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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1698/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 24th September 2026

Before:

The Honourable Mrs Justice Bacon
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE

Class Representative

v

(1) **AIRWAVE SOLUTIONS LIMITED,**
(2) **MOTOROLA SOLUTIONS UK LIMITED,**
(3) **MOTOROLA SOLUTIONS, INC**

Defendants

A P P E A R A N C E S

Michael Armitage and James Fraser (Instructed by Ashurst Perkins Coie UK LLP) on behalf
of Clare Mary Joan Spottiswoode

Tony Singla KC and Paul Luckhurst (Instructed by Herbert Smith Freehills Kramer LLP) on
behalf of Airwave Solutions Limited, Motorola Solutions UK Limited and Motorola
Solutions, Inc

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Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400

Thursday, 24 September 2026

(10.28 am)

(Housekeeping)

JUSTICE BACON: Good morning, Mr Armitage. Just let me read out the livestream warning. Some of you are joining us livestream on our website, so I will 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.

MR ARMITAGE: Madam, good morning. As of the last, (inaudible) Mr Fraser is here today as a new addition to this counsel team.

There's been quite a lot of movement (inaudible).

JUSTICE BACON: Yes.

MR ARMITAGE: Housekeeping.

For the duration of the draft composite directions, effectively reflecting changes since the Tribunal's letter (inaudible) process.

JUSTICE BACON: Yes, I can see that that's still not entirely agreed, so we'll have to just look at that.

MR ARMITAGE: Exactly. There are some green and blue -- there are a few points. The version I'm looking at I think was sent to the Tribunal.

JUSTICE BACON: Yes, I think I do have the latest version.

MR ARMITAGE: I hope you have one that is clean rather than tracked.

JUSTICE BACON: Yes, I have a clean version.

MR ARMITAGE: (inaudible).

1 JUSTICE BACON: Thank you very much.

2 MR ARMITAGE: We'll see as we go along (inaudible). I think that sounds correct.

3 Then there is also an updated version of the composite Redfern schedule. (Inaudible).

4 JUSTICE BACON: Yes, and I've looked at that. As far as I can see, there are now

5 only disputes on the first three issues. So M1, M2 and M3. Is that right?

6 MR ARMITAGE: I think that's right. We may need to address you on some of the

7 issues towards the end of the schedule. But we've had a long letter yesterday evening

8 setting out some proposals. I think we're going to need to discuss those. (Inaudible)

9 probably better we update you on those. They're not in dispute in the sense of

10 (inaudible). So, yes, exactly. Do you have that updated version?

11 JUSTICE BACON: I've got it. I've got it in hard copy actually. I'm working off the

12 consolidated version.

13 MR ARMITAGE: Yes, exactly. The version that's shorn of all the narrative which sets

14 out where we are. Exactly.

15 I won't take you through the bundles unless (inaudible).

16 JUSTICE BACON: No. I think we're both working electronically. I've now got up to

17 Bundle F.

18 MR ARMITAGE: Yes.

19 JUSTICE BACON: All right. Good.

20 MR ARMITAGE: There's an agreed agenda. Should we just turn that up. It's

21 Bundle A, page 121.

22 JUSTICE BACON: Yes. I think that given where we are, what I was proposing to do

23 was to deal with all of the expert issues and directions to trial at the start, because

24 I think most of the disputed issues are actually relating to the expert issues. Perhaps

25 if there are things that are not relating to the expert issues, I think under

26 "miscellaneous" -- oh no, that's cost budget anyway. As far as I can see, the only

1 | disputed issues in the directions to trial are the expert issues and the cost budget
2 | provisions at the end.

3 | MR ARMITAGE: That's exactly right. Indeed. I should say, I think time (inaudible)
4 | now slightly out of whack. Probably famous last words. That's it entirely
5 | (overspeaking).

6 | JUSTICE BACON: Yes. So we'll deal with that all -- yes.

7 | MR SINGLA: (Inaudible). There's a point in relation to rolling disclosure.

8 | JUSTICE BACON: Yes, all right. So we'll deal with the expert issues and the timetable
9 | for that. We'll then deal with Airwave disclosure and class member disclosure. As
10 | part of that, let's just pick up the point about rolling disclosure. So someone remind
11 | me when we get to that. We'll then address cost budgets and finally any other
12 | business.

13 | Just to flag the two points I have under -- well, I've got three points under "any other
14 | business", so you can think about it.

15 | The first is whether we should have an updated confidentiality protocol. I think the
16 | current confidentiality protocol doesn't deal with third-party confidentiality. It was
17 | produced, to be fair, before the confidentiality practice direction. So there may be
18 | other amendments that need to be made to the protocol.

19 | Secondly is I thought it might be helpful to have an agreed glossary that we can all
20 | use going forward so that we don't have to keep defining things, and I don't have to
21 | keep looking up what the various acronyms used in the case mean.

22 | The third point is a question, maybe you can just consider that with those behind you
23 | during the course of today at some convenient point, which is do we have a date for
24 | trial 2? If so, when? Because I wasn't sure. If not, should we get one in? So those
25 | were my three AOBs. Does anyone else have any AOBs that they want to add to the
26 | shopping list?

1 No, all right.

2 MR ARMITAGE: Over to the point I made for the experts' categories. Possible we
3 may ask for some directions to help get us over the line on those, but we'll come back
4 to you on that later if we may.

5 JUSTICE BACON: Yes.

6 MR ARMITAGE: On just the one point you just made, I think I'm right in saying we
7 don't have a date.

8 JUSTICE BACON: Right, so we should maybe just consider that. Because the
9 Tribunal is already booking up trials into 2029, horrific though that may sound, and
10 I know that there's quite a lot of pressure on courtroom space in 2028. So if there is
11 a desire for another trial to go in in 2028, that's going to need to be listed now.
12 Otherwise 2029 is looking okay.

13 So let's start with the expert directions. With a fair wind, it struck me that we might
14 finish by lunchtime. But I'm not going to put pressure on everyone's submissions.
15 We've got the whole day, but ideally I think we should finish well before the end of the
16 day.

17 MR ARMITAGE: Yes. I had the same thought. I think CR/M1 is by far the most
18 involved. (Inaudible).

19 JUSTICE BACON: Yes.

20 MR ARMITAGE: I'm pretty sure. Yes.

21 JUSTICE BACON: All right.

22 MR ARMITAGE: On expert evidence, we're very grateful for the Tribunal's letter.
23 We've looked at the approach taken by the Tribunal in the *Roadget* case which -- for
24 our part, we agree that (inaudible) very sensible approach (inaudible) that direction.

25 JUSTICE BACON: Yes.

26 MR ARMITAGE: Before we get to that, are there any queries on the substance?

1 JUSTICE BACON: Yes. I think we should deal with the points of principle first, and
2 then deal with the dates.

3 On points of principle. Working through the order, starting with paragraph 13. Why is
4 there a dispute about roman "ii"? It seemed to us to be quite obvious that the issues
5 need to distinguish between those of the economists and the accountants, in the same
6 way that the *Roadget* order distinguished between the issues to be considered by the
7 different experts of different disciplines. If there are some issues that you think need
8 to be addressed by both with different aspects of those issues being addressed by the
9 experts in different disciplines that needs to be made clear. What we absolutely have
10 to have is a one on one marrying up of the experts. I don't want one expert giving
11 evidence which is then addressed in some kind of blurred fashion by two experts on
12 the other side. So that's the point of having a single list of here are the issues for the
13 economists, each of the economists are going to address all of the issues in the list.
14 Similarly for the accountants, each of the accountants are going to address the issues
15 in the list. We clearly do need to distinguish between the points to be addressed by
16 the experts in different disciplines.

17 Secondly, I don't see what the objection is to explaining, as did the *Roadget* list of
18 issues, how the experts are going to provide the evidence, giving some indication of
19 whether what they're intending to do is a quantitative analysis, and what sort of
20 quantitative analysis, in broad terms, or a qualitative analysis looking at other
21 evidence. Mr Singla, what's the problem with this?

22 MR SINGLA: So the issue is not in relation to duplication. So we're content with
23 distinction between the issues to be considered. I think what gave us pause for
24 thought was how the experts provide evidence. We have already done the exercise in
25 correspondence – what we see the experts covering. We've filed methodology
26 statements.

1 JUSTICE BACON: Well, the methodologies don't necessarily marry up. The utility of
2 having a single list of issues, which incorporates a summary of the methodologies
3 proposed to be used, so we've got it in one place, and everyone can see in one place
4 the methodologies that each expert proposes to use. Then we can see also, without
5 having to have a side by side comparison and then looking at correspondence as well,
6 in a single document what are the methodologies for each of the issues, in the same
7 way that it was done in the *Roadget* case.

8 MR SINGLA: In my submission, this is actually a provision which didn't appear in
9 (inaudible).

10 JUSTICE BACON: Yes.

11 MR SINGLA: (Inaudible).

12 JUSTICE BACON: Yes.

13 MR SINGLA: (Inaudible).

14 JUSTICE BACON: Yes, but what we were concerned to get at is a document that
15 looks rather like the *Roadget* document. I think that should help us going forward to
16 understand what is proposed, and actually will help us to review what's proposed,
17 because in the *Shein v Temu* case, we didn't accept all of the proposals. Once we'd
18 seen the final lists, there was some deal of discussion at the hearing which finalised
19 that document as to exactly what the experts were going to do. So I think it is useful
20 for there to be a single document which sets out what the experts are doing and
21 hopefully marries up the analysis, so we're not getting ships passing in the night. It's
22 not just a question of saying, "We've said it in our methodology". It's actually
23 considering the methodologies on both sides, and getting the experts to agree what
24 methodologies are going to be useful.

25 MR SINGLA: With respect, the concern is that we're already operating a fairly
26 compressed timetable. We're not objecting to the concept of a list of issues. If I just

1 show you what we've done already in respect to the list of issues.

2 JUSTICE BACON: Well, we've seen the expert methodologies.

3 MR SINGLA: You may not see the correspondence, but we've actually done,
4 essentially in this division -- can I just show you?

5 JUSTICE BACON: All right.

6 MR SINGLA: I think the question is whether we need to go above and beyond.
7 Madam, if you refer to Bundle D, page 410 of tab 104, this is a letter of 15 July in which
8 we've sought to identify issues, as well as in the letter on page 442.

9 JUSTICE BACON: Well, I'm not going to make an order which requires the Tribunal
10 at some point to be wading through correspondence. The idea is to end up with
11 something that looks like the *Roadget* order.

12 MR SINGLA: Yes. I think the only question is whether -- can I just show you this?
13 We're content to provide a list of issues which demarcates exactly what each expert
14 will be doing. That is not controversial. It's just whether one needs to go beyond the
15 list of issues. I think it might just be helpful to show you page 446 of Bundle D. (Pause)

16 JUSTICE BACON: Nobody had in mind, an enormous fresh exercise, but rather
17 consolidating what's already been done, and what we can see in the combination of
18 the methodology statements and the letters, and putting it in one place in condensed
19 form, so to produce something akin to the list in the *Roadget* case.

20 MR SINGLA: I'm sorry. I thought you said the methodology statement was insufficient.

21 JUSTICE BACON: Well, there are some points on the methodology which
22 Professor Neuberger will address later on, but for these purposes, certainly what I had
23 in mind was that we end up with a document that looks rather like the *Roadget* list of
24 issues.

25 MR SINGLA: Right.

26 JUSTICE BACON: As approved by the Tribunal and attached to the order in the

1 *Roadget* case. So we have a quite narrowly defined list of sub-issues under the
2 various topics and a very condensed summary of the type of analysis that's going to
3 be used. I would imagine that what you are going to include there is a condensed
4 version of the methodologies that you've set out in your correspondence, and in the
5 methodology statement, so that we can see -- and also if it's disputed between the
6 parties, as to what kind of methodology is appropriate. We can see that, rather than
7 us having to go through different sets of correspondence and try to work out whether
8 the methodologies on each side are going to marry up. The idea now is to do the
9 marrying up and make sure that both experts are doing broadly the same thing.

10 MR SINGLA: Well, that's helpful. (Inaudible) we understood that the wording of
11 paragraph 13, roman "ii" doesn't appear in the *Roadget* Order, that's why we were
12 keen to get guidance.

13 JUSTICE BACON: (inaudible)

14 MR SINGLA: (Several inaudible words.)

15 JUSTICE BACON: No, not for the purposes of this document. As I said, we have got
16 a separate point on some of the methodology which might need to be looked at again,
17 but just to make it clear, what we envisage is that we will get something that looks like
18 the final *Roadget* list of issues.

19 MR SINGLA: (Several inaudible words.)

20 JUSTICE BACON: Right.

21 MR SINGLA: (Several inaudible words) that document.

22 JUSTICE BACON: All right, well you were directed to that in the letter from the
23 Tribunal. We want something that looks like that, first of all for the economists and
24 secondly for the accountants. To be clear, what I don't want to see is, "Mr So-and-So
25 is going to do this, and Mr So-and-so is going to do something completely different".
26 The idea, as you'll see in the *Roadget* document, is there is a single statement for

1 each of the sub-issues as to the general methodology that will be applied. The
2 assumption going forward is that both sides will be doing, effectively, the same
3 analysis. So we are not having two disparate and non-matching sets of
4 methodologies.

5 MR SINGLA: That raises a different issue of substance, different types of analysis.

6 JUSTICE BACON: Of course, they might say that there are three types of analysis
7 and Mr So-and-So is going to do this and Mr So-and-So thinks that is what is
8 proposed. If Mr Grantham thinks that what Mr Ilett is doing doesn't make sense and
9 he's going to do something else. But what we don't want is very disparate sets of
10 methodologies and then a big debate at trial as to whether one or other was
11 appropriate to have been included from the start. We are repeatedly being told that
12 the Tribunal should be grappling with the expert issues earlier in cases, and we do
13 have the time now to do that.

14 MR SINGLA: Can I just ask for a minute, just (inaudible). (Pause)
15 (Inaudible).

16 JUSTICE BACON: Yes, it's a consolidation and a summary, so it doesn't need to be
17 more detailed than the *Roadget* list.

18 MR SINGLA: Yes, well, it's difficult to know what (inaudible) happened in that.

19 JUSTICE BACON: Yes.

20 MR SINGLA: (Inaudible).

21 JUSTICE BACON: Yes.

22 MR SINGLA: (Inaudible).

23 JUSTICE BACON: Yes.

24 MR SINGLA: As I say, we'll put together the (inaudible).

25 JUSTICE BACON: Yes, but I'm not envisaging a huge document. Take the *Roadget*
26 document as your template, produce something that looks as close as possible to that

1 in terms of the level of detail.

2 MR SINGLA: (Inaudible).

3 JUSTICE BACON: Yes, exactly.

4 MR SINGLA: (Inaudible) Reflected by the wording in (inaudible).

5 JUSTICE BACON: Well, you know what you're doing.

6 All right. Then in that order, I think the final sentence should read something along the
7 lines of:

8 "The expert list of issues and the proposed page limits for expert reports shall then be
9 determined by the Tribunal on the papers."

10 If what you are producing is not agreed, the implication is then that you will provide
11 comment boxes explaining the different versions of the wording that you are
12 proposing, so that the Tribunal can see. And indeed, the Tribunal may itself disagree
13 with some of what is proposed, as exactly happened in the *Roadget* case when we
14 didn't consider that all of the issues were necessary to be addressed by the experts.
15 So it's not just that we will deal with any disputes, but the Tribunal will then settle the
16 list of issues and the proposed page limits, which may not be the same as those that
17 are agreed between the parties, if we think that what you're agreeing is excessive.

18 MR SINGLA: (Inaudible).

19 JUSTICE BACON: Yes, which will be after 23 October. Yes, thank you.

20 All right, so that deals with that.

21 MR ARMITAGE: Madam, I'm so sorry, can I -- we're very happy with that. Can I just
22 make two points: one thing that caused me a minor horror was the reference to merely
23 consolidating what's been said in correspondence.

24 JUSTICE BACON: Yes.

25 MR ARMITAGE: Because as we've seen from (inaudible) in relation to economic
26 (inaudible) we have raised (inaudible) queries about what is actually proposed by

1 experts and really (inaudible).

2 JUSTICE BACON: Yes. Well, Professor Neuberger is going to deal with some of that.

3 If that discussion in a minute doesn't pick up those issues, raise it then.

4 MR ARMITAGE: The two issues for legal causation --

5 JUSTICE BACON: Yes.

6 MR ARMITAGE: -- the economist would address that. And actually I have the relevant

7 letter open, and it just says "economic assessment of" ... and the relevant pleaded

8 issues for legal causation -- damages should be reduced by the alleged

9 unreasonableness of the Home Office rejecting offers.

10 JUSTICE BACON: Okay, the asset valuation point is going to be discussed later.

11 Let's deal with the causation point now. Take me to the correspondence that you

12 are --

13 MR ARMITAGE: It's page 411, of Bundle D. Can you see in relation to causation --

14 JUSTICE BACON: Yes.

15 MR ARMITAGE: -- the economic assessment point.

16 JUSTICE BACON: Yes.

17 MR ARMITAGE: This relates to (several inaudible words) unreasonable.

18 JUSTICE BACON: Yes, right.

19 MR ARMITAGE: Can I also just show you (inaudible) Bundle A.

20 JUSTICE BACON: Yes, Bundle A, page -- give me the reference again.

21 MR ARMITAGE: Bundle A.

22 JUSTICE BACON: Yes.

23 MR ARMITAGE: Tab 8.

24 JUSTICE BACON: Yes. Page?

25 MR ARMITAGE: Page 55.

26 JUSTICE BACON: 55. Yes, I actually did pick this up in my prereading; he wants to

1 contribute economic perspectives that may be relevant.

2 MR ARMITAGE: The particular concern, Madam, is with 18(a), the comparability of
3 the offers that were made and rejected by the parties. We don't understand that that's
4 a question of economics. In fact, Madam, we've had very much in mind your remarks
5 at the last CMC about not wanting to see experts merely commenting on documents
6 and the case being argued via the experts. We're not objecting, per se, but we don't
7 at the moment really understand what's envisaged in relation to (a), and to some extent
8 also (b).
9 (c), conducting a sensitivity, is obviously the sort of thing an economist does so.

10 JUSTICE BACON: Yes.

11 MR ARMITAGE: Madam, the reason I'm raising it is because that's the very reason
12 why we think a provision such as we see in the green text at paragraph 13 --

13 JUSTICE BACON: Yes.

14 MR ARMITAGE: -- and the *Roadget*-style order where the experts explain
15 (overspeaking).

16 JUSTICE BACON: That's precisely why we wanted a more detailed list in *Roadget*
17 and why we want a more detailed list here. It's exactly this kind of issue because in
18 the *Roadget* case, at the hearing, we made this point in relation to some of the issues
19 that we weren't sure that they were properly matters for the expert evidence rather
20 than legal submissions.

21 I did wonder what is meant by "contributing economic perspectives", and we are very
22 concerned that the economic evidence should be confined to strictly economic matters
23 and shouldn't get into legal debate. That might, it might be helpful if Mr Singla
24 explained what is envisaged by 18(a) and indeed (b).

25 MR SINGLA: I suggest as a pragmatic way (inaudible) that process would be set up
26 (inaudible) --

1 JUSTICE BACON: Yes.

2 MR SINGLA: -- which is reflected in the order --

3 JUSTICE BACON: Yes.

4 MR SINGLA: -- (several inaudible words) to flush this out.

5 JUSTICE BACON: Well, all right.

6 MR SINGLA: (Inaudible) they've made this point (inaudible) should be effectively

7 (inaudible). That's what they want more detail on.

8 JUSTICE BACON: Yes.

9 MR SINGLA: (Inaudible) without the assistance (inaudible).

10 JUSTICE BACON: All right, I think that's --

11 MR ARMITAGE: That's absolutely fine, it's just I thought it was important I made that

12 point.

13 JUSTICE BACON: Yes.

14 MR ARMITAGE: Because merely consolidating what has been said in the

15 correspondence on this point wouldn't suffice for this purpose.

16 MR SINGLA: Let's mark it down when we come to Mr Grantham's (inaudible) probably

17 going to make a point about Grantham (inaudible). Where we do take some issue that

18 the idea that one has to provide granular detail ahead of time. So in relation to this, of

19 course, if there's clarification we can provide, we can provide that.

20 JUSTICE BACON: Yes. I think this goes to the how. We're not expecting granular

21 detail, but I think, as you'll see from the *Roadget* order, that does explain where the

22 experts are, for example, going to conduct a quantitative analysis as opposed to

23 a qualitative analysis. I think that's the concern of Mr Armitage. If Mr Colley is simply

24 saying, "I'm going to look at a bunch of disclosure documents and then make some

25 comments on those", I think he would be objecting. If Mr Colley says, "I'm going to do

26 this kind of quantitative analysis which goes to the question of comparability", I think

1 that that would probably help him in understanding the relevance of the economic input
2 for that.

3 MR SINGLA: Yes, the marker we put down is in relation to both Mr Colley on
4 economics and Mr Grantham on accounting.

5 JUSTICE BACON: Yes.

6 MR SINGLA: To press us (inaudible) more detail (inaudible) you say is a general
7 point.

8 JUSTICE BACON: Yes, all right. Well, I think that debate will get flushed out,
9 hopefully, in the production of the more detailed list of issues. And then if there's
10 a dispute, then we'll need to determine that, and we may need to ask for more
11 information at that stage, but we'll see where we get to on 23 October.

12 All right, thank you.

13
14 (Sequential / simultaneous exchange)

15 JUSTICE BACON: Now, the next point of principle is whether to go for sequential or
16 simultaneous exchange. Now, there's a related question, which is: what are we going
17 to end up with at trial? You'll have seen the experts' practice direction which envisages
18 that one possibility -- and I'm just saying it's a possibility out of a menu, and each case
19 will be different -- is to end up with a trial expert report on each side, which is one place
20 with everything that's disputed.

21 That, it seems to us, could be achieved by having a process which, whether it's
22 simultaneous or sequential expert reports. Then at the final stage of that, the joint
23 expert statement being a fairly short document which identifies the agreed issues and
24 the agreed points, sets out any detail necessary on those agreed points that the
25 Tribunal understands -- the positions of the experts, then summarises only in bullet
26 points anything that is not agreed, so we have a list of the points that are not agreed

1 without further detail.

