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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1722/5/7/25

City Court House, 7 Rolls Building
Fetter Ln, consent
London EC4A 1NL

Tuesday 6th May 2025

Before:

The Honourable Mr Justice Morris
Professor Pinar Akman
Paula Riedel

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Perse Technology Limited

Applicant

V

ElectraLink Limited

Respondent

A P P E A R A N C E S

Tristan Jones KC and Femi Adekoya (Instructed by Macfarlanes) On Behalf of Perse
Technology Limited

Kassie Smith KC and Jen Coyne (Instructed by Pinsent Masons LLP) On Behalf of
ElectraLink Limited

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(Tuesday, 6th May 2025)

(10.43)

MR JUSTICE MORRIS: Good morning, everybody. Good morning, Mr Jones. Just a few housekeeping matters before you give me some housekeeping matters no doubt. We have obviously read as much as we can. You will have seen that we have sent you a note with some questions. We have some concern about the time estimate. There is a lot of material here, which most of you in this room are very familiar with and we are less familiar with, and the underlying background is not straightforward. We raise that now but we are concerned whether we will finish in a day.

The second thing we just notice in passing is that, and it is part 1 of the questions we have raised, we note the revised order. Your categories A and B, we do not know the position of ElektraLink on them but I do not know whether they are heavily disputed. And that leaves category D, the landlord position, I believe, and in that regard we note what is said about aggregated data in the skeletons.

MR JONES: Yes.

MR JUSTICE MORRIS: And I leave it there, but we wonder whether there is scope for any differences to be narrowed between you, that is all. I do not know whether that is helpful or not.

MR JONES: That is very helpful. So can I just do the introductions first?

MR JUSTICE MORRIS: Yes, of course.

MR JONES: Mr Adekoya for me for Perse and Ms Smith and Ms Coyne on behalf of ElektraLink. So, members of the tribunal, can I say firstly thank you for spending the weekend, and that is not just as an obsequious comment from me, but from all of us in court, because you clearly have come up with questions which really are questions that I will have to address your Honour and Ms Smith is going to have to address you on, we can see that.

1 MR JUSTICE MORRIS: Yes.

2 MR JONES: I hope that I will address all of those questions in the course of my
3 submissions this morning.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: It may be that we have to come back with a few references because
6 some of your questions are on details that you might want more detailed references
7 than I am going to be able to give you on my feet. But broadly speaking we have all
8 of that in sight.

9 MR JUSTICE MORRIS: Yes.

10 MR JONES: In terms of the time estimate, there is a lot to fit in. I am going to have
11 to go at a bit of a pace, keeping in mind that I need to simplify it, I need to pare it back
12 to what I can fit in and what you can sensibly be expected to follow today and that is
13 what I am going to do. I am going to focus on the core issues this morning. But, sir, I
14 agree that there is a lot to get through and I am hoping that I will get through it this
15 morning.

16 MR JUSTICE MORRIS: The trouble with, and I appreciate what you say, the trouble
17 with that approach quite often is if you and counsel feel under time pressure and then
18 paring back, there are cross-references and so when you can read that in your own
19 time or have a look at that. I personally always find it helpful to look at the material
20 when I am in court because I do not particularly want to be then doing the work
21 afterwards. I am not saying you are going to do that, but anyway, we will see how we
22 go.

23 MR JONES: Sir, yes.

24 MR JUSTICE MORRIS: But there may be times where I will say, "Actually I would like
25 to see that, please, and I would like to understand it better."

26 MR JONES: Sir, I understand that and I will try to minimise the amount of homework

1 that I give you in terms of cross-referencing.

2 MR JUSTICE MORRIS: All right.

3 MR JONES: I am going to start with some introductory comments which are going to
4 be rather detailed and the reason they are going to be detailed is that, as your
5 questions really highlight, the anatomy of this case is rather complicated. It is
6 important to be clear why we have got to this point, what is in dispute, what we are
7 seeking and why we are seeking it and that is what I want to spend some time on in
8 the introduction.

9 You will know from the evidence that Perse provides a range of services which use,
10 among other things, data concerning electricity consumption. Those services, just to
11 run through them in headline terms, include switching services that help people identify
12 the cheapest electricity supplier, carbon reporting services, which help property
13 owners work out their carbon consumption and report on that, carbon reduction
14 services, which build on the reporting and will tell a property owner how they can
15 reduce their carbon consumption and it can be quite sophisticated because you can
16 find out about where their buildings are, the aspect of the roof, all of those sorts of
17 things, demand flexibility service, which has not been important in this last year but
18 has previously been important and will be important going forwards, which enables
19 users to take advantage of schemes that reward them essentially for moving their
20 electricity consumption to times of high supply. And there is also a very small
21 additional service, which is new, which is about using meter readings to checks bills.

22 So those are the services and the data which is used to power those various services
23 is described in detail in the witness evidence, but the point which I want to stress at
24 the outset is that in relation to domestic properties ElektraLink is not supplying Perse
25 with what is called half hourly consumption data. Half hourly data could be obtained
26 if you have a smart meter, but not by ElektraLink and it is not given by ElektraLink, to

1 Perse. What they are supplying Perse in relation to domestic electricity consumption
2 is an annual consumption estimate. Why is it an estimate? Well, if you have
3 a traditional meter, which most, I apologise I should not say most, I think approximately
4 half of the residential consumers have the traditional meters, you can only estimate
5 because you have a meter read whenever you read your meter or someone comes
6 and reads the meter and that is the basis for an estimate. ElektraLink also provides
7 estimated annual readings for consumers with smart meters, but not, I underline, half
8 hourly consumption.

9 MR JUSTICE MORRIS: So, as I understand it, I am one of those 50 per cent who has
10 not got a smart meter, you will be surprised to hear. Half hourly, a smart meter
11 provides half hourly data.

12 MR JONES: It can do, yes.

13 MR JUSTICE MORRIS: But that is not what ElektraLink supply to Perse --

14 MR JONES: That is right.

15 MR JUSTICE MORRIS: -- for domestic.

16 MR JONES: Correct.

17 MR JUSTICE MORRIS: Okay, all right. Okay.

18 MR JONES: Now, they supply other data about domestic meters, who the supplier is,
19 what the kind of meter is, they can supply more granular deal about commercial
20 meters.

21 MS RIEDEL: Can I (inaudible)?

22 MR JUSTICE MORRIS: Yes.

23 MS RIEDEL: So one of the points of difference between the parties is that you can
24 distinguish domestic from commercial and ElektraLink cannot. So do you tell them
25 that it is domestic or do you just know that it is domestic when you ask for it?

26 MR JONES: Well, at the moment Perse just knows, but the reason for that is they do

1 not need to tell ElektraLink because they are only calling --

2 MS RIEDEL: No, it is just a factual point I just want to understand.

3 MR JONES: I will be corrected if that is wrong, but I think the answer is Perse just
4 knows. And as I will come on to describe in a moment, well, let me jump straight to
5 this. When you map across, I will come back to it but there is a difficult question about
6 mapping across the supply chains with the services, which I am going to come on to
7 now and may be part of an answer to your question, I will come back to that. We have
8 identified in my skeleton argument what I have called four supply chains.

9 MR JUSTICE MORRIS: Yes.

10 MR JONES: And they are really critical and the reason we have broken them down in
11 that way is because that is really where the argument comes. If we look at our skeleton
12 argument, please.

13 MR JUSTICE MORRIS: Yes.

14 MR JONES: It is bundle F, I do not know if you have them --

15 MR JUSTICE MORRIS: I have, it is paragraph 11, is it not?

16 MR JONES: So it is paragraph 11, F, tab 140, page 1802. Chain A is supply to human
17 consumers, Perse provides a service directly to a human electricity consumer using
18 data relating to that consumer, in respect of which the consumer has given consent to
19 Perse. Now, the only one of the services that I just described which is actually
20 provided under this chain is the switching service.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: And consumers could access Perse's switching services either through
23 Perse's own website, called Labrador, or through comparethemarket.com.

24 MR JUSTICE MORRIS: Yes.

25 MR JONES: Now, one of the questions on your sheet was why is Compare the Market
26 in category A. The reason is when you go onto Compare the Market and put your data

1 in and get the answer, you are engaging with an API, in other words a piece of
2 software, an application programming interface, which is entirely in Perse's control.
3 Perse does not, as it were, provide the data to Compare the Market who then provides
4 it to you.

5 MR JUSTICE MORRIS: Okay.

6 MR JONES: And that is common ground. There has not been any issue over that.

7 MR JUSTICE MORRIS: Okay, just let me make a note of that. (Pause). Okay, thank
8 you.

9 MR JONES: Now, there ought to be --

10 MR JUSTICE MORRIS: So in that respect Compare the Market is not an intermediary.

11 MR JONES: No, it is not. Compare the Market is not an intermediary. I will unpack
12 intermediaries in a moment, but no. Now, there ought to be a footnote on supply chain
13 A because it ought to say that the data may also be provided to electricity suppliers.
14 Now, that is necessary for switching services to work. And again I do not understand
15 there to be any dispute about this and if you look at the drafting of the order that we
16 have put in, it covers electricity suppliers.

17 MR JUSTICE MORRIS: So we say may be provided by Perse to.

18 MR JONES: By Perse to electricity suppliers.

19 MR JUSTICE MORRIS: To enable the switch to happen.

20 MR JONES: To enable the switch. That is how it works.

21 PROFESSOR AKMAN: Sorry, and the consumer gives direct consent for sharing.

22 MR JONES: To Perse, correct. Chain B is supply to corporate consumers, which is
23 the same as what I have just described but to a corporate consumer, and all of the
24 services that I described earlier could be provided through chain B, all of them,
25 switching, carbon reduction, etc.

26 MR JUSTICE MORRIS: Okay.

1 MR JONES: No, again, there ought to be a footnote saying in this context that the
2 data would be shared with the commercial consumer or with an electricity supplier or
3 with a supplier which enables the aggregated demand flexibility service, sorry, strike
4 aggregated from that expression because it adds confusion. A supplier which
5 provides the demand flexibility service. And again I do not understand that to be
6 controversial. We have put that in our order. I will show it to you in the documents
7 when we go through. It is just an extra clarification on B. Who provides that service,
8 it is essentially a company called NISO, which is the National Electricity Supply
9 Organisation, I think it stands for, but essentially it is a government owned company.

10 MR JUSTICE MORRIS: That is who provide the demand flexibility service.

11 MR JONES: Who supply the demand flexibility, and I think other companies are able
12 to provide it, but as I understand it, it is essentially done through NISO. Chain C,
13 supply to landlords, Perse provides a service for landlords using data regarding the
14 electricity consumption of its tenants in respect of which the landlord has given consent
15 to Perse. This is particularly relevant to the carbon reporting service because those
16 landlords may have a responsibility to report on carbon consumption in their buildings.
17 I am going to come back. I clearly need to unpack that in much greater detail, but let
18 me just go on to D and then I will stand back.

19 MR JUSTICE MORRIS: Yes.

20 MR JONES: Chain D is supplied to intermediaries. Perse provides a service to a third-
21 party corporate entity, i.e. an intermediary entity which is not the electricity consumer
22 or a landlord, which in turn provides a service to another natural or legal person. Now,
23 this could apply to several different kinds of situation and actually the complexities
24 which arise to some extent explain some of the disputes which have arisen. It could
25 arise if you have a company which is itself providing, say, carbon reduction advice to
26 end users and which gets just an input from Perse and incorporates Perse's input into

1 the service that they provide. That would be one example of an intermediary. Another
2 would be that you have a broker. A broker might connect an end consumer, human
3 or commercial, with Perse but as, if you use, for example, a mortgage broker, what
4 ends up happening is the data goes to the broker as well as to the consumer. So that
5 would be another example. And another example --

6 MR JUSTICE MORRIS: Pause a minute, please. So this is Perse, broker, end
7 consumer.

8 MR JONES: Yes, and then a further example would be something similar to Compare
9 the Market --

10 MR JUSTICE MORRIS: Yes.

11 MR JONES: -- but where actually the website offering the service itself receives the
12 data. They would also be an intermediary.

13 MR JUSTICE MORRIS: One minute. Such that when the consumer goes to the
14 website they are dealing with the website and not with Perse effectively.

15 MR JONES: Or with both of them.

16 MR JUSTICE MORRIS: Okay.

17 MR JONES: With the website, not Perse, or both of them.

18 MR JUSTICE MORRIS: Okay.

19 MR JONES: But the point being that the data goes --

20 MR JUSTICE MORRIS: But that distinguishes it from Compare the Market.

21 MR JONES: Yes.

22 MR JUSTICE MORRIS: Okay.

23 MR JONES: Now, these four chains, as you know, are key to understand how the
24 arguments have unfolded and why we are here. And ElektraLink has until recently
25 been providing Perse with services under the bilateral agreement.

26 MR JUSTICE MORRIS: Yes.

1 MR JONES: The dispute which arose has, I should say, various complexities in the
2 sense that if you read back you will see all sorts of other points, but the core dispute
3 which now remains live and which arose at the outset was about supply chains C and
4 D.

5 MR JUSTICE MORRIS: Yes.

6 MR JONES: And ElektraLink said that you do not have authority to use our data for
7 chains C and D and Perse said that they did. ElektraLink says it is willing to provide
8 C and D but only using a tripartite structure, which I will come on to.

9 MR JUSTICE MORRIS: Yes.

10 MR JONES: In December of last year ElektraLink suspended Perse's access to all
11 data because of the dispute. The parties negotiated a lifting of the suspension, but
12 then on 26 February of this year ElektraLink served a notice to terminate the bilateral
13 agreement permanently on six months' notice, in other words from August 2025. Then
14 on 1 April of this year ElektraLink again suspended Perse's access to the data. And
15 since then, and this answers another of your questions on the list, Perse has not had
16 access to any ElektraLink data and it has not been able to provide its services at all
17 save for the Compare the Market service, which at the moment, if you go on Compare
18 the Market, you will see informs you that estimated figures are being given. And what
19 that means is estimates based on just national data. It is not personalised to you in
20 any meaningful sense. And Perse says, and Compare the Market are, as it were,
21 prepared to put up with this right now, but they will not for long, and the reason they
22 will not for long is that consumers will increasingly start to find that the savings which
23 they are being informed of do not always come true because the estimates will not
24 always correspond to their actual situation.

25 MR JUSTICE MORRIS: You said it is based on an estimated figure on national data.
26 Would that estimate that was carried out now be, so, for example, specific to the size

1 of your property or the area you live in or something like that?

2 MR JONES: Can I come back to you?

3 MR JUSTICE MORRIS: Yes.

4 MR JONES: Because I do not know.

5 MR JUSTICE MORRIS: They are shaking their heads behind.

6 MR JONES: They are shaking their heads behind me, but let me come back on that.

7 MR JUSTICE MORRIS: It may be it does not matter.

8 MR JONES: Yes.

9 MR JUSTICE MORRIS: Can I just ask one further question, which I suspect I ought
10 to know and perhaps my fellow panel members know, when there was a suspension
11 in August, was that purportedly under a provision in the agreement?

12 MS RIEDEL: In April.

13 MR JUSTICE MORRIS: In April, sorry.

14 MR JONES: Yes, there were two and they are both purportedly under provisions in
15 the agreement, precisely.

16 MR JUSTICE MORRIS: All right, thank you.

17 MR JONES: And I will come on to those in a moment and just unpack why they were
18 made and what we say about it. Now, there was --

19 PROFESSOR AKMAN: Sorry, can I just ask you could explain the difference between
20 the annual consumption estimate for domestic properties, which you say ElektraLink
21 provides, and the data you are currently receiving which is also estimated?

22 MR JONES: Yes, the point is that the annual estimate which ElektraLink provides is
23 based on your own meter reading. So it is taking your own meter readings, and
24 although they are not ... there is no need to estimate is that meter readings are not
25 taken on a precise annual basis. They are taken when someone comes to check or
26 when you are asked by your supplier to do it. Whereas, and I am being given a note

1 | which probably has the wider answer --

2 | MR JUSTICE MORRIS: The current situation is based on just national --

3 | MR JONES: A median household is what the reference is. We can look at that
4 | perhaps. It is in Mr Sachdeva's first witness statement. Is that paragraph 94?
5 | (Pause). That is in hearing bundle B.

6 | MR JUSTICE MORRIS: No, A. No, B, is it not? Whose witness statement?

7 | MR JONES: Mr Sachdeva's. So it is hearing bundle volume B, page 76, and you will
8 | see in paragraph 94 the data which is currently being used.

9 | MR JUSTICE MORRIS: Just bear with me a moment, please. (Pause). Yes, thank
10 | you.

11 | MR JONES: Now, there was some last-minute correspondence before this injunction
12 | application was issued in which on 14 April Perse effectively sought to have, as it were,
13 | supply chains A, B and C switched back on under the bilateral agreement until trial.
14 | And what they said was: "We accept that D would need to be under tripartite
15 | arrangements." But as I am going to come on to, Perse does not think that those
16 | tripartite arrangements would work. So it was effectively saying: "We will do without
17 | D until trial."

18 | ElektraLink responded on 17 April 2025 and the key points are these. They said that
19 | supply chain C would only be turned back on under tripartite arrangements and they
20 | also said that if this could all be agreed then they would lift the suspension, which you
21 | might think means A and B would come back on, and indeed it would mean that but
22 | only until the termination in August because the letter made clear the termination will
23 | stand. So it is a bit of an odd result, but essentially their position has been we can
24 | enter into tripartites for C and D but the bilateral is coming to an end in August.

25 | MR JUSTICE MORRIS: Let me just digest that. (Pause). So as you describe it, going
26 | forward you say that ElektraLink was saying that going forward in the future C and D

1 | can be supplied under a tripartite.

2 | MR JONES: Yes.

3 | MR JUSTICE MORRIS: Ad infinitum or continually.

4 | MR JONES: Yes.

5 | MR JUSTICE MORRIS: But in any event we are going to stop you A and B in August.

6 | MR JONES: Yes. That is what they have said and there has been further

7 | correspondence this weekend actually to try and clarify that and that is their position.

8 | MR JUSTICE MORRIS: Okay.

9 | MS RIEDEL: Sorry, so it is termination only of A and B.

10 | MR JONES: Well, it is termination of the bilateral.

11 | MS RIEDEL: Right.

12 | MR JONES: So what they say is: "Bilateral terminates but we are help to enter

13 | tripartites." But tripartites, you see, they only work for C and D. You do not enter

14 | a tripartite for chains A and B.

15 | MR JUSTICE MORRIS: Mm.

16 | MR JONES: And I should say just --

17 | MR JUSTICE MORRIS: One minute.

18 | PROFESSOR AKMAN: And are there negotiations started to another bilateral for A

19 | and B?

20 | MR JONES: No, they will not enter into another bilateral.

21 | MR JUSTICE MORRIS: One minute. (Pause). Okay, I have got that, thank you.

22 | MR JONES: And I am going to come on to this, but I do not want this to be a mystery.

23 | On the face of it, it is odd because they are shifting to C and D and not A and B, but

24 | the reason why they are saying this is essentially they are saying, "We do not trust

25 | you." That is essentially what they are saying. They are saying, "When we had

26 | supplied under the bilateral", ElektraLink, unless they do an audit they do not know

1 | what Perse is using the data for, and so they say, "Look, historically you have been
2 | using [this is their case] historically you have been using this data for impermissible
3 | purposes." That is why they have dug in in this position. And I am going to have to
4 | come on and unpack that in a bit --

5 | MR JUSTICE MORRIS: Okay, thank you.

6 | MR JONES: -- but that explains why we are here.

7 | MR JUSTICE MORRIS: Yes, okay, so we do not trust what you are going to do with
8 | the data if we just supply it under a bilateral, but we are all right on C and D because
9 | we are party to that.

10 | MR JONES: Essentially. Your Honour, we are party to that and there is a third party
11 | which we are in a relationship with as well.

12 | MR JUSTICE MORRIS: Yes.

13 | MR JONES: That is essentially the position. But all of that is obviously critical context
14 | and it is important to keep in mind when we see statements about what ElektraLink
15 | say they are happy to provide, they are happy to provide this data or that data, it is
16 | always important just to press precisely under what conditions, do you mean a bilateral
17 | or a tripartite? And until when? Because you might be happy to provide it until August,
18 | but they have emphasised that it is terminating in August.

19 | MR JUSTICE MORRIS: Again, pause, please, a minute. (Pause). Yes, thank you.

20 | MR JONES: That then brings me to the question of why Perse's claim is the shape
21 | that it is, why we are only focusing on A, B and C today. And D is a really important
22 | supply chain, so dropping that has been a step that has been taken with a heavy heart.
23 | But let me explain it.

24 | One feature of this case, as you know, and I am going to have to come on to the
25 | contractual framework in detail, but one feature is that ElektraLink says that they do
26 | not have the right to provide data for supply chains C or D. And I am going to have to

1 unpack that in some detail later on in my submissions, but the broad point that they
2 make is we can only provide data on the basis that it will be used in accordance with
3 something which has been approved by the DTS user group. Now, at trial Perse will
4 be seeking A, B, C and D. And we are going to have to think very carefully about this
5 user group issue because it may be that they are going to have to be involved in this
6 trial because it is rather unsatisfactory to proceed on the basis that a dominant
7 undertaking just says its hands are tied by one of its own committees. So that is going
8 to be a problem that I am going to have to deal with at trial, but for today's purposes
9 we are limiting the relief to A, B and C. Why am I including C? It is because when
10 you look at what has been approved by the DTS user group, I say it does clearly cover
11 C.

12 MR JUSTICE MORRIS: Okay, pause a minute, please. (Pause). And that is a quasi-
13 contractual issue, is it, in terms of commission?

14 MR JONES: It does link to the contracts.

15 MR JUSTICE MORRIS: Because there may be, well, prove it does clearly cover C,
16 that is assuming that data, sorry, that ElektraLink is right that it can only give what has
17 been approved by the user group, okay. But then, I am just raising this, but is the
18 question of whether or not there will be breach of data protection legislation a separate
19 angle of this?

20 MR JONES: Yes.

21 MR JUSTICE MORRIS: It is, okay.

22 MR JONES: Yes, it is. Yes, it is.

23 MR JUSTICE MORRIS: All right. So, I have the point. You say that the user group
24 have effectively approved, or have approved, category C.

25 MR JONES: Yes.

26 MR JUSTICE MORRIS: Yes.

1 MR JONES: Now, D, I will show you what D says when we look at what they have
2 approved. I cannot and I am not going to try to hide from D and hide from the fact that
3 Perse have been using the data for D. It is relevant for today as well because of
4 ElektraLink's defence, if you like, where they say, "You have been using this data
5 impermissibly, you cannot be trusted, and so on." So I am going to have to show you
6 what has happened as regards D. And I will say there is some ambiguity in what has
7 been approved, but more than that, the reason why Perse has been providing to D is
8 because of discussions which Perse has had over the years with ElektraLink, and I
9 will show you the evidence on that. And just to be absolutely clear, I accept that those
10 discussions would not be part of the context when you ask what the user group itself
11 approved. And that is why I am not seeking D. But they are clearly relevant when you
12 ask the question whether or not Perse has been behaving accordance with normal
13 commercial practice, which is the expression which is sometimes used in the cases.

