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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 November 2018

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
TIM FRAZER
PROFESSOR DAVID ULPH CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ROYAL MAIL PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

WHISTL

Proposed Intervener

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.com

CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr Daniel Beard QC and Miss Ligia Osepciu (instructed by Ashurst LLP) appeared on behalf of the Appellant.

Mr Josh Holmes QC and Mr Nikolaus Grubeck (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Alan Bates (instructed by Towerhouse LLP) appeared on behalf of the Proposed Intervener.

1 THE CHAIRMAN: Mr Beard, good afternoon, and welcome back, as they say.

2 MR BEARD: Good afternoon, I am pleased to be here. I appear in this matter for Royal Mail
3 Group with Miss Osepciu. Mr Holmes and Mr Grubeck appear for Ofcom, and Mr Bates
4 appears for the applicant intervener, Whistl, in relation to these matters. I think you will
5 have seen skeleton arguments or notes from all three of us in relation to these matters.

6 THE CHAIRMAN: Yes, we have, thank you very much, most helpful.

7 MR BEARD: There is a degree of violent agreement amongst the parties in relation to a number
8 of the issues on the Tribunal's agenda. I was going to just work through the agenda very
9 briefly unless the Tribunal has particular issues that you wanted to raise.

10 THE CHAIRMAN: You are not going to tell us that the agreement has frayed?

11 MR BEARD: No, no fraying. I look across and I do not see any fraying just at the moment, no,
12 so with that in mind, if that works for the Tribunal, first of all, in relation to forum, I think
13 this is wholly uncontentious, certainly as between Ofcom and Royal Mail Group. It is a
14 matter to be treated as proceedings in England and Wales and it should be heard in London.
15 I do not understand that Whistl has any objection to that either.

16 THE CHAIRMAN: We probably would not be terribly impressed if they did.

17 MR BEARD: No, I thought not, I was merely being considerate in the circumstances. It will
18 wane in time!

19 In fact, that takes me to interventions, items 2 and 3 in relation to interventions. You will
20 have seen the position that is adopted by Ofcom and by Royal Mail Group in relation to
21 Whistl's intervention. Ofcom has no objection to Whistl intervening, and we plainly
22 recognise the interest that Whistl has in these proceedings. We have set out in a little bit of
23 detail in our skeleton argument some of the concerns we have about some of the
24 observations made in Whistl's request for intervention, which evinces in our mind an
25 intention to stray beyond the proper boundaries of its province as an intervener in these
26 proceedings. We have articulated this in a little more detail, as I say, in the skeleton, and
27 we do have a brief extract of authorities bundle with us. I am very happy to take the
28 Tribunal to those authorities.

29 In very broad terms, what they say is the decision maker cannot shift its ground or
30 reasoning. Obviously it can put in evidence in response to our evidence, but this appeal is
31 an appeal against the decision of the Regulator. The Regulator cannot expand these matters
32 and, *a fortiori*, neither can an intervener. To be fair to Whistl, in its note for these
33 proceedings it is not suggesting that it should do so. So long as that is the case then
34 obviously we will have no objection.

1 We do, however, looking at that letter, have concerns about the position that Whistl is
2 intending to adopt, both in terms of the personnel it wants to introduce into the
3 confidentiality ring, the number of expert economists, a very large number of people,
4 including several forensic accountants. We do not understand why this is necessary.

5 THE CHAIRMAN: We can come to that. We need to decide presumably, fairly early on this
6 afternoon, whether Whistl are allowed to intervene or not.

7 MR BEARD: Yes.

8 THE CHAIRMAN: Otherwise we are talking contingently the whole time.

9 MR BEARD: Yes, I make the submissions contingently, but with it being in mind that a properly
10 limited intervention by Whistl, which is not seeking to expand the scope of the decision,
11 which is not seeking to put in new evidence in relation to these matters, save as is
12 clarificatory, and recognising, of course, that Whistl has been closely involved in this whole
13 regulatory process, has submitted a great deal of material, has made all sorts of arguments
14 to Ofcom, many of which in fact have been rejected, and we do have a grave concern that
15 what this intervention could turn into if it is not properly disciplined is a vehicle for Whistl
16 to air grievances in the context, as it has fairly set out, of it wishing to bring a damages
17 claim. We say that the damages claim is wholly misconceived and we do not want these
18 proceedings to be in any way used as vehicle for testing issues that Whistl wants to adduce
19 in relation to those damages.

