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IN THE COMPETITION

Case No: 1639/7/7/24

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23rd September 2025

Before:
Hodge Malek KC
Timothy Sawyer
Andrew Taylor
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Bulk Mail Claim Limited

And

Defendant

**International Distribution Services Plc (formerly Royal
Mail Plc)**

A P P E A R A N C E S

Paul Harris KC, Ben Rayment, Hannah Bernstein and Reuben Andrews on behalf of Bulk
Mail Claim Limited (Instructed by Lewis Silkin LLP)

Kenneth MacLean KC, Edmund Nourse KC and Andrew McIntyre on behalf of International
Distribution Services Plc (formerly Royal Mail Plc) (Instructed by Hogan Lovells
International LLP)

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1
2
3 Tuesday, 23 September 2025

4 (10.31 am)

5
6 Housekeeping

7 THE CHAIR: Some of you are joining us by live stream on our website, so I must start,
8 therefore, with the customary warning. An official recording is being made and an
9 authorised transcript will be produced, but it's strictly prohibited for anyone else to
10 make an unauthorised recording, whether audio or visual, of these proceedings, and
11 breach of that provision is punishable as contempt of court. At the end of the day,
12 there will be a written ruling, which will be available on the website in due course. Yes.

13 MR MACLEAN: Good morning.

14 MR HARRIS: Good morning. We don't have an agenda for today.

15 THE CHAIR: I can give you the agenda. So the agenda -- let's see my notes. (Pause)
16 We'll deal with things in the following order: one, expert evidence; two, binding
17 findings; three, customer group; four, disclosure; five, the LFA and Practico; six, cost
18 budgets; seven, confidentiality; and eight, directions to trial. So we'll deal with it in that
19 order.

20
21 Discussion re expert evidence

22 THE CHAIR: You can trust that we've read the evidence and the skeleton arguments,
23 and there are obviously things that we want, some sort of input, as we go along. But
24 I think the first thing is to look at the proposed expert evidence, along with your
25 proposals of the parties as to how that's to be dealt with. We've looked at the report
26 of Dr Williams, I think it's his third report. We do think that he has made substantial

1 progress since the last report, and he does have a clear indication of what he intends
2 to do and the practicalities, and no doubt he's had the benefit of the disclosure from
3 the Whistl proceedings; I can see that he's got that in. But what we need to be
4 confident about is that it's not solely based on the comparators and the DID model,
5 but it's based on other things, and that there is going to have to be a qualitative
6 analysis of where things would have panned out, were it not for the infringement.
7 I think he understands that.

8 Now, looking at the comments of Mr Hunt, we understand where he is. But the thing
9 is, I need to understand from Mr MacLean in a second, as to whether Mr Hunt is simply
10 going to be criticising the model and the analysis of Dr Williams and obviously the
11 proposed forensic expert, or is he going to come up with his own methodology as to
12 how you calculate the overcharge and pass on, in which case we need to know what
13 that is, because at the moment we don't have that clarity.

14 And the other thing that we don't have is a list of issues on which the experts are going
15 to be covering in their report. Ordinarily, I'm not keen to give, as you know from other
16 cases, a blanket direction that, you know, someone has a forensic expert, another
17 person has an economic expert, and then that's it, because there's no structure to it,
18 and what we're thinking about is to direct -- there will be a list of issues by the experts
19 they can refer back to the reports that have already been filed and the issues in the
20 action, and that Dr Williams responds to the criticisms when the experts meet. I'm not
21 asking at this stage he prepares a supplemental report, but the experts need to
22 engage with each other as to exactly what they're going to do, how they're going to do
23 it, what the issues are. We do not want to have a scenario whereby the evidence
24 coming in is just so dense, convoluted, not properly structured, because it's very
25 difficult for us to absorb. As you know, I'm a simple person, I like things simply, and if
26 it's too complicated to me, it takes too long to give a judgment and it requires a lot of

1 analysis. And so I know the lawyers and the experts like writing all these long reports
2 and stuff, but just think, what can we sensibly absorb? How do you put the meal on
3 the table, so that we can actually carve up and follow it?

4 Now, some cases I've had before the tribunal, it's been really good and it's been very
5 clear, and an example of that is Paroxetine, as you know, and that was a very, very
6 efficiently run case, and it was clear and the expert reports were easy to follow. Ideally
7 I want this case to be one of those, rather than some of the others that we've had,
8 which go in a different direction, and at the moment I can see the experts are so far
9 apart that it's not clear in my mind how Mr Hunt intends to proceed. I know he's got
10 criticisms against your expert; I understand those, and whether they're well made or
11 not, they are made, and obviously they need to be considered. But I don't know which
12 way he's coming from, other than to say, "You've got it all wrong".

13 Submissions by MR HARRIS

14 MR HARRIS: So yes, I respectfully agree that a sensible course would be for the
15 experts to liaise, and if Mr Hunt does have a methodology, then he should at the very
16 least outline it, as a next step, and then the experts meet, with a view to seeking to
17 identify a list of issues. So I respectfully agree with that. Before I cede the floor to
18 Mr MacLean so that he can answer that query from the tribunal --

19 THE CHAIR: Just a quick -- these are ideas. You know, everyone can push back and
20 say how they want it to be done --

21 MR HARRIS: Yes.

22 THE CHAIR: -- but at the end of the day, what are you trying to do? You're both going
23 to try and educate us for the purposes of the trial; that's what you want to do, and I'm
24 just saying what's easier for me and obviously my colleagues to understand and how
25 we'd like to do it. You may have other ideas, and that's absolutely fine, but just think:
26 we have to absorb it at the end of the day.

1 MR HARRIS: Yes. Well, I agree with that point. May I just: three short remarks before
2 handing over to Mr MacLean on item number 1, expert evidence.

3 THE CHAIR: Yes.

4 MR HARRIS: The first one is: it won't have escaped your attention, I apprehend, that
5 this report, Williams 3, was done against the background of having received 1270-odd
6 OTS, off the shelf, disclosure documents from the Ofcom file, and nevertheless, there
7 has been substantial and substantive progress.

8 THE CHAIR: Of course.

9 MR HARRIS: But the reason I make this my first point is it's since come to our attention
10 recently -- it's somewhat unfortunate, I'm not casting blame anywhere, but somewhat
11 unfortunate -- that we now know of at least 275,000 more OTS documents that we've
12 not yet seen. And then that leaves after the OTS phase of the disclosure, any
13 non-OTS, ie orthodox, disclosure. So I only make this point for this reason: that insofar
14 as there are going to be, as there have been prior to this hearing, criticisms of
15 Williams 3 and its supposed lack of analysis or its misconceptions or what have you,
16 it's got to be taken against the background of the fact that we received 1270 odd, we
17 now know there are literally hundreds of thousands or more, which we didn't know
18 about at all.

19 THE CHAIR: Which is going to feed in. But look, what I want to avoid is: apart from
20 the necessary task of both experts understanding where they're coming from and the
21 tribunal understanding where they're coming from, is that vast sums are being spent
22 on these preliminary skirmishes and analysis, whereas what we're looking for from
23 both of you is, if you look at what's at the end of the day, we're looking for maybe two
24 rounds, or one and a half rounds, of expert evidence, then a meeting of the experts,
25 and then a list of issues, the points of agreement, the points of disagreement, in a form
26 that we can really use, very helpfully, and it's all there. That's what we did in

1 Paroxetine, and that's what worked. And so, as long as you understand and MacLean
2 understand what we're looking for, I think it's going to work out quite well.

3 I'm not in the business of criticising Royal Mail or Bulk Mail; it doesn't help us. What
4 helps us is where we are and the practical way forward, and that's all I'm trying to deal
5 with. But, I understand that there's further disclosure. One of the great things about
6 this case is MacLean's been through it once already, and so his side have got a lot of
7 disclosure. Not saying it's off the shelf, but he's got they've got a lot of disclosure.
8 They've got the stuff from the first trial, the witness statements and all that sort of stuff,
9 and they're providing that to you, and that will provide a huge saving on their side for
10 disclosure in these proceedings, and then we go on to the next phase. But can we
11 deal with disclosure as a separate topic? Because as you know, I've got views about
12 how disclosure should be done in this case; I expressed it last time. It looks to me
13 from your skeletons, everyone's got the message. We're all on the same direction on
14 disclosure.

15 Let's just talk about the expert evidence and how we get on from where we are, and
16 then I'll give a ruling on expert evidence. But the preliminary view is that, of course,
17 we want expert evidence, from all four gentlemen that have been identified by the
18 parties, and that would be quite helpful, and that I do want a bit more definition, as to
19 exactly what each expert's going to cover, topic by topic, and that's why I'd like to have
20 a list of issues and the experts to meet, and Mr Hunt to prepare a short analysis -- I'm
21 not asking for more than ten pages, Mr MacLean -- of what he says should be done to
22 calculate the overcharge and pass on, what he intends to do, as opposed to purely
23 negative.

24 Now, MacLean can decide "what we're going to do is a purely negative thing, which is
25 all we're going to do is to say that Williams has got it wrong and give explanations,
26 without coming up with saying what's the right way of doing it". He's fully entitled to

1 do that, but we need to know if that's what he's going to do.

2 But if he's going to have a positive case and calculation of his own, to explain why
3 there's no overcharge, or if there is an overcharge, what the sum is and what the pass
4 on is. If he's got a positive case, then we need to know that's what he's going to be
5 doing. Because he could go both ways, and I'm not saying he should do either way,
6 and he's probably going to do both, but that's perfectly fine, as long as we know what
7 each side is going to do. Because, as I said, I do not want to have a situation we've
8 had in other cases, where you have one expert dealing with something and then the
9 other expert just talking about completely different things, and then you don't have
10 a clear picture of what the response is to either case, they're just going in different
11 directions. As long as we know which way the Defendant's expert's going to go, I'm
12 perfectly relaxed. I'm sure we're going to get it right.

13 So if you sit down for a second, we'll hear from Mr MacLean, and see what he wants
14 to say, and go from there.

15 Submissions by MR MACLEAN

16 MR MACLEAN: Sir, that's extremely useful. I was going to explain at the outset that
17 the way that we've divvied up the various issues involves me addressing the tribunal
18 on the issue of expert evidence.

19 THE CHAIR: Oh, that's good.

20 MR MACLEAN: That's how we divvied it up.

21 THE CHAIR: I'm asking the right person.

22 MR MACLEAN: You're asking the right person, yes. And Mr McIntyre has the
23 enviable task of addressing the tribunal on most of the other issues.

24 THE CHAIR: That's all right.

25 MR MACLEAN: I will say something about the question of costs, in due course.

26 THE CHAIR: Well, that's a separate --

1 MR MACLEAN: That's a separate issue.

2 THE CHAIR: Yes.

3 MR MACLEAN: So if we stick with the question of expert evidence --

4 THE CHAIR: That's what we're going to stick with, yes.

5 MR MACLEAN: I can tell you freely that we have not decided which course we're

6 going to go down.

7 THE CHAIR: Yes. Okay.

8 MR MACLEAN: Is it course one, course two or a combination of them.

9 THE CHAIR: But --

10 MR MACLEAN: Now --

11 THE CHAIR: -- when are we going to get to that? Because look, this is what we really

12 want to know: when are we going to get to that stage? Because certainly --

13 MR MACLEAN: Yes.

14 THE CHAIR: -- I will want to know this year --

15 MR MACLEAN: Oh, yes.

16 THE CHAIR: -- exactly where you're going. And if I could just give you a little touch

17 on where I think we're going to go.

18 MR MACLEAN: Yes.

19 THE CHAIR: Is if we're going to have a preliminary issue and we decide it should be

20 by way of an oral hearing --

21 MR MACLEAN: Yes.

22 THE CHAIR: -- we will want to add on half a day --

23 MR MACLEAN: Right.

24 THE CHAIR: -- to deal with CMC issues.

25 MR MACLEAN: Right.

26 THE CHAIR: Because if you're going to be before us for one and a half

1 days -- because that's how long the preliminary issue will take -- you might as well
2 deal with any updates and stuff like that at the same time.

3 MR MACLEAN: I respectfully agree with that. So what (overspeaking) --

4 THE CHAIR: If on the timetable --

5 MR MACLEAN: Yes.

6 THE CHAIR: -- what I would like, if possible, is clarity on what your side's going to do
7 and what Mr Hunt's going to do, a proper list of issues agreed between the experts,
8 and then when we come back in, whenever it's going to be for the preliminary hearing,
9 we'll have it all in place.

10 MR MACLEAN: Right.

11 THE CHAIR: And that way we've got clarity and we're not wasting too much money
12 having unnecessary hearings, if we're going to have a preliminary hearing, in any
13 event.

14 MR MACLEAN: I well understand the sense of that. But can I say this, that when we
15 were last before this tribunal in March --

16 THE CHAIR: Yes.

17 MR MACLEAN: -- you gave a pretty strong steer that as far as the Class
18 Representative's expert evidence was concerned, you wanted to be satisfied, at least
19 at this stage, this CMC --

20 THE CHAIR: Yes.

21 MR MACLEAN: -- that the so-called qualitative method would stand up to scrutiny in
22 the event that the comparator method was a dead duck.

23 THE CHAIR: That's probably putting it in, let's say, more brutal terms. But I think
24 that's a fair summary of how it may -- it could be taken reasonably (inaudible) on your
25 side.

26 What I think we were saying is that, yes, the comparator method has its issues for the

1 reasons that we discussed last time.

2 MR MACLEAN: Yes.

3 THE CHAIR: It may actually work out quite well and we may be satisfied with it. You
4 say we're not going to be. There's an added wrinkle, which is we're not quite clear
5 what the comparators are other than the two countries we looked at last time --

6 MR MACLEAN: Indeed.

7 THE CHAIR: And that's -- but on that side, I'm fairly clear. On the other side, which
8 is, you know, the other -- the default position, which shouldn't be a default position; it
9 should be a complementary position.

10 On the complementary position, I've got a much better understanding of what
11 Dr Williams wants to do, and it seems to us at the moment that it's an improvement on
12 what we had last time, okay? You say, "Malek, it's not enough of an improvement. It
13 still doesn't hold up".

14 MR MACLEAN: I do indeed say that.

15 THE CHAIR: And we don't need to go into the detail of that because I've read Hunt 2
16 and thank god it was actually -- I didn't mean that -- thank everyone --

17 MR MACLEAN: First of all short.

18 THE CHAIR: Yes. That he has been able to condense it in the number of pages that
19 he's done. Yes. So --

20 MR MACLEAN: Right.

21 THE CHAIR: That's fine.

22 MR MACLEAN: You have seen, both in Hunt 1 and in Hunt 2, the issues which he
23 takes with the workability of the comparator method. And as you've identified, rather
24 than have more clarity, we have less clarity as a result of Williams 3 because he now
25 says, "Oh, well, it's not just Germany and Sweden". There are other countries that
26 he's --

1 THE CHAIR: Well, we need to know what they are --

2 MR MACLEAN: We need to know what they are.

3 THE CHAIR: And obviously --

4 MR MACLEAN: He's had six months since March.

5 THE CHAIR: Yes.

6 MR MACLEAN: And, you know, it's now -- it looks like it's open ended. He's now

7 saying, "Oh, well, have a look at the Netherlands". But he crossed the Netherlands

8 out the first time round in Williams 1 and Williams 2. So what I'm --

9 THE CHAIR: Mr MacLean, I agree with (audio distortion). You're pushing an open

10 door --

11 MR MACLEAN: Right.

12 THE CHAIR: -- if what you're saying is that, at least in relation to comparators --

13 MR MACLEAN: Yes.

14 THE CHAIR: -- you need to know what they are.

15 MR MACLEAN: Indeed.

16 THE CHAIR: And I hope I'm pushing an open door with you, that I need to know what

17 Hunt's positive case is and how he intends to proceed --

18 MR MACLEAN: If indeed he has one in relation to --

19 THE CHAIR: If he does. As I said, he doesn't need to have one, but if he's going to

20 go down that route -- the first route -- we need to know that, because that could have

21 some impact on the direction.

22 So if, for example, the decision is that Hunt wants to only rely on the first route, you

23 may say, "Well, it's sensible to have sequential expert evidence".

24 MR MACLEAN: I'd say that irrespective of which route we go.

25 THE CHAIR: Yes, but if there's --

26 MR MACLEAN: The reason of the ships in the night passing problem, which sir, you

1 | just identified.

2 | THE CHAIR: But it's a much stronger case --

3 | MR MACLEAN: Yes.

4 | THE CHAIR: -- for sequential --

5 | MR MACLEAN: Yes.

6 | THE CHAIR: -- if you're going to do it the first way.

7 | MR MACLEAN: It may be.

8 | THE CHAIR: If you're going to do it the second way, where he has his own scheme

9 | of things and own methodology in his own calculations, then, of course, there's

10 | a stronger argument, and we're going to have this in a minute. We haven't got to that

11 | stage yet. Whether it's mutual exchange or on a sequential basis.

12 | MR MACLEAN: It sounds, from what you're saying, sir, the ships in the night is a real

13 | point.

14 | THE CHAIR: It is a point -- a real point.

15 | MR MACLEAN: Real point.

16 | But it sounds to me that the decision as to whether it should be sequential or not may

17 | be informed by this procedure that you're suggesting, in terms of exchange of issues.

18 | And unless and until that is resolved, it may be that you take the view that you don't

19 | need to determine that until this next CMC in December -- November or December,

20 | whenever that's going to be. Because after all, until the expert evidence is not on the

21 | current timetable -- and it's obviously a matter for the tribunal. It's not due until

22 | February 2027. There's plenty of time.

23 | THE CHAIR: We'll look at the precise timetable for everything when we get to point 8,

24 | when we go through the order and we put dates on everything. But I think that what

25 | you've come up with is subject to what Harris has got to say. Is a sensible thing (audio

26 | distortion). We can give you, the parties, leave in the terms that they're seeking, but

1 say that's going to be by reference to a list of issues agreed by the experts.

2 But I do want the experts to meet. I do want Williams to indicate promptly, ie by the
3 time the experts meet, what the comparators are. But are you going to be in a position,
4 and if so, when? Well, before, let's say, December, where Hunt can say if it's 1, 2 or
5 a combination --

6 MR MACLEAN: Without instructions, I can't see why that would not be possible.

7 THE CHAIR: Yes. And what would be very helpful is that if he gives a short
8 report -- and I've said no more than ten pages -- of what his proposed approach is
9 going to be, so we all have clarity as to where he is.