14 MR JUSTICE MORRIS: Okay.

15 MR JONES: Now, there has been some criticism in correspondence since the
16 weekend of the fact that Perse in its application asked for everything, in other words,
17 A, B, C, D., and then in the skeleton argument pulled back to A, B, C. And all I will
18 say about that is that we have been doing our best to find a solution that is going to
19 keep Perse alive. We have looked at the evidence. It is not unusual to adjust the
20 shape of an application and we are at the end of the day back broadly where we were
21 on 14 April, the letter just before the application was issued. So it is not a radical
22 change. It is what broadly was offered then. Can I underline broadly? Because if you
23 do look back at all the different correspondence, both parties have, because they have
24 been in discussions, offered slightly different things at different times. I just want to
25 emphasise, if and when you read the 14 April letter, I do not want you to think that that
26 is precisely what I said today. Broadly it is.

1 MR JUSTICE MORRIS: Okay.

2 MR JONES: What is my legal argument on abuse? I am still in my introductory
3 comments, but I think it is important to canter through this before I move on.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: You will know dominance is conceded for today's purposes.

6 MR JUSTICE MORRIS: Yes.

7 MR JONES: And you will have seen from the documents that we have said that the
8 abuse argument can be approached through two different lenses; unfair terms
9 essentially or refusal to supply. Now, these categories do clearly overlap to a certain
10 extent and the authorities repeatedly tell us that the categories of abuse are not closed.
11 So trying to fit it into one box rather than another may not be strictly necessary. But I
12 just make these comments. It is true to say, I think, that if you just look at A and B, it
13 looks a little bit more like just a straight refusal to supply, but of course ElektraLink's
14 answer to that would be: "We are willing to supply but only under tripartite
15 arrangements." So then it sort of starts to look like the terms that are being offered.
16 If one does look at this through a refusal to supply lens, I rely on four main points. The
17 first is Perse is an existing customer certainly of chains A and B. Also in fact for C,
18 although you will need to look at the documents and reach a view on whether that was
19 permissible. Secondly, ElektraLink is a company which through regulation has been
20 permitted to supply data to third parties such as Perse. Thirdly, the data is needed for
21 Perse to compete effectively on downstream markets. And fourthly, ElektraLink also
22 competes, or potentially competes, with Perse on downstream markets.

23 MR JUSTICE MORRIS: All right, pause there for a moment, please. (Pause). Yes.

24 MR JONES: And I will come back to the authorities, but I will just say at the outset, I
25 am not suggesting that each of those four factors is, as it were, a hurdle which I have
26 to meet. They are all relevant factors in deciding whether there is an obligation to

1 supply and I will just highlight this one important legal point, which is that Ms Smith
2 and Ms Coyne in their skeleton argument place some emphasis on a case known as
3 Bronner, which essentially, they say, is authority for the proposition that there can only
4 be an obligation to supply if the service or product is indispensable for competition in
5 downstream markets. And I just interpose to say the case was actually not whether it
6 would be indispensable just for Perse but is it indispensable at all, as it were, and it
7 would be an answer if Bronner were the correct authority to say, "Look, there are other
8 companies competing with other data." And I would just flag that I absolutely do not
9 accept that Bronner applies to this case. There is a lot of learning on the particular
10 lens which one needs to approach where a company is, through regulation or through
11 its own design, set up to provide services to third parties, and that makes clear that
12 indispensability is not a requirement in those cases, and I will come on to that later on.

13 MR JUSTICE MORRIS: Just a minute.

14 MS RIEDEL: Could I just ask while I am writing. So, I thought I had understood in
15 terms of being committed through regulation, I thought that Ofgem had, so the data is
16 being collected for other purposes anyway and then Ofgem had considered the
17 request, I presume, by the DNOs to basically (inaudible) that data for other purposes
18 and had concluded that this would be permissible for the reasons set out in its report.
19 I had not understood that there was actually a sort of a regulatory framework applying
20 to ElektraLink itself.

21 MR JONES: Well, yes and no. I do not say that, I do not think they have their only
22 licence, for example, if that is the question. I do not think it is like that. But they were
23 set up to enable the DNOs to comply with their own licence conditions and then they
24 were permitted, and they had to be permitted, to also offer services to other
25 commercial third parties such as Perse. And that was done through a regulatory
26 process.

1 MR JUSTICE MORRIS: Pause a minute, please.

2 MS RIEDEL: Do you mean the consultation or do you mean some other regulatory
3 process?

4 MR JONES: The consultation was part of it, yes. That is the process and then the
5 decision. So it is the consultation and then Ofgem's decision, which I will show you.

6 MR JUSTICE MORRIS: So this was an Ofgem decision.

7 MR JONES: It was an Ofgem decision.

8 MR JUSTICE MORRIS: To permit.

9 MR JONES: To permit it, precisely.

10 MS RIEDEL: But not to require it, but to permit it.

11 MR JONES: Well, yes, that is right.

12 MS RIEDEL: Okay, let us not go into the detail.

13 MR JONES: Yes, I mean, that is right, although ... yes, that is right. We will come
14 back to that.

15 MR JUSTICE MORRIS: Can I just go back a moment? And I am sure you are going
16 to get to it in course. You identified four aspects which you say together support the
17 refusal to supply case.

18 MR JONES: Yes.

19 MR JUSTICE MORRIS: Or the refusal to supply allegation. The fourth of those was
20 ElektraLink competing potentially or actually in the downstream markets.

21 MR JONES: Yes.

22 MR JUSTICE MORRIS: I think we have identified that in our list as what may be
23 an important question.

24 MR JONES: Yes, and I will come to that.

25 MR JUSTICE MORRIS: Okay, because I think it is said, it appears to me to be said,
26 by ElektraLink that they do not and the fact that they do not is a mainstay of their

1 argument that there is no arguable abuse here.

2 MR JONES: Yes.

3 MR JUSTICE MORRIS: I think that is --

4 MR JONES: That is what they say.

5 MR JUSTICE MORRIS: Okay, all right, yes. Carry on.

6 MR JONES: That is the refusal to supply lens. If you focus specifically on chain C, it
7 is more easily framed as a question of fair conditions, this is landlords, and there are
8 two broad areas of dispute here relating, firstly, to the need to enter a tripartite and,
9 secondly, the obligation to obtain tenant consent. And so I will pick up in a moment
10 on the question about aggregated data which you raised at the outset.

11 Now, I want to emphasise that those are two separate points, tripartite and tenant
12 consent, because they could say that you do not need a tripartite but you still need
13 tenant consent. And indeed you could order that the data ought to be provided, but
14 you might say it is subject to tenant consent or subject to data aggregation, which I will
15 unpack in a moment. But it is important to keep those two points separate. The
16 problem with the insistence, the problem in competition law with the insistence on
17 a tripartite agreement is that it involves sharing customer identities. Indeed more than
18 that, because each customer would need to explain to ElektraLink what they are doing
19 with the data.

20 MR JUSTICE MORRIS: Pause a minute, please. (Pause). When you say customer
21 here you are talking about the intermediary.

22 MR JONES: Well, no, landlord, because I am on supply chain C. I am talking about
23 supply chain C.

24 MR JUSTICE MORRIS: I am sorry, yes, one minute.

25 MR JONES: I mean, sir, I should say the same point would arise for D. I am just
26 addressing the competition arguments on that now.

1 MR JUSTICE MORRIS: Just pause for a moment. (Pause). When you have
2 a tripartite within category C with a landlord --

3 MR JONES: Yes.

4 MR JUSTICE MORRIS: -- the landlord is effectively the consumer, the customer, is
5 that right? He is not supplying it on to anybody else.

6 MR JONES: That is correct, so it is not quite like a broker situation, that is right.

7 MR JUSTICE MORRIS: Whereas if you are in category D, call them an intermediary,
8 a broker --

9 MR JONES: Yes.

10 MR JUSTICE MORRIS: -- then they are supplying on.

11 MR JONES: That is correct.

12 MR JUSTICE MORRIS: Right, okay.

13 MR JONES: But their position is --

14 MR JUSTICE MORRIS: And in the definitions used in ElektraLink's skeleton, where
15 the terms at 17 are, is it end consumer or final consumer, the third party. In a landlord
16 situation, the landlord would be the ... this is my terminology point. It is not a major
17 point, but just so that I am clear in my head. Tripartite agreement, intermediary
18 customer, capitals final customer, in a landlord situation of tripartite, the final customer,
19 the landlord would be the final customer. Although they are ... but, yes, all right, I am
20 digressing. It does not really matter.

21 MR JONES: Well, sir, it matters in a sense. The answer is I think that that is right,
22 looking at paragraph 18 of ElektraLink's skeleton. The point I make is, I think we
23 flagged in our own skeleton and you picked up on the fact, that this terminology is
24 used in such different ways --

25 MR JUSTICE MORRIS: I know, I know.

26 MR JONES: -- it is a minefield. And we have done our best.

1 MR JUSTICE MORRIS: Yes, you both have.

2 MR JONES: So have ElektraLink done their best. But it is very ... I think, looking at
3 that, what they are saying, it is confusing, but I think where they say intermediary
4 customer there, at paragraph 18 of their skeleton, I think they are talking about Perse.

5 MR JUSTICE MORRIS: Perse, yes.

6 MR JONES: And I think the final customer would be the landlord.

7 MR JUSTICE MORRIS: Yes, it would be either the landlord or it would be the broker
8 intermediary in a category D case.

9 MR JONES: Possibly that is right, yes. Yes, that must be right. That must be right, I
10 think so.

11 MS SMITH: Sorry, my Lord, it might be helpful. The terms "intermediary customer"
12 and "final customer" in paragraph 18 of my skeleton, which are in capital letters, are
13 defined terms in the standard form tripartite agreement.

14 MR JUSTICE MORRIS: Yes.

15 MS SMITH: Which is why they are used with the capital letters there.

16 MR JUSTICE MORRIS: I understand that.

17 MS SMITH: And the tripartite and they are, for example, the intermediary customer
18 would be Perse.

19 MR JUSTICE MORRIS: Yes.

20 MS SMITH: The final customer is the broker and they enter into the services
21 agreement as explained in paragraph 18.

22 MR JUSTICE MORRIS: Yes, but in the case of a broker, we will call it a broker as
23 opposed to a landlord, that broker, there is then another party down the line --

24 MS SMITH: Yes.

25 MR JUSTICE MORRIS: -- who is the consumer --

26 MS SMITH: Yes.

1 MR JUSTICE MORRIS: -- either human or corporate. Whereas in the case of
2 a landlord, if you are applying a tripartite agreement with a landlord, there is nobody
3 beyond the landlord. The landlord is the final customer.

4 MR JONES: Yes. So that is my understanding.

5 MR JUSTICE MORRIS: Yes, okay.

6 MR JONES: So, in a tripartite situation with a landlord, the landlord enters into this
7 tripartite agreement with ElektraLink and ElektraLink therefore learns the identity and,
8 indeed more than that, the business of the landlord. I will come on to why they are
9 actual or potential competitors.

10 In the letter of 17 April, which I have already mentioned, ElektraLink said essentially
11 they could put in place a Chinese wall, but only until the tripartite was signed. So they
12 would separate this information from their sales team at the point at which the
13 customer is a potential customer, but they would not separate it once they have
14 entered into a contract with the landlord. And it is clear that sharing customer names
15 with actual or potential competitors is a breach of competition law, unless there is
16 a valid objective justification for it.

17 MS RIEDEL: Sorry, I just need to clarify that, and I probably read it too quickly. But I
18 had understood that they were thinking about, I mean, I am surprised they have not
19 already thought about it, but they were thinking about information barriers that would
20 be in place. So you are saying that is for the information barriers would not be in place.

21 MR JONES: Not in terms of what was offered before today. It is right, I think, to say
22 that in the witness statements they go further and say that they are contemplating what
23 further arrangements they can put in place. But we are here today because we have
24 not been able to reach an agreement before now and what was offered before today
25 was what I have described.

26 MS RIEDEL: I see. So you do not have a position on whether what they are

1 mentioning now would be adequate protection from the competition is accepted.

2 MR JONES: There is not a clear explanation of what that would be and we in
3 correspondence, Perse's solicitors, have tried to discuss what sort of protections could
4 be put in place and they have made clear that Perse has said in correspondence that
5 this is our concern about sharing confidential information and the position that has
6 been reached is the position I have described. Nothing further has been offered. And
7 obviously it is difficult for someone in Perse's position who does not know ... Perse,
8 for example, until the witness statements came out, did not realise that Mr Linnane
9 was not directly involved in the sales. So they just do not have insight into the way in
10 which a company like ElektraLink could impose Chinese walls. So, madam, they are
11 open to ideas but they are not satisfied with what has been suggested so far.

12 Now, on the competition law point, I do not apprehend there to be any disagreement
13 between my learned friends and us on the principles. Their essential point on
14 confidential information sharing is we are not potential competitors and anyway there
15 is a justification for it. But the idea that sharing this information on the face of it would
16 be a breach I do not think is in dispute.

17 Now, in relation to tripartites, there is also this point about pricing and, sir, I see one of
18 your questions is about that. I will endeavour to answer the questions as I go through
19 them. But could I just say, I was not planning to spend long on pricing today and the
20 reason for that is, it is true that these tripartites would be expensive and Perse says
21 unaffordable for some of its customers. However, if you are not with me on sharing
22 confidential information, this pricing point is to a certain extent parasitic on all of that
23 because if ElektraLink are entitled for other reasons to insist on tripartites, then the
24 cost issue follows from them having to implement a large number of tripartite
25 agreements. But I will come back, it is an important contextual feature.

26 MR JUSTICE MORRIS: I will not press you to go back on it, and I am not quite sure I

1 understand that, because I thought that one of your objections to the tripartite and the
2 pricing was the way it would work that you would not be able to give bulk discounts
3 effectively to other customers.

4 MR JONES: That is true. That is right.

5 MR JUSTICE MORRIS: And I would have thought, my initial reaction, that was
6 separate from sharing confidential information. But I am not going to press you to go
7 there if you are not --

8 MR JONES: Sorry, I apologise, I just make the point in a different way. It is separate,
9 it is just that the defence is the same, so I have to anyway address the defence, if you
10 see what I mean. On confidential information their answer is, "We have to enter into
11 tripartite arrangements." And that is also what they say on cost.

12 MR JUSTICE MORRIS: Okay.

13 MR JONES: We have to enter into tripartites. But then they say, "And if we enter into
14 tripartites, it follows that we have to have a different pricing structure --"

15 MR JUSTICE MORRIS: Okay.

16 MR JONES: "-- because we have to charge all these different individuals for
17 onboarding and due diligence, and all the rest of it." So, I am not trying to underplay
18 it, but the arguments largely follow from the arguments which anyway arise under the
19 commercial information heading.

20 MR JUSTICE MORRIS: Let me make a note of that. (Pause). Okay.

21 MR JONES: That is the shape of the argument on tripartites.

22 There is then, as I said, a different argument around tenant consent and this is where
23 I am about to come on to the aggregation point. Perse says that it is not necessary
24 under data protection law to obtain consent from every tenant and moreover Perse
25 says that, if it were, then it would make the services largely unworkable. I will come
26 on to look at the GDPR in due course. Now --

1 MR JUSTICE MORRIS: Sorry, can I just, I am asking you to pause again. I am just
2 checking on the heading. This is dealing with the landlord, why you say it is a case of
3 unfair conditions, and there are two separate aspects, and you are on the second
4 aspect.

5 MR JONES: Yes.

6 MR JUSTICE MORRIS: Yes.

7 MR JONES: And, sir, this is where we come to the potential solution that I need to
8 address you on.

9 MR JUSTICE MORRIS: Yes.

10 MR JONES: The potential solution to the insistence on tenant consent is that
11 ElektraLink say in their witness evidence and in their skeleton argument that they could
12 provide data on an aggregated basis. And just pausing there just to make this
13 absolutely clear, if that were acceptable, it would resolve the tenant consent issue, not
14 the tripartite issue. Because they are still saying they would need a tripartite
15 agreement.

16 MR JUSTICE MORRIS: Okay. One minute. (Pause). Okay.

17 MR JONES: So just in terms of the order as it has been drafted, it would be possible
18 to tweak the wording to say that in relation to this landlord issue that data only needs
19 to be shared on an aggregated basis insofar as it contains personal data under the
20 DPA. Now, we clearly considered that when putting the order together because it
21 would have taken this issue off the table. The problem with it is that Perse has prior
22 experience of obtaining aggregated data from ElektraLink and it was a very different
23 service being offered to what they have under the bilateral. It involved requesting data
24 manually, which I assume means by email rather than anything else, but manually
25 rather than over an API. And, sir, I will give you the reference because I do not think
26 there is anything else in it other than what I have just said, but we can look at it if it

1 would help. That is in Mr Sachdeva's second statement at paragraph 36.

2 MR JUSTICE MORRIS: Volume B? Yes, I have it. Tab 8.

3 MR JONES: Tab 8, page 163.

4 MR JUSTICE MORRIS: Paragraph?

5 MR JONES: Paragraph 36. (Pause).

6 MR JUSTICE MORRIS: Okay, although it does say it would be a viable alternative,
7 not something that is previously offered, only previously priced as aggregated data
8 once, not offered as something that could be provided on an ongoing basis, where it
9 looks as though it might be being offered now. And then he makes the point about
10 data on a manual, one-off basis, did not ever provide the data through an API.

11 MR JONES: Precisely.

12 MR JUSTICE MORRIS: Yes, all right.

13 MR JONES: And so the difficulty is, and it clearly is a shame that this did not come
14 out earlier and the parties had longer to discuss it --

15 MR JUSTICE MORRIS: Yes.

16 MR JONES: -- but the difficulty is from Perse's perspective, without actually knowing
17 what the service is, how much it costs, is it now done over an API, and Perse says
18 without having a window of time to just test it, which they cannot at the moment
19 because they are suspended, it is not something which they have written into, which I
20 have written into, the order. It could still be written in there, I accept that, but the
21 reason why we are still pushing for access to data on a disaggregated basis is frankly
22 that Perse at the moment does not know whether this aggregated offer would meet its
23 needs or not.

24 MS RIEDEL: And for that particular, for the carbon reporting service, which this is for,
25 would Perse's view, which may be you will have to take back to check with them, but
26 it would helpful be to understand whether Perse's view would be that a manual, you

1 know, that an API is essential for that service specifically. I can sort of understand
2 why it is essential for other services, you know, the switching, so if they come back
3 and say that we have not got the capability to provide it through an API, which of
4 course they may do, and it was only manual, is that something that Perse could
5 manage with or not? And you do not have to answer that now if you do not want to.

6 MR JONES: No, that is a fair question. I will take that away and come back, if I may,
7 when I have taken instructions. There is another detail to this.

8 MR JUSTICE MORRIS: Surprise surprise.

9 MR JONES: It is this, sir. I have been saying they could get aggregated data where
10 it is personal data. Now, there is a sort of separate argument about what if it relates
11 to companies, not sole traders. So sole traders would be personal data, we accept
12 that.

13 MR JUSTICE MORRIS: This is corporate tenants.

14 MR JONES: But corporate tenants, so shopping centres, that would be a good
15 example. So if Perse is providing a service for a shopping centre. It is really useful to
16 have the data individually because then they can provide individualised
17 recommendations for carbon reduction services, and there is no data protection
18 reason why that could not be done. The reason why ElektraLink say they would not
19 do that is that they themselves cannot distinguish, they say.

20 MR JUSTICE MORRIS: Yes, this was the point that you --

21 MR JONES: This was the point that was raised at the outset. So where it was --

22 MR JUSTICE MORRIS: And you say you can, is that right?

23 MR JONES: That is right. The reason that Perse can,

24 (11.42)

25 you cannot distinguish it if you just look at the meter data. I actually understand that
26 you can distinguish domestic versus commercial, but where the problem comes in is

1 | you do not know whether the commercial meter is a sole trader or not, and sole trader
2 | is personal data. So there we are. But the reason Perse can do that is it is dealing
3 | with landlords and so if you go back to, say, the shopping centre example, there are
4 | not many sole traders in a big shopping centre. There might be people who run kiosks,
5 | those sorts of things. But the person who owns the shopping centre, Perse's client,
6 | will know and can say to Perse that these ones are sole traders.

7 | MR JUSTICE MORRIS: Okay.

8 | MR JONES: So, Perse would want it disaggregated for commercial, but would it be
9 | content for it to be aggregated for any situation where it contains personal data.

10 | MR JUSTICE MORRIS: Okay.

11 | MR JONES: And that would need to be the way in which they performed the request.

12 | MR JUSTICE MORRIS: Yes. Okay, alright. So, that is one angle, so that might be a
13 | solution subject to your client's concern as to its actual workability.

14 | MR JONES: Yes

15 | MR JUSTICE MORRIS: But that still leaves, you say, the tripartite issue and the
16 | identity, commercial sensitivity issue.

17 | MR JONES: Yes.

18 | MR JUSTICE MORRIS: Okay, yes.

19 | MS RIEDEL: Yes. On what basis? If it was -- leaving aside B wanting the
20 | individualised for the commercial -- but if it is aggregated data that is being supplied
21 | by ElectraLink, on what basis is the tripartite agreement still required?

22 | MR JONES: Well, that is --

23 | MS RIEDEL: That might be a question for them, but I am just -- I would like to
24 | understand that.

25 | MR JONES: -- unless I am incorrect (?), that is what they have said in
26 | correspondence. That is what they have said in correspondence. Apprehend them...

1 Maybe they have moved on that, I do not know, but that is as I have understood their
2 case. That is how they set it out.

3 MR JUSTICE MORRIS: Oh, right. Okay. Yes.

4 MR JONES: I warned you the introduction would be long. It is maybe a bit longer
5 than I expected, and I apologise.

6 MR JUSTICE MORRIS: No, no. I mean, it is very, very helpful and it sort of illustrates
7 what we thought at the outset.

8 MR JONES: Yes

9 MR JUSTICE MORRIS: That there is a lot in this and I think we are reasonably up to
10 speed but...

11 MR JONES: There is a lot in it.

12 MR JUSTICE MORRIS: Yes.

13 MR JONES: So, do I take it from that I ought to continue at this pace and I am not
14 going to be cut off halfway through?

15 MR JUSTICE MORRIS: Well, I am not proposing to cut you off. I mean, carry on, and
16 maybe we will have a think at lunchtime about where we are going --

17 MR JONES: Yes. I am grateful, sir.

18 MR JUSTICE MORRIS: -- and timing. But yes, I personally do not want to hurry you
19 because these are complicated issues and I think we are learning a lot. And I would
20 imagine that my fellow tribunal members feel the same way and I am sure if they do
21 not, they will tell me. But, yes, okay. It is very open, Mr Jones, yes.

22 MR JONES: So I am going to build on what I said to address you broadly on the
23 question of "serious issue to be tried".