20 THE CHAIRMAN: Right.

21 MR BEARD: These are mere markers.

22 THE CHAIRMAN: This is a Tribunal renowned for its case management, Mr Beard.

23 MR BEARD: I take it as given, sir, that that is the case, and it is for that reason that we place
24 these markers at this stage, because we do have real concerns. If one looks at the letter that
25 formed the basis of the request by Whistl, you do see a number of paragraphs which do
26 appear to be traversing notions. It is in the case management bundle at tab 5, and if one
27 goes on to page 3 in particular, one sees at page 3, and I am not going to deal with all of the
28 potential issues that arise here, but just picking it up at paragraph 12, Whistl says that it has
29 submitted a complaint in 2014 and:

30 “... has worked closely with Ofcom to assist it with its investigation ...”

31 and then the final sentence of 12:

32 “Whistl should be permitted to participate in proceedings in which the evidence it
33 provided is being challenged by Royal Mail.”

1 In one sense, if it is being permitted to be involved in these proceedings, we understand that
2 that is fine. If, on the other hand, what it is saying is, “we want to be able to defend the way
3 in which Ofcom has interpreted the material we put forward and explain it further”, we are
4 not content with that, because that would be risking trespassing on the very process that
5 exists for Ofcom to put forward a statement of objections where it sets out the evidence it is
6 relying upon, sets out its interpretation of that evidence, and we get an opportunity then to
7 answer it, which results in the final decision. That process should not be reopened.

8 If one moves on to 13:

9 “The material provided by Whistl included complex models that Whistl is best
10 placed to explain to the Tribunal in so far as this appears in the course of appeal.”

11 : Well, the caveat of “appears helpful” is welcomed, but one needs to have concern there. If
12 it transpires that the models that Whistl used or put forward were applied, or indeed
13 misapplied by Ofcom, in any analysis it is Ofcom’s approach to these matters that is
14 important, not Whistl’s.

15 THE CHAIRMAN: If in paragraph 12 the letter had said, “some of the evidence so supplied”,
16 you would be less concerned, would you?

17 MR BEARD: Obviously, the sentence itself says, “Whistl should be permitted to participate”.

18 On that basis we are not objecting to participation, what we are concerned about is the
19 nature of this participation. What we are conscious of is the fact that having an interest in
20 the proceedings such as to permit you to be admitted as an intervener is, we understand, a
21 tolerably low threshold. We also recognise that *ex ante* it can be difficult for a Tribunal to
22 lay down bright lines as to how an intervention is to be case managed. We are entirely alive
23 to that.

24 What we are concerned about is that Whistl should not come away from this CMC with any
25 sense at all that it can expand or elaborate upon the decision that is under challenge by
26 Ofcom, and its role is necessarily limited. That does mean not only in submissions where it
27 should not be duplicating what Ofcom does, but particularly in relation to further evidence
28 about which this Tribunal should be particularly concerned. As I say, we have authorities
29 that explain why it is that there are real limitations on the further evidence that a Regulator
30 can put in in these circumstances, and we understand that Ofcom is not putting forward, or
31 not intending to put forward, factual material, and we are therefore very concerned about
32 the idea that Whistl should be doing so in any extensive form.

33 THE CHAIRMAN: So let me be clear, your position is that the Regulator could not do that, and
34 therefore it must not be done by the back door, as it were?

1 MR BEARD: It must not be done by the back door, and indeed we would suggest that in relation
2 to interveners, the situation is actually narrower than that of a Regulator, but it cannot be
3 broader.

