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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**
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Case No: 1698/7/7/24

9
10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP
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Wednesday 4th March

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16 Before:

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18 The Honourable Mrs Justice Bacon
19 Robert Herga
20 Professor Anthony Neuberger
21

22 (Sitting as a Tribunal in England and Wales)
23

24
25 BETWEEN:
26

27 **CLARE MARY JOAN SPOTTISWOODE CBE**

Class Representative

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31 v
32

33 (1) **AIRWAVE SOLUTIONS LIMITED,**
34 (2) **MOTOROLA SOLUTIONS UK LIMITED,**
35 (3) **MOTOROLA SOLUTIONS, INC**
36

Defendants

37
38
39 **A P P E A R A N C E S**
40

41 Michael Armitage on behalf of Clare Mary Joan Spottiswoode (Instructed by Ashurst LLP)
42

43 Brian Kennelly KC and Paul Luckhurst on behalf of Airwave Solutions Limited, Motorola
44 Solutions UK Limited and Motorola Solutions, Inc (Instructed by Herbert Smith Freehills
45 Kramer LLP)
46

47 Jack Williams on behalf of the Home Office (Instructed by TLT LLP)
48
49

50 Digital Transcription by Epiq Europe Ltd
51 Lower Ground, 46 Chancery Lane, London, WC2A 1JE
52 Tel No: 020 7404 1400

Wednesday, 4 March 2026

Case management conference

(10.30 am)

THE PRESIDENT: Good morning. I'll give the live stream warning first. Some of you are joining us live stream on our website, so I'll start with the customary warning.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Good morning, Mr Armitage.

MR ARMITAGE: Madam, I appear on behalf of the Class Representative, Ms Spottiswoode. My learned friends Mr Kennelly, King's Counsel, and Mr Luckhurst are here for Motorola. My learned friend Mr Williams is also here for the Home Office.

Just in terms of housekeeping I hope you have received the skeleton arguments from each of us and have had a chance to read those.

THE PRESIDENT: Yes, I have.

MR ARMITAGE: You should have three bundles. A is the core bundle; B is the correspondence bundle; and C is an authorities bundle.

THE PRESIDENT: Yes.

MR ARMITAGE: I don't know if the panel are working electronically or in hard copy or a combination, but I hope everything will tally up.

THE PRESIDENT: I think we are pretty much all electronic.

MR ARMITAGE: Very good. There is an agreed agenda with agreed time estimates for each item, which is at core page 814, and I assume in the usual way we'll work through each item with sequential submissions unless the Tribunal had a different

1 | proposal.

2 | **THE PRESIDENT:** Yes. Just let me get the -- can I just say a word for the future
3 | about the core bundle? There seems to be rather a lot in it and perhaps -- sorry.
4 | Where did you say the agenda is? Core page?

5 | **MR ARMITAGE:** Core, 814.

6 | **THE PRESIDENT:** 814. All right. It wasn't clear to me that the core bundle is
7 | a genuine core bundle, and just in future you might want to restrict that to things like
8 | core pleadings, witness statements, orders, what you would normally get in a core
9 | bundle.

10 | **MR ARMITAGE:** I think there was quite a lot of discussion about that. I won't trouble
11 | you with the details. We understand the points.

12 | **THE PRESIDENT:** Yes. All right.

13 | **MR ARMITAGE:** I will move directly then to the first agenda item, which is disclosure
14 | from Motorola and the Home Office. There has been, as you will have seen, a large
15 | measure of agreement in relation to the shape of that process and some further
16 | progress on that front in recent days also.

17 | Could I just at the start make sure the Tribunal has the most up-to-date version of the
18 | draft directions, and, in fact, there was a further version received last night from
19 | Motorola, which I think it is agreed we should work off for the purposes of today. So
20 | can I just ensure that the Tribunal has that?

21 | **THE PRESIDENT:** We have had that.

22 | **MR KENNELLY:** Madam, may I give you hard copies just now? It may save
23 | you -- I have hard copies for the three of you.

24 | **THE PRESIDENT:** Yes. All right. I think we have had it, but just why don't you hand
25 | up what you have got and we can just check that's the same as what we have? Oh,
26 | yes. I think that's basically just clean copies of what we have already. Thank you.

1 **MR ARMITAGE:** So obviously the black text is agreed, so you will see there is very
2 substantial measure of agreement. Obviously we are happy to address you on any
3 agreed matters if that assists you, but in broad terms you will have seen we have
4 agreed on a two-stage process whereby in the first instance there will be disclosure of
5 what I am going to call CMA material.

6 **THE PRESIDENT:** Yes.

7 **MR ARMITAGE:** So that's Home Office and Motorola disclosure to the CMA, plus
8 a number of other documents provided by third parties --

9 **THE PRESIDENT:** Yes.

10 **MR ARMITAGE:** -- during the CMA's investigation. That disclosure it is agreed will
11 be done by 27 March at least as a longstop, with Motorola using reasonable
12 endeavours to provide that sooner if possible.

13 **THE PRESIDENT:** Yes.

14 **MR ARMITAGE:** There is one tweak that is not yet reflected in the draft order that
15 you are looking at which I should mention, which is at paragraph 4(a). It's a small
16 tweak, which is that the Home Office were going to provide by 9 March the documents
17 included in the third production, which is effectively a first tranche of their CMA
18 documents. It has now been agreed that be a little bit later. It is 14 March. So I just
19 mention that for good order.

20 As I say, the longstop for disclosure of all the CMA materials, it's agreed that that will
21 be 27 March.

22 Thereafter there will be a Redfern Schedule process we would propose whereby
23 further requests will be made to Motorola and the Home Office as necessary by the
24 end of July. Responses to those requests by 18 September.

25 **THE PRESIDENT:** All right.

26 **THE PRESIDENT:** Before that we've got in paragraph 8 -- I'm not sure if that's now

1 | agreed.

2 | **MR ARMITAGE:** Yes. Sorry. So I was just summarising the agreed process and
3 | I was then going to move to the disputed points.

4 | **THE PRESIDENT:** Yes. I think we understand the agreed process so far.

5 | **MR ARMITAGE:** I am grateful.

6 | **THE PRESIDENT:** What doesn't seem to be agreed is what happens in relation to
7 | the Redfern Schedule, whether there is the process that you've set out in
8 | paragraphs 13 to 15, or whether we follow the process that's set out in paragraphs 6
9 | to 7. Is that --

10 | **MR ARMITAGE:** Yes. So that's the second agenda item, which is Motorola's
11 | application in relation to the Class Representative's disclosure.

12 | **THE PRESIDENT:** Yes. I see.

13 | **MR ARMITAGE:** Before we get there the Redfern Schedule process is agreed at least
14 | as regards disclosure by Motorola and the Home Office.

15 | **THE PRESIDENT:** I see.

16 | **MR ARMITAGE:** As you say, Madam, there are a handful of disputed points which
17 | relate to the so-called Explanatory Memorandum, but that's paragraph 8 of the order
18 | in the first instance.

19 | Just very briefly the context here is that the Class Representative had originally
20 | suggested that Motorola and the Home Office should produce disclosure reports and
21 | EDQs as envisaged by Rule 60.

22 | **THE PRESIDENT:** Yes.

23 | **MR ARMITAGE:** The Home Office were content to do that but, following opposition
24 | from Motorola, we alighted instead on the idea that Motorola and the Home Office
25 | should produce Explanatory Memoranda essentially explaining how the documents
26 | provided to the CMA were collated and then identifying what other potentially relevant

1 documents might be out there with a view that that would then assist the Redfern
2 Schedule process.

3 There is a small disputed point about timing and then three hopefully short points
4 about the contents of that document.

5 **THE PRESIDENT:** All right. Can we deal with the timing point? So just before we
6 get to the -- no, actually I think we can do -- so the disputed point about timing is
7 paragraph 8, is it?

8 **MR ARMITAGE:** It is paragraph 8. It is a small point that I don't want to spend much
9 time on. Essentially we had proposed 17 April. They proposed 1 May. We had offered
10 to split the difference with 24 April.

11 **THE PRESIDENT:** Yes, 24th.

12 **MR ARMITAGE:** We say that's adequate. That's all I want to say about that.

13 **THE PRESIDENT:** All right. It may be helpful if I indicate that our view is that the date
14 should be 24th.

15 Is there significant dispute about that on your side, Mr Kennelly?

16 **MR KENNELLY:** I am not going to waste your time arguing, my Lady.

17 **THE PRESIDENT:** All right. Then there is another point I wanted to raise on behalf
18 of the Tribunal. You may have reached agreement on paragraphs 10 to 12, but we
19 would like to just explore that. It seems to us that this is a rather leisurely timetable.
20 You will hear in due course our proposals for the trial listing, but even before we get
21 to that I don't think that there needs to be a four-month gap between the provision of
22 the CMA documents, especially because they are going to be produced in tranches.
23 It seems to us that you had proposed the end of June, and if we are right in
24 understanding where the weight of the work is going to be lying, your side is going to
25 be doing most of the work at this point. So if you think that you are able to do that by
26 26 June, it wasn't clear to us that the date needed to be any later for paragraph 10,

1 and then similarly with the dates in paragraphs 11 and, so far as paragraph 12 is
2 needed at all, which I will come on to, paragraph 12.

3 **MR ARMITAGE:** I am sorry, Madam, I am having a slight version control horror
4 because in my version of the draft order paragraph 9 is the one that has the initial
5 deadline. But, yes, I understand the point.

6 **THE PRESIDENT:** But we are talking about the deadlines, yes.

7 **MR ARMITAGE:** So the first batch of requests. Yes, exactly. We had obviously
8 proposed a rather shorter deadline and indeed we have more to do, because we have
9 to look at the full 100,000 documents. Can I turn round for one moment?

10 Yes, my instructing solicitor reminds me we agreed to the somewhat later date on the
11 basis that you will have seen there was at one point a suggestion that the CMA
12 documents should be provided earlier. We have now agreed that they should be
13 provided at the end of this month even though, as we understand it, they are,
14 effectively a pre-packaged set of documents and there is no reason for delay. So we
15 are a little concerned about putting that all the way back to the end of June.

16 **THE PRESIDENT:** In that case could we bring the CMA documents forward a bit? Is
17 there any reason why they can't be provided a bit earlier than the date set out in
18 paragraph 4 if they are a pre-packaged set?

19 **MR ARMITAGE:** Yes. Well, that's a matter for my learned friend. We will obviously
20 support that.

21 **THE PRESIDENT:** Maybe we need to work back and start with that then. Is this
22 paragraph 4 in everyone's versions?

23 **MR KENNELLY:** Yes, paragraph 4 in the version I am using.

24 **THE PRESIDENT:** Okay. Is there any reason why the CMA documents can't be
25 provided earlier than the dates you currently have or at least the longstop could be
26 earlier, as in why do you need the rest of this month?

1 **MR KENNELLY:** That's a matter for the Home Office. They are the ones providing
2 these.

3 **THE PRESIDENT:** All right. Home Office.

4 **MR WILLIAMS:** My understanding of the order is that paragraph 3 is the Motorola
5 longstop, which is 27 March as well. Paragraph 4 is then the Home Office documents.
6 So the point actually goes to both parties.

7 In relation to the Home Office's documents, there are around 20,000 documents in
8 question. There are reviews being undertaken in relation to third party confidentiality
9 as well as the Home Office's confidentiality. My instructions are that will take the rest
10 of the month. We are working as quickly as possible. You will have already heard
11 from my learned friend Mr Armitage that the first date has slipped to 14 March. That's
12 the first 10,750 documents.

13 **THE PRESIDENT:** That's paragraph 4(a), is it?

14 **MR WILLIAMS:** That's paragraph 4(a). That's correct, Madam.

15 **THE PRESIDENT:** 4(a). That's the 14th.

16 **MR WILLIAMS:** That's 10,750 documents. The first review of that has been
17 conducted. The second review and the quality checks are taking place. That's already
18 taking longer than anticipated. The rest of the documentation, so the circa 9,000
19 documents, are 23 March and 27 March. We will endeavour to provide them as soon
20 as possible and before these dates if possible, but at the moment that isn't looking
21 likely on the basis of the rates of review taking place at the moment.

22 **THE PRESIDENT:** What do you need to be reviewing for?

23 **MR WILLIAMS:** So we are reviewing for Home Office confidentiality in the first place.
24 You will anticipate that that includes documents such as procurement and tender
25 documentation. There is potentially a lot of third party financial confidential information
26 within that that Motorola as a competitor cannot see. That's Home Office material.

1 There is also then third party confidential information of the sort I have just mentioned:
2 procurement documentation and personal data. So this is quite an onerous process
3 and quite complicated because of the amount of parties in question that we then have
4 to contact and try to get their consent rather than redacting.

5 **THE PRESIDENT:** All right. I don't suppose that any of this can be short-circuited by
6 disclosing into confidentiality rings.

7 **MR WILLIAMS:** The Home Office itself can't obviously consent for third parties. If
8 directed, we would, of course, comply with any such order. But in terms of the third
9 parties in question, say police forces, for example, other third parties submitting tender
10 documentation, we can't consent on their behalf. That's why we are going through this
11 process of the redactions.

12 **THE PRESIDENT:** I see, all right.

13 Mr Kennelly, what about your documents?

14 **MR KENNELLY:** The date of 27 March in paragraph 3, as we explained in our
15 skeleton, that's the latest date for us that we can meet the obligation. As we explained,
16 the task for my instructing solicitors is to review about 80,000 documents, and it is
17 a significant task, because they have to source and merge historic document
18 productions by different solicitors. They have to process them. They have to apply
19 bates numbers and check the file types. Herbert Smith have to satisfy themselves the
20 production has been properly prepared. It is 80,000 documents, as I have said. They
21 have applied their minds to this question, because we had this dispute with the Class
22 Representative. We obviously investigated whether we could bring that date forward.
23 So that date, 27 March, is one that was reached in a considered way, having debated
24 the point with the CR.

25 **THE PRESIDENT:** All right. So we are stuck then with the dates in paragraph 4, but,
26 Mr Armitage, given that we are there, do you need longer than 26 June?

1 **MR ARMITAGE:** I am told we are a bit worried about that. I think the position was if
2 we were going to get them very shortly after the CMC, we thought we could do it
3 considerably sooner. But if it is going to be the end of March, we do think we may
4 need to have until the date in paragraph 9.

5 **THE PRESIDENT:** A month later? Even if you were getting them shortly after the
6 CMC, it would still be only a few weeks earlier than the date that's currently proposed.
7 I'm just a bit surprised that you're going to need more than three months -- I mean,
8 31 July is four months -- to review all of this. Okay, there are a large number of
9 documents, but we are not talking about millions of documents here. You will be
10 getting them in tranches and you will already be getting some on the 14th.

11 **MR ARMITAGE:** I am instructed we could live with 27 June. We obviously do agree
12 with the principle of getting on with things. We hope that will be a date we can meet.

13 **THE PRESIDENT:** 26 June, I think it is the Friday.

14 **MR ARMITAGE:** Sorry. Yes.

15 **THE PRESIDENT:** So if you can live with the date of 26 June, presumably you would
16 then be able to do 31 July for responses and then we could get the responses through
17 before the summer vacation.

18 **MR ARMITAGE:** So we wouldn't be responding to anything.

19 **THE PRESIDENT:** Yes. Okay. You're right.

20 **MR ARMITAGE:** So that's a matter for my learned friends. We don't have a view on
21 that.

