at that, having distilled that, much as  
19 I hope you would expect us to do, we now think that non-party A, B and C, they are  
20 the candidates from whom it looks as though we might want the following targeted  
21 types of material, and this is what our proposal is.

22 THE CHAIR: Mr MacLean, do you envisage any applications for non-party disclosure  
23 on your side?

24 MR MACLEAN: No, not as presently advised.

25 THE CHAIR: Yes, because I know that, you know, UK Mail had a go in the bulk mail  
26 market, but didn't really get anywhere, but I didn't know whether you would want to

1 look at that material as to why it never got anywhere.

2 MR MACLEAN: Well, we may, but, I mean, at the moment, I can tell you that we are  
3 not envisaging that.

4 THE CHAIR: Because one of the mysteries of this case is that if this was such  
5 a profitable thing to do, why no one else has done it since 2014, and all I know about  
6 is Whistl withdrew. I know from the press UK Mail, which was taken over by  
7 Deutsche Post, they had a go, and that went wherever it did go.

8 MR MACLEAN: Yes.

9 THE CHAIR: I do think that we will need to look at qualitative evidence quite carefully  
10 to see where that leads, and if that leads to non-party disclosure -- if your side can  
11 think about whether or not --

12 MR MACLEAN: (Overspeaking) --

13 THE CHAIR: Yes, because we will deal with this at the CMC in September.

14 MR MACLEAN: Assuming there is, of course, going to be a CMC.

15 THE CHAIR: Yes, assuming there is. I think that's fair.

16 MR MACLEAN: But I take the point you are making, sir, absolutely. Those behind me  
17 will consider that, no doubt diligently.

18 THE CHAIR: Look, Mr MacLean, you have two bites at the cherry when it comes to  
19 putting your case. You have got the evidence you filed and your skeleton argument.  
20 That's all been considered, and that can lead to a prima facie view.

21 MR MACLEAN: Yes, of course.

22 THE CHAIR: You then have your opportunity today, and you could make that prima  
23 facie view go the other way, or it could reinforce it or whatever.

24 MR MACLEAN: You haven't got a closed mind, I understand that, in terms of what I  
25 am going to say when I --

26 THE CHAIR: But what I am keen to do, Mr MacLean, is that whatever we do,

1 everything is sorted out for the next stage, rather than doing it the other way round,  
2 that, you know, you are guessing and you get a judgment in two months' time and  
3 then --

4 MR MACLEAN: No, no.

5 THE CHAIR: You understand what we are trying to do.

6 MR MACLEAN: Clearly, the Tribunal intends to give its judgment tomorrow, one way  
7 or the other, and obviously, if there is going to be a CMC in September, then we will  
8 have thought about whether third-party disclosure is something we want to put onto  
9 that list.

10 THE CHAIR: But, Mr MacLean, we have got really two ways on the judgment. We  
11 can either, depending when we finish today -- if we are going to finish early enough,  
12 I can say what the result is and then we do all the directions today, and then we don't  
13 need to come back tomorrow, and then the written judgment will come in a couple of  
14 days' time. You know, that may be the cheapest and the most efficient way of doing  
15 it.

16 MR MACLEAN: Well, I am all in favour of having the cheapest and most efficient --  
17 but it's entirely a matter for the Tribunal.

18 THE CHAIR: Yes, because I am conscious that, you know, we have got, what, 40  
19 people here, and if we have to come back tomorrow, it's a lot of money.

20 MR MACLEAN: Yes.

21 THE CHAIR: Whereas if we can finish everything today -- but it's not reasonable to  
22 expect me to give a judgment today on multiple issues when further information is  
23 coming from Mr Harris all the time.

24 MR MACLEAN: Of course, and we will tailor -- at least I will tailor my submissions as  
25 much as I can to enable the Tribunal to do that. I mean, you have seen what I have  
26 got to say. I am going to expand on it.



1 THE CHAIR: Yes.

2 MR MACLEAN: Mr Harris says he's going to say some other things, and we will see  
3 where we go, but --

4 THE CHAIR: Exactly. You never waste anyone's time. Thanks very much,  
5 Mr MacLean.

6 Okay.

7 MR HARRIS: So we are in favour of keeping it efficient, and I am glad you mentioned  
8 UK Mail, because that was another candidate. At this stage, it's a candidate,  
9 a potential third party, and there may be others.

10 THE CHAIR: Yes. Okay. We just don't know, but ... Yes.

11 MR HARRIS: The next item -- so I am on item number 3 -- was: you invited me  
12 personally to consider whether my team considers there are any issues that could be  
13 hived off or split or anything like that.

14 THE CHAIR: Yes.

15 MR HARRIS: As at today, no, is the answer. We don't identify any. We obviously  
16 keep an open mind. We haven't heard any suggestions from the other side, but if we  
17 do, we will consider them responsibly.

18 THE CHAIR: Yes. So we will put in the draft order that any proposals for a split trial  
19 or preliminary issues need to be formulated two weeks ahead of the CMC. So I don't  
20 want it bounced on me at the time of the hearing. If anyone wants to raise it, let's have  
21 it on the table.

22 MR HARRIS: Query, sir, whether, in those circumstances, it should say, "Any  
23 application by either party for any kind of split should be made by application, with  
24 supporting evidence, no later than two weeks before the date of the CMC, with  
25 a response one week before the CMC".

26 THE CHAIR: Mr MacLean, are you happy with that?

1 MR MACLEAN: Entirely.

2 THE CHAIR: You are happy with that? Okay.

3 All right, so put that in the order. That's fine.

4 MR HARRIS: Item 4 was these sorts of formulations for the order. You will see that

5 in due course. One of them -- I have seen a draft of the wording -- the gist of it is: we

6 will keep the Tribunal updated as regards progress against the budget. There is

7 a second provision which you will see in due course, and the gist of it is: in the event

8 that the claimant company considers that there are concerns with Asertis's ability to

9 continue to pay the claimant's own costs, and those are not resolved, within 14 days,

10 then the claimant company will promptly inform the Tribunal, and that would be

11 irrespective of whether there is a hearing coming up.

12 THE CHAIR: The Tribunal and obviously --

13 MR HARRIS: Yes, and the defendants.

14 THE CHAIR: And the defendants, yes.

15 MR HARRIS: So you will see that in due course.

16 Item number 5 was Mr Taylor's enquiry and yours, sir, about the relationship between

17 qualitative and econometric modelling evidence. I will obviously deal with that when

18 I deal with Mr MacLean's attacks on the methodology, and so that will be coming fairly

19 soon.

20 Item number 6 was Mr Aaronson's experience. I think you may by now have,

21 somewhere in the ether on your system, a letter that provides three judgments in which

22 Mr Aaronson was instructed as expert economist. One is the Isle of Wight case that

23 I mentioned yesterday that Mr Rayment and I were involved in, where his evidence

24 was accepted. It was worth some billions of pounds. Yes, the letter has now gone

25 with that.

26 THE CHAIR: Yes.

1 MR HARRIS: He was an expert economist for HMRC.

2 The other two are the two copyright cases, and we provided those as well.

3 THE CHAIR: Can we get the letter on the screen so we can look at it now?

4 MR HARRIS: I expect so. It's not in the bundle, but it must have come to you by  
5 email. Is that right?

6 Yes, it's on the Tribunal's email. The registry email address. Yes.

7 It would help, actually, because it covers some of the other homework items, this letter,  
8 such as rating of insurers, et cetera.

9 THE CHAIR: Okay. So, look, we may take a break in a minute just to look at whatever  
10 has been sent and to print it out.

11 MR HARRIS: I am grateful.

12 THE CHAIR: Mr MacLean, do you have any of this? If not --

13 MR MACLEAN: Apparently it has just literally come in. I haven't seen it.

14 THE CHAIR: Okay. So what we will do is we will get copies for the Tribunal and two  
15 copies for your side and print it out. We can print it out ourselves.

16 MR HARRIS: I will come back to these points, then, sir, perhaps after the transcriber  
17 break.

18 The next item was: Lewis Silkin to write to the Tribunal about the genesis of the claim,  
19 who found whom and how it developed.

20 THE CHAIR: Yes.

21 MR HARRIS: I have seen a draft of that letter. I don't think it has been sent yet, but  
22 that will be arriving later this morning.

23 THE CHAIR: Yes.

24 MR HARRIS: Next item, item 8 on my list, was Lewis Silkin to write to the Tribunal  
25 regarding points 1 to 5 in the first letter of 31 January. So Lewis Silkin to look at  
26 Asertis's financial materials.

1 THE CHAIR: Exactly, yes.

2 MR HARRIS: Yes, I have seen a draft of that. My understanding on that one is that  
3 will arrive later this morning because some lawyers at Lewis Silkin are continuing to  
4 look at it.

5 As you can imagine, a revolving credit facility is not just a one-page document, so  
6 people --

7 THE CHAIR: No. The thing is, I need to have the confidence that I can rely on it.

8 MR HARRIS: Precisely.

9 THE CHAIR: If Lewis Silkin say they have been through it all and they have verified  
10 that, then I can rely on it. They are not going to put their neck on the line for any client.  
11 So if they are happy with it, we are going to be happy with it. Yes.

12 MR HARRIS: I am grateful.

13 Lewis Silkin -- item 9 -- to seek confirmation from Whistl regarding the sharing of the  
14 list of documents. We have written a letter to Whistl to that effect. I can produce  
15 a copy if you need it. But it's a mundane letter; it just says, "Dear Whistl, are you  
16 happy for us to ..."

17 We have asked for a prompt response today, but they are obviously -- we can't force --

18 THE CHAIR: Well, hopefully we get a response today.

19 MR HARRIS: Yes.

20 THE CHAIR: But the very minimum is that you can have the list of Royal Mail, and  
21 that we would have to at least give them the opportunity of objecting before making  
22 any order in respect of that.

23 MR HARRIS: Exactly, sir. So let's see if they do respond as requested.

24 THE CHAIR: Okay.

25 MR HARRIS: Item 10 was preparing a side letter. I think Mr Bacon will deal with this  
26 in due course. It was about the nature of the advice, written and oral, from the law

1 firm in the instance of a settlement.

2 THE CHAIR: Yes.

3 MR HARRIS: So I have seen a draft of that. I don't think that's been sent yet, but  
4 I apprehend that by the time Mr Bacon is on his feet dealing with one of the other  
5 items, that may have been sent, and he can address you on it. We think it's fairly  
6 uncontroversial.

7 Another item was you asked for the CV of Mr Rob Mason, who's the actual forensic  
8 accountant at Forensic Risk. That has been obtained, and if it has not yet been sent  
9 to the Tribunal, it will be in the process of being sent.

10 THE CHAIR: Yes.

11 MR HARRIS: I think it might be in the very letter we talked about before, which covers  
12 certain of the items.

13 THE CHAIR: Okay.

14 MR HARRIS: The next item, 12, on my list was: proposals for Mr Aaronson/the  
15 claimant company being assisted by somebody like a costs draftsman to vet legal and  
16 other bills as they come in, and that is still being worked on, so I will be able to give  
17 you an update. We have got a proposal; we are working through it. So we have got  
18 a name, for example.

19 THE CHAIR: Yes. What I don't expect is, you know, like a formal taxation exercise.

20 MR HARRIS: No.

21 THE CHAIR: You just want someone who knows what they are doing, will spend a few  
22 hours on the bills saying, "Yes, they are okay; they are not okay". It's perhaps a bit  
23 more than I would do on a summary assessment of costs after a hearing, but  
24 something less than a full taxation, which always has a cost. It is just having a check,  
25 a common-sense check, of someone who is experienced in costs saying, "Yes, these  
26 fees are reasonable. I have looked at the work they say they have done. This is what

1 I would expect. They are not using too many people on it and the rates are fine."  
2 That's all we are looking for.  
3 MR HARRIS: We hear you loud and clear.  
4 THE CHAIR: Yes. Okay.  
5 MR HARRIS: That is work in progress.  
6 Item 13 on my list was what we have now called, in a document that we are yet to  
7 circulate, the terms of reference of a customer user group, or customer group.  
8 THE CHAIR: Yes.  
9 MR HARRIS: I have seen an advance draft of that. It's taking shape nicely.  
10 I anticipate that that will be circulated to my learned friend's team and the Tribunal  
11 during the course of this morning.  
12 THE CHAIR: Has it been finished?  
13 MR HARRIS: Yes. I am told there are hard copies. But why don't we do this, sir: at  
14 the short break, we will hand over some hard copies, and I think it'll be on the email  
15 system by then as well.  
16 14, the penultimate, was: preparing models showing scenarios for what will happen in  
17 settlements. Mr Bacon and those assisting him have taken that forward. Progress is  
18 being made. With your permission, he'd like to leave the room with Mr Aaronson  
19 shortly after 11.00, because some phone calls need to be made. But they are up and  
20 running, they will be presented, and if you see them leaving, that's what they are doing.  
21 THE CHAIR: Yes.  
22 MR HARRIS: Last point was you asked if Epiq had some updates. This is dealt with  
23 in the letter that is now on your system. To spoil the anticipation, essentially Epiq  
24 says: we don't want to update the notice and administration plan that's in the bundle,  
25 and that's because, although we have learned lessons, they are lessons that are better  
26 expressed in the context of an actual proposed settlement.

1 So, for instance, how many people might have to be paid out makes a difference and  
2 draws upon their lessons about how you hand it out; what the size of the amounts is  
3 has a difference to how they would go about distributing it, and none of those things  
4 are yet known. So how many people, what size, where they may be located, those  
5 sorts of things.

6 So lessons have been learned, but not to the extent of it being worthwhile spending  
7 money and then --

8 THE CHAIR: That's okay.

9 There is obviously the question I said about the top 20, of getting a feel for how big  
10 some of these claims potentially can be on your calculation.

11 MR HARRIS: Yes. I will find out some more information about that. But some of  
12 that -- it goes without saying, without revealing any privileged communications, that  
13 there have been communications between those instructing me and some putative  
14 members of the group, and when you see the proposal that has been generated, but  
15 not yet finalised, on what we are calling the customer user group, you will see we built  
16 in expressly a proposal to have a representative set of customers across the size of  
17 the users.

18 THE CHAIR: What I would like to have a feel for is: what is the biggest likely claimant?  
19 How many millions are we talking about, if it is millions?

20 MR HARRIS: Yes.

21 THE CHAIR: What is the sort of minimum you think is going to be out there, so I know  
22 what the range is, and also what do you think -- if you look at the top 20, how much in  
23 percentage terms does that represent the overall overcharge that you are talking  
24 about? It's things like that sort of data I would really want to see, if it's available.

25 But just give us what you have got on trying to give us a feel for, you know, the number  
26 of, let's say, big players in this, and how's that taken up? Because you have got a very

1 large number, you have got over 200,000 class members, and I can see this --

2 MR HARRIS: (Inaudible - microphone off).

3 THE CHAIR: Sorry? Yes, 290,000. It is a very large number. But I suspect that you

4 will find that the top 20 will be a significant percentage of that.

5 I may be wrong about that, but I just want to know if I am right or wrong about that.

6 MR HARRIS: Well, those behind me have heard those precise enquiries. We will do

7 what we can later this morning. What I was told yesterday was that 70 per cent of the

8 volume of the estimated damages is made up by what are called large enterprises, so

9 that gives you a first --

10 THE CHAIR: Yes, I am not surprised.

11 MR HARRIS: -- preliminary indication, but I will endeavour to get more detail from

12 what is available and I will report back later.

13 THE CHAIR: Yes. Well, put it in a letter, because it's something I would want to put

14 in any judgment, what is the answer to that question, but just try and give us what you

15 can in the time, let's say by lunchtime tomorrow, of what there is. You may just be

16 using estimates. I don't need to know the names of the people, but you can say, you

17 know: there are X number of utility companies or X banks or whatever, and we think

18 this is roughly where you are going to be.

19 MR HARRIS: Understood, sir. We will do that.

20 So those were the 15 items on our list. So some have now been dealt with, some are

21 in the process of being dealt with and some will be dealt with later on, perhaps

22 overnight.

23 So unless you would like me to do something else, what I would propose to do now is

24 deal with my learned friend's two objections to the methodology that he says are fatal

25 to certification, and in the process of doing that, I will expressly address the query

26 directed to me by Mr Taylor yesterday about the relationship between qualitative



1 so-called and statistical econometric on the other hand.

2 THE CHAIR: That's very helpful.

3 MR HARRIS: So as I said yesterday, I don't propose to turn them up unless the  
4 Tribunal would find it of assistance, but in our reply, paragraph 3, we refer to the nature  
5 of --

6 THE CHAIR: No, no, take us to the documents. We have got time now, so ...

7 MR HARRIS: Okay.

8 Well, the reply you will find in file 1, tab 8, and that's paragraph 3. So this is our reply  
9 on the certification issues that were generated as between the parties.

10 THE CHAIR: Yes.

11 MR HARRIS: It's just convenient because we have cited there from both Pro-Sys and  
12 from McLaren. This will be familiar to the Tribunal.

13 In particular, all that's required at this stage is not via a mini trial, but a plausible and  
14 credible blueprint to trial, bearing in mind that we haven't had disclosure yet. So it's  
15 not a high threshold, we say in this paragraph, and you are expressly to employ the  
16 broad axe when it comes to quantification, and take account that, as per Pro-Sys 116,  
17 which I think we will find cited on the next document I show you, there only needs to  
18 be some evidence of the availability of some data for use in the model. So one doesn't  
19 have to even have the data; one only has to have some evidence of the availability of  
20 some of the data.

21 THE CHAIR: So what are we going to do if -- let's say you've got a plausible case at  
22 the moment on the current methodology, which is DiD and using Germany and  
23 Sweden as comparators, and you say it's a relatively low test, but what happens if you  
24 look into it more deeply and you think, well, actually they are not great comparators,  
25 because although you can adjust for the differences, you find actually it's not giving  
26 you the right results? Where are you going to go from there? Because Mr MacLean's

1 line is that he's not saying what is a proper comparator, he's just saying he doesn't  
2 think these two countries are proper comparators. He may be right, he may be wrong,  
3 and it's difficult for us to form a conclusive view on that at this stage, because it's a real  
4 issue between you, and it can be an issue for trial.

5 MR HARRIS: Yes, let me answer that. The first point is that the way you have just  
6 expressed it in the second half is enough for certification. It's credible and plausible  
7 now, even though disputed between the experts, because now is not the battle of the  
8 experts on a granular issue like that. But we accept, of course, that if, when we get  
9 more disclosure, and if, when we get more evidence, it looks like there are more issues  
10 with a particular comparator country, then we will either have to use one or other of  
11 the other methods that I am going to be explaining to you in just a moment. In  
12 particular, by reference to Mr Taylor's question, I am going to explain to you what the  
13 methodologies are under the so-called qualitative heading. But it may be that we will  
14 find information that shows that another comparator market is also valuable, but may  
15 not be perfect, but it would be valuable.

16 THE CHAIR: But what you may find -- or you may not find -- you may look at the data  
17 and say, actually, we are not getting a huge amount of assistance from looking at  
18 Sweden and Germany, the qualitative evidence is pointing to a different direction  
19 because the UK is a different market and there is a different structure; what then is  
20 going to be the methodology that you are going to come up with? Because we all  
21 know what we are trying to do, but it's coming to that answer, in case Mr MacLean's  
22 side is right.

23 MR HARRIS: Well, let me do two things, then. I will answer that after just one other  
24 remark, because it involves me just setting out before the Tribunal what the other  
25 non-statistical, non-regression econometric models are, and there are lots of them.  
26 So I will come to that in just one moment. But just to finish my first point.

1 THE CHAIR: Yes.

2 MR HARRIS: So you've got the references there to Pro-Sys and McLaren not being  
3 a sort of mini trial, just being a blueprint; that's enough for certification, and if you look  
4 at the bottom of that paragraph, you will see that that's now -- it even says, in Pro-Sys  
5 itself, that you are not to resolve conflicts between the experts at this stage.  
6 So it's perfectly legitimate for you to certify, notwithstanding that Mr Hunt disputes what  
7 Dr Williams says for us, about the suitability of the comparators.

8 Then lastly on this before I turn to the much-awaited explanation of "qualitative", is in  
9 our skeleton at paragraph 8b, and in particular footnote 3, you will see that we go back  
10 to the Pro-Sys test and we explain it's not a merits test, and in particular it's not a battle  
11 of the experts. This is a phrase that has been seen in plenty of the Canadian case  
12 law and now adopted in the UK case law. If you look at footnote 3 at the bottom of  
13 page 4, we have cited Ewert, and there is a finding there in the Court of Appeal, that  
14 it's not to be drawn into a battle of the experts, and it goes on to explain, if you were  
15 to turn it -- I don't propose to do it -- but it goes on to explain that it's because at this  
16 stage the Tribunal simply isn't equipped to deal with the fact that one expert, expert A,  
17 says, no, this is the way to do it; yet another expert, expert B, says, no, actually, this  
18 is the way to do it, and they disagree. What you simply have to do at certification is  
19 ask yourself the question, is expert A - for the PCR- is he or she or it presenting  
20 a plausible and credible methodology, based upon, grounded in the facts of the case,  
21 with some evidence of the availability of data? We say we manifestly pass that hurdle.  
22 And it's not to be -- and here I am quoting again from the Mancinelli case -- no fully  
23 fledged battle of the experts.

24 I am going to make two further points. The first one is from the final sentence, which  
25 is, "that language has now been expressly adopted in UK case law"; that's the  
26 UK Trucks Claim case, as you see cited. The next one is -- I don't want to develop

1 this because it's not necessary for today, but what happens in Pro-Sys and those other  
2 cases is the court is asking itself, is there a way in which this aggregate claim can be  
3 tried? And that's what I am asking myself now, because what I don't want to happen  
4 is I don't want to devote a lot of judiciary resource to a potentially lengthy trial with  
5 a potentially big number attached to it, that is said to have common issues, but there  
6 is no credible expert methodology for dealing with the common issues. If there is this  
7 low merits hurdle test, without going into the detail of the expert evidence, that looks  
8 credible to address common issues, then my job at certification is to allow it through.  
9 So the issue that's going on at certification is really: is it not possible? Is it just not  
10 possible, not credible to address common issues? It's not so much: is every aspect of  
11 the methodology, on the limited information that's presented to me today, where the  
12 other side's expert says, "no, I disagree"; it's not for me to get into that. It's for me, the  
13 Tribunal, to ask myself, is this going to be a car crash, because the common bits are  
14 not capable of being tried, and I only find that out two years later when I am heading  
15 to a 16-week trial in some massive claim, and by then everyone's wasted a lot of time  
16 and money, including judicial time and money? So we have just always got to bear  
17 that in mind.