10 MR MACLEAN: Yes. As I say, without instructions, I see that's entirely sensible, and
11 I don't have anyone pulling me on the back saying, "No, no, don't say that --

12 THE CHAIR: You don't have a rope pulled.

13 MR MACLEAN: Oh, I know. Metaphorically, anyway.

14 THE CHAIR: Yes.

15 MR MACLEAN: I mean, yes -- I mean, as I said, we haven't yet come to a landing as
16 to whether it's 1, 2 or 3 or -- but the court -- the tribunal will expect us to do so, and
17 I see that's the sense in that.

18 THE CHAIR: Yes. Anything else you want to say at this stage?

19 MR MACLEAN: Well --

20 THE CHAIR: I think you've come up with actually a pretty good practical way forward.
21 But we'll see what -- whether Harris says it's totally impractical and then we'll try and
22 give a ruling on this.

23 MR MACLEAN: Okay.

24 THE CHAIR: And then the other thing that -- what I would like when it comes to the
25 list of issues and where we are, is when you have the list of issues, you say which
26 expert is going to cover that. Now, I understand, at least on one issue, the forensic

1 accountant is going to be overlapping and working with the economic expert.
2 I understand that. But that should be in the schedule. As long as everyone
3 understands that, that's what we're looking for.
4 MR MACLEAN: That's understood.
5 THE CHAIR: Yes. Okay. Thanks very much. Mr Harris.
6 Further submissions by MR HARRIS
7 MR HARRIS: Can I just take instructions for one second? (Pause)
8 So we agree with this approach. We think that Mr Hunt should come off the fence on
9 whether it's 1, 2 or 3, should put in a short report. That should be done in the fairly
10 near future. And that the experts should meet, which is a suggestion we had made in,
11 I think, our skeleton, and that they should arrive at a list of issues and that should be
12 presented to the tribunal.
13 On the other issue that you raised specifically for me, which is whether Dr Williams
14 can identify now with certainty the comparator countries, we can certainly do some
15 more work on that, with a view to seeking to be definitive by whatever date it is that
16 you suggest.
17 But I just enter this one caveat: to some degree -- and at this stage, it's not entirely
18 clear either to me or to Dr Williams -- to some degree, it's at least possible that the
19 further disclosure will bear upon the relevance of a comparison with some other
20 country beyond Sweden and Germany.
21 THE CHAIR: What -- sorry. Mr MacLean, when is the further disclosure going to
22 arrive? Or has it arrived? (Pause)
23 MR MACLEAN: I understand there's a dispute about that. And ... (Pause)
24 10 October.
25 THE CHAIR: Of this -- next month?
26 MR MACLEAN: Yes.

1 THE CHAIR: Okay. Thank you.

2 MR HARRIS: That's right. And what you will see that where the dispute lies, is how
3 long it will take us to assimilate that. We come back to that later. That's in the
4 directions to trial.

5 All I'm saying now is the list currently is Germany and Sweden, as it was last time, but
6 as you've seen in Williams 3, he says that:

7 "Depending upon my analysis of [and then he lists the sorts of things that he's going
8 to be looking at], it is at least conceivable that it won't, at trial, end up being limited to
9 Germany and Sweden." [as read]

10 And that must be right. And all I'm reminding the tribunal, respectfully, is that one of
11 the things that he will need to look at in order to arrive at his definitive list of comparator
12 countries is the further disclosure. So, whilst I am entirely content that at a date to be
13 named -- maybe later this term, maybe early next year -- you ask for, as definitive as
14 possible, that Dr Williams can be on the comparator countries, I must say that there
15 needs to be the caveat that it might alter when the disclosure process has been finally
16 complete. That's all I'm saying.

17 THE CHAIR: Yes, but look. As long as when we deal, if we have a hearing -- because
18 we haven't determined this yet -- the binding findings hearing -- whatever you want to
19 call it -- that I know what your comparators are, and Mr Hunt knows, I'm relaxed about
20 it.

21 There may be circumstances where you come up with further lines of enquiry and say,
22 "Actually, we want to add a comparator". Then, obviously, you tell us and you tell the
23 Defendant. Because I would have thought that the list of issues, one of them will be
24 what are comparators and which countries they are. So I would expect that to be in
25 the list of issues that you'll identify, or hopefully what those countries are.

26 Because when it comes to Hunt's job, he's going to have a section dealing with, let's

1 say, country A as a comparator, and then have another section dealing with country B.
2 And you'll have the same one, and you're all looking at the same thing.

3 So -- but if you say there's a country D, we all need to know that so that everyone can
4 work on the same thing.

5 These proceedings are going to be expensive enough, and if you don't get it right at
6 this early stage, costs are going to escalate. I can see -- we'll come to the budgets
7 later -- but you can see the costs have already increased significantly. But we'll come
8 to that a bit later.

9 MR HARRIS: Sir, we respectfully agree, it has to be clear in good time from our side,
10 whether the countries are going to be limited to Germany or Sweden or whether they're
11 going to include A, B, C, D or E, other countries; that must be right. Where I may say
12 might lead practically is that we're going to go on to item two to talk about binding
13 findings and it might be that the data upon which that issue is resolved is a little bit
14 further away than the parties had been contemplating prior to this morning, so that
15 more, if not all, of the further disclosure that's going to come next month can have
16 been assimilated, before Dr Williams says, "Yes, my list is A, B and C, albeit I reserve
17 the right with sufficient ..."

18 THE CHAIR: We'll come to that a bit later. Okay.

19 MR HARRIS: Yes. But on expert evidence, with the permission that you've granted,
20 sir, Mr Grantham on my learned friend's side and Mr Davies on our side, I have no
21 further submissions unless I can assist.

22 THE CHAIR: No, you've already been of assistance. I'll give a ruling now.

23 (11.00 am)

24
25 Ruling on expert evidence

26 (11.11 am)

1 THE CHAIR: That's our ruling on the first issue. We'll come to the timing of everything
2 later on when it comes to the order.

3
4 Discussion re binding findings

5 THE CHAIR: So the next issue is the binding findings issue. We've read the skeleton
6 arguments on that. Can you just summarise for us what are the critical binding findings
7 where you're not agreed? We can see what's agreed and what's not agreed, but which
8 ones are you saying are the really critical ones which will make a significant difference
9 to the shape of the trial?

10 Submissions by MR HARRIS

11 MR HARRIS: Well, sir, our position, I think, is that there are no issues that are so
12 critical that there has to be a preliminary issue to determine them and I can explain
13 why. But that, in attempting to answer your question directly, is the answer.

14 THE CHAIR: And where are we on them? Because last time, when we had the Whistl
15 case, one of the critical areas was on causation as to what is the impact of the Ofcom
16 decision and the tribunal appeal decision.

17 MR HARRIS: Can I explain why we say that that one's not appropriate or suitable for
18 an interlocutory determination of binding this.

19 THE CHAIR: I'm just asking, where are we on that?

20 MR HARRIS: Well, we are, but let me give you some examples. There is what we
21 describe as a finding of impact upon profitability as being material. That one is -- I'm
22 not going to turn these up, just to give you illustrations -- Ofcom finding, it's
23 paragraph 7.141(b). This is illustrative, for present purposes, for this reason, that the
24 dispute then comes to this between us. Mr MacLean's side says something like, "Well,
25 the word 'material' when it's used in the Ofcom decision is so imprecise and unclear
26 that it's not binding at all." So in theory, one could have a determination of whether

1 that word and in that context of that sentence is binding, given that it's a finding of
2 Ofcom. But the reason that we say that it's not suitable or appropriate for an
3 interlocutory determination at a preliminary stage is because so what? So what if you
4 were to determine definitively it is a finding, it says material, because at trial you're
5 going to have to determine the degree to which anything that Ofcom has said about
6 the materiality of causation or effect or impact on profitability, actually pans out on the
7 evidence before you.

8 There are several other examples like this. If I could just illustrate, sir, just so you have
9 a clear feeling of why we say it doesn't seem to be any point to us. Other ones are
10 when Ofcom uses phrases like "reasonably likely" or "there is a likelihood". Again, my
11 learned friend's position is, "Well, it's not sufficiently clear and/or it doesn't tell you the
12 answer. How likely is reasonably likely?" We say, well, strictly speaking, it's a finding,
13 and so far as it goes, it's binding, but what's the point of having a determination of that
14 now, when you're going to have to decide the question of what would have happened
15 at trial? And there are other ones like the word 'substantially', where there's the same
16 sort of dispute.

17 Where it comes down to in a nutshell, in our respectful submission, is we can't identify
18 any useful, hard-edged question of pure law, upon which you could sensibly or
19 proportionately opine now, in advance of the trial. And on these other ones, you could
20 have what we would suggest is a fairly sterile debate about whether technically,
21 because it's in that paragraph of Ofcom or in the CAT judgment, and it says 'material'
22 or 'substantial' or 'likely' or 'reasonably likely'. I mean, strictly speaking, our position
23 is, yes, that's binding, but what's the point? Because you're then going to, at trial, have
24 to determine what it really means: how likely, how material, how substantial, and allied
25 to that latter point, is that we see there's actually a fairness issue about seeking to try
26 to determine that type of issue at this very early interlocutory stage, which is that we

1 don't yet have the disclosure. So we wouldn't be able to make fair submissions about,
2 well, it's material, so you should apply a binding list of determination to it, because look
3 at the underlying material.

4 THE CHAIR: Are you saying, then, that we need a preliminary issue? Because if
5 you're right, these are all reasons why you should just leave some of these issues for
6 trial.

7 Let me just get a bit of clarity on the thing that we focused on in the Whistl proceedings,
8 is that the report refers to the reasons why Whistl didn't come into the market, and that
9 deals with a position with LDC, the funder and all of that. And one of the issues was
10 whether or not the conduct, the infringement that was found against Royal Mail, and
11 there's no dispute that infringement occurred, was the real and effective, or a real and
12 effective, cause of the plug being pulled, and that clearly, from what I can see from the
13 Ofcom decision and the CAT judgment, there was evidence on that, and that those
14 findings were made.

15 But are we going to be determining that issue again, which is to make findings? Are
16 we expected to go through all that history and say, actually, we reinvent the wheel and
17 we decide whether or not that was the effective course? Or are you saying no, they're
18 bound by what's in the Ofcom decision, in which case you may have a different
19 approach. Or are you saying, well, we want a bit of both, which is that we, at one level,
20 you look at what's in the Ofcom decision and the CAT decision, and that's a starting
21 point, but we want to bang the hammer a few more times on the nail to push it down
22 further. And so we rule on that basis.

23 MR HARRIS: Well, I think, on an issue like that, the way we see it is: Royal Mail cannot
24 go behind what is said about effect and causation, so far as it goes, in the Ofcom
25 decision. So there is a level, if you like, below which Royal Mail cannot go.

26 Let me give you an example: when it is said that the impact of doing something was

1 material, our position is, Royal Mail cannot then come to you and say, "Disregard that,
2 and whatever happens, our case is it wasn't material, and we intend to prove it". We
3 say you can't go below that.

4 However, that doesn't mean that your job is completely done, because you will
5 obviously have to address causation, what were all of the -- my learned friend's case
6 is that the LDC decision, for example, to withdraw the investment, wasn't an effective
7 cause of anything.

8 THE CHAIR: I know; that's one of the issues. But look, the whole idea of the binding
9 nature of these things in follow on cases is that you start off with findings, and it's on
10 the basis of those findings you have the follow on. What I've noticed in many of these
11 cases is that even though you do have those findings, you need to go into all the
12 circumstances again to understand the impact. And so, for example, when you look
13 at the Trucks case -- which I know you have a great deal of experience in -- of course
14 you've got the decision on Trucks, that makes adverse findings as to the cartel against
15 the Truck manufacturers, and on one level, you'd say, well, we don't need to have
16 evidence on disclosure on all those issues, because it's already been found.

17 But the problem with that is, in order to estimate the overcharge, you need to have
18 detail of all the meetings, the pricings, and understand the changes in price or the
19 movement in the market over time. You can see, well, was there a meeting at this
20 stage? Did they have a meeting and they discussed prices then? You can see the
21 effect then. So it's not enough just simply to rely on the decision.

22 But, you know, I do think it's of value trying to pin Royal Mail down. Now, we directed
23 a preliminary issue last time, and they managed to agree a formula which I looked at
24 and seemed perfectly sensible to me, which left certain things fudged, and let's not
25 hide the fact, and other things were ultimately going to be dealt with at trial. And certain
26 things were: "Yes, we accept that's clear, we're bound by that, we're not going to try

1 and undermine that", and that's possibly where you're going to end up.

2 But I do think it would be helpful -- and unless Mr MacLean's got an objection to
3 it -- that you see where they came up last time. Because we've got the opposition -- so
4 I've read it, and I remember what happened last time, and it was before the tribunal; it
5 wasn't like some sort of 'Secret Squirrel' document, it was something that was on the
6 table, and it was obviously an important thing for me, to have to understand the shape
7 of the trial. And it may be that, if he's got no objection, you should have that, because
8 it may help the parties resolve this issue. It doesn't mean I don't want to have another
9 hearing in December, because I probably do, to deal with certain things we've already
10 covered. But it should be something that is capable of resolution insofar as it can, but
11 I do understand that there are certain issues where there's room for interpretation of
12 a) what's been said and b) the significance. You can say something's material, of
13 course it can be material, but that in itself doesn't mean how material it is, and is it
14 enough to be causative.

15 And so, those sorts of things we are going to have to resolve the trial. We're not going
16 to go behind the wording and say: "Yes, it was material", but within that, we may have
17 to determine how material.

18 So, can we just hear from MacLean now?

19 MR HARRIS: May I just make three points, because I pick up on a couple of -- first of
20 all, the good news is we have made some progress in the two schedules that are --

21 THE CHAIR: No, I've seen the two schedules.

22 MR HARRIS: So we could certainly refine and create a list of that which is not
23 disputed, for whatever reason, between us. So we can do that; that would be useful
24 and constructive. That's point number 1.

25 Point number two: we do say that another useful way, constructive way, forward,
26 would be for us to see the schedule that was agreed, so far as it was in those

1 | proceedings. There is an objection to that: we don't understand what it is.

2 | THE CHAIR: Well, we'll see what the objection is. But the problem you've got is: I've
3 | studied that in the past. So, I don't want to have a situation whereby I know what's in
4 | there, it's in my mind. Obviously I can forget about it, if you want me to, but sometimes
5 | it's a bit difficult to do that. But if I've got that in my mind and I can remember what
6 | was in there, it doesn't seem to me a great situation, unless MacLean says, "Malek,
7 | because of that, we've got a valid objection, so you shouldn't sit on this case anymore,
8 | because you've got some sort of, party pre-position, and you've seen stuff that the
9 | other side hasn't seen".

10 | I don't want any of that, but if he wants to run that, of course he can.

11 | But let's just sit down, let's just hear what the objection is to getting the document. We
12 | can come back. Mr MacLean -- oh, it's not your job. Mr McIntyre, yes, you've got the
13 | short straw.

14 | Submissions by MR MCINTYRE

15 | MR MCINTYRE: Sir, thank you. When I stand up and Mr MacLean sits down, you
16 | can tell we've got on to the really interesting bits of the hearing.

17 | There are a number of points that Mr Harris raised.

18 | THE CHAIR: I'm only asking about one thing.

19 | MR MCINTYRE: That's fine; I'll come back on those separately, if I need to.

20 | THE CHAIR: Just one thing about --

21 | MR MCINTYRE: The schedules.

22 | THE CHAIR: -- the schedules.

23 | MR MCINTYRE: So this request was made initially before the Class Representative
24 | prepared its own schedule.

25 | THE CHAIR: Oh yes?

26 | MR MCINTYRE: We said "no" at the time, because we regarded it as a pointless

1 exercise to hand over the Whistl schedules. The Class Representative duly went off
2 and prepared its own schedule --

3 THE CHAIR: That's the right way of doing it, that's fine.

4 MR MCINTYRE: -- which is not coextensive with the Whistl schedule. It's a bit longer.
5 There is overlap, of course, but it's not coextensive.

6 So we were a bit surprised in the skeleton to see this request being resurrected. And
7 we maintain that --

8 THE CHAIR: My request now. Forget what they've asked for. I've got a situation
9 where I've been through, and I remember, what your line was, and where let's say the
10 fudges were done and all of that. And I was happy with it last time, okay? It does
11 make sense that if the tribunal has seen it, you've seen it. I think all of us have seen
12 it, on the tribunal side, because I think we're the same panel. Harris's side sees it, and
13 then hopefully you might be able to resolve these preliminary issues, by doing a similar
14 fudge to what you did on certain of those questions, elaborating it, going a bit further
15 down the line.

16 If, at the end of the day, you both feel that there should be a preliminary issue -- I think
17 we should at least factor in a preliminary issue hearing today -- then we'll have it. If
18 you're able to agree it -- similar lines to you did last time -- that's a constructive way of
19 doing it. You save yourself a one and a half day hearing. But you've heard what I've
20 said about it. Are you going to provide it or not? And if so, why not?

21 MR MCINTYRE: I'm not going to die in a ditch over this. But let me just say this, by
22 way of substantive answer to the point: the Whistl schedules, which you described
23 today, and I think also in the past, as "a bit of a fudge", the Whistl schedules in their
24 final form, represented a private agreement between parties to separate litigation, was
25 not reviewed by the tribunals or approved by the tribunal. It is not --

26 THE CHAIR: It was approved by the tribunal. It was sent in and I went through.

1 MR MCINTYRE: I may have mis-stated that. It was sent to the tribunal, certainly, and
2 it was on that basis that we vacated the hearing. So, in that sense, yes, I suppose it
3 was approved.

4 But I think the point that I'm making now is that it's not clear at all why a private
5 agreement reached between the parties to separate litigation would be useful here for
6 the Class Representative in narrowing the issues. If the Class Representative wants
7 to make a concession, with regard to any of the binding findings that it has put forward,
8 then it would be very welcome to do so in the next round of schedules. But it is not
9 clear why it needs to see what concessions Whistl was willing to make in order to
10 decide what concessions it should make. So we resist it, purely on the basis that costs
11 are mounting, Mr MacLean has got to come back and address the rising costs budget
12 later, we don't really see why we should be adding pointless or futile exercises to the
13 very large amount of work that is coming in this case. (Pause)

14 THE CHAIR: Okay. (Pause)

15 Anything else you want to say on -- I'll deal with that when I give the ruling. But the --

16 MR HARRIS: Yes. Two other things on binding, conceptual points.

17 THE CHAIR: Yes.

18 MR HARRIS: The first one is, in Mr MacLean's side's suggestion about what would
19 go into a preliminary issue, there is a suggestion that the tribunal, at this very early
20 stage, would disapply some findings and/or make some determinations as to the
21 purposes for which a finding is binding. We say that in some other case that might be
22 acceptable. One doesn't know. But it's premature in this case.