22 **THE PRESIDENT:** No, although if this ties in somewhat with the yellow text in
23 paragraph 10(b) because -- sorry, I had already made some notes on that assuming
24 that if we were to go down that route, you would be responding.

25 **MR ARMITAGE:** That's true. It is contingent on what happens on disclosure from
26 other class members.

1 **THE PRESIDENT:** Even if you did have to do that, I presume you wouldn't need more
2 than a month to do so?

3 **MR ARMITAGE:** Yes. In a sense it wouldn't be contingent on the previous step if we
4 did have to do that.

5 **THE PRESIDENT:** Exactly, all right.

6 **MR ARMITAGE:** I see my solicitors nodding.

7 **THE PRESIDENT:** Let me turn to Mr Kennelly. 26 June. You will have far fewer
8 documents to review. Is there any reason why you need more than three months for
9 that?

10 **MR KENNELLY:** It is true we will have fewer documents to review, but we have to
11 also consider disclosure requests in respect of other Class members. So there is
12 a degree of uncertainty, because it is hard to predict now how much time we will need,
13 because at this stage we have not even had the discussion with the Class
14 Representative about what other Class member disclosure would be practicable and
15 reasonable to seek.

16 **THE PRESIDENT:** Yes.

17 **MR KENNELLY:** Because of that uncertainty we want to --

18 **THE PRESIDENT:** You can start to formulate your view as to what kind of disclosure
19 you are going to be asking for.

20 **MR KENNELLY:** Yes.

21 **THE PRESIDENT:** You know the broad compass of what the CMA has got, because
22 you know that it sought requests for information from certain bodies that make up the
23 majority of the class, as I understand it, at least by value. So you can start thinking
24 about what you need and the question is whether -- I mean, you know what is in this
25 disclosure anyway, it's not as if you are going to be starting on March, because it is
26 within your control.

1 **MR KENNELLY:** Most of the documents are within our control. We have to review
2 them. It is true that the share of the documents that we are reviewing is smaller. The
3 key concern is the other key Class member disclosure. If, as I anticipate, the Tribunal
4 is minded to require that process of discussion about the other Class member
5 disclosure to begin now, that would definitely help, because the sooner that begins
6 and if it is pursued in a rapid, proportionate way, then we will be in a much better
7 position to make those requests.

8 **THE PRESIDENT:** We will come on to that under item 2. But we are not averse to
9 hurrying things along and to starting a dialogue if you need us to order you to carry
10 out that dialogue. I mean, there's a certain extent to which we don't necessarily have
11 to micromanage the process of reasonable cooperation between the parties. I do have
12 a question about whether we need to make orders along the lines that are currently
13 set out in 13 to 15. If you think you are not going to get anywhere unless we order it,
14 we are of course willing to make orders that help the parties move things along. We
15 will come to that under issue 2.

16 Leaving that aside, though, is there any reason why for the steps that relate to the
17 CMA disclosure and the Redfern Schedule in relation to further disclosure requests,
18 is there any reason why the dates that were originally proposed for paragraphs 10 and
19 11 shouldn't stand, so 26 June and 31 July, with the merit that this gets done before
20 the summer vacation?

21 **MR KENNELLY:** As things currently stand I can't point to a particular reason why it
22 couldn't be done, but there are concerns about Home Office redactions. The reason
23 why the deadline is where it is is to build in some flex to allow for any correspondence
24 in relation to redactions which we think are inappropriate and need to be tested to take
25 place before we make our requests. So there needs to be flex built into the timetable
26 to allow for those kinds of concerns to be --

1 **THE PRESIDENT:** Three months of flex?

2 **MR KENNELLY:** In order to review them, have the correspondence and get
3 a resolution for us then to properly engage with the process, that time is necessary.
4 I sense the Tribunal is building up to a trial listing which may be slightly earlier than
5 the parties had been discussing among themselves.

6 **THE PRESIDENT:** Yes, we might.

7 **MR KENNELLY:** It might be helpful, Madam, in the interests of disclosure if you could
8 perhaps let us know what you have in mind for a trial listing.

9 **THE PRESIDENT:** June/July next year.

10 **MR KENNELLY:** That's what I thought you might say. In those circumstances is it
11 worth discussing that and the feasibility of that before we discuss these steps?
12 Obviously the Tribunal is in charge and we are in your hands. My concern is just that
13 the flex that is needed to make sure that the process is properly undertaken is vital.
14 Our concern is that if the deadlines are too tight, it becomes a self-fulfilling prophecy
15 in the sense that disclosure then is denied. If disputes are raised -- and one of the
16 reasons why a concern we might raise might be refused is because it is just not
17 feasible in the time available.

18 **THE PRESIDENT:** All right. Just let me discuss this. **(Pause)**.
19 I don't necessarily think we should let the trial date be the tail that wags the dog. We
20 think we should be moving things along. We will set the original date of 26 June and
21 31 July in paragraphs 10 and 11.
22 Now, there is a question as to whether paragraph 12 is needed.

23 **MR KENNELLY:** I think it may be worth --

24 **THE PRESIDENT:** Let me just look here.

25 **MR KENNELLY:** One was not the same as the other.

26 **THE PRESIDENT:** All right. Paragraphs 9 and 10.

1 **MR KENNELLY:** Thank you, Madam. In view of that --

2 **THE PRESIDENT:** Just let me try to work out where the mismatch is between the
3 two.

4 **MR ARMITAGE:** I think the mismatch is that the provision about when Class member
5 disclosure would be provided under my learned friend's proposal, which I think is
6 paragraph 6, is no longer there.

7 **THE PRESIDENT:** It's all right, I have found it. It's paragraph 9 that is no longer there.
8 Paragraphs 9 and 10. So we will set that. What about paragraph 11? Is that really
9 needed at all?

10 **MR KENNELLY:** I will let Mr Armitage deal with that, but since I am on my feet, it
11 applies to us both. Yes, in order to crystallise the issues so that we can have
12 an effective CMC, because, I mean, the date you may want to bring forward, but the
13 step itself is a very useful one, because it crystallises the disputes. Since we are on
14 the subject of crystallising disputes with a view towards having a trial much earlier than
15 the parties anticipated, in my respectful submission it is very important to have orders
16 from the Tribunal. Obviously the parties seek to cooperate at all times, but the orders
17 are extremely useful in applying discipline to the parties and that's why, although
18 I know the Tribunal I think is micromanaging, it actually helps us, because it provides
19 the necessary discipline when we will be working to a much tighter timetable than we
20 had anticipated to trial.

21 **THE PRESIDENT:** All right. Well, as I said, if both parties want us to make orders for
22 them to do what might otherwise be regarded as entirely sensible things, we won't
23 refuse that chivvying, but, speaking personally, I didn't want to impose a discipline that
24 one would expect anyway, but anyway there we are.

25 We have the dates then for paragraphs what are now 9 to 11. Those are the dates for
26 the Redfern Schedule process: 26 June, 31 July and then 18 September. Does that

1 mean that the next question before we get to issue 2 is the Explanatory Memorandum?

2 **MR ARMITAGE:** The contents certainly.

3 **THE PRESIDENT:** All right. Let's deal with that.

4 **MR ARMITAGE:** So there are three points. They relate to annex A of the draft order.

5 **THE PRESIDENT:** All right. We have got that.

6 **MR ARMITAGE:** Paragraph 2 thereof. There are three points. I am going to work
7 through them in the order in my skeleton, which is actually from the bottom of the
8 page up, if that's all right. So 2 (f) and (g). We have proposed that the Explanatory
9 Memoranda should include details of any document retention policy and instructions
10 given to preserve relevant documents and also details of any irretrievable documents
11 that may be relevant. The overall purpose of that is to help us understand whether, if
12 there are gaps in the CMA documents, that is because potentially relevant documents
13 either have not been retained or for some reason are not available or because there
14 are gaps that may be filled by further disclosure. In other words, it will help to calibrate
15 the Redfern Schedule process. The Home Office is content to provide this information.
16 We say that Motorola ought to do so too. As Mr Gale notes in his evidence, these are
17 standard questions in disclosure reports or EDQs.

18 May I just show you one part of Mr Gale's third statement just on this bit? It is in the
19 core bundle at 770.

20 If everybody has that. This is Mr Gale's third statement which accompanied our
21 application for this CMC. Could I just ask the Tribunal, please, to read
22 paragraphs 12.2 and 12.3. There are some confidentiality markings here. We have
23 asked if they can be removed. We have not had a response, which is not a criticism
24 necessarily, but I don't need to read any of it out. You will see the point I hope
25 immediately.

26 **THE PRESIDENT:** Yes. It is not clear why all of this confidentiality marking is really

1 necessary.

2 **MR ARMITAGE:** I think it is a relic, if you like, of the fact that these documents, the
3 RFI responses, were pragmatically disclosed into the Inner Confidentiality Ring
4 pending a review for confidential information. So that process will obviously happen.
5 In other words, as you will see, there are issues around potential documents. We think
6 that should be set out in the Explanatory Memorandum.

7 **THE PRESIDENT:** Yes. All right. So that's your point 1.

8 **MR ARMITAGE:** That's our point 1. Would you like to hear me on the other points in
9 turn?

10 **THE PRESIDENT:** Yes. Why don't you?

11 **MR ARMITAGE:** The next one you have is Reasonable Enquiries, which is in
12 paragraph 2. So Motorola are suggesting that the obligation to produce the
13 Explanatory Memorandum should be qualified with this wording highlighted in yellow.
14 I just have some very quick points on this.

15 First, we are concerned that this might be used as a basis for doing a less exacting
16 job on producing this important document or that it may give rise to debates about
17 what counts as Reasonable Enquiries.

18 Secondly, when a party produces a disclosure report or an EDQ in an ordinary case
19 there is no provision that they only need to perform reasonable enquiries. I don't think
20 that's in dispute. We say there is no reason for a different approach for a document
21 that is fulfilling a similar purpose.

22 Thirdly, the Home Office doesn't consider that this caveat is necessary, which in my
23 submission undermines Motorola's concerns about proportionality.

24 Fourthly, my learned friend says in his skeleton that a Reasonable Enquiries caveat is
25 proportionate, because, in his words, a key body, perhaps the majority of the relevant
26 disclosure, will lie in the CMA documents. We just say that can't be known a priori,

1 and indeed, understanding what other relevant documents may be out there is
2 precisely why the Explanatory Memorandum is going to be important.

3 So those are my short points on why we say the wording is not needed. Obviously, if
4 there are limitations to the process that's carried out, they can be explained in the
5 document itself, we just don't think that the governing caveat is required.

6 Sorry. I am just handed a note -- of course, if the trial is going to be sooner than the
7 parties had perhaps anticipated, then this process of identifying relevant documents
8 properly in this document is obviously all the more important.

9 **THE PRESIDENT:** Yes. All right.

10 **MR ARMITAGE:** Sorry. The third point is 2(e). This is the point about -- this is our
11 suggestion, which is that we say that the Explanatory Memorandum should give details
12 of any Relevant Documents of which the Defendants' or the Home Office's legal
13 advisers are currently aware or become aware, including through this process.

14 **THE PRESIDENT:** What do you mean by this? Is this relevant documents not in the
15 CMA disclosure?

16 **MR ARMITAGE:** Yes.

17 **THE PRESIDENT:** So it is not identifying documents in the CMA disclosure but other
18 documents?

19 **MR ARMITAGE:** It is simply that if there are relevant documents or repositories of
20 relevant documents of which the legal team are already aware, they should give details
21 of those, which again will help calibrate the process. Just by way of a bit of context
22 here --

23 **THE PRESIDENT:** Just before you go on, when you say details of relevant
24 documents, when you made the point orally, you said "or repositories". So you don't
25 have in mind it is identification of specific documents, but where documents might be.
26 Is that ...?

1 **MR ARMITAGE:** I think if already sitting there on the Defendants' legal team's system
2 is a list of documents relevant to the proceedings, we would say why ought that not to
3 be provided? This started life as a request for known adverse documents disclosure.
4 That was resisted and we have not pursued that. That sort of process involves
5 enquiries with employees, former employees and so on. So we have withdrawn that
6 at least at this stage. As I say, what we really have in mind is if there are documents
7 that have already been identified by my learned friend's instructing solicitors, why
8 would they not provide details in whatever form is appropriate? If it is a list of
9 documents that have already been identified specifically, fine. If it is a list of potential
10 repositories of which they are aware, that's also fine. We don't seek to dictate that.

11 **THE PRESIDENT:** Are you asking for just the list to be provided or are you saying
12 that if there is a relevant document or are relevant documents that aren't within the
13 CMA disclosure, they should just be given now?

14 **MR ARMITAGE:** I think the way this works is we will get the information if this is
15 ordered, at which point we can make any appropriate requests. I suppose yes, if there
16 are specific individually-listed documents, why would they not be provided if they have
17 been identified as relevant? But it slightly depends on what is given.

18 **THE PRESIDENT:** All right.

19 **MR ARMITAGE:** As I say, I think the main objection to this is that this is KADs by the
20 back door. In my submission, that is wrong, because it doesn't require deliberate
21 checks with employees and indeed potentially ex-employees who will have to be
22 educated, if you like, on the issues in the case. It is the legal team.

23 **THE PRESIDENT:** But I think the question is what is "known" and what is your
24 definition of "what is known", because something might be sitting on someone's
25 computer but they wouldn't necessarily have at the forefront of their mind that it is
26 there. Does an enquiry have to be made? It seems to me this is a little bit vague as

1 it stands.

2 **MR ARMITAGE:** We are using the language of known in this document, obviously.

3 We are now saying details -- of course, we are using the **(overspeaking)**.

4 **THE PRESIDENT:** Currently aware. All right.

5 **MR ARMITAGE:** I see the point. It is potentially a matter of drafting. As I say, I think

6 what we really have in mind is, if there is a batch of documents that have already been

7 tagged as relevant sitting there, it would just make sense for them to be provided in

8 the course of this document. Then everybody knows about them as soon as possible.

9 In fact, we are not focusing only on adverse documents and relevant documents.

10 **THE PRESIDENT:** So what you are effectively saying is, if the legal team has

11 specifically identified certain documents as being relevant to these proceedings, but

12 they are not within the CMA disclosure, details of those should be made?

13 **MR ARMITAGE:** Yes. It may be that there are documents that were not disclosed to

14 the CMA that are relevant for these proceedings. **(Inaudible due to audio distortion)**.

15 We don't know that, that's exactly right, or of which they become aware while doing

16 this process. That is the only further point.

17 **THE PRESIDENT:** Yes. All right. Let me hear from Mr Kennelly on those three points.

18 Do you want to address them in the same order that Mr Armitage did?

19 **MR KENNELLY:** If that is convenient for you, Madam.

20 **THE PRESIDENT:** It is. Thank you.

21 **MR KENNELLY:** First of all, para 2(f) deals with document retention policies and

22 instructions to preserve relevant documents. Our concern about this is that it is quite

23 open-ended. We are concerned to ensure that the searches and details are

24 reasonable and proportionate, because Airwave was acquired by Motorola in 2016

25 and the procurement took place in the year 2000. So, if we were to go through

26 document retention policies all the way back to 2000, that would be a disproportionate

1 exercise. But we are content to give a statement of our document retention policies
2 and what we have done to preserve documents since the CMA investigation in 2021
3 and that should be sufficient. That is a reasonable enquiry in relation to document
4 retention and document preservation policies. So that's sufficient, we say, and that's
5 what we suggest in place of what's currently there in paragraph 2(f).

6 **THE PRESIDENT:** And (g)?