4 THE CHAIRMAN: No further, and possibly not as far.

5 MR BEARD: Yes.

6 THE CHAIRMAN: Right. We will hear what others think about that.

7 MR BEARD: If, sir, it is of use, I think it is perhaps important in making that submission, before
8 I go to the authorities - I would just highlight one or two authorities - just to pick up on that
9 letter. Paragraph 14:

10 "Whistl is also concerned to protect the confidential treatment of some of the
11 material it submitted to Ofcom to the extent appropriate."

12 Well, we do not have any particular concerns about that, but of course those are matters that
13 Ofcom will have to have dealt with in the course of putting forward its decision, because
14 Ofcom cannot rely on material that it holds as confidential as against Royal Mail Group.
15 Indeed, one of the grounds of appeal is that it has relied in the final decision on material that
16 it held as confidential and did not rely upon in the statement of objections.

17 THE CHAIRMAN: I feel we are going to come to that in due course.

18 MR BEARD: Yes, and at 15:

19 "A yet further reason why Whistl has an interest in the appeal is that it intends to
20 pursue an action for damages seeking compensation from Royal Mail for loss and
21 damage caused by Royal Mail's abuse of dominance."

22 It goes on through that paragraph, and it culminates, and I invite the Tribunal to read it all,
23 by saying:

24 "Permitting Whistl to intervene in the appeal is likely to assist the efficient
25 management of both sets of proceedings, having regard to the high degree of
26 overlap between them in terms of factual, economic and legal issues."

27 This is just a wrong approach. That is not a relevant consideration for this Tribunal, what is
28 going on in a putative damages action. We say it is ill-founded in any event, but that should
29 not in any way govern the way in which these matters are to be dealt with in these
30 proceedings.

31 As I say, I am not going to work my way through all of this letter, but I just highlight the
32 reasons why. In our skeleton argument, in particular at paragraph 11, we have explained
33 why we have real concerns about the scope of the intervention and what Whistl is intending
34 to do. We say at 11(a) that paragraphs 9 and 12 to 13 of that letter suggest that Whistl

1 proposes to introduce extensive factual evidence reflecting submissions made to Ofcom
2 during the administrative phase. We say that is not the right approach. It is not an
3 opportunity for Whistl to re-litigate. What is critical was what was, in fact, before Ofcom
4 and relied on by Ofcom and how it was used by Ofcom.

5 At 11(b) we note the desire to include three economists. We will come back to the number
6 of people that Whistl want to put in the confidentiality ring, but we are not objecting in
7 principle to Whistl having the advice of expert economists in understanding what is going
8 on in relation to the appeal. What we are concerned about is if there is any sense from
9 Whistl that it is intending to adduce expert reports in relation to these matters, because we
10 say we do not see any good basis for that in relation to the challenge to a regulatory
11 decision. Indeed, that is precisely the route by which proceedings such as these begin to
12 become unwieldy and indeed outwith the proper scope of the appeal parameters.

13 We do not say never, we cannot say that, because we do not know precisely what it is that
14 might be said as being particularly relevant and appropriate on which to put in evidence.
15 Broadly speaking, what one does not do is see this as an opportunity to put in general
16 economic evidence in relation to the case as it is put.

17 As I say, at 11(c) we pick up the issue relating to the damages claim, and we say that the
18 damages claim such as we have seen raises a whole wide range of issues, including matters
19 under other provisions, and indeed all sorts of issues well beyond the price differential
20 announcement with which we are concerned in these proceedings. It would be quite wrong
21 if there were any sense in which those other issues were being adverted to or used by Whistl
22 in its intervention.

23 It is for those reasons that we say that the position of an intervener in these matters is,
24 *a fortiori*, more restrictive than that of a Regulator dealing with its own decision. Otherwise
25 we do engender a risk of unfairness.

26 To make good that submission, if I may, could we take up the authorities bundle - it is only
27 extracts of authorities because some of these judgments are somewhat epic, and just in the
28 interests of saving trees we have limited the extent of the material provided. I am not going
29 to go through all of these, but if I may I would like to just pick it up in tab 2 in one of the
30 early cases, *Napp*, before the first President of the Tribunal, Sir Christopher Bellamy. Do
31 all members of the Tribunal have the authorities bundle? We may have a spare. There is a
32 spare unmarked one if that would assist.