24 MR JUSTICE MORRIS: Yes.

25 MR JONES: And in case it helps with your own note, I am going to have eight headings
26 that I will be going through. And the first one is ElectraLink, and this is a short one but

1 I want to pick up on the point that I made about regulation. You will know, the broad
2 background to ElectraLink was that it was established by industry participants to
3 enable data sharing between them. Could I ask you please to look at Mr Linnane's
4 witness statement, which is in bundle B, tab 5, page 85.

5 MS RIEDEL: Paragraph number?

6 MR JONES: Paragraphs 12 and 13? So, what he explains there is, he says, "In 2013
7 ElectraLink was granted a derogation from Ofgem and network participants to act not
8 only as a telephony operator, but also to provide data services and market operation
9 and support services to businesses in the electricity, gas and water industries in the
10 UK and elsewhere. These additional electricity-related activities included commercial
11 opportunities linked to the analysis of DTS data. As a result, ElectraLink developed
12 its Data Analysis Service, DAS. It started to take a copy of every message sent across
13 the DTM, to analyse and apply its proprietary algorithms to those messages in order
14 to obtain various data points and to package the data points into data analysis service
15 reports which is sold to commercial customers." And then he says, "As acknowledged
16 in Sachdeva 1 paragraph 13, Ofgem's view was that the creation of this new service
17 would not give ElectraLink any 'undue competitive advantage', partly because the data
18 ElectraLink would have access to does not belong to ElectraLink, it belongs to the
19 users of the DTS who would remain free to provide other entities access to that data,
20 and ElectraLink's access to data and provision of services would be subject to
21 associated limitations and obligations. Ofgem also noted that ElectraLink would need
22 to satisfy itself that it was compliant with, among other things, data protection
23 legislation." Now, I agree with that that I have just read out, and would make two
24 additional observations. The first is that the users have not authorised any other entity
25 like ElectraLink to supply data to commercial parties like Perse.

26 MR JUSTICE MORRIS: Okay. One minute, please. Yes, in the sense it would remain

1 free to provide other entities access to that data. Yes?

2 MR JONES: Yes.

3 MR JUSTICE MORRIS: When I read that first I thought, well, individually providing it.
4 But the other entities would be somebody similar to Perse, on a collected basis.

5 MR JONES: Yes, so could be (?) similar to Electrolyn. Yes, it could be either. It could,
6 I suppose, be done bilaterally. But yes, no one apart from ElectraLink can provide the
7 full service.

8 MR JUSTICE MORRIS: Okay, fine. Yes, alright.

9 MR JONES: The second point I want to to add is that Mr Linnane refers to data
10 protection law at the end, but he does not mention that Ofgem also emphasised the
11 need to comply with competition law. Now, in a sense you might think this is all
12 obvious because everyone has to comply with the law. But I do want to show you the
13 emphasis which Ofgem put on this.

14 MR JUSTICE MORRIS: Yes.

15 MR JONES: Their decision is in bundle C at tab 13, it starts on page 176.

16 MR JUSTICE MORRIS: C, did you say?

17 MR JONES: C.

18 MR JUSTICE MORRIS: Tab 13?

19 MR JONES: Tab 13. And the paragraph on its highlight is on page 179.

20 MR JUSTICE MORRIS: Yes. Just wait while I get there, if you do not mind. Yes.

21 MR JONES: And you will see in the paragraph that just starts a few lines down, "In
22 exploring potential electricity-related commercial opportunities, ElectraLink will need
23 to satisfy itself that it is complying with all relevant law, including competition law and
24 data protection legislation. Nothing in this decision or consent should be interpreted
25 as absolving ElectraLink or the DNOs from all relevant law, including competition law
26 and other legal obligations." And it goes on to say that they must continue to meet

1 | their other licence obligations. And you will see the consent is actually on the next
2 | page, and the way it takes effect is as a consent to the licensees, who are the
3 | shareholders in ElectraLink.

4 | MR JUSTICE MORRIS: Yes.

5 | MR JONES: So, I think that is the way in which it comes about under regulation. And
6 | you see that on, essentially, page 176 at the start, again, where they describe their
7 | decision, following consultation, "to provide the consent requested by DNOs which will
8 | allow ElectraLink to explore and perform data market and infrastructure support
9 | services for businesses in the electricity industry."

10 | MR JUSTICE MORRIS: Yes.

11 | MR JONES: So, I will pick up on a point which was put to me earlier. It is right to say
12 | that formally what is happening here is: permission is being given, but permission is
13 | being given in quite a special set of circumstances, which are that the shareholders
14 | are all licensees and they are telling the regulator that the effect of this permission is
15 | going to be to open up competition in these various markets. And the regulator is
16 | saying: we accept that, subject to ongoing compliance with competition law. So it is
17 | not, I accept, identical to requiring someone to provide a service, but it is pretty close.
18 | And we will see, when I come to the main case I am going to come to -- madam, which
19 | was relevant to the question which you posed me -- it is not even actually a regulatory
20 | case at all. I want to go to the Alphabet decision from the Court of Justice, which
21 | applies the same principles, broadly speaking. In other words, in that case, the
22 | network had been established by Alphabet with a view to others being able to use it.
23 | So, having a regulatory requirement to offer services to another, although it is right to
24 | say that is what I referred to earlier, that that need not be a requirement. The question
25 | is: for what purposes has this been established?

26 | MS AKMAN: Do you know of anybody else that is thought to have access to this data

1 from the DNOs, to compete the ElectraLink, in the past?

2 MR JONES: I do not have an answer to that, I will take instructions.

3 MS RIEDEL: There is a cross-reference that there is a standard condition 37, and do
4 we know if that is in the bundle somewhere?

5 MR JONES: Do not believe it is, but can I also take that away and have a look for it,
6 please. My second heading is the existing contractual framework.

7 MR JUSTICE MORRIS: One minute. Okay.

8 MR JONES: And I need to go to volume E, tab 109.

9 (tribunal confers)

10 MR JONES: It is common ground that this is the DPIA which was approved by the
11 DTS user group.

12 MR JUSTICE MORRIS: One minute. Yes, can you just explain a little bit what this
13 document is?

14 MR JONES: Yes.

15 MR JUSTICE MORRIS: I mean, I have read it several times.

16 MR JONES: Yes.

17 MR JUSTICE MORRIS: Who has prepared it, who has submitted it and why?

18 MR JONES: Yes, I am going to go to that. So, let me first make just this point, which
19 is: there are actually three of them in this tab and the next two --

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: -- and each of them is for a different ElectraLink service. This first one
22 that I asked you to look at is for the service called "Business", which is essentially
23 where they provide data for businesses. There are not material differences between
24 them, but I just mention that for clarity.

25 MR JUSTICE MORRIS: Yes.

26 MR JONES: So, this one is the business one. Now, DPIAs have to be authorised by

1 the DTS user group under the bilateral contract and under the DTSA, which is the
2 agreement between the users.

3 MR JUSTICE MORRIS: Yes.

4 MR JONES: And very broadly speaking, ElectraLink can only provide data to people
5 like Perse for uses which are covered by the DPIA, the approved DPIA approved by
6 the user group. And the user group --

7 MR JUSTICE MORRIS: Sorry, just pausing for a moment. The DTSA provides, as
8 does the Bilateral.

9 MR JONES: Yes.

10 MR JUSTICE MORRIS: That you have to go through a DPIA process?

11 MR JONES: Yes.

12 MR JUSTICE MORRIS: Before ElectraLink can provide the data to Perse?

13 MR JONES: Yes.

14 MR JUSTICE MORRIS: Okay.

15 MR JONES: Now, who submits it and how does all of that work? ElectraLink put this
16 document together, but largely using information which Perse had given to ElectraLink
17 in its own document called DPIA.

18 MR JUSTICE MORRIS: Okay.

19 MR JONES: And that may be, madam, the landscape document that you had in mind
20 --

21 MS RIEDEL: Yes.

22 MR JONES: -- a moment ago. We had thought before this litigation started that that
23 document, prepared by Perse --

24 MR JUSTICE MORRIS: Yes.

25 MR JONES: -- because it is its DPIA --

26 MR JUSTICE MORRIS: Yes, had gone.

1 MR JONES: -- had gone. And if you look at the contractual framework, that is what it
2 looks like is going to happen. What they have said in the litigation is essentially: no,
3 no, that is not what happens; you submit to us, ElectraLink, a DPIA and we then turn
4 it into a document to go before our user group. Now given that, as I have said, it is
5 largely based on the information which Perse gave ElectraLink, that point is really just
6 a footnote. Nothing hinges on it, save for this. If you turn, please, to page 1445, you
7 will see the contents.

8 MR JUSTICE MORRIS: Yes.

9 MR JONES: And the DPIA appears in chapter four, you will see.

10 MR JUSTICE MORRIS: Yes.

11 MR JONES: That is what is based on what Perse gave to ElectraLink, and that is the
12 approved DPIA. And what comes in chapters one, two and three are things that
13 ElectraLink is telling the DTS user group but they are not the DPIA which has been
14 submitted or which appears in this document. You will see also on page 1445, there
15 is an appendix at the back. So if we can start with the appendix, because it is on
16 internal page 20.

17 MR JUSTICE MORRIS: Yes.

18 MR JONES: There is a definition of "End Consumer", and you will see that it is:
19 building occupant, EV driver, entity responsible for paying energy bills, legal owner of
20 assets, leaseholder of asset. So, in this document, "End Consumer" covers landlords.
21 This is taken from Perse's DPIA -- with one tweak: someone has capitalised "End
22 Consumer" consumer, Perse's DPIA did not actually capitalise it -- but the definitions
23 are taken. There is also, you will see, a definition of "intermediary".

24 MR JUSTICE MORRIS: Okay, just pause a minute. So, a landlord is legal owner of
25 assets?

26 MR JONES: Yes.

1 MR JUSTICE MORRIS: Is that what you are saying?

2 MR JONES: Or potentially a leaseholder.

3 MR JONES: But for my purposes, a legal owner of the assets would be a landlord.

4 MR JUSTICE MORRIS: Intermediary, yes?

5 MR JONES: There is a definition of "intermediary". Now, if you then please turn back
6 to 1453. We are in the approved DPIA.

7 MR JUSTICE MORRIS: Just pause a minute, sorry. Can I just -- sorry to go back, it
8 is a slight tangent. On that definition of "intermediary", "price comparison website". It
9 is "a website to whom Perse provides services", I do not know what "white label"
10 means, "and in respect of which the end consumer", so that might be the building
11 occupant, "contracts with Perse." Is that describing the Compare the Market situation
12 or is it something different? And maybe it does not matter, I was just reading it. You
13 see what I mean?

14 MR JONES: Well, that -- I do see it, Sir, and it has caused... I think the answer is: it
15 could (?)cover Compare the Market. But I will show you, that particular point then gets
16 ironed out --

17 MR JUSTICE MORRIS: Alright, alright.

18 MR JONES: -- in the... So actually, that definition is another confusing definition and
19 the headline point I am going to make about intermediaries is: we accept that you
20 cannot provide them for intermediaries as I have described it, or at least I am not going
21 to persuade you today that this DPI permits that. Now the way it comes together with
22 Compare the Market is a bit fiddly. I agree, sir, with you that that actually could cover
23 Compare the Market.

24 MR JUSTICE MORRIS: Okay. Do not let me take you out of order. You were taking
25 me back to what page?

26 MR JONES: Yes, 1453.

1 MR JUSTICE MORRIS: Yes. Sorry. Yes.

2 MR JONES: And you will see, "How will you be processing the data? Can you explain
3 how you will be sharing the data with end consumers and intermediaries?" "Data will
4 be presented to the end consumer via a web application hosted and managed by
5 Perse, or communicated by telephone or email to the end consumer." Two paragraphs
6 down, "Data will only be shared and transferred out of Perser's database at the end
7 consumer's request and only to the end consumer, such as to email them confirmation
8 and/or to an energy supplier in the process of facilitating a switch. This may be both
9 prior to the end consumer's decision to switch and to give effect to a switch." And just
10 pausing there, the next sentence is important but before we look at the next sentence
11 could I just make this point: landlords are end consumer, and the DPIA is saying that
12 the data can be shared with end consumers.

13 MR JUSTICE MORRIS: Including landlords.

14 MR JONES: That is what it says. Now, it goes on to say "ElectraLink data and data
15 derived from ElectraLink data will not be shared with intermediaries or other third
16 parties." And so, you will see immediately that explains my position on supply chain
17 D for today's purposes, because that I accept creates a roadblock which I would not
18 get around on supply chain D today, I accept. I am going to come back to
19 intermediaries. Landlords are not intermediaries. Then it says this, "The request to
20 share data by the end consumer may be made by the end consumer to an
21 intermediary, such as via a letter of authority, with such intermediary confirming that
22 request to Perse. And just pausing there, sir. Coming back to your question about
23 Compare the Market, it does look to me as though Compare the Market might be being
24 treated as an intermediary under that definition that you picked me up on. And the
25 reason why it works in the Compare the Market context is that what this is making
26 clear is that where you have a contract with the end consumer, as in the Compare the

1 Market context, you can share the data with the end consumer even if there is
2 someone who you might call an intermediary under this contract, such as Compare
3 the Market, but you cannot give that intermediary (Compare the Market) the data. And
4 indeed, they do not. So, that may actually have been crafted for the Compare the
5 Market situation.

6 MR JUSTICE MORRIS: Alright, I am just trying to digest all that.

7 MS AKMAN: And is it stated on, for example, Compare the Market's website that
8 when the computer consumer is entering the data they are entering into a contract
9 with Perse?

10 MR JONES: Yes, yes.

11 MS AKMAN: And they did consent --

12 MR JONES: Yes.

13 MS AKMAN: -- to Perse directly?

14 MR JONES: It is my understanding, yes.

15 MR JUSTICE MORRIS: Okay.

16 MS RIEDEL: A thing which I find a bit confusing here. So you were talking about this
17 in the context of landlords.

18 MR JUSTICE MORRIS: Yes.

19 MS RIEDEL: And the landlords are receiving the data for the purpose of carbon
20 reporting.

21 MR JUSTICE MORRIS: Yes.

22 MS RIEDEL: But the paragraph here seems to be talking about switching.

23 MR JONES: Yes.

24 MS RIEDEL: So, I am sort of struggling a bit with that.

25 MR JONES: Understood. I am coming on to carbon reporting as well (inaudible) yes.

26 MR JUSTICE MORRIS: Okay, I just want to digest that. So under this, the landlord

1 is an end consumer. The data can be provided to the landlord as an end consumer.
2 The data cannot be shared with an intermediary. But the end consumer can make the
3 request for the data.

4 MR JONES: Yes.

5 MR JUSTICE MORRIS: Via an intermediary.

6 MR JONES: Yes.

7 MR JUSTICE MORRIS: But the data is not provided to the intermediary.

8 MR JONES: Correct, correct.

9 MR JUSTICE MORRIS: Right, okay.

10 MR JONES: And that is why I say that -- it is a slightly odd way of describing Compare
11 the Market, but that is a way of describing the Compare the Market arrangement.

12 MR JUSTICE MORRIS: Okay. Okay, I have got that, thank you.

13 MR JONES: Over the page on 1454.

14 MR JUSTICE MORRIS: Yes.

15 MR JONES: I just want to pick up on the suppliers point. If you look, the second
16 paragraph, "End consumers' personal data will be shared directly and securely with
17 energy suppliers as needed for the processing and completion of the energy supplier's
18 contracts with those end consumers. This includes usage data provided by
19 ElectraLink. This may also be prior to a switch in order to obtain bespoke pricing.
20 Suppliers may include entities that supply services other than electricity supply, such
21 as the National Grid ESO who supplies the demand flexibility service." So, those were
22 -- do you remember my two footnotes to chains A and B?

23 MR JUSTICE MORRIS: Yes.

24 MR JONES: And then forwards on 14.57. And back on Compare the Market, you will
25 see at the top "End consumers have a relationship with Perse. Whilst they may also
26 have a relationship with a partner of ours to whom we are providing a white label

1 service such as Compare the Market, we legally create a direct relationship.

2 MR JUSTICE MORRIS: Okay. And that links in with “white label”, that was in the
3 definition of “intermediary”.

4 MR JONES: Yes.

5 MR JUSTICE MORRIS: Okay.

6 MR JONES: And then 1458, please. You get, under the heading “What do you want
7 to achieve?”: “Enabling the energy market to work more efficiently for everyone”,
8 “Reducing cost and embedded carbon by a more informed choice”, “Reducing barriers
9 to achieve outcomes, supporting a more competitive market”. “What is the effect on
10 individuals?”: “They are in a better position to manage any asset connected to the grid
11 from a cost and embedded carbon perspective. “What are the benefits to the
12 processing for you, individuals, and more broadly?” (?): “Cost efficiencies from the
13 market operating more efficiently can be passed on to consumer bills generally.
14 Energy usage can also quantify embedded carbon to inform a more successful
15 transition to net zero, which will benefit everyone.

16 MS RIEDEL: It is a bit odd, is it not, because the questions are about individuals but
17 the answers go broader than individuals because of the definition -- well, the answers
18 go broader than individuals.

19 MR JONES: They do, and of course this is in a context where -- remember, this
20 particular one is about business supply only. So, a lot of the services that are being
21 covered do not anyway involve any human data subject. So, demand flexibility service
22 for example. So, yes, it has been drafted with a wide variety of services in mind. And
23 when it refers sometimes to data, it is talking not only about data under the DPA but
24 data more generally, commercial data as well. And one of the points which ElectraLink
25 makes, that I will come on to, is that the contracts have confidentiality provisions in
26 addition to the DPIA. So, in addition to the DPA there are other confidentiality

1 provisions under the contracts. And so data generally is, as it were, in their sights and
2 is covered by these documents. If I could also just make the point that these
3 documents are not drafted by lawyers. And I do not mean that in any way as a criticism
4 of the author of the document, but it is I think fair to say that one could read through
5 this as a lawyer and say it is not as clear as it could have been on certain data
6 protection issues. I would accept that. But what it is, I say, clear about is that these
7 services are going to be provided to landlords.

8 MS AKMAN: Will you discuss the lawful basis for processing, as it is stipulated in the
9 DPIA and is mentioned in your skeleton arguments? Because if I understand correctly,
10 in the skeleton arguments in relation to the landlords, you mention digital interest as
11 the basis for the process --

12 MR JONES: I do, I do.

13 MS AKMAN: -- debate (?), and here it says it is the performance of the contract.

14 MR JONES: Yes, well that -- I was about to come on to that one --

15 MS AKMAN: Okay.

16 MR JONES: -- because that is an example of where a lawyer may not have given that
17 answer.

18 MS AKMAN: Okay.

19 MR JONES: The reason I say that is this: it is clearly correct that they are performing
20 contracts, either with human end consumers or commercial end consumers or
21 landlords or brokers. So, the person who has filled this in has thought: we are
22 performing a contract. And they have filled it in that way. That has been approved by
23 the user group. Now, as I understand it, ElectraLink's position is: no, no, we would
24 only approve data processing with consent. So, the fact that this says "performance
25 of the contract", you cannot really look at that through, as it were, the Data Protection
26 Act lens. The person answering this is talking about the contracts which they have got

1 with their clients. They are not addressing the lawful heading under the GDPR. If they
2 were, it should never have been approved, because ElectraLink says they would only
3 approve it on the basis of consent. So, when we actually come separately to look at
4 the GDPR basis for processing in the landlord context: yes, I say legitimate interest.
5 And in the chains A and B context I say consent.

6 MR JUSTICE MORRIS: Right.

7 MS AKMAN: So was this provided by Perse, the answer to this question?

8 MR JONES: Yes, I believe so, although I have not cross-referred every line. So
9 maybe I should do that before yes, but I believe that --

10 MR JUSTICE MORRIS: Sorry, what was the question?

11 MS AKMAN: Was this answer that the lawful basis for processing is performance --

12 MR JUSTICE MORRIS: I am not sure I picked up which page we were on.

13 MS AKMAN: It is page 1458. I asked whether that information was provided by Perse
14 itself into the DPIA, that the lawful basis for processing is the performance of the
15 contract, as opposed to (inaudible).

16 MR JUSTICE MORRIS: Yes, okay, I have got it now.

17 MR JONES: Madam, we could try and bottom that out now, but I know from
18 experience that trying to match the things up takes a little bit of time.

19 MS AKMAN: That is fine.

20 MR JONES: I think the answer is yes, but if I am wrong I will correct myself after lunch.

21 MR JUSTICE MORRIS: Yes, okay.

22 MS AKMAN: Thank you.

23 MR JONES: What I take from this --

24 MR JUSTICE MORRIS: Pause a minute please, sorry. Yes.

25 MR JONES: -- is firstly that services can be provided to landlords.

26 MR JUSTICE MORRIS: Yes.

1 MR JONES: Secondly, that they will be provided for a range of reasons which includes
2 carbon reduction.

3 MR JUSTICE MORRIS: Yes.

4 MR JONES: Thirdly, that it does not say all personal data will be processed but only
5 will with end-consumer consent. And fourthly, it contains additional provisions to
6 safeguard personal data under the GDPR, and I will just flag those at page 1459 and
7 over, where there are a series of questions about what arrangements are put in place.

8 MR JUSTICE MORRIS: Yes.

9 MR JONES: And you can see in the middle of that page, "Commercial agreements
10 are in place with all third parties, highlighting expectations and requirements around
11 data handling. As I say, the other two DPIAs in this bundle contain the same sets of
12 provisions. Can I look next, please, at the bilateral contract? It is in bundle C, tab 18.

13 MR JUSTICE MORRIS: The DSFA?

14 MR JONES: Yes.

15 MR JUSTICE MORRIS: Bundle?

16 MR JONES: C, tab 18. Page 355 is where it starts. And this is where we start to get
17 problems with different definitions. You will see on page 355 --

18 MR JUSTICE MORRIS: Yes.

19 MR JONES: -- at recital C, "The customer is a price comparison website, white label
20 service provider and provider of services to end consumers and business to help them
21 save energy, carbon and money.!"

22 MR JUSTICE MORRIS: Yes.

23 MR JONES: So, they can supply end consumers and businesses, but "end
24 consumers" has a different definition here to in the DPIA. Page 357, you will see
25 halfway down the page "An end consumer is a natural person whose personal data is
26 contained in a message." And so, just to pick up on one of the questions that was

1 asked in the list, “personal data” is defined on the next page as “Personal data as
2 defined in the data protection legislation”. So, there is a cross-reference between the
3 legislative provisions on the contract.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: If you could turn, please, to page 361. The broad way in which this
6 agreement works is, at clause 5.1 you will see, “This agreement provides a framework
7 under which the parties can agree orders for data analysis services.” The orders are
8 in fact attached to this document, and you will see in 5.3, “If there is any conflict or
9 ambiguity, the provisions of the order shall prevail.” A lot of provisions have been
10 referred to in various documents, I cannot take you to all of them.