18 Now, in this case, I will obviously deal with Mr MacLean's two criticisms, but it's  
19 important to note that neither one of them is an allegation that common issues cannot  
20 be dealt with. That's an important point. Indeed, the VAT exempt, the second one of  
21 his criticisms, is only necessary if he's failed on the first criticism; namely, the  
22 methodology is just totally useless. I am paraphrasing. But, of course, if he fails on  
23 the first one, by definition there will be an acceptable overarching methodology to take  
24 common issues to trial, and then it's of no avail to him. I am prefacing something I will  
25 say when I come to the VAT exempt point, but it's of no avail to him then to say, "oh,  
26 well, I want to take a pot shot at some part of the quantum", because *ex hypothesi* you

1 will have already decided that, at an overarching level, there is a perfectly coherent,  
2 plausible methodology to take you to trial on common issues. That's my point there.

3 So that's all I have to say on case law. Unless you want me to --

4 THE CHAIR: No, that's fine.

5 MR HARRIS: So then the big question, then, that was raised yesterday, and it's helpful  
6 in dealing with Mr MacLean's criticisms, is qualitative, and how does it relate to the  
7 statistical econometric algebraic model? Let me please identify to you six types of  
8 qualitative material that is already addressed by Dr Williams in his two reports.

9 I will begin with the qualitative methodologies that apply across the board, and then  
10 I am going to identify one that deals with VAT exempt, so that'll be a fifth, and one that  
11 deals with pass-through, and that'll be a sixth.

12 The first one, then, is that Dr Williams has identified that he proposes to review  
13 evidence from the other postal markets where liberalisation and entry by competitors  
14 has occurred, and that's qualitative. We are not talking here data and statistics. What  
15 he will obtain by this first qualitative macro method is evidence of things like market  
16 share and geographic market coverage, and of course decline in prices.

17 So, just pausing, that one alone is a qualitative methodology that would lead to  
18 an outcome for this case, even if there were nothing else, even if there was no  
19 statistical econometric model and no other qualitative methodology. You will have  
20 seen, for instance, in his report, that he cites, in this regard, reviews that have been  
21 conducted by WIK Consult, which is a German --

22 THE CHAIR: What you are going to have to do is give me the paragraph number on  
23 each of these, in Williams's first report.

24 MR HARRIS: Yes. There are, in Williams 1, which is tab 5 of bundle 1, references to  
25 review of the other postal markets; paragraph 7.3.7 and 8.2.16.

26 THE CHAIR: Yes.

1 MR HARRIS: And appendix 12.

2 THE CHAIR: Okay. Thank you.

3 MR HARRIS: So that's number 1. So that is qualitative macro method number 1, that  
4 serves to supplement or work alongside the econometric model. I will come back to  
5 that.

6 Next one is, again, qualitative macro method number 2 is review of the business plans  
7 and any independent assessments of those business plans. That's both of Whistl and  
8 of Royal Mail. So we will obtain disclosure both of what Whistl was expecting to do in  
9 its business plan, and of when Royal Mail hired FTI to conduct an assessment of  
10 that -- that was paragraph 7.168(a) and (b) of the Ofcom decision that I showed you  
11 yesterday, at tab 4 -- and we have Royal Mail's business plans to assess the potential  
12 responses by Royal Mail to this entry, and I showed you some of that yesterday as  
13 well. This is dealt with in Dr Williams' first report at paragraph 8.2.14(a), 8.2.16(b),  
14 and appendix 11. As I say, it also includes analysing the Ofcom decision. So, for  
15 example, that paragraph I just gave you, 7.168(a) and (b).

16 Again, just to pause, that is qualitative assessment. Of course, there are some  
17 numbers in these materials; I am not pretending for a minute that qualitative should be  
18 divorced from numbers. Business plans will obviously contain numbers, but they are  
19 not econometric modelling. Dr Williams will assess what the likely future progress of  
20 this market in the counterfactual would have been, by reference to people who had  
21 a great deal of skin in the game. Whistl, this is what they said was going to happen in  
22 that counterfactual world -- what they hoped wouldn't be counterfactual -- and  
23 Royal Mail's assessment of how that would work or wouldn't work, and FTI's  
24 assessment from a slightly more independent point of view.

25 So, again, if there were nothing else, that would be a coherent, credible, plausible  
26 qualitative method for today's purposes, but it's not the only one, because we have

1 already identified the review of the other markets. So, so far, two qualitative macro  
2 methods.

3 The next one is, it seems likely to us that there will have to be a survey from a sample  
4 of bulk mail retail customers. This is dealt with in Dr Williams' first report at 8.2.14(b).  
5 Then there is an entire annex that you perhaps have seen in that first report, which is  
6 appendix 7, talking about the nature of the survey. Again, the survey will test the  
7 degree to which the increased competition in the counterfactual could have led to  
8 lower prices, by reference to people who are actually in the market. So what do these  
9 bulk mail retail customers say about the likelihood of the theory of harm that we  
10 advance?

11 So, again, just taking it a step back, this survey would by itself, certainly for today's  
12 purposes, be a perfectly credible and plausible method for the Tribunal to assess what  
13 is going to happen, or would have happened in the market absent the infringement,  
14 let alone when it's combined with the two others that I have already mentioned. They  
15 are, of course, intended to be combined, they are intended to be complements.

16 I will come on in a minute to how one synthesises complementary methods, including  
17 by reference to the econometric model.

18 So that's number 3. Number 4, again, macro. This is dealt with in Dr Williams' first  
19 report, appendix 11, and it comprises the collection of additional financial information  
20 which he will use to refine and test the estimates of his overcharge. So, for instance,  
21 Royal Mail's cost inputs – they are the sorts of things that would allow Dr Williams to  
22 produce a bottom-up estimate of the bulk mail delivery prices that Royal Mail would  
23 have charged. That one comes from the bottom up. You will find a reference to that  
24 specific example in table A11.1, row 10, of appendix 11 to Williams 1, which is at  
25 bundle 1, tab 5.

26 So again, just to take a step back, so far I have identified four so-called qualitative -- by

1 which I mean not econometric regression modelling -- that complement each other,  
2 that are all used coherently, and certainly for today's purposes, plausibly and credibly,  
3 to set out what Dr Williams, in his expert independent opinion, will gauge to have been  
4 what the market would have looked like in the counterfactual as regards overcharge.  
5 That's 4.

6 I said there were two more, and I will just deal with them quickly. They are slightly less  
7 macro, but one of them deals with VAT exempt customers, and I would just like to  
8 show you a part of the report.

9 If we turn up, please, Dr Williams's first report, which is tab 5, bundle 1, and if we turn  
10 up paragraph 7.4.8.

11 Perhaps we begin on page 421, under the heading "VAT treatment". I know you have  
12 had a chance to read this, but what Dr Williams is essentially saying is we are in  
13 agreement with Royal Mail here, it's sufficiently different to have had a VAT-exempt  
14 segment of the market that one has to have a different part of the regression model.

15 No problem, we all agree with that. What Dr Williams does here is he explains why  
16 the VAT treatment makes a meaningful difference. It's pretty obvious. It makes a big  
17 difference to the actual prices that actually get charged to some of the customers.

18 So without reading all of page 421 and 422, helpfully at paragraph 7.4.8, over the page  
19 on 423, and 7.4.9, having explained why it makes a difference -- as I say, a fairly  
20 obvious difference -- he says: this is my framework for the assessment of the retail  
21 customer overcharge as regards VAT-exempt customers.

22 What he says there -- the key paragraph is 7.4.9 -- is he will need to obtain and  
23 analyse, for the VAT-exempt part of the market, by way of qualitative assessment, the  
24 following materials. Again, with respect, they are fairly obvious.

25 He would need, at (a), to obtain further information about the VAT rate. That's obvious.

26 That's (a).



1 (b), again, with respect, fairly obvious: he will need to obtain further information about  
2 the proportion within the market, because obviously the bigger proportion, the bigger  
3 the potential differenced effect.

4 Then (c), the magnitude of what sometimes is called hidden VAT. I prefer to call it  
5 non-deductible VAT. You are doubtless familiar with this. Some people are fully  
6 exempt; they can't deduct at all. Some people are partially VAT exempt, and there  
7 are various formulae and plans that they can be on. He will obtain that sort of material.

8 Then (d), he will need to obtain supply and demand elasticities, and he sets that out  
9 there. Having obtained that, that will give him the ability to perform a qualitative  
10 methodology as regards VAT exempt customers, so that's a sub-part of the market,  
11 but also on the question of overcharge.

12 Then, finally, the sixth one that I mentioned is review of economic literature, in  
13 particular on the question of pass-through and inputs.

14 Now, you probably picked this up from the report, that as things currently stand, on the  
15 basis of the limited material currently available, Dr Williams's provisional estimates of  
16 the overcharge are directly produced by reference to bulk retail customers' prices, as  
17 opposed to bulk mail operators' overcharge that is then passed through. But he  
18 proposes, if necessary, to do both: look at the end prices where pass-through is  
19 already, if you like, built in, but also to look at the overcharge to the operators and then  
20 ask what is passed through from the operators to the bulk mail retail customers  
21 themselves, namely the clients in the proposed class.

22 What he explains, if you were to turn -- you don't need to turn it up, but in Williams 1,  
23 at paragraph 9.4.1 to 9.4.6, he explains that he will review the economic literature on  
24 pass-through and inputs, and that will provide him with evidence of elasticity of  
25 demand, elasticity of supply and pass-through in the postal sector, and if you want the  
26 details, it's in the appendices. You perhaps have seen those appendices.

1 So that's the six so-called qualitative, by which I am contrasting with the econometrics,  
2 and then there will also be the econometrics. You have seen the algebraic  
3 formulations of that. The question then is: how do they relate together? How do they  
4 interrelate? They are connected because the whole point of having Dr Williams or  
5 somebody of expertise is for them to assess all of these methods. So he will get, if  
6 you like, an averaged figure that is produced at the end of the econometrics of -- it  
7 seems likely that it might be in the region, for VAT-rated customers, of something like  
8 8 to 10 per cent on preliminary estimates.

9 Then let's say, taking my first example, the review of postal markets. Happily, that is  
10 consistent, and he says so in his report at paragraph 8.3.13. But what he will have to  
11 do is then assess in his expert, independent opinion, if he's getting a figure in, say, the  
12 region of, I don't know, just for the sake of argument, 6 to 7 per cent from a qualitative  
13 method number 1 review of other postal markets, and yet, from the economic  
14 regression, it looks closer to 9 to 10 per cent, then he will have to take an overview, in  
15 his expert, independent opinion, of what is the better methodology. That's what his  
16 expertise is being employed to do.

17 Then he will also have to take into account, when he's trying to come up with his expert  
18 opinion of what the number should be, of all the other qualitative methods that I have  
19 identified. So, for instance, let's say the second one identified, Whistl's business plans  
20 and Royal Mail's business plans and FTI's assessment of those business plans, let's  
21 say that looks like it's pointing to, for VAT-rated customers, an overcharge of, say,  
22 11 to 12 per cent. So, so far, on these hypotheses, you have got a difference: you  
23 have got 6 to 7 from review of other postal markets, you have got 8 to 10 from the  
24 econometric model, and you have got say, 9, 10 or 11 from the review of the business  
25 plans, then his expert judgment will have to be presented as an opinion of why he  
26 thinks it's better to place more reliance on this and less reliance on that.

1 For example, just for the sake of argument, you might say: well, there are data  
2 limitations for the econometric modelling that mean that, in my expert view, it's better  
3 to place a greater reliance upon the contemporaneous business plans that doubtless  
4 have some modelling of their own. That's an example.

5 So what is really going on -- and all the others have to be factored in. All the six points  
6 that were identified first as qualitative as opposed to econometric regression  
7 modelling, they all have to be then synthesised or, if you like, triangulated so that the  
8 experts -- and then you can take a view of Dr Williams as an expert witness. Has he  
9 synthesised them properly? Are the reasons that he prefers this one over that one  
10 acceptable? Instead, has Royal Mail criticised them in such a manner that I can't rely  
11 upon this and I can't rely upon that?

12 So that's all on the question of overcharge and how they fit together.

13 It's fair to just emphasise that the econometric modelling, inherently in it, what one  
14 produces is a sort of an averaged overcharge figure across the period, and that's the  
15 way those models work. But we do recognise -- and this is a point that was made by  
16 the chairman yesterday on more than one occasion -- that there might well be an  
17 evolution in these markets. So, for the sake of argument, it might be that Whistl  
18 entered the market with fairly aggressive price discounting in, whatever, the first  
19 six months or the first two years, but then it begins to tail off. Who knows. Who knows.

20 The econometric modelling is not quite so apt to deal with that, because it's more of  
21 an average across the time period that's being assessed. But, of course, business  
22 plans may well be able to allow Dr Williams to synthesise all of the material when he  
23 analyses it all together and say: well, it looks more likely, in my expert, independent  
24 opinion, that there would have been heavy discounting in the earlier period, and then  
25 when Whistl became more established, in order to profit-maximise, there would have  
26 been less price discounting in a later period. But --

1 THE CHAIR: But, Mr Harris, if we look at your skeleton at paragraph 26, you say:  
2 "Williams sets out various qualitative methods intended either to supplement the  
3 robustness and confidence in the results of the DiD model ..." [as read]  
4 I fully understand that, and that's what he effectively says at 8.2.16 of his report at  
5 page 428. It's the second half, I think, unless I misunderstood it, that is one of the  
6 points that Mr Taylor really wants to look at. You say:  
7 "... or to provide an alternative means of estimating the retail customer overcharge."  
8 [as read]  
9 That's why I put to you the question earlier, you know: what if you look at what is  
10 coming in from the qualitative analysis or other sources and you take the view, actually,  
11 it hasn't confirmed the robustness and confidence in the econometric analysis? It  
12 seems to me in your skeleton you are saying you can use this qualitative evidence as  
13 another means, an alternative means, of estimating the customer retail overcharge,  
14 but am I right or am I wrong that he doesn't actually say that second half in his report?  
15 If he doesn't say that, what is his position?  
16 MR HARRIS: The position is that these are alternative methodologies if needed, but  
17 he can't give a view as to whether the first example I gave is the preferred one once  
18 all the data has been (overspeaking) --  
19 THE CHAIR: No, I fully understand --  
20 MR HARRIS: -- because he doesn't have the data, but it is an alternative.  
21 THE CHAIR: I fully understand that. The only point I am making -- and maybe it's just  
22 a jury point, I don't know, but Mr MacLean will no doubt educate me -- when I look at  
23 those paragraphs, they are not describing the qualitative evidence as an alternative;  
24 they are saying they check the robustness and the confidence in the results of the  
25 econometric model. That's the only point I am making, and that there must be  
26 something in his supplemental report that I haven't picked up yet, and you can show

1 me. But looking at the first report doesn't quite --

2 MR HARRIS: He does address this in terms. Can I show you in Williams 2 at tab 9  
3 of volume 1.

4 THE CHAIR: Yes, I suspect it is somewhere else. But, yes, Williams 2. Yes.

5 MR HARRIS: Under the heading "Sole reliance on DiD". It's page 632.

6 THE CHAIR: Let's have a look at it. 632, yes.

7 MR HARRIS: We apprehended that the challenge that was being made to us was that  
8 there was solely a proposal to rely on the econometric analysis, but that's not right, as  
9 Dr Williams says here:

10 "a) sections 7 and 8 of Williams 1 set out additional evidence which supports the  
11 existence and the scale of the Retail Customer Overcharge, which is quite distinct to  
12 the econometric analysis ..."

13 I endeavoured to explain those when I was making my opening remarks. That's the  
14 six points:

15 "... and

16 "b) section 8 also sets out additional qualitative analysis I plan to undertake following  
17 disclosure [those are important words], which will allow me to test and provide further  
18 confidence in the econometrics results."

19 THE CHAIR: But that's the same point. My point is perhaps a bit too subtle, I don't  
20 know, but what my point is, is that I fully understand why what you are saying in 26.2  
21 makes sense. I fully understand that. All I am saying is: is that stated by Williams?  
22 When I looked at Williams's reports -- and it may be I looked at it too quickly -- I got  
23 the impression that he was looking at the qualitative evidence as a cross-check to give  
24 him more confidence or the Tribunal more confidence in the robustness --

25 MR HARRIS: Well, he says in terms over the page, sir.

26 THE CHAIR: Let's have a look.

1 MR HARRIS: 3.6.2:  
2 "Together with the preliminary estimates of the Retail Customer Overcharge, these  
3 additional analyses [so that's the qualitative analyses] will provide a robust view of the  
4 Retail Customer Overcharge, [then the words] even if am not able to implement the  
5 econometric analysis set out in Appendix 4 ..."  
6 THE CHAIR: Oh, yes. Okay. It's a bit cryptic there. But, yes.  
7 So, anyway, look, your case is as in your skeleton --  
8 MR HARRIS: Yes.  
9 THE CHAIR: -- paragraph 26, and you are saying that Williams is happy with  
10 paragraph 26.  
11 MR HARRIS: That's right.  
12 THE CHAIR: Even though it's not necessarily 100 per cent clear.  
13 MR HARRIS: Just to be clear, this is, in my respectful submission, above and beyond  
14 what one needs to grapple with in this certification hearing because --  
15 THE CHAIR: It may be, but at the end of the day, this case has been assigned to  
16 me -- good or bad for you, I don't know -- but I have an interest in having this case  
17 done properly and knowing how it is going to develop, because my feeling -- and it  
18 may be wrong -- is that everything's going to develop quite substantially. Once we  
19 have got disclosure, not just from Whistl and Royal Mail, but further research has been  
20 done, you may find that your initial methodology is not ideal, and you are not just  
21 looking at the qualitative stuff as a cross-check. You may find what you have got is  
22 something that overtakes it. There is nothing wrong with that, because all we are  
23 doing at this stage is deciding whether you have got a credible or plausible  
24 methodology.  
25 But I have a further interest, in the sense I do like to look forward and have a vision as  
26 to how this case is going to develop, and certainly when we get to the CMC in

1 September, we will want to look in a lot more detail as to how the parties intend to  
2 estimate the overcharge.

3 MR HARRIS: Sir, may I respectfully agree 100 per cent.

4 THE CHAIR: Yes.

5 MR HARRIS: We do agree that the methodologies may change. We can't assess  
6 that until after the disclosure has come in, which we don't have.

7 THE CHAIR: Yes.

8 MR HARRIS: It might be that some of these drop off the page altogether, it might be  
9 that they are supplemented or it might be that there are new methodologies. But for  
10 today's purposes -- and I entirely accept that it is perfectly legitimate for the Tribunal  
11 to look forward, I just -- you would expect me to submit that the test is well and truly  
12 met for certification purposes on the basis of these materials, because they are all  
13 plausible and credible, they all fit together plausibly and credibly, they are all grounded  
14 in the facts of the case, and there is some evidence of the availability of data to apply  
15 within those that require data.

16 THE CHAIR: I understand that.

17 MR HARRIS: Good. So the last part then.

18 So what I had dealt with, I hope sufficiently clearly, so far is: what are the so-called  
19 qualitative methodologies? So there were four macro and two more refined.

20 THE CHAIR: Yes.

21 MR HARRIS: How they fit together. The critical message there is: that's why we have  
22 got an expert who knows about these markets. He will triangulate them all, and he will  
23 have to explain to you, come trial, "I have come out in this spot on overcharge because  
24 this is better methodology than that one, this one applies better, the data for this one  
25 works well and doesn't work well for that one". But probably what is likely to happen  
26 is that he's going to be saying, "Well, they complement each other; they may have

1 | slightly different outcomes, but they complement each other, and it is because they  
2 | complement each other that I can be confident in the robustness overall of my opinion,  
3 | which is overcharge/damages of X", and you will have to assess that.

4 | I accept that at trial, he may not succeed. I mean, that will be my job with him at trial.  
5 | Mr MacLean will take issue with it all. So that's --

6 | THE CHAIR: We may get to a position whereby -- when you look at the Trucks  
7 | judgment, you had a great deal of learning and an expert's report. At the end of the  
8 | day, they came up with 5 per cent, which was, you know, a very broad brush, and it  
9 | may mean that, you know, on this case, once we have heard all the evidence, we can  
10 | say: we are never going to know exactly to the exact penny or whatever what the  
11 | overcharge is, but we know it's somewhere in quite a broad range and we are going  
12 | to have to come up with a figure. Mr MacLean may say, "Well, as a matter of fairness,  
13 | if it's within a range, you should be picking the bottom of the range", and you will say,  
14 | "No, you know, you have to look somewhere in the middle". That's how these types  
15 | of cases often tend to end up.

16 | Throughout these cases, I have always said that I am not usually overtly impressed  
17 | when I get experts coming up and saying, "This is the precise amount", as if that's the  
18 | only possible figure. It doesn't really help me, because there are so many movable  
19 | parts that it's a more, let's say, sophisticated analysis in getting to the final figure.

20 | But I can see you have got a plausible case that there is an overcharge. It is going to  
21 | be difficult to know now how exactly we are going to reach it. It is going to be your  
22 | expert. You are going to go out and do all the qualitative analysis you are going to do.

23 | Mr MacLean's side will probably do the same thing. Then we will hopefully be in  
24 | a position to decide whether or not there has been an overcharge, and there are some  
25 | very big questions that it's unclear what the answer is going to be.

26 | You know, we are looking at a market whereby no one else seems to have come in in



1 a long period of time. You can see that for bulk mail, demand for it is falling. You  
2 know, I used to get my bank statements in the post. Well, they now come on some  
3 sort of app. All of that reduces the volume of commerce and the attractiveness of this  
4 business. You know, these are issues that are all going to have to be factored into  
5 when you get to the stage of serving the final versions of the expert reports.

6 This is not an easy case. I am not saying -- I haven't a clue what the answer is. I have  
7 got an open mind. But it's not an easy case when it actually comes to trying to quantify  
8 this overcharge. That's why Mr MacLean's right in saying, "Look, you have come up  
9 with your thing; I have got concerns about why your thing may not work and why it is  
10 going to be so difficult", and you are going to say: yes, it is difficult, it's only an  
11 approximation, and we are going to have to look at other things in any event, either to  
12 supplement what we have got from the results of this econometric model, or not just  
13 to supplement, to overtake it and say: well, we recognise that, because of all these  
14 things, what is coming out of this analysis, which we thought was a sensible start at  
15 the beginning, isn't going to help you in a great way.

16 That's how I see it. Maybe I look at things too simply, I don't know, but that's how I am  
17 looking at it at the moment.