33 THE CHAIRMAN: We do know this case, but go on!

34 MR BEARD: I thought you might!

1 THE CHAIRMAN: This case is studied and extensively read.

2 MR BEARD: I recognise, sir, that certainly you have done. I was just going to take it at page 29,
3 and what we see at page 29 running through paragraphs 75 to 79. If I may, I will just invite
4 the Tribunal to read it, I will not read it out.

5 THE CHAIRMAN: I do not want to cut you short, but I think you can take it that we are not in
6 any doubt about the legal position, the Tribunal's practice and the terms on which the
7 intervention is likely to be allowed.

8 MR BEARD: I am grateful for that indication. Of course, the difficulty is, without knowing what
9 that precisely means in the Tribunal's mind, I do not know whether or not it is----

10 THE CHAIRMAN: We have to hear what your opponents have to say, and subject to that I do
11 not think we need to go at length into the authorities.

12 MR BEARD: If the Tribunal is satisfied in relation to these matters, if I could just direct the
13 Tribunal to a useful summary, tab 5, page 27. Again, it will be a case with which the
14 Tribunal is familiar, the *Argos* case. It is paragraph 66, which draws on *Napp* and *Aberdeen*
15 *Journals*, and perhaps usefully summarises the position, which is broadly you cannot
16 change the terms of your decision, you cannot start adducing new evidence and new
17 reasons; yes, there is scope for you putting in responsive evidence as a Regulator when you
18 are faced with an appeal on the merits where evidence has been submitted, but there are
19 limits in those circumstances too.

20 THE CHAIRMAN: And it is set out in other cases too, which you have not referred to.

21 MR BEARD: It is, absolutely, and we have gone through to *Tobacco*, and others beyond that.
22 I am grateful to the Tribunal----

23 THE CHAIRMAN: Late advice is always better when it comes to procedure.

24 MR BEARD: In those circumstances, I think you have the broad submission in relation to our
25 position on intervention, that we are not opposing it in principle, we are concerned about its
26 scope.
27 I can move on to confidentiality, unless you would rather deal with----

28 THE CHAIRMAN: I think, as a sort of clearing the decks point, I think I would quite like to hear
29 what Mr Holmes has to say, and then we might even hear Mr Bates.

30 MR HOLMES: Good afternoon, sir.

31 THE CHAIRMAN: Good afternoon to you, Mr Holmes.

32 MR. HOLMES: As is the case with Royal Mail, we do not oppose Whistl's intervention. Indeed,
33 as the complainant in these proceedings it is clearly appropriate that Whistl should be
34 granted permission to intervene.

1 We have heard what Mr Beard says. Whistl is obviously advised by very experienced legal
2 advisers, who will no doubt take care to confine its intervention accordingly, but it is really
3 premature to discuss the scope of that intervention before it is served and filed.

4 THE CHAIRMAN: And can I take it you do not disagree with Mr Beard's general remarks about
5 the sorts of considerations we will tend to have in mind when considering intervention?

6 MR. HOLMES Well, sir, we certainly agree that the case is as set out in Ofcom's decision, and
7 both Ofcom and Whistl must work within the framework of the decision as it has been
8 taken.

9 THE CHAIRMAN: Well, I will take that as very reassuring, right.

10 Mr Bates, as the requester for intervention, perhaps you would like to just tell us whether
11 there is anything to add to the letter that we have been referred to?

12 MR BATES: We do not have anything to add in relation to the reasons why we should be
13 permitted to intervene. I would like to address the points that Mr Beard has made about the
14 scope of the intervention. I do not know if now is the moment to do that, or you would
15 rather that I----

16 THE CHAIRMAN: No, I think do it now,

17 MR BATES: Thank you, sir.

18 THE CHAIRMAN: But not at too great length, please.

19 MR BATES: Can I then make clear at the outset that Whistl and its representatives are fully
20 aware of two things: first, the nature of these proceedings, that they are an appeal on the
21 merits against Ofcom's decision. The overarching question for the Tribunal is whether the
22 decision is wrong. Ofcom's submissions and evidence, and also Whistl's, will be directed
23 to upholding the decision for the reasons given therein, and also of course meeting any
24 points and arguments that Royal Mail is now raising to attack the decision.