7 **MR KENNELLY:** And (g) --

8 **THE PRESIDENT:** Because Mr Armitage has just addressed (f) and (g)
9 compendiously.

10 **MR KENNELLY:** He did. (g) is more problematic. Because again in (g) it creates the
11 same uncertainty that, Madam, you identified with him, because the current drafting
12 requires us to provide details of any irretrievable documents that are or may be
13 relevant. That's not repositories or custodians. That is on the face of it disclosure by
14 list, which is not the purpose of this exercise. Even a disclosure report or EDQ would
15 require disclosure by list. It is even more unnecessary and inappropriate at this stage
16 because he is asking for a list of documents that are no longer retrievable.

17 **MR ARMITAGE:** Sorry, if it assists, we had not intended to suggest that it should be
18 a list of individual documents. In relation to this one, and apologies if I didn't make this
19 clear, we had in mind a description of the circumstances in which classes of
20 documents may be irretrievable in relation to, say, a particular individual's device. It
21 is that sort of point as you would see with these documents.

22 **THE PRESIDENT:** All right. All that really falls together with (f) then, doesn't it? It is
23 the same point, isn't it, essentially?

24 **MR KENNELLY:** In fact, it is covered by (c), because we agree to give details of any
25 data sources used or created or stored that have held or hold or may hold. "Have
26 held" will cover data sources of custodians that had documents that are no longer

1 available. We have to give details of sources and custodians -- forgive me -- in (d)
2 that have held.

3 **THE PRESIDENT:** "Have held."

4 **MR KENNELLY:** So between (c) and (d) that concern is covered off.

5 **THE PRESIDENT:** All right.

6 **MR KENNELLY:** On the Reasonable Enquiries -- if I move on?

7 **THE PRESIDENT:** Yes.

8 **MR KENNELLY:** On Reasonable Enquiries, we have put Reasonable Enquiries in
9 again to ensure this is a proportionate exercise because, as I said earlier, there are
10 100,000 documents that need to be reviewed and -- and, this is the important
11 point -- they are likely to constitute the majority of the disclosure in the case.

12 Now, Mr Armitage, my learned friend, said we can't be sure of that, but the Class
13 Representative's own submissions before you in relation to the other class member
14 disclosure issue stressed their understanding that the CMA pack is likely to be the vast
15 majority of documents for the trial. For that reason we understood it was common
16 ground and so we sought to insert reasonable enquiries to make sure that the exercise
17 was proportionate.

18 The caveat itself doesn't seem to be problematic for the Class Representative. In their
19 skeleton at paragraph 8(c) they said that that kind of caveat to the effect that the
20 search followed reasonable enquiries could be inserted in the Explanatory
21 Memorandum of Motorola files. That is paragraph 8(c) of their skeleton. So if they
22 are happy for the caveat to go into the Explanatory Memorandum, there is no problem
23 with it going in the order and it is better to go in now so we know exactly what kind of
24 exercise we are undertaking. There is no suggestion that we are going to do
25 an inadequate job. We understand our obligations and it is just important that this is
26 understood to be reasonable and not exhaustive.

1 **THE PRESIDENT:** All right. That's the Reasonable Enquiries point. Then the last
2 point is the identified documents which aren't in the current CMA disclosure tranche.

3 **MR KENNELLY:** Yes. Paragraph 2(e):

4 "Details of any relevant documents of which the Defendants' or the Home Office's legal
5 advisers are currently aware or become aware".

6 Again, the problem with this, as I think the Tribunal anticipated, is that it appears to
7 require us to list out the relevant documents.

8 My learned friend said this could be fixed by drafting and definitely, if it remains, it will
9 need to be, because, again, as currently drafted, it requires us to provide details of
10 any relevant documents of which the Defendants' legal advisers are currently aware
11 or become aware. So that is a requirement to list documents.

12 The second objection is the reference to Airwave's legal advisers.

13 Now, as the Tribunal is well aware, normally disclosure obligations apply to parties
14 and not their lawyers. The lawyers have separate duties to ensure that their clients,
15 the parties, comply with the parties' duties. So it is quite inappropriate and unusual for
16 us to be under an obligation -- for the lawyers to be under the obligation to produce
17 relevant documents and, of course, Airwave's lawyers normally only have knowledge
18 of relevant documents by reason of their privileged interactions with Airwave.

19 **THE PRESIDENT:** This is also supposed to bite on the Home Office, isn't it?

20 **MR KENNELLY:** Yes.

21 **THE PRESIDENT:** Has the Home Office agreed this or not?

22 **MR WILLIAMS:** Yes, we have, Madam.

23 **THE PRESIDENT:** All right.

24 **MR KENNELLY:** In the Practice Direction 57AD that deals with known adverse
25 documents in the High Court, again that applies to parties, not to their lawyers. There
26 are separate duties for the lawyers to ensure the parties comply with their obligations.

1 There is a final problem with scope, because it refers to the Defendants' legal advisers.
2 It is not clear if that covers Airwave's previous solicitors who represented it during the
3 CMA process, lawyers that had represented it but have departed. As I said, the
4 procurement took place in the year 2000. This is a very extensive period. The scope
5 of the application of this to the Defendants' lawyers is entirely unclear. So it should be
6 removed. It is unnecessary, because the purpose of the Explanatory Memorandum is
7 to require the parties, including Motorola, to search for repositories and custodians
8 other than the CMA document pack which hold or used to hold relevant documents
9 during the date ranges and that is sufficient to achieve the purpose of the exercise.

10 **THE PRESIDENT:** So you say in any event (b), (c) and (d) covers this?

11 **MR KENNELLY:** Yes.

12 **THE PRESIDENT:** All right.

13 Mr Armitage, do you want to come back very briefly on any of that?

14 **MR ARMITAGE:** Very briefly. Just on document retention, I think the offer, if that's
15 the right word, was to provide details of document retention policies in place since the
16 CMA investigation. We say that's not sufficient in circumstances where the relevant
17 issues in this case pre-date the CMA investigation. If documents have been deleted,
18 for example, it is helpful that we know that.

19 **THE PRESIDENT:** Are you really expecting them to go back to 2000? That's
20 26 years.

21 **MR ARMITAGE:** Yes. I think that point has not come up in discussions before in the
22 sense that it's been agreed that the relevant date range covered by this Explanatory
23 Memorandum would go back that far. If there are issues with doing that, as I say, that
24 could be explained in the document, but obviously the relevant period in this
25 case -- there is the claim period, obviously, which is more recent, but certainly in
26 relation to negotiations one goes become a little further.

1 **THE PRESIDENT:** If you were to settle for something that was greater than 2021 but
2 significantly a shorter period than 26 years, what would be an appropriate cut-off?

3 **MR ARMITAGE:** You will obviously have seen in the pleadings there are various
4 references to negotiations.

5 **THE PRESIDENT:** Yes. Mr Herga was just suggesting that.

6 **MR ARMITAGE:** So 2014 might be a reasonable date that pre-dates the negotiations
7 that are discussed in the pleadings. So, yes. In terms of document retention --

8 **THE PRESIDENT:** What's the date of the first key negotiation? You say 2014 pre-
9 dates, but by how much?

10 **MR ARMITAGE:** Yes. I don't have that. I am reminded the date of the acquisition of
11 ASL by Motorola, which I think is 2015, we will find the exact date, that may be
12 a convenient cut-off. That's one possibility.

13 **THE PRESIDENT:** Do you want to deal with (g), which Mr Kennelly says is covered
14 by (c), effectively, anyway?

15 **MR ARMITAGE:** If it is covered by (c), in other words if that information is going to be
16 provided, then fine. We say it does serve a distinct purpose, because it provides
17 an explanation for why relevant documents may not be held, which may raise
18 questions, but if the clear understanding is that that information will be provided under
19 the existing wording, that's fine. It's just including (g) we say gives additional clarity as
20 to what's envisaged.

21 **THE PRESIDENT:** All right. Reasonable Enquiries, I think we have heard enough
22 about that.

23 **MR ARMITAGE:** Just on the point of legal advice, obviously we accept in the ordinary
24 case disclosure obligations attach to parties. We just say in the specific circumstances
25 of this case, if legal advisers are aware of relevant documents already, it is consistent
26 with the Tribunal's governing principles for those to be provided. There is

1 actually -- I will not turn it up. It is obviously a different case. There is a recent
2 precedent for an order a bit like this in the *Lenzing* proceedings, but sadly there is no
3 published order or ruling on this point, but there was -- I was at the CMC recently
4 where an order was made by reference to the knowledge of legal advisers conducting
5 the disclosure review. I don't think a jurisdictional point is being taken. I will only
6 mention that for completeness.

7 I am just going to turn round on the point about which legal advisers, if I may, just for
8 one -- because I think the point was made that does this attach to previous legal teams
9 assisting Motorola?

10 **THE PRESIDENT:** All right. Yes.

11 **MR ARMITAGE:** Yes. So we know that Herbert Smiths are already liaising with the
12 previous advisers in connection with disclosure. It seemed to us that asking a question
13 about whether they are aware of any relevant documents not covered by the CMA
14 documents would be proportionate, so we don't think it should be limited to HSFK.

15 **THE PRESIDENT:** All right. Thank you.

16 Mr Kennelly, I can see you are burning to jump up.

17 **MR KENNELLY:** We are content with doing our best to identify document retention
18 policies since Motorola acquired Airwave in 2016. Prior to 2016 that would be
19 an impossible task. But we maintain our objection to the obligation being imposed on
20 legal advisers. That's not appropriate. Even in the known adverse documents
21 requirement that's not the approach. Parties are under disclosure obligations, not their
22 legal advisers. They have separate duties to ensure that the parties comply with their
23 duties.

24 **THE PRESIDENT:** All right. Thank you. All right. What we are going to order, just
25 working through paragraph 2, we will not order the clause that says:

26 "To the extent possible following Reasonable Enquiries."

1 That should be deleted. I don't think that it is necessary to have that caveat for the
2 purposes of proportionality and I don't want any suggestion that the obligation to
3 explain is diluted in any way.

4 As for (e), we are not minded to order that at this stage. It seems that this to a large
5 extent is likely to be covered by the other provisions of paragraph 2.

6 The same goes for paragraph (g).

7 As to (f), we are minded to order that from 2016. For the reasons given in discussion
8 it seems to be inappropriate to go back to 2000 but 2016 would go back ten years and
9 is a proportionate search in our view.

10 So that deals with the Explanatory Memorandum.

11 The next question I think then is the disclosure from class members other than the
12 Home Office. All right.

13 **MR ARMITAGE:** This is my learned friend's application, so perhaps he should speak
14 first.

15 **THE PRESIDENT:** Can I just start by indicating that we think that it is going to be
16 most useful firstly for the proposals or requests to come from Motorola rather than
17 being put forward proactively by the Class Representative, because you are likely to
18 know what additional documents you need.

19 Secondly, it seems to us that it would make sense for that to crystallise at least
20 following the Redfern Schedule process, although we wouldn't be adverse to
21 encouraging or ordering some initial discussions to take place if it can do so in parallel
22 with the process of looking at the CMA disclosure tranche.

23 So in terms of crystallising any disputes, that probably is going to need to await the
24 Redfern Schedule process, but it seems that if you are able to have discussions
25 already, then that would be productive.

26 **MR KENNELLY:** Thank you for that indication, Madam. The proposal that the Class

1 Representative go first was really just a practical one, because they are the ones who
2 have the most direct contacts with the other class members and are best placed to
3 know what the other class members have and can access in a proportionate practical
4 way.

5 We have the Tribunal's indication but what that means is, if Airwave goes first, we will
6 be making proposals to the Class Representative without any real understanding of
7 what is out there and what can be found, but we can **(overspeaking)**.

8 **THE PRESIDENT: (Overspeaking)** because you have the CMA disclosure set and
9 you can then decide to what extent you want to go beyond that. It doesn't seem to us
10 that it is likely to be very useful to be going to the Loch Lomond or Mountain Rescue
11 or whatever and asking them what they have that's on the question of value. I think
12 you are going to have to concentrate your requests on the most important and largest
13 of the class members and think "what is realistically likely to advance the issues in the
14 case?"

15 **MR KENNELLY:** Madam, we obviously will, pursuant to your indication, formulate
16 a request for the types of disclosure that we understand to be necessary from the other
17 class members. What we will not be able to do is identify the sources of those
18 documents and the ease with which those documents can be produced. So we will
19 need a response from the Class Representative telling us whether our requests can
20 be achieved practicably by reference to custodians and sources from other class
21 members.

22 To your point, Madam, about smaller charities like the one you mentioned, we are
23 asking for disclosure from other class members by sample. One sample will have to
24 come from the smaller charities, because, as we discussed at the certification hearing,
25 there was a point taken against me which led to certification of the case, is that there
26 is great diversity among these class members and the value that they extract from our

1 service varies between the different categories of class members.

2 **THE PRESIDENT:** So you are proposing a sampling approach rather than saying
3 every single class member.

4 **MR KENNELLY:** Yes, absolutely.

5 **THE PRESIDENT:** That was not immediately apparent. Is there any reason why you
6 can't formulate your proposal as you have suggested in what is now I believe 9(b) of
7 the order? Maybe that has moved on. All right. Yes. All right.

8 **MR KENNELLY:** It is in 6, Madam.

9 **THE PRESIDENT:** No, I was not looking at 6. I was looking at 9.

10 **MR KENNELLY:** Sorry.

11 **THE PRESIDENT:** So 6 is if the Class Representative is going to go first.

12 **MR KENNELLY:** Yes.

13 **THE PRESIDENT:** 9(b) is if you are going to go first.

14 **MR KENNELLY:** Well, the idea is that we have to have a discussion well before July
15 in order to allow us to make an effective request in the Redfern Schedule in relation to
16 other class members. It is far too late -- if the Tribunal's proposal is to be adopted, we
17 would need to make an initial approach to the Class Representative in respect of other
18 class member disclosure sooner rather than later and they would need to get back to
19 us rapidly in order for us to understand what are its requests.

20 **THE PRESIDENT:** All right. So you would need to have discussions leading up to
21 that but 9(b) does not preclude you having discussions.

22 **MR KENNELLY:** Not at all.

23 **THE PRESIDENT:** If you are saying that in order for you to make your request -- sorry.

24 **MR KENNELLY:** Sorry, Madam.

25 **THE PRESIDENT:** No, it is all right. Do you want to take instructions?

26 **MR KENNELLY:** May I?

1 So, Madam, what we suggest is, if you are looking at paragraph 6 of the order, we go
2 first. So by 27 March we provide a proposal. In fact, all of that will be for us to do.
3 Then the Class Representative will have to respond to us --

4 **THE PRESIDENT:** Yes.

5 **MR KENNELLY:** -- emphasising the practicability with reasons as to why our requests
6 are impracticable, if that's the case, because that will then allow us to continue the
7 discussion and ultimately formulate disclosure requests of other class members.

8 **THE PRESIDENT:** All right. On the basis of your point about a sample, should we
9 insert in that provision of disclosure "from a sample of --

10 **MR KENNELLY:** Yes.

11 **THE PRESIDENT:** -- class members other than the Home Office"? All right. So your
12 proposal is that you should go first and then in paragraph 7 it would then be for the
13 Class Representative to comment on the proposal.

14 **MR KENNELLY:** Yes.

15 **THE PRESIDENT:** And then going over, I think 9(a) would go because it wouldn't be
16 the Class Representative who was asking for this or proposing it. On this basis 9(b)
17 would be retained and 9(a) would reflect the result of your discussion.