18 MR HARRIS: Sir, with respect, for today's purposes, we agree, and what you have  
19 essentially identified is that, come trial, there will be a lot of these issues that have to  
20 be tried out, and indeed that's the purpose of the trial. But today what we have got is  
21 a plausible and credible method, grounded on the facts of this case, to allow you to  
22 give permission for us to at least try to go to the trial --

23 THE CHAIR: Yes, yes.

24 MR HARRIS: -- and for Mr MacLean and his team to say, "No, you have not done  
25 a good job, you have messed this up, you have messed that up", and blah de blah de  
26 blah.

1 THE CHAIR: Yes. Some of these cases you look at and you say: I think this case is  
2 just about to get over the line and I am really doubtful it is going to get anywhere,  
3 okay? I am not saying this is one of those ones, okay? It's one of those ones where  
4 I see that there is merit on both sides, there is a real battle to be heard, and I would  
5 be reluctant to shut the door at this stage just because you don't have the data and  
6 the information at this early stage to come up with exactly how you are going to prove  
7 this.

8 You have given us the econometric model, which I understand there are comparators  
9 which may or may not be good, but you can bring in all this qualitative stuff, and I hope  
10 at some stage we are going to have a very clear idea as to how it is going to be proved.  
11 You have got a plausible start, subject to what Mr MacLean says, but don't think we  
12 are just going to sit back after this hearing. We really want to take a grip of this and  
13 go through a lot of these issues in more detail next time round.

14 MR HARRIS: Sir, yes.

15 May I deal with one other answer to Mr Taylor's enquiry in just one moment, but to  
16 respond on that exact point, here's another way of looking at it.

17 THE CHAIR: Yes.

18 MR HARRIS: Why should we be given permission to go ahead? Because essentially,  
19 the Whistl claim was going to go to trial, and for present purposes, we say the same  
20 thing as Whistl. We would have to establish at the trial that they were definitely going  
21 to have that the counterfactual world would have looked like they say it was going to  
22 look like, because we say the same thing.

23 I appreciate after that, there may be a difference as to precisely what each party would  
24 have said about where prices go.

25 THE CHAIR: Correct. That's the big difference, isn't it?

26 MR HARRIS: Agreed. But my point, just for certification purposes -- because

1 obviously it won't surprise you that my heavy focus is upon getting certification, though  
2 I accept that we should look beyond that as well -- one way of putting it is: it would be  
3 extraordinary if this case weren't given permission to go to trial when Whistl was going  
4 to go to trial on, for present purposes, essentially the same points about the  
5 counterfactual.

6 They had a triable case. We have a triable case. As we cited in our skeleton on  
7 Ad Tech, it is not the function of a certification hearing to deny, because of granular  
8 disputes about expert methodologies between A and B -- it is not the purpose of this  
9 Tribunal at certification to deny a triable case to go to trial. So I put it like that as well.

10 Just reverting finally to the question from -- I hope is helpful in response to Mr Taylor's  
11 enquiry. So far, what I have dealt with is the overcharge, the qualitative methods for  
12 overcharge in the econometric modelling, but we have to, I think, just very briefly,  
13 address the fact that one needs a damages estimate, and that one needs to obtain,  
14 as you have seen from the model, other qualitative evidence, such as VOC figures.  
15 So one needs to get them in disclosure from Royal Mail, as necessary from Whistl,  
16 and the detail of that is in the appendices to Williams 1. So that's another way in which  
17 qualitative links in with the econometrics. That's VOC.

18 The next one I will give you is qualitative evidence on the contestability of the market.  
19 How much will market share grow over what time periods? So that qualitative  
20 evidence has to be obtained, again from Royal Mail and from Whistl, and then that has  
21 to be fed into the model.

22 Because the question, as I apprehended it, was: what is the relationship between the  
23 model and the qualitative evidence? So I have just given you two more examples  
24 about how they interrelate.

25 A third example is the segment proportions. As you know, there are slightly different  
26 analyses for the bulk mail segments, whether it be fulfilment business or transactional

1 advertising. So, again, that's qualitative evidence that has to be obtained, how those  
2 different segments of the market work, and then that has to be fed into the model.  
3 Then when it comes to the overcharge, reverting back to that, we will obviously be  
4 obtaining qualitative evidence, in the sense that it's not the actual model itself, of price  
5 lists and costs input.  
6 So an example that Dr Williams gives is obtaining Royal Mail's national average fully  
7 allocated cost data. So that's, again, numerical, but it's qualitative for these purposes,  
8 and then that has to get fed into the model.  
9 So I hope that those are further examples of what you asked me yesterday, which is:  
10 what is the relationship between on the one hand qualitative and on the other hand  
11 the econometric modelling? It doesn't end there, but those are some illustrative  
12 examples, I hope sufficient for today's purposes.  
13 THE CHAIR: Okay. We will take our break now and then hopefully we will be able to  
14 copy the stuff that you have sent through so far.  
15 MR HARRIS: I am grateful, yes.  
16 THE CHAIR: Do you need any copies from your side?  
17 MR HARRIS: I don't think so.  
18 THE CHAIR: You don't? Okay, so we just need five copies then. Yes. That's fine.  
19 Mr MacLean, have you got anything to say at this stage?  
20 MR MACLEAN: No.  
21 THE CHAIR: Okay, thank you.  
22 So we will come back at 11.55.  
23 (11.45 am)  
24 (A short break)  
25 (11.59 am)  
26 THE CHAIR: Yes, Mr Harris.

1 MR HARRIS: Sir, I am in your hands. We could deal either with the letter that was  
2 sent or --

3 THE CHAIR: We will deal with the letters after we have dealt with these two issues.

4 MR HARRIS: Yes. Let me turn, then, to the two issues.

5 The overview remark, before I look at them in slightly more detail, is it is difficult for  
6 me, at least, as a competition practitioner, to conceive of a more obvious example of  
7 what the part of a trial concerning expert evidence and expert econometrics would  
8 look like than an argument about whether comparators are the right comparators, how  
9 suitable they are, how applicable they are. It's difficult for me, given that this is what  
10 I do for a living, to think of a more obvious example of what would happen at a trial.  
11 Of course, that's not the question for today. The question for today is the much less  
12 onerous certification question.

13 Actually, just pausing for a moment, I can think of at least one other example of  
14 something that happens at a trial, obviously at a trial, and that's arguments between  
15 experts about the availability and the suitability of data. Again, that's what you get,  
16 day in and day out, up and down the breadth of the country, at an actual trial. Of  
17 course, that latter point is important for this reason: that formerly, up until the week  
18 before this hearing, Royal Mail also took points about the supposed lack of availability  
19 of data that was said to be fatal for certification purposes. But, of course, even  
20 Royal Mail has now had the good sense to abandon those points because they are  
21 self-evidently points for trial. Having got a plausible and credible model with some  
22 evidence of the availability of some data to work in it, then it goes to trial.

23 So Royal Mail has abandoned the data points, and with respect, they should have  
24 abandoned this other obvious trial point, which is: "I don't agree that you have chosen  
25 the right comparator, it's not sufficiently suitable", et cetera, et cetera. So that's my  
26 macro point.

1 But the way Mr MacLean, on behalf of his client, puts it on these two flaws is firstly he  
2 says there is a selection bias. That's his first point. I am going to deal with that in  
3 a minute.

4 THE CHAIR: Yes.

5 MR HARRIS: Then secondly, he says -- and that would, if successful, defeat the entire  
6 claim. So that's, he says, a knockout point. What prima facie might look like  
7 a plausible and credible model actually is utterly hopeless. It's so hopeless that you  
8 shouldn't even be allowed to attempt to use it at trial. You should knock it out  
9 completely. That's the way he puts it.

10 The second one, of course, is different. That exemption supposed problems, that  
11 doesn't knock out the whole trial, even on his own case. That just knocks out on his  
12 own case some significant part of the quantum. I prefaced the point that I will make  
13 there earlier on, which is that's just not good enough for certification. If you have got  
14 a plausible and credible methodology with common issues, capable of dealing with  
15 common issues, that's going to go to trial anyway, it's just not an answer at certification  
16 to say, "Oh, well, some of it might not work". I will come back to that.

17 So selection bias. Let me start with the full-throttle version of that submission.

18 If you were to turn up the response, which is bundle 1, tab 6 -- this is my learned  
19 friend's response document -- and in particular to look at paragraph 29.2 --

20 THE CHAIR: So let me see.

21 MR HARRIS: It's page 503. Tab 6, page 503.

22 THE CHAIR: What is the paragraph number?

23 MR HARRIS: 29.2.

24 So there are two ways that this is put. This is the first and full-throttle and utterly  
25 misconceived, indeed improper, way of putting it. It's to be found at 29.2, the final line:  
26 "... Mr Williams [I think it means Dr Williams] appears to have chosen comparators

1 based on the outcome he wants to see."  
2 Then my learned friend's skeleton uses this phrase at paragraph 30, that the  
3 comparators:  
4 "... have been selected in a way that is likely to bias the outcome of Mr Williams's  
5 model in favour of the PCR." [as read]  
6 Now, to the extent that the allegation is that there has been a deliberate choice by this  
7 independent professional expert only to go for comparators that give rise to a particular  
8 result that favours the PCR, then that is a thoroughly scurrilous allegation which should  
9 never have been made. It's utterly without foundation. Dr Williams is a careful,  
10 professional witness, and he knows full well his independent duties to this Tribunal.  
11 THE CHAIR: I don't read it in the extreme way that you have said it. Look, at the end  
12 of the day, it's either arguable or it's not arguable. You can have a bit of the sort of  
13 jury-like flourish, but, I mean, at the end of the day, I look at these things very coldly;  
14 you know that. Saying that, you know, he's making outrageous allegations doesn't  
15 really assist.  
16 MR HARRIS: Sir, there is a more moderate way that it's put, but it's interesting that  
17 the paperwork has two ways of putting it.  
18 THE CHAIR: But whether it's deliberate or not deliberate, it doesn't really matter. It's  
19 whether or not this is a viable comparator, and if people want to put flourishes on top,  
20 it doesn't help me, because all it does is just sort of raise unnecessary temperature  
21 between everyone, and we don't want that. We are just clinically going through this  
22 one way or another.  
23 MR HARRIS: So I will take the more moderate way.  
24 THE CHAIR: Let's do the more moderate way, I prefer that.  
25 MR MACLEAN: Yes, but what you will notice that my name isn't on this reply  
26 document.

1 THE CHAIR: But does it matter? It doesn't matter whether it's you or anyone.

2 MR MACLEAN: Absolutely not, but in terms of, if my learned friend is accusing me of  
3 making scurrilous --

4 THE CHAIR: McIntyre's not doing it either. Look, McIntyre's a regular, he's not going  
5 to go over the top. You don't need to -- it's a non-issue. All I am saying is, I don't  
6 appreciate it when people make allegations against other people who are highly  
7 respected by the Tribunal. And it applies to Harris as well; he's highly respected, and  
8 if you tried to do the same thing against him, I would do exactly the same with you.

9 MR HARRIS: So my learned friend's skeleton argument, in paragraph 24, the way it's  
10 put is that the methodology "presupposes what the methodology is supposed to  
11 assess".

12 THE CHAIR: Sorry, what page?

13 MR HARRIS: It's page 6 of my learned friend's skeleton argument. I think that one  
14 does have his name on it. It's paragraph 24 at the bottom of page 6 of his skeleton  
15 argument.

16 THE CHAIR: Yes.

17 MR HARRIS: He said:  
18 "The difficulty with this approach is that it presupposes what the methodology is  
19 supposed to assess."  
20 So that's one way of putting the selection bias point. At the heart of the complaint is  
21 that Dr Williams has chosen the wrong comparators. Essentially, it is said, the  
22 comparators you have chosen are unsuitable because they are insufficiently  
23 comparable.

24 THE CHAIR: That's the really key point.

25 MR HARRIS: Yes, agreed, and I am going to deal with that. But, presupposing what  
26 the methodology is supposed to express; let me just deal with that. The difference in



1 differences model does not seek to establish, in isolation, any causation of  
2 anti-competitive harm. It is not our means of establishing causation of what would  
3 have happened in the counterfactual. In other words, the model doesn't set out what  
4 it assumes -- it doesn't assume what it sets out to prove, and we don't need any  
5 econometric model, the DiD model that this is attacking. We just don't need the  
6 DiD model in order to establish, certainly for today's purposes, that there is a plausible  
7 and credible case that the counterfactual world that we propose as our theory of harm  
8 is capable of being established. Why don't I need the DiD model for that? It's  
9 irrelevant to that. Answer: For all the materials we looked at yesterday. I've got the  
10 Ofcom decision, I've got the 230-page CAT judgment.

11 THE CHAIR: It may be 230 pages, but there is only, like, one or two paragraphs that  
12 are relevant.

13 MR HARRIS: That's true, but it upholds, in all material respects, what was set out in  
14 the Ofcom decision, and the Ofcom decision is strongly supported. It's way more than  
15 I need to have a plausible and credible case for today's purposes, that the  
16 counterfactual market that appears in my expert's and my client's theory of harm is  
17 a plausible and credible argument.

18 THE CHAIR: What you say is that, but for the infringement, Royal Mail would have  
19 expanded its operations, it would have got the substantial --

20 MR HARRIS: Whistl.

21 THE CHAIR: Sorry, yes, Whistl would have expanded its operations, got a significant  
22 proportion of the market; you then have real competition between two parties, and  
23 ordinarily you would expect that to lead to price reductions for the retail consumers.  
24 That's what they are basically saying in Ofcom. But you also accept that whether or  
25 not that's correct actually depends on the evidence. But you have enough there to  
26 say, I've got a case that's viable, at least an arguable case, or a good arguable case,

1 that this has happened.

2 MR HARRIS: Yes.

3 THE CHAIR: I accept that. It's just that that's not the be all and end all, it just gets  
4 you to stage one, and you are not pretending to get beyond stage one at this stage.  
5 That's all we can look at, at this stage.

6 MR HARRIS: Precisely. So, to put that same point, with all of those points I agree  
7 with, in another way: this is not some case where there is only an arcane economic  
8 stepwise regression model that relies upon data, and that's all we have. On the  
9 contrary; we have got all of those -- at least six -- qualitative methodological  
10 approaches that I identified earlier on, which you have seen in the reports.

11 So, to say your case cannot proceed to trial, as at today, because the econometric  
12 model assumes what it sets out to prove -- and that's what selection bias  
13 means -- that's just wrong. We've got masses of other data. This is with great respect,  
14 I put it as high as this; for certification purposes, this is a very straightforward, plain  
15 vanilla case. There are lots of cases -- this is a follow-on where I've got all of this  
16 material. Lots of cases come and they try to establish certification on the back of  
17 stand-alone without, say, an Ofcom decision, without having seen any of the  
18 underlying materials. But that's not my case. This is very straightforward. And I say  
19 again, it would be startling, it would be truly startling, in my submission, if the case that  
20 Whistl wanted to pursue was allowed to and was being allowed to go to trial, and yet  
21 my case, where there is no complaint about the commonality issue, wants to do the  
22 same thing that Whistl was already going to trial in order to seek to prove, and  
23 somehow I was denied the opportunity to do that; that makes no sense. So that's how  
24 I put the first point.

25 What I say is that the econometrics, that part of the modelling, is just one method of  
26 seeking to quantify the effect at trial. That's all that that does. You will have seen,

1 notably -- I just want to show you this point -- if you turn to bundle 1, tab 5; this is  
2 Dr Williams' first report at page 431.

3 THE CHAIR: Sorry, what paragraph number?

4 MR HARRIS: It is paragraph number 8.3.13. You will see a nice instance of what we  
5 were talking about before in response to Mr Taylor's question, which is the interplay  
6 or relationship between the econometrics and the qualitative evidence. He says:

7 "The initial estimates of the Retail Customer Overcharges are consistent with ..."

8 So that's the econometrics, "are consistent with", and then there's some reference to  
9 qualitative evidence:

10 "... the limited evidence obtained at this stage from the Ofcom Decision [well, that's  
11 qualitative for these purposes], the existing economic literature [again, qualitative], and  
12 international evidence described in Section 7.3."

13 I don't need to turn that back up, but section 7 is headed, altogether, "The existence  
14 of the alleged retail customer overcharge", and it goes through a whole series of  
15 analysis at this preliminary stage of the qualitative types of evidence that we were  
16 looking at. So it's not the econometrics. So, for instance, 7.2 is the credibility of  
17 Whistl's business plans; 7.3 is international evidence about the liberalisation of  
18 bulk mail retail services; 7.4, the VAT treatment.

19 So there we have it. The numbers already look consistent. So that's more -- I mean,  
20 that's more than many PCRs that I have seen at this stage.

21 Then you will, again, just so that you have some references, some more qualitative  
22 evidence that supports the validity of the DiD model that's attacked as being utterly  
23 unusable, such that we shouldn't be allowed to go ahead. It is the WIK Consult report  
24 that I mentioned earlier. So if you were to turn in this first report to 8.2.5, which is on  
25 page 426.

26 THE CHAIR: Yes. I thought it was quite interesting, that one, yes.

1 MR HARRIS: Yes. You will see that the choice of the comparator markets is made  
2 for what, I respectfully submit, are more than adequate reasons at this stage. The test  
3 there is, are the reasons at (a) and (b) - are they plausible and credible and grounded  
4 in the facts of this case? And, sir, self-evidently, yes.

5 THE CHAIR: Yes, and you think that, or your expert considers that, insofar as there  
6 are differences, he can factor those out and adjust for them.

7 MR HARRIS: That's right. That's exactly right.

8 THE CHAIR: Yes.

9 MR HARRIS: And an example, if I can just find the reference to WIK Consult, I think  
10 there is one in the first report -- those alongside me will find that one. In the second  
11 report, it's at 3.5.3. That's at tab 9, page 631. This is again under the heading, "choice  
12 of comparator countries". So the attack against me is, you've just got this so badly  
13 wrong, you shouldn't be allowed to proceed.

14 THE CHAIR: Yes.

15 MR HARRIS: Utterly hopeless comparators. And Dr Williams is saying, no, under the  
16 heading "choice of comparators", one of the reasons that he's chosen it is at 3.5.3,  
17 namely, that an outfit called WIK Consult -- which you will see described at footnote 36  
18 is a German consultancy firm specialising in postal and delivery markets, and that you  
19 will see, in footnote 35, has written reports about comparative postal markets,  
20 including Germany. You will see that's the report in footnote 35. What Dr Williams is  
21 saying is, somebody else, the WIK Consult report -- reading from the second  
22 sentence -- has identified both Germany and Sweden as good comparators to the UK.

23 THE CHAIR: Yes. I think there are some bits which are comparators, and some bits  
24 which are not, because there are some pretty important differences which  
25 Mr MacLean's side have outlined.

26 MR HARRIS: Yes.

1 THE CHAIR: But you are saying, at least for this stage, you've got something that's  
2 plausible, and that it may not be perfect, and I think I am not expecting, when it comes  
3 to trial, perfection from either side.

4 MR HARRIS: Yes.

5 THE CHAIR: It's going to have to be rough and ready, probably - by the time we get  
6 to trial -

7 MR HARRIS: Yes.

8 THE CHAIR: At the moment I don't concede this is a case where I'm going to get to  
9 the pounds, shillings and pence. I may be wrong, but I would be really surprised if we  
10 do so. Yes, that's fine.

11 MR HARRIS: Let me move on to another point, then. This is a discrete point, but,  
12 again, it's in this context of my learned friend's case on behalf of his client, being, the  
13 comparators you have chosen are so utterly hopeless, you shouldn't be allowed to go  
14 ahead. We wrote a letter to the defendants last week, to confirm that the settlement  
15 that they have entered into with Whistl, which for present purposes is materially the  
16 same in establishing at least the first part of the counterfactual market - we wrote  
17 a letter to say, can you please confirm that you have not settled with Whistl at a value  
18 of nil. I will show you the letter if you like. But, unsurprisingly, my learned friend's  
19 team wrote back to say they declined to confirm that the settlement value with Whistl  
20 was nil. And yet, nevertheless, they come to you today, and in their skeleton argument  
21 they try to coherently advance the submission that you should proceed on the premise  
22 that there might be a nil value for this claim, including because the methodology said  
23 to be --

24 THE CHAIR: Let's break that down. The first point is that whether they settled for  
25 zero, or even 100 per cent, is not going to sway me one way or another. People settle  
26 for all sorts of reasons, and for amounts -- they may just want certainty. We don't

1 know what the figure is. I don't think we are really going to be assisted by that.

2 MR HARRIS: You have the point.

3 THE CHAIR: I mean, it's a jury point. I do not think we are going to get any elucidation  
4 as to what the actual overcharge is, if any, from the fact that they settled with Whistl.  
5 It's completely neutral.

6 MR HARRIS: I accept that way of putting it. I was just responding to that part of my  
7 learned friend's skeleton, where he has to say to you, it's so clear that the value may  
8 be nil.

9 THE CHAIR: Yes. Look, I think that he's got a plausible case that the value is nil. But  
10 the real issue is, that's not the test. But the test would be, has he got an overwhelming  
11 case that it's zero? And the answer at the moment: he hasn't.

12 MR HARRIS: He would have to establish that there is absolutely no credible and  
13 plausible case on my side.

14 THE CHAIR: He's not applied to strike out or anything.

15 MR HARRIS: No, but in order for me to fail certification in the face of his complaint,  
16 that's what he has to establish, and he can't do it. So I will move on.  
17 He also takes a point in his skeleton, that you will have seen, by reference to the first  
18 Gormsen case. What he says -- and this proves my point. This is authority for the  
19 proposition that you can't have an expert model that assumes what it is setting out to  
20 prove. Of course, mine doesn't --

21 THE CHAIR: But you say there is no assumption.

22 MR HARRIS: Well, mine doesn't, for the reasons I have already given, that it is  
23 complemented and bolstered by at least six qualitative methods, all of which are  
24 reasonable and plausible at this stage, and grounded on the facts of this case. So it's  
25 not my method of establishing causation. I just don't need it for that reason. I am not  
26 using it for that reason. But Gormsen is obviously distinguishable for at least three

1 extremely powerful reasons, irrespective of the remark that was made by the learned  
2 chairman on behalf of the Tribunal in that case about methodologies not being useful  
3 if they assume what they are setting out to prove. As a high level proposition,  
4 I obviously don't dispute that. It's not relevant to my case, but I don't dispute that as  
5 high level. But it's important just to realise for three reasons why that remark was  
6 made in that case, and why it has no relevance to this case. The first reason: that  
7 case was pure standalone. It was a pretty ambitious set of claims about how the users  
8 of Facebook were being essentially ripped off, to use the vernacular. It had no Ofcom  
9 decision, no CAT judgment, no nothing. That's not my case. I obviously have  
10 an arguable case on the basis of the materials that I have shown you.

