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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1280/3/3/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Tuesday, 12 June 2018

Before:

THE HON MR JUSTICE MANN

(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) VIASAT UK LTD

(2) VIASAT INC

Appellants

- and -

THE OFFICE OF COMMUNICATIONS ('OFCOM')

Respondent

- supported by -

INMARSAT VENTURES LIMITED

Intervener

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PRE-TRIAL REVIEW HEARING (IN PUBLIC)

APPEARANCES

Mr Michael Bowsher QC, Miss Fiona Banks and Miss Khatija Hafesji (instructed by Latham & Watkins) appeared on behalf of the Appellants.

Mr Josh Holmes QC (instructed by Ofcom) appeared on behalf of the Respondents.

Mr Tim Ward QC and Miss Anneli Howard (instructed by Jones Day) appeared on behalf of the Intervener.

1 THE CHAIRMAN: Yes. Who is going to open this? The appellant, probably. Yes, Mr
2 Bowsher.

3 MR BOWSHER: (Inaudible) for the appellants----

4 THE CHAIRMAN: Just give me a moment to sort my -- orientate myself amongst my
5 documents. (After a pause). Yes.

6 MR BOWSHER: My Lord, I appear today for the appellant with Fiona Banks and Khatija
7 Hafesji and my learned friend Mr Holmes QC appears for Ofcom on his own, and my
8 learned friends Tim----

9 THE CHAIRMAN: Mr Holmes is not supported by----

10 MR BOWSHER: Not today. Supported no doubt from somewhere else----

11 THE CHAIRMAN: Remotely, yes.

12 MR BOWSHER: -- remotely. Tim Ward and Anneli Howard for Inmarsat, the intervening party.
13 You have got three submissions, one submission from each of us, from which it should be,
14 I hope, should be apparent that there is really one live contentious issue, namely the
15 admission of Mr Janka to the ring. There are then some important mechanical issues to be
16 discussed, but they are -- as between us they are agreed, but they are to be raised with the
17 Tribunal.

18 In terms of other documents, the only other documents I think you will -- that may have
19 been handed up are three copies of documents which have been recently produced by
20 Inmarsat in a less redacted form than they were previously available. Two of them are
21 elsewhere in the bundle but more redacted, and one is referred to in the authorisation
22 decision but is not actually anywhere else in the -- I do not think is anywhere else in the file.
23 And the purpose of them is that they reveal some matters which are pertinent to Mr Janka's
24 position in the ring, we say, and I will come onto those in due course.

25 THE CHAIRMAN: They were handed to me but without any indication as to what their
26 significance was, and they seemed to me to be rather detailed documents. But anyway----

27 MR BOWSHER: They are.

28 THE CHAIRMAN: All will become clear, will it?

29 MR BOWSHER: I will explain what they are, but they are documents in the ring and therefore
30 I will be a little bit vague about some of the detail of those documents.

31 THE CHAIRMAN: Well, Mr Bowsher, I think one of the things that may have to happen in this
32 case is that we may have to confine this hearing to those within the ring, because I think in
33 order to decide what I am going to call "the Janka point", if you will forgive us for dropping
34 the "Mr" for the these purposes, is that I will want to have a better understanding than

1 I have at the moment -- which actually can fairly be described as some understanding,
2 because I have very little -- as to what the sensitive confidential stuff is. I have looked
3 only -- for these purposes, I have looked only at the appeal notice, or whatever it is called in
4 this Tribunal, and I assume that the yellow highlighting that I have in my copy is redacted,
5 and that is the confidential stuff.

6 I must say, I am unimpressed about the deep confidentiality of most of it, but I do not think
7 I can say the decide the Janka point again, as it were, or as somebody would say no doubt
8 for the first time, without actually having a better understanding of what is said to be so
9 confidential. And that may involve excluding, I would imagine, a number of people from
10 the room in order to do that, because for once I do not think we can do that by oblique
11 references. But we may have to come to that.

12 MR BOWSHER: We will come to that. I can explain----

13 THE CHAIRMAN: I say that in the context of what you just said, because you said you were
14 going to touch lightly upon it. Well, you may have an opportunity to touch more deeply
15 upon it if we have -- when we come to that particular aspect of the case.

16 MR BOWSHER: Well, we will see how we go. I mean, I am not -- so I propose to, therefore, we
17 get -- we start off with the, as your Lordship refers to it, Janka point first----

18 THE CHAIRMAN: Yes.

19 MR BOWSHER: -- and then deal with the remaining.

20 THE CHAIRMAN: So we have got the Janka point. The Sharkey point has gone away.

21 MR BOWSHER: The Sharkey point has gone way.

22 THE CHAIRMAN: Right. So the only contentious point basically is the Janka point.

23 MR BOWSHER: Yes.

24 THE CHAIRMAN: Then we have your particular points that you want to raise with me, and
25 I have got some relatively minor but nevertheless significant points that I shall want to raise
26 with you for steering this case through. So we will come onto those. So let us deal with the
27 Janka point.

28 MR BOWSHER: (After a pause). Sorry, my Lord. You will recall from the previous outing of
29 this point, the substance of the point. Previously we had, as it were, a three-pronged
30 application for substantial further disclosure -- well, for further disclosure or for
31 un-redaction of certain documents; for the admission of Mr Janka of Latham and Watkins
32 and one lawyer from the client, Mr Colin Ward, into the ring.

33 The first tranche has been effectively settled between the parties in the last few weeks, and
34 we have reached sort of an agreed view as to what should or should not be produced. That

1 has produced a number of further documents, or at least a number of -- and a number of
2 further un-redactions, if I can put it that way.

3 THE CHAIRMAN: Yes.

4 MR BOWSHER: So more is now -- significantly more is now revealed.

5 THE CHAIRMAN: Can I just ask on that, more is revealed: is it now the case that that which is
6 not revealed, even into the confidentiality ring, is that which is said to be irrelevant?

7 MR BOWSHER: I am not sure I---

8 THE CHAIRMAN: I thought I had picked that up from something that I have read.

9 MR WARD: Sir, yes, irrelevant, and also confidential. We have not redacted stuff that is
10 irrelevant just for the sake of it.

11 THE CHAIRMAN: Right.

12 MR WARD: Irrelevant in all cases.

13 THE CHAIRMAN: That is what I thought.

14 MR BOWSHER: There we are. That is very helpful. So, and the particular -- I will come onto it,
15 sorry -- and then Mr Ward's position we have not, we are not pursuing today the application
16 with regard to Mr Ward.

17 THE CHAIRMAN: Yes.

18 MR BOWSHER: So the position is that we, today, we are applying only to bring into the ring
19 a partner of the firm that is instructed by Viasat, that is representing Viasat here today. So
20 a lawyer, an independent lawyer in private practice, part of the firm that is the relevant -- in
21 effect the relevant advisors as defined in the ring. Indeed, I think on one reading of the
22 confidentiality order one might say that Mr Janka was already covered, but we have taken it
23 at that -- the most recent order did not seem to us to perhaps by inadvertence to have
24 brought him in, but we have not acted on -- we have not taken that as being what was
25 intended.

26 THE CHAIRMAN: So at the moment in the ring there is you and your junior.

27 MR BOWSHER: I and both my juniors.

28 THE CHAIRMAN: Sorry, both your juniors----

29 MR BOWSHER: Yes, indeed.

30 THE CHAIRMAN: -- hiding behind the box there.

31 MR BOWSHER: Indeed; and Mr Colahan and Miss Luchian.

32 THE CHAIRMAN: And Miss?

33 MR BOWSHER: Luchian.

34 THE CHAIRMAN: Spelt?

1 MR BOWSHER: L-U-C-H-I-A-N.
2 THE CHAIRMAN: Right.
3 MR BOWSHER: And Dr Webb, I am sorry.
4 THE CHAIRMAN: Dr Webb is your witness?
5 MR BOWSHER: Our expert witness, yes.
6 THE CHAIRMAN: Right.
7 MR BOWSHER: And the -- I will come onto the detail of this in due course, but the focus of our
8 application regarding Mr Janka is twofold: we reiterate and renew our point that, as a matter
9 of principle, Mr Janka, as part of the law firm instructed by Viasat, should be entitled to see
10 this material. He is the best, the best qualified within the firm, to be able to understand and
11 analyse the sum of the material. And, therefore, as a matter of principle, in order to enable
12 my client to see its rights to a fair hearing being given full force, he ought to be entitled to
13 see this material.
14 In particular, though, there are some aspects of the case which have -- they were significant
15 parts of the authorisation decision, and some of the detail that underlies that, has now been
16 revealed in considerably more detail as a result of the recent disclosure. And I was not
17 proposing to go through all of these points today, but the three documents that we have
18 handed up are a useful illustration of the general nature of the point, that there are points
19 which are of a more commercial nature than a technical nature, if I can put it that way, and
20 therefore falling outside the core scope of expertise of our expert, but very much within the
21 experience of Mr Janka.
22 And this was part of the Ofcom decision, and the analysis of that is -- light is shed on that
23 analysis from a number of the documents which we are now only able to see sufficiently to
24 see what is going on. So again, so there is a point of principle and a point of practicality
25 why we say Mr Janka should now be in the ring.
26 THE CHAIRMAN: What is the principle as to which you say there is a point, as opposed to
27 a -- well, what is the principle? I cannot myself underline what the principle is.
28 MR BOWSHER: Well, the principle, in short, is that the -- a client -- that any restriction on
29 knowledge of what is going on in a hearing ought to be tightly restricted and justified by
30 that party seeking to make that justification. That is the principle which your Lordship set
31 out in the confidentiality ruling. The burden is on Inmarsat to show why there should be
32 limitations, not upon us. In this -- by making----
33 THE CHAIRMAN: So what you really mean is that they have not fulfilled the requirements for
34 the principle in relation to Mr Janka.

1 MR BOWSHER: Exactly. And we are not talking -- I mean, we are not asking for Mr Ward
2 today and I am not going to -- you know, whether we would or would not there is no point
3 in getting into the, you know, whether or not the principle would or would not go further to
4 encompass him or not. In our submission, as a matter of principle, he is the person. If he
5 can see the material, then the client will have the reassurance that their telecommunications
6 law expert worldwide has seen the material, and if there is a point to be made that it will
7 have been made.

8 Now -- and I should make the further point which picks up a point your Lordship has
9 already made, that in seeking to make out the case for this restriction Inmarsat does not
10 come before you saying, "Look at these documents, look at this particularly confidential
11 material, look at this particular document which includes a price or proprietary know-how,"
12 the sort of typical confidential material. What we are talking about is mostly marketing
13 material and it is material in which Inmarsat is telling the market, or others in the market,
14 how it proposes to roll out the EAN product.