18 **MR KENNELLY:** Sorry, Madam.

19 **THE PRESIDENT:** So 9(a) doesn't make sense because on this proposal the Class
20 Representative is not going first.

21 **MR KENNELLY:** Yes, I see that.

22 **THE PRESIDENT:** So you would be making the request in your bit of the Redfern
23 Schedule. Then, as I indicated earlier, this would be by 31 July. You would have not
24 only the Home Office responding but also the Class Representative responding. Then
25 by what is now reverting to 18 September, the Class Representative would be replying
26 and the Defendants would be -- you would be replying to both the Home Office and

1 the Class Representative.

2 **MR KENNELLY:** Yes, I see that. Yes, I understand that. I was just again slightly
3 thrown by the different colour schemes. Madam, I understand the indication of the
4 Tribunal and we are content with it.

5 **THE PRESIDENT:** All right. Then on that basis 12 to 14 would go unless it was
6 necessary in some form to build in an order for a without prejudice meeting, but my
7 assumption would be that that could take place if necessary, and if you needed us to
8 order, this then we could do it, but otherwise the period between paragraph 7 and
9 paragraph 9 builds in several months. Assuming paragraph 9 was 26 June -- I think
10 that's right --

11 **MR KENNELLY:** Yes.

12 **THE PRESIDENT:** -- you will have more than two months between the Class
13 Representative's comments and your Redfern Schedule. Now, if you think it is
14 necessary for us to order that during that time you meet to discuss, we could do that,
15 but otherwise you might consider that we don't need to micromanage that.

16 **MR KENNELLY:** That would be micromanaging, Madam, so we don't need that.

17 **THE PRESIDENT:** So, on your view, as discussed, but no need for paragraphs 12 to
18 14.

19 **MR KENNELLY:** Yes.

20 **THE PRESIDENT:** All right. Let me hear Mr Armitage on that.

21 **MR ARMITAGE:** I am very grateful for that. We welcome the Tribunal's approach
22 and indeed it in part reflects our proposal. We are largely content with it. There is just
23 one point to make, which is, looking at the draft order, obviously we completely agree
24 that Motorola should go first. Just to be clear, the Class Representative at the moment
25 doesn't have a view on the extent to which disclosure will be needed from class
26 members, subject to the pass-on point, which we may come to.

1 **THE PRESIDENT:** Yes.

2 **MR ARMITAGE:** So we very much welcome the reversal of the burden, if you like.
3 The only point to make is just that if we are going to be providing comments on
4 a proposal by the date here, which is 10 April, that is very shortly after we will have
5 received the CMA documents and obviously we will say that's a key input to the
6 consideration of what's going to be required.

7 Now, obviously, if what's envisaged is preliminary comments or something like that
8 and the process then is formalised later by the Redfern Schedule process, I am sure
9 that's fine. It is just I wouldn't want it to be thought that we would be in a position very
10 shortly after receiving the CMA documents to be able to provide fully informed
11 comments on any proposal, because we will still be looking at them.

12 **THE PRESIDENT:** Could that date be extended -- I can see that that's only a few
13 weeks actually, which is quite tight. What about if that date was extended to 30 April,
14 because there would still then be two months before the Redfern Schedule process
15 kicks off.

16 **MR ARMITAGE:** Certainly that's better. Again, we will still be looking at the
17 documents, but I don't think what's envisaged is a final word from the Class
18 Representative on any proposals, because that's going to come later in relation to the
19 Redferns. So I think that is fine. I am seeing nodding behind me.

20 Then, to be clear, we completely agree, although we had proposed the wording at 12
21 to 14 as an alternative approach, we agree that doesn't need to be provided for in the
22 order. I am sure the parties are well able to cooperate without the need for those
23 directions.

24 **PRESIDENT:** Yes.

25 **MR ARMITAGE:** So, subject to that point about the date, I think that ...

26 **THE PRESIDENT:** Let me just check with my fellow panel members.

1 Mr Kennelly, are you happy with 30 April? Because that still gives you two months.

2 **MR KENNELLY:** It does indeed. In view of that, could we have an extra week,
3 because we had not considered previously that we would be going first, and I have not
4 taken instruction, in order to formulate a useful request, not just a massive shopping
5 list but something more targeted? Could we have an extra week from 27 March, which
6 brings us up to 3 April, to formulate our request on the further class disclosure?

7 **THE PRESIDENT:** Yes. All right. That seems reasonable.

8 **MR KENNELLY:** I am sorry. I am told that's Good Friday.

9 **THE PRESIDENT:** Sorry, yes.

10 **MR KENNELLY:** It would have to be the 2nd.

11 **THE PRESIDENT:** The 2nd, Maundy Thursday.

12 **MR KENNELLY:** Yes. Thank you.

13 **THE PRESIDENT:** Mr Armitage, if you are getting until 30 April anyway and the
14 understanding is that you will be responding in principle and without expecting you to
15 have reviewed all of the CMA documents by then ...

16 **MR ARMITAGE:** Sorry they would get until -- sorry, just so I have the right --

17 **THE PRESIDENT:** 2 April rather than 27 March.

18 **MR ARMITAGE:** I think if we could have an extra week that would be useful; in other
19 words -- I am Sorry, I will let you finish.

20 **THE PRESIDENT:** I am not sure what you are proposing. You are already getting
21 until 30 April to respond. Mr Kennelly is just asking for an additional six days at the
22 start of that in that case.

23 **MR ARMITAGE:** I understand. That's absolutely fine.

24 **THE PRESIDENT:** So that's what we will order. So the date in paragraph 6 is 2 April.
25 Class Representative be replaced by the Defendants. Provision of disclosure from
26 a sample of class members. In paragraph 7 the date of 30 April. Then the Defendants

1 replaced by Class Representative. Then we delete paragraphs 12 to 14.

2 **MR ARMITAGE:** Very good.

3 **THE PRESIDENT:** Okay. Shall we take a break for a few minutes, because then
4 I think the next issue is the application for a split trial. I will give you an indication of
5 what we are currently thinking.

6 Our current view, preliminarily and before obviously hearing from both of you, is that it
7 would be useful to order a split trial for essentially the reasons given by the Class
8 Representative. We are not minded to list a ten-week trial. We are minded at the
9 moment to list a six-week trial. We are grateful for the Class Representative's
10 indication as to whether any other split could be possible. I anticipated that your
11 response would be as it was, but we wanted to at least canvass it. Obviously you
12 have thought about it. We are not going to suggest that there should be a split liability
13 versus quantum for the reason that you give.

14 Assuming that our provisional view is maintained, and would I like Motorola to bear in
15 mind our provisional indication, we are minded to order a six-week trial. At the moment
16 we are thinking of June and July next year with the idea that it would end by the end
17 of term. So that would mean starting somewhere in the middle of June. That's our
18 provisional view. Obviously we will want to hear from you as to whether that's feasible.
19 If that was the timetable, then the steps going forward would be, as we envisage, a
20 CMC at the end -- don't worry, you can both sit down. I am just giving you our
21 indication now so that during the break you can take instructions.

22 What we are envisaging is that there would be a CMC at the end of September,
23 probably at some point from 21 September onwards. We would want at that CMC to
24 have a full timetable to trial. I would imagine that there would be then fact evidence
25 exchanged around the end of the year and then the experts process next spring. We
26 would want detailed consideration at that CMC of exactly what expert evidence was

1 going to be necessary, identification of whom the experts were and the precise issues,
2 not just broadly excessive pricing, but exactly what analysis is likely to be carried out
3 by the experts and what experts you would be proposing.

4 The idea would be that we would then give full directions to trial, including detailed
5 directions for expert evidence at the CMC at the end of September and we would then
6 be lined up to a trial starting around the middle of June next year if that's feasible.

7 It seems to us that, given that this is not proceedings which have come from a standing
8 start but proceeding that arise in circumstances where there's already been
9 an extensive investigation, we should not be thinking about a normal trial timetable
10 that would apply if these were entirely standalone proceedings without any
11 consideration of this having happened already.

12 It also seems to us that the longer that trials drag on, the greater the expense on both
13 sides. So having a somewhat more truncated timetable will enable costs to be
14 controlled, but we are minded to try and do what we can to control costs going forward,
15 and having a somewhat more compressed timetable ought to make that a bit easier.

16 So that's our provisional proposal. Obviously you will come back and tell us if you
17 think that that is feasible.

18 **MR KENNELLY:** Madam, may I ask a very quick question before you rise. If we can
19 persuade you -- Mr Luckhurst is dealing with this -- that pass-on can be addressed in
20 a trial that would last, say, 6 to 7 weeks in the window that you anticipate, if it were
21 a seven-week trial, could that be accommodated in the calendar the Tribunal has
22 before it, if it were 7 weeks, not 6?

23 **THE PRESIDENT:** We can consider that. Your point is that you think that pass-on
24 could be accommodated in a seven-week trial with just one additional week?

25 **MR KENNELLY:** Exactly.

26 **THE PRESIDENT:** All right. Well, we would need to hear submissions on that. But

1 I would like you to consider when you are making that proposal whether in general
2 that window is going to work.

3 **MR KENNELLY:** Of course, yes.

4 **THE PRESIDENT:** And we will obviously want to hear submissions from everyone
5 else on that. Thank you very much. We will come back in probably ten minutes to
6 allow you to discuss that.

7 **(11.39 am)**

8 **(Short break)**

9 **(11.51 am)**

10 **MR ARMITAGE:** It is obviously my application. We have discussed and we very
11 much welcome the Tribunal's indication and we agree that this ought to be listed with
12 no pass-on for a six-week trial in June/July next year. We think that's workable and
13 will have real benefits in terms of costs savings bearing in mind that costs in this case
14 may be public money as well. It is a source of personal regret that having just come
15 into this case I won't currently be able to do the trial, but I am not going to suggest that
16 that makes a difference, sadly.

17 **THE PRESIDENT:** That's very generous of you.

18 **MR ARMITAGE:** On that basis, unless I can assist with any particular points.
19 I understand my learned friends proposed a suggestion. So maybe it makes sense
20 for me to sit down unless you have any questions.

21 **THE PRESIDENT:** No. Thank you very much.

22 Mr Kennelly.

23 **MR KENNELLY:** Thank you, Madam.

24 We have applied our minds to working out how a trial could be teed up for June 2027.
25 With the best will in the world, we just don't think it is possible. If one steps back and
26 works out the stages, it becomes clear why it couldn't work.

1 The starting point, though, is that this is not a carbon copy of the CMA investigation.
2 The CMA investigation, as you have seen from the final report, is ultimately determined
3 on quite straightforward grounds and the question of demand side value, for example,
4 was dismissed at an early stage by the CMA and was not fully investigated. We would
5 say it was not investigated at all. It is a major part of our defence. For it, we do need
6 detailed disclosure and evidence from the Home Office and the other class members,
7 the diverse class as certified. So there will be lots of factual evidence in this case.
8 So if we think about the stages, the Tribunal envisages a CMC in Michaelmas 2026.
9 That has to at least accommodate the possibility that further work on disclosure will
10 need to be done. We will bring disputes to you at the CMC and things will be ordered
11 and have to be complied with. We have to at least envisage the possibility that further
12 disclosure needs to be done.
13 So what that means is we get to Christmas 2026 with the best case scenario disclosure
14 completed. That means on the Tribunal's timetable we would have to produce factual
15 evidence in January or February 2027. We know from the Class Representative's
16 hearing estimate that they envisage significant fact evidence, and that makes sense,
17 because there are significant factual issues in this case. If one thinks about it at a very
18 high level, the question of dominance is going to turn on those negotiations that took
19 place at the crunch points between the Home Office and Motorola, this allegation they
20 were over a barrel, and our defence that, in fact, there were various contractual
21 mechanisms available to them, and how those negotiations were handled, the various
22 information the parties had to hand and the options available to them will be central to
23 the factual evidence that will be produced for the purpose of the trial, and for that
24 factual evidence disclosure will need to be produced.
25 **THE PRESIDENT:** But would that need the additional disclosure from the other class
26 members? Because you will have had the CMA disclosure by then.

1 **MR KENNELLY:** Because for the other class members we need the same. For
2 distinctive value, for the purposes of our defence for the abuse, the excessive pricing
3 allegation, we want to say that those other class members received distinctive value,
4 value distinct from the value which the other class members were receiving.

5 **THE PRESIDENT:** But what factual evidence will that require -- what initial factual
6 evidence will that require? Or will that be a matter of expert evidence?

7 **MR KENNELLY:** It will be a matter of factual evidence, because we are positively
8 saying these other class members, for example, either they had substitutability options
9 or other communication options. For the RSPCA, for example, and some of the
10 charities, they had outside options, they didn't need necessarily all Airwave products
11 for the purposes of what they were doing, but when they did need -- and that goes to
12 market definition and dominance, but similarly when they did need it, it was provided
13 in distinctive value, which justified the price that was being charged at the time. That
14 demand side value is a very important part of limb 2 of the United Brands test.

15 **THE PRESIDENT:** What factual evidence are you going to be providing? Or are you
16 saying that the factual evidence will come from the class members?

17 **MR KENNELLY:** It has to come from them. We would need disclosure evidence from
18 them on that point. Then we should be in a position to answer it, if we can, with
19 responsive factual evidence. This is an area which -- a business that we know
20 intimately. That responsive factual evidence on the Tribunal's approach would have
21 to come in in February, three weeks, a matter of weeks after receiving the significant
22 factual evidence from the Class Representative. That's in respect of material which
23 was not before the CMA. All the CMA has from other class members apart from the
24 Home Office is seven RFI responses.

25 **THE PRESIDENT:** Why would the Class Representative's statement -- sorry. Why
26 would the class members' factual evidence need to await their own disclosure? Why

1 | couldn't that be provided at the end of December?

2 | **MR KENNELLY:** The other class members' evidence could come earlier. Our ability
3 | to understand it will depend on the disclosure we get, the other class members'
4 | disclosure. Normally even the other class members would need to consider -- and
5 | Class Representative would need to consider the disclosure from the other class
6 | members before signing off on witness statements from them as to these questions.

7 | **THE PRESIDENT:** It depends how much there would have been. Let's just take
8 | Loch Lomond, for example. If you were asking a small charity like Loch Lomond, it is
9 | not going to be commenting on the evidence or disclosure of other class members.
10 | It's just going to be talking about its own situation. It is difficult to see why that would
11 | need to wait until January. It is going to be able to do that probably at any point in the
12 | Michaelmas term.

13 | **MR KENNELLY:** Before Loch Lomond is asked to do it, it needs to see if it is in the
14 | sample. Before we know what is the appropriate sample of other class members, we
15 | need to have this discussion, which is beginning imminently, with the Class
16 | Representative as to who the sample should be. But there may well be a dispute
17 | about the size of that sample that the Tribunal is going to have to adjudicate.

18 | **THE PRESIDENT:** All right. But you say that you think that the additional disclosure
19 | will come towards the end of the year?

20 | **MR KENNELLY:** Yes.

21 | **THE PRESIDENT:** If the factual evidence awaits that, it would be January. You would
22 | then be replying to that in something like February.

23 | **MR KENNELLY:** Then the experts. The experts will need to look at the factual
24 | evidence, because the expert analysis in this case will not be a carbon copy of the
25 | dispute before the CMA. The experts before the CMA did not engage with demand
26 | side value, did not engage with the particular demand side value that the other class

1 members were receiving. We have our complaints about the CMA process and
2 obviously we lost the judicial review challenge, but our concern was that it was
3 an extremely superficial approach.