2 Then each expert then consolidates into one place their evidence on the not agreed
3 points, so that we then can effectively dispense with the previous six or
4 eight statements and just look at a single trial document, which, as indeed in the
5 Google trial that's about to start, would not be a rewriting, but would rather be one
6 place consolidation of everything that has come before, to give the Tribunal all the
7 information it needs on the disputed issues, so that we only then look at those two final
8 trial reports rather than having to go back.

9 So I don't think that that stage would involve a process of rewriting, but rather simply
10 consolidating and hitting the delete button as much as possible on the agreed points.

11 Would that work?

12 (Submissions by MR SINGLA)

13 MR SINGLA: (inaudible) clarify (inaudible).

14 JUSTICE BACON: Well, I think the question is, first of all, what we think should be
15 produced, and then the time scales.

16 MR SINGLA: The two are connected. Can I make my points about why we have
17 proposed simultaneous exchange, because that arises out of a concern we have
18 about (inaudible) lack of (inaudible) document.

19 JUSTICE BACON: Yes. The two are connected because if we end up with a process
20 that just produces two reports, one on each side, there's less of a concern about
21 having fewer reports at the earliest stage. I mean, one of the ideas behind the
22 sequential exchange was you only end up with six rather than eight.

23 But actually, if we're just going to be reading a single report on each side, that's less
24 of a concern because ultimately we're not going to be looking at the previous workings,
25 if you like, we're only going to be looking at a single document. So we'll have, at the
26 end of the day, four expert reports on that basis with a very short agree/disagree

1 statement.

2 MR SINGLA: I'm not sure I believe (inaudible) --

3 JUSTICE BACON: So my point is that one of Mr Armitage's reasons for
4 proposing -- it's all right, you can sit down, Mr Armitage -- one of Mr Armitage's
5 reasons for proposing sequential exchange was that we end up with only six reports
6 rather than eight, plus the joint reports.

7 If we do follow a process where at the end of the day -- at the paragraph 21 stage -- we
8 get a single trial expert report from each of the four experts, Mr Armitage's point about
9 reducing the number of reports somewhat falls away because we will end up with just
10 one consolidated document for each expert.

11 MR SINGLA: (Inaudible).

12 JUSTICE BACON: Yes. The other reason for sequential rather than simultaneous is
13 that you have an earlier narrowing of the issues.

14 MR SINGLA: I can follow that one, but what I was going to submit to you is that whilst
15 there is some concern (inaudible) in this case and in (inaudible) outweighed by
16 (inaudible). As you'll imagine, we've given this a great deal of time. There are
17 advantages (inaudible) but the question (inaudible). The only way this can be
18 accommodated is either by having joint statements in (inaudible) and the Tribunal
19 (inaudible).

20 The other end of the time we would need to (inaudible) we have (inaudible) there are
21 factual evidence. That's something that we do feel very strongly about. It's very
22 substantial. (Inaudible) amount of time.

23 That's where we're coming from. (Inaudible) simultaneous (inaudible).

24 JUSTICE BACON: Well, why don't we just look at the consolidated draft directions
25 because I can see the dates there. You're starting really at the start and saying "In
26 order to have sequential exchange, you need to start with ..."

1 MR SINGLA: Well, just taking you through the stages, if you go to paragraph 8, that's
2 the long stop date for disclosure, 24 December.

3 JUSTICE BACON: Yes. Sorry, I'm just being told that there is an issue with the audio
4 and microphones. (Pause)

5 I'm sorry to cut off your submissions mid-flow Mr Singla, I think we should probably
6 just rise because otherwise we're going to have difficulties producing the transcript.
7 They say that they can fix it in a short amount of time if we all just rise for five minutes.
8 That might also give you a chance to consider what we've said on some of the other
9 issues.

10 But, just as a heads up, if we can schedule in sufficient time to allow for sequential
11 exchange our view remains that it would be helpful in enabling the expert reports to
12 be more targeted earlier on. So I think what we need to focus on is whether that can
13 realistically be achieved. I think the start date we probably need to look at is then
14 paragraph 11 in the order which is the starting point for factual evidence and whether
15 the 19th is simply too early given the earlier stages. I'm presuming you're thinking
16 about the dates for disclosure in December.

17 MR SINGLA: Exactly, so before we rise and I will take (inaudible). That's what's
18 driving simultaneous versus sequential (inaudible) the proper amount of time at the
19 start. (Inaudible).

20 JUSTICE BACON: Yes. Yes. Well, perhaps while we are breaking for five minutes
21 you could also consider what we've suggested about what we end up with at the end
22 of the day. Just to emphasise, the final document is not envisaged to be a rewriting
23 but rather just a bringing together so that we have everything in one place.

24 MR SINGLA: Well, what I'd like to perhaps discuss with those behind me whether one
25 could hold the dates for factual evidence and within the confines (inaudible).

26 JUSTICE BACON: Yes. Of course. All right, let's just rise for the IT to be sorted out.

1 All rise.

2 (11.04 am)

3 (A short break)

4 (11.11 am)

5 JUSTICE BACON: I'm sorry, Mr Singla. I can see you're both on your feet. Do you
6 want to carry on addressing me?

7 MR SINGLA: Exactly. Well, there are two parts to this. The first is the document that
8 you mentioned would be of assistance to the Tribunal. Then the second part is the
9 points I wanted to make about the amount of time we need for witness statements.

10 In terms of the document, we're very content to produce trial reports. So as we
11 understand it there would still be a joint expert statement following the meetings which
12 would be a short document with the agreed points.

13 But then beyond that there would be trial reports, essentially everything in one place
14 on those issues which are not agreed between the experts. So that's all very helpful
15 and we can produce those. But there's a question --

16 JUSTICE BACON: Are you content that that's a helpful and sensible direction to make
17 because we don't want to order something that everyone thinks is crazy.

18 MR SINGLA: Well, even I wouldn't go that far, but in the abstract, yes. I mean, it
19 would plainly make all of our lives easier at trial to have a document of that nature.
20 But the question is, as with everything here, can it be accommodated? So our, as it
21 were, agreement to that concept is subject to looking at the rest of the timetable.

22 Now, what we would respectfully submit can work is -- if you look at paragraph 21 --

23 JUSTICE BACON: Yes.

24 MR SINGLA: I'll come back to the earlier dates in a moment -- we would propose that
25 if the joint expert statements are produced on 16 July, one can then have the trial
26 reports, if we can call them that, produced on 30 July, two weeks later.

1 JUSTICE BACON: Well, I was wondering about that because if all that is produced at
2 the first stage is a very short, effectively, agree/disagree list, I don't think you need as
3 much time between the expert meeting and the date on which that document is
4 produced because it's going to be a very short document, it's going to be a few pages.
5 So, I was thinking that we could truncate that and bring it forward a little bit.

6 I mean, obviously there's a debate about when between 25 June and 2 July, if you're
7 working back, the experts should meet. But assuming that the experts are sometime
8 around then I wouldn't have thought that they would have needed more than a week
9 to produce a document which is going to be in the single page as I --

10 MR SINGLA: I follow that. It's the production of the other document.

11 JUSTICE BACON: Yes.

12 MR SINGLA: There's obviously a lot for these experts to do in a relatively short space
13 of time. I mean, no one is happy with a deadline on 30 July which is why our whole
14 starting point was that none of this works on a sequential basis. So I understand the
15 concern about having a deadline on 30 July.

16 But equally these are going to be the trial reports. If what you envisage is essentially
17 those documents being the ones that everyone uses at trial, they're going to be very
18 important documents.

19 JUSTICE BACON: But I wondered then, if you brought forward the date of the 16th
20 to the 9th, just for the sake of argument to work back --

21 MR SINGLA: Then 30 July --

22 JUSTICE BACON: Well, either the 30th or a little bit before that, because wasn't your
23 point that you wanted to have a little bit of time before everyone disappears in August.
24 If it's the 30th that's not going to give everyone that much time.

25 MR SINGLA: No, exactly. This is all assuming absolutely no slippage in the timetable.
26 We're very concerned about anything running into the summer vacation with a big trial

1 to prepare.

2 JUSTICE BACON: Well, yes, of course. But I'm wondering if you then had the 23rd
3 to produce the consolidated documents on the basis that we are not expecting new
4 workings --

5 MR SINGLA: Yes.

6 JUSTICE BACON: -- it's a matter of editing what is already there, deleting what's no
7 longer needed, and consolidating it into a single document. It seems to me strange
8 that you would need more than two weeks to do that, what is effectively an editing
9 exercise rather than a rewriting exercise.

10 MR SINGLA: Yes, but it's more than that, with respect. I mean, it's obviously not just
11 a case of -- I mean, these are, as I say, important documents which the experts will be
12 cross-examined on so one can understand them wanting to take time over them.
13 There are, as you know, two experts as well. So this is a high, high pressure timetable.
14 But can I just perhaps go back to the start because we say we could accept this idea
15 and this principle on our view of the world because as you know we've always been
16 very mindful of the back end. Whereas on the CR's sequential proposal their date for
17 the JES, I think, was 23 July. So if we're now talking about documents and reports
18 being produced beyond the joint expert statements, one can't actually see how they're
19 going to make this fit. So this is why we say it can work but only, with respect, on the
20 basis that we have put forward, which is essentially simultaneous.

21 The reason for that is because otherwise no doubt what Mr Armitage is going to say
22 to you is they can make this work with sequential by cutting down the time that we
23 have to produce our factual evidence, and that's the only way --

24 JUSTICE BACON: (Inaudible) very much between you. So let's just -- if you want
25 then to switch back to the front end.

26 MR SINGLA: Yes.

1 JUSTICE BACON: 19 February. Now, I presume that you will be starting to work on
2 the evidence already. You will need to take account of the disclosure. The
3 proposal -- and this might be the point at which we pick up the rolling basis
4 wording -- the Class Representative is proposing that the disclosure is provided as
5 soon as reasonably practicable after it becomes available for disclosure. That seemed
6 to me sensible and would enable you to get disclosure earlier than you would have
7 otherwise done.

8 MR SINGLA: No, so --

9 JUSTICE BACON: Is that not the case?

10 MR SINGLA: Sorry. Just to jump around, if one goes back to paragraph 1, that's
11 where this wording also appears.

12 JUSTICE BACON: 1 and 8, yes.

13 MR SINGLA: Yes. Obviously, our concern in relation to this wording applies to what
14 we have to do, not what they have to do.

15 JUSTICE BACON: But they're proposing it on a bilateral basis, both one in eight.

16 MR SINGLA: Yes, but as the party giving, at least in relation to what they're asking
17 for, potentially quite a lot of disclosure, our concern is that -- we're not objecting to the
18 rolling basis, so that aspect is agreed. It's the wording "as soon as reasonably
19 practicable after such material becomes available for disclosure". In my submission,
20 that is wording which is likely to become contentious, and effectively on one
21 interpretation means that there would be a series of productions over the relevant
22 period, because --

23 JUSTICE BACON: That is envisaged by "on a rolling basis" anyway.

24 MR SINGLA: Well, "on a rolling basis" gives, effectively, the party giving the disclosure
25 more flexibility as regards the number of productions. What we don't want is some
26 obligation that "as soon as reasonably practicable after such" -- I mean, one doesn't

1 actually see that wording in most orders that do provide for rolling disclosure. What
2 we're concerned about is this becoming an oppressive process whereby as soon as
3 documents become available for disclosure those behind me have to produce them.
4 Then there's going to be a series of productions, potentially, in a short space of time.

5 JUSTICE BACON: How frequently do you envisage that disclosure productions can
6 be made? I mean, are you objecting to more than, say, once a week?

7 MR SINGLA: Yes.

8 JUSTICE BACON: Would you be content with once a week?

9 MR SINGLA: No, no. I mean, on a rolling --

10 JUSTICE BACON: You wouldn't be content with once a week?

11 MR SINGLA: I'm sorry.

12 JUSTICE BACON: You wouldn't be content with once a week?

13 MR SINGLA: Obviously I'll have to speak to those behind me, but I imagine they're
14 going to say at this stage we don't know. We can't commit now to the frequency of
15 productions. But hypothetically --

16 JUSTICE BACON: No, but you can tell me now what is oppressive and burdensome.
17 Is once a week oppressive and burdensome?

18 MR SINGLA: That would be, because of the work involved in producing material for
19 disclosure is burdensome. So if one were doing it over this -- I think it's a three-month
20 period that one has for disclosure. And if what's envisaged is --

21 JUSTICE BACON: What's reasonable, then? Once every how long?

22 MR SINGLA: Well, we would say once every three weeks, and no more than that.
23 That's the concern. "On a rolling basis" normally gives the party doing the disclosure
24 some room for manoeuvre, in terms of trying to do this in the most efficient way.

25 JUSTICE BACON: But on the basis that the disclosure has to be provided one way
26 or the other, and the question is whether you just chunk it, and how frequent the

1 chunks are.

2 MR SINGLA: Yes. But "as soon as reasonably practicable after such material
3 becomes available" --

4 JUSTICE BACON: Yes, all right.

5 MR SINGLA: You see the point.

6 JUSTICE BACON: But I'm assuming that we have a debate as to what that means.

7 MR SINGLA: Right. Well, if one put in this "no more than once every three weeks",
8 for example, then we'd be content with that. So we're not looking to be difficult, but
9 we're just trying to head off now arguments that may arise and problems that may
10 arise in the context of three months to do a huge disclosure exercise.

11 JUSTICE BACON: Right. Mr Armitage, would you be content with no more than once
12 every three weeks?

13 MR ARMITAGE: Instead of the reasonably practicable wording?

14 JUSTICE BACON: No, with that wording, but making clear that it's no more than once
15 every three weeks.

16 MR ARMITAGE: I think we could live with that, provided it's approached in
17 a reasonable way, and it's not one document, one three-week interval. But, yes,
18 I mean, we're not pushing back against that.

19 JUSTICE BACON: All right.

20 MR SINGLA: Obviously, it'll be (overspeaking) in a reasonable way.

21 MR ARMITAGE: Reasonable.

22 MR SINGLA: So that's that was the issue on 1.

23 JUSTICE BACON: So you can have the green wording, but then in certain wording
24 that makes clear that you're not expected to produce disclosure more than once every
25 three weeks.

26 MR SINGLA: I'm grateful. That would deal with our concern.

1 JUSTICE BACON: Same in 8.

2 MR SINGLA: Of course.

3 JUSTICE BACON: So that means that you are going to be getting disclosure on
4 a rolling basis. So you won't get everything, only on the 11th and the 24th.

5 MR SINGLA: But, with respect, we don't know what we're getting when. Can I just
6 say this? On the current timetable that we've put forward, it gives us 12 weeks,
7 between 24 December and 5 March, for the production of factual witness statements.
8 Now, one has to take into account the Christmas vacation. So that's 12 weeks,
9 including Christmas.

10 JUSTICE BACON: Right, so ten then.

11 MR SINGLA: Ten. Then one has to actually have regard to what is a fair period of
12 time for my clients to produce their evidence. I do submit this is a very, very tight
13 timetable, and every week is going to count, and there's a lot to do. It's simply not
14 right to say, "Well, you can start the process now". Of course, one can do some work
15 now, but in my submission my clients are entitled to wait until the disclosure's in, have
16 a chance to review it, have a chance to speak to witnesses and then produce the
17 statements. We submit this is actually pretty fundamental in terms of the fair
18 preparation of the case.

19 JUSTICE BACON: Yes.

20 MR SINGLA: In a case worth hundreds of millions, or said to be worth hundreds of
21 millions, having 12 weeks, including the Christmas vacation, to produce a number of
22 witness statements, in my submission, is entirely reasonable and appropriate. That's
23 why we say a line has to be drawn in that regard. If we then start with 5 March, 2 April
24 for reply evidence, then one has a very short period of time indeed in which to
25 accommodate the expert process. So we're not being difficult in relation to sequential
26 versus simultaneous, but we feel very strongly about the amount of time needed for

1 disclosure and factual evidence at the front end.

2 MR ARMITAGE: Madam, if it assists -- sorry.

3 JUSTICE BACON: On my count there are ten weeks between 24 December and
4 5 March. (Pause)

5 My count may not be correct.

6 MR SINGLA: Well, mine might not be either, but I'm --

7 JUSTICE BACON: So that would be eight weeks.

8 MR SINGLA: It's eight weeks. The 12 comes from 11 December, because that's
9 when -- So, in other words, you're right.

10 JUSTICE BACON: You're talking about your period.

11 MR SINGLA: That's twelve weeks -- exactly.

12 JUSTICE BACON: Your period runs from the (overspeaking).

13 MR SINGLA: From 11 December, which is the date in paragraph 1. But in any event,
14 it's the same submission as regards the Christmas vacation. Those behind me will be
15 under a lot of pressure to get this disclosure done by 11 December. So one can say,
16 "Well, you've got to start moving with the statement process". Of course, one can say
17 that in the abstract, but in reality, there's a lot to do this side of Christmas on disclosure.
18 It's entirely reasonable and fair to await the outcome of that disclosure process before
19 proofing the witnesses and so on and finalising statements. So in my submission, this
20 is very, very tight. It's no good saying, "Well, in Power Cables there was an order for
21 sequential", because every case turns on its own facts and circumstances.

22 JUSTICE BACON: Well, I'm wondering, given that the Class Representative will get
23 your disclosure earlier in the process -- and Mr Armitage is saying that he can do
24 19 February -- whether we can have a slightly staggered timetable. So if Mr Armitage
25 puts his factual witness statements in on the 19th -- you're asking for 5 March. If that
26 could be brought forward slightly, for example to 1 March, then we could maintain the

1 date of 19 March for the Class Representative's reply statements.

2 You've asked for 2 April. We could maybe bring that forward a little bit, because you
3 will have effectively already seen the Class Representative's initial statements before
4 you put in yours. So you will have done a bit of the reply already. I would have thought
5 we could have brought that forward to 26 March. I hope someone's keeping a note.
6 Then we need to look at how that fits in with the expert reports.

7 MR SINGLA: Yes. I mean, I'm grateful for your attempts to --

8 JUSTICE BACON: That will then give more than -- wait a minute. It will give
9 three weeks before the expert reports are filed, even on the earliest date, in
10 Mr Armitage's paragraph 15. To be honest, the expert reports are going to be doing
11 mostly their own thing. They're not going to be very dependent on the factual
12 evidence, I would have thought, in terms of it.

13 MR SINGLA: Difficult to predict it.

14 JUSTICE BACON: Well, you'll know that once we get the expert statements. But
15 even looking at the proposed methodologies, most of that is not saying, "I'm going to
16 look at the factual reports and I'm going to comment", because, frankly, that's not what
17 they should be doing. They should be going off and doing separate analysis, largely.

18 MR SINGLA: Yes. I'll have to take instructions on what you've just proposed, but can
19 I maybe just say this, which is we do understand the provisional view as expressed in
20 correspondence for sequential. We do understand the attempts you're making now to
21 make that fit. But in my submission, in a sense, if one just takes a step back, this is
22 an incredibly compressed timetable on any view and slippage is inevitable. I mean,
23 experience tells one that these dates ultimately may well move. Some of them may
24 well move. In my submission, instead of doing our very best to make sequential fit,
25 one should actually accept our proposal of simultaneous. That still gives us enough
26 time to do the factual evidence. That still allows the documents, the trial reports that

1 | you would like for trial to be produced before the summer.

2 | So my primary position remains that actually the best way to make this work for
3 | everybody, before one gets to the possibility of slippage, is to stick with simultaneous.
4 | Otherwise one could get into -- I mean, I'm not necessarily opposed to what you've
5 | just suggested, but one can see immediately --

6 | JUSTICE BACON: Well, let me hear from Mr Armitage. So on the basis of the
7 | suggested dates that lead up to the 16 April date in paragraph 15, can you give us
8 | your submissions on whether that would work, and whether you still maintain that you
9 | want sequential reports, and if so why?

10 | (Submissions by MR ARMITAGE)

11 | MR ARMITAGE: Madam, yes. We do still want sequential reports. Starting in relation
12 | to the point on the trial expert reports, we are very happy to produce those. As
13 | someone who spent a long time reading them in *Coll*, they are very wonderful things
14 | and they do save real time, but we do say that is subject to making that work with the
15 | sequential process. We're very grateful that the Tribunal is keen to see that that can
16 | be made to work.

17 | We fully accept that does address one of the advantages I identified in relation to
18 | sequential. It does reduce the volume, or at least it makes the volume of reports less
19 | of an issue. It doesn't completely remove the need to look at them at any stage, of
20 | course. But we have identified a number of other advantages. They're referred to in
21 | the *Nexans* judgment. We're not saying just because it was done in that case it should
22 | be done here, but we say those are real, tangible advantages.

23 | In terms of the timetable. Just starting on the timings for factual evidence, there isn't
24 | actually very much between the parties on the existing timetable. It's a difference of
25 | two weeks. We did wonder whether simply bringing that forward or back by a week in
26 | relation to both 11 and 12 would assist. It is important to note this isn't like some

1 collective actions where the burden is entirely one sided. We are also going to be
2 producing primary witness statements from multiple witnesses. It is a different sort of
3 collective case in that respect. So we're not saying that the burden should all fall on
4 the other side. We do think the dates are achievable, but we also thought, if one split
5 the difference between the dates in 11 and 12, that would be --

6 JUSTICE BACON: I could just say, for example, 1 March, and then 26 March. For
7 example.

8 MR ARMITAGE: Well, respectfully, yes, we wondered if that was the way to do this.
9 We think that does give sufficient room in the timetable. We accept it's quite a quick
10 timetable. We think, as you say, in a sense, the next step is the filing of primary expert
11 reports from our experts on our sequential proposal.

12 JUSTICE BACON: Yes, obviously you bear the burden of it.

13 MR ARMITAGE: We bear the burden and we are happy to shoulder the burden. We
14 think, actually, obviously, it is a burden, but it isn't significantly influenced by the
15 preceding step, because our experts will be getting on with it.