15 THE CHAIRMAN: Well, that is my point: that I really need to understand what this material is.

16 MR BOWSHER: I will come onto that.

17 THE CHAIRMAN: Right.

18 MR BOWSHER: And so for today's purposes we will -- we accept that it is at least to some
19 degree sensitive, but -- and that clearly they do not want Viasat, the whole of Viasat, to see
20 this material. We have not explored, for example, in detail the terms in which this material
21 has been put into -- has been given to others and what the technical status is of it in terms of
22 has it been put into the public domain or not. We have accepted that it is sensitive material
23 which Inmarsat does not want to be more broadly published than it is publishing amongst,
24 presumably, a select group of customers -- presumably airlines and other regulatory bodies,
25 and how it does that. We have not examined all of that detail.

26 Our short point is: they do not make out a case that this is price information which is
27 inherently confidential and is kept within Inmarsat or its proprietary know-how or whatever;
28 and, having failed to do that, we say as a matter of principle there really is not, when one
29 comes to balance the matter, there is not any sound reason for keeping Mr Janka out of the
30 ring.

31 THE CHAIRMAN: I do not understand the point you have just made. You say you are accepting
32 that there is a degree of sensitivity.

33 MR BOWSHER: I accept they are sensitive, but I am not----

1 THE CHAIRMAN: But then do not you seem to go on to say but you do not accept they are
2 confidential?

3 MR BOWSHER: They have not set out in my submission satisfactorily that they are confidential,
4 that there is confidential material in it that ought to be protected in this way from Mr Janka.

5 THE CHAIRMAN: I see. So you accept it is to a degree confidential but not to a degree which
6 requires Mr Janka to be outside the ring. Is that the way you put your case---- (inaudible).

7 MR BOWSHER: (Overspeaking) That is the way we put our case -- well, there is an element of
8 compromise in the position that we have reached, and in our -- as a matter of principle we
9 say they have not established the confidentiality of this material.

10 THE CHAIRMAN: You do say that?

11 MR BOWSHER: We do say that.

12 THE CHAIRMAN: I thought you said you were not saying that?

13 MR BOWSHER: Sorry, I said they were sensitive but not confidential. And in my submission
14 they are have not established its confidentiality. They say it is sensitive; we accept that it is
15 sensitive material. For the purposes of----

16 THE CHAIRMAN: So what do you mean by “sensitive”?

17 MR BOWSHER: Commercially sensitive.

18 THE CHAIRMAN: Well, that usually means to a degree confidential.

19 MR BOWSHER: Well, but perhaps not if put out in the public domain. I mean, again----

20 THE CHAIRMAN: (Inaudible). Do you mean -- well, let me see if I can help you,
21 Mr Bowsher -- do you mean confidential but not very?

22 MR BOWSHER: Probab-- yes. I mean, that is a fair, that would be a fair summary. I mean, it is
23 not the typical material, it is not the typical material that is kept tightly within
24 a confidentiality ring such as pricing, proprietary information and so on and so forth. The
25 nature of the confidentiality is not fully made out by Inmarsat. For today’s purposes we
26 accept that it has some degree of -- I call it sensitive rather than confidential, because of
27 course there is a black-and-white element to something being confidential or not, and I was
28 not proposing to test today’s position on whether or not it is or is not confidential----

29 THE CHAIRMAN: Well, which side of the line should I regard it as falling then?

30 MR BOWSHER: Sensitive but not confidential. Not----

31 THE CHAIRMAN: Where is that on the line? I mean, you say it is a black-and-white thing
32 whether something is confidential or not. I suppose, I suppose that is right. But, you know,
33 confidential to whom may be another question. But if one assumes that there is that black

1 and white, and if you assume that confidential is black and non-confidential is white, where
2 does this -- is this information black or is it white?

3 MR BOWSHER: It is material----

4 THE CHAIRMAN: Is it dark grey?

5 MR BOWSHER: It is material that we accept the Tribunal may wish to protect from broader
6 publication than has already been made. And it is -- we do not know the detail of who has
7 seen this material. We know it has been seen by -- must have been seen by some regulatory
8 authorities; it must have been seen by one or more airlines, some of it; and it may be
9 different for different documents.

10 THE CHAIRMAN: Yes, I can see that.

11 MR BOWSHER: And rather than burden this hearing with a sort of precise characterisation, what
12 we are -- or as to each document -- what we are saying is we accept that this contains
13 material which is commercially sensitive of a type which the Tribunal might wish to
14 protect. If it were not that, we would not be -- we would be obviously asking for full
15 disclosure to Mr Ward and everyone. But it is not, when one comes to look at it, the sort of
16 material which one would regard as kept -- it is not the price proprietary information sort of
17 material that one typically sees in these----

18 THE CHAIRMAN: So my formulation is probably right: confidential, technically confidential,
19 but not very.

20 MR BOWSHER: That is probably a fair summary. Whether----

21 THE CHAIRMAN: I am not sure how that feeds through into a legal classification.

22 MR BOWSHER: Well, I was going to say, I am not sure what the legal meaning of that is, but it
23 is a fair practical description.

24 THE CHAIRMAN: Right. Well, the legal meaning may fall to be tested. We will see.

25 MR BOWSHER: The evidence of----

26 THE CHAIRMAN: Mr Bowsher, I think I indicated earlier in this debate that I wanted to
27 understand the nature of the information and the nature of the confidentiality. You know
28 what the material is; I only know what the material is said to be from looking at the Ofcom
29 decision, which is basically what I looked at for these purposes.
30 I would like to have, before we go any further, a clearer view as to what the information is
31 so I can put your submissions about its quality in some sort of real context. I think I sort of
32 know what you are saying, but I am not sure it is going to be very helpful in reaching
33 a decision because it is either confidential or it is not. And I think you are saying, well,

1 actually you accept there is a degree of confidentiality but not enough to exclude Mr Janka,
2 and that may be a decision on the facts.

3 I would like to understand, have a better understanding of the nature of the information, and
4 I think the convenient course would be, rather than for you to guess what Mr Ward's best
5 point is, for me to understand from Mr Ward what his -- for him to give me some instances,
6 and perhaps his best instances, of the things which Mr Janka really should not see. I am not
7 going to invite Mr Ward to make all his submissions on the point, but I think it would be
8 better if I ask him to do that, rather than you illustrating your case with some instances
9 which may not be the best instances and then having to revisit them in reply.

10 So I think if you would like to take your seat for the moment, I will just ask Mr Ward to do
11 that. I will confine Mr Ward just to illustrating, as it were, some of his best points, and then
12 you can resume.

13 MR BOWSHER: Okay.

14 MR WARD: Sir, yes, thank you. Well, we take as our illustration inspiration from Mr Bowsher's
15 skeleton, because you will have seen, Sir, that we note that Mr Janka's admission to the ring
16 is sought for all purposes, rather than by reference to a specific document, and that it was
17 not said that there was some particular subset of the documents that he particularly needed
18 to see. Now, I am mindful you do not want me to develop my submissions now, but the
19 only clue as to what he wanted to see that we could discern was in Viasat's skeleton
20 argument.

21 THE CHAIRMAN: Well, I do not want to go down that route as to when----

22 MR WARD: Well----

23 THE CHAIRMAN: No, no, I do not want to go down the route as to what Mr Bowsher says
24 and/or Mr Janka or his side say they want to see. You have sought to withhold certain
25 information----

26 MR WARD: Well, Sir----

27 THE CHAIRMAN: -- from the other side. I want to understand what it is. Now, I have looked at
28 the -- as I have said before, and this will be our starting point -- I have looked at the Ofcom
29 decision and I have looked at what is highlighted and with I think probably one exception I
30 am not particularly impressed with any degree of confidentiality for any of it, and I am
31 surprised at it. So I -- but I fully anticipate that -- I was going to say buried, but that is
32 a slightly pejorative term -- that tucked away elsewhere there is some rather more
33 impressive stuff.

34 MR WARD: Well, I was going to show you----

1 THE CHAIRMAN: So perhaps you would like to give me your most impressive stuff?

2 MR WARD: Yes, Sir, that is what I would like to do.

3 THE CHAIRMAN: Right.

4 MR WARD: This is a confidential document. May I hand it up?

5 THE CHAIRMAN: Yes, well I think it would be useful if we did this, and could have a freer
6 discussion, and so for once, and contrary to my constant judicial instincts, I am going to ask
7 anybody who is outside the ring to leave the room while you are illustrating this, on the
8 assumption that this is your best case and you would not want this to go further.

9 MR WARD: Correct.

10 THE CHAIRMAN: Does anybody want to make any submissions before I take that course?

11 (After a pause). Right, so perhaps I can invite those of you who are not in the ring who
12 should not be seeing this, any of you -- just one, is that right? Two -- to leave the room.
13 But do not go far, because you will be invited back in in due course. So this hearing should
14 be treated as being conducted in private while I am doing this part of the exercise, and any
15 transcript should be marked as such.

16 (For proceedings in private, see separate transcript)

17 MR BOWSHER: My learned friend's latest intervention does perhaps demonstrate the rather *ad*
18 *hominem* nature of this application of the resistance by Inmarsat, because, in my
19 submission, it just does not make sense. We are putting forward -- I mean, I am not sure
20 whether Mr Ward is saying that it would be fine if we asked our client but not Mr Janka
21 about these matters. Plainly our client will have seen from -- has seen from the unredacted
22 material the sorts of issues which are covered. I mean, there is no illusion that what we are
23 talking about here publicly is -- and it is in all the public documents -- is satellite terminals;
24 what is really going to be installed; what is really being sold. The nature of the questions is
25 not in doubt; it is the technical detail that is being withheld.

26 Our client has taken the choice that it is happy for Mr Janka to act as its proxy in deference
27 to the commercial sensitivities of Inmarsat. Mr Janka is a practising lawyer. In his first
28 witness statement he set out in detail his regulatory -- the regulatory controls upon him: he
29 is a member of the District of Columbia Bar. I take it as read that he is no more -- he is no
30 less thoroughly regulated than would be a member of the English Bar or whatever. Both
31 Inmarsat and Viasat are represented here by United States-based law firms. If it were felt
32 that something, that there was a concern to be taken up with his regulatory body, I have no
33 doubt that there is an ability on the part of Inmarsat to do that.

1 So he is, in my submission, there is no question but that a regulated lawyer subject to
2 professional obligations is, in a way, the best person to be subjected to this sort of control
3 under a confidentiality club. He is unusual as lawyers go in having particular experience.
4 That is set out in bundle E in his second witness statement. It is at tab 4. He covers his
5 professional experience and expertise over a number of pages from paragraphs 5 to the end.
6 I would particularly draw attention to paragraph 7.

7 THE CHAIRMAN: Sorry, of his second?

8 MR BOWSHER: Second witness statement.

9 THE CHAIRMAN: Second witness statement.

10 MR BOWSHER: File E.

11 THE CHAIRMAN: It is somewhere else. It would have been helpful to have had an application
12 bundle, I must say, rather than relying on documents scattered across a number of files,
13 most of which we are not going to look at. Right, I have got his second witness statement.

14 MR BOWSHER: Second witness statement at tab 4. There is some introductory material.

15 THE CHAIRMAN: Yes.

16 MR BOWSHER: Unless it is controversial, I was not going to go back to his first witness
17 statement which sets out all the regulatory background.