4 **THE PRESIDENT:** As you may have gathered from my comments about the expert
5 evidence, I don't want this case argued through the experts. It is very questionable,
6 in my mind, the extent to which the experts simply commenting in a qualitative way on
7 factual evidence is going to be useful. That, it seems to me, is a matter for lawyers.
8 The experts may carry out a quantitative analysis which you use to support your
9 contentions in relation to market definition / dominance. They will be dealing with
10 questions of the overcharge, quantification of the overcharge, but I'm not envisaging
11 that the experts will have carte blanche to essentially argue the case by looking at
12 qualitative evidence such as material that you can glean from any disclosure that you
13 get on value. That will be a matter for the legal team.

14 **MR KENNELLY:** We hear that loud and clear, Madam, but on the question of asset
15 valuation, asset valuation is a major issue in this case, and that's not something which
16 will be answered by the factual evidence. Asset valuation expertise is required and
17 even --

18 **THE PRESIDENT:** Did you say that that's not something that will be answered by the
19 factual evidence?

20 **MR KENNELLY:** No.

21 **THE PRESIDENT:** No, but then they don't need to wait for the disclosure.

22 **MR KENNELLY:** Sorry. The factual evidence will not determine the question of asset
23 valuation. It will inform the expert analysis of the asset valuation. That's central to our
24 case on excessive pricing. The experts need to wait for the factual evidence to do the
25 asset valuation. Even if they could produce it in a couple of weeks --

26 **THE PRESIDENT:** Are you really going to say that the asset valuation is going to turn

1 on some patchy evidence that you might get from a load of small charities on their
2 appreciation of the value of the service to them?

3 **MR KENNELLY:** It's not to be determined. What I am trying to explain is even relying
4 on the material which is coming from the Home Office and the factual
5 evidence -- because the factual evidence from the Home Office and from Airwave is
6 going to be produced at the beginning -- say January or February. The experts have
7 to analyse that, plus the material from the other class members in order to produce
8 reports in March, and then responsive evidence three weeks later in April, because
9 this has to lead up to a PTR in May, and it is just heading for a car crash because of
10 the concertina nature and the way it's been put together. There is no flex allowed for
11 any extensions or disputes at any stage of the process.

12 Now, I appreciate that our suggestion that the trial take place at the beginning of 2028
13 is unlikely to find favour with you, but we would implore the Tribunal to at least list it
14 after the summer. Give us the summer at least to extend these deadlines.

15 **THE PRESIDENT:** So what's your proposal?

16 **MR KENNELLY:** We will fall back on the proposal that was made by the Class
17 Representative, which was Michaelmas term 2027, so October 2027 or
18 November 2027, which is still extraordinarily tight, but --

19 **THE PRESIDENT:** Okay. That's your fallback. All right. Do you want to then deal
20 with the split trial point?

21 **MR KENNELLY:** That's Mr Luckhurst. I'll hand over to him.

22 **MR LUCKHURST:** Good morning. I say this on the premise that the Tribunal will be
23 listing a six/seven-week trial in 2027, as you helpfully indicated earlier. We say that
24 seven weeks could deal with all issues including pass-on. For example, one week for
25 pre-reading and opening oral submission, maybe three days pre-reading, one day
26 each oral openings, three weeks of factual evidence, one and a half weeks of expert

1 evidence and then one and a half weeks for closing, including preparing written
2 submissions, reading written submissions and oral closing submissions. We say that
3 could be comfortably accommodated.

4 **THE PRESIDENT:** Seven weeks then?

5 **MR LUCKHURST:** Yes.

6 **THE PRESIDENT:** How much of that time would be taken up with the pass-on issue
7 in both factual and expert evidence?

8 **MR LUCKHURST:** It is difficult to say precisely at this stage but I would certainly put
9 the point as a relative one in the sense that we say it definitely could be
10 accommodated. When it is being slotted into existing expert reports we have a slight
11 extension of time for the expert cross-examination. When it is being put into existing
12 written openings, written closing and submissions, you slot it into what is there already.
13 The contrast to draw is then with what would happen if you have a separate pass-on
14 trial later, where we say you have an entirely separate expert report, separate brief
15 fees for trial, a break between the factual evidence and closings and so on.

16 We say actually that would take weeks and would be a very expensive individual
17 exercise. But in terms of accommodating it within this trial, we don't see it extending
18 this trial by more than a week because you have the pre-existing efficiency of putting
19 it into what is there already. There will be a little bit more factual evidence that wouldn't
20 be there otherwise. The expert reports will include a pass-on subsection. But beyond
21 that we say it would be accommodated within pre-existing steps and at considerably
22 lower expense and time.

23 What I was going to do to address the application was make some short submissions
24 on the background, take you to two authorities on whether to order a split trial and then
25 make submissions on why this application for a split trial should be dismissed.

26 Could I ask you, please, to turn to -- it is Bundle A, tab 19, page 659. This is Mr Bell

1 for the Class Representative, an extract from his report in the application for
2 certification. You can see just on the preceding page, in fact, 658, he anticipates at
3 7.2.1, four lines down:
4 "Nevertheless, it is possible that some PCMs might have some downstream pricing
5 that is relevant to consider." "I would evaluate the level of such pass-on with respect
6 to the relevant economic factors."
7 He sets those out. Then at 7.2.3 on page 659 he explains that he would expect
8 relatively limited additional party disclosure requests to relevant proposed class
9 members being required. He says that could be conducted on a sample basis.
10 If you then look at, please, Bundle B, tab 99, page 304 -- I'm afraid this is part of the
11 document I have just been showing you that was chopped off so we need to go to
12 Bundle B.
13 **THE PRESIDENT:** Sorry, you want us to go to Bundle B?
14 **MR LUCKHURST:** Please. Tab 99, page 304.
15 **THE PRESIDENT:** Has Bundle B been amended?
16 **MR LUCKHURST:** It has.
17 **THE PRESIDENT:** I don't have that. Wait a minute.
18 **MR LUCKHURST:** At the foot of page 304 you should have Mr Bell particularising
19 what he expects in terms of pass-on --
20 **THE PRESIDENT:** Can you just tell me where -- was this in the bundles for the
21 previous hearing?
22 **MR LUCKHURST:** Yes, it would have been for the certification hearing.
23 **THE PRESIDENT:** Let me just -- I think I have that. Can you tell me exactly what the
24 document is I need to find? Is it Bell 1?
25 **MR LUCKHURST:** Bell 1.
26 **THE PRESIDENT:** Wait a minute. I will just find that. I don't know if anyone

1 has -- I have Bundle D. It is internal page what?

2 **MR LUCKHURST:** Page 118.

3 **THE PRESIDENT:** Right. Yes, I have got there.

4 **MR LUCKHURST:** It's page 304 in tab 99 or 118 internally in Bell 1. At the foot of

5 that page Mr Bell explains what he's expecting in terms of information to proposed

6 class members. You can see there he is anticipating internal pricing documents,

7 e-mails, memos which can be used to assess the existence and extent of potential

8 downstream pass-on.

9 **THE PRESIDENT:** Wait a minute. I am not anywhere near there. Paragraph what?

10 **MR LUCKHURST:** It's internal page 118 in Bell 1.

11 **THE PRESIDENT:** Yes, I have it. Paragraph?

12 **MR LUCKHURST:** There should be a table at 7.1 and at the foot of the table it is row

13 4.

14 **THE PRESIDENT:** Row 4. What do you want us to look at?

15 **MR LUCKHURST:** He has anticipated there what he would require to look at, he

16 expects to deal with downstream pass-on, he refers to internal pricing documents,

17 e-mails, memos from a sample of CMs, as we have seen from the extracts that I just

18 showed you. Just for completeness, no need to turn it up, you in your judgment on

19 the CPO application noted that Mr Bell would consider an appropriate adjustment for

20 pass-on, if any. That's your CPO judgment, paragraph 25, just for your reference.

21 That's Bundle A, tab 8, page 176.

22 **THE PRESIDENT:** Wait a minute. I'm sorry, you need to give us time to go there.

23 176, paragraph 25.

24 What do you get out of this paragraph?

25 **MR LUCKHURST:** Just your Honour anticipated there, four lines down:

26 "He will then apply an appropriate interest rate and then consider any appropriate

1 adjustment for pass-on to entities (if any) that are not part of the ..."

2 **THE PRESIDENT:** Yes, that's just saying that the pass-on will be carried out after the
3 calculation of the overcharge.

4 **MR LUCKHURST:** Yes, that's right. Then just two supplementary points just on that,
5 which you draw from the documents in tab 99, which I have just handed up. I don't
6 necessarily need to go to them, because I don't think these propositions will be
7 controversial, but the litigation plan, which starts at page 305. We can see then at
8 page 312, paragraph 6.8(d), the Class Representative is contemplating pass-on
9 disclosure. That's part of the existing plan.

10 **THE PRESIDENT:** Paragraph?

11 **MR LUCKHURST:** 6.8(d) at page 312. It is reflecting what we have seen in Mr Bell.

12 **THE PRESIDENT:** Yes.

13 **MR LUCKHURST:** Then in the litigation budget which is appended to that plan, which
14 is at page 317 of the correspondence bundle, so the back of tab 99 which I have
15 handed up, the assumption -- the text is rather small, but essentially the
16 assumptions -- we can see it in point 9 -- is that there will be a single trial addressing
17 all issues including pass-on. They have said up to ten weeks there. It was, of course,
18 the ten-week trial that was proposed in the Class Representative's skeleton argument,
19 paragraph 38, although there was a change of position last night. As I said in opening,
20 we think that you can have a single trial, seven weeks, that will deal with everything.
21 So by way of background I say that you take that into account. Then when Mr Gale
22 says at paragraph 18 of his third statement that the Class Representative is concerned
23 that the Defendants envisage a large-scale and costly exercise, then you are entitled
24 to have regard to the fact that pass-on was on the table at the outset and it was
25 planned and budgeted for as part of the single trial.

26 In terms of the entities in respect of which pass-on is alleged, those are set out in our

1 Defence at paragraph 79.2, which is Bundle A, tab 2, page 97. There are four
2 subparagraphs in paragraph 79.2. The first one is police forces who charge for stadia
3 and other venues for additional policing services. As we have said at the end of
4 sub-para 8, those stadia or other venues may fall outside the class in circumstances
5 where their financial contribution is not specifically itemised.

6 We then have insofar as they are within the class, those stadia or commercial event
7 venues, then they may themselves be passing on, sub-paragraph (b).

8 At (c) regulated utilities or airports.

9 Sub-paragraph (d), local authorities, because they are under a statutory obligation to
10 produce balanced budgets.

11 Now, in terms of the police forces and the venues, the Class Representative has not
12 yet established whether all the venues made a specific financial contribution. That's
13 Ashurst's letter of 10 February 2026 at paragraph 13. We don't need to turn it up. It
14 is B, tab 60, page 191.

15 If the police did charge their costs to those stadia without specifically billing them for
16 Airwave, then we have alleged police pass-on to an entity outside the class. That's
17 how it works, but these are discrete and properly and carefully particularised pleas.
18 They don't affect all of the class members.

19 As Mr Bell has said himself, and as we agreed this morning, disclosure and evidence
20 can be on a sample basis with reference to those four categories. The Class
21 Representative's Reply is at tab 3, page 129 of that bundle, Bundle A. You can see
22 at the top of the page in the first full sentence it is said:

23 "The allegations at ..."

24 **THE PRESIDENT:** Which page?

25 **MR LUCKHURST:** Page 129 of Bundle A.

26 **THE PRESIDENT:** Yes.

1 **MR LUCKHURST:** Essentially you see at sub-paragraph (b) no admissions are made
2 as to the extent of any pass-on in the sense recognised by law.

3 When the Class Representative says in her skeleton argument at paragraph 32(iii)
4 that aspects of the pass-on case are legally dubious, that is not in her pleading and
5 there is certainly no application to strike it out. In the absence of a strike-out
6 application the merits are not a relevant factor in the application for a split trial and for
7 good measure we have included in the bundles a recent judgment of the Tribunal
8 where the Tribunal declined to strike out just such a plea in respect of local authorities.
9 That's the *Adur District Council* case in authorities 2, tab 25.

10 So turning to the legal principles, please can you just turn up authorities tab 20? It is
11 page 584. *Jinxin v Aser Media*. This is a judgment of Peter MacDonald Eggers KC
12 sitting as a Deputy High Court Judge.

13 I would like to take you, please, to page 590. It is a couple of statements of principle
14 I want to pick up, so I won't trouble you with the detailed facts of this case. I just ask
15 you to note, please, on page 590 at paragraph 21 Mr Rabinowitz clarifying for the
16 defendants that:

17 " ... although there are shades of meaning between split trials and trials of preliminary
18 issues, if it is relevant, the Sixth and Ninth Defendants' application is not for
19 a preliminary issue trial, but a split trial."

20 The judge then sets out at paragraph 22 the *Electrical Waste* principles, which you
21 have seen quoted in both skeleton arguments. I will not go through those now. I
22 would like you to note, please, paragraph 23 over the page, page 591:

23 "The fact remains that the decision to split what would otherwise be a single trial into
24 more than one trial each dealing with defined issues is a step out of the norm, where
25 in most cases there will be a single trial determining all of the issues arising in
26 an action. Accordingly, there must be a real and substantial advantage if a split trial

1 were ordered to take place."

2 Then paragraph 26, please:

3 "Unless a split trial can be justified as a means of resolving the disputed issues in
4 action in accordance with the overriding objective with clear benefits over and above
5 those of a single trial, the peril exists that a split trial will add considerably to the parties'
6 costs burden, will delay the conclusion of the action (with an unappealing drain on the
7 Court's resources) and/or will lead to unanticipated difficulties."

8 So I do submit that as well as the ten *Electrical Waste* factors, it is important to recall
9 that the starting point is to have a single trial and a split trial is the exception and the
10 onus is on the claimant here to demonstrate that there is a real and substantial
11 advantage to a split trial.

12 The second of the two authorities I would like to show you is at tab 24. The judgment
13 starts at page 765. It is the judgment of Andrew Lenon KC in the *Ennis v Apple*
14 collective proceedings, rejecting the application before him in that case.

15 Could you go, please, to page 775? It is fair to say that the difficulty of achieving
16 a clean split is the weightiest reason for refusing this application.

17 **THE PRESIDENT:** Paragraph?

18 **MR LUCKHURST:** One can see at paragraph 22 just above the heading "Other
19 factors":

20 "The difficulty of achieving a clean split is, in my view, a significant factor weighing
21 against the proposed trial of preliminary issues in this case."

22 The Tribunal then points to further factors that weigh in favour of a single trial, which
23 I wish to emphasise.

24 The first is over the page at 776, paragraph 26. He says:

25 "Third, there is a risk that a trial of preliminary issues would increase costs. Apple
26 submitted that the preliminary issues would be determined in any event, so that there

1 | would be no material increase in costs overall."

2 | I would like to emphasise, please, the foot of the page, the last sentence on the
3 | page which starts "More":

4 | "More fundamentally, it is inherently likely that two trials would cost more than one,
5 | with two sets of brief fees, the costs of re-reading into a case for the second time and
6 | the adducing of expert and factual evidence in two rounds."

7 | **THE PRESIDENT:** But that would be the case for every case.

8 | **MR LUCKHURST:** Yes.

9 | **THE PRESIDENT:** So if that was decisive, you would never order a split trial.