11 MR JUSTICE MORRIS: No.

12 MR JONES: There are two particular ones that I want to show you, which --

13 MR JUSTICE MORRIS: Yes. Clause 8 might be one, I suspect.

14 MR JONES: Well, I am going to go to 7 first, because this is one which ElectraLink
15 places a lot of reliance on. So, at 7.2 you will see, “The customer”, that is Perse,
16 “acknowledges and agrees that”, and then you have got to go down to (c), “the
17 information disclosed to a customer does not include information which explicitly
18 references or identifies an end consumer, unless the customer has a right to receive
19 such information, whether at law pursuant to a contract between the customer and the
20 end consumer or their supplier or”, at (iii), “on the basis of a legitimate ground”, and
21 this is the point Professor Ackman was raising with me earlier --

22 MR JUSTICE MORRIS: Yes.

23 MR JONES: -- “under data protection legislation, including that the processing of such
24 information is in the legitimate interests of the relevant suppliers (and any other
25 relevant Data Controller) which is documented in the relevant PIA, and the customer
26 is approved as the recipient of such data analysis services on this basis pursuant to

1 annex A of schedule 9.” So, there is a lot in that. Can I go to the bit in brackets, “any
2 other relevant Data Controller”. Who are “other relevant Data Controllers”? “Data
3 Controller” is capitalised, so we should look at that first, it is on page 356.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: It is “The natural or legal person which determines the purposes and
6 means of processing of personal data. So, just starting from the beginning: the users,
7 the industry users, are data controllers. They provide --

8 MR JUSTICE MORRIS: Industry users being?

9 MR JONES: Being the shareholders of ElectraLink, so I have got --

10 MR JUSTICE MORRIS: The DNMs?

11 MR JONES: The DNMs, the DNMs. And they provide the data to ElectraLink.
12 ElectraLink actually says it is not a controller, and we do not need to argue about that,
13 but they say they are not a controller because they just essentially do what the DNOs
14 have told them. And so they say that they are a processor, not a controller. So, as I
15 said, do not need to take issue with that. If they then provide the data to Perse --

16 MR JUSTICE MORRIS: “If they”, being?

17 MR JONES: ElectraLink.

18 MR JUSTICE MORRIS: Yes.

19 MR JONES: Then Perse becomes a controller, because it now has data in its hands.
20 And it needs to treat that data in accordance with the obligations of a data controller,
21 just as any of us will require personal data in the courses of our professional activities:
22 you are a data controller when it comes into your hands. That is not controversial, that
23 is referred to -- I will just show you in Ms Ogborne’s statement, so bundle B, tab 6,
24 page 134, at little paragraph H. And you will see she helpfully quotes the definition of
25 data controller in the GDPR, which not surprisingly mirrors that in the contract that we
26 have just been looking at. And she explains that “When data gets passed to

1 ElectraLink's customers under the bilateral agreements we put in place, those
2 customers are likely to also become data controllers."

3 MR JUSTICE MORRIS: Okay.

4 MR JONES: And the same will be true, for exactly the same reason, when Perse
5 provides data to a landlord. And going back, if I may, to page 363, where we were in
6 the bilateral agreement, that little subparagraph (iii) is explicitly contemplating that one
7 might rely on the legitimate interests of any other relevant data controller.

8 MR JUSTICE MORRIS: Pause a minute, please. Including the landlord?

9 MR JONES: Yes.

10 MR JUSTICE MORRIS: Mr Jones, we need to take a break. In fact, really, we should
11 take a break much earlier than this for the shorthand writer. I am wondering whether
12 we should take an early lunch: It is a bit odd to have a 10 minute break and then come
13 back. I do not know how you are?

14 TAIA ARABULI: I am fine.

15 MR JUSTICE MORRIS: Can we go until one o'clock?

16 TAIA ARABULI: Yes.

17 MR JUSTICE MORRIS: Are you sure? Okay, well can somebody remind me this
18 afternoon that we ought to be taking a break much earlier.

19 MR JONES: Yes.

20 MR JUSTICE MORRIS: I apologise. Thank you. Yes, we will go through until one
21 o'clock.

22 MS RIEDEL: Mr Jones, I have a couple of --

23 MR JONES: Yes.

24 MS RIEDEL: -- questions on this clause which I found perplexing. Are you carrying
25 on providing explanations?

26 MR JONES: No, please ask.

1 MS RIEDEL: So, the first question I had is: when it talks about “information which
2 explicitly references or identifies an end consumer”, is it common ground that the data
3 we are talking about or the data in issue does explicitly reference or identify end
4 consumers? So, there is no dispute as to what those words mean in the context of
5 these proceedings?

6 MR JONES: Yes, that is right: that is not disputed.

7 MS RIEDEL: Okay. And then, the way I was reading (iii), almost you can ignore what
8 is in brackets because that says “including” in brackets, so the basic premise of (iii) is,
9 On the basis of a legitimate ground under data protection legislation, which is
10 documented in the relevant PIA”, etc. So, the part in brackets -- because I was
11 thinking: well, what does it mean, “information that is in the legitimate interests of the
12 relevant suppliers”, I thought: well, I can ignore that because we are not talking about
13 information which is in the interests of the relevant suppliers. You have now
14 highlighted the point about relevant data controller, but it does say “and” any other
15 relevant data controller, which then confuses me some more. So, the first question is:
16 you have drawn our attention to the part in parentheses, but actually is not the clause
17 broader than the part in parentheses?

18 MR JONES: Oh, absolutely. Absolutely, absolutely. I was just taking it in stages, but
19 yes.

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: Yes, absolutely.

22 MS RIEDEL: Okay.

23 MR JONES: And what is documented in the PIA is what I showed you when we were
24 in the PIA. In other words: for these purposes, the PIA does refer to carbon reduction
25 as an objective. And, madam, the next bit which you might put to me is: is the customer
26 approved as the recipient under annex Aa of schedule 9? And I am going to come to

1 | schedule 9 in a moment, because that is the schedule which explains the process by
2 | which you get DTS user consent, essentially.

3 | (12.30)

4 | MR JUSTICE MORRIS: Just pause a minute.

5 | MS RIEDEL: The customer here being Perse?

6 | MR JONES KC: Yes.

7 | MS RIEDEL: So can Perse, as a matter of Data Protection Law, can Perse... Because
8 | the legitimate ground... There is a legitimate claimed by the landlords.

9 | MR JONES KC: Yes.

10 | MS RIEDEL: But here... So can Perse benefit from the legitimate ground claimed by
11 | the landlords --

12 | MR JONES KC: Yes.

13 | MS RIEDEL: -- even though Perse is the recipient? So it is not Perse's legitimate
14 | ground?

15 | MR JONES KC: Yes.

16 | MS RIEDEL: Perse is receiving the data?

17 | MR JONES KC: Yes. My answer to that is yes. And you might need to ever so slightly
18 | tweak the way I have described the legitimate ground to say that, Perse's legitimate
19 | ground is to provide services to landlords to provide carbon reduction services. But
20 | that simply acknowledges that the ground, the ultimate objective is being achieved
21 | through a chain.

22 | MR JUSTICE MORRIS: So you just said Perse's legitimate ground, you rephrased it,
23 | Perse's legitimate ground is to provide data to -- sorry, the way Ms Riedel put it was,
24 | Perse can benefit from legitimate ground claimed by the landlord. And you reframed
25 | that as Perse's legitimate ground is to provide data to... I did not catch?

26 | MR JONES KC: To landlords to enable carbon reduction.

1 MR JUSTICE MORRIS: Okay.

2 MR JONES KC: But so can I – I do not want to be caught up on exactly how one
3 describes it –

4 MR JUSTICE MORRIS: Yes, okay, it is all right, it is just my note.

5 MR JONES KC: Well, no, but the general point is this, that what they are doing is
6 reducing carbon emissions, that is the, sort of, general heading. And now one could
7 carve that, as it were, legitimate objective up in different ways when you apply it to the
8 landlord, versus when you apply it to Perse. But the essential point --

9 MR JUSTICE MORRIS: Yes.

10 MR JONES KC: -- I am making is, they are all involved in the chain, the objective of
11 which is to help landlords here to make changes to reduce carbon emissions.

12 MS AKMAN: So the legal basis for processing of data within the Data Protection
13 Legislation by Perse is contract or legitimate interest?

14 MR JONES KC: Legitimate interest.

15 MR JUSTICE MORRIS: Okay.

16 MR JONES KC: I should just show you, while we are on this page, yes, I will just pick
17 up on 8.2.

18 MR JUSTICE MORRIS: Yes, that was... Yes.

19 MR JONES KC: Which is the other one which has really been emphasised.

20 MR JUSTICE MORRIS: Yes.

21 MR JONES KC: "Except as expressly permitted in this agreement, the customer..."
22 That is Perse. "shall not make the DAS reports available to any other person in any
23 form, or publish or otherwise exploit, modify or create derivative works from the DAS
24 reports or copy message data, or combine the DAS reports or copy message data with
25 other material, whole or in part." And then at B, "Onward sell or exploit the benefits of
26 the data analysis service, the DAS reports or any copied message data with any third

1 party, except where permitted under the PIA.”

2 MR JUSTICE MORRIS: Yes.

3 MR JONES KC: And then C, “The customer should be entitled to use data contained
4 in the DAS reports to directly provide services to end consumers to whom such data
5 relates.” And I say that again, since it is permitted under the DPIA, that is the answer
6 to clause 8.2. And so can I just make this observation?

7 MR JUSTICE MORRIS: Sorry. You say that supply to a landlord is not caught by 8.2
8 because it is permitted under the PIA? Is that what...?

9 MR JONES KC: Yes, I do not know, not caught, but it is within 8.2B because it is
10 permitted under there.

11 MR JUSTICE MORRIS: Yes, it is permitted. But we are talking about supplies to the
12 landlord?

13 MR JONES KC: Yes, yes, yes.

14 MR JUSTICE MORRIS: Okay.

15 MR JONES KC: And just while we are on this, 8.2 was stressed very heavily by
16 ElectraLink earlier on in the process. I am not sure they placed much reliance on it
17 now, and the reason for that may well be, because what they were emphasising was
18 the little bit at the end about how you can only provide data to end consumers. And
19 that is what introduced some uncertainty on our part, because end consumer in this
20 contract only means an actual person.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES KC: So that is what caused that, sort of, side issue about, well, are you
23 saying we also cannot do Chain B? Now my impression is that this really is not being
24 relied on particularly now by ElectraLink, because they do accept that Chain B can be
25 done, and so the whole argument about end consumers in this clause really does not
26 work.

1 MR JUSTICE MORRIS: Okay.

2 MR JONES KC: And we do not need to go through the orders but I will just show you
3 that, for example, on page 375 you see the first order. And the way it works is –

4 MR JUSTICE MORRIS: 375?

5 MR JONES KC: 375.

6 MR JUSTICE MORRIS: Yes.

7 MR JONES KC: And each of these orders that are annexed are for a different service.
8 This first one is for quote right.

9 MR JUSTICE MORRIS: Where do I see quote right?

10 MR JONES KC: You will see that actually on the next page on 377, where there is an
11 appendix with a report format. So you have a particular service --

12 MR JUSTICE MORRIS: Yes, got it.

13 MR JONES KC: -- then an appendix that tells you what the report format is going to
14 be, and then forwards on 382, the charges that are paid for that particular service.

15 MR JUSTICE MORRIS: Okay.

16 MR JONES KC: And I believe there are four orders, which confusingly, although
17 nothing really depends on this, do not precisely match the three DPIAs, but to a large
18 extent do. But I do not think anything really hinges on that.

19 MR JUSTICE MORRIS: All right, okay.

20 MR JONES KC: But just for your information there is not a, sort of, perfect alignment
21 between those. So that is the bilateral. Next –

22 MS RIEDEL: Sorry, I am so sorry to hold –

23 MR JONES KC: Yes. No, not at all.

24 MS RIEDEL: But just while we are here, I am looking at that schedule one, the order,
25 at the special terms 7.2 and I think I was quite interested by 7.2, but I do not think I
26 saw it referenced in the party's submissions, skeletons etc. So is there anything

1 interesting in 7.2?

2 MR JONES KC: Let me read it.

3 MR JUSTICE MORRIS: Depends what user intermediary and customer...

4 MS RIEDEL: And maybe you want to take it away, because I do not mind if there is

5 nothing interesting, it should not hold anything up but...

6 MR JONES KC: I believe that that is catering for the switching services, when I

7 mentioned earlier that in order to effect the switch the data needs to be given to the

8 supplier. But, madam, I will add it to my list of things to check.

9 MR JUSTICE MORRIS: Yes.

10 MR JONES KC: The DTSA, which is in volume D, tab 59, page 815. And I am going

11 to jump straight to Schedule 9, which is on page 917. I have already mentioned this,

12 this is the framework under which essentially ElectraLink is allowed to provide data

13 analysis services –

14 MR JUSTICE MORRIS: To? Externally?

15 MR JONES KC: To people like Perse. And the broad process is that the consent of

16 the user group is required. Now, can I look at page 922, please?

17 MR JUSTICE MORRIS: And just so that... I am sure... DAS contract is what the

18 bilateral is?

19 MR JONES KC: That is right. It is also what the tripartite would be.

20 MR JUSTICE MORRIS: Okay.

21 MR JONES KC: So it is a contract which is essentially approved under these

22 provisions in the language of this contract, is a DAS contract.

23 MR JUSTICE MORRIS: Okay.

24 MR JONES KC: And in 4.1.1, where it refers to the service controller, that is

25 ElectraLink.

26 MR JUSTICE MORRIS: Yes.

1 MR JONES KC: "So ElectraLink has to ensure that all DAS contracts include..." and
2 the relevant one is down at B, "confirmation from the DAS data transfer catalogue
3 customer." That is Perse. "To the extent the DAS data transfer catalogue customer
4 requests data analysis service with an MPAN specific output." It is meter. An MPAN
5 is a number associated with a meter. "The MPAN numbers in respect of which it
6 requests such services are MPAN numbers for which the DAS data transfer catalogue
7 customer has the right to receive associated copied message data." And then you
8 have the same provision that we have already looked at, "Either by law or by contract,
9 or on the basis of a legitimate brand under the Data Protection Legislation." And then
10 at the end of that, "Where the DAS customer is approved as the recipient of such data
11 analysis service on this basis pursuant by Annex A of this schedule."

12 MR JUSTICE MORRIS: Okay, just let me digest that last bit, sorry. Okay. At the end
13 of that clause it refers to the DAS customer, whereas earlier in that clause it is the DAS
14 data transfer catalogue customer --

15 MR JONES KC: Yes.

16 MR JUSTICE MORRIS: -- is there any significance in the two terms being different?

17 MR JONES KC: There is no significance for our purposes. A DAS data transfer
18 catalogue customer is a type of DAS customer.

19 MR JUSTICE MORRIS: Okay, all right. But such DAS... Where the DAS customer
20 must be a reference to the DAS data transfer --?

21 MR JONES KC: It is the same as Perse, precisely.

22 MR JUSTICE MORRIS: All right. Thank you.

23 MR JONES KC: So that is the first place that this formulation comes up in the DTSA.
24 And it comes up again on page 925, where at 4.3, "ElectraLink shall ensure that in
25 providing the data analysis services it doesn't provide any vulnerable customer
26 messages, the information doesn't include information which explicitly references or

1 identifies another user.” And then down at 4.3.3. I will not read out because you will
2 just see it is the same.

3 MR JUSTICE MORRIS: Sorry, 4.3 --?

4 MR JONES KC: 4.3.3 on page 926.

5 MR JUSTICE MORRIS: Yes, sorry, yes. Okay. So it is at [inaudible] pursuant’s
6 contract and legitimate ground?

7 MR JONES KC: Yes. Lastly, on page 930, you have seen a few references to Annex
8 A and having to approve in accordance with Annex A. This is Annex A. It is a
9 somewhat complex process which I think you do not need to worry about the details
10 of. The headline point, which I have said a few times, is simply that one needs to be
11 approved by the user group. And that is why it is significant that the DPIA, which I
12 showed you, was approved. My thought --

13 MR JUSTICE MORRIS: Can I... Sorry, can I --

14 MR JONES KC: Yes.

15 MR JUSTICE MORRIS: -- just, without digesting, does Annex A expressly refer to a
16 PIA, a DPA? Is there any reference in the DTSA to the requirement to have a DPIA
17 approved?

18 MR JONES KC: Yes, it is actually, again, confusing a different language, it is called a
19 PIA in this document, but we agree it is the same document. And you will see it is in
20 paragraph two, it is referred to there.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES KC: And that then triggers a whole series of steps.

23 MR JUSTICE MORRIS: Okay. Yeah.

24 MR JONES KC: My third heading is data protection --

25 MR JUSTICE MORRIS: Okay.

26 MR JONES KC: -- and I can, I think, do this before lunch.

1 MR JUSTICE MORRIS: Okay, fine, thank you.

2 MR JONES KC: Just to recap, Data Protection Legislation is only concerned with
3 personal data, and in this context, it is common ground that that would mean
4 residential electricity consumption data and sole trader consumption data. It would
5 also mean other things like who your supplier is and what kind of meter you have got.
6 But in a sense they are subsidiary, but I accept all of that. In Chains A and B, there is
7 no issue because Perse obtains consent. Chain D, this is a side note since I am not
8 seeking this today, but just for your information, the evidence explains Perse ensures
9 that intermediaries obtain consent from the electricity consumer. And Chain C --

10 MR JUSTICE MORRIS: Yes, pause a minute please. Okay.

11 MR JONES KC: -- is the controversy. This is the landlord's. And as you know, Perse
12 relies on legitimate interests. The key legal provision. Let me show you that, it is in
13 volume one of the authorities, tab two at page 68.

14 MR JUSTICE MORRIS: Oh, dear, my file is damaged. Yes, I got it.

15 MR JONES KC: And you will know that that this legislation is ludicrously complicated.
16 Luckily, I think we are only really concerned with this article six point. And it says,
17 "Processing should be lawful --

18 MR JUSTICE MORRIS: Page? Sorry.

19 MR JONES KC: Page 68. Article six.

20 MR JUSTICE MORRIS: Yes, thank you.

21 MR JONES KC: But there are list... "Processing should be lawful only if and to the
22 extent that at least one of the following applies." And at A there is consent. At C,
23 "Processing is necessary for compliance with the legal obligation to which the
24 controller is subject." I am going to come back to that at the very end of my
25 submissions, because that is actually relevant to a point about damages if you make
26 this order, but I will just flag it now. And then at F, this is what is relied on, "Processing

1 is necessary for the purposes of the legitimate interests pursued by the controller or
2 by a third party, except where such interests are overridden by the interests or
3 fundamental rights and freedoms of the data subject which require protection of
4 personal data, in particular where the data subject is a child.” And I confess that as I
5 read that out, those words all by a third party gave me another answer to the question,
6 which was being asked earlier, about the nature of the legitimate ground. Because
7 even if it were only a ground that landlords could rely on, it would be right to say that
8 Perse would be able to rely on those grounds. That would be the way of putting it --

9 MR JUSTICE MORRIS: Well, I mean, initially you said that the landlord was the data
10 controller, did you not?

11 MR JONES KC: So is Perse.

12 MR JUSTICE MORRIS: Yes.

13 MR JONES KC: I said they both would be.

14 MR JUSTICE MORRIS: Okay, yes, yes. You are talking about processing by Perse?

15 MR JONES KC: Yes, that is right, if you --

16 MR JUSTICE MORRIS: I mean, the controller in F is for the purpose of 6161, that is
17 the person who is doing the processing?

18 MR JONES KC: Yes. I am so, sorry, to be clear, you would need to apply F to Perse
19 and to the landlord.

20 MR JUSTICE MORRIS: Right. So in far as it is being applied to Perse, you would
21 rely on third party?

22 MR JONES KC: Yes.

23 MR JUSTICE MORRIS: Okay.

24 MR JONES KC: It is common ground that this requires a, sort of, balancing exercise,
25 as a matter of law, one has to look at the importance of the data, and on the other
26 hand, the significance of the legitimate interest which is being relied on. And there

1 may be other relevant factors, such as whether the user might have expected their
2 data to be used in this way, for example. But one has to look at the overall context.
3 That is the approach. Now on the significance of the data, I have said we are talking
4 principally about estimated annual consumption. And obviously ElectraLink are
5 emphasising before you today how significant that is, how personal it is. But I would
6 ask you to keep this in mind.

7 MR JUSTICE MORRIS: Pause a minute. Yes, personal to each individual tenant?

8 MR JONES KC: Yes, precisely.

9 MR JUSTICE MORRIS: Yes, okay. Carry on.

10 MR JONES KC: So you could go over the lunch break to moneysupermarket.com,
11 they are using ElectraLink's data, that is why I am picking them rather than
12 comparethemarket, because they are still using ElectraLink's data. And you could put
13 in your neighbour's address and it would tell you who their supplier is, and it would tell
14 you how much they pay each year. Now, to be absolutely clear, you should not do
15 what I have just suggested. You would have to click a box saying that you are the bill
16 payer. It would not be something that any of you would do, I am sure. But the point I
17 am making is the fact that it can be done, under the framework which ElectraLink has
18 put in place and authorised, and that if there were some value to unscrupulous people
19 in obtaining this, then doubtless they would be obtaining it and using it, tells you that
20 we are not talking about highly sensitive information. ElectraLink says it should be
21 protected by forcing people to tick a box. Fine. But that is the context against which
22 you then look at it from a landlord perspective and ask, how important is it that this
23 data ought to be kept from the landlord?

24 MR JUSTICE MORRIS: For carbon reporting purposes?

25 MR JONES KC: For carbon reporting purposes. And that is where you get to the
26 point that they as landlords have regulatory obligations, if they are large enough to

1 report on their carbon, and they are looking for recommendations on how to reduce
2 carbon emissions. And I do say that is clearly a weighty legitimate interest.

3 MS RIEDEL: Are those alternative legitimate interests because some landlords do not
4 have the regulatory reporting requirements if they are not large enough?

5 MR JONES KC: Could I take instructions? I do not know actually that any of them
6 are that small. So I did not... When I mentioned that I [inaudible], sort of, dance
7 around a difference, but I will come back on that as well. I hope someone's keeping
8 a long list of all these questions. Yes.

9 MR JUSTICE MORRIS: Pause a minute. Okay.

10 MR JONES KC: And Perse's evidence is that where landlords have large numbers of
11 residential tenants, obtaining consent from each of those simply would not be possible.
12 And I see that it is said that that is what another operator does. I will come onto that
13 when we look at the competition issues. But if one just imagines large blocks of flats
14 with tenants from all different walks of life being asked to give consent for something
15 which is not in their direct personal interests, changing householders, you will see
16 immediately just how difficult that would be to go and try and obtain consent from
17 everybody. And what ElectraLink says about this is they say it's not necessary within
18 F, because there are alternative sources, and one could produce carbon reports, for
19 example, using other sources of data. It would be estimated in ways which I have
20 already referred to. And I am going to look at the alternative sources of data in detail
21 later on. But just for present purposes, I will just make this point. And I am just
22 focusing on the word, necessary, which is, I think, being relied on almost as a legal
23 point, and maybe not almost, maybe entirely as a legal point by ElectraLink, when they
24 say it is not necessary for data reporting, it is not necessary for carbon reduction,
25 because you could approach it in a different way. And the answer to that legal point
26 is that in these balancing exercises, there are very often alternative measures which

1 will achieve your aim less well. And that simply has to be placed into the balance.
2 And you have to avoid, as it were, dancing on that opinion with language, because I
3 could reformulate my case to say, well, it is necessary to provide a high quality service,
4 not just a bare minimum service using estimated data, using an average household
5 size, it is necessary to provide a higher quality service, so that we actually have more
6 bespoke recommendations on carbon reduction. And that is why the way you
7 approach these issues, where there is a balance to be struck is, as I say, you factor
8 in, and you look at what, the alternative approach would look like.