11 Secondly, it was pretty ambitious, because what happened was, there were three  
12 supposed, if you like, ways of putting the case put forward in the initial expert report,  
13 but none of them had any coherent way of showing how a number could be attributed  
14 to the supposed theory of harm. In fact, when you reread the report, you will remind  
15 yourself that the Tribunal held that in two of the three ways in which the alleged  
16 naughtiness on behalf of Meta was being manifested, they didn't have any  
17 methodology at all. That was it; there was no methodology. So they were obviously  
18 saying, well, I can't certify those.

19 Then on the third one, which was about pricing, it wasn't at all clear from the  
20 methodology in that case how the pricing was said to have resulted in damages to the  
21 class members. So, at the first instance, you will recall that six months later, when the  
22 methodology was rejigged, it did get certified on that part. But at the first stage it was  
23 said: hang on a minute, your methodology doesn't translate what you say is going  
24 wrong, by Meta, into damages for your class members.

25 But, of course, I have a perfectly coherent theory, not least of all because it's the same  
26 as the one in the Ofcom decision and the CAT judgment. So I don't fall into that.

1 That's item number 2.

2 Then the third one, just for good measure, although I plainly don't need this, was the  
3 pricing analysis. So the only point that was addressed by an expert methodology,  
4 albeit a defective one in that case, the only one, it was said to be much more complex,  
5 and that's for the very obvious reason, that contrasts with this case, that that is  
6 a two-sided market, where you have Meta in the middle with its platform, Facebook,  
7 and then on the one side of the market, you have the users of Meta, Facebook, who  
8 don't pay anything. So that's their side of the market. But on the other side of the  
9 market, you have advertisers who play a great deal in order to get their hands on the  
10 personal data from the people on the platform. And what the Tribunal said in the first  
11 instance judgment was, well, hang on a minute, because you've got a complicated  
12 two-sided market, all the more reason that you have to have a coherent link between  
13 your methodology and what you say was the unlawful damage caused to people on  
14 one side of the market. All they said at first instance was, well, you just haven't done  
15 it. For instance, you haven't begun to address how the damages caused to, say, that  
16 people, on that side of the market, the Facebook users, as opposed to the advertisers  
17 being ripped off - you just don't address it so you can't have permission. Then, six  
18 months later, they came back and they had addressed that. It was differently done,  
19 but then they got certification.

20 So for all of those reasons, Gormsen doesn't assist my learned friend. It has no  
21 application to the facts of this case. This is a very, very different case.

22 But my learned friend also seeks to pray in aid -- and this is not a jury point -- he says,  
23 and this is to my surprise, he says, oh, well, it's irrelevant that I don't seek to try to  
24 strike out any part of your case. Well, with respect, it's not irrelevant. It is, we say,  
25 relevant. I don't particularly need this point, because I have already got a plausible  
26 and credible methodology based upon the underlying materials, like the Ofcom



1 decision. But it is relevant that my learned friend cannot come here and say to you  
2 today that, when I plead that there has been causation of damage to my proposed  
3 class members as a result of his client's behaviour, that he can't come to you and say,  
4 oh, well, that's unarguable. For today's purposes, it has to be accepted that it is  
5 arguable, and indeed it is accepted for today's purposes. I appreciate that at trial he's  
6 not going to accept any of it, but for today, it is relevant, that I have pleaded that and  
7 he doesn't seek to strike it out. What it lends weight to is the fact that I've got  
8 a perfectly plausible and credible case. So that was my next point.

9 Then I don't propose to go back to any parts of the decision or the CAT judgment or  
10 the Court of Appeal, so I will come back to the second aspect. I have dealt with the  
11 first aspect, which is assuming what it's setting out to prove; that's misconceived. Then  
12 there is more complaints about the actual markets that have been chosen. You have  
13 seen at paragraph 8.2.5 of Dr Williams first report why he has chosen Germany and  
14 Sweden. I have already shown you that, but he's also gone on to explain why there  
15 are plausible and credible reasons at this stage for not choosing other countries. Can  
16 I just show you that?

17 THE CHAIR: What page is that?

18 MR HARRIS: A good place to pick it up is pages 631 and 632 of bundle 1, which is  
19 Williams 2, paragraph 3.5.4.

20 THE CHAIR: Yes.

21 MR HARRIS: Would the Tribunal please just cast its eye over that paragraph? It deals  
22 with Netherlands, France and Spain.

23 THE CHAIR: This is the one that deals with the ones which you don't think are  
24 suitable?

25 MR HARRIS: Yes. So the criticism that's levelled against me, and said to be such  
26 a flaw that I cannot go to trial, is a combination of, well, you have chosen Germany

1 and Sweden, but they are not good enough. But I have just shown you credible and  
2 plausible evidence from Dr Williams as to why he thinks that they are. Then the  
3 unwritten criticism is, well, you probably should have chosen some others, even  
4 though Mr Hunt doesn't nail his colours to the mast. But here are plausible and  
5 credible reasons why Dr Williams at this stage hasn't chosen these others.

6 THE CHAIR: I suspect Hunt's final line is going to be he doesn't think any of them are  
7 suitable comparators. So it's not really for him to say, I think this other country is more  
8 suitable, if at the end of the day he doesn't think that any of them are proper  
9 comparators.

10 MR HARRIS: He may say that --

11 THE CHAIR: But it doesn't really take us very far.

12 MR HARRIS: Let's just take a step back from that. That amounts to a submission  
13 today where the hurdle is so low for me that I shouldn't be allowed to proceed because  
14 the unwritten premise from the other side's expert, in opposition to my expert, is there  
15 is never going to be any kind of comparator that works.

16 THE CHAIR: Well, that may be the ultimate conclusion --

17 MR HARRIS: Yes.

18 THE CHAIR: -- for the reasons that Mr MacLean's expert has set out, that he's saying,  
19 "Well, if you look at the two countries you have come up with, they are not proper  
20 comparators and it's not really going to assist". He may ultimately say, "Look, I have  
21 now looked at all the other countries, and it's the same". That's why it's important that  
22 when we come back in September, we have a clear understanding of: what do we do  
23 if we get to the position that actually none of these are that helpful comparators?

24 MR HARRIS: That's right, and they are issues for trial.

25 THE CHAIR: They are issues for trial -- no, but, look, what I don't want is a situation  
26 whereby we get to trial and we get the answer for the first time that they are not suitable

1 comparators and for some reason we can't come up with a figure. What we ideally  
2 want to do is get past this stage, do all the research, look at all the material and come  
3 up with perhaps alternative methodologies or complementary methodologies, and not  
4 simply say: we are just going to look at these two comparators and use the rest as  
5 a sort of cross-check. It may be that what you find is the rest is going to be the  
6 dominant thing. I just don't know. But there are different ways of how this is going to  
7 pan out.

8 MR HARRIS: May I rephrase: those are issues for post-certification.

9 THE CHAIR: They are issues -- and I agree with that. It's not that I am against you  
10 on this. It's just that what I am not keen for is to have a case where we only find out  
11 for the first time during trial that the view of the Tribunal is that we don't think they are  
12 necessarily great comparators and, actually, you need to rely on something else, that's  
13 all.

14 MR HARRIS: Can I make two more points on this selection bias point and then move  
15 to VAT exemption, and they are discrete and could be noted down as such if it suits  
16 you.

17 THE CHAIR: Okay.

18 MR HARRIS: You will recall that, prior to last week, another supposedly fatal flaw in  
19 my methodology, the DiD, was lack of parallel trends.

20 THE CHAIR: Yes, I saw that. Yes.

21 MR HARRIS: It was said, for instance, in the response document at paragraph 31.2,  
22 which you will find on page 504 -- you don't need to turn it up; it's bundle 1, tab 6,  
23 page 504 -- the assumption of parallel trends is "plainly not met in respect of the UK,  
24 Germany and Sweden". It was said at the next paragraph, 36, that it was "plainly not  
25 possible" to discern parallel trends. Indeed, one aspect of the parallel trends  
26 methodology was said at paragraph 37 to be no less than "absurd".

1 So all of these supposed problems were said a week ago to be fatal to my ability to  
2 move past certification. It was described in response paragraph 9, and as I quote,  
3 "profound methodological flaw ... that the DiD model simply cannot work".  
4 Of course, all of those supposed profound methodological flaws that were fatal a week  
5 ago, they have all been abandoned for today. It's now accepted for today that they  
6 don't present an obstacle to certification.

7 So two points emerge from this.

8 The first one is that that was an overblown and exaggerated criticism that doesn't hold  
9 water, and I respectfully say that the same criticism can be levelled against the  
10 selection bias attack altogether.

11 But more importantly, given that the selection bias criticism of supposedly insufficiently  
12 comparable markets is somehow still maintained, more importantly, therefore, it is  
13 most curious that what is for present purposes today now accepted not to have a point  
14 about alleged absence of parallel trends between these two markets, is nevertheless  
15 still said to have comparators that are insufficiently comparable.

16 So to put that point another way, there is no dispute for today's purposes that there  
17 are parallel trends between these comparator markets, and yet somehow it is still said  
18 today with a straight face to you: ah, you should throw it out, it should not be allowed  
19 to proceed past today, because even though there are parallel trends between these  
20 markets, for today's purposes, they are insufficiently comparable. Well, that says it all.

21 My final point on this selection bias issue is that it's obviously the case that an expert  
22 who, in his independent professional view, takes the position that there is  
23 a counterfactual that would have been more competitive and resulted in lower prices,  
24 it's obvious that that person, in his independent professional view, is then going to  
25 regard the most suitable comparators as ones in which there is competition as  
26 opposed to no competition. To be criticised for doing something that's consistent with

1 | your theory of harm is, with respect, misconceived.

2 | How odd would it be, I ask rhetorically, if, notwithstanding that his independent

3 | professional view, based upon all these qualitative methods, is that the counterfactual

4 | would have been entry, lower prices, better competition, lower prices to the proposed

5 | class members, if he then only analysed the market in which there was no competition.

6 | It would be incoherent. So that's another answer.

7 | That's what I have to say on selection bias, and I will easily finish what I have to say

8 | on the second supposedly fatal flaw for part of the methodology, VAT exempt, well

9 | before the short adjournment, subject to interchanges with the Tribunal.

10 | So VAT exemption, the second supposedly fatal flaw. As I have said twice now before,

11 | it's a most curious criticism, because it only even comes into existence if the selection

12 | bias challenge fails. You don't need this one at all if you have already won on point 1.

13 | But, of course, if you have lost on point 1, you have already got a common

14 | methodology that's going to trial with X witnesses, an expert of Dr Williams, and

15 | potentially in play hundreds of millions of pounds' worth of damages. That's not

16 | a situation, in my respectful submission, in which a Tribunal sensibly at the certification

17 | stage should say: "Oh, you can't go ahead with that. You are going to go ahead

18 | anyway, but you can't go ahead with that bit". That would be very startling, in my

19 | submission.

20 | But, more importantly, it's a misconceived objection. The supposed problem that is

21 | said to exist is that there is a difference across all of the time periods under analysis

22 | between the focal market, the UK, on the one hand, and the two preliminarily chosen

23 | comparator markets on the other hand, Germany and Sweden. That's said to be the

24 | problem. The difference that is said to be fatal is the VAT treatment.

25 | But what Mr Hunt, in my submission, surprisingly overlooks is the fact that DiD models

26 | are designed to cope exactly with structural constant differences across comparator

1 markets. The clue is really in the name. The DiD methodology compares not  
2 differences per se, but differences between the differences. That's why it's called DiD.  
3 So when you think of it in this easy sort of Ronseal submission, it does what it says on  
4 the tin: it measures the difference in the differences. It doesn't matter, per se, that  
5 there is a difference in the VAT treatment between the comparator markets and the  
6 focal market. What would matter -- albeit it could be dealt with, but we don't have to  
7 in this case -- is if the differences change across the time period, because then it would  
8 make them harder to measure.

9 But in this case, we just don't have that problem because the focal difference is VAT  
10 treatment, but the evidence before the Tribunal today is that the VAT treatment, whilst  
11 different between the UK and Germany and Sweden on the other hand, stayed  
12 constantly different at all time periods. So if you are looking at a model that measures  
13 the difference in the differences, it doesn't matter if one of the differences is always  
14 the same, because that doesn't result in a change of the measure of the difference  
15 between the differences.

16 So that is a simple and complete answer to this supposed fatal VAT exemption  
17 problem.

18 Let me put some numbers on it so that you have got an idea. Imagine if the VAT in  
19 the UK is 20 per cent, and that in Sweden, one of the comparator markets, is  
20 10 per cent, but it's always 20 per cent in the UK and it's always 10 per cent in Sweden  
21 - then it means that the difference between them is always going to be 10 per cent.  
22 So when you then measure the difference between the differences, it doesn't ever  
23 change from 10 per cent. It's always 10 per cent.

24 So the output of the DiD model, which is difference in differences, it is irrelevant – the  
25 fact that there is a constant difference of 10 per cent.

26 THE CHAIR: But here you say there is a constant difference of 20 per cent.

1 MR HARRIS: Yes, but the number, the digit number, doesn't matter. It doesn't matter  
2 at all, provided -- and this is all very clearly set out in Dr Williams's two reports. He  
3 says the model is designed to cope without any problems, constant differences.

4 Now, if you like, this can be seen -- if it assists you -- it may not, but if it assists you -- it  
5 can be seen in very simple algebraic form -- I personally find this equally helpful -- in  
6 Williams 2. It's very simple, I hasten to add. Not that you require something as simple  
7 as I require.

8 Williams 2, paragraph 4.2.6, so that's tab 9 at page 637.

9 THE CHAIR: Yes.

10 MR HARRIS: Picking it up at the bottom, 4.2.6:

11 "To illustrate this point, the equations below set out a simplified version of the  
12 estimation equation for the Retail Customer Overcharge using my DiD model."

13 What you can see is that the overcharge is, if you like, the difference between the time  
14 series price comparison for one market versus the time series price comparison for  
15 the other market. So that's at a very high level. No problem. That's measuring  
16 difference in differences.

17 If you just look below, of course, if there is a constant difference on both sides, then  
18 it's not going to make any difference to the number that comes out at the end. So  
19 when you adjust, at 4.2.7, that algebraic equation, and the triangle, the delta, is in the  
20 left-hand side of the equation, that's always the same over the time series period, and  
21 always the same in the right-hand side of the equation for the other time series period,  
22 then of course they net out when you do the maths.

23 THE CHAIR: But isn't the point that when you have got the VAT-exempt situation, it  
24 is going to be very difficult for Whistl to want to target those customers because  
25 Royal Mail's got a home advantage already.

26 MR HARRIS: That's right, and indeed that is why -- let me just show you again at the

1 relevant point, at 7.168 of the Ofcom decision, which is tab 4. It's page 290 of tab 4.

2 THE CHAIR: Ofcom, what paragraph?

3 MR HARRIS: 7.168(a).

4 THE CHAIR: Yes, and that's at -- where?

5 MR HARRIS: Where it's page 290 of tab 4 of bundle 1.

6 THE CHAIR: Haven't we looked at that before?

7 MR HARRIS: We did, but this is a very good contemporaneous document that  
8 supports what you have just said, and that we accept, which is why VAT exempt are  
9 being analysed separately from VAT rated, that according to a report presented by  
10 Royal Mail from its external advisers -- this was to Ofcom from FTI -- it refers to the  
11 discounts Whistl offered when it competed in delivery, and it planned to offer, on  
12 average, a 5 per cent discount to its usual retail price when customers chose to partly  
13 use their own delivery, and FTI Consulting said that, in practice, Whistl offered larger  
14 average discounts of 7 per cent to non-VAT-exempt customers and 19 to VAT-exempt  
15 customers, compared to --

16 THE CHAIR: Yes.

17 MR HARRIS: That's sufficiently different, which is why Dr Williams is proposing to  
18 analyse VAT prices separately from VAT-exempt prices.

19 So we entirely accept -- and that's why, because they are materially different, the  
20 model approaches them differently.

21 So it's not at all a problem, let alone a fatal problem, for today that there is a VAT  
22 difference, let alone that it's dealt with by a DiD model, which is expressly capable of  
23 dealing with constant differences.

24 I should just say, though, for the sake of completeness, although that's dealt with my  
25 learned friend's objection entirely, that, of course, a DiD model can also cope with  
26 differences that themselves differ over time, and that's through the use of -- I mean,



1 this is standard stuff -- control covariables, which are dealt with in detail in the  
2 appendices to Williams 1.

3 So, for instance, demand could differ between the two markets over time, and that's  
4 why there are GDP-type demand covariables that are analysed in the appendices.

5 Supply could differ. This is standard economic regression analysis, where you  
6 introduce the control variables with data in order to account for the fact that what you  
7 are comparing in time period 1 differs from time period 2 due to exogenous factors  
8 that are not relevant to the analysis.

9 What Dr Williams has done is said at this stage, way higher than plausibly and credibly,  
10 is: "Yes, I recognise that demand factors may vary, so that's why I have controlled for  
11 them; yes, I recognise that supply factors may vary, that's why I have controlled for  
12 them". That's, as I say, standard form econometrics. Nothing to see here.

13 If you wanted any further detail, lest you would want to cite or see how it's expressed  
14 by the European Commission on this entirely orthodox DiD-type approach, you would  
15 find that in the supplemental bundle of authorities at tab number 3. There is  
16 a document there -- oh, it's just the supplemental bundle. It's not a special one for  
17 authorities.

18 THE CHAIR: Yes, okay. Which tab?

19 MR HARRIS: Tab number 3. There is a document there, which is the Commission  
20 Staff Working Document Practical Guide.

21 THE CHAIR: Oh, yes.

22 MR HARRIS: You are doubtless very familiar with this. This was referred to in  
23 Dr Williams 1.

24 But if you were to turn in it to paragraphs 56 to 58, and the accompanying footnote,  
25 53 --

26 THE CHAIR: We have looked at this a number of times. Not in this case, but in other

1 cases.

2 MR HARRIS: But helpfully, it deals with -- because it is a pretty orthodox method, DiD.

3 It deals with DID's at 56 to 58 on page 36.

4 THE CHAIR: Yes. I don't think you need to take us through this.

5 MR HARRIS: Okay, good. Perhaps just the first sentence of 58:

6 "The strength of the 'difference in differences' method is therefore that it can subtract  
7 out changes unrelated to the infringement that occurred during the same time period  
8 as the infringement. It rests, however, to a large extent on the assumption that these  
9 other changes affected both markets similarly."

10 Of course, that's, for present purposes --

11 THE CHAIR: Which paragraph are you reading out of?

12 MR HARRIS: That was the first two lines of 58, and then if you look at footnote 53  
13 that accompanies --

14 THE CHAIR: Yes.

15 MR HARRIS: That's probably -- I mean, if you found it of use, footnote 53 sums up  
16 my point:

17 "Compared to a simple comparison across markets, the 'difference in differences'  
18 method also has the advantage of filtering out fixed differences between markets (such  
19 as differences due to constantly lower input costs in one of the markets)."

20 So there we have it. This is entirely orthodox and, therefore, the criticism for today's  
21 purposes is misconceived and doesn't take my learned friend anywhere.

22 Then as to his, I think, very much supplemental, makeweight point that: "Oh, well, yes,  
23 but if VAT treatment is different, well, it might mean that the markets evolved differently  
24 over the course of the time period", well, that's of course what the model is intending  
25 to measure. That's why you do the price-time comparisons.

26 On top of that, and my final point, unless you have got any questions for me, is that

1 Dr Williams will be measuring the evolution of the markets by reference to demand  
2 and supply covariables in any event. So that's dealt with, and an example of that can  
3 be found -- I don't propose to turn it up, but just so that you know this has been gone  
4 through in some depth already. It's at appendix 4 of Williams 1, which you would find  
5 on page 469. You will see that there these demand and supply covariables or  
6 covariates are set out in terms. There is a big table. That's what that appendix does,  
7 including cost shifters. It's all pretty normal stuff.

8 So the fact that the markets may evolve differently is more than capable of being dealt  
9 with, especially when it's combined with a complementary qualitative analysis of the  
10 type that I identified earlier on, which it is in this case, six of them.

11 Finally, my final point is a much more granular point, just so that you know.

12 It was previously said that an insurmountable flaw for the VAT objection was that my  
13 client didn't have and wouldn't be able to obtain prices from Royal Mail and that  
14 Royal Mail charged its VAT-exempt customers. You may recall this point. It was said  
15 that there are none from Royal Mail, and that was said to be a problem. It's not  
16 a problem for the reasons that Dr Williams already dealt with.

17 But can I just correct the record there, because it was always a bad point, and it's  
18 important to know that this sort of point was being taken as fatal and it's completely  
19 unfounded on my learned friend's own evidence.

20 So if you could turn up Mr Hunt's report this time, which you haven't seen before -- and  
21 this is my final point -- tab number 7 of the first bundle, and it's page 555 to 556. That  
22 is paragraphs 138 and 139.

23 So just to let you know, the reference to where it was said that this was a fatal flaw  
24 was paragraph 48 of my learned friend's response, which is page 510, which read:

25 "... this [by which he means this methodology] could not work for VAT-exempt  
26 customers because, as explained above, such customers are not retail customers of

1 Royal Mail, and Royal Mail's retail bulk mail prices do not reflect the actual prices they  
2 pay."

3 So that was the point that was taken. But, of course, their own expert identifies at  
4 paragraph 138 that that's not correct. There are some VAT-exempt retail customers  
5 of Royal Mail, albeit he describes them as "only a few heavily VAT exempt customers".  
6 The vast majority are not heavily VAT exempt. Then over the page: the vast majority  
7 of them. So that means that there are some.

8 So in any event, though I don't need this point because the major complaint is  
9 misconceived anyway, as I have explained, it's not as though there are particular data  
10 problems of the type formerly advanced and now abandoned, namely that Royal Mail  
11 doesn't serve any VAT-exempt customers and therefore doesn't have any prices.  
12 Royal Mail's expert accepts that they do have them, and that, of course, is highly  
13 germane to the data that can be plugged into the model on that.

14 So unless I can assist further, that's what I have to say in response to the two  
15 supposedly fatal certification objections.