16 JUSTICE BACON: So given that you are bearing the burden of the next step, do you
17 think that there is if I were to say 26 March, I mean, that would be where we ended up.
18 That's only a week earlier than the Defendants' proposal. If we ended up with
19 everyone putting in their reply statements on 26 March, you're content that gives you
20 enough time to put in your expert report by 16 April?

21 MR ARMITAGE: Yes, so 26 March reply factual statements.

22 JUSTICE BACON: Yes, and three weeks later for the --

23 MR ARMITAGE: Yes, I'm seeing nodding from those behind me.

24 JUSTICE BACON: Right, so you think, then, three weeks later for your expert report.
25 Then you are proposing 21 May for the responsive expert report?

26 MR ARMITAGE: Yeah.

1 JUSTICE BACON: And your reply 25 June?

2 MR ARMITAGE: Yeah. I haven't actually turned around to check, but the suggestion
3 that the time between the WP expert meetings and the agree/disagree
4 statement -- sorry, I'm just going to check.

5 JUSTICE BACON: Yeah, well, let's just go on your proposal then. How does that
6 work? If you put in your reply on 25 June, I mean, that might need to just be then
7 brought forward, because otherwise there might not be enough time before the expert
8 meeting.

9 If you're getting their report on 21 May, it's not clear why you'd need two, three -- much
10 more than a month to put in your reply report. Is it possible to bring that forward to the
11 18th, and then that would give a bit more time and then we could realistically have the
12 joint expert meeting by 25 June or maybe 28 June?

13 MR ARMITAGE: Sorry, Madam. So that's bringing the 25 June date in paragraph 17
14 a little bit forward. May I just turn around on that point?

15 JUSTICE BACON: Yes. That would require you to bring your reply forward to the
16 18th, which is what I had already pencilled in.

17 MR ARMITAGE: Paragraph 17, yeah.

18 JUSTICE BACON: Yes. (Pause)

19 MR ARMITAGE: Yes, we can make that work.

20 JUSTICE BACON: Right, so then the date in 17 would be 18 June. Again, the burden
21 is on you and not the other side on that point.

22 Then if I were to say something like 28 June, that's only one working day later than
23 the proposal of the Defendants for the expert meeting. That gives them more than
24 a week; it gives them a week and two weekends to consider what they agree with,
25 which would have been flushed out to a great extent already by the time you put in
26 your reply. You know what you agree with at that point.

1 Let me just look. Then what something like 9 July for -- or maybe even earlier than
2 that. I think if we had a meeting on 28 June, we could then say, potentially 7 July,
3 which would be about ten days, for the agreed disagree statements, which are going
4 to be quite short. Then what if we then said 23 July for the trial expert reports, that
5 would be a bit more than two weeks.

6 On that basis, would you be content with those dates?

7 MR ARMITAGE: The basis of that preserves our proposal, sequential evidence and --

8 JUSTICE BACON: Yes.

9 MR ARMITAGE: Yes, we would, yes.

10 JUSTICE BACON: All right, Mr Singla.

11 (Submissions by MR SINGLA)

12 MR SINGLA: Well, you have my submissions about the factual witness statements.
13 I do envisage that there will be slippage, and then there's going to be a real question
14 as to the workability of all of this. But if you're against me on that, then at the very
15 least, I would say if one looks at paragraph 15, we had said that their first round of
16 reports should come in on 9 April.

17 Now, that's just been cut by a week. You've been discussing 16 April, so we get
18 five weeks instead of six. In my submission, as a matter of fairness, if Mr Armitage
19 has just said on his feet they'll be getting on with the expert reports, they don't need to
20 wait for the factual statements and so on, well, thank you very much, we'll have 9 April.

21 JUSTICE BACON: I've just suggested 26 March, which goes more in your favour for
22 the previous step. We've already cut a week from their proposed timetable, so we've
23 already given them a week less than what they had suggested.

24 MR SINGLA: Yes, but he's just said on his feet that they're not actually concerned
25 about the date for witness statements, they're going to get --

26 JUSTICE BACON: No, they didn't say they weren't concerned --

1 MR SINGLA: With respect, the net result of this discussion is that we have lost time
2 for the preparation of our factual witness statements, and we've now lost time in terms
3 of the gap between the first round and our responsive expert reports. So one actually
4 has to take a step back. We are the Defendants in these proceedings. They are very,
5 very substantial proceedings from the perspective of my clients.

6 The timetable has been set. We have thought a great deal about making all of these
7 directions work. We've accepted the idea of your trial reports coming at the very end
8 of July. Even assuming no slippage, that is an incredibly tight timetable. Realistically,
9 Mr Armitage can say, "Well, they're going to produce some witness statements as
10 well". Realistically, if one's taking a sensible view about this, the burden in these
11 proceedings lies on my clients. At every stage, disclosure, factual witness statements,
12 and now expert reports, we are operating under a great deal of pressure, even
13 assuming no slippage.

14 My submission is, actually, if one takes a step back and looks at this in the round, the
15 fair way to do this is to give us the time that we ask for in relation to factual witness
16 statements, and is to produce the joint statements and the trial reports at the end of
17 July, but not to go down the sequential route. I mean, one is, in my submission, putting
18 far too much emphasis on the benefits of sequential reports.

19 In a world where we're going to be producing the trial reports, actually, many of the
20 benefits that one sees in other cases from sequential exchange just don't actually
21 arise, because we're all going to be working off the joint trial reports at the end of July.

22 JUSTICE BACON: A bit bemused at the suggestion which has you actually doing less
23 work because you will not be producing reply expert reports.

24 MR SINGLA: I'm sorry?

25 JUSTICE BACON: This proposal has you doing less work because on your proposal,
26 you are producing initial expert reports effectively blind, and you are not producing

1 a reply report. Whereas on this proposal, you just you do your reply report at
2 paragraph 16. That involves a great deal less work for you than doing two expert
3 reports.

4 MR SINGLA: We may be at cross-purposes. We are producing -- so on this
5 sequential basis, we're producing at paragraph 16, responsive expert reports.

6 JUSTICE BACON: Yes, on a simultaneous basis, you start off producing two reports:
7 you produce your initial report; and a reply. On a sequential basis, you only have one,
8 so it's much less work for you to do.

9 MR SINGLA: It's not less work in the real world though, is it? One still has to produce
10 the expert evidence that one wants to rely on at trial.

11 JUSTICE BACON: We all know that every stage at which something is produced is
12 a lot of work and a lot of extra cost to the client. On this, the claimants have the burden
13 of producing two reports -- an initial report and a reply report -- you just do one at
14 paragraph 16.

15 MR SINGLA: But we still have the joint expert process and then the trial reports at the
16 end of July.

17 JUSTICE BACON: Yes.

18 MR SINGLA: So there's a great deal of work to be done on any view. My submission
19 really is actually less about the detail of the expert process and more about taking
20 a step back and looking at the timetable in the round. If we are back before the
21 Tribunal saying a witness is not available or an expert has a problem, then that could
22 really throw quite a considerable spanner in the works. So if one asks myself, "Well,
23 why is one going down this route?" It's because of an expressed preference for
24 sequential over simultaneous. That seems to be driving the whole thinking. We say
25 one has to balance the advantages of sequential that may exist in other cases with
26 the prejudice to us if we don't have proper space in the timetable.

1 If there's a further disclosure application, if there's any sort of issue down the line, how
2 is that going to be fitted in? As long as the Tribunal gets these joint trial reports before
3 the summer, then that should actually deal with any issues about whether sequential
4 might be better in theory or not.

5 JUSTICE BACON: Yes. Well, right. Let me just discuss with my fellow panel member.

6 (Pause)

7 (Inaudible) about what we're going to do on this and come back.

8 (11.43 am)

9 (A short break)

10 (11.52 am)

11 (Order exchange of expert reports)

12 JUSTICE BACON: We have considered the parties' submissions. If there had been
13 space in the timetable to the satisfaction of both sides to do sequential reports, I think
14 that would have been desirable. However, I have listened very carefully to Mr Singla's
15 comments on this and I am concerned at the prospect of slippage of the timetable and
16 the fact that, although we have between us come out with something that is more or
17 less workable for sequential exchange, that does leave very little slippage in the
18 timetable, and then is likely to put everyone under pressure, including in particular the
19 Defendants who are faced with a very substantial claim.

20 I am concerned that we should complete the process before the summer vacation
21 period, and indeed, sufficiently ahead of the summer vacation period, that work can
22 be started on the preparation of the trial arguments, by which I mean the skeleton
23 arguments and also cross-examination and so on, ahead of August.

24 So although this was not my first inclination, I will order simultaneous exchange of
25 expert reports on the timetable suggested by the Defendants with a few amendments.

26 Starting with paragraph 20, given that the simultaneous exchange will necessarily then

1 produce four reports rather than three by the end of the first and second phases of the
2 expert reports, and the parties' arguments therefore should be flushed out in greater
3 detail than would have been the case with sequential exchange, I think we can bring
4 the date forward for the expert meeting to 23 June.

5 Then we can bring the date forward for the agreed/disagree statement to 5 July.

6 Then 21 July for the consolidated trial expert reports which, even with a little slippage
7 in that timetable -- which I hope will not be necessary -- will enable the trial expert
8 reports to be produced ahead of August.

9 There is another reason why I think that that should work in this case, or perhaps two
10 reasons: the first is that in any event we will end up with a single trial expert report
11 from each expert. So the benefit of having fewer reports at the earlier stage is then
12 not so great, because ultimately we're going to end up with the same thing.

13 Secondly, if we do have sequential exchange, I hope that that will make the process
14 of preparing the trial expert reports a little easier because they will have already then
15 been two rounds (inaudible) reports on each side.

16 And thirdly, I hope that the process of producing the more detailed lists of expert issues
17 will enable the parties' positions to be flushed out quite significantly earlier, so that
18 there should be little surprises when it gets to the expert reports.

19 Finally, as to what methodology is being used by the parties. In fact, each side's expert
20 should have a fairly good idea of what methodology the other is using. If it is necessary
21 to have any more granular specification to enable that process to run smoothly, as in
22 more detail than is already required, we anticipate that someone will tell us at some
23 point, and there's already, we know, a debate about, the asset valuation issue, which
24 we will come on to.

25
26 (11.57 am)

1 (Asset valuation)

2 That's our order, and that then deals with almost all of the expert points, and the
3 remaining point is then the asset valuation point.

4 Now, I think we should start with Professor Neuberger's questions on this and then if
5 there are any other points to be made, then those can be picked up in your responses
6 to those questions.

7 Right. So I'll hand over to Professor Neuberger.

8 PROFESSOR NEUBERGER: Thank you very much. So, it concerns the test for
9 excessive pricing and the benchmark being proposed by the Defendants for workably
10 competitive prices. I think it's clear from Mr Colley's methodology paper and his first
11 report that what he's looking at there is the prices which would emerge if there were
12 a tender for the supply of the service from 2020.

13 The argument's fairly straightforward: with competition for the market then the price
14 which would emerge under workably competitive competition would be the price
15 sufficient to cover the cost of a rival who was competing for the tender, who would
16 have to necessarily provide for the capital cost of a new system because they didn't
17 have a network of their own. So I think that's all fairly clear in principle.

18 Where I have a problem in understanding how the methodology would work is how
19 that which involves creating a network, which presumably is a long lasting network
20 lasting ten or 20 years whatever, relates to pricing over a three and a half year period.
21 So for example, it crossed my mind it wasn't clear from the methodology statement
22 whether one was envisaging, for example, that the hypothetical tender which would
23 occur in 2020, would be for a three and a half year service or would be for a much
24 longer service.

25 If it was for a much longer service there would be the question of the cost that the rival
26 would have to charge -- would be charged over many years and the phasing of that

1 charge would then relate quite strongly to how much would be charged in the first three
2 and a half years.

3 So to summarise my concerns, it seemed to me there were important methodological
4 questions associated with this very important piece of work which were not at all clear
5 and on which I would have liked to have been clearer at this relatively early stage
6 before trial.

7 (Submissions by MR SINGLA)

8 MR SINGLA: I'm grateful for the question. As you'll understand, there's a limit to what
9 I can deal with on my feet now, but we do understand the question and perhaps we
10 can take that one away. It's obviously not something that's been raised by the CR in
11 any of the correspondence.

12 Rather than take up time -- I'm conscious that the President was keen to try and finish
13 as early as possible -- rather than take up time now walking through the reports, which
14 I know you've read, we can perhaps look at that question after the hearing, and no
15 doubt we'll receive a letter, or we can deal with it in the context of the list of issues. Is
16 that a satisfactory way to proceed?

17 JUSTICE BACON: Provisionally I think it involves the refiling of the methodology
18 statements.

19 MR SINGLA: Right, I understand. Can I reserve my position as to that?

20 PROFESSOR NEUBERGER: Can I just add to that, it does affect both the statements
21 of Mr Colley and Mr Grantham, in the sense that Mr Colley would have to provide the
22 overall economic rationale --

23 MR SINGLA: Yes.

24 PROFESSOR NEUBERGER: -- and then that would be reflected in the actual
25 questions which Mr Grantham will have to answer.

26 MR SINGLA: Yes, I understand, they do dovetail. I mean I'm looking, for example, at

1 Mr Colley's first report, paragraph 75, talking about workable competition involving
2 a new tender for the Airwave Network Service at the start of 2020. But again it's
3 perhaps risky for me to start to develop these points.

4 JUSTICE BACON: No, I mean, this is not a question for you to explain the economics
5 on your feet, rather for us to provide an appropriate procedure for this to be addressed.
6 I think what we should then do is to include a provision for an updated methodology
7 statement to be provided by each Mr Colley and Mr Grantham. I mean, we've already
8 got provision for an updated statement from Mr Ilett. We'll just have to bolt on to that
9 updated statements from Mr Colley and Mr Grantham to address the methodological
10 questions raised by Professor Neuberger just now.

11 MR SINGLA: Yes, that's understood. So I'm looking at Mr Colley's methodology
12 statement. It's paragraph 12(a) which talks about workably competitive benchmarks.
13 I think you anticipate a development of that paragraph.

14 JUSTICE BACON: Yes. I mean, you could probably put just clarifying the
15 methodology or asset valuation methodology or something like that.

16 MR SINGLA: Yes, but I just want to make sure it's a question, I think, arising out of
17 12(a). Yes, I'm grateful. So, we'll sweep that up as part of the process that we've
18 talked about already.

19 JUSTICE BACON: Yes, all right. Well, no, there's two things. I mean, there's an
20 updated methodology statement and then that will then feed into the 23 October
21 document.

22 MR SINGLA: I understand.

23 JUSTICE BACON: All right.

24 Mr Armitage, you had maybe a different point.

25 (Submissions by MR ARMITAGE)

26 MR ARMITAGE: It is a somewhat different point, but we appreciate the indication.

1 Now, I'm not sure whether this point is one that, subject to the Tribunal's views on the
2 points I'm about to make, is one that can be flushed out in the process we were
3 discussing earlier for the *Roadget* style document or indeed an updated methodology
4 statement.

5 Can I just go directly to the -- this is from Mr Grantham's report and it relates to asset
6 valuation, the MEA approach, and the paragraph that we struggled with is page 59 of
7 Bundle A. Paragraph 1.2.6 of Mr Grantham's methodology statement.

8 I'm sorry, I should actually tee this up. Sorry, on the preceding page at
9 paragraph 1.2.3 --

10 JUSTICE BACON: Yes.

11 MR ARMITAGE: This is the proposal to conduct an asset valuation approach using
12 the MEA basis. Mr Colley had earlier expressed a view at the CPO stage that that
13 was the appropriate approach. It was in fact something that Motorola strongly argued
14 for in the context of the CMA investigation and was a subject of the subsequent judicial
15 review and appeal as well.

16 So, Mr Grantham expresses a preliminary view in his methodology statement that that
17 is the most appropriate valuation method.

18 JUSTICE BACON: Yes.

19 MR ARMITAGE: Now, whether that is the right approach is a matter for trial obviously.
20 Mr Singla says in his skeleton it's a standard approach in competition law. We don't
21 accept that in relation to chapter 2 cases, and that engages some of the points
22 Professor Neuberger was making. We don't see those as points for today, but we're
23 very grateful for the indication that further detail will be provided in an updated
24 methodology statement.

25 But what we're unclear on is exactly what is envisaged in terms of the practicalities of
26 conducting such an evaluation methodology in this case. It's very important that our

1 experts in particular should know that at this stage because the methodology obviously
2 involves estimating how much it would cost to replace the relevant network assets with
3 their modern equivalent, if I haven't mangled it. On its face that is not an expert
4 accounting issue so much as a telecoms issue. So it's very important to understand
5 what Mr Grantham proposes to do, and it's paragraph 1.2.6, Madam --

6 JUSTICE BACON: Yes, and is it the last sentence: "I'll consider to what extent the
7 information --"

8 MR ARMITAGE: Yes. There's the prior point about reliance on a report produced by
9 another expert in a different context. There's a certain irony in that proposed approach
10 in circumstances where my learned friend's position is that the CMA's analysis of the
11 very same issue is completely inadmissible. But again, I think that's not a matter for
12 today.

13 The matter for today, as you say, is the last sentence which refers to supplementing
14 this information with:

15 "... my own assumptions based on my understanding of the Airwave Network and
16 Airwave's business, and factual evidence, including witness evidence."

17 We just say that the issue for today's purposes is that this paragraph does not explain
18 how Mr Grantham proposes to assess this issue for himself as an independent expert
19 with duties to the Tribunal. So, what is the further evidence that he says he may need?
20 What is the potential witness evidence that is envisaged in relation to this particular
21 methodology?

22 We've asked about this in correspondence but haven't been given further information.
23 My learned friend made the point earlier that we were being too granular in our request.
24 We don't think that this is a request for overly granular information; it is an extremely
25 important issue. It's going to be very important indeed to the Limb 1 analysis that's
26 going to be conducted at trial because everyone agrees that the opening and closing

1 asset valuations are important, indeed critical, inputs to the IRR style analysis that
2 both economists have said is appropriate in this case. So we do think, one way or
3 another, further particulars should be provided of what is envisaged, particularly, as
4 you say, Madam, in relation to that last sentence, so that we can understand what is
5 proposed. As I say, we're ambivalent as to whether that's done in the context of an
6 updated statement or via the *Roadget* style process. But we do think it's very important
7 that that's done.

8 JUSTICE BACON: Yes. Well, Mr Singla, Mr Grantham is going to be clarifying what
9 he proposes to do anyway, following Professor Neuberger's question, is there any
10 objection to providing some more detail of what's proposed so that the other side
11 understands what they're going to have to meet in due course?

12 (Submissions by MR SINGLA)

13 MR SINGLA: Yes. Well, with respect, I do submit that the question that Mr Armitage
14 is posing falls into a different category. Professor Neuberger's question is completely
15 reasonable and we'll obviously address that. But what they're actually asking of
16 Mr Grantham is to explain now what further evidence he may require. In my
17 submission, if one actually thinks about that question it's plainly inappropriate to ask
18 an expert at this early stage of the proceedings when he's not, as I understand it, even
19 part of the confidentiality ring, so he's not actually seen any documents.

20 He said he's going to conduct a completely standard type evaluation. It's referred to
21 by the OFT in its guidance. There's already been an MEA evaluation of the
22 Airwave Network. Everyone knows what an MEA evaluation is.

23 The reason I say it's granular is because it's asking the expert at the methodology
24 statement stage to explain and particularise the evidence on which he will rely. It's
25 actually very different to Professor Neuberger's question.

26 Then the second point is, well, what do they actually want this information for? What

1 are they going to do with it? They've got a view that MEA is completely inappropriate;
2 that's a matter for trial. So their expert, Mr Ilett, will do what he wants to do. But why
3 are they probing for more detail of Mr Grantham and in particular what evidence he
4 intends to rely on? There's actually a limit to what he could possibly say in answer to
5 that question, in fairness to him. So it's not so much a methodology question. It's
6 about actually what evidence he intends to rely on.

7 We say it is very different. However, if they want to ask us a specific question, we can
8 consider that after the hearing in the context of the process that we've discussed. But
9 I am putting down a marker that if the question is: "Just be more granular, what
10 evidence will you rely on?" we're likely to say that's inappropriate, but no doubt the
11 Tribunal can deal with that kind of dispute if it arises when you look at the list of issues
12 that comes your way.

13 JUSTICE BACON: Yes. (Pause)

14 Mr Singla, when you come to refile Grantham, I do think that it would be helpful if
15 Mr Grantham would give some further detail of what assumptions he has in mind, and
16 bearing in mind his circumscribed area of expertise -- he's not a telecoms expert -- and
17 where he thinks that he's likely to get the further factual evidence and witness evidence
18 from. He must have something in mind already, because he said it. So I think it would
19 be helpful for him to explain what assumptions he will need to supplement the MEA
20 analysis, and where he currently proposes to obtain the further evidence that he thinks
21 that he will need. That's necessarily provisional.

22 MR SINGLA: I hear that loud and clear. But there is a question of degree. I suspect
23 that may be where we end up in terms of how far he can actually take that point.

24 JUSTICE BACON: Yes, all right. So I think that deals with the Grantham
25 methodology. There will need to be a provision in the order that reflects that. Does
26 that then bring us to the disclosure point?

1
2 (Disclosure)

3 MR ARMITAGE: I think so, yes.

4 JUSTICE BACON: All right. So M1.

5 (Submissions by MR ARMITAGE)

6 MR ARMITAGE: Madam, yes. Can I just very briefly trouble you with some law? Only
7 really to say this, which is that there is no dispute about the general principle set out
8 in paragraph 22 of my learned friend's skeleton. We obviously accept that relevance
9 alone is not enough to get an order for disclosure in this Tribunal. We accept that you
10 should assess proportionality by reference to that which has already been provided.
11 On the other hand, we do say it's very important that adequate disclosure is given on
12 important disputed issues. This is ultimately a standalone case. We do not have
13 a regulatory decision establishing that Motorola has committed the infringement that
14 we allege, and we need to ensure that we have the disclosure necessary to make that
15 case out. We obviously do have the CMA disclosure, and it is unquestionably a very
16 helpful starting point. It has meant, in particular, we have not needed to ask for any
17 custodian-based email searches, bar two exceptions that have now been agreed.