25 THE CHAIRMAN: Hang on, Mr Bates, this is an appeal on grounds.

26 MR BATES: Yes, sir.

27 THE CHAIRMAN: And I have been told many, many times that we have to confine our
28 consideration to the grounds of appeal.

29 MR BATES: Yes, sir.

30 THE CHAIRMAN: We can take it as read, can we, that you are in agreement with that, your
31 intervention is not just about the reasons for the decision, it is about the matters in dispute,
32 and the dispute is set by Royal Mail and Ofcom's decision.

33 MR BATES: We agree with that, but the point I was seeking to make was that, first of all, we
34 will be, of course, be defending the decision in so far as it is criticised by the appeal; and

1 secondly, the evidence that is filed by Royal Mail, which of course we have not seen as
2 Whistl - we have not seen the notice of appeal, we do not know what evidence there is
3 beyond the fragments we have been able to glean from the skeleton arguments. Whatever
4 material Royal Mail has chosen to put in, obviously both Ofcom and, in so far as we are
5 permitted to intervene, Whistl will be able to respond to that, if appropriate. One can see
6 that actually in the *Napp* case that has just been referred to. I know the Tribunal is very
7 familiar with it, but Mr Beard referred you to paragraphs 76 through to 79, but 80 and 81
8 are also important. 79 says that there should be a presumption against permitting the
9 Director, the Regulator, to submit new evidence that could properly have been made
10 available during the administrative procedure. Let me say clearly that Whistl accepts that
11 the same constraint should apply to us.

12 At 80, at the end of that paragraph, it says:

13 “Those considerations may militate against permitting new evidence by the
14 Director, but in some circumstances considerations of fairness may point in the
15 other direction. An obvious example is where a party makes a new allegation or
16 produces a new expert’s report which the Director seeks to counter.”

17 At the end of 81 it says:

18 “A situation whereby the appellant could always have a ‘free run’ before the
19 Tribunal, but the Director was always confined to the material used in the
20 administrative procedure could lead to a significant lack of balance and fairness in
21 the appeal process.”

22 THE CHAIRMAN: You may rest assured that we will do our utmost to run a fair procedure, but
23 it is only reasonable to point out that important a case though *Napp* is, it is a case about an
24 appeal against a decision of the OFT. I was not aware that there was an intervener in that
25 case. Those passages you are quoting are about what evidence the Regulator can produce -
26 is that right?

27 MR BATES: Indeed, sir, but as I understood Mr Beard’s submission, what he was saying is that
28 just as the scope of evidence that a Regulator can introduce is constrained by those
29 principles, the same principles should also apply to an intervener, and I make it clear----

30 THE CHAIRMAN: I think he said - maybe not so far, I think was what he said.

31 MR BATES: He said not so far, he did not say in what respect he thought it would not go to the
32 same extent. It is difficult to argue on that.

33 THE CHAIRMAN: I think I said to him, you can rely on us to take a view on all that.

1 MR BATES: Indeed we can say, sir, and Whistl is also aware of the proper role of an intervener,
2 that its intervention should be proportionate. We are not seeking to duplicate Ofcom's
3 submissions or evidence. There is no dispute about any of that.

4 Frankly, there is also no basis for Mr Beard's suggestion that Whistl's representatives
5 would not observe those principles. Listening to his submissions about our letter applying
6 for permission to intervene, it reminds me of when I occasionally have an argument with
7 my wife. Whatever I say, she seems to hear something completely different from what it is
8 that I have said.