18 THE CHAIRMAN: Yes. I have read it.

19 MR BOWSHER: His second witness statement, so 5 he covers a number of areas of experience.
20 I was not going to read it all out, but for example (d), (e), (f) and (g) would be particularly
21 relevant. And particularly, if I can go on to paragraph 7, he says, after going through
22 various activities he has been involved in over the last 30 years, he starts eight lines down:

23 “As a result, I have developed an understanding of the technical operation
24 of satellites and terrestrial radiocommunication networks (including
25 satellite terminals and terrestrial base stations); the way in which they are
26 commercially used; the pieces of equipment that are necessary to transmit,
27 receive, and decode radiocommunication signals and provide actual
28 services; how that equipment operates; and also the characteristics of
29 radiocommunication signals.”

30 And then he goes on to other aspects of his advice and his preeminent position in the
31 telecommunications legal regulatory world, and also the satellite world.

32 THE CHAIRMAN: Does not some of that create a problem for you, in that he sets out his
33 expertise -- which I do not challenge for a moment -- and shows what a widely respected
34 and widely instructed and good chap that he is; but that just means it may be more likely,

1 does it not, that he brings into play, subconsciously maybe in some cases, what he has learnt
2 from this case in acting maybe for other clients?

3 MR BOWSHER: Well, with respect, I mean that is true of all lawyers. We all suffer from that
4 situation if we are----

5 THE CHAIRMAN: But usually it is all right to do so. I mean, you may in due course become
6 an expert in this area and you will bring into play some of your expertise. But I suppose it
7 would be a danger which applies to you as well, but it is capable of creating conflicts for
8 him, is it not?

9 MR BOWSHER: It is. But the issue, the core issue here, is around the installation on -- sorry, we
10 are in public again.

11 THE CHAIRMAN: I am sure you can express things obliquely.

12 MR BOWSHER: Yes, the core issue -- I just wanted to stop what I was about to say -- is the
13 installation of equipment on a -- specific equipment on a specific aircraft of specific entities.
14 As your Lordship has already identified, most of that material is in fact, if not historic, it is
15 not current material; it is about what was intended, what was being said and what was being
16 done immediately after the authorisation decision.

17 Yes, it may be interesting for all of us to know what a particular airline was or was not
18 doing, or was or was not been incentivised to do in 2014, 2015, 2016, but that is the sort of
19 information which, with respect, goes stale very quickly and is not going to be capable of
20 reuse. And in any event, a responsible lawyer, that is part of our job doing these sorts of
21 cases is to know that you do not share that material. I mean, it is just a fact that you -- going
22 back to the old when we had more roofing cartels cases than were good for us, some of us
23 after a while began to know the going rate for a roofing contractor in different parts of the
24 country. Not very good, not very healthy information to have, perhaps. We had the good
25 sense not to go around telling people what it is we had learnt from one case in another case.
26 They were distinct cases. That is one of the things that one should have regard to. And if,
27 in the future, Mr Janka were genuinely conflicted, he would have to act upon that. But he
28 has understood that, we all have to deal with that problem, and that may be something in the
29 future he may have to say to himself, "No, I cannot advise on that because I am being asked
30 to advise a specific airline about its specific arrangement and I know too much." That will
31 be something he will have to deal with at the time, no doubt with his colleagues at Latham
32 and Watkins.

33 But Viasat has asked him to take on this role on its behalf. Latham and Watkins and he are
34 happy for him to take it on. In our submission, it is their problem, not Inmarsat's. You

1 know, it is for him to police, as we all do as lawyers. And it would be -- well, it is the
2 nature of any of these -- you know, whether it be pharmaceuticals or whatever, or
3 telecommunications -- you end up with a small group of lawyers who do have this sort of
4 knowledge and experience. The reason why they get where they are is because they are
5 able to handle it appropriately -- or one of the reasons why they get where they are. They
6 would not get there if they were not able to do so.

7 So, in our submission, to single out Mr Janka really highlights the rather, in my submission
8 rather unfortunate *ad hominem* nature of the application. In my submission, he is -- to some
9 extent putting him forward into the ring is a compromise, but in our submission it is
10 an appropriate compromise balancing the various interests in play, the interests of justice, as
11 against the practical interests that Inmarsat may have in withholding certain information.
12 I have not gone back and covered, rather skipped beyond the law, and we have somewhat
13 taken that as read. But if I---

14 THE CHAIRMAN: Well, the law is -- and I hardly needed the authorities that were cited to
15 me -- this is a question of practicality, starting from a point of principle, which I think
16 everybody understands and agrees is a question of practicality and what there is a need for
17 and the extent to which the established principles on the facts of this case should be
18 departed from.

19 MR BOWSHER: The short point is we say, the starting point must for Inmarsat to say what it is
20 that has to be withheld and why. Open justice is the starting point.

21 THE CHAIRMAN: Well, they have said all that.

22 MR BOWSHER: They have said all that, we say they have set out what they can. In our
23 submission, we have demonstrated why this is an appropriate way forward. I have not
24 touched on, as it were, a secondary aspect -- the point of principle. When I said at the
25 beginning as a matter of principle and particularity it was right that Mr Janka go into
26 the ring, in my submission there are two aspects of this. We have focused on the second,
27 the particularity; there is the further aspect that the starting point should be that Viasat is
28 entitled to have access to the knowledge of all that goes on and be able to fully vindicate its
29 rights to a fair hearing. That would be the normal starting place. If, as Viasat has done, has
30 said, "Well, we are happy to forego that, but we would wish our proxy, Mr Janka, to be
31 there, because there may be technical telecommunications points which even Mr Colahan
32 and Mr Bowsher, or more likely Miss Banks may not fully understand on the day, because
33 Mr Janka has a level of experience in this sector which none of them do," in my submission,
34 as a matter of principle of open justice, it is right that my client be able to rely upon that

1 person when that person is someone whose professional position means that the information
2 is properly protected. So the proper protection is in place, and by putting him in, as it were,
3 the client's proxy on these issues, the principle of open justice can be fully vindicated. So
4 that, as a matter of balance on principle, and as a matter of balance on the practicality of this
5 important issue about what the EAN actually comprises, or rather what Ofcom was told or
6 ought to have concluded was the nature of the EAN, as a matter of practicality Mr Janka
7 should be admitted.

8 Unless there is anything else I can assist with, I think in a somewhat eccentric order, but I
9 hope helpful, I have covered (inaudible) all I needed to cover.

10 THE CHAIRMAN: I took you out of what you hoped to be your course, no doubt. Yes,
11 thank you.

12 MR WARD: Sir, the starting point here is that the material in question is confidential.

13 Mr Bowsher came up with various euphemisms for that in opening his case, but essentially
14 he said it was sensitive commercial information that should be protected from broader
15 publication.

16 THE CHAIRMAN: Confidential but not very.

17 MR WARD: Confidential but not very.

18 THE CHAIRMAN: But it is still confidential.

19 MR WARD: It is confidential, and I have shown you, Sir, in a sense why there is some very, very
20 sensitive material in there, in a case which is about future plans of direct competitors. But
21 that confidentiality has already been compromised, both in the literal and practical sense, in
22 that there is a confidentiality ring, and in that ring, by negotiation and discussion, a large
23 amount of sensitive material has been disclosed. And what you said on the last occasion,
24 Sir, is that such a ring is a way of squaring the circle between two competing propositions:
25 that litigation should be open, but that the legitimate commercial interests of a party
26 dragged here against its will should be respected. And that is why, of course, they are the
27 standard tool in these kind of cases.

28 That much is not in dispute. Inmarsat has accepted there should be a ring, Inmarsat has
29 consented to disclosure into that ring, and in negotiation with Viasat the scope of the
30 documents within that ring have been defined. So we are very, very, very far from anything
31 resembling a denial of open justice and so on and so forth, as Mr Bowsher has said. That is
32 not what is in issue in this case.

33 What is in issue in this case is whether the ring should be further extended. We already
34 have three counsel, two members of a highly respected law firm and an expert who can give

1 evidence on any technical matters. And that is a point you again made last time, that,
2 insofar as Viasat needs technical input, it is not apparent why Dr Webb cannot provide it.
3 That was in your ruling at paragraph 10.

4 And the reason you did not decide the application in the claimant's favour last time was you
5 said there was not a sufficient evidence base to show why the ring needed to be extended to
6 Mr Janka and Mr Ward, and my respectful submission is that that remains the case today,
7 because what you have been told is, at a high level of generality, that Mr Janka is a lawyer
8 with a great deal of expertise in telecoms and satellites in particular. That is what the
9 evidence shows, that Mr Bowsher just showed you. But what is he going to add? And of
10 course -- sorry, before we get to that -- and we already know he is playing an active role in
11 these proceedings already. Mr Colahan, in his second witness statement, said he has played
12 a central and distinct role in the proceedings from the outset. So this has not meant
13 Mr Janka cannot join the team, it just means he is not able to see the very sensitive material
14 which is in the confidentiality ring. And if you want the reference for that, Sir, that is
15 Mr Colahan's second witness statement at paragraph 13, E2 at page 13.

16 So all we are told is that he can bring commercial input to bear. The question is: what is the
17 issue? What is the issue he is going to assist with? These are judicial review
18 proceedings -- sorry, it is an appeal and it is an appeal heard by reference to the standard in
19 judicial review, to be more precise. So it is not a comprehensive regulatory audit, nor is it
20 a trial, like a High Court trial where the court makes all findings of fact in the first instance
21 of its own volition; the question is whether Ofcom has made some error in law in the
22 broader public law sense in its determination. Did it have regard to irrelevant
23 considerations? Did it actually misconstrue the law?

24 And indeed most of the grounds of challenge are classic judicial review grounds, as you will
25 have seen, Sir. They essentially say that this particular EAN falls outside the statutory
26 definitions contained in the EU Regulatory Framework. But it is right, as Mr Bowsher said,
27 that the part of their case is -- and I think I will just put it the way he put it to you when you
28 said, "What is your imaginary best case?" he said, "We want to see how it is going to
29 be -- how it is marketed. In reality, we think that people are not going to bother installing
30 the terminal." That is the case. And what you have already seen, Sir, is the way it is being
31 marketed has been considered by Ofcom, conclusions have been drawn, and my submission
32 is that many members of the team already, including Dr Webb, are able to see, to the
33 judicial review standard, whether that marketing material supports the rather general
34 conclusions that Ofcom drew.

1 And that takes me, though, to the particular documents that have been highlighted, and it is
2 remarkable, in my respectful submission, how narrow the interest is that was articulated to
3 you. And if I can ask you to take up the one that looks like this: there is an aeroplane on the
4 front page, in portrait. The first one Mr Bowsher showed you.

5 THE CHAIRMAN: Yes. I can sensibly take that up in his clip, can I?

6 MR WARD: Well, I think if you have the clip you have the advantage of me, Sir. I wanted to
7 point to each of these documents.

8 THE CHAIRMAN: Just let me make sure I am using the right document.

9 MR WARD: My Lord, there is a very nice plane on the front cover against some sky.

10 THE CHAIRMAN: Yes, with some white blobs on it.

11 MR WARD: I think the name of the airline has been redacted because this was a specific
12 customer proposal. But that, I am pleased to say, is not in issue.