16 THE CHAIR: Unless your junior has got something to say.

17 MR HARRIS: May I just ...

18 MR RAYMENT: I don't need to ...

19 THE CHAIR: Thank you very much.

20 Mr MacLean.

21

22 Submissions by MR MACLEAN

23 MR MACLEAN: Right. Let's start at the beginning, if I may.

24 THE CHAIR: Yes.

25 MR MACLEAN: As you know, this is a purely follow-on claim, and that has certain  
26 consequences, because it sets the limits for what Ofcom did or did not find, but not,

1 | apparently, for the apparent extent of Bulk Mail's ambition in this claim. But as we will  
2 | see, in my submission, this informs the debate concerning the proposed methodology.  
3 | Now, as you know, Royal Mail was found to have abused its dominant position by  
4 | issuing contract change notices -- we went through this yesterday -- on the 10th, I think  
5 | it was, of January 2014, which were suspended a matter of six weeks later, when  
6 | Ofcom decided it was going to launch an investigation on the complaint of Whistl. But  
7 | no findings were made, as you know, and I have shown you the paragraphs in the  
8 | Ofcom decision, as to why it was that Whistl didn't proceed, or as to how successful,  
9 | if it had proceeded, Whistl would have been. It expressly disavowed any intention of  
10 | making such findings.

11 | Now, I have shown you the paragraphs. I am not going to take you back to them, but  
12 | let me give you a list of the paragraphs that I referred to.

13 | It's 7.171, which is on --

14 | THE CHAIR: Let's quickly look at them.

15 | MR MACLEAN: Shall we have a look?

16 | THE CHAIR: I just want to make sure that I have marked them on my copy.

17 | MR MACLEAN: This is at page 291.

18 | THE CHAIR: 7.171. I have marked that. I noted that, yes.

19 | MR MACLEAN: 7.231 on page 309.

20 | THE CHAIR: All right, let me have a look at that.

21 | MR MACLEAN: That's no findings -- any findings in the decision, that's important:

22 | "... any findings in this Decision as to (i) the causes of Whistl's exit; or (ii) the extent to  
23 | which [it] can be attributed to the introduction of the price differential."

24 | THE CHAIR: Yes.

25 | So what they have found is that the plug was pulled by LDC as a result, but there is  
26 | an issue on this which we have to deal with, I know. But the plug was pulled by LDC,

1 | which meant that they didn't have the funding for the expansion plans. That's different  
2 | from withdrawing from the market completely.

3 | MR MACLEAN: Yes.

4 | THE CHAIR: Which here they are saying: well, they are not making any findings on  
5 | that at all, because it doesn't necessarily follow that you withdraw from the bits that  
6 | you are already in merely because you don't expand.

7 | MR MACLEAN: Indeed.

8 | THE CHAIR: Yes. I have got that point. Yes.

9 | MR MACLEAN: As far as the LDC point is concerned --

10 | THE CHAIR: Yes. You were going to come back to me on that. Yes.

11 | MR MACLEAN: I am going to come back to you. I can come back to you on it now if  
12 | you like.

13 | THE CHAIR: Yes, please. That would be a good idea.

14 | MR MACLEAN: So there are two questions essentially you asked: do we take issue  
15 | with the allegation that the conduct caused LDC to withdraw its investment, and if so,  
16 | is that precluded by the Ofcom decision?

17 | Now, you may recollect that there was a live issue about this in the Whistl proceedings.

18 | THE CHAIR: There was, yes, I know, yes. That's why I raised it.

19 | MR MACLEAN: Although we don't have a defence yet, so we can't be 100 per cent  
20 | definitive about this, but there was a live issue about this. Ultimately, there was  
21 | a compromise, I think, between the parties.

22 | THE CHAIR: I remember now. Yes, yes.

23 | MR MACLEAN: The Chair wasn't troubled with having to make a ruling.

24 | THE CHAIR: I was going to make a ruling, but you took it away from me by coming  
25 | up with a --

26 | MR MACLEAN: We may have been wise, we may have been unwise. We don't know

1 at this stage. But the second question will potentially --

2 THE CHAIR: Yes.

3 MR MACLEAN: So it is potentially a live issue.

4 THE CHAIR: Yes.

5 MR MACLEAN: We are not in the position -- I say "we"; the Tribunal is not in a position  
6 to deal with that today. No one is asking the Tribunal to deal with that today. I have  
7 not come prepared to deal with that because there will be issues of law, presumably,  
8 section 58, section 58A of the Act.

9 THE CHAIR: Yes, I have had those arguments.

10 MR MACLEAN: I am sure you have.

11 THE CHAIR: I have dealt with it in previous rulings.

12 MR MACLEAN: But you haven't heard them from me. Now, that doesn't mean they  
13 are any better.

14 THE CHAIR: No, but it's quite case-specific. So we know what the principles are --

15 MR MACLEAN: Absolutely.

16 THE CHAIR: -- but applying them is quite difficult.

17 MR MACLEAN: Indeed. Even if you get beyond that, there is going to be a question  
18 about: well, was it a finding of fact? Was it a finding of infringement?

19 THE CHAIR: Yes, I know, yes.

20 MR MACLEAN: All of that, and then, potentially, there is a question as to the proper  
21 construction of whatever it was that is said to be a finding.

22 So there are issues there. That's all I want to say about that at this stage.

23 THE CHAIR: What I would like to happen is -- I think maybe I have ordered it in Whistl,  
24 but it's really for the claimant to identify the passages in the Ofcom decision and the  
25 CAT decision that they rely upon, and then we can have a schedule, you know, just  
26 like last time.

1 MR MACLEAN: Indeed, just like last time.

2 THE CHAIR: That's something probably that we can direct later on today when we  
3 come to directions, because Mr Rayment remembers that's for the agenda. Yes.

4 MR MACLEAN: Yes, absolutely.

5 So that's all I am going to say about that.

6 THE CHAIR: Yes, that's fine, thank you.

7 MR MACLEAN: So, in the light of Ofcom, in our submission, it's worth bearing in mind  
8 what it is that in this particular case, this claim, these claimants are going to have to  
9 prove. They are going to have to prove that Whistl would have actually succeeded in  
10 entering into the market, and it would have succeeded to such an extent that it made  
11 lovely profits, and it would have succeeded to such an extent that those lovely profits  
12 would somehow have been translated into a reduction of prices for the ultimate  
13 consumer of the services, who may be --

14 THE CHAIR: I agree, you've got various steps, but some of the steps are quite big  
15 steps.

16 MR MACLEAN: They are very big steps.

17 THE CHAIR: I understand that.

18 MR MACLEAN: The reason that they are important is that, when you come to consider  
19 the question of the methodology which has been put forward at this stage, I entirely  
20 accept that the Tribunal is faced with a relatively low hurdle in the Pro-Sys case.

21 THE CHAIR: Yes, I understand.

22 MR MACLEAN: It's a relatively -- of course, I don't want to teach this Tribunal to suck  
23 eggs.

24 THE CHAIR: But you can, it doesn't matter.

25 MR MACLEAN: But the fact is that the hurdle is not non-existent, and it has been  
26 stressed a number of times, including by Lord Justice Green in the Gutmann case,



1 | which obviously my friend was in, that this is a hurdle which gives the Tribunal teeth  
2 | at the appropriate stage if the methodology isn't up to snuff. The methodology isn't  
3 | just concerned with identifying commonality of issues. That's how it started out in the  
4 | Pro-Sys case, because the issue there was, is commonality established to a sufficient  
5 | extent that it covers the claims being made by the class? But that Pro-Sys test, which  
6 | has been adopted in this jurisdiction, has outgrown your commonality, and now the  
7 | Tribunal has, in my submission, to consider whether the methodology which has been  
8 | put forward is capable of dealing with all the elements of the claim which the claimants  
9 | rely on. It's not simply a question of quantification. You have to consider whether this  
10 | methodology which has been put forward is able to deal with the causation issues. In  
11 | our submission, there is a blank hole in relation to the methodology, as far as causation  
12 | is concerned, and the reason there is a blank hole is because as you, as you have  
13 | identified, sir, there are going to be big steps in this case before we even get to the  
14 | question of --

15 | THE CHAIR: But answering that, we are going to have to look at the qualitative  
16 | evidence to get there. Everyone accepts that a major part of the analysis. So I don't  
17 | think anyone's really going to dispute what you said on that.

18 | MR MACLEAN: Well, I am not sure about this, and the reason I say that is because  
19 | of the way in which it's put against me in the skeleton argument. If we look at my  
20 | learned friend's skeleton argument.

21 | THE CHAIR: Let's have a look at that.

22 | MR MACLEAN: Paragraph 19. You see that it is said in paragraph 19 on page 8 of  
23 | the document:

24 | "The PCR relies on the expert economic analysis in Williams 1, which provides  
25 | a plausible and credible methodology for establishing that the proposed class  
26 | members have suffered loss."

1 So that is the anterior question to the question of quantification. That comes to  
2 quantum. So you've got two questions here and, as Mr Williams accepts, theoretically,  
3 these questions are separate -- theoretically -- but actually in practice, causation and  
4 quantum merge into one. For your note, he says that at page 417 of the bundle,  
5 paragraph 7.1.2:

6 "Although conceptually distinct, the matters relevant to the first and second stages are  
7 likely to interrelate."

8 Well, we agree with that, obviously, but the anterior question that I want, if I may, to --

9 THE CHAIR: Just give me the paragraph number, then let me just write it down.

10 MR MACLEAN: 7.1.2, sir, on page 417 of the bundle.

11 THE CHAIR: Yes, thank you.

12 MR MACLEAN: So, what I want the Tribunal to focus on, if I may, before we come to  
13 the question of quantification, which is what the DiD model supposedly is going to deal  
14 with, is whether we have got a methodology here which is plausible and credible in  
15 relation to the anterior questions, namely, was there an overcharge at all? Because  
16 when you look at the reply document my learned friends put in, when you look at their  
17 skeleton argument, they assume that there was an overcharge. They just simply  
18 assume that. So when you get to the methodology, you are going to see that, baked  
19 into it is an assumption that there would have been an overcharge. That's baked into  
20 the methodology, and it's baked into it because they pick up Germany and Sweden,  
21 which, incidentally, Mr Williams has said are the only comparators which he has used  
22 pre-certification and proposes to use post-certification. So we didn't worry about, as  
23 far as Mr Williams is concerned, any of the other jurisdictions throughout the world, or  
24 all throughout Europe, it's simply Germany and Sweden.

25 THE CHAIR: We can hear the rest at 2.00. So what we will be doing is -- how long  
26 do you think you are going to be Mr MacLean?

1 MR MACLEAN: Well, depending on the questions I have from the chair or from the  
2 Tribunal.

3 THE CHAIR: Well, there's normally questions, you can assume that.

4 MR MACLEAN: I can assume that. Well, I hope to finish by 3.00.

5 THE CHAIR: Yes, that's fine. That's absolutely fine. Then we will hear Mr Harris in  
6 reply, and then hopefully by 2.00 there will be more correspondence on some of the  
7 other issues, unless you have got it here already?

8 MR HARRIS: Yes, sir. You should now have on your system a letter with the draft  
9 updated litigation timetable, proposed draft order, wording for the order regarding  
10 costs budget and updating the Tribunal, and draft terms of reference for the customer  
11 user group.

12 THE CHAIR: Okay, so --

13 MR HARRIS: And my learned friend's team as well.

14 THE CHAIR: So if that's all printed out for me -- someone can print that out for  
15 me -- we will look at that in the afternoon. But at the moment it looks to me that we  
16 will finish everything today. So we save the expense of, you know, 40 people turning  
17 up tomorrow, because I am really conscious, a hearing like this every day costs  
18 a small fortune. You know, you could buy a village in Africa at the price of a day in  
19 court.

20 One thing I want to make clear at this stage is that the exercise we are going through,  
21 looking at the expert reports, is really, really helpful at this certification stage. So  
22 whether or not we certify, this type of example, these reports we got from Williams and  
23 Mr Hunt are very, very helpful, and it certainly helps us decide how to manage the  
24 case and go forward.

25 So I don't think any of the material from either side has been unhelpful. I just want to  
26 make it clear to the experts that, you know, they have produced some pretty good

1 work that we can work with.

2 Okay, I will rise until 2.00.

3 (1.03 pm)

4 (The short adjournment)

5 (2.04 pm)

6 THE CHAIR: Yes, Mr MacLean.

7 MR MACLEAN: So I had made some submissions about what Ofcom did or did not

8 find.

9 THE CHAIR: Yes.

10 MR MACLEAN: That has consequences for the way in which the case has to develop.

11 In my submission, the Pro-Sys test requires the claimants to produce a plausible and

12 credible blueprint or roadmap for all of the issues going forward in the context of what

13 Ofcom did or did not find. That's recognised by the claimants if you look at the claim

14 form on page 33 of the bundle, paragraph 92.

15 THE CHAIR: I need to get to that.

16 MR MACLEAN: Yes. Bundle 1, tab 1, page 33, paragraph 92:

17 "The PCR relies upon Williams/1 that proposes a plausible and credible methodology

18 for establishing (a) that the Proposed Class Members have suffered loss, and (b) for

19 estimating the quantum of that loss in the aggregate."

20 So it's not just simply a quantification issue; it's all the anterior issues that come before

21 it.

22 The question that you, Tribunal, have to consider today and are considering is whether

23 the methodology which is proposed in Williams 1, or indeed as supplemented by

24 Williams 2, amounts to a plausible and credible blueprint going forward for all the

25 issues in the case, not just quantification.

26 THE CHAIR: On that, we have got -- when you say we are talking about what the

1 methodology is, it's a bit of a moving feast, because what you have got is you have  
2 got the stuff that Williams has done so far and saying, "Well, we are going to look at  
3 the comparators", but then he's also saying, "Well, we are going to be looking at all  
4 the evidence and we will come back with a qualitative analysis". So it's a bit of  
5 a moving feast because it hasn't really landed.

6 MR MACLEAN: Yes. My answer to that is it shouldn't be a moving feast at this stage.

7 THE CHAIR: Yes.

8 MR MACLEAN: One can well understand a situation where it is said, for example,  
9 "Oh, well, we have done as much as we can in the absence of disclosure", and you  
10 heard my learned friend say that to you yesterday. That calls to mind what  
11 Sir Marcus Smith said in the Gormsen case about the St Augustine fallacy. It's not  
12 good enough to come along to the CAT in all circumstances and say, "Well, that's  
13 a matter for another day, that's a matter for disclosure", and it doesn't work in relation  
14 to this case for a number of reasons, because when you look at the methodology which  
15 has been offered, at least in the DiD terms, disclosure isn't going to help, because the  
16 question that we are seeking to debate is: are these comparators appropriate?  
17 Now, Royal Mail isn't going to have any evidence to give about the extent of  
18 competition in the Swedish or German markets. There is simply no disclosure going  
19 to be coming in relation to that. So the disclosure is not an answer to the point which  
20 we are making, and it's not an answer to the point of principle when I get to it in relation  
21 to VAT, because it's accepted that the markets in Sweden and Germany were not  
22 distorted by the presence or absence of VAT, and that's the critical point which I ask  
23 the Tribunal to ponder on when we come to criticise the methodology in relation to  
24 VAT. Disclosure isn't going to help in relation to that. It's a point of principle. We are  
25 either right or wrong about it, but it's not something that disclosure is going to assist  
26 you to get over the hurdle.

1 Now, as far as this issue, have you suffered loss, the existence of an overcharge, well,  
2 what we see in the material that has been put before this Tribunal is a good deal of  
3 bootstrapping.

4 Perhaps I could invite you to look at what they say in paragraph 21 of their reply, which  
5 is in tab 8, at page 602, paragraph 21.

6 Now, in paragraph 21, I hope the Tribunal sees, it is said:

7 "Royal Mail's criticisms of the ... methodology ..."

8 THE CHAIR: You will have to give me the page number again.

9 MR MACLEAN: Forgive me, sir. 602, paragraph 21.

10 "Royal Mail's criticism of the ... methodology fall into the same trap. Once it is  
11 accepted (as it must be on this application) that the Infringement led to a Retail  
12 Customer Overcharge ..."

13 Well, that, I am afraid, is confusing and conflating two issues which you have heard  
14 from Mr Harris about. He has said, "Well, we have a sufficiently plausible case that  
15 you haven't applied to strike it out". True it is, we have not applied to strike it out. But  
16 that doesn't answer the question as to whether the methodology put forward for  
17 a prima facie arguable case meets the test in Pro-Sys.

18 Now, it is not right to say, once you satisfy the test -- once you get over the hurdle of  
19 non-strikable or non-reverse summary judgment, there is nothing else to argue about  
20 when it comes to methodology. Otherwise, there would be no point in having  
21 a separate Pro-Sys test. It's quite clear from what the highest courts in this land have  
22 said the Pro-Sys test is meant to do something; it's meant to represent a hurdle, it's  
23 meant to protect the parties in the position of Royal Mail from speculative claims, and  
24 so it's meant to have some teeth.

25 So it's not an answer to say: oh, well, you must accept for summary judgment purposes  
26 or reverse strikeout that there is a case. That doesn't answer the question whether

1 the methodology which has been suggested is appropriate.

2 So we don't accept that there was an overcharge, and when we come to the  
3 methodology, this Tribunal is entitled to ask to see: what is the blueprint going forward  
4 to trial to establish in this methodology which they rely on for the existence of an  
5 overcharge?

6 THE CHAIR: Can we break it down?

7 MR MACLEAN: Of course.

8 THE CHAIR: You don't accept there is an overcharge.

9 MR MACLEAN: No.

10 THE CHAIR: They point to the passages in the Ofcom decision which say that you  
11 would expect that, with competition, et cetera, prices will go down, and so they rely on  
12 that.

13 MR MACLEAN: They do.

14 THE CHAIR: There are a number of reasons why you could say that you don't accept  
15 there is an overcharge. It'd be helpful for me if you could just give me the bullet points.  
16 I can think of a number, but I am sure we can have a list.

17 MR MACLEAN: Well, before you get to an overcharge --

18 THE CHAIR: Yes.

19 MR MACLEAN: -- and we are talking about the ultimate consumers of these services,  
20 be they banks, charities --

21 THE CHAIR: Yes.

22 MR MACLEAN: -- whoever they are, before you get to that stage, you have got to  
23 leap over a number of hurdles, which, as you said, sir, might be quite big steps.  
24 The first hurdle they have got to get over is what entry, to what extent, over what period  
25 of time, would Whistl have achieved? Would Whistl's presence in the market in  
26 relation to that entry have been permanent, evanescent, or something in between?

1 THE CHAIR: Because it could be like a UK Mail.

2 MR MACLEAN: It could. So where is the methodology, where is the route map, for  
3 answering that? It's non-existent.

4 But let's assume that Whistl managed to sustain its presence in the market. Now, as  
5 you observed yesterday, sir, Whistl is likely to be a profit-maximising entity for the  
6 benefit of its shareholders. You will see from the Ofcom report that, as far as bulk mail  
7 delivery is concerned at the relevant time, Royal Mail had a 98 per cent share of the  
8 market.

9 THE CHAIR: Yes.

10 MR MACLEAN: It was the big player in the market. Now, the best you are going to  
11 get -- and there is no real suggestion anywhere in the Ofcom documents -- indeed the  
12 contrary -- that anybody else other than Whistl was going to come in, that was realistic.

13 THE CHAIR: Yes, but we have got UK Mail. Maybe they were trying to do something  
14 different, but I think that --

15 MR MACLEAN: No. UK Mail was a presence in the market, but it wasn't a presence  
16 in the end-to-end delivery market, as far as I know.

17 THE CHAIR: No.

18 MR MACLEAN: So what you are going to then have, assuming we get over the  
19 hurdles that Whistl would have managed to get in and stay in, what you have then got  
20 is an entrant, and you have got the incumbent, effectively a monopolist. So, at best,  
21 you are going to have a duopoly.

22 What is to say that that duopoly is going to want to share, in circumstances where we  
23 know that the market is declining? Why is it going to want to share the fruits of this  
24 competition with the end users as a whole? Most likely, they would like to keep those  
25 lovely profits for themselves, and the ultimate result would be no effect: it's just shares  
26 around the shares in the declining market.



1 So those are a few of the hurdles I can think of --

2 THE CHAIR: That could end up to no lower price, but the other thing is, when you  
3 look at the Ofcom decision, they somehow think that one possibility is that Royal Mail  
4 would react to Whistl trying to get entry by somehow lowering its own prices and having  
5 efficiencies, and that may or may not be right. You know, how would Royal Mail react  
6 in price terms is something that is very much up for grabs.

7 MR MACLEAN: Absolutely. Absolutely.

8 It won't surprise you to hear that Royal Mail's position is the last thing they were going  
9 to do was to undermine their business by engaging in a price war with some new  
10 entrant.

11 Now, yes, you can say: well, that's all a matter that's going to have to be explored in  
12 the trial. But the only point that I am making at this stage is that, confronted with those  
13 sorts of issues and problems, as this claimant is, you are going to have to be offered  
14 a routemap for trial for the resolution of those particular issues. All we have in Williams  
15 and all we have in the supporting submissions is that it must be accepted at this stage  
16 that there was an overcharge. Well, nonsense. It doesn't need to be accepted at this  
17 stage that there was an overcharge for the purpose of the methodology.

18 THE CHAIR: The point is, what they will say is that the Tribunal should proceed on  
19 the basis, at least for this test, that they have got at least a good arguable case that  
20 there is an overcharge, and they point to the relevant provisions of the Ofcom decision.  
21 But what you seem to be saying is that they have actually got to do something more  
22 than that and come up with a methodology for establishing that overcharge.

23 MR MACLEAN: Yes, and that's because they are not "the beneficiary" of the Ofcom  
24 decision, other than indirectly.

25 THE CHAIR: Yes, but the problem on all of that is that whether or not there was an  
26 overcharge in those terms will depend on how Royal Mail would have reacted, how

1 Whistl would have reacted, because, as you say, Whistl could have come in and said,  
2 "We are looking at this; actually, it's one thing to have London and stuff, which could  
3 be profitable, but if we want to provide a UK-wide service, we are going to have the  
4 same problems that Royal Mail's had and it is going to be very difficult to make a profit  
5 in this, and so we are not that keen."

6 What they may find is that the costs of having a countrywide service is so high that  
7 there is not that huge scope for having big price reductions, because they say: "well,  
8 look, the reason why Royal Mail prices at this price is because it reflects what the cost  
9 is of such an expensive system".

10 Because it's one thing, as I said, just to pick London or Birmingham or Manchester,  
11 I can see how that's attractive on its own, but they have withdrawn from that anyway.  
12 We know that. But to do a UK-wide is quite a big cake to swallow.