18 Madam, there is one authority that we cited in our skeleton. I'll just give you the
19 reference. A flavour of the arguments on the other side concerns the very large
20 document pools that have been thrown up in relation to the preliminary searches in
21 relation to CRM1. Madam, you'll have seen that I cited in my skeleton the *Kent v Apple*
22 case. Can I briefly show you that? At E/6/75. (Pause)

23 JUSTICE BACON: Yes. What's the page of the bundle?

24 MR ARMITAGE: Sorry, page 75 of the bundle.

25 JUSTICE BACON: Oh, I'm sorry. Yes, I've got that.

26 MR ARMITAGE: Madam, you'll be familiar with what this case was about. The

1 heading is "Manual Review versus Technology". There's a debate being considered
2 in the case about the potential need for a manual review of "several million
3 documents" and Mr Tidswell, sitting as chair, observes that he's:

4 "... sceptical that it would be necessary or proportionate for there to be a manual
5 review of such a magnitude of documents ... either prior to or after production ..."

6 This is the particular proposition I rely on:

7 "Where the parties are faced with very large document populations, the starting point
8 should be how the thoughtful use of technology can reduce the numbers to a sensible
9 size before a manual review takes place."

10 Then, reading on a little:

11 "... I do not accept that the technology available to the parties ..."

12 It's that point, and we'll come back to that later on.

13 So there are a number of sub-elements to CRM1. I don't know if you have the
14 composite schedule to hand.

15 JUSTICE BACON: Yes, we do.

16 MR ARMITAGE: I'm grateful. Essentially we are asking Motorola to conduct
17 reasonable and proportionate custodian-based searches of three specific document
18 repositories: SharePoint, Google Drive, and Google Chat. We sought to tie that to
19 eight specific issues.

20 I should say, I don't know if this has reached the Tribunal, but I have told my learned
21 friend that we don't pursue issue "c" any longer.

22 For each issue, a specific time period has been proposed. Over the course of the
23 largely very constructive Redfern schedule discussions, we've narrowed the request
24 down substantially so that it now covers the five specific custodians that you see
25 identified, who are all important figures, as we can see from the CMA disclosure.
26 We've also proposed search terms in respect of each issue.

1 Madam, there's no dispute about the relevance of the issues, but would it nevertheless
2 be helpful if I took you through them and showed you, at least briefly, how they relate
3 to the pleadings?

4 JUSTICE BACON: No, because there isn't a dispute they're relevant. So the question
5 is proportionality --

6 MR ARMITAGE: I'm very grateful.

7 JUSTICE BACON: -- proportionality when significant disclosure has been and is going
8 to be provided.

9 MR ARMITAGE: Yes. Well, in relation to that, I'm very grateful. Can I start please by
10 making four points that I think are essentially common ground and which go to these
11 questions.

12 The first point is that there is no dispute that these three document repositories are
13 important repositories that are routinely used in the course of Motorola's business. We
14 know that from the explanatory memorandum that Motorola filed following the last
15 CMC. Can I just show you that very quickly?

16 JUSTICE BACON: Well, I mean, this is not a disputed issue, so you don't need to
17 show me.

18 MR ARMITAGE: I'm grateful.

19 JUSTICE BACON: You can truncate your submissions because you can assume that
20 we've read your submissions and those of Mr Singla.

21 MR ARMITAGE: I'm grateful. I'll identify the common ground points very briefly. As
22 I say, no dispute that the document repositories are important repositories routinely
23 used. There's also no dispute that these repositories may contain potentially relevant
24 documents. That is entirely unsurprising, given the descriptions of those repositories
25 in the explanatory memorandum. Of course, the purpose of that document, it stood in
26 place of an EDQ and disclosure report. It was to help identify potentially relevant

1 further repositories beyond the CMA disclosure. That's why we focused on those
2 repositories in our request.

3 The third point is that these repositories were not the subject of any comprehensive
4 searches for the purposes of the CMA investigation. That is apparent from the
5 explanatory memorandum itself, in paragraph 3.1. My learned friend's skeleton at
6 paragraph 31 confirms that the repositories other than custodial email data were not
7 systematically harvested and searched for the purposes of the CMA investigation. The
8 explanatory memorandum confirms that the majority of the formal document searches
9 conducted for the CMA investigation related to custodian email data. Subject to two
10 exceptions, which are now agreed, as I've said, that is why we haven't sought any
11 further custodial email searches.

12 Now, one of my learned friend's main points is that while the searches conducted for
13 the CMA investigation were focused on emails, other repositories were not off limits,
14 and in particular cases the CMA made follow-up requests for specific documents
15 referred to in emails. But as I say, the schedule to the explanatory memorandum
16 speaks for itself. With one very narrow exception in relation to the Google Drive
17 repository, there were no systematic searches in relation to the three repositories
18 we've identified.

19 Now, the CMA was clearly content with that approach for its own investigative
20 purposes, and we'll come back to the relevance of that. But we say it is not sufficient
21 for present purposes simply to rely on the approach taken by the CMA.

22 The fourth point, Madam, is that each of these three repositories previously have been
23 the subject of extensive searches in earlier litigation brought by Motorola against the
24 Home Office. That was a public procurement challenge in relation to the so-called
25 Deferred National Shutdown Notice that the Home Office issued in March 2024, which
26 had the effect of extending the so-called blue light contracts from December 2026 until

1 2029. I think it settled prior to judgment, but there was a substantial disclosure
2 exercise. If I may, I'd like to just show you briefly some extracts from the disclosure
3 report from that litigation. In that case, Motorola was the claimant represented by
4 Quinn Emanuel. The reason I'd like to do that is because, in my submission, it is
5 informative as to what a proper and proportionate approach in the present case might
6 entail. It does cast some doubt on some of the evidence that is before you on
7 questions of proportionality.

8 So you have that at Bundle A, tab 15, page 213. It's an annex to the explanatory
9 memorandum.

10 JUSTICE BACON: Are we talking about PDF 213, or are we talking about numbered
11 page 213?

12 MR ARMITAGE: I'm so sorry. I hope it's the red number in the bottom right.
13 Page 213.

14 JUSTICE BACON: The PDF numbers, I think, are two ahead. Wait a minute.
15 Number 213.

16 MR ARMITAGE: 213. It's a disclosure certificate, High Court of Justice.

17 JUSTICE BACON: Yes.

18 MR ARMITAGE: You'll see it's a claim by, in fact, Airwave Solutions Limited, D1, not
19 Motorola, against the secretary of state for the home department.

20 So just to show you a few points, Madam. If you move on, please, to paragraph 4 of
21 the disclosure report, which is at page 217, in the red numbering, under the heading
22 "Sources of documents". You'll see that, in these proceedings, at the start of the
23 disclosure process:

24 "The Claimant has collected ... and/or been voluntarily provided with a total of [over
25 6 million] documents."

26 You can see from paragraph 5, those documents had been collected from a number

1 of named custodians. Some overlap with custodians in our case. You'll see that they
2 include both Google Chat and Google Drive, so two of the three repositories we've
3 identified for the purposes of this request.

4 Then over the page at paragraph 6.2 is the other of the three repositories we identified,
5 so SharePoint.

6 If we could then move on to paragraph 9.2 in the same document. You'll see that what
7 was done in this litigation in relation to SharePoint is that MSUK, voluntarily at the
8 claimant's request, provided to Quinn Emanuel a list of the key details for each of the
9 sites in the SharePoint, which included the site hub that the site belonged to, other
10 details. Then following a review of these details Quinn Emanuel, Motorola's solicitor,
11 identified three sites which contained potentially relevant documents. You see the
12 names of those sites there. Then what one sees is that documents in each of these
13 sites are extracted, and there's a total of 65,000 documents.

14 Then, similarly, in relation to Google Drive, another of the repositories we're interested
15 in here, each of the custodians were asked whether they were aware of any shared
16 Google Drives having been used by Motorola to store documents that may be relevant.
17 Quinn Emanuel then reviewed the list of all the shared Google Drives which were
18 identified. In consultation with the representatives of MSUK, who voluntarily assisted,
19 identified 13 shared Google Drives potentially containing relevant material. The
20 names of the shared drives are listed.

21 Then below you'll see that on extraction of those documents from those files, one
22 produces a total of 881 documents. So what one can immediately see is that this
23 process of identifying potentially relevant locations within these repositories, looking
24 at the names of the folders, the names of the file locations, is helping to produce much
25 more manageable document pools. I'll come back to this, but this is important,
26 because we have asked Motorola to do a similar exercise in the present case, and

1 they have simply refused to do it. Indeed, they now say there is insufficient time to do
2 it. I say I'll come back to the details of that.

3 Just one more point, while we're in this document, which is also relevant, in relation to
4 the proposition I showed you from the Kent case, if one turns on to page 222 of the
5 PDF or other of the bundle, bottom right. So we started with six million documents.
6 The process I've just described has been gone through.

7 Then in terms of the review of the documents, see at paragraph 14 that Quinn
8 Emanuel, Motorola's solicitors, had used technology-assisted review for the purposes
9 of reviewing, inter alia, the Google Drive, Google Chat and SharePoint data.

10 Paragraph 15, you see that two technology-assisted review models were employed by
11 Quinn Emanuel in that case. If one looks at the first one, you see that this was done
12 after keyword and date ranges had been applied to the documents that had been
13 extracted for some of the relevant issues. That produced a total of 143,901 documents
14 in the document pool for this model.

15 Then, if one goes over the page, some details of the way in which this model was
16 applied are set out, which I'm afraid I don't understand. But what one sees over the
17 page, I think from the end of paragraph 17, is that applying this model reduced the
18 pool of 150,000 documents down to a much smaller pool of 1,500 documents for
19 review, by which I understand them to mean manual review.

20 So in this litigation, when Motorola was the claimant, having harvested documents
21 from these sorts of repositories -- not in a wholesale way, but having first taken steps
22 to identify potentially relevant locations, liaising with relevant custodians and so
23 on -- you get a pool of documents, then you use technology to reduce that down to
24 a manageable amount for human review. At least on the basis of the approach taken
25 here, it looks as though a pool of 150,000 documents was reduced by about
26 99 per cent as a result of using this sort of technology. The precise numbers, of

1 course, don't matter. The point I'm making is that this approach is in stark contrast,
2 we submit, to the present case, in which Motorola's proportionality objections to this
3 category are founded on the premise, I think, that there would need to be human
4 review of every single document responsive to the proposed search terms.

5 Madam, one final contextual point to make before getting to Motorola's objections. It's
6 a point made at paragraph 17 of my skeleton for today's hearing. It concerns
7 a Mr Vincent Kennedy who was director of Airwave for the second Defendant between
8 February 2016 and April 2020 -- obviously an absolutely critical period for the
9 purposes of this claim, and some of the key relevant negotiations in relation to Airwave
10 service pricing. We cited in my skeleton some documents showing that he was
11 absolutely critical, for example, in Motorola's acquisition of ASL, and that he was the
12 main point of contact with the Home Office. None of that is in dispute.

13 But what we do know from the explanatory memorandum is that Mr Kennedy's emails
14 were deleted when he left employment with the second Defendant. Nothing untoward
15 about that; that was in line, we're told, with the Defendants' standard document
16 retention policies. But what that does mean is that there is a further critical gap in the
17 CMA process, which provides, in my submission, a further factor supporting our
18 request for searches of broader repositories, because certainly in relation to the emails
19 of this key individual, none of those were retained and none of them were available to
20 be searched in the context of the CMA investigation.

21 In terms of my learned friend's points on proportionality, I think there are essentially
22 two main points that Motorola makes.

23 The first is that the specific issues overlap with the CMA's enquiry, and that we have
24 not identified any "systematic gap" in the CMA disclosure, such as to justify searching
25 these repositories. Then the second is the point made in particular in Mr Rowan's
26 evidence, that complying with the request would be overly time-consuming and costly.

1 That's principally based on an analysis presented in Mr Rowan's second statement.
2 But it's been supplemented in more recent correspondence, and I'll take you briefly to
3 that.

4 JUSTICE BACON: Well, extremely briefly, because we would actually like to hear
5 Mr Singla's response to all of this before the lunch adjournment.

6 MR ARMITAGE: I'm grateful.

7 In relation to the CMA investigation, and the suggestion that there's no systematic gap
8 in the CMA disclosure, justifying the further searches. The first point to make is we
9 say there is a systematic gap precisely because there have been no prior searches of
10 three crucial business repositories, bar a very small exception in relation to Google
11 Drive. The CMA just did not require this.

12 In relation to that, again, three quick points on the CMA's investigation: first, as you
13 know, Madam, the CMA was not conducting an abuse of dominance investigation. So
14 this case is not analogous to the many cases before this Tribunal in which there is
15 a prior commission or CMA investigation into the very same allegations that are then
16 the subject of the claim before the Tribunal.

17 JUSTICE BACON: In formal terms, it wasn't conducting an abuse of dominance
18 analysis, but it was looking at the same question. I mean, it was looking at what
19 happened, what the reasons were, what negotiations took place. And as Mr Singla
20 has set out in his skeleton argument, in making this assessment as it did, the CMA
21 traversed essentially the same ground as you were asking for and in these requests.

22 MR ARMITAGE: So Madam, certainly the CMA was interested in the same factual
23 events. It was not concerned to determine whether Motorola held a dominant position
24 for chapter 2 purposes, nor whether it engaged in the kind of exploitative pricing
25 conduct which amounts to "unfair pricing". It was concerned with its statutory task of
26 determining whether any "relevant feature" of each relevant market prevents, restricts

1 or distorts competition, so-called "adverse effect on competition", or AEC.

2 It's a point that Motorola emphasises very strongly in its defence Bundle C, page 65.

3 Madam, I won't trouble you by taking you back to the discussion at the last CMC, but

4 Madam, you made a provisional suggestion, you may recall, that this trial might be

5 listed for June this year, which Motorola opposed. In fact, may I just show you quickly

6 what Motorola said in that context because it is relevant to the present discussion.

7 It's Bundle C, tab 15, page 710. (Pause)

8 Towards the bottom of the page, line 24, it's Mr Kennelly KC, at this stage. He's

9 resisting the suggestion, successfully as it turned out, that trial could be brought on to

10 June 2027. Then over the page, he makes the point that:

11 "The starting point is that this is not a carbon copy of the CMA investigation. The CMA

12 investigation, as you've seen from the final report, is ultimately determined on quite

13 straightforward grounds, and the question of demand side value, for example, was

14 dismissed at an early stage by the CMA and was not fully investigated. We'd say it

15 was not investigated at all. ... For that, we do need detailed disclosure and evidence

16 from the Home Office and other class members ... So there will be lots of factual

17 evidence in this case."

18 And then towards the end of that paragraph:

19 "We have to at least envisage the possibility that further disclosure needs to be done."

20 Then picking it up at line 17:

21 "If one thinks about it at a very high level, the question of dominance is going to turn

22 on those negotiations that took place at the crunch points between the Home Office

23 and Motorola this allegation they were over a barrel, and our defence that, in fact,

24 there were various contractual mechanisms available to them, and how those

25 negotiations were handled, the various information the parties had to hand and the

26 options available to them will be central to the factual evidence that will be produced

1 for the purpose of the trial, and for that, factual evidence and disclosure will be
2 needed."

3 Madam, for good measure, my learned friend Mr Singla makes the same point in
4 paragraph 11 of his skeleton.

5 JUSTICE BACON: Yes, but you are getting further disclosure. And also you've got
6 the documents produced for the CMA for the purposes of your witnesses, even if those
7 didn't all feed in precisely to the CMA's analysis because they were doing a slightly
8 different exercise.

9 What's not clear is whether there are any obvious gaps in what you've identified. I'm
10 wondering about whether it would be more proportionate for you to go away and,
11 having reviewed the evidence that you have got, to come back if there are particular
12 points or issues, rather than potential repositories, where you say you haven't seen
13 anything in what has already been handed over.

14 MR ARMITAGE: Madam, respectfully, we would press for this request. The second
15 point just to make in relation to the CMA is the obvious point: it's a public body; it has
16 administrative priorities. In a market investigation context, it is concerned with
17 obtaining sufficient evidence for the purposes of making a decision that is defensible
18 on judicial review grounds. It's not concerned with obtaining the sort of disclosure
19 necessary to make out a case of abuse of dominance before the CAT.

20 We are absolutely not saying that the CMA information gathering process was
21 inadequate for the purpose the information was gathered for. None of what I'm saying
22 is to undermine the very real value of the CMA documents; they have enabled us to
23 make very focused and targeted requests, many of which have been agreed.
24 Focusing now in relation to these categories on particular custodians, and particular
25 repositories, they have enabled us essentially to bypass making requests for further
26 comprehensive email searches.

1 As I said, the critical point, Madam, is that the CMA's information gathering did not
2 cover in any systematic way a number of key repositories that are, according to
3 Motorola itself, potentially relevant to the present case. We don't know what we don't
4 know, Madam. It is the kind of systematic gap that my learned friend says we have
5 failed to identify.

6 In my submission, there are proportionate ways of conducting searches of those
7 repositories in relation to the issues that we have identified. My learned friend makes
8 the point at paragraph 31 of his skeleton:

9 "The CMA made follow-up requests, where its consideration of the emails that
10 Motorola had provided gave rise to further queries."

11 And it's true that the CMA did make follow up requests in relation to particular matters,
12 but again that is subject to my point that the CMA was not conducting an abuse of
13 dominance investigation; it was not considering whether prices were unfair for
14 chapter 2 purposes. In that regard, it was not concerned with the kind of internal
15 strategic documents that may be relevant in the context of an abuse of dominance
16 unfair pricing case. Particularly, there is no evidence that CMA made any requests for
17 Google Chat messages, for instance.

18 JUSTICE BACON: No, but for example, as Mr Singla pointed out in his
19 paragraph 29.5, they didn't specify where the repository was, but they simply asked
20 for all documents recording or commenting on the discussions, negotiations, and
21 contractual outcomes. So if there had been any relevant documents, you would have
22 expected that to have been provided.

23 MR ARMITAGE: Madam, in relation to that particular example, one does need to be
24 slightly careful about exactly what was provided, and what was done. If you would just
25 bear with me one moment. (Pause)

26 I'm so sorry, Madam. The paragraph of my learned friend's skeleton you mentioned,

1 would you mind just repeating that?

2 JUSTICE BACON: Yes, it's paragraph 29, subparagraph 5. He's saying that:

3 "The CMA made numerous requests, in 16 separate requests with subrequests,
4 including requests for all documents, recording and commenting on the discussions or
5 negotiations and contractual outcomes."

6 So his point is that although they didn't specify particular repositories, the issue of the
7 negotiations was extensively traversed in the requests that were sent.

8 MR ARMITAGE: Madam, in relation to that, we don't have evidence on the particular
9 searches that were conducted in relation to that particular request. That is true. We
10 do know though, from the schedule to the Defendants' explanatory memorandum, that
11 no searches were conducted in relation to the repositories that we have identified, in
12 relation to that or any other requests. That's my short point. We aren't for a minute
13 suggesting that the CMA was not conducting an adequate information gathering
14 exercise for its purposes. But in my submission, as I say, there's no evidence that
15 there are any searches conducted of Google Chat message, for instance. We say
16 that's a very important potential channel of communication in relation to these matters.
17 Can I just show you one document just in relation to that? It's at bundle C, tab 26,
18 page 1105. (Pause)

19 JUSTICE BACON: Bundle C?

20 MR ARMITAGE: Bundle C, yeah. Tab 26. 1105.

21 JUSTICE BACON: Yes.

22 MR ARMITAGE: This is a document essentially thrown up by chance in relation to the
23 CMA disclosure. It's Google Chat messages that have been -- I think this may be
24 confidential, so I'll proceed with care.

25 It simply shows a conversation between Mr Kennedy, whose emails as I say were not
26 retained and were not searched in the context of the CMA investigation, and Mr Dyson,

1 | who was a senior technical figure in relation to these matters. It shows a discussion
2 | of -- and as I say, given confidentiality, I won't refer to the details -- what appears to
3 | be an important strategic discussion taking place via Google chats.

4 | So we say there is real prospect that these repositories -- and as I say, they were
5 | identified by Motorola in their explanatory memorandum precisely because they may
6 | contain relevant documents. That was the purpose of the explanatory memorandum.

7 | In relation to --

8 | JUSTICE BACON: To be honest, without some further explanation, I'm not sure what
9 | I get out of this chat. You may not be able to refer to that in open session but at the
10 | moment this tells me very little about the importance of this document in the grand
11 | scale of things, given the other documents received by you from the CMA repository.
12 | It's quite an informal and clearly quite colloquial discussion between two individuals,
13 | but that's as far as I can take.

14 | MR ARMITAGE: No, Madam, I'm not really pushing it further in relation to the
15 | particular subject matter of the documents. The point I'm simply making is that
16 | Google Chats, among other repositories, are identified as channels that are used for
17 | the purposes of business communications. They have not been subject to any
18 | searches in relation to this case. In my submission, there are proportionate ways in
19 | which such searches can be conducted to ensure that relevant documents where they
20 | can be proportionately searched are not omitted.

21 | It is important to be careful in assessing submissions about the exhaustive nature of
22 | the CMA investigation, for example, in relation to specific issue "a", which concerns
23 | the rationale for Motorola's acquisition of Airwave, in my learned friend's skeleton
24 | Mr Singla refers to one of the CMA's RFIs which sought business plans and strategy
25 | documents provided to Motorola solutions board and/or senior management in the UK,
26 | including due diligence reports which were prepared in connection with the acquisition.

1 He praised that in aid as an example of a request which effectively ensures that the
2 specific issue we've identified at A was adequately covered by the CMA. We do have
3 that RFI at Bundle C, tab 23, page 868. Can I just show you that?

4 (Pause)

5 It's in particular questions 4(a) and (b). So on its face it's a request that seems to go
6 directly to one of the requests we are now making in relation to the three repositories.
7 But having reviewed Motorola's explanatory memorandum, schedule 1(c) of which
8 sets out the searches that were actually conducted in the context of the CMA
9 investigation, we see that no email searches at all were carried out in response to this
10 request.