23 One couldn't sensibly or fairly, as regards the CR, make a determination to disapply
24 a finding or to only determine that it's binding in a certain manner, unless both parties,
25 who were having the argument before you about that, had had proper and full access
26 to the relevant underlying materials.

1 And if that's to be done before Christmas, there's no possibility of us being able to
2 address you on those issues.

3 THE CHAIR: On disapplying findings, my inclination would be to leave those to trial,
4 or at least we touch upon them at the -- if we have a hearing, and we deal with it. But
5 all I can say is it's likely at this stage, if MacLean is asking for certain findings to be
6 positively disapplied, I think it would be helpful, at least when it comes to the next
7 hearing, that we understand exactly why he's saying that, what he's actually asking
8 for, and then at least we have a clear understanding as to where we go forward, even
9 if, when we look at it, we decide actually we're not going to rule on that today because
10 that's suitable for trial.

11 Because some of these binding findings, it's sensible to get it resolved now, and we
12 know where we are. Others, I think, are, particularly when MacLean's asking for
13 something to be disapplied, that may require evidence and a much better
14 understanding of the case on your part. We're at this relatively early stage of these
15 collective proceedings.

16 MR HARRIS: So we see that exactly the same way and endorse the suggestion that
17 you've made. The same would apply to any -- the suggestion that's made in the
18 current formulation by Royal Mail of the preliminary issue, that a finding might be
19 binding for only a certain purpose. Mr MacLean's team, we respectfully suggest,
20 should be asked or directed to identify exactly what the candidate list of purposes are,
21 and which finding he or his client says should be binding for which of those purposes
22 and why.

23 And then -- again, because it may be that the same answer applies. We say, "Well,
24 okay, at a later stage, we can make that determination, but not now". So that was the
25 first conceptual point.

26 The second one, related to the dispute that has bubbled up regarding the CAT

1 judgment, you may recall -- you don't need to turn it up -- but in our list of binding
2 findings, the table is bifurcated between findings, on the one hand, from the Ofcom
3 decision, and on the other hand, from the CAT judgment.

4 Mr MacLean's team takes the stance that it is not possible to find any binding finding
5 anywhere in the CAT judgment, and he says he wants that determined as an issue of
6 law. We say, with respect, that's also premature. It's not helpful, because our stance
7 on the CAT judgment is that it would be an abuse of process for Royal Mail to be
8 allowed to resile from the findings that were the subject of a merits-based full evidential
9 determination by this tribunal in that case.

10 But our stance is you can't determine that because the question of abuse of process
11 is very much fact and context dependent and takes into account all considerations.
12 You simply wouldn't be able to determine that in --

13 THE CHAIR: When you look at the two, you will have a passage where they make
14 a finding, and that finding is replicated in the CAT judgment. That's not a problem.

15 You'll also have examples where the specific findings were made, which were -- the
16 tribunal specifically did not follow, and that's quite easy to deal with.

17 You've got this third category where a finding's made in the Ofcom decision, but it's
18 not touched upon in the CAT judgment. The question is, well, is that still binding, and
19 has the CAT judgment 100 per cent replaced the Ofcom decision?

20 Looking at it, from my point of view, on that third category, it's not an easy argument
21 for MacLean to run. Of course he can run it, and it's wrong for me to express a firm
22 view on that, but that's not a great one to run.

23 But I think we need to have an understanding of how he runs them, and I think that
24 what we would like is that if we are going to have a fight now on it, that we understand
25 what his position is on each of these binding findings, and we can have his written
26 submissions on those.

1 But I think the parties will need to recognise that even with the benefit of those
2 submissions, when it comes to the hearing, if we're going to have it in December, we
3 may say we've understood what his position is; however, we're going to leave that to
4 trial.

5 And that's always a possibility with preliminary issues, you know. Often people go for
6 preliminary issues and they see them as a shortcut, and they can be a shortcut. And
7 I know the tribunal likes to have preliminary issues, particularly in big cases, in order
8 to make them, let's say, in chunks that you can -- it's easy to sort of break the case
9 down as you go along.

10 But sometimes, you go for a preliminary issue and it doesn't work like that, that you
11 actually, you get no result. You've just got more expense, and it just gets pushed off
12 to trial.

13 Is it my understanding that both parties agree that there should be preliminary issues?

14 Further submissions by MR HARRIS

15 MR HARRIS: No. No. Conceptually, we agree that if you can find a hard-edged
16 question of law for the facts of this case that is capable of clean determination at
17 a hearing -- and we would be perfectly content with a determination in December. If
18 you can find that, then that would be sensible.

19 But we have, since we've received the proposed drafting of the preliminary issue, we
20 have struggled to find a sensible example of a useful, hard-edged, pure question of
21 law on binding findings, for the reasons that I've previously given, and that you've
22 picked up in your remarks to me. We can't find one.

23 So ultimately, our position is, unless and until you can find a pure hard-edged question
24 of law with a yes/no answer or a definite determination, then you shouldn't do it.

25 And in that regard, the problem that we've got is that many of the disputes between us
26 in the respective schedules, that you'll find at tabs 10 and 11 of the bundle, when you

1 actually analyse them and get down to them, you realise that, actually, they depend
2 upon evidence.

3 First of all, there are two problems with that. The first one is we don't have the
4 evidence, so we would be hamstrung in arguing about them if it takes place later this
5 year. And that's simply a question of fairness. That's not fair.

6 But much, at least as important, is it's pointless from your perspective, in my respectful
7 submission, because you are going to have to assess the evidence on these matters
8 at trial.

9 So I go back to my examples. They can't go below an Ofcom finding that it's material,
10 but you will still -- members of the tribunal -- you'll still have to determine what that
11 really means in practice. They (Royal Mail) can't go behind a finding that it's
12 something that is reasonably likely. But you're still at trial, have to determine what that
13 really means.

14 There's another example. I mean, there are lots of these, but there's a dispute about
15 whether in the Ofcom decision 7.27, the following phrase:

16 "... the margin between access operators' retail prices and the access charge paid to
17 Royal Mail ... is around 10 per cent."

18 That's a finding in the Ofcom -- but what's the point of having a determination now,
19 that they can't go behind the words "around 10 per cent"? Because you'll have to
20 potentially determine what the margin is, or was or would have been, and what effect
21 that would have had upon the market.

22 So we've taken, we think, and I respectfully contend, a responsible view. We've
23 received the drafted preliminary issue put forward. We've looked at it and we thought,
24 what is there in there that could be a hard-edged, pure question of law that could be
25 determined without any knock on consequences, and nobody's going to regret it
26 six months later and think, "Oh god, crikey, now I want to revisit it because there's

1 | some evidence on it". We can't find one.

2 | All the others, we say it's not a useful or proportionate diversion of resources from this
3 | tribunal to take them off --

4 | THE CHAIR: But the thing is, Harris, if -- look, it's their application, okay? You
5 | understand that. If at the end of the day, they push this forward, we have a hearing,
6 | and we decide, "Actually, there's nothing in there that we need to determine now and
7 | it should go to trial", then there will be cost implications. You may be right. You may
8 | be wrong. There will be cost implications. Because then we would have had
9 | a preliminary issue against your objection, in circumstances where they're asking us
10 | to determine something which should be properly determined at trial.

11 | There are plenty of examples of this happening in practice, where preliminary issues
12 | are ordered, it's a good idea in theory, doesn't work, so the applicant pays the cost of
13 | that hearing.

14 | What may well happen is, if we decide to give you the previous documents in the
15 | Whistl proceedings, that you and MacLean will be able to agree something, whereby
16 | you can say: well, this is the way forward, actually, and we think that either we can
17 | fudge it or they should be determined at trial. Or you may say: between you there are
18 | particular issues, where we can both see that they can be determined now, but we just
19 | can't agree them. Then we will determine that. And so --

20 | MR HARRIS: Yes. That's essentially what we've said in our skeleton argument. And
21 | the words I think we use were, "There should be a period of some weeks from now for
22 | my team and Mr MacLean's team to liaise, to seek to identify whether there's anything,
23 | really, fruitfully that can be done".

24 | And it may be that at the end of that process, Mr MacLean's team will say, "No, no.
25 | We're going to stand by our guns. We think there is a proper issue that can suitably
26 | be determined". And we'll have to take a view then.

1 I suspect right now, because we've done quite a lot of thinking about this, that we will
2 say it's just not -- it's pointless. And then he will have to persuade you, which, in my
3 contention, could be done in writing. We don't have to have another hearing for you
4 to determine whether the exercise of this tribunal's discretion should be to allow there
5 to be a determination of something that we reach after a few more weeks' liaison.

6 And then there's another question after that, whether you then determine that on the
7 papers or at a hearing. I'm not going to deal with that now.

8 THE CHAIR: I'm not keen to determine something this fundamental on the papers,
9 given that there may be contentious points. I think it will be a hearing. I do
10 understand -- I do think there's going to be a cost, though, and that where the cost of
11 that exercise goes depends on where we are.

12 Look, if you look at the realistic possibilities, it is that the parties will obviously do more
13 than they've done so far to crystallise the issues. They may or may not agree that
14 they disagree on what the ultimate answer is on certain disapplying binding findings.
15 They will say -- may or may not say, "Well, we think the question of disapplying, that
16 really should be a matter for trial".

17 You may not agree that, but if MacLean's side says, "No, we still want you to determine
18 that now", and we decide, no, we're not going to determine it for reasons that I might
19 have just summarised, then there's a cost implication of that.

20 But there's a number of ways we can go. But my inclination at the moment -- and
21 I need to speak to my colleagues in a second -- is that we are inclined to order
22 a preliminary issue that will provide focus for both sides as to what they both think
23 realistically can be dealt with at that hearing, and give both parties the opportunity to
24 try and resolve things.

25 But if you don't, then you don't. Because that way, it's on the agenda for the next
26 hearing. Maybe at the next hearing you'll have a big fight over it, and it's going to take

1 up much of the next CMC. Or maybe it's only going to be a little fight on one small
2 aspect, and we can deal with that aspect, if that can be usefully dealt with.

3 But at the moment, we're inclined to direct that there be a preliminary issues hearing
4 on their application, subject to various caveats.

5 MR HARRIS: Well, on the question of whether a hearing on the papers, I'm not going
6 to push back about that. If the tribunal prefers a hearing, no problem. I did notice,
7 I think --

8 THE CHAIR: No, because I want to hear it anyway, to deal with the expert evidence
9 in December.

10 MR HARRIS: Precisely --

11 THE CHAIR: As part of that, it's sensible to deal with any issues of preliminary -- any
12 preliminary issues on bindingness which we can feel that we can sensibly resolve.

13 MR HARRIS: Sir, I agree with that. So you won't hear any more from me about that.
14 But what I would say is one thing that we're anxious -- and this comes from
15 experience -- to avoid, is an overblown hearing in terms of scope on binding findings.
16 And the reason for that is because our experience has been that ultimately, it really
17 doesn't make a lot of difference one way or the other. That's just -- our experience
18 has been that.

19 What we would be very keen to do is have a limited hearing. Mr MacLean's team has
20 so far suggested two full days on binding findings, and we think that's completely over
21 the top, especially if there's to be a period of further liaison between now and then.
22 And I think I noted that in the Whistl order, the preliminary issue on binding findings
23 was set down for half a day, albeit with half a day in reserve. In any event, that's the
24 marker that I would seek to put down, because the danger is if you move into a second
25 day that costs -- well, they're obviously, if not double, then something approaching
26 that. So that's what I have to say about that.

1 Then there is also the question of whether, after this period of further liaison, since it's
2 my learned friend's application and he's got to go first on exactly what purposes he
3 says, whether assumption should be disapplied because the exercise of the discretion
4 should be in this way or that way, et cetera, et cetera, whether we should have
5 sequential skeletons on that and he goes first on his application. So there's another
6 suggestion that I put forward. Again, I'm not going to die in a ditch about it, but unless
7 I can assist further, that's what I have to say about it.

8 THE CHAIR: You've been of significant assistance.

9 MR HARRIS: Thank you.

10 THE CHAIR: Mr McIntyre.

11 MR MCINTYRE: Might I just take instructions for a few minutes?

12 THE CHAIR: Yes, yes.

13 MR MCINTYRE: Can we suggest that we perhaps take the transcriber break now,
14 just to give me a few more minutes?

15 THE CHAIR: Yes. That's excellent. That's a good idea. Yes.

16 (11.45 am)

17 (A short break)

18 (11.58 am)

19 THE CHAIR: Mr McIntyre.

20 Further submissions by MR MCINTYRE

21 MR MCINTYRE: Thanks very much for that extra time. We were a little surprised to
22 hear from my learned friend, Mr Harris, that the class rep opposes the determination
23 of a preliminary issue. Mr Harris's skeleton at paragraph 12 says the CR is not
24 opposed in principle to a determination of a preliminary issue about bindingness and
25 in a letter of 15 September, which is tab 87 of the CMC bundle, we don't need to turn
26 it up:

1 "Whilst BMCL is content for there to be a preliminary issue concerning the bindingness
2 of certain findings ... we do not agree with your detailed proposed directions ..."

3 So we're a little bit surprised by this U-turn but having had time to consider it, we are
4 content for today not to pursue our application for a preliminary issue and simply to
5 take this wording out of the order. What we will offer is to provide the schedules that
6 were agreed in Whistl and then, as has been suggested, and as both parties have
7 already agreed in principle, to use the next couple of weeks or months to see if we can
8 narrow the existing schedules. And it may be that, having done that exercise,
9 Royal Mail wants to revisit the matter and apply for some form of determination of a
10 preliminary issue based on the narrower schedules. But we won't be pursuing that
11 application for today.

12 It would have been helpful if the Class Representative could have made its position
13 clear in advance, and then we could have avoided a lot of wasted effort disputing
14 things like hearings and directions for the hearings. But now that it has indicated that
15 it does oppose the preliminary issue, as I say, we won't be pursuing that part of the
16 order.

17 We are content for there to be a direction of a provision of the Whistl schedule. We
18 can do that very quickly and then we have some directions already in the order about
19 exchanges of drafts of revised tables of the schedule.

20 I think one marker that I would want to put down: Mr Harris raised a new point about
21 abuse of process. Abuse of process is, of course, different from bindingness of the
22 findings. The position that they've taken is that the CAT is somehow an exception to
23 the general constitutional principle that first instance courts cannot bind courts of the
24 same level. So their position is that the CAT is an exception for some reason and in
25 fact, the CAT judgment is binding. Now, we oppose that.

26 The new point today was abuse of process and of course, as the tribunal knows, if

1 someone wants to run an abuse of process argument, the normal way of doing that is
2 to apply to strike out pleadings as being abusive and you specify what part of the
3 pleading is abusive and what grounds in which it's said to be abusive. So if there's an
4 abuse argument being run in respect of our pleaded case, we would like to see that
5 articulated so that we can address it. So that's just a marker. But as I say, there is
6 going to be, we hope, and if the tribunal agrees, a process of winnowing these
7 schedules and articulating the parties' positions over the next few weeks. But for the
8 time being, with no order for preliminary issue, that's our suggestion.

9 THE CHAIR: Right.

10 MR HARRIS: Sir, we're content with that. We look forward to receiving the schedule.

11 THE CHAIR: I'll give directions as to what needs to be done. So look, I'll give a ruling;
12 the second ruling, binding findings.

13 (12.01 pm)

14
15 Ruling on binding findings

16 (12.09~pm)

17
18 Discussion re customer group

19 THE CHAIR: Agenda item three is a short one for Mr Harris to update the tribunal on
20 the customer group and how it's working, because we've seen what's in the skeleton
21 arguments but if you can just give us a bit more flesh on that.

22 Submissions by MR HARRIS

23 MR HARRIS: I'm pleased to say, sir, that there was a meeting of the customer group
24 on September 8. It has, as we speak today, five members but we have been able
25 from various sources, some of which we liaised with the tribunal about, to contact other
26 prospective members. The total number of companies that we've contacted as at

1 today is 71. And so we are waiting to hear back from -- some of those were relatively
2 recent. So, for example, some of them came out of the Whistle disclosure where we
3 wrote to the tribunal. The tribunal gave permission for us to use it in that respect. So
4 that's the position.

5 THE CHAIR: On that though, is that of the ones you've got so far, do we have a range,
6 ie do we have anyone who, let's say, falls within the minnow category, or are you
7 concentrating on the bigger ones, which I think that's probably what you should be
8 doing?

9 MR HARRIS: My understanding is it's the bigger ones. I'll take some detailed
10 instructions. I know, for example, one is an NHS trust, and the other four are all big
11 companies.

12 THE CHAIR: And you don't have --

13 MR HARRIS: Within the 71, however, are they all big companies? I'm told they're all
14 large companies as well, and we've taken that direction, because that was how we
15 apprehended the tribunal, saw it at the last hearing. (Pause)

16 THE CHAIR: Thank you.

17 Mr MacLean, is there anything you'd like to say about --

18 Submissions by MR MACLEAN

19 MR MACLEAN: Yes, there's something I'd like to say briefly, and that's: we would like
20 to know who these entities are.

21 THE CHAIR: We all would like to know that.

22 MR MACLEAN: The tribunal --

23 THE CHAIR: That's one of the things that I'm going to direct on, don't worry.

24 MR MACLEAN: Sorry, sir?

25 THE CHAIR: We'd all like to know, so that's one of the things I'm going to direct in,
26 (inaudible) don't worry.

1 MR MACLEAN: That's okay, I'll sit down then.

2 THE CHAIR: Yes, thank you. (Pause)

3 I'll turn to the third agenda item: customer group. In the CPO judgment --

4 Further submissions by MR HARRIS

5 MR HARRIS: Sorry, sir, I'm terribly sorry to interrupt, but there is an issue, I'm told,

6 about a revelation of identity, at least to some extent. We have told, I am told, that the

7 membership, that their identity would remain confidential. So, may I just take

8 a moment to ascertain?