13 THE CHAIRMAN: I see.

14 MR WARD: What way really said was, if you look at---

15 THE CHAIRMAN: What, somebody knowledgeable will not be able to identify the airline from
16 the livery?

17 MR WARD: Well, I do not know. Maybe somebody else can, but I must confess I would not be
18 able to.

19 THE CHAIRMAN: Well, I would not, but I would be very surprised, looking at the nature of the
20 aircraft and the livery, somebody could not have a pretty good guess as to that.

21 MR WARD: Well, hopefully it will not be reproduced in the judgment, Sir.

22 THE CHAIRMAN: Well, it certainly will not if someone does not tell me. I am not going to
23 guess, I am just -- there is a faintly serious point underlying this, which is it is a redaction
24 which seems to me to be largely pointless, in line with frankly loads of redactions that I see
25 in loads of cases -- I am not talking about this one.

26 MR WARD: Well, Sir, can I put that aside?

27 THE CHAIRMAN: Yes. That is just a frivolous aside, Mr Ward.

28 MR WARD: Mr Bowsher suggested that in each of these three documents, in fact, the concern
29 were these diagrams. And if you look at page -- internal numbering page 16 of this
30 document, I think I am allowed to say this much in open court so no need to clear the room,
31 but there is a diagram there of some terminals with some dimensions. And what
32 Mr Bowsher said is that Mr Janka, who is a lawyer, may have valuable cross-examination
33 material to offer based on these sizes of these terminals. And it is, in my respectful
34 submission, a bit hard to understand how that dovetails into their case. But in any event, if

1 | there are points about the sizes of terminals which are more or less (inaudible) for airlines, it
2 | is not difficult to ask Viasat that question without giving the kind of detail that has been
3 | redacted in here.

4 | And you can actually see as well in the public domain material Mr Bowsher took you to
5 | there is some generalised description of the qualities of these terminals. And that was in
6 | fact, just to recall, Sir, we are going to come back to that----

7 | THE CHAIRMAN: Sorry, can I be clear about this? So as things stand, somebody would be able
8 | to go to Viasat and say there is -- I cannot remember whether the redacted version shows,
9 | has the words "dimensions of competitors (inaudible)". I think it probably did. Those were
10 | redacted, I think. So it would be able to go to Viasat and say, "Tell us something about
11 | acceptable dimensions".

12 | MR WARD: Well, what is wrong with that? If you go to -- you have to be very careful, but, you
13 | know, we do not doubt Mr Janka's professional probity or anyone else at Latham and
14 | Watkins -- but you say to the client, it is done all the time, "There is an issue in our case
15 | about the size of satellite terminals. What do you think is acceptable or unacceptable?
16 | What is attractive to customers?" These can be asked as open questions, not leading
17 | questions, without putting anything, and to see if there actually is a point here. And the
18 | underlying client, frankly, is much more likely to have a view of that than Mr Janka, despite
19 | all his years of experience in litigation.

20 | So we do not understand the constraint at all there, and why it is that knowing these
21 | particular numbers is really important to a judicial review case about whether or not Ofcom
22 | had sufficient material to reach the decision that it took. And I do not really need to go to
23 | the other----

24 | THE CHAIRMAN: Sorry, but the point is -- and forgive me -- the point is not just whether it had
25 | sufficient material but whether the material that it had justifies its decision.

26 | MR WARD: Yes.

27 | THE CHAIRMAN: Because I think----

28 | MR WARD: Quite right, Sir, yes.

29 | THE CHAIRMAN: -- I think Mr Bowsher's case will be, "Well, look: this is the material that
30 | you had, and on the basis of this you can see that this is really a ground-based system and
31 | nothing to do a satellites." I am exaggerating for effect.

32 | MR WARD: No, that is roughly his case. It is very hard to understand, with respect, how it is
33 | that these particular dimensions of the terminals will dovetail into that case, but if he wants
34 | to ask his client----

1 THE CHAIRMAN: Well, because it will be added to some other factors, I suspect.

2 MR WARD: Perhaps, but we do not know, and in fairness it is not his task to open his case today
3 and I am not criticising him for that in the least.

4 THE CHAIRMAN: No.

5 MR WARD: But if he thinks that the particular size of terminal is an important issue as to
6 whether this system is essentially a sham, then these are things that can be explored with his
7 client without in any way trespassing on this confidential material. In fact, it would be
8 amazing if that had not already happened.

9 So we do not understand why it is that there is such a compelling case that the
10 confidentiality ring has to be widened, essentially, really, so that Mr Janka can see these
11 diagrams, and in all three documents you are basically looking at the same thing. And one
12 is bound to say that it would have been of assistance if some of this had been explained in
13 some evidence.

14 THE CHAIRMAN: Yes.

15 MR WARD: And we have been listening with interest to see which documents are really in issue,
16 but really none of this has been developed in a way that would have enabled closer
17 consideration of it.

18 But I do want to say something also about Mr Janka in particular, and this is not an *ad*
19 *hominem* attack on him, as was suggested, it just is a concern about his particular role.

20 Nobody here is suggesting that Mr Janka -- can be concluded that Mr Janka would not
21 respect undertakings given to an English court. That is not the case. But the issue, as you
22 said, Sir, is about use of material in different proceedings. And what Mr Bowsher said
23 about that in substance was we just have to rely on him to be self-policing.

24 But this is not a hypothetical problem at all in this particular case, because as you know, Sir,
25 Viasat has brought a range of actions against the EAN network, not just in Luxembourg but
26 in a number of different European jurisdictions, all aimed at preventing the EAN from
27 emerging as a competitive threat. And we know that Mr Janka is central to the client
28 relationship, and the reason we know that is Mr Colahan has explained it. May I ask you to
29 turn up their application bundle, which is, I hope, the other bundle E, Colahan 2.

30 THE CHAIRMAN: (After a pause). Yes.

31 MR WARD: And if you turn to tab 2 of bundle E, page 25, paragraph 14.

32 THE CHAIRMAN: You will have to give me paragraph numbers. I am using a different version.

33 MR WARD: I am sorry. Paragraph 14 of Colahan 2.

34 THE CHAIRMAN: It is paragraph 25, yes.

1 MR WARD: "Mr Janka is an essential asset to the team advising Viasat and Viasat, with whom
2 Mr Janka has built up a significant level of trust over a number of years wishes him to be in
3 the confidentiality ring."

4 So what is said is he is essential to the team. We raised a concern at the last CMC that
5 (inaudible) remember, Sir, about his potential role in different proceedings, and neither
6 Mr Colahan nor Mr Janka----

7 THE CHAIRMAN: You should not assume that I remember the detail of the previous
8 proceedings.

9 MR WARD: No, Sir, of course.

10 THE CHAIRMAN: I say that to warn you.

11 MR WARD: Yes. So, in short, last time around we raised this same problem of what about the
12 use of this in other proceedings? And in fact you can see that -- well, I will not take your
13 time, but we raised it in our witness statement the first time around and we have raised it
14 again in our witness statement this time around, precisely because there are so many parallel
15 proceedings targeting the EAN afoot at the moment.

16 But nothing in Mr Colahan's witness statement explains Mr Janka's role in those other
17 proceedings; nothing in Mr Janka's witness statement does, because Mr Bowsher read you
18 extracts from it, but they gave you a very fair summary. What Mr Janka carefully omits to
19 say is what else he is doing for Inmarsat -- Viasat, I am sorry. And, in my respectful
20 submission, that is a remarkable omission. It was plainly put in play at the last hearing, the
21 point was reiterated in Mr Cotter's witness statement for this hearing. It is a very, very live
22 concern that the claimants have simply chosen not to address. And it is not good enough for
23 Mr Bowsher to say, "Well, he will have to be self-policing," and, as someone memorably
24 once said to me, "I have a Chinese Wall in my head." That is not an effective remedy for
25 these concerns, a Chinese Wall in one's head. And Mr Janka has not even come clean
26 about the role he is playing in those other proceedings. So it is not a sort of *ad hominem*
27 attack, it is a very real concern about how this material might be used elsewhere.

28 Now, one of the things Mr Bowsher says about that in his skeleton argument is, well, we
29 have lawyers as well who are acting in other proceedings. But there is an enormous
30 difference here between the position of Viasat and Inmarsat. Viasat has chosen to bring
31 these proceedings. In the course of doing so it has chosen to put forward some confidential
32 information, essentially about usage patterns of satellite communication systems. Inmarsat
33 was forced here. It is not that it responded, but its material is directly in issue and these
34 proceedings are an attack on its business. It has no choice to be here, and the disclosure in

1 issue is not being given voluntarily by Inmarsat, it is being given by Ofcom and Inmarsat
2 has done its best to preserve the confidentiality of that material. It was not a choice to put
3 this material before the Tribunal.

4 So we do respectfully submit, in summary, that there is already ample means by which
5 Viasat can prosecute its case. It has very experienced and renowned people already in the
6 ring. Mr Janka can assist, albeit that he cannot join the ring; and the basis on which it was
7 said his input was so badly needed is, in my respectful submission, paper thin.

8 Unless I can assist further, those are my submissions.

9 THE CHAIRMAN: Well, supposing it is not paper thin or it cannot be demonstrated to be paper
10 thin; supposing that there is a need which cannot be satisfied, a need to assess
11 commerciality which lies at the heart of Mr Bowsher's case, which cannot be satisfied by
12 an expert, and experienced no doubt Mr Bowsher and his team are, there is a justifiable
13 need for somebody else, there would seem in a situation like this to be -- well, there is
14 usually only one candidate, and that is usually the client and somebody from the -- that is to
15 say Viasat -- would have to be in the ring so they can say, "Well, hang on, that is complete
16 nonsense. You just cannot do that." Now, that is not something which I suppose you
17 favour. The other side say, "Well, we are putting forward somebody else," and you say,
18 "Well, he is no good because he is involved in all this other litigation." So if one -- assume
19 for the moment against yourself that there is a need, how is that to be fulfilled?

20 MR WARD: Well, I say two things, Sir, in reverse order: obviously from our client's point of
21 view it is better to have Mr Janka than somebody from within Viasat.

22 THE CHAIRMAN: Right.

23 MR WARD: So if we have to choose between the two I am sure -- I will just make sure that
24 nobody behind me is shaking their head vigorously -- we would rather have Mr Janka than
25 the client.

26 THE CHAIRMAN: Right. That sort of deals with my point.

27 MR WARD: Well, it deals with the second part of your point, but the first point was the
28 hypothesis that this was necessary at all, and in that, in my respectful submission, they
29 simply have not made out a case, because what you have heard today is submissions from
30 Mr Bowsher, no doubt on instructions, not supported by any relevant evidence at all,
31 because the evidence that there is in front of you from Mr Colahan and Mr Janka is just
32 extremely general. And can I just remind you what is in Mr Janka's evidence for the PTR,
33 which is in the PTR bundle -- sorry, it is not in the PTR bundle at all, it is in the application
34 bundle.