11 We already know that there were no searches of the three repositories we've identified
12 for the purposes of CRM1. In fact, what happened is that a total of 12 documents
13 were provided. In fact, what the explanatory memorandum says is that Motorola
14 responded to this request by providing documents it had already submitted to the CMA
15 in connection with the CMA's investigation of the acquisition under its merger control
16 powers and then leaving aside what searches of any were actually done. This request
17 obviously would not cover things like Google Chats, nor would it cover internal
18 documents on people's shared drives that were not presented to the board or senior
19 management.

20 I'm not proposing to pick up every point, in a sense my point is a general one, but
21 I would just pick up one further point of detail on our specific issue G, negotiations,
22 that's the one that my learned friend made in his skeleton, as you have seen.

23 Can I just show you a different element of that analysis? It's paragraph 29(2) of my
24 learned friend's skeleton. Page 151 of bundle A. So, dealing with our request in
25 relation to negotiations and amendments to the Airwave contracts he makes the point
26 that:

1 "Catch all requests were made at an early stage: e.g. the RFI of 9 July 2021 sought
2 'all documents' prepared for meetings with the Home Office in stated time periods
3 'together with any underlying documentation e.g. financial models ...'"

4 But that needs to be read with care because although my learned friend refers to
5 a request for "all documents prepared for meetings with the Home Office", if one looks
6 at Bundle C, tab 23, page 873 where we see the RFI itself. (Pause)

7 Towards the bottom of the page:

8 "Request for Information.

9 "Capital expenditure.

10 "6. Please provide all documents including for the avoidance of doubt, presentations,
11 prepared for meetings ... with the Home Office between September 2017 and
12 September 2018 ... together with any underlying documentation e.g. financial models
13 or other types of analysis underlying any figures presented."

14 So, in context, this seems to be a request for documents relating to capital expenditure
15 issues. It's a request for documents prepared for meetings with the Home Office, not
16 a request for the sorts of internal strategy documents or discussions that might shed
17 light on Motorola's internal objectives --

18 JUSTICE BACON: (Overspeaking) any underlying documentation or other types of
19 analysis underlying any figures presented. So that wasn't just a request for anything --

20 MR ARMITAGE: I see that, but I say it's in the context of capital expenditure and it's
21 an analysis underlying the figures presented.

22 Now, Madam, sorry, I'm going through some of the points of detail simply to make the
23 point that one does need to assess with care the particular points that were actually
24 covered by the CMA requests. I understand in relation to this request only four
25 documents were submitted in response to this question. On that basis it seems very
26 unlikely that comprehensive searches were conducted for all documents relating to

1 the relevant negotiations.

2 As I say, we absolutely accept there is significant coverage of the negotiations in the
3 CMA's final report and we accept, very much so, that substantial email searches were
4 carried out, that's subject only to the caveat I've already made about Mr Kennedy. But
5 in my submission absent searches of three repositories we've identified;
6 Google Chats, the documents sitting on Google Drive potentially in draft form, never
7 attached to emails. There is a risk you're only getting part of the picture.

8 Madam, I'm conscious of the time, but may I just briefly address you on the
9 proportionality objections that have actually been raised. In my submission, on
10 a proper analysis there is a proportionate way of getting at the documents sitting on
11 these repositories and the objections from my learned friend and his team are
12 significantly overblown.

13 I'll start by making a very important point about process. We are criticised for the
14 breadth of this request, but it is very important to note that the Redfern
15 schedule process was supposed to be an iterative one, and in relation to a number of
16 other categories that was indeed the case. We've been very proactive about seeking
17 to narrow the scope of the necessary searches across a number of dimensions:
18 reducing the numbers of custodians, proposing alternative sets of search terms and
19 so on. But in relation to this request Motorola has essentially not engaged.

20 Can I show you immediately just one important respect in which we say Motorola has
21 not been cooperative. I showed you earlier that in the earlier litigation against the
22 Home Office Motorola's then solicitors engaged in an exercise of liaising with
23 custodians to identify potentially relevant named folders within the Google Drive and
24 SharePoint repositories. We saw that when we received Motorola's explanatory
25 memorandum -- I think that was on 14 May. We very promptly identified this sort of
26 approach as a potential efficiency in the present case to address this issue of the

1 missing repositories, and having received that explanatory memorandum on 14 May
2 we wrote to Motorola on 20 May, something like four working days later, asking that
3 a similar exercise be conducted in the present case precisely for the purposes of
4 enabling us to formulate a targeted Redfern request focusing on particular subfolders
5 within these identified repositories.

6 I can show you the correspondence, but I don't think there's any dispute. Motorola
7 refused to do that. They said it wasn't necessary to do it in order for us to formulate
8 our requests. Well, fine. But what that meant is that the CR's requests necessarily
9 had to be focused on the repositories generally, and not specific relevant folders within
10 them.

11 In any event, once the requests were made, Motorola did not then seek to undertake
12 the kind of exercise it undertook in the earlier case which, as I showed you earlier, had
13 the effect of narrowing down the pool of documents even before one started applying
14 that technology. We saw in relation to Google Drive that this process resulted in a very
15 manageable total of only about 800 documents needing to be considered and none of
16 that has been considered here.

17 Mr Rowan, in his second statement -- can I just show you what he says about this. It's
18 at Bundle A, tab 11, page 79, paragraph 34. Mr Rowan says:

19 "... in relation to the request for Google Drive and SharePoint platforms, the CR's
20 Reply ..."

21 Now he means the CR's reply to the Redfern schedule. Our reply to the Redfern
22 schedule was filed on 4 September. "Our reply", he says:

23 "Suggested that Airwave should first identify folders in Google Drive and SharePoint
24 that might contain [relevant material] ..."

25 But you have my point that this omits the fact that the relevant request was made, in
26 fact, as early as May when we first saw their explanatory memorandum. So it is not

1 right to say that this request was first made in the reply. That's an important point.
2 He says towards the end of the paragraph -- this is essentially the evidence on
3 proportionality. Picking it up five lines from the bottom:

4 "Since each user of Google Drive ... may maintain their own unique folder structures,
5 to identify potentially relevant folders, Airwave would need to interrogate each
6 custodian's Google Drive separately. In the time available, Airwave has not been able
7 to undertake that analysis."

8 Certainly the presentation there is that the reference to the time available is the time
9 between the reply on 4 September and the time of this statement on 15 September.

10 Whether that's deliberate or otherwise, that is not an accurate presentation; we were
11 asking about this in May. There is no reason, in my respectful submission, why
12 Motorola could not have asked relevant custodians about potentially relevant folder
13 locations at that stage, just as it did in the prior High Court litigation.

14 Paragraph 39, just to complete the point -- it's at page 81. It's the same point, Madam,
15 in relation to SharePoint. He says that:

16 "Airwave would therefore need to liaise with all potential custodians and access each
17 individuals' folder structure separately. Depending on the number of relevant
18 custodians, this process could take a number of days or weeks. In the time available,
19 Airwave has not been able to complete this analysis."

20 But again, in my submission, the time available is the time since May when we first
21 asked them to conduct this sort of exercise, at the very latest since 26 June when we
22 made our Redfern requests relating to these repositories. Our original request in
23 relation to this category made it very, very clear that our request was provisional and
24 that we would welcome engagement from Motorola as to the volume of additional
25 documents that would be generated by searches for these documents, with a view to
26 ensuring that disclosure is reasonable and proportionate. We say Motorola can and

1 should carry out this exercise now in relation to Google Drive and SharePoint
2 documents.

3 JUSTICE BACON: Can I ask this? Out of the three repositories -- Google Drive,
4 SharePoint, and Google Chat -- which do you think are the most likely to provide useful
5 documents? Are you saying it's Google Drive and SharePoint?

6 MR ARMITAGE: So in order of priority, Madam, I think Google Chat is actually
7 number 1, in the sense that Google Chat was not subject, it seems, to any searches
8 or requests in relation to the CMA investigation.

9 JUSTICE BACON: That's not the question. It's not whether they were searched
10 before, but what's likely to throw up useful documents. It may be they weren't
11 searched because all that's on there is some quite colloquial, informal chats which
12 don't really amount to much probative evidence. In terms of the probative evidence
13 that's likely to be really useful and valuable, where is that likely to be in order of priority
14 on these?

15 MR ARMITAGE: So, in my submission -- take the point about the colloquial nature of
16 such chats -- in my submission, that may in fact be why one might expect them to
17 contain helpful and probative material. It's the interstitial discussions, if you like,
18 between executives in relation to, for example, a key meeting which may be revelatory
19 in relation to matters such as Motorola's true strategic intentions, its understanding of
20 the relevant bargaining position. In such communications, one may expect that
21 executives may be less guarded, more candid about these matters.

22 JUSTICE BACON: So your order of priority is what?

23 MR ARMITAGE: Google Chat, Google Drive. SharePoint is in a somewhat different
24 category. We know from the documents in the previous litigation that even this
25 process of identifying relevant folders produced a very large number of documents.
26 SharePoint, as described in the explanatory memorandum, is a repository for formal

1 documents, things like final agreements and so on and so forth. They are the sorts of
2 documents that may be somewhat more likely to have been picked up in the course
3 of the CMA investigation. So certainly --

4 JUSTICE BACON: All right. Where's the detail in Mr Rowan's statement of what of
5 how much data is --

6 MR ARMITAGE: Yes. Can I address you on that? That's the final point.

7 JUSTICE BACON: Paragraph 36, page 80.

8 MR ARMITAGE: Yes. But that has moved on in the correspondence because some
9 further analysis has been conducted. So can I show you what I think is the most recent
10 word? That's in the further bundle, Bundle F, which I hope you have, at page 200.
11 This is a letter from Herbert Smith last night, essentially completing the analysis that
12 was started in Mr Rowan's second statement. So it's an updated version of his table.
13 Do you have that?

14 JUSTICE BACON: Yes.

15 MR ARMITAGE: Thank you. So what Motorola has done here, according to
16 Mr Rowan, is to run the search terms and date ranges that were proposed by the CR
17 in her Redfern schedule replies, which were filed on 4 September.

18 JUSTICE BACON: Yes.

19 MR ARMITAGE: Across each of the eight specific issues, across the Google Drives
20 of an identified number of custodians, so nine custodians, it's done that for
21 Google Drive and for Google Chat. So we'll take those and turn. It hasn't done the
22 exercise for SharePoint. So just to --

23 JUSTICE BACON: Produces 383,000 documents in relation to Google Drive, and on
24 Google Chat 1,823.

25 MR SINGLA: Yes. That's at least what it appears to show, but things are perhaps not
26 quite so simple. Can I just develop that in relation to four points? I should say, just to

1 reiterate, this doesn't reflect any process of liaising with the relevant custodians to
2 identify which folders might be relevant. I'm sorry, I've made that point.

3 JUSTICE BACON: Is that your point 1?

4 MR ARMITAGE: That's my point 1. I've made that point already, but it's important to
5 emphasise that this analysis is not based on any such exercise.

6 The second point to make is that when this table refers to a total of 383,000
7 documents, with respect, that is not a very accurate word to our understanding,
8 because it is not a cumulative total at all, as we understand it. It is effectively
9 a summary of the total number of responsive documents in relation to the search terms
10 proposed for each of the eight issues. But it doesn't reflect the fact that a given
11 document may be responsive to more than one set of search terms. So it is an
12 accurate total when one adds up the relevant rows, but it doesn't take account of that
13 point, that the same document may be responsive to more than one set of search
14 terms. We raised that in a further letter overnight.

15 JUSTICE BACON: You mean that there may be duplication.

16 MR ARMITAGE: Indeed. We don't know how much, but it isn't safe to assume that
17 the true total is 383,000.

18 JUSTICE BACON: Yes.

19 MR ARMITAGE: The third point is that in response to Mr Rowan's second statement,
20 where the initial version of this analysis was presented, we produced a revised set of
21 proposed search terms and a significantly reduced custodian list. We reduced the
22 identified custodians from nine down to four. We made that proposal in a letter of
23 17 September. My learned friend says in his skeleton that that proposal didn't amount
24 to a meaningful reduction in scope that resulted in a proportionate search. But, with
25 respect, that can't be right. Removing four custodians, as well as narrowing the search
26 terms, is clearly a meaningful reduction.

1 JUSTICE BACON: That's for the Google Chat.

2 MR ARMITAGE: Yes, we're just on the Google Chat -- no, I think we've made that
3 proposal for both Google Drive and Google Chats.

4 Madam, Motorola hasn't said what impact the revised search terms and the revised
5 custodian list would have on the figures presented here. Mr Rowan, when describing
6 the searches that he had to undertake in order to arrive at these figures, says that the
7 process for doing this sort of search is "very lengthy, taking at least several hours and
8 potentially days". So on its face, that evidence suggests that in the time since we
9 proposed our revised search terms and our narrower custodian list on 17 September,
10 Motorola could have rerun this exercise to see its impact.

11 It also bears emphasis, Madam, that Motorola has never proposed any search terms
12 of their own at any point during the Redfern schedule process. They've never sought
13 to understand how that might affect matters.

14 JUSTICE BACON: Are those your four points?

15 MR ARMITAGE: Sorry, that was the third. The fourth point, and perhaps the most
16 important one to make, is that this is where we see that Motorola appears to be
17 envisaging that once search terms are applied to the Google Drive documents, every
18 single responsive document will need to be the subject of a human review.

19 JUSTICE BACON: Yes.

20 MR ARMITAGE: Can I just show you, very briefly, Rowan 2, on what he says that that
21 would entail. It's back in bundle A, at page 84.

22 JUSTICE BACON: You will need to bring this to a close so that we can break for
23 lunch.

24 MR ARMITAGE: I'm nearly done. Page 84 of bundle A. So he's talking about his
25 initial analysis, which was essentially an incomplete version of this analysis where two
26 of the categories had not yet been --

1 JUSTICE BACON: Yes, your point is that if you use TAR then you would get down
2 your initial pool.

3 MR ARMITAGE: Indeed. He describes, very colourfully, I should say, a process that
4 involves a first level review process and a second level review process. Then, we see
5 it subparagraph c, this is what he has in mind. We are conscious, in reading this, of
6 the figures that we've seen in Motorola's budget in relation to disclosure:

7 "... on the assumption that approximately 225,000 documents [and that was the
8 number in the early version of this analysis] would need to be reviewed [it talks about]
9 a team of 28-30 FLR reviewers working full time (7 hours per day) across a number of
10 offices [globally] overseen by a supervising team of 4-5 experienced quality control
11 team members [and] a smaller team ... staffed by approximately 4-5 people, working
12 exclusively on SLR."

13 Madam, you have the point, this completely ignores what the Tribunal in Kent
14 described as the starting point when one is faced with large document pools, of using
15 technology to distil the pool into a manageable pool of documents. It's only at that
16 stage that one engages in human review. It simply doesn't address this. It's not an
17 abstract suggestion in this case, for the reason I gave earlier, because it was done in
18 the earlier litigation, seemingly with great success in reducing the pool of documents
19 that needed to be reviewed by humans. As soon as you start applying that sort of
20 approach here, the superficially ominous numbers you see in Herbert Smith's table
21 start to look much more manageable.

22 JUSTICE BACON: One final question before we break for lunch, and then we'll hear
23 Mr Singla. You've said that you think that the Google Chat is most important because
24 it wasn't searched at all. SharePoint, you say that's most likely to have been searched
25 for the CMA files. If you look your list in the Redfern schedule for the searches to be
26 run under Google Drive and SharePoint, who are the most important of these

1 | custodians, in order of priority? Is it Vincent Kennedy to start off with, given that his
2 | emails are missing, or is it somebody else?

3 | MR ARMITAGE: So the slight difficulty with that is we are not actually sure whether
4 | the deletion also applied to Mr Kennedy's chats and Google Drive data. What we
5 | know is that his emails were deleted. That's what we're told in the schedule. So on
6 | the assumption that his other materials were not subject to the same policies, he would
7 | certainly be right at the top of the list, given his central role.

8 | JUSTICE BACON: Below that, who then?

9 | MR ARMITAGE: Bear with me one moment. (Pause)

10 | I'm sorry, Madam, it's a little hard to do. Certainly, Mr Kennedy, Mr Brda, Mr Brown,
11 | whose emails were not the subject of routine searches for the purposes of the CMA
12 | investigation. It's now agreed under CR/M4. Mr Brown, as you know, is the CEO, and
13 | Mr Brda is essentially the next down in the ladder. I think we would --

14 | JUSTICE BACON: They're already going to be searched?

15 | MR ARMITAGE: In relation to emails that's now agreed. That is true. So I think,
16 | certainly, Mr Mark -- Kelly Mark, or Mr Mark. We may be prepared to consider
17 | narrowing this further. This has already been narrowed down from a list of nine.

18 | Can I make one extremely brief point on Google Chats just so that I can finish. I'm
19 | sorry for going on past 1.00. We see in the table applying the search terms to Google
20 | Chats, on its face, which produces a much smaller number of documents. All of the
21 | points I've made in relation to Google Drive apply. It doesn't take account of
22 | duplication. It doesn't take account of any enquiries as to what chats or conversations
23 | might be relevant. Again, there's no reference to the possible use of AI. But even on
24 | its face, that is a manageable number of documents, even before one considers how
25 | the pool might be narrowed further using TAR. My learned friend has said that -- sorry,
26 | Motorola has said that some unspecified number of those 1,823 documents may be

1 | conversations, rather than individual messages. We're not told how prevalent that
2 | issue is, however.

3 | Insofar as there are conversations, an obvious step would be to ask the relevant
4 | custodians which conversations they consider might contain relevant communications.
5 | None of that has been done. So we do say there are manageable ways of reducing
6 | this.

7 | Just finally, on SharePoint, we're not told anything at all about the likely number of
8 | documents. Again, we're simply told that a process would need to be undertaken to
9 | liaise with custodians about potentially relevant folders, and that this could take days
10 | or weeks. You already have my point that we were asking them to do this process
11 | back in May, and it was just not done.

12 | All we're asking ultimately, Madam, is for an order saying that reasonable and
13 | proportionate searches should be conducted across these three repositories in respect
14 | of a small number of identified custodians, in respect of a list of issues that are
15 | accepted to be relevant. I thank you for the indulgence.

16 | JUSTICE BACON: Thank you. We will resume at 2:10.

17 | (1.09 pm)

18 | (The short adjournment)

19 | (2.10 pm)

20 | JUSTICE BACON: Yes. Mr Luckhurst, do I need to look at this letter now?

21 | (Submissions by MR LUCKHURST)

22 | MR LUCKHURST: Not right now, Madam, but maybe towards the end of my
23 | submissions. I just handed it up earlier to save time.

24 | JUSTICE BACON: All right. Can I tell you where we are at provisionally, because
25 | that may enable you to focus your submissions? Our view at this point is that we do
26 | not intend to order further disclosure from the SharePoint.

1 That leaves the question of the Google Drive. Our view is that we will, subject to your
2 submissions, consider ordering searches to be run for data belonging to Mr Kennedy,
3 for the specific reason given by Mr Armitage that his emails haven't been preserved.
4 Now, there's no information before us as to whether there will be anything. But it
5 seems prudent to at least explore whether there's anything for him on the Google
6 Drive. Our provisional view is that it would be appropriate to search the Google Chat
7 data on the basis that that hasn't been -- it seems common ground -- searched and
8 provided to the CMA. Also, given that the volume of the Google Chat data is
9 significantly lower than for the Google Drive data. I'm looking at the latest letter from
10 HSF Kramer indicating that it may be in the range of 1,800 documents. That's of
11 course before any deduplication.

12 So you could simply address those issues. Then we don't need to come back to the
13 other points, because we've taken a view on those without needing to hear from you.

14 MR LUCKHURST: I'm grateful, that's a very helpful indication. I can cut a lot of the
15 submissions on proportionality in light of that and deal with the points of principle.
16 There are some general points of principle that are responsive to those residual points
17 (inaudible).

18 JUSTICE BACON: Well, yes, but the points of principle seem quite mitigated given
19 that what we are inclined to order is no more than searches for one custodian on
20 Google Drive -- nothing on SharePoint. As Mr Armitage fairly acknowledged, that's
21 probably the repository which is most likely to have been searched for the purposes
22 of the data already given, and a fairly discreet group of documents on the Google Chat
23 data.

24 MR LUCKHURST: I'm grateful. Two authorities in two minutes, I promise no more
25 than that. To start with, Bundle E, tab 5, page 65, please.

26 It's the judgment of Mr Malek KC. He lists factors pertinent to whether disclosure is

necessary and proportionate, and emphasises at number (3):

"The importance of the disclosure sought, both in relation to the case as a whole, and how profitable the disclosure exercise is likely to be."

And then (8) in particular, "the amount of disclosure already provided". Then please, page 190 behind tab 10.

JUSTICE BACON: Which judgment is this?

MR LUCKHURST: This sorry, this is the judgment of Mr Malek KC in *Ryder Limited v AB Volvo*, the judgment of the Tribunal of [2022] CAT 41, where he was determining a specific disclosure application in the context of the *Trucks* litigation, for documents held on the Commission administrative file. It's just (3) that I emphasise - is it likely to be profitable - and (8) -

The amount of disclosure already provided are factors relevant to what is necessary and proportionate.

The next authority, Madam, is page 190 behind tab 10, which is the *Coll v Google* case. It's the judgment of the Tribunal chaired by Ms Lucas KC. It's dealing with the KAD application, but there are observations of general importance in relation to the approach to disclosure and relevance.

I don't know if you have paragraph 53 on page 190? About four lines down, she explains:

"Expert evidence, and in particular from experts in economics, is generally front and central. It is important to the resolution of the key issues in dispute in terms of establishing liability and matters of causation and quantum."

Then going down to paragraph 54:

"Disclosure in a competition case is therefore, to a significant extent, an expert-led process. Often the provision of data or information that is of importance rather than original documentation. That is not to say the original documentation or evidence from

1 those in key positions in the defendants or industry is entirely irrelevant, expert
2 evidence must not become elevated so as to become purely theoretical and divorced
3 from the factual reality underpinning the context in which the claims arise. Where it is
4 relevant and available, the qualitative evidence must, of course, be reflected in the
5 methodology put forward. However, disclosure must be proportionate, in particular in
6 collective proceedings cases where the defendants are frequently [and so on]."