9 THE CHAIR: Okay.

10 MR HARRIS: Thank you. (Pause)

11 So the concern is that, on the part of these companies, that they are provided with

12 ongoing serious services from a monopoly supplier, and they don't want there to be

13 any repercussions. And that's the concern that was expressed to us, I am instructed,

14 and that's why we said, well, at this stage, that is something that can remain

15 confidential. It might be possible, should this meet with the tribunal's favour, for there

16 to be, might be, if you're so minded, identification to a very tight number of named

17 people, should that be necessary. But that's the reason, and it's a genuine reason.

18 So we would invite you not to make an order today, directing that their identity be

19 revealed, and of course they have skin in this game. So were you minded to so order,

20 it may be that the only fair position is to hear from them, but in a manner that preserves

21 their confidentiality, subject to you making --

22 THE CHAIR: Okay, thank you.

23 Further submissions by MR MACLEAN

24 MR MACLEAN: This is the first time I've heard the suggestion that there might be

25 "repercussions". I mean, come off it.

26 THE CHAIR: No, but there's two issues, MacLean, you're clever enough to know that.

1 One is: whether or not there would, in fact, be any repercussions, and I'm quite
2 satisfied that it's most, most, most unlikely --

3 MR MACLEAN: The suggestion should never have been made.

4 THE CHAIR: No. The other half of it is that people might perceive that there could be
5 a problem, and that's where there can be an element of sensitivity. And so, whilst
6 I don't accept there's any likelihood of any repercussions, doesn't mean that people
7 don't think that there might be. And so I think that we will be able to resolve this, one
8 way or another.

9 MR MACLEAN: Sorry?

10 THE CHAIR: We will have to resolve these issues one way or another, and one simple
11 way of doing it is, clearly, they will need to consult with those persons about revealing
12 their names, because if they've been told it's going to be confidential, they've got the
13 right to be able to be consulted on whether or not their names can be disclosed. But
14 it may be much easier if it can be agreed that, at least for now, the identity of the
15 members be confined to external solicitors and counsel. It's not a big deal. I don't
16 think Royal Mail needs to know who's in this consumer group. That's all it is; it's only
17 a customer group. This is not a group that's going to determine the direction of travel
18 in these proceedings, that's not the role I've given them.

19 MR MACLEAN: No, but I can see that there is a possibility if, as counsel and solicitors
20 we are told which NHS trust it is and which large company or bank or whatever
21 financial institution it is, we may wish to consider seeking disclosure from these entities
22 in their capacity as a Class Representative.

23 THE CHAIR: That applies anyway.

24 MR MACLEAN: Yes, and to do that, we may need to take instructions from our clients,
25 and it would not be right for the clients to be --

26 THE CHAIR: I can't see that's a problem. Look at it not logically.

1 MR MACLEAN: I hope I am.

2 THE CHAIR: On pass-on, there may be an issue -- let's say you have one class
3 member that charges its customers for postage and packing. So to them, if it's higher
4 or lower, they don't suffer the loss, it's passed on to the customer. But then you have
5 the alternative argument that because they're charging postage and it's going higher
6 and higher, if that's what's happened, then that puts them at a competitive
7 disadvantage, if they get less business, because people, when you go on the Internet,
8 you see some say "free postage", and those are the ones you go for. Others you get,
9 like, £10 or something, and then you find, well, actually, I'm not going to use them, I'm
10 going to use these ones.

11 MR MACLEAN: You're absolutely right. But all of this is fine, as long as we're not put
12 in a disadvantageous position, as a result of the degree of some degree of secrecy
13 about this.

14 THE CHAIR: But then you can come back to me and say, "Look, Malek, there's
15 a particular thing, I need to go back to my client."

16 MR MACLEAN: I don't need to go on and on about it; I've made my position clear.

17 Ruling Customer Group

18 MR HARRIS: There are two short points.

19 First: it is at least conceivable that some of the existing members would want to
20 withdraw, if their names are known. I can't speak for them. We would have to take --

21 THE CHAIR: Take instructions on that. But you've heard what I've said: nothing's
22 going to be done at this stage until we have the next CMC.

23 Further submissions by MR HARRIS

24 MR HARRIS: Exactly, that was my first point.

25 But the second point is rather more profound, which is the one example my learned
26 friend gave, of the reason why Royal Mail might want to know the names of the

1 customer group, is concerning. It would be very concerning if the reason that
2 somebody was sought to be pursued as a non-party for disclosure purposes is
3 because they're on the customer group, because that is a distinct disadvantage to that
4 class member, by being a member of the consultative group, compared to some other
5 class member who's not, and I can certainly imagine -- again, I can't speak for these
6 people, but I can certainly imagine -- that if anybody knew now that there was a greater
7 degree of likelihood that they would be targeted as a non-party for disclosure purposes
8 by dint of their membership of that group, than not being a member, it's quite easy to
9 see what some of them might well do.

10 So going forward -- we don't need to decide this today, but going forward -- we would
11 need to be, in my respectful submission, quite confident that that is absolutely not
12 going to be a reason to target a person for non-party disclosure purposes. I'm sure
13 we can come up with such a mechanism, but it's only fair that I should put down that
14 marker, and the reason that this arises is because this is not something that I've made
15 up or my instructing solicitor; the perception has been that the reason that they were
16 told you can remain confidential is precisely because their perception is what would
17 happen to them if their name doesn't remain confidential.

18 So I'm not saying we need to do anything about that now, but I think it's only fair that
19 I should lay that on the table. Thank you.

20 THE CHAIR: Let's move on to the next topic, because on the customer group, we're
21 not making an order today. We've given the indication of the direction of travel and
22 that the (audio distortion) to the parties can discuss it as we go along.

23 But what we're looking for on the customer group is at least some visibility for the
24 tribunal to know who's on the customer group, so we can assess the appropriateness
25 of what's going on for (audio distortion).

26 As part of that, it's only fair that at least external lawyers know the same information

1 that the tribunal knows. That's where we are, and I'm sure that Mr MacLean's side
2 can come up with any suitable assurances over the next CMC. But it's still early days,
3 we haven't consulted with the customer group, and we'll see where we are at the CMC.
4 The next topic is disclosure. So what's an issue on disclosure? Because it seems to
5 me that good progress is being made and that everyone is being sensible. We've had
6 that one hiccup about, is it the 275,000 documents or whatever, but that, in the scheme
7 of things is fine. We're still fairly early in the proceedings, and we're lucky to have had
8 this, let's say, dry run in the Whistl proceedings.

9
10 Discussion re disclosure

11 Submissions by MR HARRIS

12 MR HARRIS: So I think there are three matters that require the tribunal's attention. If
13 I could identify the first one. It's behind tab 1 of the first file of the non-confidential
14 bundle. So it is the rival directions to trial.

15 THE CHAIR: Which one am I looking at?

16 MR HARRIS: You should, I hope, have one that has both red, green, blue and black
17 writing on it.

18 THE CHAIR: Well, no, don't assume that. So just tell me what it says.

19 MR HARRIS: So the issue, the first of what I have -- three short issues on disclosure.

20 THE CHAIR: Bundle. I just need to know which bundle.

21 MR HARRIS: Oh, I beg your pardon. It's file 1 of 2 of non-confidential CMC bundle.

22 THE CHAIR: Yes, I've got that now your pardon now.

23 MR HARRIS: And tab 1 of that. (Pause)

24 And I am told that the one with green writing, which is the one --

25 THE CHAIR: Which one am I'm looking for? What page?

26 MR HARRIS: I'm told it's right at the back now, so it must be file 2 of 2; is that right?

1 Not 1 of 2.

2 THE CHAIR: 2 of 2.

3 MR HARRIS: I beg your pardon. It's file 2 of 2, non-confidential CMC bundle. I'm told
4 it's page 1334. (Pause)

5 MR MACLEAN: Yes.

6 MR HARRIS: Right. Yes. And if you turn up the heading on internal page 5 of that
7 document.

8 THE CHAIR: Oh, this is just the draft order that's been sent.

9 MR HARRIS: Yes.

10 THE CHAIR: Yes, I've got that. I've --

11 MR HARRIS: So on disclosure, there are three issues.

12 THE CHAIR: Let's make sure I've got the same one as you. (Pause)

13 No, it's the same one. I'll put that file away and just work from the one I printed out.

14 MR HARRIS: So the first of the three issues that I have -- I think I have on disclosure
15 are whether, once the OTS, the remaining OTS -- so that's the 275,000
16 documents -- are provided on 10 October. That's agreed.

17 THE CHAIR: Well, where are we now?

18 MR HARRIS: Well.

19 THE CHAIR: Paragraph 5? Which paragraph are we on? The further
20 OTS disclosure? Paragraph --

21 MR HARRIS: Look at paragraph 3, to start the story.

22 THE CHAIR: Yes.

23 MR HARRIS: It is -- the date in paragraph 3 is agreed. So that will be Royal Mail
24 providing to my team 275,000-odd other documents that form other OTS disclosure
25 by 10 October. (Pause)

26 So, so far so good. That date is agreed. What I was going to address you on next

1 was the following disclosure dates, and they're to be found in paragraph 5 and 6, and
2 I think over the page, 9. And then I was going to come back to the disagreed wording
3 in paragraph 3.

4 THE CHAIR: Yes, that's fine.

5 MR HARRIS: Okay. So dates. So we'll get 275,000-odd further OTS disclosure
6 documents on 10 October, and prior to us learning that, we had provisionally agreed,
7 in paragraph 5, that the next stage would be 19 December, and that would be when
8 the parties write to each other about non-party disclosure applications.

9 But, we provisionally agreed to 19 December before realising what the sheer bulk was
10 of this addition. So 275,000, we didn't anticipate that. And again, to put it in context,
11 what we got post the March-April CPO was 1,270-odd, and we've had months to digest
12 that, produced Williams 3, and come to this hearing.

13 And now -- anyway, the long and short of it is my clear instructions are it's not
14 reasonable or feasible for us to digest and then take further steps in relation to 275,000
15 documents by 19 December.

16 Instead, we say it should be by 19 February. I think that that's in dispute.

17 THE CHAIR: The (inaudible) from McIntyre, that's still in dispute. It does seem
18 reasonable that they have a bit more time and that in the scheme of things, (inaudible)
19 a trial in April 2028, there's a lot of other things to get on with. I would have thought
20 that their proposal of 19 February is not an issue that's sort of, you know, is to fall out
21 over.

22 Submissions by MR MCINTYRE

23 MR MCINTYRE: Sir, I'm pre-empting Mr Harris slightly here. Our only concern is
24 maintaining a sufficient gap between this first date and the final date in paragraph 9
25 for provision of the disclosure. And so -- I mean, whether that is done by keeping the
26 original dates or by moving to the green dates -- Mr Harris's dates -- but then extending

1 the deadline in paragraph 9, I think we would be ambivalent about it.

2 It's the interval that matters to us rather than --

3 THE CHAIR: That's sensible.

4 MR MCINTYRE: So we can come back to -- I don't know if Mr Harris wants to deal
5 with paragraph 9, but we just want to preserve the interval. So if we are using
6 19 February. I can say this now, and then I can sit down. We would suggest changing
7 paragraph 9 to 22 May. Paragraph 8 can stay. The rest can stay as it is. Paragraph 6
8 can stay as it is, the green text there.

9 Further submissions by MR HARRIS

10 MR HARRIS: So I'll take instructions. I'm very grateful. I suspect we may not be too
11 far away.

12 THE CHAIR: McIntyre could come up with a practical timetable. I'm happy with that.

13 MR HARRIS: So are we.

14 THE CHAIR: You don't need to take instructions.

15 MR HARRIS: We're happy with that date. So the green in paragraph 9, I think all
16 parties agree, the tribunal's approved. Instead of 10 --

17 THE CHAIR: I've ticked the green in paragraph 5. I've put -- in paragraph 9 I've put
18 22 May.

19 MR HARRIS: Yes, we're happy with that. I don't know if there's a dispute about the
20 blue versus the green in paragraph 6. Perhaps not. No. So my learned friend's happy
21 with 1 March 2026 in green.

22 THE CHAIR: Yes, I'm sure he is. He says as long as you've got the --

23 MR HARRIS: Yes.

24 THE CHAIR: -- relevant distance. Yes.

25 MR HARRIS: Good. So then, if I can go back. There is some wording in red versus
26 blue in paragraph 5, but that hinges upon what you decide on the disputed wording in

1 paragraph 3. So --

2 THE CHAIR: I'll just look at something.

3 MR HARRIS: Yes. (Pause)

4 THE CHAIR: Yes. The wording that -- I'm just looking at the wording of paragraph 5

5 to 13. That's exactly what I would have expected, and it follows similar orders I've

6 made in other cases. I think that that's -- we're content with that, and there's only a bit

7 of wording on 5 we need to look at. But let's just resolve the wording in 5 now we're

8 there.

9 MR HARRIS: Well, sir, I think you'll find that that resolves itself once you decide about

10 the wording in number 3.

11 THE CHAIR: Okay. Let's look at that. So you've got wording in number 3. Okay. So

12 Royal Mail is in blue.

13 MR HARRIS: Yes, sir. You want to read it or shall I?

14 THE CHAIR: No, I just want to read it, if that's okay. (Pause)

15 Okay. Yep.

16 MR HARRIS: So the dispute really is, as we say in red, the documents that should

17 come by way of the further OTS disclosure should be "all disclosure disclosed at any

18 time during the Whistl proceedings", as you can see. Or the rival contention is what

19 we think is a narrower set of disclosure that's put forward by Royal Mail, which is

20 identified as being in subparagraphs (a), (b) and (c) below and coming from Whistl

21 LDC or PostNL.

22 And then (a), (b) and (c), you can see for yourselves, that rather than all disclosure

23 disclosed at any time during the Whistl proceedings, we get, instead, documents listed

24 in disclosure lists, and then there's, with the exception of category 8 -- I'll have to

25 address you separately on category 8 in just a moment.

26 THE CHAIR: But the thing is that -- are there documents which were provided, which

1 are not in the disclosure list? It looks as though there will be.

2 MR HARRIS: That's what we don't know because, of course, we weren't in it. But
3 we're in -- usually, there are. And that case went -- some went through several
4 hearings. I appreciate it didn't reach trial, but certainly, our experience of litigation is
5 that you don't always get all disclosure, including from all third parties, by way of formal
6 disclosure lists.

7 Now, if there were an assurance to this tribunal by Royal Mail now that there is simply
8 not a single further document, then this dispute goes away. But that's not an
9 assurance we've had so far.

10 THE CHAIR: Let's just see what --

11 MR HARRIS: You want me to address you on category 8 and the exhibits? Those
12 are the two minor further points. I'm happy to.

13 THE CHAIR: On exhibits, the position is quite clear, that if there's an exhibit and it has
14 a document within that exhibit, which is completely irrelevant and it doesn't relate to
15 any of the issues in the case, they don't need to disclose that. Otherwise, they do.
16 But I would imagine there's not going to be a huge amount of documents because it's
17 going to be such a burden on them to go through all the exhibits and say, "Well, can
18 I have this one? We'll leave out that one". That just increases costs.

19 Now they may take the view, "Well, the simplest thing is to give you the witness
20 statements and the exhibits". That's the most convenient way of working, having the
21 witness statement and understanding it to follow it through. You've got the exhibit,
22 you've got the pagination, and that, if they have to go through and take out any
23 individual page, because it's irrelevant, it's a huge cost for very little return.

24 MR HARRIS: So yes, that may be the case. The reason this arises today is because
25 one of the carve-outs that you can see in the order is by reference to what's called
26 "category 8". That means category 8 of the disclosure that took place between Whistl

1 and Royal Mail in the previous set of proceedings. And we are told, "You can't have
2 it because it's not relevant". We don't agree with that, and then that --

3 THE CHAIR: Where is category 8?

4 MR HARRIS: A category 8 is set out in footnote 9 of my learned friend's skeleton
5 argument. That's where I'm reading from.

6 THE CHAIR: So what paragraph is that under?

7 MR HARRIS: It's on internal page 8, beneath paragraph 23 of my learned friend's
8 skeleton.

9 THE CHAIR: Yes.

10 MR HARRIS: The key word is "unaddressed". It's data to do with unaddressed mail
11 delivery volumes and pricing. So as I say, the key thing here is "unaddressed". My
12 learned friend -- perhaps it's Mr McIntyre, I'm not sure -- the position that they've taken
13 is, "Oh, well, unaddressed. That might have arisen in the Whistl case, but it's got
14 nothing to do with your Bulk Mail case, so you can't have it".

15 But with respect, we say that that is not correct, and it is relevant to our case for
16 a reason that I'm about to elucidate.

17 THE CHAIR: Yes.

18 MR HARRIS: If it is relevant, then we should have it. But it bleeds into the second
19 point about exhibits in this way. If in a moment I persuade you that category 8 is
20 relevant, and Royal Mail has got it wrong and is proposing to exclude it on
21 a misconceived objection about relevance, then it gives rise to a concern on our part
22 that exhibits from witness statements that have hitherto not been disclosed may also
23 be wrongly excluded on grounds of supposed irrelevance, when that's not right. So
24 that's how the two bleed in.

25 But in order for me to develop this category 8 response, I am going to need to at least
26 show you, if not read out, some confidential material.

1 Now, I'm happy to seek to proceed on the basis of me just turning up a document and
2 asking you to read it to yourself, but I invite you to just be --

3 THE CHAIR: That's normally the most efficient way of doing it.

4 MR HARRIS: I just invite you to be conscious, though, that if there's any interchange
5 about it, then we'll --

6 THE CHAIR: I'll be careful.

7 MR HARRIS: I'm very grateful. So the first point, the first --

8 THE CHAIR: Sorry. Can I just make a note. Give me a second.

9 MR HARRIS: -- documents --

10 THE CHAIR: Yes, give me a second.

11 MR HARRIS: -- is in the confidential bundle.

12 THE CHAIR: Can you just give me a second. I said I'm taking a note.

13 MR HARRIS: Oh, beg your pardon. I didn't hear that. (Pause)

14 THE CHAIR: Have you got the witness statements, Mr Harris, on the (inaudible) case?

15 MR HARRIS: We have quite a few Whistl witness statements in the existing OTS
16 disclosure.

17 THE CHAIR: And on that, are the exhibits -- can you see that they've taken out certain
18 exhibits or not?

19 MR HARRIS: I don't know if you can see, but we have been told in terms that some
20 have been taken out on grounds of supposed irrelevance.