13 MR MACLEAN: It is.

14 THE CHAIR: And it could be a bitter cake when you get down to the bottom of it, or  
15 the centre of it.

16 So these points you are making, Mr MacLean, they are all good points when it comes  
17 to trial and developing it. The problem I have -- and, you know, I am always pretty  
18 open with what I think -- is that they have come up with something that is plausible,  
19 but I don't see they are saying it's in concrete, and they recognise that they are going  
20 to have to look at the qualitative evidence to get home on this. Because if you ignore  
21 the qualitative evidence, I can't see it, let's say, being safe to come to a conclusion.  
22 So it's getting to that first base, and getting to the first base I think probably -- and this  
23 is just my views for now -- is going to require an examination of the inherent  
24 probabilities and the qualitative evidence, and when you look at comparators, they are  
25 not going to be the final answer to that big question as to how Whistl would have  
26 developed or not in this business. All I know is that they have never shown any real

1 interest -- maybe there is something in disclosure that is going to come out -- since the  
2 Ofcom decision of coming back in.

3 As we discussed in the other CMC -- I can't remember when it was now, but it was  
4 sometime last year -- that's a pretty fundamental point, because what their case was,  
5 was that this business was going to be so profitable, they were going to make  
6 something like 600 million in a relatively short period of time from this business. You  
7 say to yourself: well, how are they going to make that amount of money on the back  
8 of massive reductions in price? That's why there is the contradiction and the conflict  
9 between those proceedings and these proceedings.

10 You could quite easily have had very different results, depending on which trial you  
11 are doing, but now we are not having the Whistl trial, but it does inform that this  
12 exercise is not straightforward.

13 MR MACLEAN: I agree the exercise is not straightforward. All I am seeking to say is  
14 that when you come to the question of what is the methodology, the blueprint for taking  
15 this forward --

16 THE CHAIR: Yes.

17 MR MACLEAN: -- it's not good enough to say: oh, well, this looks a bit dodgy -- if I can  
18 put it in colloquial terms -- it's going to have to be improved. My answer to that is: no,  
19 no, they should have got their ducks in order at this stage.

20 Because if you take, for example, all the lovely peroration that you had from Mr Harris  
21 about qualitative stuff, essentially what they are saying is: look, there is a bit more  
22 disclosure that we would quite like in order to bolster the comparative exercise which  
23 has been carried out.

24 Now, take, for example, the survey evidence. How's this going to help? This is  
25 a survey which will be conducted ten years after the event on a counterfactual basis.  
26 Who are you going to find to give any evidence worth its salt when you start posing

1 questions about what you might or might not have done ten years ago, in  
2 circumstances which never materialised? That's just one example.

3 I mean, I am going to come on to say that when you look at what has -- there has been  
4 a good deal of smoke and mirrors here about the qualitative stuff, because if you look  
5 at the evidence which has been put forward, there's about two or three real pages in  
6 the document which addresses qualitative evidence in an attempt to bolster this  
7 comparative stuff.

8 But I am going off piste in one --

9 THE CHAIR: No, you are not. It's helpful.

10 MR MACLEAN: Because I wanted to say that when you look at paragraph 31 of my  
11 learned friend's skeleton, again, that gives the game away about trying to dance round  
12 the problem they have of establishing that there was an overcharge.

13 Paragraph 31.

14 THE CHAIR: Of what?

15 MR MACLEAN: Of the skeleton.

16 THE CHAIR: Of the skeleton? Yes.

17 MR MACLEAN: I might have made a mistake. No, no, it's on page 12. This is their  
18 skeleton.

19 THE CHAIR: Yes.

20 MR MACLEAN: So it said that:

21 "We do not at this stage take issue with the claim the infringement resulted in an  
22 overcharge." [as read]

23 Well --

24 THE CHAIR: I have highlighted that.

25 MR MACLEAN: You have highlighted that.

26 Then it says:

1 "This fact alone marks these proposed proceedings out from the crowd of other CPO  
2 applications." [as read]

3 THE CHAIR: Look, all I know is that I have always understood that you have taken  
4 issue with the existence of an overcharge. I think they understand that. This is  
5 shorthand -- and Harris can correct me if I am wrong -- for saying: for the purposes of  
6 certification, you are not raising that as a bar.

7 We all understand that your case is that there was no overcharge. You have outlined  
8 three; there's more reasons you can add to it as to why there was no overcharge. It  
9 may be you are talking about different things, but Harris I am sure accepts that you do  
10 not accept for one moment that there was an overcharge. He is just saying, for the  
11 purposes of certification, one has to make assumptions and make -- I am not saying  
12 concessions, but at the end of the day he's saying I have got the Ofcom decision, and  
13 from the Ofcom decision, you can have an argument that one would expect there to  
14 be an overcharge.

15 But your point is to say, "Well, look, I understand that, but what I am saying is what is  
16 your methodology for establishing that there was an overcharge?" The way I look at  
17 it -- and it may be simplistic -- is that you are going to have to look at the qualitative  
18 evidence to determine whether or not there's an overcharge. You are just clearly going  
19 to have to find out what was the intention of the parties, how they would have reacted,  
20 and that you can't do by using the econometric analysis. You can't do that, and that's  
21 what you are saying.

22 MR MACLEAN: Yes.

23 THE CHAIR: But you can look at the qualitative evidence, come to a view as to  
24 whether or not there would have been an overcharge in principle, and then, from there,  
25 you are saying: well, let's look at these comparative figures on a DiD basis and that  
26 you are going to come up with a figure, and that figure is going to have to be adjusted

1 to take into account all the different factors and the variables, but that's something that  
2 you can do under a DiD model. You are also going to have to take more broadly  
3 account of what other things are coming out of the qualitative analysis.

4 That's how I see it at the moment, and that's why it's difficult for you to knock this out  
5 at this stage. But at the same time, what it has brought home, in a very focused and  
6 concrete way, is that this is not a straightforward case, that the experts really do need  
7 to engage with the Hunt points, if I can call them that -- I don't mean that to be  
8 derogatory -- and when I read Hunt, I thought it was a pretty good rebuttal, and it  
9 raises issues that clearly have to be taken into account. But at the moment it's  
10 a question of issues, it's not a knockout blow.

11 That's where I am, Mr MacLean. You know, it's hard to sort of push back on that when  
12 that's the view that I have got, having heard you and obviously --

13 MR MACLEAN: My answer to that is I don't have to show the Tribunal a knockout  
14 blow. That's coming at it from the wrong angle.

15 THE CHAIR: Yes.

16 MR MACLEAN: That's the sort of summary judgment reverse strikeout. I am not  
17 seeking at this stage to do that, but as a matter of law that isn't an answer to the  
18 question: does this methodology provide a route map for the answer to all the  
19 questions which arise, and not simply quantification? So, as a matter of law, we say --

20 THE CHAIR: On the route map point, okay; the route map clearly includes the  
21 qualitative evidence and the points that Harris has made. It does include that, and  
22 that's part of the route map. You can complain and say two things; one is, it wasn't  
23 abundantly clear, at least from Williams 1, that this was part of the route map, in the  
24 sense that it was anything other than a cross-check for the comparative analysis on  
25 the DiD model. But it is clear to me the types of exercise that everyone's going to have  
26 to do in establishing whether or not there was an overcharge -- it may be it's quite

1 | general, it is quite general -- but they say, well, we've got to see what is out there.  
2 | We've got to look at the disclosure, and then come up with something more concrete.  
3 | And what I am saying is that I will require something more concrete than we have seen  
4 | so far, for when we properly case manage this case in September. So you may put  
5 | down a pretty firm marker with which I agree, but, you know, we are where we are,  
6 | Mr MacLean.

7 | MR MACLEAN: We are where we are. Can I finish this?

8 | THE CHAIR: Yes, of course you can finish.

9 | MR MACLEAN: It's good to hear and you know, it's not music to my ears, but it's good  
10 | to hear what it is the Tribunal is thinking. Of course, it gives me an opportunity to tell  
11 | the Tribunal why they are wrong.

12 | THE CHAIR: Of course you can. But what I am saying, Mr MacLean, is that what you  
13 | have done is actually very useful, and we are not wasting everyone's time in dealing  
14 | with these points. It also, if you look at some of the other points you are raising about  
15 | funding, you are saying, well, I wasn't pursuing it, but the points you have raised have  
16 | actually had a real benefit for these proceedings and the certification, and it's very  
17 | similar with these two points. Please don't think I don't understand the two points. I do  
18 | understand the points, and I do understand what your concerns are, and I am not  
19 | saying they are not well founded. But what I am saying is that, at the moment, we look  
20 | as though we have got enough to get over the Pro-Sys test, because it's relatively low,  
21 | and because of the thing that's hanging out there is the point about the quality of  
22 | evidence, which you say they haven't developed enough and will have to be developed  
23 | for when we come back in September.

24 | MR MACLEAN: Let me make a submission, not wanting to question the Tribunal --

25 | THE CHAIR: But you can of course, you know, it's your job.

26 | MR MACLEAN: My submission, rhetorically, would be: so what happens if we come

1 back in September and the Tribunal is not satisfied by whatever my learned friend has  
2 come up with? What happens then? Is this a post-certification complaint which leads  
3 to de-certification? I mean, what happens?

4 THE CHAIR: Okay, well, if you want me to answer that, it's quite common in these  
5 cases to have a CMC after certification, where you look at, in more detail, how this  
6 case is going to be proved, and that's what is going to happen. But it doesn't mean  
7 that, necessarily, we are going to de-certify. If at the end of the CMC, I say, look,  
8 I can't see how, on what you produced, any way that there's even a reasonable  
9 prospect of establishing an overcharge, let alone what the quantification of that; of  
10 course, that is going to have impacts. Of course it is going to have an impact. So,  
11 I think that's the answer to your question.

12 MR MACLEAN: I just submit that it's rather unfortunate that we can get to the stage  
13 where there are serious doubts, I suggest, about the roadmap, for the reasons that  
14 I have been developing, and I think, to an extent, the Tribunal has been accepting,  
15 that that is not really consistent with how it is envisaged that this relatively low hurdle  
16 operates as a filter to prevent speculative cases going forward to trial.

17 THE CHAIR: But what I can't do is to say, well, I think that they have got enough there  
18 to get over this relatively low hurdle, and for that reason, because there may be some  
19 doubt at the end of the day whether they are right or wrong, I shouldn't certify. That's  
20 not what the law is. The law is that what may come up at certification stage may be  
21 very different from what appears at trial, but that's inherent because of, let's say, the  
22 asymmetry between disclosure and what comes out of disclosure, and we are at a very  
23 early stage. But what they have come up with, in our view, is something that's  
24 sufficiently plausible, and also it's sufficiently flexible, given what Mr Harris is saying,  
25 and it's referred to in Williams, in his report. But the warning for everyone is that if it  
26 does look as though the comparators are really not going to assist it, there will be



1 | consequences, because we, at every stage on this case, we have to be satisfied that  
2 | certification is appropriate, and if we think this is a dead duck, it's better to shoot it  
3 | now, or at the next CMC if it's got no hope. What we don't really want is cases that  
4 | huge amounts of money is spent on both sides, and that no one benefits at all.

5 | MR MACLEAN: Can I then --

6 | THE CHAIR: Yes.

7 | MR MACLEAN: -- address you about the VAT issue.

8 | THE CHAIR: Of course, the VAT issue is quite an interesting one, yes.

9 | MR MACLEAN: Slightly different.

10 | THE CHAIR: Yes.

11 | MR MACLEAN: Perhaps we should look at what Williams says in 3.7.7 in his second  
12 | report, which is at 634 of the bundle, tab 9, I think it is.

13 | THE CHAIR: Yes. What paragraph?

14 | MR MACLEAN: 3.7.7. Now, this is dealing with the question of VAT, and it says:  
15 | "... Williams 1 sets out additional qualitative analysis, which I plan to carry out following  
16 | disclosure of the information which I will request from Royal Mail to allow me to  
17 | perform the analysis. The additional qualitative analysis will allow me to test and refine  
18 | my estimates of the Retail Customer Overcharge for VAT-exempt ..."

19 | Blah, blah, blah. Now, that shows you that this is an adjunct or a replacement, it's not  
20 | an alternative. It's something qualitative that he says is going to assist in relation to  
21 | testing, in relation to whatever comes out of the model in relation to VAT, okay.

22 | THE CHAIR: Yes. But if we go back, I can see he's put it as an adjunct there, but  
23 | you've got, as you say, the prior question, which can only be -- well, not only -- which  
24 | can only be plausibly dealt with by looking at the qualitative evidence, and looked at  
25 | those different scenarios and factors that you have set out already.

26 | MR MACLEAN: That's as far as the non-VAT is concerned.

1 THE CHAIR: Yes.

2 MR MACLEAN: This applies to the VAT element as well. It is just that that happens  
3 to have an additional tweak, and the additional tweak is, it is still insisted that the  
4 DiD model will work in relation to a scenario where, within this jurisdiction there was  
5 a 20 per cent competitive advantage as far as Royal Mail was concerned, compared  
6 with the jurisdictions where that did not exist. So you've got Sweden and Germany,  
7 which you've been told are the only comparators which have been proposed to be  
8 used for the purposes of the DiD model.

9 Now, it's not -- the answer to that point is not, as my learned friend suggested to the  
10 Tribunal, "well, it's a constant figure of 20 per cent". Or, let's say, Sweden is  
11 10 per cent, and the jurisdiction here is 20 per cent. That's not an answer to the  
12 problem. The problem arises because the difference-in-differences model does what  
13 it says on the tin; it compares differences in differences, but that doesn't enable them  
14 to skip over the fundamental problem, which is this: that when you are assessing how  
15 competition would have evolved in a jurisdiction like ours, where the incumbent has  
16 a 20 per cent competitive advantage, introducing a distortion into the market, you can't  
17 extrapolate -- which is what the DiD model does -- from other jurisdictions which do  
18 not have the similar competitive distortion. It's not good enough, and we simply don't  
19 understand how it can be said that the competitive distortion, which is inherent on  
20 someone trying to break into the market where Royal Mail has a 20 per cent  
21 advantage, can be answered in any way, shape or form with reference to what  
22 happened in a market where this distortion does not exist. The DiD model does not,  
23 in any way, shape or form, in our submission, answer that question.

24 THE CHAIR: It's quite a simple point, and we will need to hear Mr Harris on that.

25 MR MACLEAN: Yes. Now, it's a simple point; it amounts to half this claim, effectively,  
26 because you've got the evidence from Mr Williams that approximately 50 per cent by

1 revenue is attributable to customers who are either VAT-exempt, or partially  
2 exempt -- I can give you the reference to that. That is at --

3 THE CHAIR: VAT-exempt or partially exempt?

4 MR MACLEAN: Yes, that's right. Sorry, I will give you the reference; I had it a second  
5 ago. I am sorry, sir --

6 THE CHAIR: Don't worry, you can move on to your next point. Mr McIntyre will get  
7 the answer by the time you have finished.

8 MR MACLEAN: Page 423. You have been shown this already, I think. 7.4.9,  
9 subparagraph (b). Now, my learned friend's answer to this seemed to be "oh, well,  
10 even if there's a problem there, because there isn't a problem elsewhere, you ought  
11 to go ahead and certify that". Well, you shouldn't, because it's conceded that you've  
12 got to run a separate model in relation to the VAT element. This Tribunal should not  
13 be in the business of certifying claims where the methodology does not support it, and  
14 it doesn't in this circumstance.

15 THE CHAIR: You say that the consequences will be that we should only certify, let's  
16 say, the VAT element, and if you are right, just on that point -- assume that you are  
17 not right on the first point, but if you are right on the second point, the consequence is  
18 not that there's no certification, but there's certification, but with an exclusion?

19 MR MACLEAN: Exactly, yes.

20 THE CHAIR: Okay.

21 MR MACLEAN: Unless there's anything else.

22 THE CHAIR: No, no, that's been very helpful. Let's hear from Mr Harris.

23

24 Reply submissions by MR HARRIS

25 MR HARRIS: Sir, very shortly, then.

26 Can I just show you -- it may assist in any judgment that you write -- the bundle of

1 authorities, Court of Appeal, tab 11, in Gutmann, a case that I argued, and in particular  
2 Lord Justice Green's judgment for the court on the matters that you should address is  
3 to be found at tab 11, page 684.

4 THE CHAIR: What paragraph number?

5 MR HARRIS: It is paragraph 55, beginning under the heading "Absence of  
6 disclosure".

7 THE CHAIR: Yes.

8 MR HARRIS: My learned friend has got the wrong test. He's saying the blueprint has  
9 to identify more things than are required at this stage. What Lord Justice Green for  
10 the Court of Appeal said:

11 "The methodology is subject to a certification assessment prior to disclosure and is  
12 thereby necessarily provisional and might, properly, identify refinements and further  
13 work to be carried out after disclosure."

14 And it refers to informational asymmetry, which is a phrase that you used yourself, sir.

15 THE CHAIR: Yes, exactly.

16 MR HARRIS: "At the certification stage [this is the penultimate sentence] all that might  
17 be possible is for the class representative to advance a methodology identifying what  
18 might be done following disclosure."

19 So that answers some of my learned friend's points.

20 But over the page, just for your note, paragraphs I also rely on and may prove of  
21 assistance --

22 THE CHAIR: Just give the numbers, yes.

23 MR HARRIS: 56, 57 and 58. So what they say in 56 is:

24 "... the methodology must identify the issues, not the answers."

25 My learned friend --

26 THE CHAIR: We have done that, don't worry, yes.

1 MR HARRIS: That's true, but my learned friend ignores it. He's saying you have to  
2 have an answer, including for VAT exempt, but that's not right. You have to identify  
3 the issues, and I am going to show you where they are identified.

4 In 57 is the CAT rationally can make assumptions at this stage based upon what is  
5 called "informed guesswork". So the parallel for this case is it's perfectly legitimate -  
6 it's a perfectly rational assumption for you to take at this stage that there is a likely  
7 impact upon prices based upon what you have seen in the -- that's that one, and then  
8 obviously the broad axe points --

9 THE CHAIR: Exactly. Yes, I am familiar with it.

10 MR HARRIS: So that is all I wanted to say on that.

11 Now, as to the VAT exemption --

12 THE CHAIR: Yes, that's all I really want to hear you on.

13 MR HARRIS: Yes.

14 So can I take you, please, into tab 9 of bundle 1, page 633. This is Dr Williams's reply  
15 on the supposedly fatal flaw about VAT-exempt customers, whether wholly or partially  
16 exempt.

17 THE CHAIR: Yes.

18 MR MACLEAN: He begins by saying at 3.7.1:

19 "3.7.1. Hunt 1 misinterprets [what I am doing] ...

20 "3.7.2. [As at] Williams 1 ... I explain that:

21 "'a) as I am currently restricted to working with publicly available data, it is not possible  
22 to distinguish ... between VAT-exempt and VAT-rated customers and ... I am unable  
23 ... to calculate ... and

24 "b) I will need to undertake further work following the disclosure ..."

25 So just pausing, that's exactly the reason why I showed you paragraph 55 of the  
26 Gutmann Court of Appeal. That's perfectly legitimate to do at this stage.

1 Next point, 3.7.3:  
2 "At this stage ... I was instructed to present a working methodology for estimating ...  
3 I have done [that] ..."  
4 And I paraphrase: separately for VAT-exempt people.  
5 Then the key paragraph for present purposes, sir, over the page, 3.7.4:  
6 "As set out in Williams 1, I will seek disclosure from Royal Mail which will allow me to  
7 distinguish between VAT-exempt and VAT-rated customers."  
8 Just pausing there, you will recall that I showed you that passage in Williams 1.  
9 THE CHAIR: I marked this. I know this bit.  
10 MR HARRIS: "I propose to use this information ..."  
11 These are the points. He can't do it yet, but he will get disclosure. We are  
12 pre-disclosure.  
13 "I propose to use this information to understand the scale and scope of  
14 VAT-exemption, and to estimate a separate model for VAT-exempt customers. This  
15 framework for VAT-exempt customers is my working methodology for estimating the  
16 Retail Customer Overcharge for these customers, but may need to be updated  
17 following disclosure. For example, as I use a data-driven approach to disregard any  
18 control variables that would not improve the predictive power of my model, i.e. a  
19 step-wise regression, the final specification of VAT-exempt customers might look  
20 different compared to the specifications I have put forward in this preliminary analysis."  
21 So just pausing there, by reference to those paragraphs in Williams 1 which I showed  
22 you, where he says: "I am going to need data from disclosure on how many VAT  
23 customers there are, what the proportion is, what the hidden VAT is and what the" -- I  
24 have forgotten temporarily the fourth one. I think it might have been the degree of  
25 pass-through. I can't remember. It doesn't matter, the ones we saw before -- "that's  
26 all preliminary, it's all pre-disclosure, that is going to be my methodology". It's

1 a separate one precisely because there is a different impact on the market -- what my  
2 learned friend was calling the distortion -- "and that's what I am preliminarily going to  
3 do."

4 Then I have got two more paragraphs.

5 3.7.5 I can just paraphrase, because that's what I explained: a DiD model has no  
6 problem in dealing with the fact that there's a constant difference.

7 THE CHAIR: Yes, I have read that as well.

8 MR HARRIS: Good.

9 So what he then says is, 3.7.6:

10 "Therefore, in my opinion ..."

11 So that's basically --

12 THE CHAIR: Yes, I have got that.

13 MR HARRIS: Right.

14 Lastly, then, 3.7.7:

15 "Furthermore, Williams 1 sets out additional [that's an important word my learned  
16 friend skated over] qualitative analysis, which I plan to carry out following disclosure  
17 ... which I will request ... The additional qualitative analysis will allow me to test and  
18 refine my estimates ..."

19 Just pausing there, by that he means the provisional estimates that he's got on the  
20 pre-disclosure information.

21 Next sentence:

22 "The qualitative analysis would model the likely impact of Royal Mail's VAT-exempt  
23 status on competition and prices, based on key inputs and assumptions."

24 So just pausing there, that's the exact analogue and parallel to what I was explaining  
25 to you on the not VAT-exempt customers. You have qualitative analysis that models  
26 the likely impact, and then you put that alongside the DiD analysis in exactly the same

1 way that you do --

2 THE CHAIR: Yes.

3 MR HARRIS: That's it.

4 In particular, he says in terms -- I am reading the next sentence:

5 "In particular, I will model the likely price incentives for Royal Mail in relation to  
6 VAT-exempt customers in the Actual and Counterfactual Scenarios."

7 So that, with respect, is a complete answer at this stage. It's plausible and credible,  
8 based upon the facts of this case, pre-disclosure, when the test is so low and the Court  
9 of Appeal expressly says the model can evolve going forward. That meets the hurdle  
10 now.

11 My learned friend's last point just on this was: "oh, well, it's so-called distortion" -- well,  
12 I don't accept that; it's just a difference in price treatment -- and that it will evolve  
13 differently. Well, I dealt with that in opening.