7 JUSTICE BACON: Yes.

8 MR LUCKHURST: So it's not as though every potentially relevant document is
9 desirable or realistically possible, she says.

10 JUSTICE BACON: Well, I've had that well in mind in the provisional indication that
11 I've given.

12 MR LUCKHURST: I'm going to come to what -- particularly in light of Coll, I'm going
13 to be looking at what Mr Bell says he needs to advance the core of the excessive
14 pricing case. I will submit to you that the Google Chat is just not going to be assistive
15 to the Tribunal in relation to that. So in light of those authorities, can I briefly take you
16 please to the --

17 JUSTICE BACON: But I thought there was no dispute as to relevance?

18 MR LUCKHURST: There's no dispute as to relevance, but in light of those two cases,
19 I'm entitled to submit that: is the provision of a Google Chat going to be of incremental
20 benefit when the Tribunal comes to consider the core issues arising out of the pleaded
21 case? And the way that Mr Bell explains that the *United Brands* analysis is going to
22 be advanced. My submission will be: even if it were relevant, there would be no real
23 incremental benefit from that sort of colloquial-type exchange, when one actually looks
24 at the pleadings, and what the expert says.

25 The claim form, it's in Bundle C, tab 1, page 11. (Pause)

26 If you have page 11, paragraph 15, please. This really sets out the core of the case:

1 an allegation of an abuse of a dominant position; and then (a.), we can see the
2 allegation is that:

3 "Motorola had recouped its investments in the Airwave network and obtained
4 a reasonable return over the 19 year [period]", and in an exercise of market power,
5 "Motorola was able to set or maintain its prices that were substantially and persistently
6 above efficient costs and the competitive level."

7 So the core of it, as suggested at 15, at the top, three lines down, was essentially an
8 allegation that they refused to negotiate sufficient price reductions to reduce prices to
9 a fair level. And then at 16, it's explained that reliance will be placed on Mr Bell's
10 report.

11 Looking at page 21, please, it's expressly pleaded in paragraph 46:

12 "There is a substantial body of evidence in the Final Report supporting the claim that
13 Motorola had abused a dominant position by charging excessive and unfair prices for
14 Airwave Services."

15 And at page 28, paragraph 73, a full summary of the conclusions relied upon from the
16 final report, and I ask you to note, in particular please, over the page at 29,
17 subparagraph (e), it is said that they can take from the final report that:

18 "... the price charged ... after the expiry of the PFI Framework Agreement did not
19 materially change, notwithstanding the fact that ... [the] costs would [not] have included
20 the recovery of the network set-up and build costs."

21 And therefore it didn't reflect -- subparagraph (f):

22 "... what would be expected in a well-functioning market."

23 Then at (g) we can see some particulars, over the page at page 30. Particularly it's
24 said, asset transfer provisions are ineffective at (iii). (v):

25 "... the Home Office was locked in."

26 (vi): "Home Office had weak bargaining power; (vii), "asymmetry of information"; (viii),

1 "terms ... did not effectively constrain [and so on]."

2 These are all things that are pleaded as being demonstrated by the evidence
3 considered in the final report.

4 On page 34, please, paragraph 84 at the foot of the page, it's pleaded:

5 "Further commentary regarding the parties' relative bargaining powers, and their
6 perception of the market dynamics during the Claim Period, can be found in the
7 contemporary evidence set out in section 4 of the CMA Final Report, [with cross
8 references given]."

9 It's explained below, Mr Bell intends to assess the relative bargaining power, taking
10 into account the negotiations.

11 You can then see at 88(i) and (ii) at the top of page 36, the *United Brands* two-stage
12 test pleaded out.

13 Then the actual particulars of breach, page 37, paragraph 92 and 93, it's said that what
14 will be relied upon is:

15 "... the evidence and analysis set out in Mr Bell's Report and the Final Report."

16 And then the particulars of abuse, in 93(a), "super normal profits"; 93(b):

17 "... excessive because they were significantly and persistently above costs."

18 And then in terms of whether prices were unfair at 93(c), is a reference to market
19 context, and the context is said to be that it's:

20 "... a monopoly provider of a critical and essential service, facing purchasers with weak
21 bargaining positions, and absent sufficient competitive constraints on pricing. [There
22 was an] ability and ... incentive to exploit this position of entrenched market power."

23 And then at (d), a number of further economic points about the alleged differential
24 between prices and costs, and an increase in profitability.

25 Then page 39, please, in paragraph 95, bottom seven lines, starting, "The absence of
26 countervailing buyer bargaining power", it continues:

1 "... resulting from the lack of any realistic alternative option for User Organisations,
2 was well understood by both Motorola and the Home Office during the Claim Period."

3 Footnote 76 is to the final report. It's said:

4 "This is highlighted by the fact that CMA found there are also features relating to ESN
5 and Motorola's dual role, and the transition of users from one network to another, that
6 have a distortive effect."

7 And again, footnote 77 is to the final report.

8 And then 98, it's said, on page 40, paragraph 98:

9 "For the avoidance of doubt, the PCR's case in respect of the Infringement is
10 supported by the CMA's findings in the Final Report and supported appendices."

11 And well, there's detail --

12 JUSTICE BACON: Yes, but then at the end of that:

13 "Whilst the PCR reserves the right to plead further particulars of Infringement following
14 disclosure and/or evidence, the threshold of a triable issue is ... clearly met."

15 So the reference to the CMA's report was to show that there was at least a triable
16 issue.

17 MR LUCKHURST: That was before they had received any of the CMA disclosure, or
18 any disclosure at all.

19 JUSTICE BACON: Yes.

20 MR LUCKHURST: And they've now had all of that disclosure.

21 Then just in light of the observations in *Coll* that I showed you, it's important to look at
22 how Mr Bell is intending to establish abuse. We can go to Bell 1, please. That's in
23 tab 4 of this bundle. We can go to page 199. You can see at the foot of 199, 4E,
24 "Proposed methodology for assessing abuse", and he refers to the *United Brands* two-
25 limb test. (Pause)

26 Then page 218, please. This section continues for a while, but there's a helpful

1 summary at 218, in table 5.1, of the data that he says he requires "for assessing
2 excessiveness". And if you have table 5.1 on page 218, it's four rows, and it's
3 essentially financial data: the profitability; CapEx estimates; regulated asset base
4 value; and then reference at 4 to "contracts".

5 Then limb two, "Unfair in itself", you can see from page 219 a number of headings
6 under 6B. Just to run through those very quickly, at page 220 we can see:

7 "Market structure and market power leading to an ability to impose unfair outcomes".

8 At paragraph 6.8, there is some reference to evidence, he says:

9 "... my preliminary view is that the market is typically characterised as a monopoly with
10 a single supplier, procured through contractual terms determined through a tender
11 process. However, due to the particular circumstances in this case, a gap arose
12 between the ... contractual period and the introduction of a new service."

13 He says:

14 "In the intervening period, commencing in 2020, Airwave purchasers have no option
15 but to deal with Motorola (a monopolist supplier ...) [and] they could not credibly walk
16 away."

17 And he says:

18 "Should this view be supported by the factual evidence in due course, this would mean
19 that Motorola was essentially a monopolist."

20 And that's really the high point of the reference to factual evidence in this section of
21 Bell 1 dealing with abuse. But the CMA did investigate this factual area, as the Class
22 Representative pleads in the claim form, 73(g) as I showed you.

23 Then 6B.2, the next subheading on page 221, "Incentives promoting unfair outcomes".

24 You can see over the page at page 222, paragraph 6.13 another reference to
25 evidence. He says:

26 "I will test what Motorola's incentives were likely to be in due course subject to further

1 disclosure and witness evidence, including for example internal documents recording
2 its deliberations around potential negotiations leading up to and during the Claim
3 Period."

4 And the CMA sought documents on that, as I'll show you with reference to an RFI.

5 All of the other subheadings are essentially matters of economic analysis. So, 6B.3
6 are the circumstances suggestive of unfairness. He mentions the alleged differential
7 between price and costs, whether the differential might be economically justified.

8 Page 223, 6B.4: "Examination of whether there would be any economic justification
9 for setting the price level higher than costs under conditions of workable competition".

10 Page 224, 6B.5: "Size of differential between prices and costs".

11 Page 225, 6B.6: "Market outcomes meriting regulatory intervention", and so on.

12 JUSTICE BACON: Yes. There's no dispute that a lot of the ground is covered by the
13 CMA. The question is whether there's anything else that is likely to be relevant. The
14 reason why I focused my suggestion on things like the Google Chats is that that's
15 qualitatively different from the kind of documents that we would already expect to have
16 been produced, if relevant, through the CMA request for information process.

17 MR LUCKHURST: If we look at what's been pleaded by the Class Representative and
18 what Mr Bell says he needs, it's essentially: were these captive customers, could they
19 have walked away or were they trapped and therefore did Motorola have a position of
20 market power? Then the rest is all cost price analysis.

21 So my submission is: the CMA has looked at that, and I will show you where the CMA
22 has looked at that -- the CMA has asked for information pertinent to that and I'll show
23 you that very quickly. But why would Google Chat exchanges add materially to that?
24 Why would that exercise, which is potentially substantial because we don't know how
25 many chats fall within each hit -- why would the experts or indeed the Tribunal be
26 assisted by trawling through what the Tribunal described fairly as "colloquial

1 exchanges" in question to --

2 JUSTICE BACON: Well, in one of the passages that you've just shown me Mr Bell
3 was commenting that he would derive some support from internal discussions within
4 Motorola. So the question is: where are those discussions likely to be? Most likely in
5 some form of internal messages. You're already going to be searching for emails so
6 it must be accepted that there may be some additional relevant documents there, and
7 you're already searching for some WhatsApp messages.

8 The Google Chat messages are of a very similar ilk, probably, to the WhatsApp
9 messages, and indeed, probably because this seems to be more work related, more
10 likely to find something there than in WhatsApp I would have thought. But one doesn't
11 need to speculate, you're already searching for WhatsApp and iMessages and it's not
12 very clear to me why there's some kind of qualitative difference in terms of the
13 probative value between WhatsApp messages and Google Chat.

14 MR LUCKHURST: Can I just respectfully push back on the suggestion that the Class
15 Representative is entitled to say, well, because you're giving us disclosure on that you
16 have implicitly accepted that everything that may be comparable should also be
17 disclosed.

18 JUSTICE BACON: No, I'm not saying that. I'm just saying I don't understand what
19 the qualitative difference is and why WhatsApp messages are more likely to be useful
20 than Google Chat, the latter of which is presumably more likely to be limited to work
21 related discussions.

22 MR LUCKHURST: We've said that we don't necessarily accept the relevance or
23 proportionality of the WhatsApp exercise either, but the line has to be drawn
24 somewhere, and this is ultimately where Airwave drew the line. We've agreed to
25 a huge amount without prejudice to whether that's going to be of assistance, but you've
26 just opened the requests too wide here and we do object to CR/M1.

1 JUSTICE BACON: Given that I don't quite understand the logic of that line, I think you
2 need to look at the proportionality of what I've provisionally indicated we might be
3 ordering. What we've got is evidence which suggests that at most -- and that's before
4 any de-duplication -- there might be in the region of 1,800 documents to which you will
5 be able to apply technology assisted review before any manual review which may well
6 further whittle down the pool giving you quite a small pool of documents to review
7 manually, at least in relation to the Google Chats.

8 In relation to the Google Drive I've expressly said that what should be searched for is
9 the documents belonging to Mr Kennedy on the basis that we don't have that on the
10 email searches because his email account has been deleted. So, again, that is
11 a vastly smaller volume than the volumes that you're talking about.

12 So if it turns out that there is little probative value -- that may be the case for lots of
13 this -- the question is how much time is going to be wasted for looking for that? If it
14 comes down to "It's a matter of a few days", well, we're spending quite a lot of time in
15 man hours and woman hours in court today debating this.

16 So in terms of proportionality, are you really saying that it's not going to be feasible
17 within the time available to do searches on the limited basis I'm suggesting?

18 MR LUCKHURST: I don't have the evidential material to be able to say that that can't
19 be done in the time available. That's not what Rowan 2 deals with. So the objections
20 are: it will undoubtedly take some time, it will take some cost, and so the objections
21 that I'm trying to advance on those discrete points are that it shouldn't be ordered
22 because it's not going to be additional and useful in the context of what's already been
23 disclosed and the issues in the case.

24 Just specifically on Mr Kennedy, he's only one person in a large company and he
25 would have been emailing out to colleagues, and indeed the Home Office. He would
26 also have been receiving emails from colleagues and the Home Office. There's no

1 suggestion that the inboxes and outboxes of those people were deleted. Indeed, that's
2 evidenced by the fact that the Class Representative's skeleton argument cites three
3 emails from the CMA disclosure sent by Mr Kennedy.

4 JUSTICE BACON: Yes.

5 MR LUCKHURST: So I do say that to move from the absence of his emails to more
6 expensive and time-consuming sort of data harvesting and searches of repositories is
7 a non sequitur in the case of a large company where people are naturally
8 communicating in the course of business, and there has been thorough custodial email
9 searches done. Our position is that what really the Class Representative should have
10 been doing, having received a wealth of rich disclosure, is a gaps analysis rather than
11 a --

12 JUSTICE BACON: Yes. Well, it's done that and it says, "Well, we've identified that
13 there are no emails from Mr Kennedy and that he was fairly centrally involved during
14 a critical period of time".

15 MR LUCKHURST: Well, yes, his email inbox was deleted but there are emails which
16 Mr Kennedy is on.

17 JUSTICE BACON: Yes.

18 MR LUCKHURST: The idea that there's a silo of documents sitting on a drive that
19 people have not communicated about in the course of business is, in my submission,
20 an odd one, because if Mr Kennedy is at the heart of the business and is
21 communicating with colleagues, we will or we won't have that in the custodial email
22 disclosure. But the likelihood that Mr Kennedy was maintaining a separate document
23 on a drive somewhere that he was not talking to people about, that he was keeping
24 personal thoughts on, is an unlikely one.

25 So that's why I submit that it doesn't logically follow from the fact that his emails were
26 deleted in the ordinary course of business that one then jumps to looking at the drives.

1 It's just a fact that we have to live with in terms of the matrix of the CMA disclosure
2 that he couldn't be a custodian there.

3 On the principle of whether or not the Google Chats are necessary in order to address
4 the, what in my submission are relatively narrow, points of evidence put forward in Bell
5 and the claim form about inability to walk away and Motorola's market power, can I just
6 please show you the RFI briefly as an example. That's at C, tab 23. Just the RFI and
7 then an extract from the final report, if I may. C, tab 23, page 115. (Pause)

8 Sorry, it's an internal page 115. 899 is the bundle reference for C/23, page 899 in the
9 PDF. This is to meet the suggestion that the Class Representative makes in the
10 skeleton argument that the CMA is just not looking at commercial strategy. This is at
11 Class Representative skeleton, paragraph 19. This is said to be the gap between what
12 the CMA did and what you would look at in an abuse case.

13 But you can see at 13, and then sub (c) in particular -- 13 starts:

14 "Please provide a chronological description of all the discussions and/or negotiations
15 and contractual outcomes of these between Motorola and the Home Office in relation
16 to ..."

17 Then 13(c):

18 "all Documents recording and/or commenting on these discussions/negotiations and
19 outcomes/contractual outcomes."

20 And then we see there is clearly follow up and careful examination of the document
21 universe because at page 903, at questions 19 and 20 -- 19, it refers to a document
22 number, it says:

23 "... is an email exchange regarding an upcoming Airwave/ESN strategy discussion, for
24 which 'some number simulations' ... would be run. Please provide all Documents
25 prepared for this discussion and all Documents prepared in the course or as a result
26 of this ... discussion.

1 Then, similarly, more demands for "all Documents related to an 'Airwave Strategy
2 Session".

3 JUSTICE BACON: Yes, but that necessarily wouldn't show up an informal discussion
4 between individuals which might be revealing as to what Motorola was thinking
5 internally. There's a difference between a formal document prepared for a discussion.
6 In suggesting that we won't order any further disclosure from the SharePoint I'm
7 reasonably satisfied that those are likely to have been handed over and/or captured in
8 the other searches that have been agreed. But what that won't throw up is
9 a discussion which may be revealing of motivation.

10 MR LUCKHURST: It's the hypothesis that there is something being said in
11 a Google Chat that couldn't be said on email, or that wouldn't be said on email -- we're
12 not in a secret cartel case here. We're in a case where there was pretty open
13 negotiations between two counterparties and open strategic discussions within the
14 business as to what was in the commercial advantage of the business and, as I'll show
15 you briefly in the final report, what the position of the opposing counterparty was.

16 So I do submit that it's somewhat unlikely that people would have actively thought
17 "I wouldn't put that in an email, but I'd say it in a Google chat"; that's very unlikely.
18 I take your point, Madam, there may have been further exchanges, people may have
19 used different language, it may have been colloquial. My submission is that, to the
20 extent that you need anything on analysis of commercial position and bargaining
21 power, that's probably going to be there in the emails.

22 Just briefly to show you what the CMA took from the contemporaneous documents to
23 assess those points. E/26, page 491, please.

24 JUSTICE BACON: Can you give me the reference again?

25 MR LUCKHURST: Bundle E, tab 26, page 491.

26 JUSTICE BACON: Yes.

1 MR LUCKHURST: This is the final report. The subtitle is "Evidence from
2 negotiations", above paragraph 4.150:

3 "We have assessed the contemporaneous and related evidence about the
4 negotiations in 2018 and 2021. Our assessment is that it shows the Home Office
5 lacked outside options and buyer power and that market power lay within Airwave
6 Solutions / Motorola. We note that, as we describe below, this is a position Motorola
7 itself recognised in its internal business documents, commenting in particular that:"

8 Then there's quotations from those documents.

9 Then it explains at 4.151:

10 "In making our assessment, we ... considered the evidence that relates to each of:

11 "(a) the chronology and the conduct of the negotiations [and]

12 "(c) the parties' perceptions of their bargaining positions."

13 That's why this paragraph is pleaded by the Class Representative. It goes directly to
14 the point Mr Bell says he would test against the factual evidence.

15 Just to -- hopefully not trespass on your patience too much further -- but in the
16 appendices, we can see really detailed analysis of these internal documents that the
17 CMA obtained. So for example, if you go to page 608, the green highlighted text is all
18 Motorola internal documents. There's an examination at 71(a) and (b) of the CMA's
19 analysis of Motorola's internal discussions on its positioning for upcoming negotiations
20 on Airwave and ESN.

21 If you scroll through just to page 610, you'll see there's a lot of green highlighting. At
22 76, the CMA says:

23 "At no point was the negotiation solely at the Home Office's request ... we have seen
24 no evidence that Motorola was reluctant to negotiate. The evidence is consistent with
25 Motorola expecting to have to do so ... it saw commercial advantages in doing so on
26 both occasions."

1 JUSTICE BACON: But all this somewhat falls away when it's recognised that, as
2 Mr Kennelly fairly did at the last CMC, there will be additional material. It doesn't
3 entirely rest on the CMA findings and evidence. The question is what additional
4 material should be provided. It's been agreed that additional material will be provided.
5 As you say, the question is where to draw the line.

6 MR LUCKHURST: Yes. This is just the principle (overspeaking) --

7 JUSTICE BACON: I'm just trying to work out why this is the thin end of the wedge, if
8 it's actually such a very small, thin end, if I'm not mixing my metaphors too much. I'm
9 struggling to understand why you are so vehemently opposed to searching through
10 what seems to be a fairly minimal additional trove of material.

11 MR LUCKHURST: Can I make one final point on what we've agreed to provide?
12 Because, whilst it's correct that Mr Kennelly acknowledged at the last CMC that further
13 disclosure would be provided, this debate is also taking place in the context of a largely
14 agreed Redfern schedule where an extremely large amount of further documentation
15 is to be provided. So we've set out at paragraph 25 of our skeleton argument for the
16 further categories of documents provided to the board and senior management, which
17 includes eight individuals that have been agreed to be given. I'll just emphasise in
18 particular CR/M7, business plans and strategy documents. Can I take you just briefly
19 to the Redfern schedule?

20 JUSTICE BACON: Yes, we've got it in hard copy.

21 MR LUCKHURST: So this is the original Redfern schedule with the five columns. This
22 is in B.

23 JUSTICE BACON: Yes.

24 MR LUCKHURST: Tab 1, page 13. It's explained in column 3:

25 "The Defendants provided Business Plans and Strategy Documents for [that period]
26 in response to [the CMA's RFI]."

1 The request is made for those.

2 JUSTICE BACON: We're looking at M/7?

3 MR LUCKHURST: Yes, CR/M7, on page 13.

4 JUSTICE BACON: All right. Column 3.

5 MR LUCKHURST: Business plans and strategy documents are very important, if one
6 is concerned with evidence as to what was Motorola's perception. We can see on the
7 far right column, the Class Representative emphasises that and recognises that.
8 When the relevance was queried, under the heading "Business Plans and Strategy
9 Documents are clearly likely to be relevant to issues in dispute", the Class
10 Representative says:

11 "The CR considers that business plans and strategy documents are likely to cover
12 many, if not all, of the issues contained in the agreed list of issues in these
13 Proceedings."

14 So these are the sort of extensive further searches that are being undertaken for the
15 documents that, in my submission, would really be of value, and which it is
16 proportionate to disclose.

17 The further sort of trawling around for a smoking gun in a Google Chat is actually, in
18 my submission, the wrong direction to take in a case of this nature. Whilst one could
19 understand it in a cartel-type case, in this case where it's essentially a debate about
20 rather esoteric economic principles, to some extent grounded in some factual
21 evidence, and where a huge wealth of CMA disclosure has already been given and
22 handed across, and where the Class Representative pleads reliance on precisely that
23 material, actually, it's just a step too far to be trawling around through those further
24 repositories.

25 I don't need to take you through the evidence on deliverability, in light of your
26 indication. So the objection is essentially one of principle, as I've been trying to

1 articulate. Obviously there are costs and it does add a burden, but I can't say it's
2 impossible.