21 THE CHAIR: On the category 8 point?

22 MR HARRIS: No. Category 8 is something, as I understand it, that is going to be
23 taken out from the next tranche, the tranche that's due on 10 October. (Pause)

24 And to be fair -- sorry.

25 THE CHAIR: Yes.

26 MR HARRIS: To be fair to Royal Mail in the post CPO directions order, they were

1 | entitled. They were the ones who were entitled to decide on relevance.

2 | THE CHAIR: Of course, that's the normal course of events.

3 | MR HARRIS: So this point arises -- well, in the manner I've just described.

4 | THE CHAIR: So you've got an issue between you as to whether or not, they're right

5 | on whether they're relevant? Because if they are relevant then obviously they need to

6 | be disclosed. If they're not relevant, then they don't need to be disclosed.

7 | MR HARRIS: And of course, we've got one hand tied behind our back because we

8 | can't have a view on relevance one way or the other. It's entirely up to them. And

9 | what concerns us is, the example I'm about to give you, we say, shows that they

10 | haven't got the relevance assessment right and that bleeds into a concern about well,

11 | if you haven't got this one right, then have you got the previous ones right?

12 | THE CHAIR: Okay so let's look at this example.

13 | MR HARRIS: Yes. This is a confidential document so you'll therefore find it in the

14 | confidential bundle which has red on the spine.

15 | THE CHAIR: I've got that, yes.

16 | MR HARRIS: And if you look to the very final tab, it's tab 9. I'm not going to read out

17 | any of this since it's currently designated confidential in its entirety. But if you look at

18 | the first page, you can see the provenance of the document is --

19 | THE CHAIR: The name of the document is not going to be confidential.

20 | MR HARRIS: I doubt it, but --

21 | THE CHAIR: That's not going to be confidential.

22 | MR HARRIS: I'm being very -- provenance certainly isn't. It's a TNT document. That's

23 | what matters for my purposes. So it's something that we've received in the existing

24 | OTS disclosure. It comes, if you like, from the Whistl side of the table. You can see

25 | the date, the date doesn't concern me, but there are two pages I'd like to show you but

26 | not read out. The first is page 709. And so --

1 THE CHAIR: Are we disapplying r.102 on this or not?

2 MR HARRIS: Uhh.

3 THE CHAIR: Is it going to be continued to be subject to restriction on --

4 MR MACLEAN: Collateral use.

5 THE CHAIR: Collateral use?

6 MR HARRIS: No, this one must have been --

7 THE CHAIR: Because you're referring to a document in open court that's been read

8 by the tribunal. So do I need to make an order now or not?

9 MR MCINTYRE: I'm told that this is covered by the previous order, so the collateral

10 restriction would have to have been lifted for us to give this to the tribunal.

11 MR HARRIS: Yes, that's how I understood it.

12 THE CHAIR: The mere fact that the document's been read by the tribunal in open

13 court, does not disapply the restriction on collateral use. That's fine.

14 MR HARRIS: Yes, thank you. Anyway, you can see the date and you can see how

15 that relates to the CCNs, which are in early 2014. So this is, in broad terms, what that

16 party considered were its investment opportunities. And then if you look at page 709,

17 you can see under that heading that there were further opportunities. The key one is

18 if you could just look on the right-hand side -- well, either in the left-hand column with,

19 if you like, pictures, do you see the middle one and what that is called? And then next

20 to it in the text on the right-hand side again the heading.

21 THE CHAIR: Yes.

22 MR HARRIS: So that was a further opportunity as identified by that party at that time.

23 And then the next page is quite short, if you like. If you turn over to page 716, it just

24 gives you an idea of the scale of that opportunity and you can see in the table on the

25 left-hand side under the summary financials, you can see what the heading of the first

26 item is and the scale of the figure. And then beneath it you can see the heading of the

1 second item and the relative scale of that figure. And then you can see, it's very easy
2 to work out approximate percentage of the second heading by reference to total sales
3 and all I -- my only submission is this document demonstrates that that second
4 heading is material. It's not a de minimis further opportunity.

5 The second confidential document I would like to show you is -- because a point is
6 taken against me, "Oh well, that opportunity is not relevant in your case about bulk
7 mail" and also it is said against me that it's not a pleaded point. Can I show you on
8 that pleading point, the confidential --

9 THE CHAIR: The fact is that -- pretty logical -- but you're talking about unaddressed
10 mail. That is going to be part of what goes in on the end-to-end delivery service and
11 if there's an argument as to whether that is part of the attractiveness of being in that
12 market, then it should be disclosed. Now, I've understood that but let's see what
13 McIntyre says, because now I've understood what category 8 is, because I hadn't
14 focused on footnote 9 before, I can see that this is something that, at least from my
15 point of view, subject to speaking to the other two, is going to be relevant, but it's not
16 a live or die issue. You know, it's not going to make a huge amount of difference on
17 disclosure, but it's probably something that we think that the experts will probably need
18 to address when it comes to doing their expert evidence.

19 Mr McIntyre, what have you got to say about that? Because Harris has come up with
20 a document that seems to indicate why, in deciding whether or not to go into this
21 market and its attractiveness, and it can probably go into pricing decisions as well, that
22 unaddressed mail is relevant. It's part of the whole business with the business
23 includes unaddressed mail, includes unaddressed mail.

24 Further submissions by MR MCINTYRE

25 MR MCINTYRE: Yes. I think Mr Harris actually had three objections to our sort of
26 version of the disclosure wording. Would you like me just to deal with the unaddressed

1 mail?

2 THE CHAIR: Unaddressed mail. I think let's just deal with unaddressed mail, because
3 I think that it's one that is not critical for you. It's not critical for him. But I think it does
4 fall within something that I think the tribunal will probably want to look at when it comes
5 to trying this case.

6 MR MCINTYRE: Sir, the answer from my point of view is fairly simple. Can I just start
7 with an uncontroversial proposition, which is that relevance for disclosure purposes is
8 assessed by relevance, by reference to what is in dispute on the parties' pleaded
9 cases.

10 THE CHAIR: Absolutely.

11 MR MCINTYRE: Now, category 8 was a disclosure category in Whistl because Whistl
12 expressly and specifically pleaded an issue concerning unaddressed mail.
13 Unaddressed mail I should say, is obviously a completely separate market from bulk
14 mail, and the tribunal has that point. But although the claim was primarily about bulk
15 mail, Whistl specifically pleaded as part of its counterfactual that it would have supplied
16 greater volumes of unaddressed mail and that's not derived from any confidential
17 material. That's from the pleadings.

18 THE CHAIR: So you're saying that whilst it could be relevant, it's not yet relevant
19 because it's not --

20 MR MCINTYRE: Precisely.

21 THE CHAIR: -- been pleaded.

22 MR MCINTYRE: And it's a very interesting argument that's been articulated, but it's
23 not a pleaded argument. Can I just make this point too, sir? The Class Representative
24 has had Whistl's pleadings for more than six months, and there is a lot of copying and
25 pasting in the class rep's particulars from the Whistl particulars. No criticism intended,
26 of course. But this particular point about unaddressed mail was not adopted, and we

1 presume that must have been a conscious decision, because there is liberal adoption
2 of other points. But the plea on the unaddressed mail market was not pleaded and
3 not introduced. Now, would it become relevant if it were pleaded?

4 MR HARRIS: (Inaudible)

5 THE CHAIR: Yes, if it's in the pleading, then --

6 MR HARRIS: Thank you.

7 THE CHAIR: Look, if McIntyre is right and it's not in the pleading, you're not going to
8 get disclosure if it doesn't -- if it does not relate to a pleaded issue, then obviously it's
9 out. If it does relate to a pleaded issue, then in my view it's in. But you show me the
10 pleading because that's a critical (inaudible).

11 MR HARRIS: Sir, you need to pick up the confidential bundle again, it's tab 3. It's our
12 reply, parts of which are confidential.

13 THE CHAIR: Which bundle?

14 MR HARRIS: It's the confidential bundle with red on the spine.

15 THE CHAIR: Yes.

16 MR HARRIS: It's tab number 3.

17 MR MACLEAN: Yes.

18 MR HARRIS: And if you were to turn to bundle page 581 and I've got to be careful
19 here because --

20 THE CHAIR: Just show me where am I meant to read?

21 MR HARRIS: I beg your pardon. It's paragraph 22(c) which in this document is
22 completely unredacted but we just need to be careful what we say out loud, because --

23 THE CHAIR: I'll just read it. (Pause)

24 But it -- one other.

25 MR HARRIS: What it says is "would have taken other measures", and then it gives
26 a single for instance. And what you'll see in the document that I turned up before, is

1 that the one for instance that we have cited is the other one on that page.

2 THE CHAIR: No, I agree, but McIntyre's point is going to be this has not been pleaded.
3 Look, if you amend your reply and put it in, I don't think he's going to oppose it but at
4 the moment it's not in your reply.

5 MR HARRIS: In that -- well, we say it's never been said to us before where you've
6 used the phrase, "have taken other measures, for instance" and we give one, "Oh, you
7 need to give a full list of all of them" but if my learned friend now says we should give
8 another for instance, we'll happily do that. But it seems a sterile debate. It's relevant
9 for the reasons that I've given and if he wants the word "unaddressed" as another for
10 instance in a list of other measures about which they've never asked before, we can
11 do that.

12 THE CHAIR: I know, but the thing is that, what we're trying to do is avoid surprise at
13 trial and also have all the evidence in place so we can have a fair trial. If, for example,
14 your expert evidence is going to focus and have, let's say, a significant part of it on
15 unaddressed mail, then it should be something in the pleadings. I know there's small
16 little side alleys and stuff like that. We don't need to have that specifically pleaded in
17 the pleading. And I agree that you put, "for example", but if Mr McIntyre has taken this
18 pleading point, then I think it's only right that he should be allowed to say, "Well, you
19 haven't pleaded it until you plead it. We don't need to give disclosure."

20 On the other hand, I'm not inviting Royal Mail to redact documents to say, "Well,
21 there's a passage in this that doesn't relate to a pleaded issue and that we're going to
22 be redacting anything that deals with unaddressed mail", because that really is
23 a complete waste of money and time, particularly given that it's likely that we're going
24 to order that unaddressed mail needs to be addressed.

25 So, what I suggest you do is that you provide an amendment to your reply, to deal with
26 the unaddressed mail. It's not going to be a big topic. You can file it on Friday, and

1 we will order disclosure, in respect of unaddressed mail. But they don't need to give
2 disclosure until your reply has been made. If there's any objection to the amendment,
3 obviously that's going to take a bit longer. But any objections to the amendment
4 proposed must be in writing and filed within seven days of your supplying of the draft
5 reply. If there is no objection to the amendment you have leave to make that reply. If
6 there is an objection, then that will be resolved on the papers.

7 MR HARRIS: Yes, we can end with that.

8 THE CHAIR: So that's how we're going to deal with that issue. Okay.

9 MR HARRIS: And then that only gives rise now to the residual thing which is less
10 important, which is: going forward, exhibits to witness statements. Is the better course
11 for them to be disclosed to us and we can decide on the relevance, given that there's
12 been this dispute about relevance now, or whether the tribunal is content with the
13 existing status quo?

14 THE CHAIR: Now, we've got to clarify about unaddressed mail; I don't propose that
15 they take out that. But if there are exhibits which are wholly irrelevant to these
16 proceedings, as a matter of law, they're probably entitled to take those out. Whether
17 or not they do is a different question, because they may decide it's just not worth the
18 candle, because it's going to cost a lot of money doing that exercise. But if they get it
19 wrong, by taking out exhibits on a wrong basis, then there could be a problem further
20 down the line.

21 So, I'm not going to change the previous order that we made, because that's fairly
22 standard, and that's what we normally order when we order witness statements to be
23 disclosed. You supply the exhibits, but if there are any particular exhibits which are
24 confidential -- so it's got to be confidential and irrelevant to the issues in the
25 action -- they can take it out.

26 MR HARRIS: Yes, I'm not aware of there being other disclosure issues, but may I just

1 | check before on this item? (Pause)

2 | Nothing else from our side on item four: disclosure.

3 | MR MCINTYRE: Sir, a couple of points just for me to address you on, although we

4 | have moved much closer now to a solution.

5 | So, you'll have seen in the order that there are two competing versions of paragraph 3.

6 | Can I just say, just by way of quick overarching comment, there isn't a huge

7 | substantive difference. The reason for the different wording is primarily that we're just

8 | concerned that the class rep's wording is a bit too imprecise. This is an obligation that

9 | falls on us, and we want to make sure that it's very clearly defined. And so that's the

10 | background.

11 | The first objection that Mr Harris made, this is --

12 | THE CHAIR: If we're looking at the red bit?

13 | MR MCINTYRE: Yes.

14 | THE CHAIR: "Shall provide the copies of", and he put all disclosures at any time

15 | during the Whistl proceedings by any party or non-party.

16 | MR MCINTYRE: The red text is --

17 | THE CHAIR: Yes, that's what they're proposing.

18 | MR MCINTYRE: Yes.

19 | THE CHAIR: And that you prefer to have --

20 | MR MCINTYRE: A precise delineation of what we mean by --

21 | THE CHAIR: I'll tell you what I prefer, and we'll see whether it works, okay? So,

22 | I would put copies of all -- I put "all relevant" before the word "disclosure", okay?

23 | Because I don't like the word "all disclosure", because that will capture things which

24 | are wholly irrelevant to the issues in this action. So, on the red wording, I'd put "all

25 | relevant disclosure", during -- "all disclosure relating to the issues in the proceedings",

26 | that's probably better. So: "all disclosure relating to the issues in these proceedings

1 at any time". And then we can put, after non-party, put a full stop. And then: "this will
2 include, for the avoidance of doubt, the following". And then we go through the items,
3 a) you've already dealt with category; we take those out. (Pause)

4 So, a) we would take out the word "with the exception of", those bits go. Then any
5 other documents assigned to disclosure identification number not contained in the
6 disclosure list, that's fine. The voluntary disclosure provided by LDC in the Whistl
7 proceedings.

8 And then -- or we're leaving in. Yes? So four is sensible, okay. Are there any
9 documents though that you have that have been disclosed by any party that falls
10 outside your a to c?

11 MR MCINTYRE: So this is precisely the point, sir, and this is why I still have to
12 advocate --

13 THE CHAIR: If you tell me if there are any, then I know where to go from.

14 MR MCINTYRE: -- for our version. Yes, of course there are documents that are not
15 captured by this, such as inter-partes correspondence, but that we say that's not
16 disclosure. So this is precisely why we have our own. The problem for us is the idea
17 of "all disclosure". We don't want to have silly disputes further down the line about,
18 "Well, why didn't you hand over this letter?" And we say: "A letter isn't disclosure".

19 So what we have said is we're going to give this: paragraph A, all documents listed in
20 the disclosure lists. Right? And the Class Representative then makes a point in the
21 skeleton, says, "Well, that's not enough". That doesn't capture ad hoc disclosure.
22 That's a mistake, I think, in my learned friend's skeleton, because they haven't gone
23 on to read paragraph B. Their complaint is: you've not caught ad hoc disclosure
24 outside the disclosure lists. The straightforward answer to that is: yes, we have.
25 Paragraph B is designed to deal specifically with that.

26 So paragraph B, in addition to all the stuff from the disclosure lists, captures any other

1 documents assigned a disclosure ID number in the Whistl proceedings, but not
2 contained in the lists. So that sweeps up all the ad hoc, and now the reason that we've
3 referred to disclosure ID numbers is simply that that is how Royal Mail's solicitors are
4 going to carry out their obligations. That's how they are going to approach this task
5 mechanically. They'll go to work out what they have to hand over, they'll go to the
6 disclosure lists and give everything in that, and then they'll look at their systems and
7 see, well, what else is there, if anything, that has a disclosure ID number that wasn't
8 in the lists, and then they'll give that. And by doing that, we say we will have handed
9 over all disclosure that was given in the Whistl proceedings.

10 So that's why we have articulated it in this way, that's why we don't agree with the
11 Class Representative's wording of "all disclosure", and it is also, sir, why I think we
12 would push back on your formulation of "all relevant disclosure", because it has that
13 same problem as the Class Representative's language, the possibility for further
14 disputes down the line.

15 THE CHAIR: What I'm inclined to do is to use the current wording, but it ends "copies".

16 (Pause)

17 So I'm inclined to say where it's in red:

18 "Copies of all disclosure disclosed at any time during the Whistl proceedings by any
19 party or non-party relevant to the issues in these proceedings." [As read]

20 And then A, B, we've discussed already; C, we've discussed; but then I'd add in a D,
21 any other documents disclosed in the Whistl proceedings, relevant to the issues in the
22 proceedings, because I'm keen that we have that. But I understand your point, about
23 inter-partes correspondence may have all sorts of stuff in it, which is not going to assist
24 anyone, it's not really relevant to the issues in the proceedings and is not actually part
25 of the disclosure in those proceedings, so you don't really need to worry about that.

26 Obviously, if there's something in disclosure, I mean, inter-partes correspondence,

1 which is fundamental, you may say actually, we're going to give you this letter and that
2 letter, and in my experience, you know, it's not all or nothing when it comes to
3 inter-partes correspondence, when you've got subsequent proceedings. Sometimes
4 there will be something in there that's highly significant that should be disclosed, other
5 times it's just sort of routine stuff that no one wants to read, no one will ever read it,
6 it's never going to be referred to at trial. So if you come across something in
7 inter-partes correspondence that you say, actually this is material, I can see that being
8 of real value in the proceedings, I can see that in the trial bundle, and disclose that.
9 But if it's just a sort of routine run of the mill stuff, no one wants to read it. It's just
10 a waste of money, giving disclosure.

11 So what we'll do is we'll give a ruling on disclosure now. So that's going to be our
12 Item 4.

13 (1.05 pm)

14
15 Ruling on disclosure

16 (1.14~pm)

17 THE CHAIR: Yes, Mr McIntyre. You had something to say?

18 MR MCINTYRE: Sir, I'm grateful. I apologise for interrupting. I just wanted to address
19 you on the exhibits point. I had understood, when we were looking at the draft order,
20 I think you indicated that paragraph 4 of the draft order would stand. It says:

21 "... not be required to disclose exhibits to witness statements that the Defendant was
22 entitled not to disclose pursuant to the terms of paragraph 1(e) of the Post-CPO
23 Directions Order."