1 THE CHAIRMAN: Is this in Janka 2, is it?

2 MR WARD: Yes.

3 THE CHAIRMAN: I have got Janka 2.

4 MR WARD: And then Mr Colahan says in very general terms in his witness statement, "Ah,
5 well, he has got commercial expertise." If we look there, that is in tab 2 of that same
6 bundle. It was the paragraph we were just looking at, that he has got all this commercial
7 expertise. But that is woefully short, in my respectful submission, of showing why he has
8 something in particular to bring in respect of the particular information that is being
9 withheld.

10 THE CHAIRMAN: Paragraph 12 of Janka 2 is the important paragraph, is it not, for these
11 purposes?

12 MR WARD: Sorry, let me turn that up.

13 THE CHAIRMAN: From his evidence.

14 MR WARD: But again, he is saying what he has been able to do in paragraph 12, and then he
15 says it limits his ability to advise, but again that is in completely general terms and does not
16 answer the question: what is it that he can do that really is relevant to the grounds that, for
17 example, Dr Webb cannot do? And what we have had, essentially, are some oral
18 submissions, unsupported by evidence, that for some reason that is still obscure the precise
19 dimensions of the terminals are in issue. So, in my respectful submission, that is just all far
20 too imprecise.

21 THE CHAIRMAN: I suppose you would say that actually the process described by Mr Janka in
22 this paragraph is actually not the process which emerged from Mr Bowsher's evidence. He
23 wants to be able to do this so he can best advise his client, rather than assist Mr Bowsher
24 and his team in preparing the case for trial.

25 MR WARD: It is a completely different thing, but also when he says advise his client, we would
26 be very concerned as to advise them in respect of what and in which proceedings, given that
27 Mr Janka -- we have to proceed on the inference that Mr Janka's role is wider than merely
28 these proceedings.

29 But our overarching submission is, even when you add in Mr Bowsher's explanation of this
30 morning, all of this is just far too general. And we start from the proposition that this is
31 confidential material; the confidentiality should be respected, subject to the principle of
32 open justice, which of course is not in doubt; and in reality a very substantial incursion into
33 that confidentiality has already been ordered. Why should it go further? In our submission,
34 this is just too vague to make good that case.

1 THE CHAIRMAN: Supposing that the confidentiality in respect of Mr Janka were
2 expressly -- sorry, the confidentiality provision, supposing there were some -- were
3 expressly limited to the sort of participation in the process which Mr Bowsher described,
4 that is to say you will not use or discuss this material in any way, or put it in or use it for
5 any purpose other than the assistance of Mr Bowsher and the team in preparing for and
6 conducting the hearing, so it is quite clear, that would -- provided it is adhered to -- would
7 meet some of your objections. You say, well, actually, it is impossible because in future it
8 is in his head and he cannot forget it.

9 MR WARD: It would help.

10 THE CHAIRMAN: That would spell out more clearly something which is not spelled out in
11 paragraph 12.

12 MR WARD: Yes. It would help, and it would be in a sense an additional -- it would make more
13 explicit what is already in the general undertaking (inaudible) confidentiality order.

14 THE CHAIRMAN: Yes.

15 MR WARD: But as you rightly say, Sir, it does not deal with our concern entirely, because it is
16 what is then known by Mr Janka in his various other roles advising Inmarsat. And it is
17 a very important thing again that is missing from any of the case put forward by -- I said
18 Inmarsat, I meant Viasat -- there is another major hole in what is put forward by Viasat.
19 There has been no suggestion that Mr Janka would give any additional undertakings of the
20 kind often given in this court where, for example, somebody agrees not to advise or act in
21 a particular matter for three years thereafter.

22 THE CHAIRMAN: Yes.

23 MR WARD: I gave those undertakings myself in a healthcare judicial review in respect of one
24 aspect of the case. But Mr Janka is not saying that, which fortifies the concern that the
25 reason it is not being offered is because, in reality, he will be. And the suggestion that you
26 have made, Sir, certainly helps but really does not go to the heart of it.

27 THE CHAIRMAN: Yes.

28 MR WARD: Sir, unless I can assist further, those are our submissions.

29 THE CHAIRMAN: No, thank you Mr Ward.

30 Mr Holmes, you are not participating in this debate, I understand?

31 MR HOLMES: No, sir.

32 THE CHAIRMAN: Right.

33 Mr Bowsher?

1 MR BOWSHER: The first point to (inaudible), with respect to Mr Ward, turns the matter on its
2 head. The starting point is for Inmarsat to justify a departure from the normal open justice
3 position. And your Lordship has already described to him the way in which we have
4 recognised the sensitivity by putting Mr Janka in as, in effect, a proxy for the client,
5 specifically for this purpose, what I have called the practicality aspect of this case, but also
6 for the point of principle that the client then, if there is a sort of -- there is the known
7 unknown and the unknown unknown aspect to this. The practical point is we know there is
8 an area around satellite terminals, which I will come back to, but there may be some other
9 commercial point. The client has said, "If something comes up in the ring which we cannot
10 know about, in deference to Inmarsat's concerns we will not go in there but Mr Janka be our
11 proxy, he will be the person who can hear and understand, and understand what is to be
12 done about it, whether that is in submissions, whether that is in answer to
13 a cross-examination question."

14 It is not right to say that there is no evidential basis for what we have said; on the contrary,
15 in Colahan 2, which you have just been discussing, paragraphs 14 and 15, it is tab 2 of file
16 E, Mr Colahan describes -- and you were just taken to this -- Mr Janka, he describes how he
17 is an asset to the team. He is advising and assisting in this litigation. The nature of his
18 input is described, and, if one goes over to page 26 at the end of paragraph 15, the very
19 issues which we have touched on today are identified as the issues to which he has
20 particular expertise in. We have explained precisely what the points, what the topics are for
21 which he has unique -- within our team provides a unique additional role. So it is not right
22 to say that we have not set out the basis upon which we need him in the ring.

23 As I say, there are two aspects: there is the practicality issue around those topics, there is the
24 principled question of the client having a proxy who can essentially hear everything in this
25 case. It is also not true to say that he has not limited himself to these proceedings, because
26 he has said that he is happy to sign up to the form of undertaking, and the form of
27 undertaking we have all signed in this case -- I will not take you to it.

28 THE CHAIRMAN: No, I would like to see it.

29 MR BOWSHER: Okay. I am not sure if this is the most recent version, but a version of it is at
30 G1, tab 39. There has been some evolution of the order, but I do not think the undertaking
31 has changed along the way. (After a pause). The undertaking is two or three pages in.
32 There is the full order. The paragraph I was going to take your Lordship to is paragraph 3.
33 So there is a specific reinforcement of what of course would be the normal position anyway,
34 that one does not make collateral use of information gained in one set of proceedings in

1 another. Sorry, I was just looking for the provision in the CAT Rules which matches the
2 provision in the **White Book**. And all of these proceedings, there are different rules and
3 different proceedings insofar as Inmarsat's lawyers, just as we are governed by the
4 limitations of civil procedure in the various proceedings limiting us to using information
5 from one to the other case. That is inevitable in any proceeding: that disclosure for the
6 purpose of one case cannot be used in another case, at least without going back and making
7 an appropriate application. Obviously the way in which that is put in Belgium may be
8 different from Luxembourg, and so on and so forth, but there is a reinforcement to that
9 general position.

10 That is entirely different, with respect, to the point that your Lordship was making. I have
11 addressed, when I was talking about self-policing, I was addressing what is no doubt
12 a serious problem for all specialist lawyers -- we all encounter this, as my learned friend
13 says, at one time or another -- that there are genuine conflicts issues. If you have learnt
14 something in one case and then you suddenly discover that you are actually advising some
15 other client in another situation, you think, well, actually, I cannot get involved in that
16 because I just know too much. Now, that is a genuine conflicts issue. This is not -- the
17 point that my learned friend is addressing here is not a conflicts issue.

18 THE CHAIRMAN: Well, it will become a conflicts issue.

19 MR BOWSHER: It is not a conflict of interest, because there is no conflict of interest between
20 one client and another. What is being identified here is what happens when you have a lot
21 of parallel -- or the framework of a lot of litigation. It is not, strictly speaking, a conflicts
22 issue; it is, "I have learnt something in one case in one jurisdiction and the same case is
23 going on in Scotland. Can I automatically use the English information in the Scottish
24 case?" Well, that is not -- you cannot. You do not unlearn it -- I mean, it is in your
25 head -- but you cannot just use it in the Scottish litigation. There has to be -- and we all live
26 with that constraint, and sometimes that constraint is reinforced, as it is here in this
27 confidentiality undertaking.

28 That is a problem for all the lawyers involved in this litigation. As I say, we all have that,
29 as it were, as a recurring problem, that we may learn something but we cannot reuse it in
30 other litigation. That is as much a rule of civil procedure as anything else.

31 THE CHAIRMAN: That is true. I am not quite sure how it is going to assist in this debate,
32 because if we take this multiplicity of proceedings point that Mr Ward takes, supposing that
33 Mr Janka becomes privy to all this information, forms a view, for example, that this is
34 commercially hopeless and expresses that view based on -- forms that view based on a

1 number of facts which he can now see to be the case, and then the client says, "Now, let's
2 discuss the proceedings in AN Other jurisdiction," or a couple of other jurisdictions, it does
3 become quite difficult for Mr Janka, or it may well become quite difficult for Mr Janka in
4 those proceedings, to be able to advise on issues which may or may not be similar, and
5 whether there is evidence and how the case should be run, knowing at least what he
6 managed to get out of at least the English disclosure proceedings. I do not know whether
7 there would be the same disclosure available in other jurisdictions; I suspect not. That is, I
8 think, a feature of the contrast between jurisdictions.

9 MR BOWSHER: Well, there is a danger that one leads to an absurdity here, which is that you
10 would have to have a separate legal team for all parties in every single set of proceedings.

11 THE CHAIRMAN: Yes.

12 MR BOWSHER: My learned friend has already acknowledged that they would rather Mr Janka
13 than Mr Ward, for example.

14 THE CHAIRMAN: Yes.

15 MR BOWSHER: The starting point should be Mr Ward is in, and only Mr Ward but Mr Ward's
16 Mr Baldridge and Mr Ward's -- you know. That should be the starting point. We have not
17 put them to justify why -- we have gone a long way by putting forward Mr Janka. He is not
18 able to -- sorry, if he is in the ring he will now know some dimensions, for example, to take
19 one point. He obviously cannot use that information. He cannot use the dimensional
20 information that he has gained from being in the confidentiality club. In fact, he cannot
21 even use documents that were produced in these proceedings unless they become public
22 documents.

23 THE CHAIRMAN: But let us say in other proceedings the question of how they are going to
24 make their case, and the lawyers in AN Other jurisdiction say, "Well, how are we going
25 to -- you say that this is a commercial pretence, but how are we going to make that good?"
26 And the temptation of Mr Janka is to say, "Well, why don't you get some disclosure of
27 some documents?" It is going to be irresistible, is it not?