9 MR JUSTICE MORRIS: Yes. So you are saying that, I think you are saying, the mere
10 fact that there is an alternative measure, which would achieve the objective but less
11 well --

12 MR JONES KC: Yes.

13 MR JUSTICE MORRIS: -- is not an immediate answer to 61F.

14 MR JONES KC: That is right.

15 MR JUSTICE MORRIS: But that it is a factor that you need to take into account when
16 you balance?

17 MR JONES KC: That is right.

18 MR JUSTICE MORRIS: Okay. Yes, carry on.

19 MR JONES KC: Also that may be a convenient moment.

20 MR JUSTICE MORRIS: Yes, can you just give me a moment? Yes, we are just
21 looking at timing. Yes, we think that there is a strong chance we will not finish today.
22 And, I mean, it has been very helpful, Mr Jones, and I am not going to in any way cut
23 Ms Smith short. However, you should be aware that as matters presently stand, the
24 tribunal cannot sit again until the 14th. That is a week on Wednesday. So I wanted
25 you to bear that in mind. But that is where we are at the moment and we thought we
26 would tell you that before lunch. It may not make any difference to anything, but we

1 have looked very hard as to whether we could sit again this week, but unfortunately
2 we cannot.

3 MS SMITH: My Lord, I am very grateful for the indication, I should put it on the record
4 that we initially indicated we would need our full half a day, two and a half hours to
5 make our submissions.

6 MR JUSTICE MORRIS: Yes.

7 MS SMITH: We will still need that.

8 MR JUSTICE MORRIS: Yes.

9 MS SMITH: So just so that Perse is aware of that.

10 MR JUSTICE MORRIS: Yes. For my part, in terms of everybody else, I do not want
11 to cut anybody short because this is relatively complicated, and I want to be sure that
12 I have understood it all. So I am not in any way putting time pressure on you, but I
13 wanted you to know that.

14 MR JONES KC: Yes.

15 MR JUSTICE MORRIS: Okay, thank you very much. Two o'clock, thank you.

16 (13.01)

17 (Luncheon adjournment)

18 (14.00)

19 MR JUSTICE MORRIS: Yes, Mr Jones, when you are ready.

20 MR JONES: So before I may pick up on a false heading, can I just start with two
21 corrections and some answers to questions?

22 MR JUSTICE MORRIS: Yes.

23 MR JONES: Correction number one: you asked who the users were within the DTSA,
24 and I said it was the shareholders, the DNOs, but of course that is not right. The Users
25 - capital U - are --

26 MR JUSTICE MORRIS: Users in the DTSA.

1 MR JONES: Yes - are what I also refer to as the core industry participants. What that
2 means is people like energy suppliers; people who own the meters who have to share
3 data between themselves. So the DNOs set up this framework so that those wider
4 class or industry participations --

5 MR JUSTICE MORRIS: Wider class or industry participants.

6 MR JONES: Precisely.

7 MR JUSTICE MORRIS: Okay.

8 MR JONES: So, those are the users. So, the second correction is when I was
9 describing estimated data - this may not be a correction, but it may be just a
10 clarification - what I said was you have got the meter readings and so you sort of
11 average it out over 12 months. That is how you get an estimated annual consumption.
12 But I have been reminded that in fact these estimated numbers are forecasts. So,
13 they are looking forwards to the next 12 months. So, if you have had a very cold 12
14 month period up to today, when MoneySupermarket or Compare the Market or
15 whoever is used to give you a quote going forwards, the input is estimated annual
16 consumption --

17 MR JUSTICE MORRIS: Going forward.

18 MR JONES: -- not go forwards.

19 MR JUSTICE MORRIS: But that estimate is based on your past consumption.

20 MR JONES: It is based on past consumption. Precisely.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: It is a small point.

23 MR JUSTICE MORRIS: Okay, yes.

24 MR JONES: It is based on past consumption, precisely. That may actually also
25 explain another question that you may have - you have not yet asked me but you might
26 - which is for smart meters where there, in theory, is a capability to obtain half-hourly

1 data, not from ElectraLink but from others, where is the estimation involved in
2 providing an annual estimate? So, ElectraLink is providing annual consumption
3 estimates for smart meters and traditional meters.

4 MR JUSTICE MORRIS: For --

5 MR JONES: For domestic.

6 MR JUSTICE MORRIS: -- domestic, yes.

7 MR JONES: And in both of those cases it is having to estimate on a forward looking
8 basis. That is the point.

9 MR JUSTICE MORRIS: I see.

10 MR JONES: And it is the only source of that data. Questions: the first is whether a
11 manual request would be sufficient for carbon reporting purposes, and it is a good
12 question and the answer is: yes, it might well be but it would depend on how quickly
13 it is turned around because when this was done previously it was apparently weeks.
14 But, madam, this does tie into a couple of practical points which is --

15 MR JUSTICE MORRIS: Just a moment. This is a manual request by Perse --

16 MR JONES: Precisely.

17 MR JUSTICE MORRIS: -- of ElectraLink.

18 MR JONES: Yes, for aggregated data. The way this comes up is in the context of
19 their offer of aggregated data.

20 MR JUSTICE MORRIS: Yes, okay.

21 MR JONES: One of the points I made was that it --

22 MR JUSTICE MORRIS: Yeah, yeah, yeah.

23 MR JONES: -- would have to be manual. Now, of course if we are - which we will,
24 inevitably, be coming back on the 14th, there is now a window for the parties to actually
25 test this. I am going to come back to this at the end, but clearly what should happen is
26 that Perse should have an opportunity to test this aggravated service between now

1 and not the 13th, but over the next few says essentially so that they can see whether
2 it is actually working, because otherwise there is this big issue on your plate which
3 need not be there. So, that is my practical suggestion.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: Second question: you asked about the standard condition, and I will just
6 hand that up please. This is the condition on the DNOs which Ofgem was considering
7 when it made its decision committing them to permitting ElectraLink to provide data to
8 commercial third parties, and it was done under condition 29.2, and so this is condition
9 29. You will see, if you look at 29.2, it is essentially saying that the DNOs cannot,
10 without Ofgem's consent, hold various types of shares, and so they need consent in
11 order to hold shares in particular companies, and that is the sort of springboard for the
12 regulatory interventions.

13 MS RIEDEL: And then I think condition 37 is a provision of the data cancelling service
14 (inaudible) supplied by Lear***

15 MR JONES: Yes, and that is --

16 MS SMITH: That actually is in the bundle at tab 58, my Lord. The condition 37.

17 MR JUSTICE MORRIS: Can you give me the volume?

18 MS SMITH: I am sorry. I just put them all in one. That is volume C.

19 MR JUSTICE MORRIS: Okay, tab?

20 MS SMITH: No. I lie. Volume D.

21 MR JONES: B.

22 MS SMITH: Yes.

23 MS REIDEL: D.

24 MR JUSTICE MORRIS: Tab? D, tab?

25 MS SMITH: Tab 58.

26 MR JUSTICE MORRIS: Okay. I would just like to put this in. I do not know if there is

1 a hole punch, but I am going to swap this in under tab 58.

2 MR JONES: The next question which I said I would get an answer on is whether
3 anyone else has asked the DNOs to provide data in the way that they do to ElectraLink,
4 and the answer is: not as far as we are aware, no. Next - madam, you raised clause
5 7.2. Maybe we can just have a look back at that.

6 MS RIEDEL: Bilateral.

7 MR JONES: Yes, in the bilateral, exactly. So, C tab 18, and it is in the order. It was
8 one of the special terms on the order.

9 MR JUSTICE MORRIS: Oh yes.

10 MS RIEDEL: Oh, yes. The special (inaudible)

11 MR JUSTICE MORRIS: It is page 376?

12 MR JONES: Yes. You will remember if you look at that: "7.2. The Customer may
13 disclose copy message Data in relation to an end consumer to a User or Intermediary
14 on the User or end consumer's behalf where necessary to effect a switch of User or in
15 accordance with the permitted purposes described in 3.2." Those permitted purposes
16 you will see on the prior page. A wide range of things.

17 MR JUSTICE MORRIS: Yes.

18 MR JONES: Clearly, this will be relied on at trial when we are also focusing on supply
19 chain D very firmly because you will see that there is a reference to supplying services
20 to intermediaries. I do rely on it for today's purposes because, as I have said, I am
21 going to have to come on to explain to you why Perse has been providing services to
22 intermediaries, notwithstanding what we showed you in the DPIA about that, and this
23 is one of the points that I do rely on in that context.

24 MR JUSTICE MORRIS: And this is true intermediaries we are talking about.

25 MR JONES: True intermediaries.

26 MR JUSTICE MORRIS: Chain D.

1 MR JONES: Chain D. Precisely.

2 MR JUSTICE MORRIS: Yes.

3 MR JONES: So, while we are talking about true intermediaries, could I just mention
4 this point which was made to me over lunch, which is a related point, which is the
5 range of potential intermediaries is potentially even more complicated than I have
6 realised because there is, at an extreme, the kind of situation where you have a
7 software provider essentially like using the Cloud to upload a document, and it has
8 been pointed out to me that it would be ridiculous for Perse not to be able to transfer
9 data over software where the channel is literally then with the end consumer, and that
10 is the end consumer's only way of accessing the data.

11 MR JUSTICE MORRIS: So, in this scenario a software provider might be regarded as
12 an intermediary is what you are saying.

13 MR JONES: Well, and they really ought not to be, and I was not meaning earlier on
14 to suggest they would be, but it has been pointed out to me that if one is too sort of
15 adamant about the data not going to anyone, then if you send something in an email
16 it - quotes - goes to Microsoft. That may require, and I do apologise for this but again
17 taking advantage of the slight delay until the 14th, that may require us just to look at
18 what we have put in the order and think about whether it is clear enough to carve these
19 out, and clearly I will do that in the next day or two. But I do flag that because it was
20 another nuance on precision in the use of terms that I am going to have to give a little
21 more thought to.

22 MR JUSTICE MORRIS: Okay. This would be for (a) and (b), would it? In other
23 words, working some wording to permit that under (a) and (b) --

24 MR JONES: Yes, (a), (b) and I suppose (c) as well.

25 MR JUSTICE MORRIS: Okay.

26 MR JONES: It could apply to any of them.

1 MR JUSTICE MORRIS: All right. I will make a note to note it and see what happens.

2 MR JONES: Yes. Fifth, madam, you also asked me whether all landlords have
3 regulatory obligations. The answer to that is most of our landlord customers do. Perse
4 tells me that some of the smaller ones do not, but they are voluntarily following the
5 same standard to provide reports to their shareholders, and so it does follow, as you
6 have suggested to me, that in fact the legitimate objectives could be put in two ways.
7 One was carbon reporting obligations and the second was carbon reduction generally,
8 and I accept that for those smaller landlords they would be relying on carbon reduction
9 as a general purpose, but that the reporting obligation would not apply to all of them.
10 Lastly, before I do pick up with heading 4, I finished just before lunch on a point about
11 necessity. I was talking about heading 3 and data protection --

12 MR JUSTICE MORRIS: Yes.

13 MR JONES: -- and what is meant by "necessary" --

14 MR JUSTICE MORRIS: In article 6.1.

15 MR JONES: -- in article 6.1. There is, in volume E, tab 105 some guidance from the
16 ICO, the Information Commissioner's Office.

17 MS RIEDEL: What is the tab number?

18 MR JONES: It is tab 105.

19 MR JUSTICE MORRIS: Can you just wait a moment whilst I tidy up a little? (After a
20 pause) Yes.

21 MR JONES: You will see at the top of that page, 1432 --

22 MR JUSTICE MORRIS: 1432?

23 MR JONES: 1432, yes, if we turn forwards in that document, so in fact if one looks
24 back at 1431 you will see "Purpose necessity and balancing" is the way that they
25 describe the test, these three parts. Then at the top of 1432: " 'Necessary' means
26 the processing must be a targeted and proportionate way of achieving your purposes.

1 You cannot rely on legitimate interest if there is another reasonable and less intrusive
2 way to achieve the same results.” Then you see the next paragraph: “You must
3 balance your interests against the individual’s interests.”

4 MR JUSTICE MORRIS: How does that tie in with what you told us before lunch?

5 MR JONES: I think it is simply repeating what I told you before lunch in the same way,
6 which is it is a balancing exercise and so you need to balance, in that exercise, the
7 interests of the data controller versus the individual’s interests.

8 MR JUSTICE MORRIS: Yes.

9 MR JONES: In the first paragraph you are looking at the question of proportionality
10 and asking whether there is a less intrusive way to achieve the same result.

11 MR JUSTICE MORRIS: Yes.

12 MR JONES: So, in the context of --

13 MR JUSTICE MORRIS: So, are you saying that... I thought you said before lunch
14 that if there was an alternative way of doing it, that wasn’t - that didn’t mean that it was
15 not necessary, your way was not necessary.

16 MR JONES: No, that is right.

17 MR JUSTICE MORRIS: Are you - so it’s wrong.

18 MR JONES: No. That is right. I do say that because what I was --

19 MR JUSTICE MORRIS: Is it to do with -- turns on the same results, but --

20 MR JONES: Yes, precisely. That was the point I was making before lunch.

21 MR JUSTICE MORRIS: -- it does not achieve the same results.

22 MR JONES: Precisely.

23 MR JUSTICE MORRIS: Okay.

24 MR JONES: So, could I just have a moment, because I have at the back of my mind
25 that there was another point I wanted to show you on this page and I now cannot see
26 it. I apologise. I will just take a second. (After a pause) I must have dreamt it. That

1 is that on that document. Thank you.

2 MR JUSTICE MORRIS: Thank you.

3 MR JONES: My next heading is --

4 MR JUSTICE MORRIS: Heading 4.

5 MR JONES: -- 4. It is the history between ElectraLink and Perse. What this is
6 particularly relevant to is the question of why Perse was supplying data to landlords
7 and intermediaries, and whether ElectraLink is justified now in cutting off all data in
8 light of that. That is what this is directly relevant to. The short point here is that there
9 is a conflict of evidence. In other words, the parties disagree over what happened
10 historically. Before we look at the evidence, can I just show you the correct approach
11 to resolving conflicts of evidence and interim injunctions? It is the Sports Direct case,
12 please, which is in the authorities bundle at tab 22. It is the second volume of
13 authorities, if you have the volumes the same as me. Tab 22.

14 MR JUSTICE MORRIS: It is in my third volume.

15 MR JONES: So, tab 22. I just mention, I am going to come back to this authority
16 several times.

17 MR JUSTICE MORRIS: Yes.

18 MR JONES: It is key, and it is quite unusual to have an interim injunction application
19 in the Court of Appeal shortly before it has addressed a very similar one, because this
20 is a refusal to supply case in a capped context from last year. I am coming back to it
21 several times, but for now I just want you to look, please, at page 1190 and at
22 paragraph 17. What had happened essentially was that this tribunal had said: There
23 is a conflict of evidence and therefore we are not going to accept what the applicant is
24 saying because it is contentious, a and so at this stage we cannot accept contentious
25 evidence. So, the court says at 17: "The tribunal said it was proceeding on the basis
26 that even a dominant undertaking was entitled ... without necessarily making its

1 actions abusive to structure its business in order to maximise profits. The following
2 sentences show how the tribunal actually approached the question whether there was
3 a serious case to be tried as to whether Newcastle United's actions were abusive..."
4 They say this: "Put another way..." - this is the tribunal - "... before a restructuring of
5 operations can be said to be abusive the facts to the extent that they can be
6 uncontroversially ascertained, need to be established and the nature of the abuse
7 alleged identified. For the present, we are concerned with the uncontested facts, i.e.
8 those that can be relied upon for the purposes of assessing a serious issue to be tried."
9 The Master of the Rolls then says : "I should say at once that is not the correct legal
10 approach. On an application for an interim injunction the court must take the claimant's
11 pleaded and evidenced case at face value unless it can be shown to be plainly false
12 or fanciful. In evaluating whether there is a serious case to be tried, the tribunal cannot
13 disregard contested facts." They go on to say, if you get to the balance of convenience
14 stage, you look at the strength of the case. So, that is the correct approach. We are
15 not here today to decide who is right about this issue. It is important to look at what
16 Perse says and ask whether it is plainly false or fanciful. What Perse says we can
17 pick up in Mr Sachdeva's witness statement, please? So, in bundle B, tab 4, page 67,
18 paragraph 68. Rather than read this out, could I just pause and invite the tribunal to
19 read 68 to 70 to yourselves, please, just to remind yourselves what those say.

20 MR JUSTICE MORRIS: (After a pause) Yes.

21 MR JONES: Now, clearly the key point is at the end of 68. ElectraLink has known
22 since mid-2020 our products have included services to intermediaries or brokers and
23 landlords." You will see, and the reason I asked you to read all through those
24 paragraphs, is that that does not just come out of the blue. That is in a wider context
25 of Mr Sachdeva describing a close working relationship between these two companies
26 in which Perse is innovating, and ElectraLink is part of that journey. There is the

1 particular example given of NatWest. So, he has given a fulsome description of the
2 relationship between them and why it was that they were having these discussions.
3 Now, Mr Linanne disagrees with, and I should just show you that. It is tab 5, so the
4 next tab in this bundle, page 97 at paragraph 59.

5 MR JUSTICE MORRIS: Yes.

6 MR JONES: Mr Linanne's witness statement goes on to describe how he says
7 ElectraLink came to learn that the services were being used in this way. Just to
8 complete the look of the evidence, can I give you a reference in tab 7 of this to Mr
9 Sachdeva's second witness statement, paragraph 7. I apologise; that is tab 8 of this
10 bundle at page 156, paragraph 7 where Mr Sachdeva says he has seen what Mr
11 Linanne says and he is very surprised because they have had these conversations
12 over many years. Now, this conflict of evidence is something that can only be resolved
13 at trial. For today's purposes the question is only whether Mr Sachdeva's evidence is
14 plainly false or fanciful, and I say it obviously is not plainly false or fanciful. It is a
15 fulsome description of a close collaborative relationship. I would mention in that regard
16 that although Mr Linanne makes the comments which I have shown you, he does not
17 address, for example, the NatWest collaboration. So, these are points which will need
18 to be explored in disclosure and in cross-examination. Now, that is the historic
19 position.

20 MR JUSTICE MORRIS: Can I just ask you this? As we burrow down into detail, which
21 is very helpful, just remind me how this issue of whether or not ElectraLink knew that
22 your clients were supplying to third parties and landlords at an earlier stage, how that
23 factors into the question of a serious issue to be tried?

24 MR JONES: It is a defence run by ElectraLink to the argument that they should supply
25 chains A and B because they say this is how Ms Smith and Ms Coyne put it in their
26 skeleton argument. Firstly they say we are not within obligation to supply territory.

1 They make that point, but then they say: "You do not need to supply to a customer
2 who is not going to comply with normal business practice." That is the way it is put in
3 the authorities. So, if we are providing data - this is how they put it - we are providing
4 data on an agreed basis and you, Perse, are then going off and using it for other
5 reasons, then essentially that is --

6 MR JUSTICE MORRIS: Okay.

7 MR JONES: You know, even a dominant company does not have to do that.

8 MR JUSTICE MORRIS: Okay. You have been going behind our back all these years.

9 MR JONES: Precisely.

10 MR JUSTICE MORRIS: You are not complying with normal business practices.

11 MR JONES: Yes.

12 MR JUSTICE MORRIS: Therefore, we do not have - okay, all right. Thank you.

13 MR JONES: So, it could also come in in terms of the order - the interim order that I
14 am seeking because, you know, you might think: we cannot order this because we
15 have no control over what Perse will do between now and trial.

16 MR JUSTICE MORRIS: Yes.

17 MR JONES: They could make it in that context. Of course, that is a little bit different
18 because there would then be an order and if necessary bolstered by undertakings and
19 so on and so forth.

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: So, that is a different point, but it could also be relevant there, sir.

22 MR JUSTICE MORRIS: Okay.

23 PROFESSOR AKMAN: Can I ask whether there was a tripartite contract with NatWest
24 or was that done under the bilateral agreement?

25 MR JONES: Under the bilateral. There has not been a tripartite --

26 PROFESSOR AKMAN: And that would go under your supply chain C.

1 MR JONES: No. It would actually be D. That would be an example of D because
2 what NatWest was doing - it is explained elsewhere in the statement - but what they
3 were doing was providing services essentially to their own customers who owned the
4 properties.

5 PROFESSOR AKMAN: Okay. Thank you.

6 MR JUSTICE MORRIS: Sorry, I will just write my note. (After a pause) Okay.

7 MR JONES: Then if you come forward to more recent events, and ElectraLink
8 becomes, over time, firmer that it requires, it says, a reseller and a tripartite. Reseller
9 just goes with the tripartite, I should say.

10 MR JUSTICE MORRIS: Yes.

11 MR JONES: So, it is essentially the same thing.

12 MR JUSTICE MORRIS: As I understand it, there is a tripartite agreement to which all
13 three parties are party.

14 MR JONES: Yes.

15 MR JUSTICE MORRIS: Then there is a reseller agreement between effectively
16 ElectraLink and Perse.

17 MR JONES: Yes.

18 MR JUSTICE MORRIS: And then there is another agreement, the name of which I
19 cannot remember, between Perse and the downstream purchaser.

20 MR JONES: Yes, and that reseller only works where there is a tripartite.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: They go hand in hand.

23 MR JUSTICE MORRIS: Yes.

24 MR JONES: It is not, as it were, a substitute for the bilateral for chains A and B, if
25 that makes sense.

26 MR JUSTICE MORRIS: Okay, yes. I think so.

1 MR JONES: I was not going to take any time on that. It only works with a tripartite in
2 the background. So, you then come forwards to more recent events. You have
3 ElectraLink saying that a tripartite is necessary; saying tenant consent is necessary.
4 You have a series of negotiations around that. What I would say is it is important to
5 keep in mind when you come to these more recent events that by this stage
6 ElectraLink has, we say, permitted Perse knowingly to develop its business in reliance
7 on this data, and Perse has no real bargaining power in these discussions. It is in
8 discussions with a dominant business, dominant undertaking, trying to maintain
9 access to data and making offers, making suggestions in that context.