10 | **MR LUCKHURST:** Yes, if that was decisive, that's correct, but in a way it links in with
11 | the *Jinxin v Aser Media* points, which I took you to, which is it is not the norm to just
12 | split, there has to be a real and substantial advantage if you are going to take a choice
13 | to incur those extra costs.

14 | I rely on it in support of the proposition that I made at the outset, which is that it is not
15 | a neutral decision to split. We say you could do it all in seven weeks here, but if you
16 | do choose to split it off, it will take longer if you give it a separate trial and it will cost
17 | more if you give it a separate trial. That is the point.

18 | Then at paragraph 27 the judge says:

19 | "Fourth, there is some risk that a trial of preliminary issues would delay the outcome
20 | of the case."

21 | So some emphasis there on delay.

22 | Turning to the present case, my first submission in opposition to a split trial is that it
23 | will substantially increase expense. As I have said, it will last weeks if you do it as
24 | a standalone issue by the time you've allowed for openings, factual and expert
25 | evidence, the break for preparing written closing, hearing oral closings and so on.

26 | **THE PRESIDENT:** I don't understand that. If you say it would add about a week on,

1 why would it then suddenly double in size just because it was a separate trial? I mean,
2 if you assume that you are going to say no more at trial 2 than you would have said at
3 trial 1 and 2 together, and if it was tightly controlled in terms of the timetable, I can't
4 understand why just moving it to a different point in time would double the size of it.

5 **MR LUCKHURST:** Because of the choreography of the trial, because you have your
6 oral openings and that takes place on a specific day or days, you then hear the
7 evidence and then have a break where everyone prepares their written closings.

8 **THE PRESIDENT:** Not necessarily much of a break if you only had a trial of a week.

9 **MR LUCKHURST:** A break nonetheless.

10 **THE PRESIDENT:** Would there need to be a break? I'm sure we have all done trials
11 where you didn't have a break, just go straight into it. I know Mr Kennelly is wrinkling
12 his nose at that but it is possible to do it.

13 **MR LUCKHURST:** It would be very tiring.

14 **THE PRESIDENT:** It wouldn't. You just make your opening submissions, hear the
15 evidence and hear the closing submissions. It is done all the time. Maybe not in this
16 Court, because the trials tend to be longer.

17 **MR LUCKHURST:** Still being on the junior end of a trial team, it is quite challenging
18 with complex evidence. You do need time to do that if those submissions are to truly
19 assist the Tribunal when it comes to write its judgment. I am not saying that you would
20 necessarily trip all the time but I do respectfully submit you would certainly increase
21 some expense. It's the inevitable consequence. That's what Andrew Lenon KC was
22 recognising in his judgment in that case. It does just follow. It's not a veto, as you put
23 to me, Madam. But it's a relevant consideration.

24 My second submission is that the delay to final judgment does threaten to be very
25 significant if there's a split trial assuming against my client that it's not 100% successful
26 in the main trial, because the main trial is not going to come on any sooner if you

1 remove pass-on and the delay will be significant, because the Class Representative's
2 proposal is that there will have been no work at all on pass-on disclosure, factual or
3 expert evidence in the meantime. So all of those phases of the litigation will be starting
4 from scratch after the final judgment in the main trial and there may be an appeal
5 against the judgment in the main trial, especially given the novel content for this
6 excessive pricing claim.

7 We could be looking at judgment on the main trial in late 2027/early 2028, an appeal
8 in 2029, disclosure and evidence on pass-on late 2029/early 2030, pass-on trial in
9 2030, maybe even early 2031. Judgment on pass-on possibly 2031 and only then
10 distribution if the Class Representative succeeded.

11 The split trial only does not increase overall costs and cause significant delay if
12 Airwave wins outright or the parties settle after trial 1. As regards settlement of the
13 pass-on issues, that would, in my submission, require Airwave being able to evaluate
14 on an informed basis the strength and quantum of the pass-on issues, but that requires
15 at least some disclosure and evidence, which is what the Class Representative is
16 resisting.

17 So, in reality the Class Representative is hoping that Airwave will throw in the towel
18 after trial 1 without interrogating pass-on through that process. In my submission,
19 that's hopeless speculation and it's not a proper basis on which to proceed, because
20 the assumption has to be that this is a pleaded issue that requires determination.

21 My third submission is that there will be duplication of effort and cost to the parties and
22 to the inconvenience of the class members. So disclosure and evidence from class
23 members is a tripartite process, as we were exploring earlier this morning. It involves
24 the parties and the relevant class members and both sides are saying that those class
25 members are going to be selected on a sample basis in the interests of proportionality.

26 If you engage in that process twice, first for the main trial, secondly for a pass-on trial,

1 that is inevitably going to increase complexity and costs. It would be cheaper and
2 more efficient, we say, to have one set of discussions at the outset about which class
3 members should be in the sample, what disclosure they should give. Mr Gale at
4 paragraph 27 says:

5 "To the extent the same class members needs to give disclosure and/or evidence
6 twice it will likely involve different document searches."

7 Even if that is right, it doesn't acknowledge the inefficiencies and the duplication in the
8 specific circumstances of this case where we are talking about that tripartite process
9 and the sampling exercise.

10 As regards witnesses, the Class Representative says it is unlikely that the same
11 witness from class members will have to give evidence at trial 1 and trial 2. That's
12 their skeleton argument at paragraph 31. But she doesn't say it definitely will not
13 happen, and that's because it is not possible to rule it out at this stage. It is possible
14 that there is one individual as a representative class member who would address on
15 the one hand distinctive value of Airwave and whether there is a substitutable services
16 and on the other hand whether the sums that class member paid for Airwave were
17 passed on.

18 Just mopping up then by dealing with the Class Representative's points, it is said that
19 this only affects some class members. Can I ask you, please, just to look at Gale 3,
20 which is Bundle A, tab 34, page 778? Page 778, foot of the page, paragraph 21,
21 Mr Gale says:

22 "Further, while the CR does not admit the existence of any pass-on (in a legal sense),
23 I note that pass-on is unlikely even to be a relevant issue for a significant proportion
24 of the class, such that it is not in the interests of those class members for there to be
25 a single trial that encompasses pass-on issues."

26 In my submission, that's a bad point, because the Class Representative is seeking

1 aggregate damages. So pass-on has to be resolved before anyone gets damages.
2 You can't have final judgment and distribution before pass-on is resolved. Individual
3 class members are not paying for the costs of this trial.

4 The Class Representative says that the likely quantum of pass-on is small. For
5 example, Mr Gale at 24. Well, first, they don't say it is de minimis, and given the scale
6 of the claim, it could be worth millions. Airwave is definitely entitled to pursue the plea.
7 Second, we are not in a position to quantify pass-on prior to disclosure in consideration
8 by the experts.

9 Third, assume that it is true that it is a relatively confined issue, in my submission that
10 cuts against the Class Representative's application, because it would be
11 disproportionate to list a second trial with all the attendant expense if this is a small
12 issue. If it is a small point, it can't be said that inclusion of pass-on in the main trial
13 makes it excessively complex to try the case or places an undue burden on the
14 Tribunal.

15 I have dealt with the submission that the pass-on defence is legally dubious, so I will
16 not return to that.

17 So, just in summary, to run through the *Electrical Waste Recycling* factors, those are
18 set out, amongst other places, in our skeleton argument at paragraph 29, which might
19 be a convenient place to take them from. That's page 849 of the bundle.

20 **THE PRESIDENT:** Yes.

21 **MR LUCKHURST:** Factor one is costs. We say that costs weighs firmly against a split
22 trial. Factors two and four are broadly speaking trial preparation and management
23 and complexity. We say pass-on can be accommodated in the main trial and the Class
24 Representative's own evidence establishes it is not an unmanageably large issue.

25 Factor three, inconvenience to witnesses. It is too early to say whether individual
26 witnesses will be inconvenienced, but, as I submitted, it will cause duplication and

1 inconvenience in the management of the class member disclosure in the broader
2 sense.

3 Factors five, seven and eight, which are broadly seeking dealing with delay,
4 bifurcation, the need to try it fairly, quickly and as efficiently as possible, we say that
5 the delay and the inefficiency of a second trial weighs strongly against the proposal
6 and that the risk of an interim appeal is very high in this case.

7 Factor six, which is clean split, I accept that a clean split is possible, but that's
8 a threshold condition. Just because it can be split it doesn't mean that it should be
9 split.

10 Factor nine is encouraging settlement. We say that the Class Representative's logic
11 falls down here, because you can't settle without the information needed to assess the
12 quantum of the pass-on issue and without some expert engagement, but the Class
13 Representative doesn't want any of that work to happen.

14 Then factor ten doesn't really apply here, because we are not late in the day in these
15 proceedings, but you do have my submissions on increased costs.

16 **THE PRESIDENT:** Yes. All right.

17 **MR LUCKHURST:** I am grateful to you for hearing me respond, having given
18 a provisional indication.

19 **THE PRESIDENT:** Thanks very much.

20 Mr Armitage.

21 **MR ARMITAGE:** Yes. Obviously you will let me know if there are any particular
22 points. On Mr Kennelly's submissions, our enthusiasm for your provisional proposal
23 remains undimmed, Madam. We think it is possible, with active case management, to
24 have a trial excluding the issue of pass-on in June/July with the time estimate now
25 being considered.

26 In contrast, we think a single trial on pass-on is a much bigger exercise. We would

1 say the ten-week estimate that originally appeared in our litigation plan is a reasonable
2 estimate for trial encompassing all issues on a unitary basis. That would have to be
3 considerably later than June next year if pass-on was factored in, in my submission.

4 The only specific point arising out of Mr Kennelly's submissions I wanted to make was
5 he said something about disclosure from class members on the question of distinctive
6 value.

7 We reject the premise underlying some of those submissions, as I apprehended it. As
8 we see it, while we are in a relatively early stage, evidence from class members and
9 factual evidence from class members about how much they valued or otherwise
10 a service is unlikely to be that informative in relation to the Tribunal's consideration of
11 economic value issues. As we see that, the key question when it comes to the
12 unfairness of the price focuses in on the position as between the key parties that
13 negotiated the relevant agreements; in other words effective class members, the
14 Home Office, and obviously there is going to be significant disclosure from the
15 Home Office in this case. It's also worth bearing in mind that Motorola has the
16 evidential burden on economic value issues.

17 I don't recall there being factual evidence from class members on distinctive value
18 issues in either the *Le Patourel* or *Kent* cases where these sort of issues arose. I only
19 say that to make clear that we don't necessarily envisage that there will be witness
20 statements and so on from class members on distinctive value points. In a sense it is
21 a matter for us.

22 Unless there is anything else on timing questions, shall I respond briefly to the split
23 trial points?

24 **THE PRESIDENT:** Yes, please do.

25 **MR ARMITAGE:** So Mr Luckhurst's position was that a seven-week trial could
26 accommodate all issues including pass-on. We disagree with that. Pass-on is going

1 to almost certainly require disclosure and factual evidence from class members and a
2 separate and distinct variety of expert analysis.

3 We have referred in our skeleton argument to the recent judgment of the Tribunal in
4 the *Interchange* case. It is obviously a different case, but we do say it is instructive to
5 note that in that case, which was effectively a split trial -- was a split trial dealing only
6 with pass-on issues, relevant downstream pass-on issues were addressed by way of
7 a sample from the many hundreds or perhaps even thousands of claimants in that
8 case, some of whom I believe were collective claimants, although it was principally
9 a grouped individual claim. Mr Williams is the resident expert on that case I should
10 say.

11 Even though disclosure was only given from a limited number of claimant groups and
12 witness evidence, I think, in the vicinity of ten witnesses, so, as I say,
13 an extremely -- on a heavily sampled basis, that trial still occupied, I think, 18 days of
14 court time. We say that is a reasonably good comparator for how any form of sample
15 analysis of pass-on would need to be conducted in this case. We think something like
16 2 to 3 weeks in terms of additional trial time is a completely reasonable working
17 assumption.

18 My learned friend referred to some of the CPO materials, the litigation plan and so on,
19 and he said the pass-on was always envisaged as being part of the analysis and
20 budgeted for. Well, that is of course right but the point is that we have identified
21 a possible efficiency since then and that's why we are seeking a split trial.

22 My learned friend took you to the pleadings. I don't know if we need to turn them back
23 up, but in my submission what the pleadings show is that there are a range of pleaded
24 circumstances in which pass-on is said to arise. Just on the basis of what is expressly
25 referred to in the pleadings, you have potential pass-on by police forces in terms of
26 special policing services, potential pass-on by stadia, so that's the Tottenham Hotspur

1 example insofar as stadia made specific financial contributions and they may have
2 passed them on in their own downstream prices. Airports, regulated utilities and then
3 local authorities. So I think there are at least five expressly pleaded groups.
4 So even if one had just two from each category, and, of course, there may be other
5 categories, you would have ten class members all giving factual evidence and
6 disclosure. It's quite similar actually to *Interchange* in terms of the number of
7 witnesses and so on. So we say that really just reinforces the point I make about the
8 likely saving in terms of trial time if one were to split off pass-on.
9 There have been various points about the merits. I wasn't proposing to address you
10 on that. We do say the position has rather moved on in light of what's said about the
11 law on pass-on in the *Interchange* case, but we agree that for the purposes of the
12 decision you have to make now that you should proceed on the basis that all the
13 pleaded issues on pass-on are in dispute and will need to be considered. That's
14 a factor in my favour rather than in my learned friend's favour.
15 Very briefly on the authorities, my learned friend referred to *Jinxin* and the point that
16 the split trial is often seen as an exception. We actually reject the suggestion that at
17 least in this Tribunal in complex competition cases split trials are the exception. They
18 are, as all members of the Tribunal know, very common and can have significant
19 advantages. Of course, the key point is that we say on the facts of this case there are
20 distinct case management advantages here.
21 Then reference was made to the various factors that were said to weigh against a split
22 trial in *Ennis*. The short point there is that the reason why the clean split is said to be
23 an important starting point, and it's not a threshold issue, is that it colours all of the
24 other factors, because the point is that where you have a clean split, inefficiencies and
25 so on that may arise from splitting a trial up really don't arise to the same extent
26 precisely because of the cleanness of the split.

1 There was some discussion of the fact that on my learned friend's case the time
2 estimate would somehow magically expand by double if one were to split off the issue
3 of pass-on as opposed to hearing it as part of a single unitary trial. We just don't agree
4 with that. We would respectfully submit that while there may be some very limited
5 inefficiencies, really they are outweighed by the extremely significant case
6 management advantages. Indeed, inefficiencies like that are capable of being
7 controlled by the usual degree of active case management from the Tribunal.

8 In terms of delay to judgment, in my submission it is a slightly unusual submission for
9 a defendant to make. Just to make an obvious point, Ms Spottiswoode has no
10 incentive to delay the final outcome of these proceedings unduly. The Class
11 Representative genuinely thinks that this is an issue that may resolve matters without
12 ever needing a pass-on trial with all attendant time and expense.

13 My learned friend said with a split trial there is a risk of an interim appeal. That's
14 always the case with a split trial. It's not a factor that moves the dial.

15 In terms of the point on settlement, we do say, for the reasons given in writing, that
16 having an initial trial which resolves all issues of liability and at least prima facie
17 quantifies the aggregate damages due to the class in terms of the overcharge would
18 just obviously increase the prospects of settlement. The idea that one needs to do
19 a very detailed full-blown analysis of pass-on to get to a settlement is, we say, wrong.
20 You can make relevant assumptions.