24 So that just --

25 THE CHAIR: I meant, in 4, you need to revise it to exhibits which are both confidential
26 and irrelevant.

1 MR MCINTYRE: Yes, it's the confidential point; it's an addition that wasn't
2 paragraph 1(e).

3 THE CHAIR: Exactly. I think I'm going to do that because, generally, that's what I do.
4 And when you've got an exhibit -- let's say you've got an exhibit like that, there'll be
5 some confidential stuff that's confidential, it is worth redacting because it doesn't relate
6 to the issues in the action. There may be stuff that you will have in there that's not
7 confidential and it's no big deal, it stays in there. That's what I think.

8 Because, look, it's much easier to follow a witness statement when you've got as much
9 as possible of the exhibits available. Now, when you start taking out huge chunks,
10 you may lose the ability to sort of fully understand what that witness statement is, so
11 I'm going to make that order. That's what it's going to be.

12 MR MCINTYRE: Can I just make two --

13 THE CHAIR: You can. But -- Yes, you perfectly can.

14 MR MCINTYRE: Can I just invite clarification? In that case, I won't push back --

15 THE CHAIR: Yes, that's fine.

16 MR MCINTYRE: Can I just invite clarification? When you say both confidential and
17 irrelevant, there may of course be exhibits which partially contain some confidential
18 information, but they are not confidential in their totality. I just want to clarify how that
19 would be addressed.

20 THE CHAIR: Let's say you've got exhibit 15. Exhibit 15 has got confidential material,
21 and it's irrelevant. You leave out the whole of exhibit 15. If exhibit 16 is all confidential
22 and irrelevant, you take it out. If exhibit 17 is not confidential, but has what is what
23 you say is not really relevant to the issues in the action, leave it in. Is that clear
24 enough?

25 MR MCINTYRE: That's clear. Thank you very much.

26 THE CHAIR: I'm only doing this because we're talking about exhibits to a witness

1 statement. It's slightly different when you're looking at disclosure of freestanding
2 documents, but when it's an exhibit to a witness statement, this is how I prefer it to be
3 done. And it's because the more of the exhibits you have, the more it is easy to follow
4 and understand what's in the witness statement.

5 Once you start pulling out stuff unnecessarily, it may be harder to follow. So that that's
6 what I'm doing for exhibits. But it's not the general rule for normal disclosure of
7 a freestanding document.

8 MR MCINTYRE: I understand. Thank you.

9 THE CHAIR: Mr Harris.

10 MR HARRIS: Yes, I'm just conscious of the time. We may want to ...

11 THE CHAIR: Yes. We can -- let's see what -- what have we got left?

12 MR HARRIS: My list (overspeaking) --

13 THE CHAIR: First disclosure.

14 MR HARRIS: Item 5 was Practico.

15 THE CHAIR: Yes, that won't take long. Cost budgets -- I think we're going to have to
16 talk about cost budgets, why the costs have gone much higher than they were before.

17 MR HARRIS: Yes.

18 THE CHAIR: Confidentiality is really easy because, effectively, you've agreed
19 confidentiality on a sensible basis. And then directions to trial, that's a quick run
20 through of the order, putting in all the dates.

21 So I wouldn't envisage that we're going to be more than an hour this afternoon, but
22 hopefully -- but you never know, once we get into the budget. So maybe a bit more
23 time.

24 But we'll have a break and we'll come back at, let's say, quarter past -- or just, are
25 people happy to come back at 2 pm? Then you can all go quickly. Is that a problem?

26 Okay.

1 We'll come back at 2 pm, then we'll resolve the rest. Thank you very much.

2 (1.18 pm)

3 (The short adjournment)

4 (2.02 pm)

5 THE CHAIR: Sorry. Just one thing on -- one or two things on experts, which we'll put
6 on the ruling, is that it's really important that the experts give objective and
7 non-partisan reports and evidence. Because all too often, we're seeing in this tribunal,
8 let's say, relatively extreme positions being taken.

9 It's in no one's interests that we have non-objective experts because: a, it doesn't
10 assist the tribunal; but b, they could be criticised, which will have an impact on them
11 for their future prospects if they concentrate on being experts. But it's a really
12 important message that I want to get across, and that extreme positions don't help.

13 The second point I'd like to make -- is in the ruling (audio distortion) -- is that we do
14 not expect experts to quantify the overcharge to the last farthing. Sometimes people
15 are looking for precision where there isn't precision, and this tribunal is going to have
16 to determine some of these issues on a broad-axe basis, rather than a completely
17 precise basis.

18 The third point is that when it comes to the expert reports, particularly for trial, there
19 will be page limits. We do not want to have a situation whereby we're given hundreds
20 and hundreds, if not thousands, of pages of expert reports, whilst at the same time,
21 you, as counsel, have got limited page numbers for your submissions. All too often
22 it's forgotten that expert reports are to be controlled and be of a sensible length.

23 So those are the points I wanted to make on that.

24 On disclosure, an additional point is that we do expect an element of give and take on
25 disclosure, and that the parties do co-operate. We find that when solicitors meet and
26 go through disputed areas of disclosure, quite often they will agree. And so it may be

1 that if the parties are having difficulty on agreeing disclosure, that the sensible thing is
2 for solicitors to agree. It's so much easier to have a give and take if you meet, rather
3 than the traditional method of writing long letters.

4 The final point on disclosure is that we do have relatively flexible ways of dealing with
5 disputes over disclosure. You know, we can have a hearing for guidance, or the
6 parties can write in and ask for a ruling in principle on specific areas. And the tribunal
7 can either say, yes, we're going to give a ruling on the papers, which can be indicative.
8 And if the parties accept that, then it will be -- the parties will follow that. If either party
9 is not happy with that and wants an oral hearing, then we have an oral hearing to
10 determine that issue.

11 But we are available to help resolve issues and get this case ahead. And I'm fully
12 appreciative that disclosure is often the most expensive item in a case, and so clarity
13 is required from the tribunal. If you need it, you will be provided with it.

14 With that introduction, if we can go into item 5, which is the LPA and what's Practico
15 doing. So on the LPA, there's been -- there's an updated LPA --

16 MR HARRIS: LFA, I think.

17 THE CHAIR: LFA. Yes. LFA. Is there anything else that you'd like to say about the
18 LFA, before I start asking you some questions? (Pause)

19 MR HARRIS: I just hope I can answer the questions.

20 THE CHAIR: Sorry?

21 MR HARRIS: I just hope I can answer the questions.

22 THE CHAIR: No, of course you can. You are very good at answering my questions,
23 and I appreciate the way you're able to handle things. You know that, Mr Harris.

24
25 Discussion re LFA and Practico

26 THE CHAIR: So you've updated -- you filed the updated LFA, and you'll see that, in

1 | this case, we dealt with the wording of the LFA. The only query I've got is: does that
2 | LFA have the flexibility needed, that in respect of any cost fees and disbursements not
3 | approved, or in respect of unclaimed damages, that the tribunal will have the power to
4 | direct that whatever's left or whatever it considers appropriate can go to charity or
5 | cy-près.

6 | That was an issue that arose in Gutmann v SSWT. Fortunately, the parties were able
7 | to agree that that wasn't a problem and they've agreed that £3.8 million will go to
8 | charity, out of the unclaimed damages.

9 | But how -- is there sufficient, let's say, flexibility in the LFA to cover that? Of course,
10 | the LFA recognises that any order for cost, fees and disbursements is subject to the
11 | discretion of the tribunal. It does that. But does it have that flexibility in relation to
12 | payments to charity? You don't necessarily need to answer this very moment, but if
13 | someone can check, then we can deal with that.

14 | MR HARRIS: Somebody could please check because I'm afraid --

15 | THE CHAIR: No, no, no. But you've got a huge team behind you and it does include
16 | some regulars who know what they're doing. So I think that they should be able to
17 | give us an answer during the course of today's hearing. As regards Practico, which
18 | individual is doing that?

19 | MR HARRIS: The name of the person?

20 | THE CHAIR: Name of that person, yes.

21 | MR HARRIS: Andrew Ellis.

22 | THE CHAIR: Andrew Ellis. What's his qualifications and all that experience?

23 | MR HARRIS: Might be able to look that up right now. I don't --

24 | THE CHAIR: Look it up now. Yes.

25 | MR HARRIS: Yes. If we could look that up please. I can tell you an outline, if it
26 | assists.

1 THE CHAIR: Yes.

2 Submissions by MR HARRIS

3 MR HARRIS: The process that the tribunal set out on the last occasion has been
4 implemented. It's working. There are no issues with the process. It was looked at
5 and approved by Mr Nicholas Bacon KC, who you will recall appeared on the last
6 occasion, he's a cost specialist. And the way it works is there are monthly reports from
7 Practico, Mr Ellis, to just Mr Aaronson, who's as you know the sole director of the
8 claimant company. They don't go to the law firm, let alone to me, and that's the
9 measure of independence, and that's operating fine.

10 As for Mr Ellis, his profile is up in front of me, it says he's been working on costs since
11 1991, co-founded Practico in 2011, he's ranked band one in chambers UK. Just says:
12 go to cost lawyer. He's a lawyer.

13 THE CHAIR: Yes, I know that.

14 MR HARRIS: Yes.

15 THE CHAIR: And on a practical level, have any of his recommendations led to
16 a reduction in costs?

17 MR HARRIS: I'm told yes. Mr Aaronson, of course, is the man who sees this. I don't
18 see this, nor does my learned friend.

19 THE CHAIR: No, of course you don't. I'm just talking to him, I was not talking to you,
20 and he's answered that. Thank you very much.

21 Mr MacLean, have you got anything you'd like to say on the LFA, before we go on to
22 Practico?

23 MR MACLEAN: No, I don't.

24 THE CHAIR: You've got nothing to say?

25 MR MACLEAN: I've got nothing to say either on that or on Practico.

26 THE CHAIR: Thank you very much. You could have left that to Mr McIntyre.

1 MR MACLEAN: I could have left it to him, but you asked me.

2 THE CHAIR: I know. (Pause)

3 The next item is the item five update, updated LFA and Practico. In the CPO judgment
4 at paragraph 32 to 41, we dealt with the funding arrangements, and we requested that
5 the LFA should be revisited, in the light of other decisions and the factors set out in
6 that judgment. Mr Bacon, Nicholas Bacon KC, looked at a revised LFA, which is being
7 now put in place, and we're satisfied by the wording of the revised LFA.

8 There's one further matter, which will need to be checked and covered if it's not already
9 covered, is that it needs to be clear that any costs, fees and disbursements to be paid
10 out and in what order, is ultimately a matter for the tribunal, and that the tribunal is able
11 to direct that any unclaimed damages or sums allocated, costs, fees and
12 disbursements, not approved by the tribunal, may be paid to charity or applied on
13 a separate basis. Subject to checking that, the updated LFA is approved, and we
14 suggest that Mr Bacon look at what we have said today and look at the arrangements,
15 if it's already covered, that's absolutely fine. If he thinks that it does need further
16 clarification, that should be done.

17 As regards the review of costs, we determined in the CPO judgment that it'd be
18 appropriate that a cost specialist be engaged to advise Mr Aaronson, who is the sole
19 director of the CR, in the vetting and approving of bills. Mr Harris, on behalf of the CR,
20 has explained that the firm Practico was co-founded by Mr Andrew Ellis in 2021. He
21 is a highly rated cost lawyer and he's been advising Mr Aaronson directly by way of
22 monthly reports on the costs, and those reports have already led to some costs being
23 not approved or reduced, but it does seem that that part of it is working.

24 Next item is cost budgets.

25 MR HARRIS: Sir, I think strictly Practico was 2011, not 2021 when it --

26 THE CHAIR: Was it 2011? We'll put that in the ruling, thanks very much, yes.

1 On the cost budgets, that's the next item, and really the question is, and Mr MacLean's
2 raised this in the skeleton, that the tribunal should be looking at why the costs have
3 increased from the initial budget that we saw before, to 15.275 million in the current
4 draft. Obviously we can see which items have changed, but it's not as easy as it
5 normally is, because the cost budgets are not necessarily like for like, and so it's been
6 done slightly differently the second time. But I think a lesson for the future is, if you
7 are going to do cost budgets, try and do them on a consistent basis, so it's much easier
8 for us to see what's increased and what's decreased. It's not a criticism, it's just that
9 it's a much easier task, because it's taken me a bit longer than normal to be able to
10 have a sensible comparison between the two, and to understand where the
11 differences lie. But the first question is: are all these costs secured by funding?

12 MR HARRIS: Yes.

13 THE CHAIR: Second question is: are we dealing with a scenario of deferred fees for
14 the lawyers, or are the lawyers being paid on an ongoing basis?

15 MR HARRIS: Solicitors are on the CFA.

16 THE CHAIR: Yep, but it'd be a partial CFA. Yes, I understand that.

17 MR HARRIS: But it's a partial CFA.

18 THE CHAIR: Yes, but on the partial CFA, the bit that you're going to get, in any event;
19 is that being covered on an ongoing basis, or is any part of the fees deferred? So
20 forget about the uplift, but the ongoing cost being incurred, the bills from you and
21 counsel; are they being paid, or is any element of that being deferred? (Pause)

22 MR HARRIS: My instructions are part of the solicitor's hourly rates being paid on
23 a monthly basis, part is being deferred, and then on top of that, there is a success fee,
24 should there be success.

25 THE CHAIR: Having deferred payments can feature on reasons of separate judgment.
26 Are we saying is it like being deferred for, let's say, a month or two, or are we saying

1 is being deferred until a settlement or judgment?

2 MR HARRIS: Deferral is until the conclusion of the proceeding.

3 THE CHAIR: What happens if proceedings are dismissed? Is the funder going to pay

4 the deferred amount, or is it actually, in effect, another, in real terms, contingency,

5 because the lawyers are not going to get paid that amount if they lose, it's only if they

6 win and there's money in the pot, they'll get that. But what are we dealing with?

7 You just need to get to the bottom.

8 (2.18 pm)

9 (Audio was lost)

10 (2.20 pm)

11 MR HARRIS: Thank you for indulging me with the time. So what I explained before,

12 I've been corrected.

13 THE CHAIR: Well, that's good.

14 MR HARRIS: Yes.

15 THE CHAIR: I was worried about that.

16 MR HARRIS: Yes. So, based upon what I had understood first time round, but I am

17 now told is wrong, there are not two parts that don't get paid on a monthly basis.

18 There's only one part, and it's the success fee.

19 THE CHAIR: That's absolutely fine. There's no problem with it.

20 MR HARRIS: So in other words, to give stylized examples, let's say there's a bill of

21 100, then on a monthly basis, for the sake of argument, the solicitors get 70 each

22 month. For the sake of argument, the success fee, the deferred bit, is 30. If there's

23 success at the conclusion, they'll get the 30, but if there's not, they don't. But

24 everything else has already been paid on a monthly basis.

25 THE CHAIR: That's absolutely perfect. And you've already given who's got the

26 undertaking, referred to at paragraph 37, the previous ruling, which is:

1 "In the event that the PCR -- which is now the CR -- has any concerns about the
2 financial position of the service and its ability to continue funding the proceedings,
3 which are not resolving within 14 days of undertaking, it will inform the tribunal role in
4 writing." [As read]

5 I think that it would be helpful if there are any substantial, let's say, issues about being
6 paid on an ongoing basis, the tribunal should be told about that, because when it
7 comes to the end of the proceedings, whether it's a settlement or a judgment, you can
8 then have conflicts between the funder and the lawyers, and we want to avoid that as
9 much as possible, and if you have too much fees which are deferred, you can have an
10 imbalance or whatever. But as long as there is an issue, and that the fees are
11 significantly behind, the CR should notify the tribunal, then we can look at it and see
12 where we're going.

13 MR HARRIS: So the undertaking remains in place, not being triggered, but if it did,
14 we would --

15 THE CHAIR: I'm revising the undertaking slightly, because it is not just concerns about
16 its ability to pay, you may have a situation where you're quite satisfied that Asertis has
17 the ability to pay, but it will not pay, and that is a scenario which is not yet covered in
18 the undertaking. So I think the undertaking needs to be modified a bit. So if you could
19 sit down for one second.

20 (2.23 pm)

21
22 Ruling on LFA and Practico

23 (2.24 pm)

24 THE CHAIR: Mr Aaronson, do you understand that? Are you prepared to give that
25 undertaking?

26 MR HARRIS: May I just take instruction? (Pause)

1 Yes, sir.

2 THE CHAIR: Thank you.

3 So now go back to cost budget. Item six.

4
5 Discussion re cost budget

6 Submissions by MR HARRIS

7 MR HARRIS: Yes, so there are two short preliminary matters, then I'll explain the
8 evolution of the budget.

9 The first one that you've already dealt with, with me, is it is fully funded.

10 The second one is: in our joint estimation, realistic. So last time around, the two key
11 concerns of the tribunal were: is it a realistic budget and is it funded? And that remains
12 the case. I appreciate it's a lot higher, but I'm going to deal with that now. So that's
13 the third point.

14 I've identified eight reasons for the increase, and if it pleases the tribunal, I'll quickly
15 run through and identify why the budget has gone up.

16 THE CHAIR: Before you do it, the purpose of this cost budget is to inform the tribunal,
17 and obviously Royal Mail, costs are being incurred on an ongoing basis. Cost budgets
18 can also have a function whereby the tribunal says if you exceed this cost budget,
19 you're not going to get your costs. We're not talking about that type of cost budget.

20 I'm not imposing cost budgets on this case, unless someone says I need to
21 for the purposes of restricting your client's ability to get costs at the end of the day. All
22 we're trying to do -- that's why the schedules are general, that's what I expected -- is
23 to understand what those ongoing costs are and that we can see the direction of travel
24 and, if necessary, can say some things, but it's not intended to be a shackle on the
25 CR. As long as you understand that; I think I made that clear last time, but I want to
26 make it clear again, so there's no misconception, because this is not like doing a case

1 in Chancery and saying, "Here's my cost budget, the other side has their cost budget",
2 because we're not requiring Royal Mail to provide any such breakdown. This is just
3 part of the tribunal's basic case management and supervisory role of collective
4 proceedings.

5 MR HARRIS: And I'm grateful for the indication again. That's why I began with those
6 two points, because the key concerns that were raised last time, and I fully understand
7 and we fully respect our number 1: is it realistic? Answer: yes. Uniformly on this side,
8 we all take the view that that is a realistic budget at this stage, with the caveats that
9 have to be entered at this stage. That's item number 1.

10 And arguably, of equal importance, you having heard that all parties on my side of the
11 court take the view that it is realistic with our experience and our previous exposure to
12 these types of proceedings, is: is it funded by the funder? And the answer to that is
13 yes.