10
11 ***

12 And the reason I am emphasising that is that when you come to the December 2024
13 suspension, what happens is that under the pressure of the suspension, Perse says
14 in an email that they would only use the data for Compare the Market. And then there
15 is more email correspondence in which that is amended and it is opened up to cover
16 certain other services. There are then further discussions about the reseller tripartite
17 arrangement. Perse explains that they, in the middle of all this, sought legal advice
18 and in the course of all of that, it is true that Perse then starts resupplying
19 intermediaries. But I say, in relation to that, that in the circumstances, given the
20 background, given the existential crisis that that Perse was facing, and is facing today,
21 that particular point about starting up supply to intermediaries after the December
22 suspension is not in my submission sufficient for ElectraLink to say that they now are
23 entitled to, as it were, turn off all supply, including A, B as well as C. It is certainly not
24 sufficient at this interim stage. My fifth heading is the importance of the data for Perse
25 to compete downstream. I am going to run through the six alternative sources of data
26 that Mr Linanne identifies in his statement and tell you the answers to those if I may.

1 So that is in Bundle B, tab 5, page 122.

2 MR JUSTICE MORRIS: Can we just go back to this factually for a second --

3 MR JONES: Yes.

4 MR JUSTICE MORRIS: -- in the last heading. There was a suspension in December.
5 Is that right?

6 MR JONES: Yes, that is right.

7 MR JUSTICE MORRIS: And then you said that Perse started resupplying
8 intermediaries.

9 MR JONES: Yes.

10 MR JUSTICE MORRIS: That presumably was after the suspension was resolved, was
11 it?

12 MR JONES: Yes.

13 MR JUSTICE MORRIS: Suspension; agreed to commence supply again.

14 MR JONES: Yes.

15 MR JUSTICE MORRIS: Electra - and then Perse started following that resupply from
16 ElectraLink to continue to supply intermediaries without a tripartite in place. Is that --

17 MS REIDEL: But I think that Perse had said they would not supply intermediaries on
18 the basis of the... The suspension was lifted. It was for more limited purposes.

19 MR JONES: Yes, and that was the point that I was addressing. So that is right.
20 However, it is a little more complicated and it is complicated, I am afraid, in ways that
21 I cannot show you in the evidence, other than to show you that there are gaps in the
22 evidence. Let me just put it this way, before going into the evidence: maybe we could
23 look at this Ms Ogborn's statement, which is in this bundle B that you have open in
24 front of you at tab 6, paragraph 69? Apologise. It is tab 5.

25 MR JUSTICE MORRIS: Paragraph 69 again?

26 MR JONES: Paragraph 69, yes. (After a pause). So he has described in 68 -- he says

1 "Perse assured us they signed our tripartite and were comfortable with the proposals
2 we have made and we would start the process of onboarding. Perse provided
3 assurances its service... that in accordance with the bilateral approved ... they would
4 only provide data for Compare the Market, DFS, scheme and Labrador in the
5 meantime."

6 MR JUSTICE MORRIS: Yes.

7 MR JONES: "In response, we recommenced supplies." But then he describes that
8 there were comments on the contractual documents and a few more questions which
9 required further investigation. And meanwhile, if you go to Mr Sachdeva's witness
10 statement - that is a prior tab - 82. So meanwhile, Perse is seeking legal advice and
11 there is correspondence going between solicitors, and that carries on into the end of
12 February as you see in 83. So when I said that we do not have the full story, you see,
13 we do not have the full story. What is going on is there are some discussions
14 happening; legal advice is being taken; there are then letters being sent and it is in
15 the course of all of that that it is correct to say that they restarted supply to
16 intermediaries. And the point which I make about that, which I made a moment ago,
17 is simply that you have to see that in the context of what has gone before and in the
18 context of Perse seeking to do everything it can to save its business. The fifth heading.
19 Shall I move on to the fifth.

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: -- which is the importance of the data for Perse to compete downstream,
22 and for this I wanted to go through Mr Linanne's statement. So that is tab 5 of this
23 bundle, page 122, yes and 183. You will see, if you look at the first header there, he
24 says: "End customers can provide their own consumption data. And in that paragraph
25 he points out that you can in fact insert your own data onto Compare the Market. The
26 answer to this point is that it is obviously a much less useful service if users have to

1 dig out bills to find their consumption. And that is why almost all of Perse's competitors
2 in the residential switching space use ElectraLink data. The exception to that is Go
3 Compare but they are understood also to be in discussions with ElectraLink. And that
4 is explained in Mr Sachdeva's first witness statement at paragraph 33, if you wanted
5 to have a look at that. That is on page 58. Mr Linanne's second is that suppliers could
6 provide an end customer's consumption data. So suppliers could do it. And in that
7 paragraph on page 122 what he is suggesting is that this could be done within seven
8 days. In other words, Perse would write to a supplier and it would give an answer
9 within seven days.

10 MR JUSTICE MORRIS: And supplier being the electricity supplier.

11 MR JONES: Yes. And at the end of that he says that with a developed or acquired
12 API it provides substantially the same service as Perse. There is, you will see, a lot
13 of work being done in those words "developed or acquired API" because what he is
14 suggesting there is that Perse could simply go away and come up with some software
15 which 50 or 60 different electricity suppliers agree to integrate into their systems - or
16 perhaps 50 to 60 different types of software, who knows. But that is clearly not a
17 practical solution. Moreover, the suggestion here that the process takes seven days
18 is not accepted. It takes, in Perse's experience, several weeks and whether it's seven
19 days or several weeks, it is completely different to having a real time service. And I
20 will give you a reference to what I have just said. VS/2. So Mr Sashdeva's second
21 witness statement at paragraph 24, which in this bundle is on page 160.

22 MS REIDEL: A bit too fast for me. Sorry. Go Compare... So coming back to "End
23 customers can provide their own assumption data", does Go Compare do what is
24 suggested by Mr Linanne? Is that what they are doing? So I know you are saying
25 they are in discussions to get data from ElectraLink, but at the moment are they
26 doing... Are they just getting people to input their own data? I am seeing a nod.

1 MR JONES: I do not know the answer to that.

2 MS REIDEL: Okay. It would be quite interesting to know to understand if somebody
3 is doing this or not.

4 MR JONES: Yes.

5 MS REIDEL: I had another point there, but never mind. In relation to the second point,
6 he says that two thirds of the market already operate using this method. Did Mr
7 Sachdeva refute that?

8 MR JONES: I do not think he has come back on that specifically, but it is not clear
9 what is meant by two-thirds of the market operating - which market is being referred
10 to and are they providing services in competition with ElectraLink? That is very -- in
11 competition with Perse. They have not come back on that, but which market that is
12 about is unclear.

13 MS REIDEL: Yes, actually I know I have a further question which is in an entity relation
14 to "End customers can provide their own consumption data", if that were the case,
15 would that sort of fundamentally undermine Perse's business model because the
16 comparison - the PCWs could almost do it without Perse.

17 MR JONES: Well, I am slightly hesitant to answer whether --

18 MS REIDEL: There is a nod at the back. There is a nod at the back.

19 MR JONES: -- something would undermine a business model. Madam, I think the
20 position at the moment is you can, using Perse's API on Compare the Market, you can
21 input your own consumption data. So Perse is able to provide the software which
22 takes as it were your consumption data that you input. My understanding is you do
23 not actually input it in the sense of typing in your consumption data. There is a little
24 QR code on your electricity bill which you could scan in and it would link up. So, the
25 answer I expect is that Perse would still have a role to play, but it is quite a different
26 situation to what they are currently doing for most consumers.

1 MS SMITH: Madam, while the point is live, it may be, rather than coming back to it as
2 it is such a point of detail, you asked the question about what Go Compare is doing at
3 the moment and Mr Jones said that Mr Sashdeva's evidence was that Go Compare
4 has been in talks with ElectraLink to obtain ElectraLink's data. It is right that you see
5 the response that Mr Linanne made to that which is that that is not correct. And this
6 is paragraph 138 and foot note 39 of his witness statement which is on hearing bundle
7 tab 5, page 115. Mr Jones can make that submission, but it is right you see the
8 responsive evidence to that paragraph in Mr Sachdeva's evidence. It is paragraph
9 138 and foot note at the bottom 139. It is not correct to say that Go Compare has also
10 recently been in touch to obtain ElectraLink's data. "Whilst we do continue to offer to
11 market our services to all industry ... Go Compare has consistently declined to take up
12 our offer."

13 MR JONES: And you will also... I am grateful for that that reference. And you will see
14 in 138 there is actually an answer, madam, to your question about what data goes
15 where.

16 MR JUSTICE MORRIS: Yes.

17 MR JONES: Back on page 122, the third is - it says: "Rico already provides Perse
18 with supplier and meter information." This is a non-profit company which also has a
19 role in supplying information to the industry. But the short answer to this is it can
20 provide some information such as their electricity supplier but it cannot provide and
21 does not provide consumption data which is the key data. And that is in Mr Sachdeva's
22 first statement at paragraph 23.1. And the fourth on this page is that Perse could
23 access its smart meter data through a company with an unpronounceable name. Now
24 the answer to that is that that company firstly only provides data for smart metres but
25 secondly does not provide the annual estimated consumption data which is what
26 Perse needs. And just to make this clear, the reason why half-hourly data from smart

1 metres is not a substitute for annual estimated data is that because of how granular
2 the smart data information is, to get that for a consumer the consumer needs to put in
3 credit card information to identify themselves. And that is not something which many
4 consumers want to do. That is all explained in Mr Sachdeva's second statement at
5 paragraph 25. The fifth on page 123 is bilateral arrangements with AIMEDA members.
6 What this is talking about is the idea that Perse could enter into bilateral agreements
7 with each of the 67 members of this trade organisation and of course it would also
8 need some form of API to actually receive data from each of them. That is responded
9 to in Mr Sachdeva's second witness statement at paragraph 26. Then, back on 123,
10 the sixth source identified by Mr Linanne is the ESS Energy Inquiry Service. And he
11 says: "Of the data items which ElectraLink makes available to its customers, 99% is
12 available in the ESS which includes all ElectraLink data except consumption data."

13 MR JUSTICE MORRIS: I will just underline that.

14 MR JONES: I do not know how the 99% is calculated but it is the important bit that
15 they do not provide is what we are after. That is responded to, Mr Sachdeva's witness
16 statement at paragraph 27. Now, am I saying that the ElectraLink data is
17 indispensable in the sense that no company could compete in downstream markets
18 without it? No, it is not indispensable in that sense because as you have seen there
19 are companies who manage without it, but they are providing, Perse says, vastly
20 inferior products and Perse's own business model, indeed its entire business, is built
21 on being able to provide services which use real time data. "Real time" is an
22 expression which has been used and only ever used to mean data which is given
23 immediately over software. There was some misunderstanding about that in the
24 background, but that is what I mean when I say "real time". And the reason I am
25 emphasising it is it goes back to the point about indispensability that I mentioned in
26 my in instructions, and I am going to come on to the case law in a moment, but I do

1 not need to show that this data is indispensable in the way that one would, for example,
2 if one were applying the famous Bronner approach to these issues. I simply do not
3 need to go that far. My sixth heading is ElectraLink competes with Perse.

4 MR JUSTICE MORRIS: Yes. This is -- I am interested in everything but I am
5 particularly interested in this because I am not sure I fully understand all the different
6 ways people provide these services to the market, so to speak.

7 MR JONES: Yes.

8 MR JUSTICE MORRIS: So, you take it as you as you wish, but I am not sure at the
9 moment I have got a full understanding of who is supplying who with what at what
10 level.

11 MR JONES: So far as I am aware, ElectraLink does not currently supply switching
12 services direct to end computer consumers. So in that particular type of service they
13 would be at most a potential competitor. I am going to come back to talk about
14 potential competition in a moment. But when you look at supply chain C and the
15 products which tell people about the carbon - their carbon consumption, I say that they
16 are actual competitors. And the reason that they are actual competitors is that a
17 company which wanted data, wanted information about its carbon consumption could
18 obtain a product from Perse or they could obtain a product from ElectraLink.
19 ElectraLink's product, which is geared towards this, is called Carbon Track. And I
20 want to show you what Mr Linanne says about this, please. It's in bundle B, at tab 5,
21 page 115, paragraph 144. "ElectraLink introduced the branding Carbon Track in
22 2024..." Just pause there - after Perse had launched its own carbon track products.
23 So, "ElectraLink introduced the branding Carbon Track in 2024. It is functionally an
24 identical product to that offered under QuoteRight and identical to the data obtained
25 by Perse. The only slight difference is that we also offer carbon track consumption
26 data for industrial and commercial customers where QuoteRight only maps

1 consumption by individuals and SMEs. We use different terminology and different
2 branding because our Carbon Track offering is aimed at different customers from our
3 QuoteRight product. Both include the same consumption data, but one is aimed at
4 enabling switching between energy suppliers and the other at carbon consumption
5 reporting.”

6 MR JUSTICE MORRIS: And QuoteRight is aimed at switching.

7 MR JONES: Yes.

8 MR JUSTICE MORRIS: Okay.

9 MR JONES: So, if a commercial customer wants to switch, they get the data from
10 ElectraLink and then they can use that to switch.

11 MR JUSTICE MORRIS: Okay.

12 MR JONES: He says: “As shown on ElectraLink’s website, Carbon Track enables
13 ElectraLink’s customers to use a combination of consumption and meter reading data
14 provided by ElectraLink to create a portfolio emissions profile, monitor progress against
15 reduction targets and prove a return on investment. Carbon Track is an input into
16 Perse’s carbon reporting service in exactly the same way as QuoteRight is an input
17 into Perse’s switching services. Customers can obtain the data directly from
18 ElectraLink and use it to calculate their own carbon reporting, or they can seek
19 services from third parties such as Perse to use their own data for carbon reporting.”

20 So the point which Mr Linanne is emphasising there at the end is that the input that
21 ElectraLink sells Perse for Perse to use in its carbon reporting products is the same,
22 he says, as what ElectraLink was supply to an end customer, if they come to
23 ElectraLink and ask for the data direct. And my answer to that is that does not mean
24 that they are not competing. The reason it does not mean that is that downstream
25 customers have a choice. They may prefer to use Perse because of whatever
26 additional value Perse is able to provide them. They may prefer to use ElectraLink for

1 various reasons. Maybe they have a relationship with ElectraLink. Maybe they think
2 ElectraLink's customer service is better than Perse's. And true it is that the services
3 may not be identical because Perse is adding value, but they will be close enough to
4 be substitutes. And this kind of situation could come up in all sorts of contexts. But to
5 give a really silly example, if someone who sells sugar in big bags, then they sell it to
6 cafes, but also to people who put the sugar into little sachets to sell on to cafes, that
7 cafe owner has a choice between buying the sugar in the big bag or buying sachets.
8 And the big bag sugar company is in competition with its own customer. That is not
9 unusual. It has an input into the little bags, but they are in competition.

10 MR JUSTICE MORRIS: Just pause a minute while I just... (After a pause) Just so
11 that I understand 146, the direct supply to the customer by ElectraLink goes to the
12 customer; the customer calculates its own carbon reporting. Yes --

13 MR JONES: Yes.

14 MR JUSTICE MORRIS: -- on that data. The contrast is where - am I right in thinking
15 - on the alternative route where the input goes from ElectraLink to Perse that Perse
16 calculates what they need to do for carbon reporting.

17 MR JONES: Yes.

18 MR JUSTICE MORRIS: The additional service provided by Perse is processing that
19 data.

20 MR JONES: Yes.

21 MR JUSTICE MORRIS: Okay.

22 MR JONES: So it is what in competition economics would be a kind of self-supply. If
23 you are the customer who just gets the raw data and does your own calculation, you
24 are, quotes "self-supply calculation".

25 MR JUSTICE MORRIS: Yes, got you.

26 MR JONES: But when you are facing those choices, shall I buy from ElektraLink and

1 self-supply a calculation or shall I buy from Perse?

2 MR JUSTICE MORRIS: Yes.

3 MR JONES: They are substitutes. They are in very close competitive tension with
4 each other.

5 MR JUSTICE MORRIS: I have one further question. You said a moment ago not
6 an actual competitor in relation to switching, but this paragraph compares the position
7 in relation to carbon track with the position with Quote Right.

8 MR JONES: Yes, my understanding is, when
9 (15.00)

10 I said that about switching, I was talking about residential switching.

11 MR JUSTICE MORRIS: Okay.

12 MR JONES: But Quote Right I think is similar to what I have just said about carbon
13 reporting.

14 MR JUSTICE MORRIS: Just remind me what quote right is.

15 MR JONES: Quote Right was at 144.

16 MR JUSTICE MORRIS: Yes, but the product is.

17 MS SMITH: It is order 1 attached to the bilateral agreement.

18 MR JUSTICE MORRIS: Okay.

19 MS SMITH: It is the DAS reports --

20 MR JUSTICE MORRIS: So it is business customers.

21 MS SMITH: -- in the form. It is page 377 of tab 18.

22 MS REIDEL: I have Quote Right. I have written a note that Quote Right is data relating
23 to domestic and SME consumers. So the meter number, annual end sheet. So I have
24 made a note.

25 MS SMITH: Yes, it is actually on page 3, sir. That is the report.

26 MR JUSTICE MORRIS: No, I understand what Quote Right is. What I do not

1 understand is your ... sorry, have I understood 144 to 146 correctly that ElektraLink
2 supplies Quote Right both to Perse and directly to others?

3 MR JONES: Yes.

4 MR JUSTICE MORRIS: Okay, and who are those others that it supplies Quote Right
5 to?

6 MR JONES: Well, various others, but it would landlords in the example that I was just
7 discussing. I was talking about supply chain C. It would be someone who comes to --

8 MR JUSTICE MORRIS: But that would be for switching, would it not?

9 MS REIDEL: So Perse or ElektraLink? Sorry, is your question about Perse or
10 ElektraLink?

11 MR JUSTICE MORRIS: It is about ElektraLink supplying Quote Right. Sorry, we have
12 just been talking about in relation to the carbon track --

13 MR JONES: Yes.

14 MR JUSTICE MORRIS: -- and carbon reporting --

15 MR JONES: Yes.

16 MR JUSTICE MORRIS: -- the two routes for the carbon track material to be used.

17 MR JONES: Yes.

18 MR JUSTICE MORRIS: Okay. And in relation to carbon reporting.

19 MR JONES: Yes.

20 MR JUSTICE MORRIS: But these paragraphs refer to switching as well and Quote
21 Right, what I am questioning is why does the analysis that you have just provided in
22 relation to carbon track and the service of providing carbon reporting not equally apply
23 to Quote Right and the use of Quote Right for switching? Because you told me a few
24 moments ago there is no actual competition in relation to switching. You can come
25 back to it.

26 MR JONES: Sorry, I answered the question and I apologise I did not answer that one

1 clearly. Let me come back to it. I think when I said earlier they do not provide
2 switching, I meant human end consumers. Do they provide a switching service to
3 commercial businesses? Let me come back on that because if they did the same
4 point would apply.

5 MR JUSTICE MORRIS: No, it was just that when you said what you said, we went to
6 144 --

7 MR JONES: Yes.

8 MR JUSTICE MORRIS: -- it says its functioning ... it is all the references to Quote
9 Right in 144 and, yes, and the reference to ... one is aimed at enabling switching the
10 carbon consumption.

11 MR JONES: Yes.

12 MR JUSTICE MORRIS: It was 144 and 146. It is an input in exactly the same way as
13 Quote Right is an input into Perse's switching services. So I did not understand how
14 you --

15 MR JONES: Why I had said it does not apply in relation to switching as well.

16 MR JUSTICE MORRIS: Come back to it.

17 MR JONES: I will come back to it. There is also this complication, just to add it. My
18 understanding is Quote Right is the product which Perse would need ... there is not
19 a separate product just for carbon switching under which Perse receives data from
20 ElektraLink. So although Quote Right and the business variation of that, when you
21 look at them, emphasise switching, those are actually the orders under which Perse
22 would also get information for things like carbon reporting.

23 MR JUSTICE MORRIS: Okay.

24 MR JONES: And so trying to separate them out in precisely the way I said that you
25 are doing may not be the right way. But I will come back.

26 MR JUSTICE MORRIS: It is not a big deal. The point you are making is you are

1 seeking to demonstrate that there is downstream competition, actual competition, in
2 relation to carbon reporting.

3 MR JONES: That is my point.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: And I will come back on switching, but this is particularly relevant to the
6 landlord argument.

7 MR JUSTICE MORRIS: Okay.

8 MR JONES: Which is why I focused on carbon reporting.

9 MR JUSTICE MORRIS: Okay, thank you.

10 MR JONES: It also is relevant and will be relevant at trial to obviously the intermediary
11 context. And you may have seen in that context the arbnco example which is
12 discussed in the evidence. So, arbnco, it is on page 116 actually if you have that open
13 before you, you will see it there.

14 MR JUSTICE MORRIS: Yes.

15 MR JONES: And arbnco is a company which used to be a customer of Perse's.

16 MR JUSTICE MORRIS: Yes.

17 MR JONES: And they provided services to landlords essentially, so a complicated
18 intermediary plus landlord situation, but it is a supply chain D example. And on the
19 day that ElektraLink suspended Perse, they also announced, or I should say arbnco
20 announced, what it called a new partnership with ElektraLink.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: And what ElektraLink are saying, what Mr Linnane is saying in these
23 paragraphs, is essentially a variation on what we have just looked at. He is saying
24 that we reply arbnco with the same data we supply Perse. And again I do not dispute
25 that, but I just make the point that again it shows that the services they are offering are
26 substitutable. In other words, are in competition with each other.

1 MR JUSTICE MORRIS: Okay. But you say that arises only in relation to effectively
2 chain D.

3 MR JONES: Well, arbnco is a chain D example. But the carbon reporting --

4 MR JUSTICE MORRIS: It is a chain D example but with landlords is the ultimate ...
5 yes.

6 MR JONES: But the carbon point I was making is a chain C example.

7 MR JUSTICE MORRIS: Yes.

8 MR JONES: And I will come back on the question of commercial switching.

9 MR JUSTICE MORRIS: And we are also looking to have a ten-minute break.

10 MR JONES: Yes.

11 MR JUSTICE MORRIS: You can carry on for a few moments, but at a convenient
12 juncture.

13 MR JONES: My seventh heading ... so maybe that is a convenient juncture given that
14 ... I may have misread the room just then. That could be a convenient juncture since
15 I am about to go to the seventh heading.

16 MR JUSTICE MORRIS: Yes, that is fine. Let us break until 20 past. Thank you very
17 much.

18 (15.07)

19 (Adjourned for a short time)

20 (15.22)

21 MR JUSTICE MORRIS: Mr Jones, just really checking where you are. We are
22 obviously going to a second day. We want to make sure that Ms Smith has adequate
23 time on that second day. I mean, I do not really want to sit beyond half past 4.00
24 today and I am not proposing to tell you that you must finish today, but what you must
25 do is, whatever you do is you must give Ms Smith sufficient time on the second day to
26 cover what she wishes to cover.

1 MR JONES: Yes.

2 MR JUSTICE MORRIS: With obviously with time for you to reply at the end, perhaps
3 for a relatively short period. But I leave that with you.

4 MR JONES: Thank you. Yes. I will finish today. It will not take long.

5 MR JUSTICE MORRIS: That was the point. Yes. Heading seven.

6 MR JONES: Well, you asked me a question about supply to customers for switching
7 and I do have instructions on that and it might be helpful just to look back where we
8 were in Mr Linnane's witness statement at page 116.