9 THE CHAIRMAN: Not something you should admit to, Mr Bates! In the best marriages there
10 are no arguments!

11 MR BATES: There is certainly no basis, we say, for this sort of anticipatory paranoia about the
12 way in which we might use the intervention for some ulterior purpose. That is not what we
13 are trying to do at all. Our position in response to the suggestion that some special shackles
14 should be put on Whistl so that we had to apply in advance for permission to adduce
15 evidence, etc, which is one of the proposals that is put in Royal Mail's skeleton argument, is
16 that we say there is no call for that.

17 It would upset the timetable that everyone is agreed would be an appropriate timetable,
18 whereby Whistl was putting in its statement of intervention and evidence early in the New
19 Year. The sensible approach would be for all parties to file their evidence, and then, if there
20 are any objections to it, the Tribunal can consider those objections at the second CMC,
21 which again everyone seems to think is a good idea. Of course, at that stage the Tribunal
22 will have the benefit of seeing the shape of the entire case and can decide whether any
23 evidence should be excluded as being inappropriate.

24 I do make the preliminary point again that the Tribunal will appreciate that Whistl is not
25 well placed to deal with some of the points that my learned friend Mr Beard made because
26 we have not seen the notice of appeal, we do not know anything about the evidence that
27 Royal Mail is relying on. What we have gleaned from the skeletons for the CMC is that a
28 substantial volume of material has been filed by Royal Mail. It includes multiple factual
29 witness statements, and also expert reports including specifically forensic accounting
30 evidence. So we were right in anticipating that we would need the services of a forensic
31 accountant in order to understand that evidence and to decide whether there was anything
32 we wished to say in response. Indeed, it is clear from page 5 of Royal Mail's skeleton what
33 that forensic accounting material consists of. At page 5(v) it says:

1 “It is noted that Whistl proposes to include in the confidentiality ring four forensic
2 accountants. Royal Mail is concerned that Whistl may envisage the use by those
3 individuals of documents disclosed in these proceedings for the purposes of
4 advancing a damages claim.”

5 Well, we do not.

6 “Royal Mail cannot discern any other role for forensic accountants acting for
7 Whistl in these proceedings, and notes that Ofcom does not propose to rely on a
8 forensic accounting report. Royal Mail’s own forensic accounting evidence from
9 Mr Harman is largely concerned with an analysis of Whistl’s own business plans,
10 of which Whistl clearly has direct knowledge.”

11 So what we infer from this paragraph is that the forensic accounting evidence filed by Royal
12 Mail is a forensic analysis of Whistl’s business plans. Now, of course, in so far as we have
13 people who were employed by us all those years ago when we were trying to do delivery
14 competition, those individuals if they were involved in the business plan may be able to
15 help us to some extent in dealing with those points. I suggest that this illustrates the nature
16 of Royal Mail’s evidence so far as we can guess what it is from what is in the skeletons, and
17 the need for Whistl to be fully involved in these proceedings in order to understand and
18 respond to new matters which they are raising.

19 THE CHAIRMAN: It is rather a circular situation, is it not, Mr Bates? You are going round in
20 circles. You do not know what you are going to say until you have seen what you have to
21 answer, and you do not want to agree to any limitations until you have seen what you have
22 to seek.

23 MR BATES: Precisely, sir. With regard to the specific reasons why we say we should not be
24 placed under shackles at this stage, I make four points: first of all, the nature of this case, it
25 is a case in which Royal Mail’s appeal appears, from what we know about it from the
26 summary on the Tribunal website, to challenge Ofcom’s case on issues of fact that directly
27 concern Whistl and are raised on the basis of new factual and expert evidence. In particular,
28 it is said that Ofcom was wrong to find that Royal Mail’s conduct was a contributing force
29 either to, first of all, Lloyds Development Capital’s suspension and subsequent withdrawal
30 of its investment from Whistl; and second, from Whistl’s decision to suspend and
31 subsequently abandon its plans to compete in letter delivery. So those are matters about
32 which Whistl is especially well placed to comment, and they directly concern us. Those
33 challenges are likely to dispute factual and expert evidence that Whistl provided to Ofcom,

1 and on which Ofcom has relied in the decision, and so to that extent it is Whistl's evidence
2 that Royal Mail is challenging, so we should have a chance to answer their points.