14 So, those in my respectful submissions, just like last time, they are the two key criteria,
15 and they are both met. But if it would assist -- it may not -- but if it would assist, I can
16 identify eight reasons why the budget has gone up compared to last time, albeit that
17 you will doubtless very well recall that last time I entered all manner of reasonable and
18 sensible caveats about how the budget was at that stage. I don't know if it would
19 assist, but I can if you'd like.

20 THE CHAIR: If you can do it in five minutes, that's fine.

21 MR HARRIS: I will enumerate them very briefly.

22 THE CHAIR: List them and then --

23 MR HARRIS: Yes, just list them. They're not in order of importance. The budget has
24 gone up compared to last time because of number 1, the instruction of Practico;
25 number 2, the creation and the funding of the customer group; number 3, that there's
26 now, on both sides, another additional expert and expert discipline compared to what

1 was envisaged last time, namely forensic accountancy; number 4, the hourly rates for
2 some members of the team have increased, compared to where they were at the
3 outset of the litigation and the inception --

4 THE CHAIR: But not more than inflation, I would have -- it's just --

5 MR HARRIS: No, no, they have gone up more than inflation. If you'd like me to show
6 you them, I can show them to you.

7 THE CHAIR: I looked at the rates last time and they're reasonable. Are you saying
8 the hourly rates have significantly increased?

9 MR HARRIS: Yes. Would you like to see them, or shall I finish the list?

10 THE CHAIR: No, no, let's just look at that now. I can deal with this now.

11 MR HARRIS: Yes. The --

12 THE CHAIR: I don't need to look at anything. You just tell me what they are.

13 MR HARRIS: Well, if you want them, they're page 1310. So just reading it from the
14 top. The partner at Lewis Silkin --

15 THE CHAIR: I better look at it then. So which bundle is it?

16 MR HARRIS: In my one, it's bundle two of two, tab 99, page 1310.

17 THE CHAIR: And you're saying all this has been looked at by Practico and they think
18 that this is reasonable.

19 MR HARRIS: What we're saying is that all of this has been looked at by Practico and
20 there have been no problems with the process with Practico. Absolutely.

21 THE CHAIR: Okay. Just a second. So where do I see the hourly rates?

22 MR HARRIS: Bottom of that page, left-hand side under the heading "Notes". (Pause)

23 THE CHAIR: Yes, but that is substantial increases because it -- last time I approved
24 it because I thought those rates were reasonable but then these are substantial
25 increases.

26 MR HARRIS: Yes, sir. That's why I'm careful to draw them to your attention. (Pause)

1 THE CHAIR: And then intended to get an uplift on these fees if there's success.

2 MR HARRIS: At the solicitor level.

3 THE CHAIR: Is success an approved outcome?

4 MR HARRIS: Plainly to the extent -- absolutely. And if I could just -- I'm in your hands
5 but if I could provide a little context, it's important to remember two things.

6 The first is that, as was explained in some detail by my instructing solicitor,
7 Mr Wanambwa, on the last occasion, his involvement in this case is now almost
8 six years old and the original hourly rate came from years ago. If you recall, the
9 so-called genesis letter was that he spotted the relevant Ofcom decision and he
10 engaged with funders and then PCRs and other members of his firm and the counsel
11 team. And so my submission is that that partner rate that was identified at the last
12 hearing, which is already six months ago, is both (a) out of date and (b) doesn't reflect
13 what Mr Wanambwa secures in the market and for what it's worth, is very likely to be
14 considerably lower than the hourly rate of either of the two partners that appear in this
15 matter for Royal Mail. Just for context,. we have one partner and they have two
16 partners at levels where, that's not a deprecatory remark, but notoriously, their rates
17 will be very likely to be higher and then there's been an update with some members of
18 the solicitor team, as you can see, but again, likely to be (a) fewer in number than
19 those on the Hogan Lovells side for Royal Mail -- you could inquire if you were so
20 minded -- and likely to be lower rates. Again you could inquire if you were so minded.
21 But our respectful submission is that they are both realistic and they're funded and
22 they are sensible updates reflecting market rates for that firm.

23 THE CHAIR: Okay. I'll just hear from Mr MacLean. Have you anything to say on the
24 budget?

25 Submissions by MR MACLEAN

26 MR MACLEAN: I've got something to say more generally about this, given what you

1 | were told on the previous occasion. You recall you were very interested, sir, in whether
2 | the budget was realistic. That's the phrase that you used.

3 | THE CHAIR: That's what we wanted to be sure about.

4 | MR MACLEAN: And you put Mr Bacon on the spot and said, "Have you been through
5 | this line by line?" And Mr Bacon said he had not.

6 | MR HARRIS: (Inaudible)

7 | MR MACLEAN: Will you let me finish?

8 | MR HARRIS: I beg your pardon.

9 | MR MACLEAN: And then you ask the same question of Mr Harris and he said he'd
10 | have to refresh -- Day 1, he said he'd have to refresh his memory and on Day 2, he
11 | came back and said he'd been through it in 2021, and he'd been through it again, and
12 | they were satisfied, at that stage, that was a realistic budget.

13 | THE CHAIR: And so was I.

14 | MR MACLEAN: And so were you.

15 | THE CHAIR: Yes, that's fine.

16 | MR MACLEAN: Now, the question, amongst other things -- I don't know if you've seen
17 | what my solicitors have prepared which is a comparison table. So you can see the
18 | various line items, item by item. And you were told by Mr Harris that at the certification
19 | stage the figure in the budget was 637,000, you were told that it was slightly over.
20 | Turns out, it wasn't slightly over, it was 1.6 million. And that's on page 1315 of this
21 | CMC bundle 2 that you're looking at under tab --

22 | THE CHAIR: What they say is certification in the first CMC, which I think they mean
23 | the CPO, the directions order --

24 | MR MACLEAN: Yes.

25 | THE CHAIR: -- they're saying it's 1.63 million.

26 | MR MACLEAN: Yes. Sorry? 1.63 million at that certification.

1 THE CHAIR: And they're also saying that in respect of the --

2 MR MACLEAN: And that's --

3 THE CHAIR: -- second CMC, which is this hearing --

4 MR MACLEAN: Yes.

5 THE CHAIR: -- that it's incurred already 1.3 million.

6 MR MACLEAN: Hmm.

7 THE CHAIR: And -- yes.

8 MR MACLEAN: Yes.

9 THE CHAIR: But can you just address me on these cost rates though, because before

10 they were considered by me, rightly or wrongly, to be entirely reasonable and that

11 there was no problem at all with those rates, I don't think you had any problem last

12 time.

13 MR MACLEAN: Well, I don't think we examined it any (overspeaking) --

14 THE CHAIR: No, I think I examined it and I didn't say anything adverse.

15 MR MACLEAN: I didn't make any submissions, I accept that, but --

16 THE CHAIR: But on these ones --

17 MR MACLEAN: Yes.

18 THE CHAIR: -- do you have any submissions on these actual figures? These rates.

19 MR MACLEAN: No, I don't, but I do say this, that if the excuse which is being or the

20 reason which is being suggested is that, "Oh, well, the partners got engaged six years

21 ago", they ought to have been telling you that, be in a position to tell you that, that

22 these rates were way below what they say is the market rate.

23 THE CHAIR: Let's put it in more concrete terms. If at the time of the CPO --

24 MR MACLEAN: Yes.

25 THE CHAIR: -- the intention was to increase the rates to these types of rates, I clearly

26 should have been told.

1 MR MACLEAN: Indeed.

2 THE CHAIR: If, on the other hand, that wasn't the intention at the CPO stage, but later
3 on they assessed it and all that sort of stuff, and you've had Bacon involved and
4 Mr Ellis involved, and they think that these rates are fine and reasonable, then I don't
5 mind. I'm not bothered. But if it was a case that at the time of the CPO, the intention
6 was to get me to approve it at the previous rates, and then the day after start charging
7 a different rate, I'm not going to be happy about that, but we'll have to hear from
8 Mr Harris on that.

9 MR MACLEAN: I can't help you with that because obviously, I don't know.

10 THE CHAIR: We'll find out. Don't worry. We'll find out.

11 MR MACLEAN: Ultimately, where does all this go to, apart from realising that
12 ex hypothesi, the original rate, looking back at it now was not realistic. You also have
13 to consider, I suggest, what is the knock-on effect as far as the class is concerned,
14 because you'll recollect on the previous occasion you required scenarios to be
15 produced.

16 THE CHAIR: I do require scenarios again, now. Don't worry.

17 MR MACLEAN: And the scenarios now, now show that the Class Representative isn't
18 going to be getting anything, unless the recovery is over 100 million by virtue of the
19 increased costs and the uplift. That's where it comes down to. I can show you
20 a comparison of the figures, but that is something which obviously the tribunal will want
21 to bear in mind.

22 THE CHAIR: I must admit, the scenario table which I asked for was helpful.

23 MR MACLEAN: Yes.

24 THE CHAIR: I do want a new scenario table and we'll look at that. That's going to be
25 served within a short period of time from today. And we'll look at the scenario table
26 again at the next CMC. But I do want to have an understanding of what the scenarios

1 are, what the figures are, because these cases will either settle or go to judgment.
2 Goes to judgment, someone wins or someone loses. And that is when the crunch will
3 come.

4 MR MACLEAN: Of course.

5 THE CHAIR: When there's a potential conflict of interest between all the stakeholders.

6 MR MACLEAN: That's why you want this information.

7 THE CHAIR: I do. Well, no, that's not the only reason, but --

8 MR MACLEAN: Not the only reason.

9 THE CHAIR: One of the reasons.

10 MR MACLEAN: One of the reasons. I entirely understand and support that.

11 THE CHAIR: Yes.

12 MR MACLEAN: All I'm pointing out is that when you redo the figures on the basis of,
13 we're now told, a 15.2-odd million budget for trial, the knock-on effect is substantial in
14 terms of where you have to get to for the class to get anything out of this.

15 THE CHAIR: I know, I appreciate that.

16 MR MACLEAN: Cui bono. That's what I'm --

17 THE CHAIR: We'll get to the bottom of it now from Mr Harris. Yes.

18 Further submissions by MR HARRIS

19 MR HARRIS: Well, see, I can give you the -- it won't surprise you, but I can give you
20 the categoric reassurance that there was no intent on the part of me or anybody on
21 my side to come to the CPO hearing and seek to get certification on the back of fees
22 with the intention the next day or the next week or the next month simply to bump them
23 up having got certification. What in fact happened was we listened very loud and clear
24 to what you said on that occasion with your two colleagues about how it was important
25 going forward and at all times to continue to have a realistic budget and to take account
26 of all the moving pieces that were occurring post the CPO, including, notably

1 disclosure -- let me come back to that -- and to make sure that when you were
2 professionally satisfied, all of you, on my side, that it was realistic, would it be funded?
3 And we took that to heart and that's exactly what we've done.

4 THE CHAIR: But the point about the hourly rates is that if you're telling me that there
5 was no intention to increase the hourly rates, by you or your solicitors at the time of
6 the CPO and the figures that you gave me last time were the figures going forward in
7 the trial, then if that's what you're saying, I accept what you say. You're not going to
8 mislead me just for one client or for one case, Mr Harris.

9 MR HARRIS: 100 per cent. I can give you that categoric assurance. Yes.

10 THE CHAIR: If you say that, your word's good enough.

11 MR HARRIS: But I also therefore take issue with what my learned friend said, which
12 was ex hypothesi, therefore, those figures back at the CPO hearing and I'm quoting
13 here "was not realistic". That's not right.

14 THE CHAIR: I don't know what -- we are where we are. What we haven't come to yet
15 but when we look at the scenarios document, I will want to look at the scenarios
16 document with the correct figures now, because it was done on different figures. You
17 don't need to give it to me now, but as long as I have it within the next week, it's fine.
18 But if you could do it quicker, that's better. But, whenever.

19 MR HARRIS: I think there is one at 1309.

20 THE CHAIR: Should we look at it? If you've already done it, then that's brilliant.

21 MR HARRIS: Updated scenarios following amendment to budgets, tab 99 of the same
22 file, page 1309.

23 THE CHAIR: We've done the update. And when was this prepared?

24 MR HARRIS: Last week. In light of the updated budget, obviously.

25 THE CHAIR: So it's 13 September. Just give me a second. (Pause)

26 Where do you say that the crunch comes in? What figure?

1 MR HARRIS: Well, it all depends upon which scenario you're in. So the crunch comes
2 a lot later if you're in scenario one. So that's the second, if you like, major row down.
3 The first major substantive row down. So if there's a settlement --
4 THE CHAIR: Let's say after disclosure.
5 MR HARRIS: -- after disclosure, then plainly the amount of money incurred by way of
6 funding costs is lower at that stage. So at each stage, you can see the amount of
7 recovery at the top: 50 million, 100 million, 200 million. I mean, it's pure mathematics
8 here, isn't it? If you're at that early stage and you recover 100 million, then it amounts
9 to the percentages that are given.
10 THE CHAIR: What you're looking at is -- there's nothing secret about this table.
11 MR HARRIS: No.
12 THE CHAIR: But let's say, in scenario one, you settle at 100, funding costs will already
13 be 49 per cent or so and then at that stage, potentially, if that's a global figure that
14 you've been given, then class members have the potential of claiming 50 per cent of
15 the recoveries, and as long as you have a high take up, all that will be eaten by, it's
16 likely in a case like this, given the nature of the individual class members, it's likely that
17 you will have a proportionately high level of take up in terms of the remaining 50 will
18 be taken. Yes.
19 And then let's look at it under scenario two. Not so attractive. Scenario three is
20 difficult. Scenario four is bad.
21 MR HARRIS: That's the one I think Mr MacLean was referring to, if you like, as the
22 break even because he must have been in his mind talking about scenario four.
23 THE CHAIR: Is that right?
24 MR MACLEAN: I was talking about scenario four.
25 THE CHAIR: Thanks very much. We've got that. Then everything's so much easier
26 if you get to 200 and so -- yes. Okay.

1 MR HARRIS: And we've only split it up by hundreds of millions but plainly there could
2 be, you know, 150 million.

3 THE CHAIR: Yes. (Pause)

4 MR HARRIS: But as you will appreciate --

5 THE CHAIR: Can I just -- still studying it.

6 MR HARRIS: Sorry.

7 THE CHAIR: Sorry, a bit slow. (Pause)

8 Okay. Let's keep moving on. So we've dealt with the hourly rates. What's item five?

9 MR HARRIS: Now that we have a greater appreciation of disclosure, we've
10 considered that the trial encompasses a little bit more and has led to -- subject to your
11 ruling -- a slightly longer trial timetable. Therefore, in the way of these things, a slightly
12 bigger budget. So that was item number five.

13 THE CHAIR: Longer trial. Yes.

14 MR HARRIS: Yes. Longer prep to trial.

15 THE CHAIR: Was it longer trial and prep?

16 MR HARRIS: No, no, nobody has yet sought to revisit the preliminary estimate of
17 six weeks.

18 THE CHAIR: Okay.

19 MR HARRIS: But because of the scale of the disclosure, it's taking longer to get there
20 and that involves more costs. So that was item number five.

21 THE CHAIR: Yes.

22 MR HARRIS: Item number six is we hadn't envisaged, at this stage of the CPO
23 hearing, that there would be by this stage, three reports from our expert, let alone two
24 reports from the other side's expert, with another one to come possibly later this
25 calendar year.

26 I'm not -- this is no criticism of anybody. This is, as you said in the CPO judgment,

1 cases like this develop. This case has developed and for good sound case
2 management reasons. But that's item number six.

3 THE CHAIR: Yes.

4 MR HARRIS: Of course, I hasten to add that because of the case management at this
5 stage, it's possible that the cost later on will be lower. That's great if that's the case.

6 Number seven is part of our assessment of realism, post-CPO, is a greater
7 appreciation, particularly in the light of the disclosure from the OTS segment of the
8 implications for our trial, of the Whistl trial, not going ahead. In other words, to put that
9 another way, we've taken a step back and we've asked ourselves, does the Whistl trial
10 not going ahead have an impact upon the budget? We think it does.

11 And then the last one is, we're just conscious and we've now seen this post certification
12 that no stone is being left unturned by our opponents. Now, again, that's not
13 a criticism. They're entitled to do that. They've got a team of two KCs, two partners
14 at Hogan Lovells, a big other team, and they are taking lots and lots of points and that
15 creates cost. And we've factored that into our assessment of realism. So those are
16 the eight things that I've identified.

17 Ruling on Cost Budgets

18 Ruling On Confidentiality

19 THE CHAIR: So that finally, the only thing that's left on my list are --

20 MR HARRIS: Sir, a small point on confidentiality.

21 THE CHAIR: Of course, yes.

22 MR HARRIS: It's been a helpful degree of consensus between the two parties when
23 it comes to de-designating some of Royal Mail's originating disclosure in their
24 proceedings, and also Whistl disclosure from the Whistl proceedings that's come
25 across. But there's one slight sticking point, which is Royal Mail's position, is that
26 some seven witness statements that have been provided to us as confidential, cannot

1 be de-designated as non-confidential at this stage, that's how I understand it. And
2 we've written to query why that is the case; we haven't received a satisfactory answer,
3 and what we don't understand is why the entirety of all seven witness statements
4 should still be said to hold such sensitive, confidential information, that they need to
5 remain the subject of confidentiality obligations.

6 At the very minimum, there needs to be an explanation from Royal Mail of why either
7 the entirety of it all contains confidential information that remains sensitive today, or, if
8 that's not the case, why there are certain bits.

9 THE CHAIR: Just to explain what the significance of this is, because clearly, by the
10 time we get to trial, we'll want to have worked out if there's an issue in relation to these
11 and whether they need to be subject to a special confidentiality regime. But is there
12 a practical need from your side, why this needs to be resolved at this stage? That's
13 the only question I've got.

14 MR HARRIS: Well, it's not vital that it be done today.

15 THE CHAIR: No.

16 MR HARRIS: But equally the PTR's a long way off and only shortly before trial, and
17 there will come a point in time at which, plainly, there will be some people whom we
18 might wish to show -- after all, it is the witness statements telling the narrative as
19 between Royal Mail and Whistl, so we won't be able to show them to people, because
20 they're not in the confidentiality ring. So that's the point.

21 THE CHAIR: But the thing about these things -- this is not the first time this issue has
22 arisen -- is that what would normally happen is, you'll say, "Well, look, you've given us
23 this witness statement, it's in the CRO, we want to show it to potential witnesses". And
24 they'll either say "yes" or they'll say "no", or they may say somewhere in between,
25 which is you've got no objection to you showing it to potential witnesses, as long as
26 you don't give them a copy, so you can show it to them in your offices.