3 JUSTICE BACON: Yes, all right. Thank you very much. (Pause)

4 (2.49 pm)

5 (Order)

6 Well, I am going to make the order that I provisionally indicated that there should be
7 further searches for the Google Chats and for the Google Drive of Mr Kennedy, if that
8 exists. I take Mr Luckhurst's point that this may not throw up anything of great
9 probative value, but the same can be said of a lot of material. It seems to me that
10 there may be some further material which is relevant in the perhaps less curated and
11 more informal discussions within Motorola. On the basis that that material may exist,
12 it seems to me that Google Chat may well be a place where those discussions were
13 had. There certainly seems to be no logical reason for excluding Google Chat when
14 it has been agreed to search, for example, emails and WhatsApp and iMessages.

15 There is no specific submission on proportionality or unfeasibility of provision of these
16 materials limited in that way. I have already explained why I do not consider it
17 necessary or appropriate to order further searches given the material that has already
18 been provided in the case and will be provided under the further searches set out in
19 the Redfern schedule.

20 (2.51 pm)

21 So that deals with M/1.

22
23 (Known adverse documents)

24 M/2. This is known adverse documents. I hope we can deal with this relatively shortly.

25 (Submissions by MR ARMITAGE)

26 MR ARMITAGE: I assure you that is by far the meat of the --

1 JUSTICE BACON: All right.

2 MR ARMITAGE: We can, I think, be much quicker on the small number of remaining
3 categories.

4 KADs. If you have the composite version, you can see the precise formulation. The
5 key point is that this is not a request for a KADs order. Generally speaking, without
6 further qualification, it relates only to six named individuals who are all current
7 employees. In the business and property courts, Madam, you'll know that the KADs
8 obligation, which is standard in those cases, extends to ex-employees, but we're
9 happy to confine our requests to these current employees. We've also confined it to
10 the specific issues that we've identified under the previous category.

11 On the law, there's no dispute that the CAT has the jurisdiction to make an order of
12 this kind. We've cited the recent ruling of this Tribunal in Ms Spottiswoode's other
13 collective proceedings, against Nexans and other power cable companies. I don't
14 know if I need to turn it up, Madam. I've cited the relevant passages in my skeleton.

15 JUSTICE BACON: Yes.

16 MR ARMITAGE: The context there, though, was that that is a follow on damages case
17 arising out of the European Commission's infringement decision in relation to a cartel
18 in the power cables market. As is conventional, Ms Spottiswoode had already
19 received disclosure of a number of 1,000 commission file documents.

20 I will very briefly actually show you just the ruling. It's at Bundle E, tab 16, page 262.
21 The ruling of Mr Justice Richards earlier this year. We've just got an extract. Picking
22 it up at 59 as a reference to the requirement in the business and property courts, and
23 his Lordship says:

24 "There's an obvious reason for this: it would be quite wrong for a litigant to know of
25 a document adverse to its case and simply choose not to disclose it."

26 The judge agrees with the Class Representative that this obligation should apply here.

1 There's a reference to some difficulties that the Defendants had pointed to, including
2 the fact that the relevant disclosure exercise had been carried out a long time ago,
3 et cetera, et cetera. He says that those sorts of submissions "do not give sufficient
4 weight to the fundamental proposition that if the Defendants actually know of
5 a document that is adverse, it should be disclosed".

6 Then at 61 is an important point in relation to the scope of the obligation, "making key
7 enquiries" -- I'm not sure what "key" means there -- "enquiries of key individuals
8 currently employed to check for known adverse documents". There is the reference
9 there to those who have left. As I say, we're not seeking that here. Then this phrase,
10 "the touchstone is reasonableness":

11 "The Defendants cannot be expected to track down every employee, show them the
12 disclosure list and ask them if there is anything else. However, just because it is
13 possible to envisage things that are not needed and would not be reasonable, that
14 does not mean that nothing should be done."

15 We do say the same essential considerations apply here. My learned friend makes
16 various points in his skeleton. First he says that the likelihood of individuals being
17 aware of adverse documents in addition to the CMA disclosure is slim. We say that
18 doesn't follow at all. It links back to the point we've been debating in relation to the
19 previous category, that certain repositories were simply not searched in the context of
20 the CMA investigation. Obviously, in light of your ruling, there are not going to be
21 further searches of Google Drive, but that, in my submission, strengthens the case
22 rather for KADs disclosure.

23 Secondly, he says that the six individuals targeted by the CR's requests were
24 custodians for the purposes of the CMA disclosure. That's true, but that's the same
25 point because they were email searches, as you know.

26 Then there are a number of other points. I think probably the most fundamental point

1 is the point that the concept of adversity is, in his submission, not straightforward. He
2 relies on the ruling on KADs that was given in the *Coll* litigation. Madam, I know you're
3 very familiar with the issues in that case. I won't comment on how straightforward or
4 otherwise those issues are. But in relation to the present case, we do fundamentally
5 say that the basic case is rather simple. It's that Motorola leveraged the Home Office's
6 dependence on Airwave in order to extract prices that were excessive. That's the
7 fundamental allegation that lies at the heart of this. As Mr Justice Richards says, in
8 the *Nexans* case, the touchstone is reasonableness. It's for the defendant to decide
9 what enquiry should be made of the relevant individuals. The key point is that those
10 enquiries get at the fundamental point of fairness, that if there are actually adverse
11 documents sitting on the Defendants' systems of which those individuals are currently
12 aware, it would be unfair if they were not disclosed.

13 So, Madam, those are the submissions on KADs. We do say it would be an
14 appropriate order, confined in the various ways we've set out in the schedule.

15 JUSTICE BACON: Yes. Thank you very much. Mr Luckhurst.

16 (Submissions by MR LUCKHURST)

17 MR LUCKHURST: If I can briefly take you to *Coll*, please, which Mr Armitage referred
18 to. That's Bundle E, page 190.

19 JUSTICE BACON: Page?

20 MR LUCKHURST: 190. I won't show you again the passages that I showed you in
21 my prior submissions, just that at the top of 53, Bridget Lucas KC says:

22 "As we have said, PD 57AD does not apply to a competition claim, even where those
23 cases proceed in the High Court. It plainly does not apply in the Tribunal. It seems to
24 us there are good reasons for this. Competition cases are frequently substantial and
25 complicated."

26 And I've showed you the passage beneath that.

1 Then it's paragraph 55 that we need to go to for KADs:

2 "In our view, to impose upon a party a general obligation to disclose known adverse
3 documents, such as that contended for by the [Class Representative], is fraught with
4 difficulty. It will at least require Google to check whether it has known adverse
5 documents. That does not amount to a requirement to conduct a search for them, but
6 we agree with Mr Justice Stuart-Smith in *Castle Water* ... that, if the obligation is to be
7 meaningful, Google will be required to identify those with accountability or
8 responsibility [and so on]."

9 JUSTICE BACON: (Overspeaking) paragraph.

10 MR LUCKHURST: It's a "distillation of complex issues", potentially a "time-consuming
11 and onerous task". We do submit that as in *Coll*, the concept of adversity isn't
12 straightforward in this case, because although my learned friend said, "Well, you know,
13 it turns on whether or not Home Office was stuck as a customer", well, actually, that's
14 not the totality of the issues. There's issues of market definition, dominance, test for
15 excessive and unfair pricing, that are unfamiliar to persons without competition law
16 expertise -- cost price analysis and so on.

17 So adverse actually isn't a straightforward concept to apply. Each case does turn on
18 its facts. One can readily see that in a case like *Power Cables*, where the Commission
19 has found a hardcore cartel over a time period, and there remains a dispute as to
20 whether all of the tenders in that period were actually cartelised, as is the case, the
21 Tribunal might reasonably conclude that a KAD order is necessary and readily
22 understandable to people who aren't economists. But in this case, the core of the
23 dispute lies in economic and legal tests of some complexity.

24 As well as *Power Cables*, my learned friend's skeleton cites an order in *Lenzing*
25 *v Westlake* as an example of a KAD order. Two points on that: first, it's another
26 Article 101 collusion case; but second, the order isn't actually a standard business and

1 | property courts KAD order. I could just show you that quickly, please. It's E/23,
2 | page 444. You have paragraph 6 on 445, the Tribunal's ordered:

3 | "As soon as reasonably practicable and by no later than the long-stop disclosure
4 | date ... the parties shall each give disclosure of any known adverse documents that
5 | they identify in the course of searches conducted for the priority disclosure categories."

6 | So it's actually an order for accelerated disclosure of KADs found in the course of an
7 | ordered disclosure exercise. Whereas a standard KAD order under PD 57AD doesn't
8 | require searches; it requires interviews with employees. So that's not what the Class
9 | Representative is asking for here, in the *Lenzing* example.

10 | We make some further submissions in our skeleton. I'll take them quickly as you've
11 | helpfully indicated you've read the skeletons carefully. The first is that the CMA
12 | vigorously sought relevant information over the course of 24 months, 80,000
13 | documents were disclosed and so on.

14 | JUSTICE BACON: Yes. Well, I've read that.

15 | MR LUCKHURST: So KADs in addition to disclosure is quite slim, in likelihood. The
16 | six individuals targeted were email custodians. There's going to be additional
17 | searches now of Mr Brown and Mr Brda because CR/M4 is agreed.

18 | Now, third, we've agreed to take further searches --

19 | JUSTICE BACON: I've read this paragraph, so you don't need to repeat it.

20 | MR LUCKHURST: And finally, we've got our point about the asymmetric position of
21 | the Home Office.

22 | JUSTICE BACON: Yes.

23 | MR LUCKHURST: And you'll have seen as well, Madam, that we do have a fallback
24 | position on Mr Brown.

25 | JUSTICE BACON: Thank you. Thank you very much, Mr Luckhurst.

26 | Mr Armitage, any reply?

1 (Submissions by MR ARMITAGE)

2 MR ARMITAGE: Very briefly, Madam, all we're seeking here is, a limited order that
3 provides for reasonable enquiries of the named individuals. We say this is analogous
4 to the other *Spottiswoode* case, in terms of the likely odiousness of this exercise.
5 *Lenzing*, I accept, is a different form of order, and I primarily do rely on the order that
6 was made in the *Spottiswoode v Nexans* case. My learned friend's submissions, with
7 respect, didn't really touch on the fundamental point of fairness identified by
8 Mr Justice Richards. In that case, if there are actually adverse documents that these
9 individuals are aware of, they should be disclosed and they may not be picked up by
10 searches. And that's all.

11 JUSTICE BACON: Thank you very much. I'm not going to make the order. I consider
12 that Mr Luckhurst's submissions are well founded. This is, like Coll, a case which is
13 going to turn on issues which are essentially economic issues of market definition
14 dominance and the test for excessive unfair pricing. The economic evidence is front
15 and centre. That seems rather different to an article 101, chapter 1 cartel case.

16 In order to make the enquiries suggested by the Class Representative, that's going to
17 need a considerable degree of education of the individuals to explain what is meant
18 by "adverse" in the context of this case. That is likely to be a time-consuming task and
19 the likelihood of obtaining additional documents that have not been produced already
20 from the extensive search has already made for the purpose of the CMA investigation
21 and the further searches that are going to be done for the disclosure of the various
22 categories in the Redfern schedule seem rather unlikely.

23 Therefore, in my view, not reasonable to ask for those further searches or further
24 enquiries to be made of the individuals in question.

25 That deals with M2. Then the last point is M3. What's the remaining debate between
26 you on this?

1 MR ARMITAGE: It is just Mr Brown's text messages. Motorola have agreed to the
2 request in relation to the three other named individuals: Watkins; Waddell; and Dyson.

3 JUSTICE BACON: So it's just Mr Brown.

4 MR ARMITAGE: And the parameters of the searches are agreed; we've proposed
5 search terms, and they're happy in this instance to apply those. In my submission, the
6 disclosure of Mr Brown, the CEO's, text message is also reasonable and
7 proportionate.

8 JUSTICE BACON: And the objection was Mr Brown is solely that he was the CEO
9 and is less likely to have relevant information?

10 MR ARMITAGE: Yes, that's broadly it, Madam, though it isn't in dispute that Mr Brown
11 was involved in the events of which this claim relates. He was the subject of specific
12 information requests and email searches for the purposes of the market investigation.

13 JUSTICE BACON: Yes.

14 MR ARMITAGE: The CMA plainly regarded him as a relevant individual for the
15 purposes of that.

16 JUSTICE BACON: Yes, and it's been agreed that his email --

17 MR ARMITAGE: It's now been agreed that his -- I'm sorry to speak over you, Madam,
18 but yes, his emails will be searched.

19 We have referred to some relevant documents from the disclosure given to date. Just
20 one example that we don't need to turn up: it's F/12/147. It's simply an example of
21 Mr Kennedy, whose emails were deleted, directly reporting into Mr Brown on relevant
22 matters.

23 There is a suggestion in Mr Rowan's responsive evidence, Rowan 2. Can I just turn
24 that up briefly? It's paragraph 76, Bundle A, tab 11, page 96. He's addressing CR/M3.

25 (Pause)

26 Can you see Mr Rowan says -- I'm sorry, if I could look over 75, first.

1 JUSTICE BACON: Yes.

2 MR ARMITAGE: So he says:

3 "I am informed by Airwave that Greg Brown communicated only to a very limited extent
4 with other individuals within Airwave via text message. [And that] any relevant
5 communications conducted on his mobile device was via voice calls."

6 Of course, that's obviously quite careful language, and I'm going to come to a couple
7 of documents in a moment in relation to Mr Brown's use of text messages.

8 Then the next point, there's a reference to some documents that we cited in our reply
9 to the Redfern schedule, seven documents. I don't need to go through the documents.

10 Mr Rowan says:

11 "... none of those documents demonstrate that Mr Brown communicated any matters
12 via text message (including WhatsApp and iMessage). None of the documents
13 referred to Mr Brown sending text message, and only one document contains an email
14 sent directly from Mr Brown himself."

15 And it's right in relation to those seven documents that they do not refer to Mr Brown
16 sending text messages. They were cited, rather, to evidence the fact that he was
17 involved in relevant matters.

18 JUSTICE BACON: Yes.

19 MR ARMITAGE: Now what this bit of evidence ignores, though, is that there are other
20 documents showing that Mr Brown did communicate by text message in relation to
21 these matters, and indeed generally.

22 Quickly taking those in reverse order. We've referred to this in our skeleton, but can
23 we just turn up Bundle C, tab 24, page 1095. (Pause)

24 JUSTICE BACON: Bundle C, 1095?

25 MR ARMITAGE: 1095.

26 JUSTICE BACON: Yes, this --

1 MR ARMITAGE: This is a Motorola Solutions Presentation.

2 JUSTICE BACON: Yes.

3 MR ARMITAGE: This is, I think, a public appearance at an investor's conference
4 earlier this year. Mr Brown had a fireside chat with somebody called Adam Tindle.

5 JUSTICE BACON: Yes.

6 MR ARMITAGE: And if you turn over the page, this is simply in relation to
7 Mr Brown's --

8 JUSTICE BACON: Oh, I see.

9 MR ARMITAGE: -- general business -- sorry.

10 JUSTICE BACON: Second paragraph.

11 MR ARMITAGE: On the next page, yeah.

12 JUSTICE BACON: "They all have my cell phone."

13 MR ARMITAGE: It's the one we cite. "I don't know", he says,

14 "The top 150 people. They all have my cell phone. We text, we call."

15 So those are his general business practices suggesting that both of the users' text
16 messages and that his role as CEO is not limited to mere oversight. As for his use of
17 text messages in relation to Airwave-related matters, I've shown you that Mr Rowan's
18 evidence on that point is carefully worded; there's no suggestion that it's never done.

19 In fact, I'll show you just one document from the CMA disclosure. It's also in Bundle C,
20 page 1113. I think it's Inner Confidentiality Ring, but we'll see that this is from --

21 JUSTICE BACON: Yes, I can read it. All right.

22 MR ARMITAGE: You'll see the point. In my submission, this is a sufficient basis to
23 consider that searches of Mr Brown's text messages may yield relevant documents.
24 My learned friend suggests it wouldn't be proportionate to collect and review
25 Mr Brown's texts, and all that Mr Rowan says in that regard, in his evidence, is that it
26 would be disproportionate because they've agreed to provide disclosure of text

1 | messages from the other three individuals we've identified, but we don't have any
2 | particulars of the alleged disproportionality, the number of messages that are
3 | responsive to search terms, or the likely time or cost involved. Fully
4 | representing -- appreciating the demands on Mr Brown's time, we do respectfully
5 | suggest that it is not realistic to say that his texts could not be searched in
6 | a proportionate way, in the same way as these other individuals. So those are our
7 | submissions on this point.

8 | JUSTICE BACON: Yes, Mr Luckhurst.

9 | (Submissions by MR LUCKHURST)

10 | MR LUCKHURST: The three individuals whose text messages are being searched
11 | that had already been harvested in other proceedings.

12 | JUSTICE BACON: Yes.

13 | MR LUCKHURST: Pragmatically, Airwave agreed to search that, without prejudice to
14 | whether that's a relevant or proportionate request or necessary.

15 | The fourth is Mr Brown. His data hadn't been harvested to date, and Airwave's drawn
16 | the line there. As an overarching point, we do need a sense of realism about what the
17 | case is about, and whether searching the CEO's text messages is necessary. It's not
18 | a secret cartel case, as I've said, it's an allegation prices were excessive and unfair,
19 | applying a *United Brands* analysis.

20 | It's highly unlikely submissions on text messages are going to be critical to that
21 | analysis, particularly when there's a wealth of other financial data, business plans,
22 | briefings to the board and senior management, which have been or are being
23 | disclosed.

24 | I also emphasise that Airwave has now agreed pragmatically to search Mr Brown's
25 | emails over an extended period under CR/M4. I say that's a point in our favour, not
26 | a point in the CR's favour, because it's yet further searching of substantive

1 communication that may have gone to Mr Brown (inaudible)

2 It's addressed by Mr Rowan, and you've been shown Rowan at A/11/96. I won't take
3 you back to that document, but he explains that Mr Brown communicated only to
4 a very limited extent with other individuals within Airwave by text message.

5 JUSTICE BACON: I'm not sure that's a helpful point, because if that's the case, you'll
6 produce a nearly nil response when you do your keyword search; you just won't throw
7 up anything.

8 MR LUCKHURST: That's true, of course, but there's just a threshold question as to
9 whether or not it's truly necessary in these proceedings to go and find the CEO, get
10 his devices, harvest them, and run searches.

11 JUSTICE BACON: That will take a couple of days to do a clone of his device and
12 dump all of the texts and WhatsApps. If you then apply keyword searches and nothing
13 comes up, then you won't be very much inconvenienced.

14 MR LUCKHURST: No, I'm not saying it can't be done financially or as a matter of
15 resources, I'm just submitting it's not necessary in the context of this case.

16 In terms of the documents that my learned friend took you to, if you've still got C,
17 tab 28, page 1113. This was the email from Mark Kelly to Mr Brown. It shows ...

18 JUSTICE BACON: Is it in the confidentiality ring? That's why --

19 MR LUCKHURST: It is indeed. Thank you for mentioning that.

20 JUSTICE BACON: I'm not sure why it's in a confidentiality ring. It may be because
21 there was a blanket confidentiality designation. It doesn't seem to be particularly
22 exciting, but --

23 MR LUCKHURST: Probably because the process has not yet been gone through on
24 designation.

25 I think I can say without any confidentiality issues that Mr Brown is informed by text
26 message that there had been a call. So he's told by someone else by text that there'd

1 | been a call. When it came to dealing with a real matter of substance, Mr Kelly has
2 | sent an email and attached a slide deck. So it's plainly documents such as the email
3 | and the slide deck that are the more proportionate target of searches. In terms of the
4 | fireside chat at the investor conference that you were shown -- two points.

5 | He talks about texting and calling, that's consistent with Mr Rowan's evidence on
6 | instructions that if Mr Brown was in touch by mobile phone it would normally be voice
7 | calls with limited text messaging. Second, and more fundamentally, he's talking in
8 | general terms about being in touch with his employees. It doesn't show he was
9 | running the company, making key business decisions, by text messages. It is, with
10 | respect, unrealistic to suggest that the commercial strategy and decision-making of
11 | a sophisticated global company is going to be found in text messages. So, taking
12 | those points together, we say that the application for a search of his text messages
13 | isn't necessary.

14 | (Order)

15 | JUSTICE BACON: Yes, all right, thank you. I am going to make the order for
16 | Mr Brown's text and WhatsApp messages to be searched. There is not any direct
17 | evidence on proportionality. That is because I suspect it is not an enormously onerous
18 | task to do so. The main focus of Mr Luckhurst's arguments was that it was simply not
19 | likely to throw up highly relevant documents. If that is the case, then that indicates
20 | simply that there will be very little time spent on it because the searches will throw up
21 | a nil or almost nil response.

22 | On the other hand, it seems to me that, for the reasons already canvassed in relation
23 | to the Google Chats, there may well be additional material which is relevant to the
24 | Defendants' internal thinking which was revealed in less guarded messages than
25 | might have been sent on email and which may be informative of the intention and
26 | strategy behind what was publicly said.

1 Given that, as I said, there doesn't seem to be a real proportionality concern, and given
2 that other individuals' messages are being searched, that doesn't seem to me a good
3 reason to exclude Mr Brown from that, given the material in the file before me
4 indicating that he was involved with the issues in this case and may well have sent or
5 received relevant communications. So that deals with Mr Brown and I think that brings
6 us to the end of this part of the disclosure.

7 (Expert-led requests)

8 (Submissions by MR ARMITAGE)

9 MR ARMITAGE: Yes, subject to one point Madam. If you were to move on to CR/M21.

10 JUSTICE BACON: Yes, you said there were some points around the back end.

11 MR ARMITAGE: There's a cluster of requests. It's CR/M21 to 26 and then M28, which
12 are all, if you like, expert-led requests. They are highlighted green and you'll see the
13 phrase "Agreed in principle, subject to discussions, proportionality and agreement is
14 the timing". Then you see lots of text in the Defendants' position column. That has
15 been added, I think, after 5.00pm last night. We very recently received the
16 Defendants' proposals in relation to these matters.