28 MR BOWSHER: Well, that is as true as -- again, I am afraid----

29 THE CHAIRMAN: Because you know it is the answer to the question.

30 MR BOWSHER: That leads -- well, the only answer to that is that you end up having special
31 advocates. The interests of our client, the ability for it to look -- I mean, again, one cannot
32 have it both ways. He has taken the trouble of redacting this stuff; he clearly thinks there is
33 something to redact here, that it is particularly sensitive. If it is important, then we, Viasat,
34 it is clearly important to a significant part of the case, we must be in a position to be able to

1 test it and understand what has come back, what is said about it, and I will come back to
2 that in a moment. The normal way of dealing with that would be Mr Ward and others being
3 in the ring. If we were talking about an *Al Rawi*-type case, we would have a special
4 advocate and goodness knows whatever. I mean, this is not how these cases are dealt with.

5 THE CHAIRMAN: You cannot have that without express statutory----

6 MR BOWSHER: Exactly.

7 THE CHAIRMAN: (Inaudible).

8 MR BOWSHER: This Tribunal has to deal with what it can do, and just as in the special
9 advocate situation the principle of open justice is recognised, and because of the peculiar
10 sensitivity of the information a particular statutory procedure is put in place. That does not
11 exist here. So, with respect, there is no choice in order to satisfactorily meet the rights of
12 my client than to put in the appropriately qualified private independent lawyer. To do
13 otherwise is to abrogate my client's rights in principle, with particular practical effect.
14 Now, it is not just about, "Well, can you not take instructions on the dimensions?"
15 Obviously, and my learned friend will have discerned, it comes to no surprise to us that the
16 nature of the terminal, its shape and so forth, is an important issue in the case; and
17 obviously we have been able to ask questions of Viasat along the lines of, "What do you
18 think you would do? What do you think you might ask someone to do?" But that is not the
19 same as, "What they are saying is this; is there something that strikes you about that that is
20 odd?" That is the prep question. And, again, we are prepared to go with the suboptimal
21 option of, rather than asking the engineer, in the first instance anyway, we ask Mr Janka.
22 Now, if there was a real problem we might have to come back to the Tribunal, but that is the
23 position that we are dealing with.

24 The most urgent part of this of course comes at the hearing. Mr Sharkey is in the box and
25 I ask him a question about -- let us suppose I ask him a question that may not even be
26 a confidential question, as it were, but the answer may come back containing a reference to
27 some confidential material, perhaps even unexpectedly. These things happen all the time,
28 of course: some confidential material gets blurted out and you wonder why you bothered in
29 the first place, but let us leave that to one side. One can imagine the sort of answer to which
30 none of us in the team here would have any means of being able to test. You know, "There
31 we are. You have just said the answer is 42 because Douglas Adams said it was." I have no
32 means of dealing with that.

33 Now, again, it is suboptimal, but it is the suboptimal offer that we have -- proposal we have
34 made in order to balance the rights of our client and those of Inmarsat, to put Mr Janka in

1 the ring, but at least my client is happy that it will have the best possible chance to be able
2 to pick up whatever comes along at that stage.

3 The only other point I should just -- a slight qualification. My learned friend rightly says
4 this is a judicial review -- sorry, it is an appeal on judicial review principles. It is also right
5 to note, though, that it comes within the context of the regulatory framework, the telecoms
6 regulatory framework, and that requires that the merits of the case are duly taken into
7 account in Article 4 of the overall 2002 Directive. I mean, that is true, there is a delicate
8 balance, which we will no doubt explore at some point in the near future, about quite what
9 the nature of these proceedings is. But this being the----

10 THE CHAIRMAN: But you will be saying, even on a normal judicial review basis, your case
11 is -- it may be right, it may be wrong -- but your case, which you want to have
12 an opportunity to make as I understand it, is: look at the authorisation, look at the material
13 which is said to underlie the authorisation. What they have done is actually authorise
14 something which can be seen to be just a ground system, not a satellite system. That is
15 about as judicially reviewable as it gets. That would be your submission.

16 MR BOWSHER: Yes. That is ground 1(a), (b) and (c) of our case, in different ways.

17 THE CHAIRMAN: Yes. I understand that. Thank you.

18 MR BOWSHER: Is there anything else I can assist with?

19 THE CHAIRMAN: I do not think so. Thank you.

20 I want to get my thoughts in order on this case and reflect on it, so I will give judgment at
21 2 o'clock on that particular point.

22 Shall we turn to the bits and pieces now, in the hope that, when I give judgment on this, that
23 will be all that is left.

24 MR BOWSHER: Yes. So the logistical matters we covered in our note from page 7. I think
25 probably timetable was probably -- the timetable and pre-reading is probably the best
26 starting point. The parties have jointly proposed a timetable on the basis that three of the
27 witnesses are to be cross-examined. So there is Mr Webb, the Viasat witness; Mr Harrison,
28 an Ofcom witness; and Mr Sharkey, and Inmarsat witness.

29 THE CHAIRMAN: Sorry, can you remind me again: are there witnesses who are not to be
30 cross-examined?

31 MR BOWSHER: Yes.

32 THE CHAIRMAN: Can you just list them? I have not seen the witness statements, so just so I
33 have got the list of who they are going to be and so I know who is going to be taking no
34 time at all.

1 MR BOWSHER: Baldrige.

2 THE CHAIRMAN: He is giving evidence of what? Who is he for?

3 MR BOWSHER: And Dorman. Baldrige is Viasat Commercial, and Dorman is Inmarsat.

4 THE CHAIRMAN: And what is he giving evidence of?

5 MR BOWSHER: Sort of the background. The facts of the consultation. Baldrige talks about
6 the market context and so forth.

7 THE CHAIRMAN: How many pages in his witness statement, roughly speaking?

8 MR BOWSHER: 20.

9 THE CHAIRMAN: Just so I get an idea for pre-reading purposes.

10 MR BOWSHER: Around 20, I think.

11 THE CHAIRMAN: That will do. I wanted to know whether there is 50 or 100, principally. So
12 that is Baldrige, yes. Next?

13 MR BOWSHER: Then Dorman and Harrison. So Dorman is the Ofcom factual -- sorry, Dorman
14 is ours, sorry. He is a short engineer, sort of, flight analysis statement.

15 THE CHAIRMAN: A what, flight analysis?

16 MR BOWSHER: Yes.

17 THE CHAIRMAN: What does that mean?

18 MR BOWSHER: It is all about how many planes there will be in the sky and capacity and so
19 forth, and so that then becomes relevant as to which parts of which resource are being used.

20 THE CHAIRMAN: How many pages?

21 MR BOWSHER: Eight.

22 THE CHAIRMAN: Is that highly technical?

23 MR BOWSHER: Not terribly technical, no.

24 THE CHAIRMAN: Right.

25 MR BOWSHER: And yes, I had forgotten, there is Colahan 3, which essentially proves some of
26 the regulatory documents that have been obtained through various information requests.

27 THE CHAIRMAN: So he formally proves and produces them?

28 MR BOWSHER: Yes.

29 THE CHAIRMAN: There is no dispute as to those documents, is that----

30 MR BOWSHER: I do not believe so.

31 THE CHAIRMAN: So it will not be necessary to read Colahan?

32 MR BOWSHER: The documents exist. A lot of them are slideshows, so I would suggest that
33 Mr Colahan is a useful summary of some (a) quite technical and (b) the sort of slide

1 show-type material where it is often quite hard to work out what on earth it means and what
2 context there is.

3 THE CHAIRMAN: How many pages?

4 MR BOWSHER: Six pages for Colahan, and if you have read it you have got the best points
5 from 300 pages of exhibit. But, I mean the 300 pages, the Tribunal will not be taken to all
6 300 pages. An awful lot of it is long slide shows, and so on and so forth.
7 And then there is Webb, which is 20 pages. Again, he has -- sorry, there is Webb 1 and
8 Webb 2. So Webb 1 is quite a bit longer, but he is being cross-examined.

9 THE CHAIRMAN: So that is Webb. And then the next witness?

10 MR BOWSHER: Then in file B, the defence, there is Harrison is the only witness statement for
11 Ofcom, and he is being cross-examined.

12 THE CHAIRMAN: He is being cross-examined?

13 MR BOWSHER: He is being cross-examined. His is 15/16 pages.

14 THE CHAIRMAN: And what does he deal with?

15 MR BOWSHER: Sort of the operation of -- Ofcom's understanding of the operation of the
16 product. And he comments on various points made by William Webb.

17 THE CHAIRMAN: Yes.

18 MR BOWSHER: And then for Inmarsat there is Mr Pearce, who is not being cross-examined.

19 THE CHAIRMAN: What does he---

20 MR BOWSHER: Commercial stuff: the market; why Inmarsat does what it does, et cetera,
21 et cetera.

22 THE CHAIRMAN: So he gives evidence of the commercial stuff, but he is not being
23 cross-examined?

24 MR BOWSHER: He is not being cross-examined.

25 THE CHAIRMAN: And you do not anticipate that he will be cross-examined even when you
26 have got the benefit of -- if you get the benefit of Mr Janka?

27 MR BOWSHER: Then we would reserve our position, but I do not think it is very likely. We
28 have looked at it fairly carefully -- well, very carefully. I mean, the issues about operation
29 and commercial issues about operation are dealt with by Mr Sharkey. He deals with the
30 things which we have been talking about today, for example.

31 THE CHAIRMAN: So that's Pearce. Next?

32 MR BOWSHER: Sharkey is being cross-examined.

33 THE CHAIRMAN: And he is commercial again, is he? Or is he technical?

1 MR BOWSHER: He is an engineer. He is talking about sort of commercial/technical. So he is
2 talking about these sorts of issues: "What we are going to do is put this sort of terminal on,
3 and this is the sort of offer which we are making to airlines," and then it goes off into the
4 confidential area.

5 THE CHAIRMAN: But he is technical.

6 MR BOWSHER: He is technical, but he is also covering, "What is it we are offering to airlines?
7 When are we going to put the terminals on? Are we going to make them do this? Are they
8 going to take this product or that product?" That sort of thing.

9 THE CHAIRMAN: Right.

10 MR BOWSHER: Exactly what we have been talking about today.

11 THE CHAIRMAN: Right. And any other witnesses?

12 MR BOWSHER: No. Unless I have forgotten anyone, no.

13 THE CHAIRMAN: Well, in that case, let us come back to Mr Janka. Supposing you get some
14 input from Mr Janka along the lines of what we were talking about this morning, which of
15 these -- bearing in mind that Sharkey is, you tell me, technical -- who are you going to
16 cross-examine on the basis of Janka input, if you get it?

17 MR BOWSHER: It would be Sharkey, because he is dealing with -- I mean, we can go through
18 the statement, but he is dealing with issues about what is the terminal size that we are
19 talking about? What is the contractual arrangement which we are proposing with this
20 airline? What are airlines expecting? What are they actually going to put in? What are you
21 going to force airlines to do? So he is at the crossover. He is technical, he is an engineer,
22 but he is also dealing with the commercial aspect of what it is that airlines will do on the
23 basis of the offer that they are getting from Inmarsat in terms of product.