1 So there's a number of ways of resolving this. I suggest what you do is: you continue
2 the dialogue you've got already, and see where we've got. If it's still an issue by the
3 time you have to start taking witness statements and going out to getting witnesses,
4 we'll resolve it then; it's not a difficult issue.

5 MR HARRIS: I'm quite content with that.

6 THE CHAIR: Yes, we'll resolve it then.

7 So Mr MacLean, if there is an issue on this, and there's a letter on this which hasn't
8 been answered, can you get the letter and answer it? I don't want to know the answer.

9 MR MACLEAN: I don't think there is a letter about this. But, as you'd expect, we'll
10 deal with the request as it comes in.

11 THE CHAIR: That's fine.

12 MR MACLEAN: That's how we'll deal with it.

13 May I ask this before you come on to deal with dates, et cetera, for the purpose of the
14 order, I ask merely for a comfort break.

15 THE CHAIR: Yes, that's absolutely fine. It makes sense. So we can come back at
16 3.15.

17 MR MACLEAN: I'm very grateful.

18 THE CHAIR: And hopefully if the juniors can start talking to each other in the break,
19 they can probably agree a lot of the wording, in the light of what we've said.

20 MR MACLEAN: I'm sure they can. Maybe you should say 3.20 then.

21 THE CHAIR: Yes, we'll come back at 3.20. We'll let the juniors have a chat with each
22 other, and hopefully the juniors will take us through the draft order, so we can hear
23 from both of them, rather than you and Mr Harris.

24 MR MACLEAN: Yes, (inaudible) from me on that.

25 MR HARRIS: So the order that we'd invite you to amend formally is at page 1194.
26 That's the amended CRO, but it's the one that was subject to consent from the two

1 parties.

2 THE CHAIR: So I'll amend that. That's fine.

3 (3.04 pm)

4 (A short break)

5 (3.43 pm)

6 THE CHAIR: So, we need to add in the undertaking that we got from the Class
7 Representative today. I'm not going to dictate it now, but you know what the
8 undertaking is, it will be clearer when you get the transcript, and our ruling, but that
9 needs to be added in.

10 We did give directions in relation to the preliminary issues, or at least the bindingness
11 of certain findings. We asked for a new schedule, and we gave particulars of that, so
12 that needs to be reflected in the order. And it may be that the sensible thing is you
13 can finalise this order once you've got the draft ruling in the next couple of days. I'm
14 not sure if I'd be able to give it to you tomorrow, but I think you'll get it pretty quickly,
15 and then insofar as there's something in there that I think is sufficiently important to
16 say in the ruling, it's probably sufficiently important to go into the draft direction. So
17 I did give directions about the binding nature of certain findings and how we're going
18 to resolve that. So that needs to be done.

19 As regards the disclosure, are there any differences between the parties on
20 disclosure? It looks sensible to me.

21 MR RAYMENT: I think we've made significant progress. There was a possible issue
22 that, I think my learned friend wanted to check, on 1D.

23 THE CHAIR: On 1D? What does he need to do? Because I've clarified in the ruling
24 what the limits are to that, and that will be in the written ruling. I don't think you need
25 to put that in here. Do you think I need to put something in there, Mr McIntyre?

26 MR MCINTYRE: No (inaudible). I just didn't (inaudible).

1 THE CHAIR: Yes, do that, and then if there's an issue, then you reflect it in the wording
2 of the order when it comes back. But what I'm saying is I don't expect you to agree
3 this order, until you've got the ruling. Once you've got the ruling, then if you can agree
4 everything with your opposite number, and if there's anything that's not agreed, just
5 put it in a different colour, and then I'll just decide which wording is right or not. I don't
6 want to hear detailed written submissions on precise wording of the order, unless
7 there's a huge bust up, but I doubt that that's going to happen.

8 MR MCINTYRE: Thank you.

9 THE CHAIR: Yes, Mr Rayment.

10 On two, could you put the word "both" after "that" on the first line? I don't want them
11 to be separate points. Just make it clear that if a document is going to be excluded,
12 it's got to satisfy both of those limbs, rather than one.

13 MR RAYMENT: On three, we're content with the blue wording.

14 THE CHAIR: That's fine. Yes, okay.

15 On expert evidence, there's a bit of work that needs to be done on that. If I can just
16 outline what needs to be done, and then Mr Rayment, if you can just reflect it in the
17 order. The idea is that the permission is limited to giving expert evidence on the issues
18 in the list of issues for experts, ie it's not a carte blanche, it's by reference to the list of
19 issues. So the Class Representative has permission to rely upon the evidence of
20 whatever, in respect of the issues in the list of issues for experts. Okay? That's clear.

21 MR RAYMENT: Probably refer down to the point in the order where we've got the
22 provisions.

23 THE CHAIR: On the --

24 MR RAYMENT: Are you looking at 18, sir?

25 THE CHAIR: 18.

26 MR RAYMENT: So --

1 THE CHAIR: I've said a bit more than that, because that in relation to the list of issues,
2 it's got to identify which expert is covering which issue. But I think once you get the
3 ruling, or look at the transcript, you'll see what needs to be incorporated. There's no
4 point doing it now.

5 MR RAYMENT: Well, that's helpful, because we also need to take instructions on the
6 date so we can.

7 THE CHAIR: Yes, and all of that. Yes, so that that's fine. And remember the Hunt 3;
8 I don't think it's enough just to say Hunt 3, I think just --

9 MR RAYMENT: Specify the purpose.

10 THE CHAIR: Purpose, limited to ten pages, remember. And that sort of stuff.

11 MR RAYMENT: Mention the negative/positive.

12 THE CHAIR: Exactly. And then on D, you've got to specify the further comparative
13 countries, and in respect of each country why you contend, in summary form, that's
14 an appropriate comparator. And the list of issues -- we're going to have
15 provision -- that the list of issues be filed with the tribunal by a particular date. And
16 obviously, it's for you to discuss with your opposite number as to what these dates are
17 going to be.

18 MR RAYMENT: And the experts.

19 THE CHAIR: Yes, exactly. You're going to work on these --

20 MR RAYMENT: You'll recall that Mr Harris made the point that, in relation to
21 Mr Williams and further comparator countries, we are content with Sweden and
22 Germany, but he didn't want to close the door, having in the light of having considered
23 the disclosure. So that needs to be factored into the date.

24 THE CHAIR: It does. But then, if at a later stage, in the light of disclosure, and you've
25 got to a particular (audio distortion) after the list of issues has been finalised, you come
26 up with another comparator, you're going to have to explain that to the other side, why.

1 And if there's an issue, it will have to be dealt with at the next CMC.

2 But I'm aiming that, if we are going to have another CMC, that we should have it in
3 December, because there are a number of things that need to be worked out,
4 particularly on expert evidence and directions and stuff, that I may need to have done
5 in December.

6 Similarly, we'll be going back to look at things, where we are on the preliminary issues,
7 do we need to have any to be determined, et cetera? And it may be that by the time
8 we get to the preparing for the CMC, that Mr MacLean will say, "Actually, I want you
9 to determine this particular aspect of bindingness", in which case we may have to
10 factor it in or deal with it at another CMC.

11 But you haven't got quite there on both expert issues and what the list of issues are
12 from the preliminary issues for things to crystallise. But I do want everything to be
13 crystallised by December. So when we have a further hearing then, it's all understood
14 what everyone is doing.

15 MR RAYMENT: So we will be very assisted by your ruling.

16 THE CHAIR: Yes, exactly. You'll know what the direction of travel is, and if people
17 haven't got a message, then -- if something needs to be clarified, you can write in and
18 say, "Can you clarify this?", and we can deal with it informally.

19 Yes, Mr McIntyre.

20 MR MCINTYRE: I just want to make one small point. I just want to say it now so that
21 no suggestions I make during the drafting process come as a surprise. But we'll check
22 the ruling. It may be that what's currently referred to as Hunt 3, it may be that it needs
23 to be Mr Hunt and Mr Grantham, depending on what's being said about methodology,
24 or it might be and/or Mr Grantham --

25 THE CHAIR: Well, they can do it together. Whatever --

26 MR MCINTYRE: Perhaps. We just want to make sure that in the drafting we suggest,

1 | there may have to be some flexibility as to who is actually writing these --

2 | THE CHAIR: What I don't want is anything more than ten pages.

3 | MR MCINTYRE: Yes.

4 | THE CHAIR: All right? So if you can't send ten pages, you're not going to be able to
5 | get the message across, so ...

6 | MR MCINTYRE: Yes.

7 | THE CHAIR: As long as it's Hunt, or the other guy, or both, or whatever, it's fine.

8 | MR MCINTYRE: Yes. And the same goes if Dr Williams needs Mr Davies, then --

9 | THE CHAIR: Yes, of course.

10 | MR MCINTYRE: Yes.

11 | THE CHAIR: But I expect that, you know, the meeting of the experts is going to be
12 | one where all the experts are going to be there, and at least one lawyer from each
13 | side to be there, to assist in the process. Because when it comes to actually drafting
14 | the issues, I suspect the best person to draft is a solicitor, because they have different
15 | ways of doing things and they understand the sort of cross-referencing I need.

16 | Whereas if you leave it to the experts, you don't know what you're going to get. But
17 | I know with the regulars we've got on the solicitor's side, they know exactly what's
18 | required.

19 | Thank you very much. Yes?

20 | MR RAYMENT: So the next heading is Pre-Trial Review. I mean, the parties are
21 | content with 7 February, given the --

22 | THE CHAIR: Yes, but we are going to revisit things like -- yes, further evidence for
23 | the CMC. Have you provided for the further CMC in here yet?

24 | MR RAYMENT: I don't think we have, actually.

25 | THE CHAIR: I think you're going to have to, because at the CMC, there's a number
26 | of issues which are going to be considered. And we identified those as we've gone

1 along through the ruling, and that, obviously, you want the ruling before you finalise
2 these directions. But I do want a CMC possible in --

3 MR RAYMENT: The time estimate?

4 THE CHAIR: One day.

5 Look, if there are any preliminary issues to be determined in respect of bindingness,
6 and the parties really want that to be determined, try and determine them at that CMC,
7 if we can.

8 If I look at it and (audio distortion) how far you've got on bindingness and think, actually
9 he hasn't really crystallised what (audio distortion).

10 I envisage that if there is anything about preliminary issues that needs to be resolved,
11 it's going to be resolved at the next CMC. So that gives the parties the incentive to
12 sort out the preliminary issue point, as far as possible. You can reach a compromise
13 along the line of that's acceptable to be able to (several inaudible words).

14 MR RAYMENT: We haven't provided for the Whistl list to be provided. I mean, I'm
15 (audio distortion). I'm sure (audio distortion). Yes, we'll put that in.

16 THE CHAIR: I'm not going to finalise the order now.

17 MR RAYMENT: Okay, fine.

18 THE CHAIR: Put in a new CMC that --

19 MR RAYMENT: Can we leave over, then, the Pre-Trial Review, trial bundle and
20 opening submissions issues to next time?

21 THE CHAIR: Yes, we will do.

22 MR RAYMENT: Yes.

23 THE CHAIR: Well, the main thing that we want to do is to get the trial date in, things
24 like the next PTR trial bundle, issues about the CRO and what's confidential. We can
25 come back to all of that next time around.

26 But we certainly made a lot of progress today, and I'm very grateful for everything that

1 everyone has done, and I appreciate how much work these hearings are. But we
2 really have moved on today, and I'm satisfied we're all on the right track, and this is
3 not going to be one of those cases which is impossible to try.

4 Try this (audio distortion), come to a conclusion, whatever that (audio distortion), get
5 as much assistance from you and the experts, (audio distortion) understanding is
6 digestible. If you do that, then it's going to be a (audio distortion).

7 I don't think there will (audio distortion) one. And I can see that some issues here
8 coming to trial (audio distortion) factual evidence (audio distortion) really would have
9 happened, the different scenarios, the possibility of different (audio distortion).

10 He may be right, he may be wrong, but it does require a lot of co-operation between
11 the parties to have a properly ordered trial. (Audio distortion) now it's believed going
12 to take, is it six weeks?

13 MR RAYMENT: That's the current estimate.

14 THE CHAIR: Is that -- doing about Fridays? Is it going to be six weeks, with Friday to
15 deal with things like any directions and stuff and catch up with other things and prepare
16 for the next week, or is it going to be a five-day week?

17 Because I would prefer to have a four-day week. Because let's say you've got experts
18 coming in on the Monday. I wouldn't want to have them on the Friday, when I can
19 spend Friday getting my head around the experts before they get into the box. But
20 I do find it helpful on cases like this. I'm not saying to have Friday off; it won't be off.
21 It won't be off for anyone. But Friday is a prep day for the next week.

22 But if we do that, is it still going to be within six weeks?

23 MR RAYMENT: I'm not sure. I'm not sure. We were not wedded to the allocation of
24 time within the six weeks. It was more that we thought that would be the number of
25 sitting days. At this stage -- which is obviously quite an early stage -- certainly from
26 our side, we don't have any objection to a commercial court, if I can put it like that,

1 sitting week, because that can promote efficiency.

2 THE CHAIR: So what we'll say is, you know, unless otherwise directed that we won't
3 sit on Fridays, for the purpose of the trial, and that means if we start a trial and we feel
4 we need to speed up a bit, we can take those Fridays back. But I think six weeks
5 should be long enough to do this trial. Mr MacLean, what do you think about the
6 timing?

7 MR MACLEAN: With respect, that's entirely sensible. Our preference, I think, would
8 be for a non-sitting day, as you have said. You're absolutely right that that Friday will
9 not be taken up by twiddling our thumbs in the course of a six-week trial, so ...

10 THE CHAIR: We won't be playing golf on Friday.

11 MR MACLEAN: Not being a golfer. I won't be playing golf. But anyway, we'll be
12 working.

13 THE CHAIR: Yes.

14 MR MACLEAN: Thank you.

15 THE CHAIR: That's fine. We will need to consider, when it comes to the expert
16 evidence, the number of pages and the font. Let's not forget that, because I've had
17 cases where the expert reports are like 200 pages (audio distortion) and I really won't
18 endear the expert to do something (audio distortion). So I would expect no expert
19 (audio distortion) 75 (audio distortion) each. Try and persuade me (audio distortion)
20 that this should be longer.

21 75 pages, half spacing, which is more than enough for a case of this (audio distortion).
22 And then it may be that the second round, if we're going to have two rounds, the
23 second round should be shorter than (audio distortion). (Audio distortion) just come
24 back next time as to, I envisage, page number.

25 The skeletons done today, I'd like to commend both sides for the way they've done the
26 skeletons and just to the right length. And they were very easy to follow and that really

1 | did assist the tribunal.

2 | Yes, is there anything else?

3 | MR MCINTYRE: My Lord, I'm content with my learned friend's suggestion that we
4 | leave things like trial bundles and submissions to a future hearing, but my solicitors
5 | have made the very fair point, I think, that there might be an advantage to fixing a PTR,
6 | because some of us -- and I think they really mean Mr MacLean rather than me -- but
7 | some of us are in high demand and for diary purposes, it can be good to have
8 | a hearing already booked in.

9 | So we just wonder if that should go into the order now?

10 | THE CHAIR: It's quite a compliment, the way he's put it.

11 | MR MACLEAN: Sorry, didn't hear that.

12 | THE CHAIR: He's saying that you're in high demand.

13 | MR MACLEAN: Well, that may or may not be true.

14 | THE CHAIR: We need to fix the PTR (inaudible), book something else in there, in the
15 | interim. I think there's some merit in that. So unless someone says anything
16 | differently, we'll have at least the date for the PTR in, and we will try and get the date
17 | in December for the next CMC. So if you can liaise with the tribunal as to whatever's
18 | a convenient date for us and for you, then we will fix the date for the next CMC in the
19 | order, when you finalise it. So if you can start looking at your diaries.

20 | Mr MacLean, are you free on any date in December?

21 | MR MACLEAN: In December? I am free in December on certain dates. I can't
22 | remember off the top of my head that.

23 | THE CHAIR: What we're looking for is a date that you and Harris can make.

24 | MR MACLEAN: Yes.

25 | THE CHAIR: And the tribunal can make.

26 | MR MACLEAN: Absolutely.

1 THE CHAIR: And if the juniors can come, they're welcome but if they can't come,
2 I don't think that's a reason for not fixing on that day.

3 MR MACLEAN: No, I understand.

4 THE CHAIR: We're going to fix the CMC for one day at the convenience of the tribunal,
5 leading counsel on both sides. Harris, is there any issue about finding a date in
6 December for you?

7 MR HARRIS: No, sir.

8 THE CHAIR: So we should be able to get that date fixed in the next couple of days.
9 Let me just check with my colleagues. We're all okay for December and I'm probably
10 thinking of not before mid-December. So it's really towards the end of term, probably,
11 if possible, the end of the second week or early in the third week of December. And
12 then once we've got this order, then the parties can start -- when we've got a bit further
13 down the line -- suggesting what the direction should be for that next CMC. But I think
14 it's too early now to determine what the directions will be, because there's a number
15 of moving parts.

16 As regards the meeting of the experts, hopefully, that will be done relatively soon.
17 You're going to give a lot of disclosure on 10 October. So I think there's probably a lot
18 of work on both sides to be done between now and December that -- but once we've
19 done that, we should have all the directions for trial done and we'll all know where
20 we're going.

21 MR MACLEAN: Yes. Well, the usual liberties apply for further direction.

22 THE CHAIR: Yes.

23 MR MACLEAN: I think.

24 THE CHAIR: If something crops up, of course. Yes.

25 Mr Rayment, anything else you want to say?

26 MR RAYMENT: No, sir. Thank you for your input on the draft as it stands at the

1 moment. We'll get that sorted out between ourselves and to the tribunal as soon as
2 possible.

3 THE CHAIR: Yes. So if we aim to get you the ruling, it's just a question of taking out
4 what we said and putting it from the transcript and putting it into something. But if we
5 say that we'll give it to you hopefully, Friday morning, then if you have until the Tuesday
6 afterwards to try and agree something but the cut off date for the directions is
7 5 October, so I'd like the directions to be agreed by 5 October. If they're not agreed,
8 if you give me the version with the differences by 10 am on 5 October.

9 (4.05 pm)

10 (Hearing adjourned)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?