9 MR JUSTICE MORRIS: Yes.

10 MR JONES: And what he is talking just for context in paragraph 45 about providing
11 Carbon Track to ElectraLink's customers. And I will just make this point before I
12 answer the switching point, which is of course Perse does not know who ElectraLink's
13 customers are. Now, the way it is being described here is general and it reads as only
14 saying that you as a company could come forward. So maybe there is a landlord, in
15 the example I was giving, and obtain data, obtain a service for carbon reporting. That
16 is how I understand what he is saying.

17 MR JUSTICE MORRIS: Yes.

18 MR JONES: Now, the only actual example of the customer switching that we are
19 aware is the arbnco example, because that is one which is public and Perse has seen.
20 And so it is against that background one comes back to the question that you put to
21 me about whether a company could also go to ElectraLink and ask for data essentially
22 to enable it to switch. And the answer is: it could do, as far as we are aware. There
23 is nothing to stop that. It does not look as though that is a service which ElectraLink
24 has been promoting to large customers, but maybe it has customers that do that. But
25 whether they actually do it, I do not know. Clearly they are potential competitors
26 though, in that space, because at the very least you could go to ElectraLink. What

1 | you would get is the data on your consumption and you would then have to do the bit
2 | yourself, the value added bit that Perse does, which is to look at the market and work
3 | out the alternative suppliers.

4 | MR JUSTICE MORRIS: Just give me one moment. (After a pause) I mean,
5 | presumably it is a question that, if need be, Ms Smith can respond to, but I am looking
6 | at paragraph 144 again. Let us not spend time on it.

7 | MR JONES: My seventh heading is Refusal to Supply, and under this heading I
8 | wanted to show you the authorities that I rely on. I have mentioned them already a
9 | couple of times. The first one is the Alphabet case. It is in volume 2 of the authorities'
10 | bundle, tab 23.

11 | MR JUSTICE MORRIS: Give me the tab because I think mine is volume 3.

12 | MR JONES: Tab 23.

13 | MR JUSTICE MORRIS: 23 or 33?

14 | MR JONES: 23. It starts on page 1198. It is February this year. It is not binding on
15 | the courts in this jurisdiction. I should just make that clear. So I am not relying on it
16 | as a binding authority, but in my submission it is highly persuasive and I can rely on it
17 | to show that there is a serious issue. What this case is about factually, is a company
18 | which made an app which essentially would tell you where you can get your electric
19 | car charged. That is essentially what the app was.

20 | MR JUSTICE MORRIS: Yes.

21 | MR JONES: And what they wanted was access to infotainment systems in your car
22 | so that when you are driving along, you can have up on your screen information about
23 | where to recharge your car. And the operating system which those infotainment
24 | systems used was a Google Android operating system, and Google Alphabet were not
25 | prepared to let the operating system be used for that purpose. They have, as you will
26 | know, their own map services, which, among other things, will tell you where you can

1 recharge your car. So they did not want that to happen.

2 MR JUSTICE MORRIS: But they were not already... They had not previously allowed
3 them to. So it was not an existing --

4 MR JONES: It was not, and it was not even an existing situation.

5 MR JUSTICE MORRIS: Yes. Go on.

6 MR JONES: And if you look at page 1201, at page(sic) 18, there is a reference to the
7 referring court because the way this comes about is Italian regulatory action against
8 Google, which is then appealed in Italy, which is then referred to the Court of Justice.

9 MR JUSTICE MORRIS: Okay.

10 MR JONES: So before the referring court, Alphabet submitted inter alia that AGCN
11 did not - the regulator - did not examine correctly the conditions for assessing whether
12 a refusal to supply is abusive. And they criticised the authority, in essence, for having
13 failed to carry out an analysis of whether access to Android Auto was indispensable
14 for the Juice Pass app. They also claim that Google's conduct was justified by
15 objective and legitimate considerations.

16 MR JUSTICE MORRIS: AGCM is the Competition Court in Italy.

17 MR JONES: Yes.

18 MR JUSTICE MORRIS: Thank you.

19 MR JONES: And there is then a very learned discussion from page 1203, starting at
20 paragraph 33, about the requirements which apply in a refusal to supply case.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: And the relevance of indispensability. And you will see in paragraph 35,
23 a reference to the case of Bronner --

24 MR JUSTICE MORRIS: Yes.

25 MR JONES: -- which is the case that established indispensability as a requirement.

26 And, sir, I am going to go to the conclusion, but I will just observe that in the paragraphs

1 that I am about to jump over, which are all of those up to paragraph 44, that is my
2 landing point, there is a lengthy discussion on the case law and the competition law
3 nerds in this room, in which bracket I include you, sir, but the competition law --

4 MR JUSTICE MORRIS: Include me.

5 MR JONES: -- will know that this debate does not come from nowhere. There is no
6 long-standing debate --

7 MR JUSTICE MORRIS: Even I, in my previous past, recognise the cases. Yes.

8 MR JONES: So indispensability, lots of controversy about the circumstances in which
9 it applies. And where you get to at 44 is this: the court says, "By contrast, as the
10 Advocate General observed in point 35 of her opinion, where a dominant undertaking
11 has developed infrastructure not solely for the needs of its own business, but with a
12 view to enabling third party undertakings to use that infrastructure, the condition laid
13 down in Bronner relating to whether that infrastructure is indispensable for carrying on
14 the business of the entity applying for access, in that there is no actual or potential
15 substitute for that infrastructure does not apply."

16 MR JUSTICE MORRIS: Yes.

17 MR JONES: And the reasoning for that is all about incentives operating on different
18 companies. That is set up in the previous paragraphs. But that is a really clear
19 conclusion which is expressed again in 52, but just there by reference specifically to
20 digital services, which is why I have highlighted 44, because the reasoning is not in
21 any way limited to digital services. So I emphasise that for indispensability. And one
22 of the other points which I emphasised at the outset was that Perse is an existing
23 customer. So, that is another factor which I rely on, which was not present in this case.
24 And the significance of a company being an existing customer, and one can see in
25 many of the authorities, but I am just going to take you again to Sports Direct, please,
26 which is in this bundle, tab 22. So, what had happened was Sports Direct used to

1 supply to end consumers Newcastle United football shirts. Newcastle United went into
2 new ownership. Certainly if you are a football fan, you will know this history, but it was
3 all about the strategy and in the new ownership --

4 MR JUSTICE MORRIS: It rings a faint bell.

5 MR JONES: In the new ownership, they took a very different view of whether they
6 ought to have a relationship with Sports Direct - let me just put it like that- and they
7 decided that they did not want Sports Direct to be selling their kit. So they changed
8 the arrangements and it came to an end. Now, I showed you earlier what the court
9 said about disputed facts.

10 MR JUSTICE MORRIS: Yes.

11 MR JONES: And the reason that fits in is that there was actually a dispute about
12 whether or not in the circumstances of this case Sports Direct was existing customer
13 because its contract had basically come to an end.

14 MR JUSTICE MORRIS: Yes.

15 MR JONES: And it was just one which was up for renewal on a regular basis. And
16 so difficult to see why there would be an existing customer, except they were saying:
17 we had a legitimate expectation that this would continue. So, the court of Appeal
18 accepted, since that was a disputed fact, that one ought to look at it as it were through
19 Sports Direct's eyes. And if we could pick up then at para 33 on page 1195, you will
20 see that the court says: "In my judgment, the tribunal ought to have looked at Sports
21 Direct case as pleading its evidence as if it would be established at trial without
22 foreclosing any of the disputed facts against it. It was not suggested its factual case
23 was fanciful. There are important questions about whether the definition of the market
24 and dominance and whether Sports Direct was right to say the question of abuse of
25 dominant position should be considered from the standpoint of the existing supplies
26 from Castor..." - which was another intermediary company in the chain, essentially

1 between Newcastle and Sports Direct. "The tribunal assumed the market and
2 dominance that Sports Direct alleged, but arguably looked at its case on the status
3 quo on the basis that Newcastle United would win the argument at trial. If Sports
4 Direct were right that the matter was to be viewed as a refusal to supply an existing
5 customer. It was at least arguable that Sports Direct's expert was right to say that the
6 withdrawal of its supply might have a material effect on competition. It was obviously
7 not for the court, hearing an application for interim relief, to determine the conflict
8 between those cases and Microsoft, if indeed there really is one." So in that case, the
9 question of whether or not they were an existing customer swung the balance as to
10 whether there was a serious issue to be tried. That is the point which I am drawing
11 out of that. Because once one approached it on the correct factual basis, they would
12 be treated as an existing customer, and that swung the balance. That is why I
13 highlight that.

14 MR JUSTICE MORRIS: It swung the balance because it made the case for the refusal
15 to supply being anti-competitive stronger.

16 MR JONES: Yes.

17 MR JUSTICE MORRIS: Okay.

18 MR JONES: As it would be in this case because you, here, have a customer which
19 will not be able to compete if the service comes to an end.

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: So those were the two authorities I wanted to show you on that.

22 MR JUSTICE MORRIS: Okay. Just give me a moment. (After a pause) Yes.

23 MR JONES: My eighth heading is "failure to supply on fair terms" and I just want to
24 make a few observations under this. I said in my introductory comments that this is
25 an alternative way of looking at the case, in particular if you focus on supply chain C.
26 I do not, I think, need to go back through that because I have made --

1 MR JUSTICE MORRIS: No. That is all right.

2 MR JONES: -- some quite extensive comments on introduction but I just want to pick
3 up on the point about confidentiality of customer lists. Now, clearly the importance of
4 this is linked to the question of whether they are competitors or potential competitors.
5 ElectraLink does not at the moment know the identities of Perse's landlord customers.
6 A few of them have been named in the course of these proceedings but just a few of
7 the big ones. As I said they offered in their 17 April letter to put in place a form of
8 separation but only until the tripartite contracts are signed. We all have a lot on our
9 plates already before the 14th but of course, given that there is now a pause, there
10 can perhaps be more discussion about whether other measures can be put in place.
11 That was a point that was raised at the outset of today's hearing. So, there is an
12 opportunity to do that. I mentioned in my introductory remarks that information sharing
13 between potential competitors is obviously contrary to competition law unless it is
14 justified, and I do not understand that to be in dispute. I was simply going to mention
15 that in my skeleton argument in paragraph 60 we have got references to the cases.
16 So maybe this is one of those moments where you will tell me you want to look at the
17 cases.

18 MR JUSTICE MORRIS: Sorry, let me just look at your skeleton. Paragraph 60?

19 MR JONES: Paragraph 60.

20 MR JUSTICE MORRIS: Yes. 60. Well, unless it is strongly disputed, I do not think
21 we need to look at the cases at the moment. If need be, you can do it in reply.

22 MR JONES: Part of the reason why you cannot share it is that it is just presumed to
23 have an anti-competitive effect. So, in an information sharing case you do not have
24 to go on to --

25 MS REIDEL: Could I -- sorry I do not want to slow things down, but I have to say this
26 was... I obviously understand the point about not sharing commercially sensitive

1 information to competitors or potential competitors. There are numerous occasions
2 where data does have to be shared and where as a matter of practice information
3 barriers are put in place. So I think as you have just alluded to, there can be further
4 discussions now because I think what you said was that the respondents did not
5 anyway offer satisfactory measures. But I think it is important to be clear whether your
6 position is without... It is never going to be acceptable to put in place - to share this
7 information or there might be because it is anti-competitive to do so, which is a little
8 bit what I infer from the skeleton; or whether your position is if there were suitable
9 information barriers in place that we felt were sufficiently robust, then we think that that
10 would be an answer to the question of breach of competition law.

11 MR JONES: Yes. I wonder whether I could dodge that question, but tell you --

12 MS REIDEL: You certainly can because there is not much time.

13 MR JONES: If we were concluding today, I would give you a straight and complete
14 answer to that. There is obviously a window where the parties can talk about this and
15 if I were to say it is never, never permissible, then it rather raises the question of what
16 is the point of then discussing whether conditions could adequately be put in place.
17 So, the practical and sensible thing for the parties here to do is to go away and talk
18 about what could be put in place and then review legality in light of that.

19 MR JUSTICE MORRIS: Okay.

20 MR JONES: That concludes "serious issue to be tried". The next three will be much,
21 much quicker.

22 MR JUSTICE MORRIS: Yes.

23 MR JONES: Damages.

24 MR JUSTICE MORRIS: I mean we are very interested obviously in the next three.

25 MR JONES: Yes.

26 MR JUSTICE MORRIS: Not surprisingly. I will let you make your own... We are

1 particularly interested, I think, and this is not to stop you from going to the first whether
2 damages are adequate for you, but we will be particularly interested in the next stage,
3 which is the suggestion of irreparable harm being done to ElectraLink and how that
4 might arise. And I know that Ms Smith will obviously address it, but if you could cover
5 that today as well, that would be good.

6 MR JONES: I will start then with damages as an adequate remedy for Perse.

7 MR JUSTICE MORRIS: Yes.

8 MR JONES: The first question to ask here is what would it look like for Perse to survive
9 until trial without ElectraLink's data? So that is really what we are talking about.
10 Imagine we get to trial, Perse is still up and running, but has not had ElectraLink's
11 data. Now as you know, its whole business is built on the proposition of having access
12 to real time data from ElectraLink. We looked at the alternatives but let us, as it were,
13 posit for a moment because there are suggestions in the witness evidence and in my
14 learned friend's skeleton argument about what Perse could do to survive and I just
15 want to concentrate on those. Let us assume firstly that there is some core of
16 customers who are willing to obtain a reduced service over the next year or so in return
17 for some sort of compensation. So, not all of Perse's customers go. There is some
18 core who stay and they are compensated. Let us then assume that Perse can cut
19 back, make redundancies - this is what is suggested - cut off various contracts and
20 minimises cost. So it does all of that. And then let us also assume that the losses that
21 Perse builds up between now and trial are covered by an investor, maybe an existing
22 investor, maybe they managed to find another investor who comes in. So Perse is
23 able to sustain its operating losses until trial. What then? Perse wins a trial. This is
24 the basis on which we have got to think about this. Perse wins at trial. This is the
25 basis on which we and you are then asked, presumably, at the second trial, because
26 it would be difficult to do in one, to work out what damages would be. You would have

1 a company which starts out here today as a small, we say, innovative company in this
2 space, and it is a space where the markets are relatively juvenile, in economist speak.
3 So there are opportunities to now grow and obtain new customers and innovate. But
4 Perse, on this hypothesis, has suffered a body blow to all of that. It has suffered a
5 body blow to its reputation, to its customer relationships, to its staff who have been
6 made redundant. So that is the question: could Perse then be adequately
7 compensated in damages for all of this? And the answer is, in theory a court could
8 award damages to reflect all of these various things, but in practice it would be
9 extremely speculative and hard to prove. How long, for example, would it take for
10 Perse to rebuild its brand or its customer base? What would have happened to Perse
11 in the counterfactual? Would it have obtained new customers? These would be
12 extraordinarily complicated questions, and with the best will in the world, the best that
13 you would be able to do would be to give an imperfect estimate. You would be entitled
14 to do that, but that is all you would in fact be able to do.

15 MR JUSTICE MORRIS: Now, it all assumes that you survive.

16 MR JONES: Well, it does. I will come back to that in a moment. It does. All of that
17 assumes that we survive.

18 MR JUSTICE MORRIS: This all assumes that one way or another you survive.

19 MR JONES: This is all on an optimistic footage.

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: Now, I want to go back again to Sports Direct, please, because this issue
22 also or a similar issue came up. It is in the authorities' bundle - mine is 2 - towards
23 the end of authorities tab 22. Before I take to the paragraph, just to situate this, Sports
24 Direct were saying if we do not have supply of Newcastle shirts now, our customers
25 between now and trial will go to other outlets, like JD Sports, for example, and --

26 MR JUSTICE MORRIS: To get Newcastle shirts.

1 MR JONES: Yes, they will go there to get Newcastle shirts, but also while they are
2 there, they will buy other things and they will develop a relationship --

3 MR JUSTICE MORRIS: A loyalty with --

4 MR JONES: -- with loyalty. That is the argument. At paragraph 37, this is what the
5 Court of Appeal says about that: "On the adequacy..." This is page 1195. "On the
6 adequacy of damages for Sports Direct, Newcastle United contend by their response
7 notice that the tribunal ought to have decided that damages would have been
8 adequate. Newcastle United say no evidence has been provided to substantiate the
9 loss of any sales replica kit and associated purchases on a safe shopping visit leading
10 to material changes in future shopping patterns. It seems to me that it is obvious that
11 Newcastle United supporters coming in large numbers to buy their replica kit as soon
12 as its launch from Sports Direct, are likely to buy other things at the same time and to
13 become repeat customers for unquantifiable later purchases. If they are disappointed
14 and disaffected by the inability to get replica kit where they bought it before, trade may
15 well be lost. It will be hard to assess that loss. Accordingly. I agree with the tribunal
16 that on this limited ground damages would not be an adequate remedy for Sports
17 Direct." And if you just think again about that situation, these are just consumers going
18 into a shop to buy a shirt. You can go into JD Sports today and Sports Direct tomorrow
19 You might have a degree of loyalty, but it is really not going to be that strong. If Sports
20 Direct is more convenient, you can go into Sports Direct. Nonetheless, what is said is
21 that in that situation damages would not be an adequate remedy. If that applies there,
22 it applies, I say, in spades to this case because we are talking about customers who
23 are sticky, in economic terms; in ordinary terms, large commercial customers who
24 you have to cultivate relationships with and you integrate your API with them. Now, in
25 the end, I should say, because I have gone to Sports Direct so many times, so this
26 does not come as a surprise, Sports Direct does not get their injunction and the reason

1 they do not get it is a completely different point. It is on the balance of convenience
2 and it essentially goes back to the Mike Ashley general context and Newcastle being
3 able to change its suppliers and it being thought that it would be rather unfair to hold
4 Newcastle to supply Mike Ashley until trial. So that is the outcome there. But this, I
5 say, is another very important passage. And, sir, as you have already put to me,
6 everything I have said up to now is on the optimistic scenario. What Perse actually
7 says in its evidence is that none of the services would be provided. They are not being
8 provided now, and moreover that no investor would step in. And I just make the
9 observation that whether an investor would or would not step in is in some ways linked
10 to this question of whether damages would be an adequate remedy because it is
11 understandable that an investor might not step in even if they are optimistic about the
12 case, if damages are not going to be an adequate remedy. But be that as it may, it
13 does not matter. I do not need to go that far. I do not need to convince you that unless
14 you make this injunction Perse will go out of business and the debates around
15 precisely how many months it can survive on a runway and whether it could sack
16 enough people and to get money in from investors and so on and so forth, are simply
17 too extreme and I do not need to persuade you about that.

18 MR JUSTICE MORRIS: You say that even assuming they survive, there will be
19 effectively irreparable or unquantifiable harm.

20 MR JONES: Yes.

21 MR JUSTICE MORRIS: Because of the effect on its reputation, etcetera.

22 MR JONES: That is right.

23 MR JUSTICE MORRIS: And lost opportunities which you will not be able to quantify.

24 MR JONES: That is right.

25 MR JUSTICE MORRIS: Okay.

26 MR JONES: So next, damages as an adequate remedy for ElectraLink.

1 MR JUSTICE MORRIS: Yes.

2 MR JONES: Now, before I look at the detail, there is just an important access to justice
3 point here. You have a large dominant company cutting off supplies to a small
4 company. The small company seeks interim relief and is faced with an argument that
5 the interim relief could cause millions of pounds of harm, which the small company
6 could not pay. Clearly one needs to scrutinise very carefully what is the basis for that
7 sort of argument. If I had been able to bring this within the CATS rules regarding short
8 trials - someone will have to give me the reference to the rule - but there is a rule which
9 permits you to make interim injunctions. If the case is essentially going to be dealt
10 with in a small number of days at trial, then you do not need to give the cross
11 undertaking.

12 MR JUSTICE MORRIS: Okay.

13 MR JONES: But I am not going to get into those small kind of divisions, but that just
14 recognises the access to justice point that I have just adverted to. Now, what are the
15 damages they might face? Let me deal firstly with the one which we suggested they
16 might face, but which I think is not in fact pursued by ElectraLink. What we said in the
17 application was that the only basis we could see for a damages claim would be that
18 ElectraLink might say if you had been on the tripartite agreement framework, you
19 would have paid more for the data and so you would have to pay us the damages on
20 the basis that that is what we would have charged you.

21 MR JUSTICE MORRIS: Let me just think this through. So you have an injunction now
22 which does not require tripartite. You lose at trial; it requires tripartite. If the injunction
23 had not been made --

24 MR JONES: Yes.

25 MR JUSTICE MORRIS: -- you would have -- we would have had a tripartite. We
26 would have earned on a tripartite.

1 MS REIDEL: Just for the landlord or --

2 MR JONES: Yes.

3 MR JUSTICE MORRIS: Okay.

4 MR JONES: Now, in the application, there was an effort to work out how much that

5 might add up to, and it was said £400,000, roughly.

6 MR JUSTICE MORRIS: You estimated it at £400,000?

7 MR JONES: That is right. But two points. Firstly, that was in the application when we

8 were looking for A, B, C and D. So that includes D, which is no longer in the mix. But,

9 secondly, and really more importantly, what we did not know then but know now, is

10 that ElectraLink only charges more for the tripartites to cover the cost of the tripartites.

11 That is what Mr Linnane explains at paragraphs 127 to your 130 of his statement.

12 MR JUSTICE MORRIS: Yes, carry on.

13 MR JONES: And so the consequence of that is that, in any event, the £400,000 that

14 we calculated would be wrong because there is actually no loss.

15 MR JUSTICE MORRIS: It is not a loss.

16 MR JONES: Not a loss.

17 MR JUSTICE MORRIS: Okay. Because the higher price reflects higher cost.

18 MR JONES: That is all it is supposed to do.

19 MR JUSTICE MORRIS: Okay.

20 MR JONES: Now, I want to look at what Mr Linnane says about the losses in his

21 statement. B5.

22 MR JUSTICE MORRIS: So that is the first category potentially. We are now moving

23 on. Yes, B5.

24 MR JONES: Page 126.

25 MR JUSTICE MORRIS: Yes.

26 MR JONES: At paragraph 194 what is being said is that Perse would be in breach of

1 the bilateral agreement.

2 MR JUSTICE MORRIS: No, not the bilateral. Well, the DTSA.

3 MR JONES: No, it is in stages.

4 MR JUSTICE MORRIS: Sorry. Yes, go on.

5 MR JONES: The first sentence is "Perse would be in breach of the agreement." That
6 is reference to the bilateral.

7 MR JUSTICE MORRIS: Oh breach of the... Apologies. Sorry, I was reading the
8 second sentence.

9 MR JONES: Because then he says the consequence of that is ElectraLink would be
10 in breach of the DTSA.

11 MR JUSTICE MORRIS: Yes.

12 MR JONES: And then he is saying, therefore the DTS user group would suspend
13 ElectraLink's right to access and commercialise DAS reports.