14 So just to reiterate: this model expressly copes with the difference over the time period  
15 of evolution in the two markets by reference to demand covariables, supply  
16 covariables, all as set out in appendix 11.

17 So that's the answer.

18 THE CHAIR: I think when it comes to -- a major, let's say, variable on this, that could  
19 have an effect, is the size of the VAT. You know, if you are talking about 5, maybe  
20 10 per cent, it's actually quite easy to do what you are saying. But when it's such a big  
21 gap, it may actually go to whether or not Whistl at the end of the day would want to  
22 take this segment of the market. But we will only know that once we have got  
23 disclosure.

24 MR HARRIS: Precisely. The words out of my mouth. But what we do know for today  
25 is 7.168(a) of the decision that says that their plan was to offer a 19 per cent --

26 THE CHAIR: I know, a huge discount.



1 MR HARRIS: Well, there we go.

2 THE CHAIR: Yes.

3 MR HARRIS: That's enough for me today. But at the risk of misstating it, I do accept  
4 that going forward, if I get past certification, you will continue to hold my feet to the fire  
5 as regards how this will be dealt with going forward, and fair enough. That's nothing  
6 less than I would expect.

7 THE CHAIR: Okay. Thank you very much.

8 MR HARRIS: Thank you.

9

10 Decision

11 THE CHAIR: So on these two points, we are against Royal Mail, given the low test  
12 and the stage we are at. Clearly, as this case goes forward, the qualitative evidence  
13 is going to have a major impact on the actual methodology that has been involved,  
14 and it may not simply just be a cross-check to be used against the DiD analysis. It is  
15 something a lot more fundamental than that. The existence of the overcharge is  
16 contested by Royal Mail on a number of grounds, which we have been through today,  
17 which may mean, if they are right, there was, in fact, no overcharge. But that question  
18 is probably only going to be answered through the analysis of the qualitative evidence,  
19 but also using the DiD model analysis.

20 So that is where we are on that.

21

22 Housekeeping

23 THE CHAIR: Now, if we can get a look at the correspondence that you have sent. On  
24 the last piece of correspondence, we have got the draft side letter, and that exactly  
25 matches what I think needs to be done. So that will need to be somehow factored in  
26 in the recitals to the order.

1 MR HARRIS: Yes, we will take care of that. Thank you.

2 THE CHAIR: Then when we look at the other documents, Robert Mason, no problem  
3 at all, because he's a well-known character and he knows what he's doing, very  
4 experienced, and so there's no issue on that.

5 The previous case that Mr Aaronson has been involved in, we know those cases, so  
6 that's fine.

7 The ATE policy ratings, you have got AM Best, who are credible people in relation to  
8 the insurance sector, so if you have got an A rating with them, I think that's a pretty  
9 good sign that we don't have at this stage any concerns about the ability of the ATE  
10 funders to honour their obligations.

11 The Epiq point, do they need to amend or update their notice and administration plan?  
12 I think that clearly further work is needed, but the question is: is it needed today and  
13 is it a necessary expense? I don't think it is a necessary expense. I don't think we  
14 should require them to produce a further report at this stage. But certainly if it does  
15 come to distribution, I would expect to see a lot more than what we have got here. But  
16 that's understandable.

17 MR HARRIS: And I would need to see that.

18 THE CHAIR: Yes, of course. So that's where we are on that.

19 We are still waiting for the analysis of the top people, but I think Bacon is going to deal  
20 with that, and we will look at the timetable later when we come to do the directions.

21 The draft wording for the budget update, I think I would like that to be amended to  
22 reflect that at any CMC we have that. So it's not just going to be the next CMC, but  
23 for all CMCs, I want the budget update.

24 MR HARRIS: Yes, the amended wording. We had understood that, but it didn't reflect  
25 that.

26 THE CHAIR: It didn't reflect that, no.

1 So let's hear what Bacon's got to say. Yes.

2 MR BACON: So, yes, the --

3 THE CHAIR: The scenarios --

4 MR BACON: The scenarios is done. We need to -- I would invite the Tribunal, if you

5 wouldn't mind, to have a ten-minute tea break.

6 THE CHAIR: We will come back at 3.05.

7 MR BACON: Perfect.

8 THE CHAIR: While we do that, can everyone check their diaries to see if they can

9 make either 23rd or 24 September.

10 Mr MacLean, do you know where you are on the -- you probably don't know yet, but

11 can you check, and then we will see.

12 MR MACLEAN: We will check.

13 THE CHAIR: But it's always difficult to find a date where all us three are available.

14 MR MACLEAN: Yes, I will ask my clerks.

15 THE CHAIR: It's not absolutely necessary to have the same juniors, but I do think it

16 would be very helpful to have you and Mr Harris there, because no disrespect to

17 Mr McIntyre, but this is a pretty important hearing, and I would rather have

18 Mr MacLean there. That doesn't detract from you, because I know you are a good

19 advocate, but it's a big responsibility of a case of this size.

20 Mr Harris, do you know where you are on your --

21 MR HARRIS: I can check over the short break.

22 THE CHAIR: Yes, but I don't really want it to go to October. I have offered two dates.

23 We will just try and find either the 23rd or the 24th. Hopefully everyone will be flexible.

24 Yes, Mr MacLean, you are going to check later?

25 MR MACLEAN: I certainly will.

26 THE CHAIR: Yes, thanks very much.

1 MR BACON: Sir, there's also an email you received or the Registry received at 13.49.  
2 That contains proposed wording to deal with the LFA variation, the written advice on  
3 settlement.  
4 THE CHAIR: I have approved that already, just now.  
5 MR BACON: I just wanted to check you have done that. Thank you.  
6 THE CHAIR: Yes, and I said that's got to be reflected in the recitals to the order.  
7 MR BACON: Perfect, thank you. I missed that. So we will print off the handout and  
8 then share that with you.  
9 THE CHAIR: Have we got a draft order? Has someone been -- Mr Rayment, how far  
10 have you got?  
11 MR HARRIS: Mr Rayment is working on that, yes, and we will get that as soon as we  
12 can. It'll have to be an overnight job because we are trying to build in everything that's  
13 been going on.  
14 THE CHAIR: Yes, but we want to have an order that's basically done, subject to sort  
15 of drafting. So I suggest what we do is we come back at, let's say, 3.15. You then  
16 plot out the draft order, give us a copy of the draft order, and we go through that,  
17 because I don't want us to go today without a draft order and a timetable for the next  
18 CMC.  
19 As regards the next CMC, Mr Rayment, what I would want is I will want a bundle of  
20 everything, that includes the skeletons, hard copies of everything for the hearing, at  
21 least five working days before the hearing. That gives us the time to read it.  
22 So I am not really interested in, you know, when you prepare your skeletons or when  
23 you agree the bundle or whatever. I just want to know that five working days before  
24 the date for the CMC, it's all going to be on my desk. You understand what I mean?  
25 Yes.  
26 MR MACLEAN: Before you rise, can I invite you to read the so-called genesis letter?

1 | I believe this --

2 | THE CHAIR: Well, I haven't got the genesis letter.

3 | MR MACLEAN: You don't have it? Oh.

4 | THE CHAIR: Where's the genesis letter?

5 | MR MACLEAN: Well, you should have it. The only observation I wanted to make

6 | was --

7 | THE CHAIR: No, no, where is it?

8 | MR MACLEAN: -- you will see that Mr Williams is not mentioned in it.

9 | THE CHAIR: Sorry, Mr MacLean?

10 | MR MACLEAN: Mr Williams is not mentioned in the genesis letter, I don't believe.

11 | I haven't seen it, but those are my instructions. I just wanted to observe that.

12 | THE CHAIR: Well, we need to look at the genesis letter because I will need it for the

13 | ruling.

14 | MR MACLEAN: You will.

15 | THE CHAIR: Is there another letter that hasn't come to me?

16 | Look, we will come back at 3.15. So whatever I need to look at can be printed out and

17 | we will look at it. We will come back at 3.15 to work out the order that we are going to

18 | be making.

19 | Yes, thank you.

20 | (2.59 pm)

21 | (A short break)

22 | (3.32 pm)

23 | THE CHAIR: So, Mr Bacon, we have read the analysis that's been prepared.

24 | MR BACON: Yes.

25 | THE CHAIR: It's fairly clear. But what I would like is to have another version --

26 | MR BACON: Yes.

1 THE CHAIR: -- which has 100 and then 50, okay?

2 MR BACON: Yes.

3 THE CHAIR: Because it clearly makes sense, at least on the current basis, that at  
4 200 million, you are talking about the percentages there.

5 MR BACON: Yes.

6 THE CHAIR: But once you get to 100 million, the percentages start changing --

7 MR BACON: Of course.

8 THE CHAIR: -- pretty dramatically.

9 MR BACON: Yes.

10 THE CHAIR: As you get down to 50, it's even more dramatic. You must not assume  
11 that we are approving anything or we --

12 MR BACON: It is not presented on that basis.

13 THE CHAIR: It's not, it's just this is what we are looking at so we understand what the  
14 funding proposal is, and it's a very helpful exercise.

15 MR BACON: I have to say, I think it's an excellent idea that came from the Tribunal  
16 and one that probably should be adopted in all cases where there are -- because you  
17 get to -- this can be adopted and adapted as the case goes on.

18 THE CHAIR: Yes. Yes, I agree. It's very helpful.

19 So, look, obviously Royal Mail will say that this was their idea, so I don't claim it's my  
20 idea. I saw it in the correspondence. It seemed to me a pretty useful thing. You  
21 probably saw what I said in McLaren, I think at paragraph 100.

22 MR BACON: Yes.

23 THE CHAIR: It may be that we will want to have that type of evidence if we get to that  
24 stage.

25 MR BACON: Well, as you say, it is up for grabs, as it were.

26 THE CHAIR: Yes, it's up for grabs, but I can see that there's a range where it's not

1 going to be too difficult as to what the distribution is going to be and how it is going to  
2 work out. It's when you get to a sufficiently low figure --

3 MR BACON: That's when the difficulties arise.

4 THE CHAIR: -- that's when the difficulties arise, and when the figure is zero, there's  
5 no difficulty because we know where we all stand.

6 MR BACON: That is one of the easier ones.

7 THE CHAIR: But I think that, you know, this is helpful for now.

8 Now, going back to the -- anything else you want to say? I still want to see the figures  
9 about the big players and all that.

10 MR BACON: No, the point I was going to clarify was the point I made just before we  
11 rose, sir, that you said you had already dealt with it.

12 I may have been at cross-purposes, but we sent the Tribunal a separate letter relating  
13 to the amendment of the litigation funding agreement to deal with the settlement advice  
14 being in writing.

15 THE CHAIR: I have got that one.

16 MR BACON: Yes.

17 THE CHAIR: Is there another one?

18 MR BACON: No, that's what I was talking about.

19 THE CHAIR: And that's what I was talking about.

20 MR BACON: There was some confusion on this side whether that was something you  
21 had approved or not.

22 THE CHAIR: I have approved that.

23 MR BACON: Thank you.

24 THE CHAIR: Yes, and I have approved -- and I have now looked at the user group.  
25 That's useful as well.

26 But insofar as there's things that's been handed up, and so for example the user group,

1 I want a reference to the user group in the recitals. Insofar as Mr Aaronson is going  
2 to have a costs specialist to assist him in assessing invoices, I want it to be said in the  
3 recitals: this is what he's going to do.

4 MR BACON: Yes.

5 THE CHAIR: So it's all on the record, because if all you are looking at is what is in this  
6 bundle, it's not enough and there's more stuff, and the more stuff has to be referred to  
7 somehow in the recitals, and insofar as the scene has changed from the original  
8 application, it has got to be reflected in the order.

9 MR BACON: (Inaudible - microphone off).

10 THE CHAIR: All right? Okay. Thanks very much.

11 Now, on the draft order. We need to approve the notice that goes out. Now, we have  
12 got a notice at tab 3, haven't we? I looked at this earlier.

13 MR BACON: Yes.

14 THE CHAIR: Now, what I have noticed is it doesn't have a huge amount of detail as  
15 to what Royal Mail's alleged to have done and when. It doesn't provide you that much  
16 information.

17 It's really page 55. What I prefer to have is to say what the infringement was, when,  
18 a reference to when the Ofcom decision was made. I just think this needs a bit more  
19 detail. I also think it needs to make it clear that dissolved companies are excluded.

20 So what I suggest you do, Mr Harris, is that your team work on this, have a bit more  
21 detail on what Royal Mail is alleged to have done wrong, and what are you trying to  
22 prove, and it may be helpful to put your theory of harm in there. On that part, it's too  
23 vague. The rest, I don't think there's a problem. So it's really: dissolved companies,  
24 take out, and this bit on page 55 at the bottom, expand on that, so anyone looking at  
25 it will really understand what your case is, that there's been this overcharge, et cetera,  
26 and the timings.



1 Okay, so that's that one.

2 On the directions, we need to get first the date of the CMC and then we work  
3 backwards.

4 Mr MacLean, do we know where we are on that?

5 MR MACLEAN: I regret to inform you that, at this stage, I can't give you an answer.  
6 My time has been offered to a third party and I am due to hear later today whether  
7 they want me or not.

8 THE CHAIR: Well, they may or may not want you. Okay. Is that really for the whole  
9 of September or is it just --

10 MR MACLEAN: That's the whole of September and the whole of October, November.

11 THE CHAIR: Yes. So whatever happens, you have got a problem then, if you take  
12 that brief.

13 MR MACLEAN: Well, if they take me. The offer is out there.

14 THE CHAIR: Okay. If you win the beauty parade --

15 MR MACLEAN: Exactly.

16 THE CHAIR: -- then --

17 MR MACLEAN: Exactly, then there might be a problem. But I can do no more than  
18 tell you there is a potential problem out there.

19 I expect to hear today, but you know how these things are.

20 THE CHAIR: But, Mr MacLean, if the answer comes back that your services are  
21 needed elsewhere, you are not going to be able to make any date that works. That's  
22 the problem. So --

23 MR MACLEAN: Absolutely, that's a problem.

24 THE CHAIR: I don't know --

25 MR MACLEAN: It shouldn't deter the Tribunal from fixing a date.

26 THE CHAIR: Fixing a date. I think we are going to have to fix a date, either the 23rd

1 or --

2 MR MACLEAN: Yes. I mean, I support that.

3 THE CHAIR: Okay. That's really sensible. Sometimes when you get a brief like that,  
4 they let you have a day off. They may have a -- no, it's not one of those?

5 MR MACLEAN: It may be, but I am not --

6 THE CHAIR: But you don't want to say that now.

7 MR MACLEAN: I can't say that now.

8 THE CHAIR: Okay.

9 MR MACLEAN: I will let you know if and when I hear, but 23rd and 24th is --

10 THE CHAIR: Yes. Okay.

11 MR HARRIS: Sir, I am available on either date, and I note that Mr Nourse KC's name  
12 is on certain of the documents for the other side, so there is another silk already  
13 instructed. But I am available on both.

14 THE CHAIR: Yes, he's pretty good as well. He's pretty experienced.

15 So, Mr MacLean, if you are not there, you don't feel too guilty, because if he's  
16 available, then it is going to be --

17 MR MACLEAN: I don't know what his diary says, but it may be --

18 THE CHAIR: Yes, okay.

19 So we will fix it for 23 September, a one-day CMC starting at 10.30. We now need to  
20 sort of work backwards on dates. So let's have a look.  
21 Pleadings. Let's look at pleadings first.

22 So defence. Mr MacLean, can you just give us a date and we can put that in?

23 MR MACLEAN: We are asking for 11 weeks for the defence after the date of the CPO.  
24 I don't know what date that is.

25 THE CHAIR: Yes, just give me a date, then I can write it in.

26 MR MACLEAN: Well, let's assume the CPO order is made today.

1 THE CHAIR: Yes, it will be.

2 MR MACLEAN: 11 weeks is, I am told, 20 May.

3 THE CHAIR: Thank you.

4 Mr Harris, your date?

5 MR HARRIS: I think my date, I am being told, is 23 July, if the date for the defence is  
6 20 May. Is that right?

7 THE CHAIR: No, 20 May.

8 MR HARRIS: Somebody will have to help me on this. What is eight weeks from  
9 20 May, if 20 May is the date for the defence? (Pause)

10 15 July.

11 THE CHAIR: So you want 15 July? Yes.

12 MR HARRIS: Yes.

13 THE CHAIR: Okay. I would like that on that day you supply a list of the paragraph  
14 numbers of the Ofcom decision and the CAT decision on which you rely as being  
15 binding on Royal Mail.

16 MR HARRIS: Yes.

17 THE CHAIR: Mr MacLean, if you have that on 15 July -- I am sure you have done this  
18 exercise already, given what we directed last time.

19 MR MACLEAN: Yes.

20 THE CHAIR: Are you able to give us a date when you can give us your reply? I would  
21 have thought two weeks before the CMC, but ...

22 MR MACLEAN: Yes. We have got August coming.

23 THE CHAIR: I know, that's what I am saying. Two weeks before the CMC.

24 MR MACLEAN: Two weeks before the CMC, yes.

25 THE CHAIR: So that takes us to the 10th. Is it 10 September? Or should we put  
26 9 September?

1 MR MACLEAN: Assuming that's not a Sunday. Tuesday.

2 THE CHAIR: Okay. So 10 September, response.

3 MR HARRIS: Sir, did I pick up from an earlier interchange --

4 THE CHAIR: And yours is 15 July.

5 MR HARRIS: The Royal Mail may have already done that exercise about what it says

6 is binding --

7 THE CHAIR: Well, they settled it, so we never got that far.

8 MR HARRIS: Oh, I see. I wasn't aware of that.

9 THE CHAIR: Okay.

10 So Ofcom and CAT decision paragraphs that you rely on as being binding in these

11 proceedings.

12 MR HARRIS: Might it nevertheless prove of assistance to this Tribunal, as well as to

13 us, if it was settled by way of agreement that the following paragraphs are -- I don't

14 know how it was settled.

15 THE CHAIR: No, they completely fudged it, that's the problem. We didn't get a clear

16 answer. So on this one, we will want to have, if we can, an answer, and then when

17 we get to September, we are not going to have the argument on what is binding or

18 not. At least I just need to know what is binding, and then if we feel we need to have

19 a hearing on the bits which are in issue between you, we will set that as a separate

20 hearing.

21 MR HARRIS: In one case I did, that was dealt with in writing, but that's a matter for

22 the Tribunal.

23 THE CHAIR: Yes.

24 MR HARRIS: Issued in writing and then decision --

25 THE CHAIR: Yes. Yes. Well, we will see how we go on that.

26 On the disclosure, where are we on the disclosure lists point at your paragraph 2(d)?

1 MR HARRIS: Yes. Whistl has written back, I believe, yesterday saying they don't  
2 object, subject to a CRO, to providing their list of documents.

3 THE CHAIR: So that's going to be provided by Royal Mail?

4 MR HARRIS: That's right, isn't it? Yes.

5 THE CHAIR: Okay. So ...

6 MR HARRIS: This is subject to a CRO, and Mr Rayment's going to -- if you have  
7 questions about the CRO, because he's been dealing with that.

8 MR MACLEAN: And Mr McIntyre is going to deal with the --

9 THE CHAIR: He can deal with the CRO. Of course he can. Yes. Yes.

10 MR MCINTYRE: Sir, can I also just pick up on that point where you said that  
11 Royal Mail would be providing it. Royal Mail is content to provide its own disclosure  
12 lists, and we also think that, to understand the disclosure lists, you probably need to  
13 see the disclosure statements, so we will provide those.

14 THE CHAIR: Yes.

15 MR MCINTYRE: It's a technical point, but we can't volunteer Whistl's lists today  
16 because Whistl needs to confirm it's happy with the CRO. The Tribunal could order  
17 us, but we can't volunteer that.

18 Just a very small technicality.

19 THE CHAIR: Yes. Look, what will need to happen is that hopefully we are going to  
20 settle a CRO. That's going to be provided to Whistl's team, and if they want a separate  
21 CRO or whatever they want, we need to have that resolved before anything goes in.  
22 So it's got to be a CRO that all the relevant players are happy with. That must be the  
23 case, and I presume that the lawyers in this court will be dealing with -- I think it's  
24 Fieldfisher -- for Whistl to come up with something that's agreed. But they are being  
25 constructive. They are saying that they have got no real difficulty in principle. Yes,  
26 okay. We will look at the CRO in a minute.

1 So that's on that part of disclosure.

2 I would like that, as part of the preparation, on the same date as 10 September, which  
3 is the date for the response to your list of paragraphs, both parties indicate in general  
4 terms what non-party disclosure applications they envisage making. I am not saying  
5 you have got to make the applications then, but against whom and in respect of what  
6 categories of documents.

7 Now, as regards the position of methodology and how you are going to do it, we will  
8 need to have something from your side ready for the CMC, because it is going to have  
9 to be more developed than what we have got now, particularly on the qualitative  
10 evidence, and so we need to have a date for that, and I need to find out from  
11 Mr MacLean whether or not he feels that he wants to have the opportunity to put  
12 evidence in reply on that, or is he just content to say "let's see what they have got to  
13 come up with and we can play with that at the CMC".

14 MR MACLEAN: Let's see what they have got to come up with before we commit to  
15 spending further money.

16 THE CHAIR: Yes. No, I can see that there's an advantage on that, but what I want to  
17 happen is that two weeks before the CMC, we have an updated report or a new report  
18 from Mr Williams setting out in detail his methodology, and in particular dealing with  
19 the qualitative evidence and the interrelationship between the two.

20 MR MACLEAN: Yes.

21 THE CHAIR: I think they are all the things that we have been raising today.

22 So we put a further report from Mr Williams to be served on 10 September 2025 on  
23 the methodology and the qualitative evidence that he seeks to use and how he wishes  
24 to use it to get to the overcharge. Yes. (Pause)

25 Yes, let's just keep moving.

26 So we have dealt with disclosure, pleadings, case management.

1 MR HARRIS: Sir, there's an issue about the Ofcom file documents. If you turn to  
2 paragraph number 2, under the heading "Disclosure".

3 THE CHAIR: Yes.

4 MR HARRIS: At (a), I think it's --

5 THE CHAIR: Is there a dispute over that?

6 MR HARRIS: Well, perhaps Mr MacLean could --

7 MR RAYMENT: I am not sure if the dispute, sir, is between us and Royal Mail or  
8 whether it's between us and Whistl, because at the moment my understanding is  
9 Whistl have not consented to those documents being disclosed by Royal Mail.