24 THE CHAIRMAN: So if it is relevant to the debate, as to which I say nothing at the moment, he
25 will be the chap who will be resisting the suggestion that nobody is going to buy this in a
26 month of Sundays, to put your case at its highest.

27 MR BOWSHER: Yes. He would say, "No, everyone buys everything, and really it is all
28 satellite" -- well, that is not what he will say -- "but you have completely misunderstood
29 what it is. Everyone will buy the satellite. It will be all up and running as a satellite product
30 from day one."

31 THE CHAIRMAN: So if you get Janka, and if he gives you some gold dust in cross-examination,
32 it will be Sharkey that you will be cross-examining on the basis of it.

1 MR BOWSHER: And Harrison. But, yes, we are cross-examining Harrison as well because he
2 touches on some of those issues. But the key technical stuff comes from Sharkey, because
3 he is dealing----

4 THE CHAIRMAN: Right.

5 MR BOWSHER: You know, the question, if Sharkey says, “The great thing about our terminal is
6 it takes 10 seconds and costs £2.50 to install and has no material effect on the aerodynamic
7 performance of the aircraft, why would they not take it? In fact, it also makes cups of
8 coffee,” you know, if that were the proposition we would be saying, “That cannot be right.
9 Look at what you have actually said.”

10 THE CHAIRMAN: Right, so that is the witnesses. Then in terms of timetable there will be the
11 opening. Everybody is going to do an oral opening.

12 MR BOWSHER: Yes.

13 THE CHAIRMAN: And that is planned at the moment to start on the Tuesday of the week, as
14 I understand.

15 MR BOWSHER: Yes.

16 THE CHAIRMAN: I think Mr Ward’s timetable puts in some actual days, but that day plus going
17 into the next. Right, and then there is about a day and a half of witnesses.

18 MR BOWSHER: Yes.

19 THE CHAIRMAN: Yes. Right. So that is the Wednesday/Thursday.

20 MR BOWSHER: Yes.

21 THE CHAIRMAN: And then you have Friday to write some submissions.

22 MR BOWSHER: Yes.

23 THE CHAIRMAN: And then we have Monday to read them.

24 MR BOWSHER: Mm-hmm.

25 THE CHAIRMAN: And Tuesday we have final submissions, about which I will say something in
26 due course. That is the timetable you propose. Well, I can live with that. And hopefully it
27 does not get extended by further cross-examination, but we will have to see where it goes.
28 Timetable should be adhered to, but they are not necessarily mutable, and subject to that,
29 and so far as you need my blessing you have my blessing for that timetable. So we will for
30 sure be starting on Tuesday the whatever it is, X of June, in this building.

31 MR BOWSHER: Yes.

32 THE CHAIRMAN: Good. Right. Are there any other issues that you want to raise? I will go
33 down the line.

1 MR BOWSHER: On timetable, no. We have noted our position on transcripts, but no doubt we
2 can take that up elsewhere.

3 THE CHAIRMAN: That is completely beyond my powers.

4 MR BOWSHER: Indeed. It was on the agenda, but I do not think there is----

5 THE CHAIRMAN: Do you know which transcribers you will be instructing?

6 MR BOWSHER: I do not, without checking.

7 THE CHAIRMAN: The ones that I have been seeing recently have produced their transcripts
8 astonishingly quickly, and 5.30 would be quite late for some of them.

9 MR BOWSHER: Yes.

10 THE CHAIRMAN: But you will have to take that up with them.

11 MR BOWSHER: The only question I suppose, the important question to raise is pre-reading.
12 I mean, we would say, as we have said in our skeleton, it is a good day of pre-reading.
13 There is a lot of -- and some of the documents do not read like Agatha Christie.

14 THE CHAIRMAN: There is far more than a day's pre-reading in my view, but I have already
15 decided that for myself, and apart from the Monday I personally will find the time -- I am
16 sure my lay members will also find the appropriate time -- for the pre-reading, but we will
17 come to that in a moment. Is there anything else you wanted to raise?

18 MR BOWSHER: I do not think so.

19 THE CHAIRMAN: Mr Ward, did you want to raise anything?

20 MR WARD: No.

21 THE CHAIRMAN: Mr Holmes?

22 MR HOLMES: Nothing.

23 THE CHAIRMAN: No. Then can I raise my shopping list? So in terms of pre-reading, I want a
24 clear pre-reading, sensible pre-reading list, a joint pre-reading list. As far as I am
25 concerned, and I am sure I speak for my lay brethren, I will want to pre-read all the witness
26 statements. Pre-reading does not mean pre-mastering, it means pre-reading. So we would
27 want to be pre-reading those, and we will need clear guidance as to what exhibits or
28 annexes we go into and where. And if you say evidence plus exhibits pages 1 to 250, they
29 will not get read. So we will want some sensible steerage there. My view is that this case
30 merits, or at least is likely to merit at least two days' pre-reading, if we are to accomplish
31 the timetable that you proposed.

32 How long, what sort of length of document do you anticipate your opening written
33 submissions to be? Are we talking -- I am going to take an extreme number which I will

1 then actually bar of 150 pages. Are you contemplating 50 pages, or 40 pages each? What
2 sort of length are you anticipating?

3 MR BOWSHER: Well, it is going to be produced at 4 o'clock this afternoon, so I can check what
4 page number we were on this morning.

5 THE CHAIRMAN: Oh, right.

6 MR BOWSHER: We were on 68 this morning.

7 THE CHAIRMAN: No longer than that, I think, otherwise -- well, then your opening can be
8 commensurately shorter. That seems to be pretty long, but I am not going to bar you from
9 that. When you say you have got to 68 this morning, you mean someone is adding to them
10 as we speak?

11 MR BOWSHER: I think it is actually (inaudible), because the last time I saw it it was 71. So it
12 is----

13 THE CHAIRMAN: It is going the right way.

14 MR BOWSHER: Well, you know how these drafts -- for every one that comes in, something
15 comes out. That is the nature of----

16 THE CHAIRMAN: You are having sequential exchange, are you not?

17 MR BOWSHER: Yes. We are producing this afternoon and my learned friends are producing
18 something in -- a week's time?

19 MR WARD: Yes.

20 MR BOWSHER: A week's time. The only observation we made in correspondence, I think with
21 the Tribunal, was that we have not woven Sharkey 2 into our skeleton. But the points we
22 need to make are all in the opening. We will weave in what we need to say about Sharkey 2
23 when we can.

24 THE CHAIRMAN: That seems pretty long to me, but it may make life shorter.
25 Now, it may be, Mr Holmes, Mr Ward, that you cannot answer these questions until you
26 have seen the 68 or whatever it is pages. What lengths of documents do you anticipate? I
27 am thinking in terms of pre-reading, it is going to be at least two days if I am going to have
28 written openings from everybody of that length, which I would hope I would not have.

29 MR HOLMES: Of course, Sir, it is a little difficult to say without having seen the skeleton
30 argument from my learned friend, but we would hope certainly not to exceed the total
31 number of pages that he offers.

32 THE CHAIRMAN: Well, I would certainly hope not.

33 MR HOLMES: We will try to be briefer.

1 THE CHAIRMAN: Well, I would hope that your skeleton arguments would be able to say, "We
2 accept that the basic position is set out at pages 1 to whatever it is."

3 MR HOLMES: Yes.

4 THE CHAIRMAN: And I am sure that Mr Bowsher will bear in mind that at least part of such
5 an opening document should be uncontentious, so I do not have to read three slightly
6 different, but ultimately immaterially different, versions of the facts and/or law, and when it
7 does not really matter. I think your skeletons should not be longer than Mr Bowsher's, and
8 I would be disappointed if they were actually approaching that length, assuming Mr
9 Bowsher's is responsible in its terms of expedition of what is unsatisfactory.
10 You are the same, are you?

11 MR WARD: Well, Sir, I am a bit more optimistic even than Mr Holmes. We are an intervener in
12 this case, we are not the defendant. It is Ofcom's burden to answer the case
13 comprehensively. We anticipate that our skeleton will be a good deal shorter than
14 Mr Bowsher's.

15 THE CHAIRMAN: Good.

16 MR WARD: Of course, we have to read it.

17 THE CHAIRMAN: Good. All right, thank you. You are going to be producing written final
18 submissions. Can I make clear one rule that I apply in relation to written final
19 submissions -- probably various rules, but this is rule 1 -- is that you are not allowed to
20 incorporate by reference anything which was in your opening submissions; that is to say,
21 when I and my colleagues read your final submissions, we will be reading one document
22 from each of you and not one plus going back to bits of the other. So if you need
23 stuff -- and you may well do, I accept this, it is often useful to have it -- if you need stuff
24 from your opening in your final material as well then you must set it out in some form so
25 we are looking at one document. You are not allowed to say, "See paragraphs 24 to 73 of
26 my opening skeleton." I am just not going to do that. So bear that in mind. What that
27 means is that you may have to do some cutting and pasting, which is less than elegant.
28 Well, I do not care, and my colleagues will not care, as long as the information is there.
29 You need not produce beautifully crafted Shakespearean prose, as long as the material is
30 there, but we are going to read one document from each of you in final submissions, not
31 two. So incorporation by reference is not allowed; express incorporation is definitely
32 allowed.

33 Can I ask what volume of documentation we can expect in terms of numbers of bundles?

34 Roughly speaking. Let us assume there is a bundle of witness statements, or a bundle from

1 each of you, and a bundle of the formal documents, the appeal documents. But in terms of
2 other documents we shall be looking at, how many bundles of other documents is there
3 likely to be, leaving aside solicitors' correspondence?

4 MR BOWSHER: Six or seven, I would think.

5 THE CHAIRMAN: As much as that? Right.

6 MR BOWSHER: In total.

7 THE CHAIRMAN: You mean excluding witness statement bundles and pleading bundles?

8 MR HOLMES: Sir, I hope that this will meet with the Tribunal's agreement, but obviously it is a
9 matter for the Tribunal. What has been discussed by the parties' solicitors is to reuse the
10 existing bundles in order to avoid cutting down a whole lot more trees. So the Tribunal will
11 simply have the two appeals bundles, the defence bundle, the intervention bundle and the
12 two reply bundles as the core bundles for the case, and then a couple of volumes of
13 authorities bundles will be added. I hope that that is what the Tribunal had in mind. You
14 mentioned a separate witness bundle, but I do not think that that is what is currently
15 envisaged.

16 THE CHAIRMAN: That is not what I had in mind. When I -- speaking for myself, and I am the
17 only person I can speak for in this respect, but I am chairing it and so I will -- when I want
18 to read the witness statements, I want to find the witness statements in one bundle, or three
19 bundles, one from each side, so I can read Mr Bowsher's witness statements, Mr Ward's
20 and then yours, or whichever order I do it in. I do not want to have to find a witness
21 statement in that bundle, another witness statement in another bundle, go back to the first
22 bundle to find the third; I do not want that at all.