21 The point about the extent of the class for whom pass-on may be an issue, that's the
22 analysis in Mr Gale's third witness statement, I can address you on that if it is of
23 assistance. The point we are making there is that one needs to distinguish between
24 the question of whether pass-on is going to make a big difference in terms of the
25 aggregate quantum. We say no for the reasons given by Mr Gale. But there is
26 a different question, which is how costly and how time consuming it is to resolve it. So

1 it is a sort of good money after bad submission, if you like. So we say while we don't
2 expect pass-on to have a major impact on the aggregate damages due at the end of
3 the day, there is reason to think that it will be a costly and time-consuming issue to get
4 to that point.

5 As I say, if it would be helpful, I can take you through the Gale 3 analysis in more
6 detail, but subject to that, unless you have any questions for me, those are the reasons
7 why we maintain that the split trial we put forward should be adopted.

8 **THE PRESIDENT:** All right. I think we are just going to rise for a few minutes to
9 consider your submissions.

10 **MR LUCKHURST:** Can I address one point that's made in submissions?

11 **THE PRESIDENT:** Is it a new point?

12 **MR LUCKHURST:** It goes to a point my learned friend made about *Interchange*, which
13 he says dictates the time. I just say that the analogy with the *Interchange* judgment is
14 inapt, because they had two defendants and various claimant groups with everyone
15 filing their own expert evidence. If you look at the judgment at pages 385 to 404 of
16 the authorities bundle, there were eight experts -- this is in that judgment -- six of whom
17 gave evidence, whereas in this case we are talking about two experts with
18 an extension to their **(inaudible)**. That was the only point I wanted to make. Thank
19 you.

20 **THE PRESIDENT:** All right. Thank you very much. We will rise.

21 **(12.42 pm)**

22 **(Short break)**

23 **(12.55 pm)**

24 **THE PRESIDENT:** All right. There are two issues that we have to decide under this
25 point: the question of when the trial should be listed and whether there should be a split
26 trial. You may be encouraged to know the answer is it is one all. We are persuaded

1 by Mr Kennelly's submission about the timing. It may be that there is not a lot of
2 disclosure to be given in the Michaelmas term such that with hindsight we could have
3 got everything on earlier, but we acknowledge that we don't know at this point the
4 scale of any further disclosure, and, given that, we are grateful to Mr Kennelly for
5 taking us through what the timetable would then look like if there was a reasonable
6 amount of further disclosure to be got through, and we accept that that would lead to
7 a very tight timetable if we are talking about a June start date.

8 So we will list the trial for October, to start at the start of October. I think, given the
9 opening of the legal year, that would probably need to be on 2 October, but I will check
10 my end and we can let you know that.

11 As to the question of the split trial and with that trial length we are unanimously of the
12 view that there should be a split trial. We acknowledge that, if both trials do go ahead,
13 that will lead to some extra cost and some delay, but that is the case in any case where
14 there is a split trial. We note that in competition cases it is now commonplace for there
15 to be a split, including a split-off of issues of pass-on. Both sides properly
16 acknowledge in this case that there could be a clean split. The witnesses are likely to
17 be different, it seems to us the evidence will certainly be different and the disclosure
18 will be different, albeit that it may come from some of the same parties, but not
19 necessarily the same individuals.

20 The benefits of having a split trial seem to us to be that the trial listing will be shorter
21 by a reasonably significant amount. We don't accept that the pass-on issue could
22 easily be accommodated in simply one additional week of court time. We think that it
23 is likely to require at least two additional weeks of court time. It's a difficult issue, as
24 previous cases in this Tribunal have demonstrated. It will require factual and expert
25 evidence and no doubt substantial submissions even if it affects only a small set of
26 claimants or categories of claimants among the class members.

1 So we are inclined to the view that without a split the trial length could be
2 accommodated in six weeks. With a split it is likely to be at least eight weeks. That is
3 a significant difference not only in the preparation and trial time itself but also in the
4 time required for the Tribunal to address the issues in its judgment.

5 There also seem to us to be significant prospects of settlement following trial 1,
6 whatever the result of that trial. If the Class Representative fails in trial 1, there will
7 not need to be a trial 2. If the Class Representative is successful in trial 1, then that
8 will crystallise everyone's thoughts around whether trial 2 does indeed need to take
9 place. That seems to be a significant benefit and creating a real prospect that trial 2
10 would not be needed in this case, which is the case in many, if not all, of the cases in
11 this Tribunal where the trials have been split. It has been done on the basis that it is
12 hoped that the subsequent trials will not ultimately need to take place.

13 So for those reasons and given that, as I have said, there is no dispute that there is
14 a very clean split here, it seems to us appropriate to order a split trial with a start date
15 of October 2027.

16 So that deals with what are the most substantial issues for this hearing. We are at the
17 lunch adjournment. Given that there are some more issues, I think the only major
18 outstanding issue is costs management, how long do you think you need for that? If
19 you think you can deal with this in five minutes, we can do it now, but if it is going to
20 be a bit longer, then we could rise for lunch and then everyone who is not interested
21 in costs can go away and we can have a slightly smaller hearing this afternoon.

22 What do you suggest, Mr Armitage?

23 **MR ARMITAGE:** The agreed estimate is 15 to 30 minutes. If it helps, the Tribunal's
24 letter on this raised three matters: whether the CR should appoint a costs specialist,
25 whether the CR should produce an updated budget and whether the Defendants
26 should produce a budget. And our answer is yes to all three, if that helps. I suspect

1 we will probably be more than five minutes, because, as I understand it, my learned
2 friend opposes the costs budget.

3 **THE PRESIDENT:** All right. Let's rise for lunch. We will deal with costs afterwards.
4 There is one more point. The Home Office raised a point about confidentiality. Do we
5 need to deal with that? This is the point at your paragraphs 20 to 22. Because if we
6 need to deal with that, it could be that we could deal with that now and then you could
7 go.

8 **MR WILLIAMS:** At this stage there is no formal application before you, Madam. I am
9 just laying down a marker that there may be two issues brewing. The first of those is
10 in relation to the principle of whether any Home Office external legal advisors should
11 be added into any ring. Somewhat regrettably Motorola has refused to consent to that
12 despite the Home Office and the Class Representative suggesting that be the case in
13 relation to four solicitors external to the Home Office and one member of the counsel
14 team. That's surprising, but I think we can take that off air and try to agree that.
15 The second point is the terms and the mechanics of adding those members into the
16 ring and the terms of the Confidentiality Ring Order itself. That's a formality which
17 I hope we can deal with between the parties and resolve because at present the ring
18 does not quite work for third party disclosure.

19 **THE PRESIDENT:** It seems to me if that is an issue that is brewing and can't be
20 resolved, that will need to come back before September. That may be just
21 something -- other than that do you need to be here this afternoon?

22 **MR WILLIAMS:** No.

23 **THE PRESIDENT:** In which case I am very happy for you to be released. I don't want
24 people to come back who don't need to be here.

25 **MR WILLIAMS:** My Lady, I'm grateful.

26 **THE PRESIDENT:** All right. Thank you. Thank you very much.

1 **MR ARMITAGE:** I was only going to point out on confidentiality that there is an agreed
2 process in relation to the confidentiality protocol, which -- we have been provided with
3 a draft on it. The agreed timetable is we will comment on that and the Home Office
4 will comment on that by 13 March. It makes sense, in my submission, to pick up points
5 about the confidentiality ring and Home Office's legal advisors and so on in that context
6 and then potentially -- I am sorry to interrupt.

7 **THE PRESIDENT:** No. That's very sensible and I was going to say then let's just
8 everyone be aware if there are disputes, bring them back before the Tribunal in the
9 course of the summer term or Easter term so that they can be resolved sooner rather
10 than later, including any differences in principle about how confidentiality is going to
11 be approached, because I don't want to get to trial and have lots of issues about third
12 party confidentiality, which makes the trial very difficult to manage.

13 Just to say that's probably as far as we can get on that. If that enables the Home
14 Office team to go away and have a nice lunch and not come back this afternoon, that's
15 excellent. Then we will return at 2 o'clock and we will deal with the costs budgeting
16 issues.

17 **(1.03 pm)**

18 **(Lunch break)**

19 **(2.00 pm)**

20 **THE PRESIDENT:** A slightly thinned out courtroom. Let me just plug myself in. All
21 right. Thank you.

22 Yes, Mr Armitage. Costs.

23 **MR ARMITAGE:** I think the final agenda item is costs. That arises from the Tribunal's
24 helpful letter from last week. As I said, there are three particular matters raised:
25 whether we should appoint a cost specialist. We agree, in fact, we have already
26 identified a particular cost specialist and expect to finalise engagement with that

1 specialist shortly. Whether we should produce an updated budget, which will
2 obviously now need to take account of the decisions on the case management today.
3 Again, yes, we would be doing that anyway and we can provide that in relatively short
4 order after this CMC. Then the third point, we think it would be useful for the
5 Defendants to produce a budget. Unless you have any questions on the three points
6 from me, it may be sensible for my learned friend -- I think Mr Luckhurst is going to
7 address you on costs issues from the Defendants' side.

8 **THE PRESIDENT:** Yes. All right. Thank you.

9 Yes, Mr Luckhurst.

10 **MR LUCKHURST:** To signpost where I am going, Airwave is happy to provide
11 an update after the CMC on costs incurred and happy to provide updates on costs
12 incurred at particular milestones between now and the 20 million indemnity that the
13 Class Representative has so that the Class Representative and the Home Office are
14 aware of their exposure, but we would respectfully resist a prospective cost budgeting
15 regime. I will just develop that point.

16 The Class Representative is under an obligation to file a cost budget with her
17 application for a CPO. That is in the Guide to Proceedings at paragraph 6.30. That's
18 authorities, tab 1, page 5. See at the foot of the bullet points there on page 5 a
19 requirement to append to the litigation plan a cost budget. The purposes of the Class
20 Representative's cost budget are quite helpfully analysed in the judgment of the
21 Tribunal in the Power Cables case in which Ms Spottiswoode is also a class
22 representative. I think it is useful to draw that to your attention. That's authorities 1,
23 tab 10 and the judgment starts at page 144. It is Andrew Lennon KC,
24 Mr Justice Richards and Professor Neuberger.

25 This point is picked up at paragraph 35 of the judgment, which is at page 158. Can
26 I just ask you, please, to read that to yourself rather than me reading out the entire

1 paragraph?

2 **THE PRESIDENT:** (Pause.) Yes.

3 **MR LUCKHURST:** Three purposes there, a range of purposes, some specific to the
4 position of the Class Representative. It is fair to say that the second purpose
5 encompasses exercising control over costs, but the Tribunal also ties that to the cost
6 - benefit assessment under Rule 79(2)(b), which is a key eligibility criterion for
7 certification on an ongoing basis.

8 The Class Representative points to the *Uber* case in the High Court as an example of
9 where a High Court judge has exercised the discretion to require cost budgeting in
10 a high value claim, because, of course, if Ms Spottiswoode's claim had been brought
11 in the High Court, it would not be subject to cost budgeting, because the damages
12 claimed exceed 10 million, although the Court would have a discretion to require
13 budgeting.

14 We can see that at authorities tab 21, and the judgment starts at page 612. It is the
15 judgment of Mrs Justice O'Farrell. It is important to look at the particular facts of *Uber*.
16 If you go, please, to page 620, you can see the claimant's submissions as to why cost
17 budgeting should be ordered in that particular case, starting at paragraph 57.

18 It is submitted at paragraph 58:

19 "the claimants are predominantly private individuals of modest means and that the
20 relief that they seek on an individual level is approximately £15,000 ... [the claimants]
21 are particularly concerned that they are sufficiently protected by ATE insurance
22 against future adverse costs and ... need to have a reliable view of their exposure at
23 an early stage of the case."

24 In paragraph 59 it is submitted:

25 "... [they] should not be compelled to over-insure as a result of ... uncertainty ..."

26 60. They want to know -- particularly the final three lines of 60:

1 "... [they will] know in advance what sums they can reasonably draw down from their
2 own funding for their costs and will know the ATE that they need to meet the
3 defendants' costs."

4 It is said at 61:

5 "... there is a risk that the costs will be disproportionate."

6 Then we can see those factors essentially picked up by the Court in that case in terms
7 of what swayed the Court. The judge notes at 63 it's a high value claim and she said:
8 "As has been stated, and in particular in the *CIP Properties v Galliford Try* case, that
9 makes it less likely that the costs will appear to be disproportionate to the value of the
10 case. However, it is not necessarily the position, particularly as the court has to
11 consider a range of factors in terms of proportionality, not just the amount of money
12 that is at stake."

13 Whilst you normally wouldn't have cost budgeting above 10 million, there are other
14 factors. We see the factors that particularly sway the court here at paragraphs 65 and
15 67:

16 "65. However, the court is very aware of the fact this is a large group action, over
17 13,000 separate claimants and their claims individually are very modest indeed."

18 She can see:

19 "... in those circumstances ... the real advantage of cost budgeting ..."

20 67, last two lines at the bottom of the page:

21 "The concern that is raised by the claimants is that there may have been too much
22 eaten into their funding and ATE insurance at that stage so that it could impact
23 adversely their ability to fight the subsequent proceedings."

24 The importance of the claimants being able to carry out a cost-benefit analysis is in
25 68.

26 So there are some points of distinction with this case, because we are not dealing here

1 with private individuals with low value claims, and also this case is not proceeding on
2 the basis of ATE insurance, somewhat unusually for collective proceedings. You can
3 see that confirmed in the Class Representative's skeleton argument at paragraph 49,
4 for example. What's happening is that the largest claimant is indemnifying the Class
5 Representative currently in the amount of £20 million.

6 So against that background --

7 **THE PRESIDENT:** Is there no ATE at all here?

8 **MR LUCKHURST:** No. There is an indemnification from the Home Office.

9 So I make six points as to why in my respectful submission Airwave should not be
10 subject to a prospective cost budgeting requirement.

11 The first is that there's no equivalent public interest or requirement under the
12 certification criteria of ensuring that the proceedings are adequately funded in the
13 interests of the class. So that's why we don't have the sort of a priori requirement to
14 file a cost budget on the part of Defendants and monitor costs as in the case of Class
15 Representative.

16 The second submission is that the Tribunal, throughout the case. has control over
17 a defendant's recoverable costs, because those can only ever be recovered if they're
18 reasonable.

19 The third submission is that the Tribunal through its public judgments sets a general
20 expectation as to how reasonable matters will be approached, for example, as to
21 guideline hourly rates, duplication, size of legal teams and so on.

22 The fourth reason is that prospective cost budgeting does introduce an additional work
23 stream and costs for defendants.

24 The fifth reason is that Airwave has not conducted the litigation in a manner that raises
25 prima facie concerns about the reasonableness of its approach. It has one firm of
26 solicitors – contrasting with the criticisms made of the Class Representative in the

1 Tribunal's judgment on costs at the certification stage -- and counsel and solicitor
2 attendance at hearings has not been excessive. We had two counsel at the
3 certification stage and have two counsel today.

4 My sixth submission is that insofar as the concern is that the Class Representative
5 and the Home Office should be able to monitor their exposure, as I have said, Airwave
6 is happy to provide updates as to incurred costs potentially at pre-agreed intervals
7 between zero and £20 million, which is the current amount of the indemnity, and that
8 in the particular circumstances of this case ought to be sufficient to meet the concerns
9 as to whether or not the Home Office has adequately indemnified the Class
10 Representative and what the accrued level of exposure is as one goes through the
11 case.