17 I don't want to trouble you at 3.20 pm in the afternoon with the rights and wrongs of
18 why these proposals are coming in when they are, and my learned friend and I have
19 different perspectives on that. Essentially, I think where we are is that we need to go
20 away and consider these proposals with our expert, in particular Mr Bell, and
21 potentially also to some extent, Mr Ilett. We would very much hope that we can reach
22 agreement, but as it stands we're not in a position to say today that we do agree in
23 entirety with these proposals. There are various matters that have been raised and
24 need to be followed up in correspondence in relation to data availability. We don't
25 want this to drag on it's --

26 JUSTICE BACON: No. Why don't we just agree a time by which you'll send a revised

1 Redfern schedule. If it turns out that some of these aren't agreed or are partially
2 agreed you'll have to recolour them and put in your submissions and then the Tribunal
3 can determine that on the papers when settling the Order.

4 (Pause)

5 MR ARMITAGE: We'd be very content with that. We would suggest, just because
6 there is potentially a quite a bit of correspondence on these points, we wondered if
7 three weeks might be a --

8 JUSTICE BACON: Oh, well that's not going to be done when settling the order then
9 because --

10 MR ARMITAGE: Oh, sorry, I misheard you then --

11 JUSTICE BACON: No, no --

12 MR ARMITAGE: No, no, assuming you want to settle the Order promptly, I think that
13 would be too quick.

14 JUSTICE BACON: Yes, all right.

15 MR ARMITAGE: As I say, I do hope we can reach -- famous last words, but I wouldn't
16 expect you to have a whole bunch of disputed points to adjudicate on.

17 JUSTICE BACON: Yes. Mr Luckhurst, how long do you think is realistically required
18 to sort all of this out? Mr Armitage has suggested three weeks to come back to me.
19 That seems quite a generous amount of time, but it may be that there's lots behind
20 this that needs to go back and forth.

21 MR LUCKHURST: There's a sense that the ball's in Mr Armitage's court because
22 we've explained our current position and the Class Representative needs to come
23 back to us on what we've said. I can't necessarily second guess (inaudible) what they
24 need.

25 Insofar as there's a genuine dispute about what should be provided, what sort of
26 search should be done, there might have to be some detailed explanation on our side

1 as to actually technically what (inaudible).

2 JUSTICE BACON: Yes, but can I suggest -- I think three weeks is a little bit too
3 generous -- that by close of business on 9 October you provide the Tribunal with an
4 updated schedule and very brief submissions from both sides insofar as that's
5 necessary or just simply the updated schedule with your submissions in that schedule
6 and the Tribunal can make a decision on the papers.

7 MR ARMITAGE: I'm obliged.
8 I think that does complete the inter-partes disclosure agenda item.

9 JUSTICE BACON: Right. So then there's other class member disclosure, request 1.

10 MR ARMITAGE: I'm so sorry, that is no longer opposed, if you like, in a sense we're
11 happy for that to be requested of the other class members. I'm sorry if that hadn't
12 reached the Tribunal, I had told my learned friend yesterday.

13 JUSTICE BACON: No, no. I see, so that's no longer an issue.

14 MR ARMITAGE: That point is no longer an issue. The sample itself is agreed. The --

15 JUSTICE BACON: The wording of the letter to the class members. There are a few
16 tiny points in green at the back end. I've looked at this. I'm not sure that it's necessary
17 to include the wording in green.

18 MR ARMITAGE: Fine, I won't waste time now. I'll --

19 JUSTICE BACON: So you can delete that.

20 MR ARMITAGE: That I think is the only point -- it occurs in a number of places, but --

21 JUSTICE BACON: Yes, I don't think it's necessary.

22 MR ARMITAGE: Madam, unless you have any questions about the approach,
23 otherwise the approach to the categories and so on are agreed --

24 JUSTICE BACON: No.

25 MR ARMITAGE: We'll see where that process ends up.

26 JUSTICE BACON: All right.

1
2 (Draft Order)

3 (Submissions by MR SINGLA)

4 MR SINGLA: Can I just mention in the Draft Order, paragraph 7:

5 Parties have agreed there should be a hearing listed to address any matters which
6 may arise from the responses.

7 JUSTICE BACON: Yes. I wonder if that's necessary and whether we could simply try
8 to deal with that on the papers, not least because as matters currently stand I'm going
9 to be occupied a little bit over the next few months and listing a hearing in that period
10 is going to be very challenging. So do we need to --

11 MR SINGLA: Well, the difficulty is if it transpires a hearing is required, then making
12 arrangements for that to happen may not be straightforward given what you've just
13 said (inaudible) the deadlines (inaudible).

14 JUSTICE BACON: Yes, but at the moment it's just not straightforward to put any
15 hearing in my diary because at the moment, for the foreseeable future, I'm either sitting
16 or I've got other commitments. Already I have quite a lot of other commitments listed
17 on the non-sitting days in the trial I'm about to commence.

18 MR SINGLA: If we tend to deal with things on the papers then we'd gratefully accept
19 that in order to keep the process moving.

20 JUSTICE BACON: I think if it is absolutely necessary to have a hearing then I think
21 that you will just need to get in touch with the Tribunal and I will have to see what my
22 diary looks like at that point.

23 MR SINGLA: To be clear, I don't think we were envisaging a full day. I think it's a short
24 hearing.

25 JUSTICE BACON: Well, yes, but if I'm sitting -- and much of the timetable provides
26 for long sitting days, so before or after court is not going to be possible either.

1 MR SINGLA: I'm sorry to hear it, but, well could I just put --

2 JUSTICE BACON: As am I, but you know, needs must.

3 MR SINGLA: Well, needs must in this case as well. Can I just put down a marker that
4 if there is a problem we will be seeking a hearing because it's obviously very important
5 for the progress of this case that this is resolved (inaudible).

6 JUSTICE BACON: Absolutely. So I think if there's a problem, ask for a hearing.
7 Ultimately, if there does need to be an additional hearing and I'm not available, we will
8 look for somebody else to do it. As you know, Mr Malek does a lot of these types of
9 hearings, and there are other fee paid Tribunal members who can step in. That may
10 be necessary if I'm otherwise taken up in trial. Of course, the Tribunal will do its very
11 best to accommodate a hearing if that's required.

12 MR SINGLA: I'm very grateful. But it may be a request made at fairly short notice,
13 because if this process is to be effective I think we envisaged approaching the Tribunal
14 in the last week of October or the first week of November, just to make that clear.

15 JUSTICE BACON: Well, I mean, one lives in hope that big trials may miraculously fall
16 away, but at the moment I wouldn't be available around --

17 MR SINGLA: We live in hope that the other class members provide all the disclosure.

18 JUSTICE BACON: Yes. All right. So, just get in touch with the Tribunal and we'll
19 accommodate it, if that's necessary.

20 Does that leave, then, cost budgets? Does anyone want a short break or can we go
21 on?

22
23 (Costs)

24 (Submissions by MR ARMITAGE)

25 MR ARMITAGE: Depends how long do you think we need.

26 JUSTICE BACON: I'm hoping not very long.

1 MR ARMITAGE: There are two particular directions that we seek. Obviously you've
2 had an updated budget from the Class Representative, covering an updated figure for
3 incurred costs and an updated budget. We've had to seek further budget from the
4 Home Office. It's been instructed, a long process over the summer months, but we
5 have secured some additional budget. We've given an explanation of the various
6 factors. One of the factors is sitting next to me. I'm obviously happy to give you further
7 detail, but in terms of the directions we've asked for two directions in relation to
8 Motorola's budget, which you see at paragraph -- I'm so sorry, my Draft Order is in the
9 wrong order. Towards the end of the Draft Order, 31 and 32.

10 JUSTICE BACON: Yes. You're saying number of hours estimated. I've looked at
11 both of the budgets and on both sides, unless I've been looking at the wrong
12 documents, I don't see hourly rates for the relevant fee earners. Now, if those hourly
13 rates were inserted, then you can just, by reverse engineering, work out the number
14 of hours.

15 MR ARMITAGE: So there's two aspects. One is that we'd like to know their updated
16 incurred costs, which we provided and they haven't. That's the first point.
17 Then on the hourly rate, and I may be wrong about it. My understanding is the Tribunal
18 has versions of the parties' budgets showing the hours expected to be incurred in
19 relation to each phase by the solicitors. We don't have each other's equivalent
20 information. So we had proposed that we reciprocally agreed to show each other the
21 relevant information so that we can each understand. Because you'll have seen
22 there's a --

23 JUSTICE BACON: I see. So you just want a mutual show and tell.

24 MR ARMITAGE: You'll see there's a very big disparity between the budgets. We just
25 want to understand whether that's based on estimates of hours, whether it's based on
26 hourly rates, or what combination of the two. I think we only need one of the two

1 pieces of information.

2 JUSTICE BACON: You only need one of the two, obviously. Yes.

3 MR ARMITAGE: We're ambivalent as to which one. I think we thought it would be
4 a helpful provision.

5 JUSTICE BACON: All right. Mr Singla.

6
7 (Submissions by MR SINGLA)

8 MR SINGLA: Can I just say something general about this? Because the background
9 to this whole issue about costs is, in fact, what you said post certification about the
10 CR's cost. You'll remember the issue in terms of the overspend on the certification
11 phase of the budget. And you have said in this case, and it's more widely of concern
12 to the Tribunal, the way in which Class Representatives are conducting themselves
13 and so on.

14 JUSTICE BACON: Yes.

15 MR SINGLA: So the backdrop to this is actually a concern expressed about the way
16 they were handling these proceedings. What you said at the last --

17 JUSTICE BACON: I mean, not really, because actually across the board we are now
18 asking for cost budgets on both sides. It's fair to say that there are concerns on both
19 sides, and Class Representatives frequently come to the Tribunal and say that
20 Defendants are overspending. So I think, whatever the motivations, we have asked
21 for cost budgets on both sides. There is a general question, then, as to what we do
22 with them. Is there any reason why it's not appropriate or possible to disclose either
23 the hourly rates or the numbers of hours, because --

24 MR SINGLA: Can I just take this in stages? Because having gone back to the
25 transcript of the last CMC in this case, what you were concerned about was being able
26 to scrutinise the Class Representative's budget and having some visibility from our

1 side in order for you to conduct that analysis. So we have provided a budget. We're
2 content to provide --

3 JUSTICE BACON: Mr Singla, this is not all about the Class Representative. It's about
4 the costs on both sides.

5 MR SINGLA: I understand.

6 JUSTICE BACON: So let's just draw a line under what you may or may not read into
7 the last transcript. Going forward, the Tribunal wants to see cost budgets on both
8 sides regularly updated.

9 MR SINGLA: I understand. We have said to the Tribunal that our budget remains
10 materially the same as the version that we provided earlier in the year. So there's no
11 issue about the budget. We're also content to provide the incurred cost figure by
12 1 October in writing. So that's paragraph 31. But our issue in relation to both of these
13 points -- we're content to accept 31, just to cut through this -- but 32 does, in my
14 respectful submission, raise a concern that where this is heading is effectively cost
15 management through the back door. Now, if one were to apply cost management or
16 suggest applying cost management in a formal sense, then we would have quite a lot
17 to say about that because of the way in which --

18 JUSTICE BACON: That's not been asked.

19 MR SINGLA: No, it hasn't been asked.

20 JUSTICE BACON: At the moment they just need to know on what basis your
21 proposals are put forward. Also it is important, because of the issue that has come up
22 in some cases regarding the ultimate costs that are due to be paid and the visibility of
23 those throughout the course of the proceedings. Because if they are already having
24 to go to the Home Office to ask for further funding, there may be a question in future
25 as to whether that's appropriate and necessary, and whether they've got sufficient
26 funding in place. That debate can only be had against some consideration of the

1 reasonableness of the cost budgets on both sides.

2 MR SINGLA: In my respectful submission, if one takes this in stages, there are two
3 issues that one could conceivably be concerned about in respect of our costs.

4 One is the point that I think you've just alluded to. The Home Office has provided an
5 indemnity of 20 million, and we have said in terms, quite a long time ago in
6 correspondence, that we will notify the Class Representative if and when our total
7 incurred costs, I think, reach 18 million. So there's no issue in terms of the Class
8 Representative being taken by surprise, having to approach the Home Office for
9 additional funding and so on. So to that extent, any concern has been dealt with.

10 The second concern that could theoretically arise is whether the Defendant is incurring
11 an unreasonable amount of costs. If that is the concern, in my respectful submission,
12 the way to deal with that is for the Tribunal, on assessment at the end of the
13 proceedings, to say whether or not costs have been reasonably or unreasonably
14 incurred.

15 JUSTICE BACON: That is, I'm afraid, a ship that has sailed, because we are not
16 proceeding on that basis in every case. The idea behind asking for costs budgets is
17 to enable some consideration of more active cost management during the
18 proceedings, without any suggestion at this stage as to what that might be. We can't
19 do that until there is proper visibility as to the basis on which the costs are suggested
20 to be incurred. This is not a debate for today. The question for today is simply whether
21 you are going to resist providing the information. At the moment I haven't heard
22 a reason why that's confidential in some way.

23 MR SINGLA: Well, I think I've just made my point, which is we resist this because of
24 where it ultimately ends up. I think, Madam, what you've said effectively confirms that
25 where this ultimately ends up is essentially cost management light.

26 JUSTICE BACON: No, it's not saying that's where it will end up, it's that we can't even

1 consider whether that's appropriate without both sides having proper information.

2 MR SINGLA: But we have provided, along with our budgets -- so we've given a budget
3 back in April. We've updated or confirmed no material updates are required recently.
4 And if one looks at the budget that we've provided, there are very detailed assumptions
5 underlying that budget, and I might add much more detail in the assumptions than the
6 Class Representative herself has provided.

7 JUSTICE BACON: Well, if you want more information from the Class Representative,
8 you can ask for it.

9 MR SINGLA: But we don't, because we are against the idea. In a case worth
10 hundreds of millions, we are against the idea of cost management, in a world where
11 there can be no suggestion that there's anything unreasonable going on at the
12 moment. What they're saying is, effectively, they want cost management to apply.
13 There's just no way around that.

14 JUSTICE BACON: They're saying they want to consider whether they are going to
15 apply for anything. Of course, I can't say now what the decision would be. They may
16 well apply for something and we may refuse that request.

17 MR SINGLA: But they have our budget. If what is going on is that they want to
18 consider whether to apply for a formal order that cost management should apply then,
19 in my respectful submission, they have enough material currently on which to make
20 that decision. They will have an incurred cost figure as at 1 October. So they'll have
21 incurred costs. They'll have a very detailed budget. In my submission, that is
22 adequate for them to decide whether to follow through with an application.

23 If there is going to be an application for formal cost management, that will be resisted,
24 and that will require some detailed submissions on that point. So in my submission,
25 it's actually putting the cart before the horse to give them this information, which they
26 would only be entitled to if we were going down the cost management route.

1 JUSTICE BACON: I'm just, at the moment, mystified as to why there is some great
2 secrecy about the number of hours, which obviously you have calculated. It's not
3 something that you don't know. You have based your cost budget on something and
4 they're just asking for the underlying assumption.

5 MR SINGLA: There's no great secrecy. But one has to ask oneself why do they want
6 it and why do they need it? And my submission, I think the only utility in this
7 information is that they're going to apply for cost management. If that's the application,
8 they should bring it on.

9 JUSTICE BACON: All right.

10 (Order)

11 I am going to order that the information at paragraphs 31 and 32 be provided. It is not
12 for today as to what we do with that information, that is another question.

13 MR SINGLA: That takes us to AOB.

14
15 (AOB)

16 JUSTICE BACON: That takes us to AOB. All right. So first of all, updated
17 confidentiality protocol. Could an updated confidentiality protocol be filed? And could
18 there be a direction for that in the order? I'll leave you to agree when would be
19 appropriate. Sometime soon. And could that please deal with third party
20 confidentiality, on the assumption that there probably is some?

21 MR ARMITAGE: Yes, absolutely, yes. We see good sense in that.

22 JUSTICE BACON: Could an agreed glossary be filed reasonably quickly so that we
23 can use it for all further hearings and then you can just keep that updated on a rolling
24 basis?

25 MR ARMITAGE: It would be an odd one to resist, Madam, we're very happy with that.

26 JUSTICE BACON: And then you can all now stop defining everything in every single

1 document, because once it's in the glossary, it's there.

2 MR ARMITAGE: That would give me great pleasure.

3 JUSTICE BACON: Yes. Trial 2 date.

4 MR ARMITAGE: Yes --

5 JUSTICE BACON: Any thoughts on that?

6 MR ARMITAGE: We're very attracted to having something in the diary.

7 JUSTICE BACON: Yes.

8 MR ARMITAGE: This has not been discussed with my learned friend and we haven't

9 thought about the precise practicalities, and maybe we need to take those away, but

10 we had in mind something like a year after the first trial might be appropriate, obviously

11 allowing time for judgments. But that's a very provisional suggestion.

12 JUSTICE BACON: So that would be 20 ...

13 MR ARMITAGE: Sorry, I appreciate that.

14 JUSTICE BACON: That puts us into the point at which we're already overbooked in

15 the Tribunal. If it's the autumn of 2028, we're very busy then.

16 January -- let me take that away, but I think that it would probably need to be no earlier

17 than January 2029; is that --

18 MR SINGLA: Well, leaving aside the lack of courtroom space, I think we also see that

19 as being a number of steps that would need to be completed after you give judgment

20 in trial 1.

21 It's not as straightforward as going straight to trial 2, because let's say the judgment

22 comes out in the early part of 2028 --

23 JUSTICE BACON: Yes.

24 MR SINGLA: One then needs to go through a process of identifying the class

25 members who will be relevant to the pass on trial, and may or may not be the same

26 as the ones giving disclosure.

1 MR ARMITAGE: So even irrespective of the Tribunal's --

2 MR SINGLA: Exactly.

3 JUSTICE BACON: -- logistical difficulties, do you think January 2029 is more realistic?

4 MR SINGLA: Well, no, I think beyond January 2029, because one then has to go
5 down the route of identifying the class members. They will have to provide disclosure.
6 They will have to provide factual witness statements. There will need to be expert
7 reports on pass on. I think you indicated previously it would be a two week trial, and
8 looking at this now, there's a huge amount of uncertainty as to how long we'll be
9 required for each of those steps.

10 JUSTICE BACON: Well, can I leave it at with this thought: perhaps the two of you
11 could discuss offline, and come back with your proposals in the Draft Order. This
12 should be a relatively short discussion at this point. We can have a provisional listing,
13 to be updated once we've had trial 1. Because that still leaves us -- I mean, if it's
14 January 2029, at the point of trial 1, it'll be more than a year away. You're saying it
15 shouldn't be January 2029 now, but I think just getting something provisionally in the
16 diary will help us with our logistical planning.

17 Put it in the Draft Order. If you can't agree a date, then put some alternative dates and
18 reasons for that.

19 MR SINGLA: Yes.

20 JUSTICE BACON: All right. One more AOB, and I'm sorry. I should have raised this
21 before. Would it be helpful for the Tribunal to make any provision for, or
22 encouragement or directions, regarding mediation? It seems to me that the Tribunal
23 should be doing as much as it can to encourage the parties to try and settle out of
24 court if that's possible.

25 There are experienced competition mediators, as you probably know, including my
26 direct predecessor, Sir Peter Roth. Is there any consideration of that, and is there any

1 order or directions that we can make that would facilitate or encourage mediation that
2 you would suggest to be included?

3 MR SINGLA: (Inaudible).

4 JUSTICE BACON: You will need to be -- all right. Can you deal with that in the Draft
5 Order? Because if you do think that it would be helpful to for us to include something,
6 then we would certainly want to facilitate that as much as possible. I'm not suggesting
7 that that should involve any change in the timetable, obviously, but if there is
8 something that you think that we should or could usefully include, then we would like
9 to consider that.

10 MR SINGLA: Just give me one moment.

11 JUSTICE BACON: Yes.

12 MR SINGLA: We prefer just to deal with this in writing after the -- but we're very
13 grateful.

14 JUSTICE BACON: All right. I'm aware I've just sprung that on you. I wasn't expecting
15 an immediate answer, but could you consider that.

16 Can we then just deal with when we're going to get a Draft Order. Unless, is there any
17 other AOB first, I should ask?

18 MR SINGLA: Not that I'm aware of.

19 JUSTICE BACON: No. Oh, yes. I'm sorry. There's one. Yes, one. One more AOB,
20 which is: do we have a date for the next CMC? Do you want to put a date for the
21 next -- I mean, obviously there may be further hearings on points like disclosure, but
22 do you want to list the CMC next?

23 MR ARMITAGE: There's no provision for that in the draft I reckon. I think we'd
24 envisaged that the hearing that we were discussing earlier might deal with issues
25 arising out of both inter-party disclosure and class 1 disclosure, and that maybe would
26 take place a little later. I don't think we're suggesting a further intervening CMC. I'll

1 | just turn round to see if that's right.

2 | Yes, I don't think we're at the moment suggesting that.

3 | JUSTICE BACON: All right, do you want us to put a CMC provisionally in the diary at

4 | an appropriate time when there might be further issues to be discussed? That would

5 | probably need to be in the early part of next year.

6 | MR SINGLA: We don't see the need for that at this stage.

7 | JUSTICE BACON: You don't?

8 | MR SINGLA: As and when issues arise, we can obviously --

9 | JUSTICE BACON: All right, okay. So then Draft Order. I'm aware there are a few

10 | points that you need to discuss between you. What about if you provide the Tribunal

11 | with a draft by close of business on Monday? (Pause)

12 | And please, if there are issues that need to be resolved, simply mark those up in

13 | comment boxes and the Tribunal will resolve them, rather than having protracted

14 | further correspondence between you to try and debate them. Obviously, it'd be good

15 | if you can agree as much as possible. But as I've already indicated, there may be

16 | various points that we need to resolve.

17 | MR ARMITAGE: Close of business on Monday sounds very sensible to us.

18 | JUSTICE BACON: Yes. Mr Singla, does that work for you?

19 | MR SINGLA: Yes (inaudible).

20 | JUSTICE BACON: Yes, all right. Thank you very much to the four of you and, and all

21 | those behind you. Fortunately we have finished before the end of the day, so that was

22 | very efficient, thank you.

23 | (3.43 pm)

24 | (The hearing adjourned)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?