23 MR HOLMES: That is very helpful.

24 THE CHAIRMAN: I suspect you are going to have to re-bundle, and I do not care -- I felt
25 disadvantaged by not having an application bundle for this application. It may be that the
26 practice in this Tribunal is different from elsewhere, but I do not care. I felt disadvantaged
27 because I kept failing to work out where the witness statements were. I created my own in
28 the end, so I had the witness statements gathered in the same place. So I do want bundles of
29 pleadings, as I will call them, witness statements and other documents with cross references.
30 If there are cross references from witness statements to other pages, that is going to have to
31 be done by marginal notes.

32 MR HOLMES: That is very helpful.

33 THE CHAIRMAN: That is the only way of doing it, otherwise we spend all our time dotting
34 around looking in bundles, and you never know where you are. I am afraid that does mean

1 more trees. The way of avoiding trees, of course, is to have an electronic bundle, but I take
2 the view at least in the High Court I can probably order it, but it never happens. It is up to
3 the parties whether they have that. If you are really sensible about trees, you can get
4 a decent electronic bundle, but I am not sure this case has the volume of documentation
5 which makes it worthwhile. So I am afraid it is a bit of tree destruction.

6 MR HOLMES: Not at all. It is very helpful to know. We will put our heads together.

7 THE CHAIRMAN: So if I say conventional High Court type bundles, I think you will all know
8 what I mean by that. Dotting about in bundles is not satisfactory. It is commendable that
9 you want to try and avoid trees, and I know there is an emphasis on doing that, but it is
10 actually to the disadvantage of the Tribunal when that happens. Personally I never know
11 where I am.

12 MR BOWSHER: That is noted, and we will work on that. The only point I would draw from that
13 is we will at some point, I hesitate to say when, have to reserve our skeleton with updated
14 references to the new bundles. That will happen, I suspect, nearer than the hearing, because
15 we will first have to do the bundles.

16 THE CHAIRMAN: Well, I do not quite know when it is planned to get the bundles for reading to
17 my lay members, but when is it likely to go to them? How soon before, in practice, do these
18 bundles and material go? A week before? Less than a week before?

19 MR BOWSHER: (Inaudible).

20 THE CHAIRMAN: A couple of weeks before? Well, again, I will speak for myself. If the
21 revised -- with marginal, you can do it in manuscript in the margin -- with revised cross
22 references, that comes to me at the latest by the Wednesday of the week before, I will not be
23 starting pre-reading before the Thursday, personally, the Thursday of the week before. And
24 I do not think, if it takes that long to get it all together, I am sure my lay members will not
25 mind seeing a second version appropriately cross-referenced. So you need not worry about
26 that, particularly.

27 Can I advance a particular foible of my own in relation to the written forms of your skeleton
28 arguments? I will personally want to have all your skeleton arguments digitally, but I also
29 want paper versions. As I say, I do not need to see them, unless you hear to the contrary, I
30 do not need to see them before the Wednesday of that week before the hearing. Will you
31 each, please, pick a pastel shade of colour and provide your skeleton arguments on different
32 shades of colour so I can see at a glance what colour document -- pink for one, yellow for
33 the other, green -- whatever colours you choose. You are not allowed to choose white, to
34 deal with the facetious suggestion once made to me by other counsel. You can choose

1 whatever colours you like, but I want your skeletons in discrete colours, please, and for my
2 lay members as well. It is just easier, when you have got three parties, I find you know
3 what you are looking at, and whose skeleton you are looking at at any given moment. And
4 the same applies to any supplementary documents that you pass up during a case, of
5 summaries of things, and you will find the document skeletons as well. You choose
6 a colour and stick to it for documents that you are handing up, of the nature of skeletons,
7 chronologies, useful summaries, whatever you are handing up. I am not going to dictate
8 what colours you have. They should be pastel and not strong colours (inaudible). You may
9 think that that is an odd foible, but I can tell you it makes a difference. Mr Bowsher looks
10 sceptical, but I do not care.

11 MR BOWSHER: No, no, I was just thinking of red and green, just whether I have to find out
12 whether anyone is red/green colour blind. That is all.

13 THE CHAIRMAN: Well, it does not matter, because I am not, and it is for me, and conceivably
14 my brethren, and I am not going to make that personal enquiry of my lay members. So I am
15 not in any form colour blind, so I do not care, Mr Bowsher, so that is all.

16 MR BOWSHER: Okay.

17 THE CHAIRMAN: And then I think lastly, unless I think about anything over lunch, you have
18 allowed, roughly speaking, I think, a couple of hours each of you, or a bit more than that,
19 for your final submissions. You should assume that the final submissions are likely to take
20 the form first of all of having to deal with questions that we, in particular I, may have -- and
21 that usually takes quite a chunk of time -- upon your written submissions which will have
22 been read, provided they are not too lengthy. We will discuss length at the hearing. But
23 second, you should assume that the most helpful form of final submissions, written final
24 submissions, is not an emphasis or a regurgitation of what is in the written submissions,
25 which we will already have had and which we will have available to us when we finish, but
26 they should concentrate on what is wrong with your opponent's submissions. That is the
27 most helpful form of oral submissions, so we have basically your answers to whatever is
28 said at that point. If that leaves little or no time for further exposition of your written
29 submissions, well, so be it, but we have got them in writing in any event. So you will no
30 doubt want to bear that in mind when you are preparing your final submissions, and in due
31 course making them.

32 Those, I think, are the only directions. As far as I am concerned, those matters need not be
33 incorporated into any form of final order; they are merely oral directions given for the
34 proper conduct of the case and I do not expect to see them in an order. Before I rise for

1 lunch and think about my decision on the Janka point, are there any other points that you
2 want to make arising out of anything that I have said? No. So if you want any further
3 clarification, you will be able to ask for it.

4 I will sit and deliver my decision on the Janka point at 2.15.

5 (Adjourned for a short time)

6 (For ruling, see separate transcript)

7 MR BOWSHER: I am much obliged, my Lord. As indicated in our note for today, we would ask
8 for our costs of the application regarding the admission of Mr Janka to the ring. As we
9 indicated in our note, the costs are rather deeply entangled with the costs of the broader
10 disclosure application, and therefore not cost effective to produce a schedule of those costs
11 at short notice. So we would ask that we have our costs of that application, to be assessed if
12 not agreed on a detailed assessment.

13 MR WARD: Sir, we submit that there should be costs in the cause. This application was first
14 brought before the court for the case management conference. It was rejected at that stage.
15 No costs order was made on that occasion. Today, Sir, you have indicated that this was
16 a question of balance, and, as is apparent from the ruling, the explanations given by
17 Mr Bowsher from the bar were material to that ruling. Those explanations were not
18 prefigured or set out in any witness statement. In my submission, costs in the case is the
19 appropriate approach.

20 THE CHAIRMAN: Mr Holmes, are you saying anything about the costs? Otherwise the costs of
21 today are going to be costs in the case. I do not think anybody is going to say otherwise for
22 the costs of the PTR as well. Are you going to say anything?

23 MR BOWSHER: (Inaudible).

24 THE CHAIRMAN: I thought you were, yes. I just want to make sure Mr Holmes does not want
25 to say anything about this debate. No?

26 MR HOLMES: (Shakes head).

27 THE CHAIRMAN: Do you want to say anything else?

28 MR BOWSHER: No, my Lord.

29 THE CHAIRMAN: No. Costs in the case. I agree with Mr Ward that the application was
30 materially advanced by material which had not been advanced in the witness statements.
31 Rather than taking the point that, yet again, strictly speaking an evidential case had not been
32 made out, I decided to deal with the matter as it came before me, bearing in mind the
33 imminence of the trial. The fair order for costs, reflecting all the relevant circumstances,
34 and the fact that at least one important potential additional safeguard in terms of drafting

1 has come out of my judgment, that is to say the express obligation on Mr Janka to use the
2 information only for the limited purpose which I have said, it seems to me the appropriate
3 and fair order is that costs should be in the case. Which means that the costs will be in the
4 case as well, all the costs of the PTR will be costs in the case. It would be right, would it
5 not, to have a carve-out to say that in no circumstances should Ofcom be left bearing the
6 costs of this part of the debate----

7 MR HOLMES: I am grateful, Sir, yes.

8 THE CHAIRMAN: -- because they did not join. So I am not quite sure how you do that as a
9 matter of drafting, but I suppose as between the two of you costs shall be in the case, and
10 the order should say that in no event shall Ofcom bear the costs of and relating to this
11 application. I think that will do the trick, but you can no doubt find a better form of drafting
12 than that. But as a matter of principle, even if Ofcom lose and end up paying costs of the
13 appeal and therefore of this PTR, they should not pay the costs of this bit. That is the trick.
14 I am sure you can achieve that trick.

15 MR BOWSHER: We will work it out, yes. A question of practicality: time being short, and in
16 the past it has sometimes taken more than a day or two to un wrinkle changes to the
17 confidentiality ring, I wondered what was the best means of communication between the
18 Tribunal and yourself to make sure that we try and get Mr Janka actually into the ring as
19 soon as possible?

20 THE CHAIRMAN: This is a question of the drafting.

21 MR BOWSHER: It is a question of getting the order drafted, then getting it to here, approved by
22 the Tribunal to you, signed off by you and then----

23 THE CHAIRMAN: Well, let us for once, and with all due respect to the Tribunal staff, for whose
24 administrative qualities I have the greatest admiration, let us cut out the middleman at that
25 stage. If you liaise directly with my clerk, if there is a dispute as to drafting. When it is
26 approved by me it can then find its way to the Tribunal. I am sure the Tribunal will not
27 mind being left out of an email chain which is basically I think going to be a forwarding
28 exercise.

29 (Aside to the Tribunal staff)

30 Yes, straight to my clerk as if this were High Court litigation.

31 MR BOWSHER: Yes.

32 THE CHAIRMAN: You can imagine the enthusiasm with which I will embark on a dispute as to
33 wording, but if I have to resolve a dispute as to wording I will resolve a dispute as to

1 wording. And I think we should have this done promptly. What day are we not, Tuesday?

2 I do not see why you cannot have this agreed by close of business on Thursday, do you?

3 MR BOWSHER: No.

4 THE CHAIRMAN: Do you?

5 MR WARD: No.

6 THE CHAIRMAN: No. Mr Holmes does not care.

7 MR BOWSHER: I mean, I am hoping it is just a question of getting your initials on the relevant
8 bit, then that is the----

9 THE CHAIRMAN: If you have agreed the wording, I am unlikely to make a fuss about it, so it is
10 really more down to you. So if you get me a draft by close of business on Thursday, we can
11 have it wrapped up by Friday, and then we know where we are.

12 MR BOWSHER: Yes. I am much obliged.

13 THE CHAIRMAN: Good. Is there anything else?

14 MR BOWSHER: No.

15 THE CHAIRMAN: Good, thank you for your help. When it comes to delivering bundles, will
16 you liaise with the Tribunal as to whether it is going to be more convenient to get bundles
17 direct from you to me, rather than coming through here -- for me, obviously. For the lay
18 members it is different. But it may be convenient to get them to me in the Rolls Building
19 direct. If there are reasons why it needs to come through here it does, but I am not going to
20 insist on that myself. But I will leave that to you.

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