14 (15.56)

15 MR JUSTICE MORRIS: Yes.

16 MR JONES KC: Now, you have seen what I had to say about the bilateral agreement
17 and the DTSA, and clearly my case, as you understand it, is we are permitted to
18 provide services under chains A, B and C.

19 MR JUSTICE MORRIS: Yes.

20 MR JONES KC: Obviously permits A and B, that is common ground. If you agree
21 with me that there is a seriously arguable case that the documents also permit chain
22 C –

23 MR JUSTICE MORRIS: Okay, pause for a minute. Yes.

24 MR JONES KC: Then that will presumably be on the basis that I have put it to you
25 today, which is that that's what the user group authorised under the DPIA. So I do say
26 it is, with respect to Mr Linnane, completely fanciful to think that in those

1 | circumstances, the user group would look at this and think, we cannot tolerate this
2 | pending trial and we are therefore going to essentially pull the whole edifice down. But
3 | more than that, if they did that we would injunct them, because the exact same
4 | arguments that I have put to you today about ElectraLink would apply to the user
5 | group. So it, with respect, simply does not hold water as an argument to say that if
6 | you order what is being sought, the user group is going to pull the whole thing down
7 | in the way that Mr Linnane describes here.

8 | MR JUSTICE MORRIS: Okay, just pause. Okay. Yes, carry on.

9 | MR JONES KC: Paragraph 197 is the second one. What he says is we would have
10 | to tell the ICO. And the ICO would confirm consent is required, given this and the
11 | indemnity we given the DTSA to the user group ElectraLink would need to identify the
12 | data controller's in the DTS user group for any claims made as a result of the breach.
13 | And I think that should say indemnify, apologies where it says identify, I think it should
14 | say indemnify the data controllers for any claims. And it says the number of data
15 | subjects impacted could be large. And again –

16 | MR JUSTICE MORRIS: So this is, just so I understand it, this is suggestion that by
17 | supplying in the way, pursuant to the injunction, the data users would be breaching
18 | Data Protection Legislation, not contract, and they would be liable in damages and
19 | you would be liable to indemnify them. Is that --?

20 | MR JONES KC: Yes. The indemnity, I think is there is an indemnity which is given by
21 | ElectraLink to the user group.

22 | MR JUSTICE MORRIS: Under the DTSA.

23 | MR JONES KC: Under the DTSA. So I think what is being contemplated is a data
24 | subject comes along and says, I... It is a tenant and this –

25 | MR JUSTICE MORRIS: Yes, a tenant.

26 | MR JONES KC: I am a tenant, I did not give consent for this so therefore I am going

1 to sue, say my supplier, who is a user, for allowing my data to be used in this way. I
2 think that is the sort of broad proposition. It is fanciful.

3 MR JUSTICE MORRIS: Why?

4 MR JONES KC: Because it would be, it would be a complete answer to any claim by
5 any data subject that ElectraLink was ordered to provide it by this court.

6 MR JUSTICE MORRIS: I am interested in that point.

7 MR JONES KC: Well, that is... If we go back in.... Where is it? Volume 1, tab 2.

8 MR JUSTICE MORRIS: Authorities?

9 MR JONES KC: Authorities volume 1, tab 2, page 68.

10 MR JUSTICE MORRIS: One minute. Yes. I am afraid that was the one bundle that
11 was already damaged. Somebody might have to provide me with a fresh lever arch
12 file, if you do not mind.

13 MR JONES KC: I am told that one has been provided. It is on the desk actually –

14 MR JUSTICE MORRIS: It is all right. The point is, is that because I wanted single
15 sided, the bundles are a bit too thickly stacked and when they have got too much in...
16 Yes. Sorry, can you just give me a moment whilst I -- Which authorities bundle are
17 you going to? Authorities bundle 1?

18 MR JONES KC: Yes.

19 MR JUSTICE MORRIS: Right. Can I... Bear with me a moment whilst I... Yes.

20 MR JONES KC: And it is on page 68, so tab 2.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES KC: And then the answer would be either C or F.

23 MR JUSTICE MORRIS: I am sorry about this. Yes, okay. Yes, and you did mention
24 that you were going to come back to C?

25 MR JONES KC: Well I will just come back to it because it states(?) if there is a legal
26 obligation to which the controller is subject. Now --

1 MR JUSTICE MORRIS: Just remind me here, in this context who would be the
2 controller? The user?

3 MR JONES KC: Yes, the supplier, yes, the user if you mean 'u' User?

4 MR JUSTICE MORRIS: Yes. Because this envisages a claim against a member of
5 the user group. A user.

6 MR JONES KC: That is what is being envisaged.

7 MR JUSTICE MORRIS: Sorry?

8 MR JONES KC: Yes, that is what is being envisaged.

9 MR JUSTICE MORRIS: Which ElectraLink would have to indemnify?

10 MR JONES KC: Yes.

11 MR JUSTICE MORRIS: Right, fine.

12 MS RIEDEL: But the injunction is not --

13 MR JONES KC: No, precisely. So, as I said, C and F. So you would have to read
14 this and say, well, look, C, clearly what Parliament has in mind is that if the court has
15 told someone to provide data, a data controller, then they are going to have to do it.
16 That is squarely within C. Now, on these facts, you would say, well, in fact, the data
17 controller is the supplier and so the processor Electralink may not itself be able
18 directly... I apologise, and so the data controller itself, the supplier, may not be able
19 to rely directly on C. But given that ElectraLink has been required by you to provide
20 the data, the supplier would say, well, it is clearly necessary under F, because the
21 court's ordered it.

22 MR JUSTICE MORRIS: Okay.

23 MR JONES KC: And so the idea that a data subject is going to be able to get damages
24 from its own electricity supplier, because Electralink has done something that a court
25 has ordered is, in my submission, fanciful.

26 MR JUSTICE MORRIS: Okay, sorry, who...? So C does not apply directly because

1 the controller is not subject to legal obligation?

2 MR JONES KC: Yes.

3 MR JUSTICE MORRIS: Okay. Processing is necessary. The processing is carried
4 out in this case by ElectraLink. Is that right?

5 MR JONES KC: Well, it would also, in this example of someone suing their supplier,
6 it would also be the supplier processing the data by providing it to ElectraLink.

7 MR JUSTICE MORRIS: Okay, so for the purposes... So the supplier's processing for
8 legitimate interest pursued by a third party?

9 MR JONES KC: That is right.

10 MR JUSTICE MORRIS: The third party being ElectraLink.

11 MR JONES KC: Being ElectraLink.

12 MR JUSTICE MORRIS: Who are under a court order.

13 MR JONES KC: Who are under a court order. And precisely, and there is the close
14 relationship between the suppliers and ElectraLink as users.

15 MR JUSTICE MORRIS: Okay. So you say it is Article 61F, third party. All right.

16 MR JONES KC: Yes, but the reason I mention C is just one has to see it through the
17 context, as it were, of C. It clearly is permissible for a person to process data if they
18 are ordered by a court to do that.

19 MR JUSTICE MORRIS: Yes.

20 MR JONES KC: That is the point which I rely on C for.

21 MR JUSTICE MORRIS: Okay. Fine. All right, so that is the --?

22 MR JONES KC: That is the second one. And then the third on page 126 at para 198,
23 is about a diverse user base. And it said, "We assume a diverse user base, five to six
24 large players and 100-150 smaller ones distributing costs and risks. If the Perse model
25 is accepted, it encourages market consolidation to four to six major brokers." So this
26 is not actually a point about damages between now and trial. It is a point about what

1 would happen if Perse, as it were, won at trial and its business model were then
2 replicated across the industry? So it is an argument which ElectraLink is entitled to
3 seek a trial, but it does not actually go to their damages before trial. And as far as I
4 can understand, the fourth one, it seems to be the same. The fourth one starts at
5 1.99. "The pricing under the bilateral agreements isn't designed for these types of
6 cases. And so for each individual customer, ElectraLink would not produce a profit."
7 And this seems to be a follow on from the third. And what is envisaged in these
8 paragraphs, among other things, is that there would need to be audits of all of the
9 different customers of Perse. So you see for example at 199.1.4(?). So again, it just
10 is not about, as far as I can see, losses between now and trial.

11 MR JUSTICE MORRIS: It is a loss caused by opponent's injunction, is it effectively?

12 MR JONES KC: Yes, effectively, yes.

13 MR JUSTICE MORRIS: All right.

14 MR JONES KC: And you will see at the bottom of the page at paragraph 204, it says
15 fifth.

16 MR JUSTICE MORRIS: Yes.

17 MR JONES KC: But that fifth one is actually not a fifth reason why damages may be
18 suffered by ElectraLink. It is about the undertaking, which is --

19 MR JUSTICE MORRIS: It is about the ability of Perse to pay?

20 MR JONES KC: Yes.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES KC: But it is all premised on the idea that there are going to be these very
23 high irrecoverable damages.

24 MR JUSTICE MORRIS: Yes, okay.

25 MR JONES KC: With that said, I was going to move finally then to balance of
26 convenience --

1 MR JUSTICE MORRIS: Okay, so you say that you do not get the balance of
2 convenience. I mean –

3 MR JONES KC: I do say that.

4 MR JUSTICE MORRIS: I am aware of what is said in Sports Direct about the
5 approach.

6 MR JONES KC: Yes.

7 MR JUSTICE MORRIS: I had, before I read that, I had the more traditional approach.

8 MR JONES KC: Yes.

9 MR JUSTICE MORRIS: Which is if we are satisfied that damages – we are not
10 satisfied that damages would not be an adequate remedy, to the extent that it is
11 needed, then you grant the injunction. That you do not get to balance of convenience.
12 You only get to balance of convenience... I know if damages are not an adequate
13 remedy for either party.

14 MR JONES KC: Well, so --

15 MR JUSTICE MORRIS: Well, that is the traditional approach.

16 MR JONES KC: Yes, and one can get into these very complicated diagrams, as I try
17 to do myself over the weekend, working out what happens if you win on the first one,
18 but not the second one, and what are the routes to get to balance of convenience?
19 Can I just show you briefly, sir, I know you will have this in mind, but I will just mention
20 that in the bundles we do have the Factortame description of this, which is... It is in
21 Authorities 1 to 6(?).

22 MR JUSTICE MORRIS: Well, before you take me, tell me what you say the approach
23 is before you take me to it. What do you say the approach is?

24 MR JONES KC: If there is doubt on the adequacy of the damages at either stage,
25 then one can move on to balance of convenience.

26 MR JUSTICE MORRIS: Okay, all right. That might be a slightly different approach,

1 but, you know.

2 MR JONES KC: Well that is –

3 MR JUSTICE MORRIS: Okay, go on, take me to it quickly.

4 MR JONES KC: Well, it is in tab six of Authorities volume one, page --

5 MR JUSTICE MORRIS: And is it accepted law that Factortame has provided a gloss
6 on [inaudible] signing it?

7 MR JONES KC: Well, Lord Goff says at the top of that page –

8 MR JUSTICE MORRIS: Yes, but I have not got – you will just have to wait because
9 my bundles are in such disarray, it takes me longer. What page?

10 MR JONES KC: Page 418.

11 MR JUSTICE MORRIS: Yes, he does refer to signing [inaudible]. Yes.

12 MR JONES KC: So he is not intending to qualify the guidelines laid down in Lord
13 Diplock's speech. Lord Diplock approached the matter in two stages. "First, the
14 relevance of the availability of an adequate remedy and damages either to the plaintiff
15 or to the defendant."

16 MR JUSTICE MORRIS: Yes.

17 MR JONES KC: "As far as the plaintiff is concerned, the availability to him of such a
18 remedy will normally preclude the granting him of an interim injunction. If that is not
19 so, the court should consider whether if an injunction is granted against the defendant,
20 there will be inadequate remedy and damages."

21 MR JUSTICE MORRIS: Yes, yes.

22 MR JONES KC: "If so, there will be no reason under this ground to refute."

23 MR JUSTICE MORRIS: Yes.

24 MR JONES KC: "And then at this stage, many applications can be denied. But if there
25 is doubt as to the adequacy of either or both of the respective remedies, the court
26 proceeds to always court the balance of convenience." So, sir, reading back over that,

1 it may be that there is not, as it were, a straight jacketed approach, because even
2 when the first and second stages are being described, Lord Goff is saying, for example
3 at B, "As far as the plaintiff is concerned, the availability to him of such a remedy will
4 normally procured the granting him of an interim injunction." I mean, I accept that, of
5 course I do accept that.

6 MR JUSTICE MORRIS: Yes.

7 MR JONES KC: And I accept the other way of putting it, which is at the next stage, if
8 damages would be inadequate for ElectraLink, normally that would mean that I would
9 fail in my application. But one can go on.

10 MR JUSTICE MORRIS: I was about to say, this is a gloss, and then he says, "I do not
11 wish to place any gloss." [Laughs]. I am sure we have all looked at these Authorities
12 multiple times. Yes. Anyway, you wanted to say something about the balance of
13 convenience?

14 MR JONES KC: Well, if we get to it, it essentially recycles the points that I have made,
15 in the sense that one simply has to look at the, what I say, is the high risk of harm to
16 Perse on the one hand, and the low risk of harm to ElectraLink on the other hand. So
17 one of the questions in your list --

18 MR JUSTICE MORRIS: Yes.

19 MR JONES KC: -- was about whether this is a mandatory injunction or not? And you
20 opened the possibility, and so it might be that does not matter, and that, in a sense, is
21 my answer. I will just unpack it a little bit.

22 MR JUSTICE MORRIS: So just so that I read back to you, there is learning which
23 says that if it is an interim mandatory injunction, then when you get to the fourth stage,
24 balance of convenience or balance of justice, then the claimant might have to show a
25 higher prospect of success on the merits.

26 MR JONES KC: Yes.

1 MR JUSTICE MORRIS: That is the argument?

2 MR JONES KC: Yes.

3 MR JUSTICE MORRIS: And there is something... I looked at G over the weekend
4 and I have not looked at the cases, but I raised the question in this case about, is this
5 truly a mandatory injunction?

6 MR JONES KC: Yes.

7 MR JUSTICE MORRIS: And if you had applied before... Anyway --

8 MR JONES KC: Well that --

9 MR JUSTICE MORRIS: -- but carry on with your answer.

10 MR JONES KC: -- is where I am going.

11 MR JUSTICE MORRIS: Yes.

12 MR JONES KC: Firstly, mandatory prohibitory is a slippery distinction, because I could
13 have framed the order as they are prohibited from suspending or prohibited from
14 terminating. So one does need to be careful, firstly, not to categorise this one way or
15 another just because of the way it has been written down in an order. That is the first
16 point. The second point is, why is it that in mandatory cases the threshold may be a
17 bit higher? The answer is because it is generally a lower risk approach to, "maintain
18 the status quo."

19 MR JUSTICE MORRIS: Yes.

20 MR JONES KC: And generally speaking --

21 MR JUSTICE MORRIS: And not to force people to do something which they are not
22 otherwise going to do?

23 MR JONES KC: Precisely, not something they are going to do. But here the status
24 quo is the continuation of supply. Yes, it has been suspended for a short period, but
25 it has been in place for years.

26 MR JUSTICE MORRIS: Yes.

1 MR JONES KC: So that is why I say this should not be seen as a mandatory injunction.
2 And that is not just a linguistic point, it is just contextually what we are faced with here
3 is a need to maintain the status quo pending trial.

4 MR JUSTICE MORRIS: Yes or put it another way, even if it is a mandatory... Even
5 if it is strictly mandatory, then the rationale for the higher threshold does not apply?

6 MR JONES KC: Precisely.

7 MR JUSTICE MORRIS: And that is what that question, obviously, that question was
8 aimed at.

9 MR JONES KC: Yes. We want to put it, another way to hold the room for the trial,
10 that is what we are about.

11 MR JUSTICE MORRIS: Yes.

12 MR JONES KC: I have almost finished, but I want to show you the correspondence
13 that I mentioned at the outset and make some comments about the period between
14 now and the 14th. For the correspondence, could I ask you please to look in bundle
15 G, if you have a bundle G?

16 MR JUSTICE MORRIS: Yes.

17 MR JONES KC: And if you go forwards please to tab 145.

18 MR JUSTICE MORRIS: I do not have tab 145. Others have it.

19 MR JONES KC: These are new inserts.

20 MR JUSTICE MORRIS: Okay. Thank you.

21 MR JONES KC: And you will see in tab 145 there is a letter from last Friday I think it
22 was.

23 MR JUSTICE MORRIS: Yes.

24 MR JONES KC: Just following the exchange of skeleton arguments, in which Pinsent
25 Masons said at paragraph 2, "That Perse is reformulating... Is pursuing application on
26 a radically reformulated basis." And at three, "No longer pursuing position on supply

1 to intermediaries.” And at four, “That leaves supply to landlords only as the
2 outstanding issue.” And they say, “Perse’s arguments on the unfairness of the tripartite
3 have fallen away as a result of the concession set out in the previous paragraph.” And
4 then they go on to talk about aggregated data and say that, “Perse’s position that it
5 does not know that it was available essentially does not make any sense.” That is
6 essentially what they are saying about that. And this was a somewhat surprising letter
7 for Perse to receive. And you will see on the next tab 146, this was Saturday. “The
8 position which Perse has taken in the application is accepted in paragraph 7, broadly
9 reflects the approach in our letter of 14 April. It was a constructive and pragmatic
10 attempt to avoid the need for the application.” And then in your letter of 17th of April
11 you made, among other things, the following points. And the first one is the hurdles
12 regarding tenanted properties. One, you reiterated landlords would also need to enter
13 tripartite, and two, tenant consent is required. It says they are not only in respect of
14 residential properties, but also in respect of commercial properties.” That is because
15 in the 14th of April offer Perse had offered to go a bit further in relation to seeking
16 consent. And it says, “Given that Perse in any case considers seeking consent from
17 residential properties is likely to prove impossible. And the offer it made in that regard
18 was very much a last attempt to avoid a hearing, those additional hurdles would make
19 the services to landlords entirely unworkable. Accordingly, in using the references to
20 supply chains in Perse’s [inaudible] arguments under your proposed approach, supply
21 chain C would have been unworkable.” And then in the next paragraph, “Secondly,
22 you reiterated that the termination notice would not be withdrawn. So as you know,
23 that would mean that we would get A and B back on for a short period under the
24 bilateral, but it would end in August.” And the reason I said a moment ago that that
25 letter was surprising, is because it was just focusing on landlords and saying that the
26 tripartite issue does not arise. To which the answer is, hang on, what about supply

1 chain A and B and the fact that you have given tripartite --?

2 MR JUSTICE MORRIS: Can I just read 2.2 again? Sorry.

3 MR JONES KC: Yes.

4 MR JUSTICE MORRIS: Yes, got you.

5 MR JONES KC: So then, Three, "Business cannot be operated." Four, "If we are to
6 understand from your letter that ElectraLink is now willing to withdraw the termination
7 notice and allow the bilateral agreement to continue in respect of chains A and B
8 pending full trial, please inform us urgently. If so, there may be scope for discussion
9 on whether the [inaudible] solution of landlords will allow Perse to continue to operate
10 in supply C on acceptable terms until trial."

11 MR JUSTICE MORRIS: Yes, okay.

12 MR JONES KC: And then there was not an answer to that. So that is essentially why
13 we are here.

14 MR JUSTICE MORRIS: Yes.

15 MR JONES KC: There is this opportunity for the parties to discuss. But, sir, I do make
16 this point. Between now and the 14th, there simply does not seem to be any good
17 reason why chains A and B cannot be turned back on. And if that requires Perse to
18 give an undertaking to the court that it will only use the data for those supply chains, I
19 can give that undertaking. And then secondly, in relation to supply chain C, I have
20 already made the point that it would clearly be sensible for the parties to test the
21 aggregated solution, which has been floated.

22 MR JUSTICE MORRIS: Yes. Yes. I mean you are, sort of, implicitly saying that... I
23 cannot... I am not going to make an order without hearing from Ms Smith obviously
24 at this late stage. You are asking for it to be turned on now, are not you A and B
25 effectively in the meantime?

26 MR JONES KC: Yes.

1 MR JUSTICE MORRIS: I can see why you say that and I do not think we can make
2 such an order now without hearing from Ms Smith and that may involve more than
3 about seven minutes.

4 MS SMITH: Yes.

5 MR JONES KC: Sir, I see that and I appreciate it.

6 MR JUSTICE MORRIS: But, I have not consulted with my colleagues, but do I
7 personally think that it would be a good idea if the parties could use the next seven
8 days constructively? Of course I do.

9 MR JONES KC: Yes.

10 MR JUSTICE MORRIS: And I also... I can understand why you are all here today,
11 and I can understand given the history of the toing and froing, why there may... I do
12 not know and I am guessing, but there may have been built up an atmosphere of lack
13 of trust between the parties. I do not know. But now that we are here, and you have
14 that opportunity, ElectraLink have heard what you have said, and have heard what
15 you have said about A and B. And indeed, from one of our questions, we raised that
16 question about A and B and it did occur to us what was the position? One might hope
17 that the parties can do some talking, but I do not think I can do more than that at this
18 stage.

19 MR JONES KC: Sir, I understand that and I am not going to push you to do any more
20 than that.

21 MR JUSTICE MORRIS: Yes, okay.

22 MR JONES KC: So I am very grateful.

23 MR JUSTICE MORRIS: Yes, okay. But if, in the meantime you have got something
24 to tell the tribunal in between you –

25 MR JONES KC: We will keep you informed.

26 MR JUSTICE MORRIS: -- then keep us informed. And if undertakings are required

1 in some form of limited interim order or interim undertaking has been agreed and you
2 want to place it before us, of course we will consider it.

3 MR JONES KC: Sir, I am grateful.

4 MR JUSTICE MORRIS: Yes.

5 MS SMITH: That is the first time at 21 minutes past four on the first day of the hearing
6 that there has been any offer to give undertakings to the court. If those are going to
7 be given, then we need to understand exactly what that would involve.

8 MR JUSTICE MORRIS: Yes. Well, again, I am not going to --

9 MS SMITH: That is not on the face of a draft order that is being pursued right up until
10 now.

11 MR JUSTICE MORRIS: Yes, I am not going to require that to be offered now, but
12 plainly if it is something that you can deal with together, and if Perse are able to
13 particularise some sort of undertaking that they are willing to give, then that could be
14 part of the toing and froing, and you can place that before us.

15 MR JONES KC: Yes, I am grateful, Sir.

16 MR JUSTICE MORRIS: Yes, very good. Right. Well, as far as at the moment we
17 think that the resumed hearing should be on the 14th. We will let you know if there is
18 any problem with that. I have consulted with my people. I know the tribunal can do it,
19 but it may partly depend on... I will come back to you if it is not going to be 14th as
20 soon as possible. At the moment also, I believe that it is likely to be in this building
21 again and we will make arrangements. We will let you know if anything changes
22 about that. The only other thing is I might need two of the new larger files because I
23 have rather damaged a couple of them, but that would be most helpful. Anything more
24 from --?

25 MR JONES KC: No, Sir.

26 MR JUSTICE MORRIS: Okay, thank you all very much. We will rise, thank you.

1	(16.24)
2	(Hearing Adjourned)
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