12 **THE PRESIDENT:** What do you say is the extent of the additional work, because one
13 of the points made in the *Uber* case was the costs of a cost budgeting hearing. I don't
14 think anyone is suggesting that there would need to be a hearing along those lines in
15 this case separately.

16 **MR LUCKHURST:** That goes in two directions. If it is simply producing the budget,
17 then it is a modest amount of additional work, but it is some additional work, but if there
18 is to be no follow-up hearing to do anything about the budget, then query why we are
19 being required to produce it in a sense. What is the purpose that it is serving?

20 **THE PRESIDENT:** Well, let's take the counterfactual case that you provide updates.
21 The point there is that if the Class Representative takes issue with the amount that
22 you are spending, that will be addressed not necessarily at a separate costs hearing
23 but as we go along.

24 I imagine that that is what Mr Armitage envisages being done with the costs budget.
25 So actually in terms of the additional work that is entailed he is not asking the Tribunal
26 to order anything different on an ongoing basis than would be the case under your

1 primary proposal in any event. It is simply that one would have a more accurate
2 counterpart to compare his cost budget with, because otherwise you have his cost
3 budget on the one hand, then how do we properly assess that if there is no cost budget
4 on the other side?

5 **MR LUCKHURST:** If we were to take the point that their cost budget is inadequate at
6 some stage, they could very properly turn around and say, "Let's see your cost budget"
7 or if we were to say "Your projection through to trial is manifestly excessive", I can see
8 why it would be pushed. They could ask, "Well, let's see your projection through to
9 trial", but if -- unless he is going to ask for a preemptive order that our costs must be
10 controlled in some way or a preemptive order that we are not entitled, if successful at
11 trial, to recover above a certain amount at some sort of follow-up cost budgeting
12 hearing, which you indicated was not really envisaged, it is not clear what additional
13 benefit is offered by it save for slightly more visibility on the horizon. So it's more
14 visibility.

15 **THE PRESIDENT:** That's the point. You do get more visibility. As you know, there's
16 a real concern within the Tribunal about the management of the costs of collective
17 actions.

18 Now it seems to me that that's very difficult for us to do that if we only have a one-sided
19 cost budget, because, of course, the purpose of the cost budget is not only that you
20 can call out what appears in the ultimate phase to be excessive, but that you could
21 potentially call out the costs that are being incurred along the way, and particularly in
22 your submission if we get beyond trial 1 and we are into a trial 2 phase -- everyone
23 hopes that won't happen -- there is at least the potential of the proceedings being
24 somewhat protracted. I think it would be very unsatisfactory for the Tribunal to put the
25 Class Representative to the expense of a cost budget and then close our eyes to it
26 along the way, but if we are going to do something meaningful on the way, it is difficult

1 to do that without having cost budget on both sides.

2 **MR LUCKHURST:** I see that.

3 **THE PRESIDENT:** That's the thought process.

4 **MR LUCKHURST:** The final observation is that my client is entitled to spend what it
5 wants in its defence of these proceedings in which it is facing a real sort of
6 extraordinarily large damages claim. So whilst the Tribunal might --

7 **THE PRESIDENT:** You are not entitled to recover what is unreasonably
8 incurred -- that's your point.

9 **MR LUCKHURST:** That's entirely accepted. My client could spend a lot more than it
10 is ever going to recover, because of the extraordinary claim it is facing. So there
11 should at least in my submission not be any question of it being restricted in its
12 defence. Not that we say we are --

13 **MR HERGA:** Your client itself ought to know as it goes along what it may be able to
14 recover and what it may not be able to recover from this huge budget.

15 **MR LUCKHURST:** If that is the proposal, but I understood --

16 **MR HERGA:** I raised that in the context it might not be any extra work your client
17 would want anyway.

18 **MR LUCKHURST:** Well, we are then looking at a slightly different regime, because
19 we are more then into the High Court cost budgeting regime, where there are quite
20 rigid structures in place, and there's a practice direction that sets that up. It is well
21 established how those cost budgeting hearings work and so on and so forth. We are
22 not quite in that world at the moment here.

23 **THE PRESIDENT:** No. We are fashioning something which is not as rigid as the High
24 Court regime, but enables the Tribunal to control the costs as they go along and have
25 some oversight, and that's more or less the entire -- it reflects the Tribunal's procedure.
26 We don't have as rigid rules, but we are enabled to fashion the procedure in a way

1 that enables efficiency and control by the Tribunal.

2 So my suggestion to you, if we would be going down this route, would be that it doesn't
3 need to rigidly adhere to the High Court cost budgeting structure, and indeed that's
4 not what Mr Armitage I think is asking for -- we will obviously hear from him -- but
5 something more flexible could be envisaged, which at the same time would allow
6 a proper comparison to be made, because at the moment what you are putting forward
7 isn't a proper comparison. It was just a regular update. I think then it would be very
8 difficult for any meaningful control to be exercised by the Tribunal during the
9 proceedings.

10 **MR LUCKHURST:** I have made my points.

11 **PRESIDENT:** Yes. All right. Thank you.

12 Yes, Mr Armitage.

13 **MR ARMITAGE:** A few general points and then I will go through the six factors if that
14 would be helpful.

15 To be clear, we are not seeking a full-blown High Court style costs management order,
16 certainly not at this stage, requiring consequential hearings and so on. That's not part
17 of our proposal.

18 All we are saying, we are making a very limited point that the Defendant should now
19 tell us both actual costs incurred to date, which I understand they are prepared to
20 provide, but also their estimated future costs of various phases of the litigation, in other
21 words, broadly the equivalent of what we have to do as Class Representative.

22 Now, depending on what we get, it is conceivable that we might want to argue for
23 some form of costs management, but that's not something we can say at this stage.

24 Really, as you'll have apprehended, it's a question of having visibility and oversight as
25 to what the position is both in terms of actual costs and projected costs on the other
26 side, and that is why we cited the *Uber* case. I don't need to turn it back up.

1 Paragraphs 65 and 69 of that judgment emphasised the real advantages of cost
2 budgeting from defendants in terms of visibility over what's being spent.

3 I don't need to tell you, Madam and members of the Tribunal, that the CAT's governing
4 principles include ensuring that parties are on an equal footing and saving expense.
5 We say it is plainly justified by reference to those governing principles.

6 Just quickly, if I may, going through my learned friend's six points, he relied on the fact
7 that there was no requirement for the Defendants to file a cost budget at the CPO
8 stage and referred to the public interest. We say that is not a significant factor here
9 and on the other hand there is a strong public interest in having visibility over potential
10 exposure to costs, particularly in a case where funding on our side, as you know, is
11 taxpayer funding effectively.

12 On the second point, yes, the point about the -- sorry -- the second and third points
13 I can take compendiously, which is the point about the Defendants will only ever be
14 able to recover their reasonable and proportionate costs and the point that there are
15 judgments in the CAT which give guidance on that.

16 I mean, that is always true, but as it is well recognised, including the *Uber* case, there
17 may be benefits to some form of cost budgeting in terms of visibility, notwithstanding
18 that the Defendants can only ever recover their reasonable costs. We say again that
19 doesn't -- that is not a decisive factor.

20 In terms of additional work for the Defendants, as I have made clear, what we are
21 proposing is something quite limited, and one would expect the Defendants to have
22 done internal budgeting. You would have thought that Motorola would want to know
23 what they are likely to be spending on this litigation, so we don't see that there is a
24 material amount of additional work to be done, and, as I say, we are not seeking
25 a further standalone cost budgeting hearing or anything like that at this stage.

26 In terms of the fifth point, which is about whether there are any particular proportionality

1 concerns, I am not going to trouble you with anything on that, anything specific on that
2 front at this stage. The only point I will make is we obviously have limited visibility over
3 their costs, and it is possible that in light of what we get, if our request for a budget is
4 granted, we do have concerns about the proportionality of what has been done. As
5 I say, at this stage we just don't have very clear visibility over proportionality on the
6 Defendants' side and that's precisely why we urge this proposal on you.

7 Then in terms of the final point about monitoring, the only point I make there is we
8 think there is a real value to having not only the costs incurred today, but also the
9 projections as to anticipated future costs; again as I say, exactly the sort of thing that
10 the Class Representative is going to be providing when she updates her budget.

11 So those are the only short points I wanted to make. That's our position.

12 **THE PRESIDENT:** Thank you.

13 **MR LUCKHURST:** Can I just make one very practical suggestion, which is those
14 instructing me have suggested, in my submission sensibly, that it should be sequential
15 so that we can see their assumptions, so that there are some common assumptions
16 hopefully in the plans, because that will foster the comparability exercise that you
17 suggested was going to be quite useful; otherwise there is a bit of a risk of ships in the
18 night if there are slightly different assumptions as to staging or allocation. It need not
19 be a long delay, but that would be in my submission helpful.

20 **THE PRESIDENT:** Any objection to that, Mr Armitage?

21 **MR ARMITAGE:** I can't immediately think of one. Obviously they have seen our CPO
22 budget so they know our assumptions but we are going to be updating that by
23 reference to today's developments. I think as long as it doesn't introduce delay --

24 **THE PRESIDENT:** No. All he is saying is if he is ordered to produce something, it
25 should be after you have updated yours. We will have to talk about timings anyway if
26 we order this. Yes. All right.

1 All right. Thank you very much. Well, we will order a cost budget to be provided by
2 the Defendants. We think that it is right to put the parties on an equal footing, as
3 Mr Armitage has said, in terms of the Tribunal's cost management. As I said in my
4 discussion with counsel, there is a general concern within the Tribunal about the
5 management of the costs of collective actions, and it is important that the Tribunal has
6 oversight of the costs of collective actions along the way if the Tribunal is going to
7 meaningfully exercise control over the costs that are being incurred, and in order to do
8 that properly that needs to be on the basis of information provided on both sides as to
9 the expectations of costs and the costs actually incurred.

10 Ultimately what is proposed by Mr Armitage isn't very different from what the
11 Defendants already agreed to provide, which is to provide regular updates. It seems
12 to us if that is going to happen, that can properly be done within the context of
13 a regularly updated cost budget so that the Tribunal can compare the cost budget on
14 both sides and, if necessary, take further steps to deal with the costs.

15 There is no suggestion immediately that there should be a separate cost budgeting
16 hearing, but the point is if there is visibility on both sides, then either side can ask the
17 Tribunal to take action and make appropriate orders along the way, if thought
18 appropriate, but that can't even happen if there isn't proper and comparable visibility
19 of the costs being incurred and anticipated to be incurred on both sides of these
20 proceedings.

21 So we will order the Defendants to produce a cost budget indicating the costs incurred
22 to date as well as the anticipated costs for the remainder of the proceedings. However,
23 we see some sense in the suggestion of Mr Luckhurst that the Defendants should do
24 so on a sequential basis after the Class Representative has updated its cost budget
25 in view of the indications and decisions reached at this hearing.

26 Do we need to consider any more of the detail in relation to that? Do I need to set any

1 deadlines? I am not sure --**MR ARMITAGE: (Inaudible).**

2 **THE PRESIDENT:** I think it would be helpful to split the case into phases, because
3 we have ordered a split trial. So I think we would want to see both phases of the trial
4 in the budget. To forestall any arguments about when this is going to be done would
5 it be just helpful for us to set dates, otherwise it is somewhat in the ether?

6 If you were going to produce yours by the end of the month, what about then giving
7 the Defendants until the end of April to do theirs?

8 **MR ARMITAGE:** That's fine.

9 **THE PRESIDENT:** All right.

10 **MR ARMITAGE:** One short point about the costs specialist. I don't know if you are
11 envisaging anything on that going into the order. It is in hand and being done.

12 **THE PRESIDENT:** I don't think it needs to, because it is on the Tribunal's record that
13 you have said that you are engaging a court specialist to assist the Class
14 Representative.

15 **MR ARMITAGE:** There is just one other point. We had mentioned in our skeleton the
16 nature of the exercise that the cost specialist would be undertaking -- in terms of
17 a game plan yet it wouldn't be finalised -- would be in line we envisaged with the
18 indication in the Bulk Mail case of Mr Justice Malek; in other words, something more
19 exacting than a summary assessment but not quite a detailed assessment. I just
20 wanted to put that forward in case the Tribunal had any observations, but that's what
21 we envisage in terms of the scope of the instruction. I just put that forward.

22 **THE PRESIDENT:** That is what the Tribunal had in mind. It seems to me consistency
23 across cases is a good thing and that's been tried in other cases. We have had no
24 reports this has gone wildly wrong or been unhelpful. This is obviously a fairly new
25 procedure, but something that we think might be useful to be building in, and we will
26 see how it goes. Now ultimately if you come along and say at some point, "This is not

1 really helping us", then we can review that. All right?

2 Now just a few other things. One, a costs related point. We are always in this Tribunal
3 happy to have submissions from junior counsel. I would just say that in future CMCs
4 the Tribunal itself is not expecting everyone to turn up with leading counsel, and it may
5 well be that the Defendants consider that it can also do those CMCs with just one
6 junior counsel and we would be very happy. I don't think there should be any
7 expectation that leading counsel needs to attend these hearings. Of course the
8 Tribunal is always happy to see you, Mr Kennelly, but I don't think you should feel that
9 you need to turn up for fear of the Tribunal thinking you are not taking this seriously.
10 We are very happy if you want to send along juniors.

11 **MR KENNELLY:** I am obliged.

12 **THE PRESIDENT:** Certainly for the CMC at the end of September I would have
13 thought this would be suitable to be dealt with by junior counsel, but obviously you can
14 take a view about that as the time approaches.

15 One point on bundles. I have already mentioned that it would be helpful if you would
16 pare down the core bundle in future. Also just a request. I understand there must
17 have been a bundle update which did not make it to me.

18 If there is a bundle update, please don't just put in a bundle update without checking
19 whether it would be more useful just to provide a supplemental bundle. If there is
20 a bundle update, often the Tribunal will have started working on the case and will have
21 marked up the original bundle. So please just -- no criticism on this occasion -- but
22 before just filing an updated bundle just check if it would be better to put in
23 a supplemental bundle in case the panel members have started marking up the
24 originals.

25 I think that was the only housekeeping that I had. Let me just check. All right.

26 Are there any other housekeeping points from anybody?

1 **MR KENNELLY:** Not from our side, my Lady.

2 **MR ARMITAGE:** I will see what our point is. A date for the second CMC hearing. We
3 may have covered that.

4 **THE PRESIDENT:** Well, I suggested some time in the two weeks beginning
5 21 September. Could we not leave it for you to liaise with the Tribunal in the usual
6 way?

7 **MR ARMITAGE:** Just one moment.

8 **THE PRESIDENT:** I am happy to put that as a day with a second day in reserve.

9 **MR ARMITAGE:** Yes. We can tell you nearer the time and leave it there.

10 **THE PRESIDENT:** Yes. All right.
11 Is there anything from your side, Mr Kennelly?

12 **MR KENNELLY:** No. I am leaving it to be determined on availability and my learned
13 friend will be in touch.

14 **THE PRESIDENT:** Yes. All right. Provision of the draft order. Could I ask that you
15 send to the Tribunal by the end of the day tomorrow a draft order agreed as far as it is
16 possible to agree and then with any points of disagreement marked up with comment
17 boxes as to your positions? All right. What's the agreed costs order? Costs in the
18 case as against the parties. All right. So there is no dispute about costs for today. All
19 right. Thank you very much.

20 **(2.33 pm)**

21 **(Hearing concluded)**

22

23

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?