10 MR MCINTYRE: I will let Mr Rayment deal with the position as between his client and  
11 Whistl. Our understanding is the same. They don't have consent from Whistl.  
12 There is a separate point taken by Royal Mail, which is that we would consent to  
13 disclosure of such of the Ofcom file as was disclosed in the Whistl proceedings. You  
14 may recall this, sir, it was a long time ago, but a similar dispute arose in Whistl, where  
15 Whistl was asking for disclosure of the whole file.

16 THE CHAIR: I refused that.

17 MR MCINTYRE: That's right.

18 THE CHAIR: Because I said that it is going to contain a whole load of stuff that's  
19 irrelevant to the issues in the case, and you are under no obligation to give disclosure  
20 from that file of irrelevant documents. So it's only going to be relevant documents.  
21 We can have an argument. But as long as they have the index, they can have the  
22 index to the Ofcom file, plus what you say are the relevant documents. If there's an  
23 argument about the rest, we can argue about that in September.

24 MR RAYMENT: For now, sir, we are perfectly happy with what Whistl got (inaudible).

25 THE CHAIR: No, but that doesn't -- but that may or may not be the answer, because  
26 there may be stuff that is relevant as between them and Whistl that's wholly irrelevant

1 as between you and them. All I am directing -- they may say, "We are just going to  
2 give you all the Whistl stuff", and they are happy with that, and that includes all the  
3 stuff that's relevant, but it may mean there is other stuff that's relevant to the issue in  
4 the proceedings, and all I want to do is get to the position that anything that's relevant  
5 to the issues in this action from the Ofcom file goes to you. It's as simple as that.

6 Mr McIntyre, what do you think about where we are on that?

7 MR RAYMENT: Sorry, sir. Obviously we are going to have to get to the bottom of  
8 that, but the practical issue is: what do we do about the order today? Obviously, I think  
9 that's --

10 THE CHAIR: In the order today, you will get what appears to be the relevant  
11 documents from the Ofcom file, plus the index.

12 MR RAYMENT: Very good.

13 THE CHAIR: Then next time round, if there's an argument that there's further  
14 documents from the index you would like to see, we will deal with that in September.

15 Mr McIntyre, is that --

16 MR MCINTYRE: We are content with that from Royal Mail's perspective. As I say,  
17 there is the separate issue as to whether Whistl is content with that, but I think that's  
18 for Mr Rayment to address by reference to the correspondence.

19 THE CHAIR: Well, I have got power to order disclosure of relevant documents, even  
20 if it's confidential to someone else. Obviously, if there's sort of leniency material and  
21 stuff like that, but I don't think that's a question in this case. But I made the direction I  
22 have made. That direction has been made.

23 MR RAYMENT: Yes. I think if Whistl have any objections, then they will be able to  
24 raise them. You would receive them, I assume, but I suspect they won't.

25 THE CHAIR: No, I don't think they will. No, no, it's very unlikely. But if they do, of  
26 course we will listen to what they say. But I think their main concern is about making



1 | sure that it's in a confidentiality ring. But their documents are clearly going to be highly  
2 | material. Just looking at the Ofcom decision, you can see that it is going to have a lot  
3 | of relevant stuff that you need to work from. I am keen you start getting these  
4 | documents so you can formulate your methodology and adjust it when we get to  
5 | September. So we will make that order.

6 | Now, how long is it going to take to get this? Because we will have the CRO. Ideally,  
7 | I need to have a date when all this is going to be done by.

8 | MR RAYMENT: Well, the CRO and the procedure for notifying Whistl in relation to its  
9 | documents that are confidential is agreed between ourselves and Royal Mail.  
10 | Therefore, it's just a question of contacting Whistl as soon as possible after this  
11 | hearing to see if they agree with what we have come up with. As we understand it, it's  
12 | pretty much what Whistl have said in correspondence they are looking for, so we don't  
13 | expect it to take very long.

14 | THE CHAIR: Okay. Yes, that's fine. Are there any --

15 | MR RAYMENT: Once the CRO is established, which, as I say, I don't think should  
16 | take too long, then you will see from the face of paragraph 2 of the draft order that  
17 | there was a dispute of seven or 14 days between the parties as to how quickly after  
18 | the CRO is made that the disclosure of the relevant documents into the CRO should  
19 | be made.

20 | THE CHAIR: Well, I think it's going to be 14 days, because you are going to have to --

21 | MR RAYMENT: Well, I think that's right, now that we have had the relevance issue  
22 | come up.

23 | THE CHAIR: Yes.

24 | Have you got a draft CRO for me to look at? There was something floating around  
25 | earlier.

26 | MR RAYMENT: Yes, sir. Well, if you would like to turn up the supplemental bundle

1 and go to tab 12.

2 THE CHAIR: Yes.

3 MR RAYMENT: I mean, the first document at 171 is correspondence between us and  
4 Lewis Silkin about -- you don't need to look at that.

5 The second document is an order made in the Trucks proceedings, which has served  
6 as a model for the order that we have come up with in relation to the protocol for  
7 dealing --

8 THE CHAIR: I am familiar with that.

9 MR RAYMENT: Fine, fine.

10 THE CHAIR: You don't need to worry about that.

11 MR RAYMENT: So the confidentiality ring -- well, at page 190, you will see a draft  
12 consent order.

13 THE CHAIR: Yes.

14 MR RAYMENT: That's the draft consent order that governs the use of the Whistl  
15 proceedings document. So, effectively, that sets out a procedure, a protocol, to  
16 protect Whistl's position.

17 THE CHAIR: A lot of this is fairly standard.

18 MR RAYMENT: Yes. That's correct.

19 THE CHAIR: Okay.

20 MR RAYMENT: Then the actual confidentiality ring order itself is at 194.

21 THE CHAIR: Okay.

22 MR RAYMENT: That, again, is a pretty standard document.

23 THE CHAIR: Yes.

24 MR RAYMENT: I mean, it's largely based on the one that was used in the Whistl  
25 proceeding.

26 THE CHAIR: Yes, and that was approved, so that -- yes.

1 So are there any issues, Mr McIntyre, on this?

2 MR MCINTYRE: No, these are our drafts, so --

3 THE CHAIR: You are happy. You are happy. So we will make the order as drafted.

4 So that deals with the CRO. Okay.

5 MR RAYMENT: Just to be 100 per cent clear: obviously, Whistl have not given the

6 green light, although I am anticipating they will.

7 THE CHAIR: Oh, yes, so you need to get the order and say an order in these terms

8 has been approved, subject to any observations that they may have, and if they

9 confirm that they have got no amendments, then you just write to the registry and the

10 order will be made that day. If they have proposed amendments, then they should set

11 out any proposed amendments in a letter to the Tribunal, with the right view and

12 to -- for Royal Mail to have any observations in reply. But we do want to get this

13 moving fairly quickly.

14 Yes, okay, let's go back to where we are.

15 So we have dealt with disclosure, pleadings, the CMC.

16 MR RAYMENT: We have got to add in those two recitals that you mentioned, the

17 costs advisor to the class representative.

18 THE CHAIR: Yes.

19 MR RAYMENT: The user group.

20 THE CHAIR: Yes, plus references to the letters and any additional material put before

21 the Tribunal.

22 MR RAYMENT: Yes.

23 THE CHAIR: But you are undertaking to file another scenario document, an updated

24 version, that's dealing with 100 and 50 as an additional --

25 UNIDENTIFIED SPEAKER: That has been done.

26 THE CHAIR: Oh, you have done that already?

1 UNIDENTIFIED SPEAKER: (Inaudible - microphone off).

2 THE CHAIR: Okay.

3 MR RAYMENT: You will see in red --

4 THE CHAIR: Yes.

5 MR RAYMENT: -- on the second page of the draft order, there's also the recital you  
6 asked for in relation to updating the Tribunal and the defendant at each case  
7 management conference.

8 THE CHAIR: Yes, I am happy with that.

9 MR RAYMENT: Yes, and then there's the second one about any concerns about the  
10 funder's ability --

11 THE CHAIR: The one we talked about a minute ago, so --

12 MR RAYMENT: Yes.

13 THE CHAIR: Okay. That's fine.

14 As regards paragraph 7, I want the skeletons cross-referenced to the -- oh, you have  
15 got that already. Yes. So incorporating bundle references, seven days before the  
16 CMC. That's fine.

17 MR RAYMENT: Sir, you previously said five; you just said seven.

18 THE CHAIR: No, no, I said, "That's fine".

19 MR RAYMENT: Oh, "That's fine". I am so sorry. Mr Harris and I both misheard you,  
20 so --

21 THE CHAIR: That's okay. Sometimes I am a bit incoherent.

22 Ideally, what I don't want to happen is that every time I have a hearing, I have  
23 a different bundle. Insofar as -- let's say we get the bundles for this CMC, which is  
24 going to include, you know, the Ofcom decision, the Court of Appeal decision and the  
25 pleadings, I want to have at least one bundle that never changes. There may be  
26 updates or whatever, but I don't want to keep reading the decision and noting it up

1 again and whatever. So just think about the practicalities of recycling bundles for  
2 further hearings as we go along, knowing that it's not great just to have a completely  
3 new set of bundles every time.

4 I can see now we need to effectively start again, because a lot of things are going to  
5 happen between now and the CMC, but I think what will probably happen is we will  
6 have the CMC in September, and then we will be fixing another date for other things  
7 to be resolved. I just don't want to keep having, you know, completely new fresh  
8 bundles.

9 Let me look at the list. (Pause)

10 MR RAYMENT: Sir, just for complete clarity on the draft order, can I invite you to just  
11 put a line through paragraph 1. That shouldn't be there. That's just a legacy footprint  
12 from an earlier draft that was passing between the parties.

13 That's the same for the recital in red on the first page. Again, that's a prior proposal  
14 that's no longer in issue.

15 THE CHAIR: This is the directions order. What about the other order, which is the  
16 order on the application for the CPO?

17 MR RAYMENT: That's the bundle 1. (Pause)

18 MR HARRIS: Sir, that's tab 2 of bundle 1, updated draft CPO. By my note, there  
19 are --

20 THE CHAIR: Should we -- Mr Rayment, some of the things that we have said about  
21 things like the user group and all of that, shouldn't that be in this order?

22 MR RAYMENT: I had the same --

23 THE CHAIR: Can you just bring them into this order?

24 MR RAYMENT: Transfer them across, yes.

25 THE CHAIR: Yes, transfer them across.

26 MR RAYMENT: Anything that's conditional to your approval of the CPO, effectively,

1 | should be brought into this one.

2 | THE CHAIR: Yes. Bring it into this one. Yes. Okay. Thank you very much,

3 | Mr Rayment.

4 | So the class definition needs to be amended.

5 | MR RAYMENT: Yes.

6 | THE CHAIR: And the date.

7 | MR RAYMENT: Yes.

8 | THE CHAIR: The domicile date will be the same date, won't it?

9 | MR HARRIS: It certainly can be. It's very much in your hands, and we are content

10 | with it being the same date. Then there's a date over the page for opting out. Again,

11 | it's entirely up to the Tribunal. That could in theory be today, but equally you can give

12 | more weeks or more months now that the CPO --

13 | THE CHAIR: I would give three months.

14 | MR HARRIS: No problem. We are entirely content with that.

15 | Then again, in item 9, it often is the same date.

16 | THE CHAIR: Yes, I think it makes sense to be the same date.

17 | Presumably we will have costs in the case, won't we?

18 | MR HARRIS: Yes, I am sure. Yes.

19 | THE CHAIR: Mr MacLean?

20 | MR MACLEAN: Are we talking about the costs of this hearing or --

21 | THE CHAIR: This hearing, the application for a --

22 | MR MACLEAN: The only point I make about that is that ought there not to be some

23 | form of reservation in relation to costs which will be incurred anyway, because they

24 | are going to have to come before the Tribunal and satisfy the Tribunal that it was

25 | appropriate.

26 | THE CHAIR: I agree, but the thing is, doesn't that just all get wrapped up in costs in

1 the case?

2 MR MACLEAN: Yes, well, it may do. I simply --

3 THE CHAIR: Because no one's seeking costs against anyone else in relation to this.

4 Mr Harris, what would you say?

5 MR HARRIS: Sir, can I just take some instructions? Entirely content with costs in the

6 case of those aspects of this hearing that are to do with case management, but can

7 I just check as regards the costs of the CPO application, because that was an

8 application that we made, we have succeeded and was resisted.

9 Can I just check, if you don't mind?

10 THE CHAIR: Because you are going to get some pushback.

11 MR HARRIS: Well, I am instructed to make the standard costs application. I mean,

12 it's standard in my experience that if you make a CPO application that is resisted and

13 the resistance fails, then that should be a costs order made in favour of the successful

14 applicant.

15 I accept, of course, that some part of this hearing has been, in effect, a case

16 management hearing for going forward, and I entirely accept that it would be legitimate

17 for a proportion, therefore, to be devoted to that. But insofar as my learned friend had

18 two supposedly knockout points, together with an expert report, together with rounds

19 of submissions about his knockout points, and they failed, he should pay the costs of

20 that. In other words, my client should be awarded the costs of that.

21 This is, of course, a litigation funded matter. It's only fair that if we mess up and my

22 litigation funder, through my client, the claimant client company, has to pay costs to

23 Royal Mail, which is what they would demand, the same is true when it works in the

24 opposite direction. I mean, they have resisted an application and they failed.

25 THE CHAIR: Thank you, Mr Harris.

26 Mr MacLean?

1 MR MACLEAN: I recall what the Tribunal said earlier today, that they found both sets  
2 of evidence helpful. The Tribunal has made directions in relation to the provision of  
3 further expert evidence on the part of the claimants, because the methodology is going  
4 to need to evolve. In our submission, if you reject the proposition that there ought to  
5 be some small carve-out in relation to the application which is going to be made, costs  
6 should be in the case.

7 MR HARRIS: Well, sir, if I may, the way to test this, of course, is that all of the  
8 supposedly helpful stuff for onward progress of the directions, that could have been  
9 done, in my respectful submission should have been done, absent these two  
10 supposedly fatal flaws, which I remind the Tribunal were preceded by a series of other  
11 supposedly fatal flaws that then got abandoned.

12 So what has happened is, beyond the helpful stuff, there has been essentially costs  
13 to which we have had the trouble of going to that shouldn't have been raised.

14 These objections were bound to fail at the certification stage, given the low merits  
15 hurdle and the nature of the test. It shouldn't have been taken. Some were abandoned  
16 after they'd incurred costs. Some were persisted with and they failed. That's the bit  
17 that I say there should be a costs order in favour of the PCR. (Pause)

18

19 Decision re costs

20 THE CHAIR: We have made the CPO today and Mr Harris, on behalf of the PCR,  
21 makes an application for part of his costs of the application on the basis that there  
22 were two points relied upon by Royal Mail which increased the costs of this hearing.  
23 In particular, it necessitated a further expert report in response to the expert report of  
24 Mr Hunt.

25 In all the circumstances, we do not think it is appropriate to make any adverse costs  
26 order against anyone. When the application was taken out, there were legitimate



1 concerns over funding. Those concerns were raised and dealt with, but it did  
2 necessitate a revised funding agreement.

3 As regards the expert evidence, the points being raised on behalf of Royal Mail are all  
4 points which need to come into the mix and, quite clearly, further thought and  
5 development of the methodology on behalf of the PCR needs to occur. As part of that  
6 process, the exchange of expert evidence is extremely helpful for everyone and the  
7 case going forward.

8 I do not consider that any costs have been wasted by the participation and the  
9 resistance by Royal Mail to the certification on the two points relied upon.

10 MR HARRIS: Sir, yes. Can I --

11 THE CHAIR: So costs in the case.

12 MR HARRIS: Costs in the case, yes.

13 THE CHAIR: Look, if I thought that the points being made were, you know, completely  
14 bad points, wild and really did increase the costs of this case generally -- they haven't.  
15 What they have done is they have really helped crystallise what some of the key issues  
16 are between the parties, and I don't think anything has been wasted because it is going  
17 to be used for the next CMC, and clearly both parties are going to learn from what has  
18 happened today and the evidence that has been put. So I am quite relaxed as to  
19 where we are at the moment.

20 MR HARRIS: Sir, I understand entirely.

21

22 Housekeeping

23 MR HARRIS: What else remains that you would like me to deal with?

24 THE CHAIR: Look, as ever, it's a great pleasure to hear from you, Mr Harris, and  
25 I think that there's nothing more that you can help us on, but if Mr Rayment can make  
26 sure that we have a draft order agreed with Mr McIntyre by 10.00 on Thursday, that

1 | would be great, both the CPO order and the directions.

2 | MR RAYMENT: I am sure we can achieve that.

3 | THE CHAIR: Yes. Thank you very much.

4 | MR MACLEAN: Before you rise, if that is the last point --

5 | THE CHAIR: Oh, yes.

6 | MR MACLEAN: -- can I seek a point of clarification that, in the event that anyone was

7 | to consider an appeal against the order which comes out of this hearing, does time

8 | run from now or does it run from when the order is going to be sealed? It's purely

9 | a point of clarification. I am not suggesting there is going to be, but if there was, would

10 | it be from today?

11 | THE CHAIR: What I will say is time for appeal will start once you have got the written

12 | judgment. That way, no one's prejudiced. Because you may look at the written

13 | judgment and say: this is such nonsense that we are going to take this to the Court of

14 | Appeal.

15 | MR MACLEAN: I am grateful for that clarification. I anticipated that's what you would

16 | say, sir.

17 | THE CHAIR: Yes, so you have got the normal period starting from the day you get

18 | the written judgment.

19 | We will get you the written judgment hopefully, I would have thought, this week, and

20 | then the juniors can come back with any corrections.

21 | MR MACLEAN: There's one final point.

22 | THE CHAIR: Yes.

23 | MR MACLEAN: I think I mentioned it to you. There is the so-called genesis letter.

24 | I think -- and I simply make an observation on it -- you might not find anything in there

25 | about the part that Mr Williams did or did not play in its genesis. That's --

26 | THE CHAIR: Let's just have a look at that then.

1 MR MACLEAN: I might be wrong about that.

2 THE CHAIR: Have I got the genesis letter here?

3 What you will find is ... But does it have to? I didn't ask for that. I asked --

4 MR MACLEAN: Well, it was merely raised for your consideration, sir, and if that's --

5 THE CHAIR: But what this illustrates is the importance of the protections being put in

6 place.

7 MR MACLEAN: Yes.

8 THE CHAIR: Because it's the opposite to normal litigation. Certainly this information

9 will be in the written ruling --

10 MR MACLEAN: Yes.

11 THE CHAIR: -- so everyone can see, including class members, exactly how this case

12 evolved.

13 MR MACLEAN: Yes.

14 THE CHAIR: It's not a problem, as long as you have got effective checks and controls,

15 which Mr Aaronson has agreed to have.

16 MR MACLEAN: Yes.

17 THE CHAIR: Yes, thank you very much.

18 MR BACON: Sir, you should have received a further email attaching the letter from

19 Lewis Silkin, whose transactional lawyers have considered the rolling credit facility.

20 THE CHAIR: Oh, good. Yes.

21 MR BACON: That's now with the Tribunal. I understand --

22 THE CHAIR: So all these letters need to be referred to in the recitals --

23 MR BACON: In the recitals.

24 THE CHAIR: -- of the CPO. You can have a schedule or whatever, and just have in

25 brackets what the topic is of each letter, because we have got a number of letters of

26 the same date now.

1 MR BACON: Yes. The (inaudible) scenario is apparently being printed out outside,  
2 and apparently you are going to get a copy -- I think it's just one copy that they have  
3 agreed to print.

4 THE CHAIR: Well, let's have a look at -- where is it now?

5 MR BACON: Well, we are waiting for it. I am told that the person outside has said  
6 that they'll only produce one copy, which is not very helpful, if I may say so, but ...  
7 (Pause)

8 THE CHAIR: I want to have it before we all go.

9 MR BACON: I think so, because obviously the 50 million point is where the numbers  
10 become more problematic if the contractual terms of the arrangements are --

11 THE CHAIR: Yes, I know. That's where the crunch is going to come.

12 MR BACON: That's where the crunch comes, sir, yes.

13 Before I depart, if you have any questions, I would be happy to answer them.

14 THE CHAIR: Yes, let me have a look at it. Yes. Sit down for now. (Pause)

15 MR BACON: Thank you to the staff for printing it out. Thank you.

16 Just one sort of overlay on that last column. Obviously, there wouldn't be a 20 million  
17 liability on the part of the class. Obviously, the maximum that could be charged,  
18 recovered, whatever one wants to call it, by the funder if the contractual terms were  
19 applied, would be the 70 less the 20, so 50. I see one of your wing members nodding.  
20 So that's just to make that clear.

21 But, of course, as you have indicated, these are difficult circumstances at that point,  
22 and the Tribunal will have to decide, if that were the final outcome, what to do.

23 THE CHAIR: Yes, exactly. As I said, it's not so difficult when you look at the larger  
24 figures, but you will always find a bit of pushback from the Tribunal when you are  
25 talking about a settlement that really causes a squeeze for everyone. The view I take,  
26 subject to what other people may say in the Tribunal and what may be said in the

1 Merricks decision, is that when you have got a smaller cake, you know, everyone's got  
2 to cut their cloth.

3 MR BACON: Yes.

4 THE CHAIR: We don't want to have a situation whereby class members are seen as  
5 being shortchanged at the end of the day, however you define it. But I know there's  
6 lots of different ways of looking at it because you may say, well, if it was privately  
7 funded, it's a risk that everyone accepts, and if you lose a case, you lose a case, you  
8 lose all your money. Or if you only get 5 million and you spend 5 million, well, you are  
9 going to get nothing, and that's what happens in normal litigation.

10 But the difference is this is collective proceedings subject to the oversight of the  
11 Tribunal. It's not as simple as that.

12 MR BACON: No.

13 THE CHAIR: These are very difficult issues. Once you get to 50 million --

14 MR BACON: They are.

15 THE CHAIR: -- it's a very difficult scenario. But 100 million is going to be debatable  
16 either way as to how we are going to cut the cake, if there is a cake.

17 MR BACON: Indeed.

18 THE CHAIR: But anything above that, looking at these figures, I don't see anything  
19 particularly that you stand back and say: there's clearly something wrong here.

20 MR BACON: No. (Inaudible). Thank you.

21 THE CHAIR: Thank you very much.

22 No other applications, so thanks very much, everyone, for your help. It has been dealt  
23 with really sensibly, and we have got through everything, and we have got to  
24 a scenario that we could make a CPO today.

25 I will rise. Thank you.

26 (4.17 pm)

(The hearing adjourned)

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