3 I note that Ofcom's skeleton indicates that the material filed by Royal Mail in the appeal
4 goes beyond the material that was provided in the administrative procedure. Of course,
5 there is no reason why Royal Mail cannot do that. They are the appellant, this is an appeal
6 that satisfies Article 6 of the Human Rights Convention. That material and the matters put
7 in issue by Royal Mail's appeal need to be answered so that the Tribunal can consider them
8 fairly, and we are particularly well placed to do that.

9 Royal Mail's case also, to some extent, cuts across matters that would be central to our
10 intended damages claim, and would give rise to factual findings by this Tribunal that may,
11 as a matter of reality, make it very difficult to persuade the Tribunal in a subsequent
12 damages claim trial to reach contrary conclusions. The reasons for that are obvious from
13 what I have said about some of the specific matters that are raised in the notice of appeal.

14 THE CHAIRMAN: That is not something we can have in mind, is it?

15 MR BATES: Well, in my submission, it is something that you can have in mind, because if
16 Whistl is an intervener to proceedings in which findings made in the Tribunal's judgment at
17 the outcome of these proceedings will therefore be binding upon Whistl, it would be wholly
18 unfair to try to deal with those matters in a way where Whistl's hands were tied behind our
19 back in terms of being able to respond to the matters being raised.

20 THE CHAIRMAN: I am not sure that is right. Obviously, if we were to allow you to intervene,
21 we would take the factual evidence as we find it, but our focus would be on the correctness
22 or otherwise of the appeal.

23 MR BATES: Indeed, it would be on the correctness or otherwise of the appeal, but in so far as
24 Royal Mail has chosen to put in issue matters that are directly relevant to causation of loss
25 on the part of Whistl, because what they are saying is that the conduct that was found to be
26 an infringement did not have impacts on Whistl in terms of causing our exit from letter
27 delivery competition. In my submission, it would be entirely wrong for the Tribunal to deal
28 with and rule on that matter in proceedings in which Whistl was a party without Whistl
29 being able to respond properly to that matter. It may be that we do not have to get into the
30 weeds of that today, but I think it illustrates the nature of some of the matters that are being
31 raised by Royal Mail, and the reasons why it would be appropriate for the Tribunal to make
32 any decisions about restricting the scope of Whistl's evidence or excluding particular
33 evidence once the Tribunal has seen the material that all the parties are putting in with their
34 pleadings, and that can be done at the next CMC.

1 The second point we would make is about the scope of our evidence. There is nothing to
2 suggest that we would be introducing a new theory of harm, or any other basis of finding
3 the infringement. Rather our need for factual and expert evidence is driven simply by the
4 need to respond to the case put by Royal Mail in opposition to the factual and economic
5 evidence submitted by Whistl in so far as relied on by Ofcom in the decision.

6 The third point is about pragmatic and fair case management and the need for the Tribunal
7 to deal with these matters on an informed basis. As I have already said, that can most fairly
8 and properly be done at the next CMC, at which point of course Whistl will have had the
9 opportunity to see what the issues actually are in the appeal.

10 Fourth, there is, as I have said, nothing to indicate that Whistl, whose advisers are
11 experienced in the practice of this Tribunal, do not understand, or would not respect the
12 proper boundaries of the intervention. We especially object to the suggestion that is made
13 in Royal Mail's skeleton that we are seeking to use materials from these proceedings in a
14 damages claim. We are not. We are well aware of our professional obligations.

15 So far as confidential information specifically is concerned, further provision in the
16 confidentiality undertaking attached to the draft confidentiality order we have provided
17 would expressly exclude the precluded material from being used for any other purposes, but
18 even, apart from that, we are aware of our professional obligations. There is no need for us
19 to be made subject to any special orders in order to ensure this, though I do note that Royal
20 Mail does not, in any event, suggest that material deployed in these proceedings would not
21 be disclosable in due course in a damages proceedings anyway, but of course we would
22 make an application for the material to be disclosed in that proceeding before relying on it
23 there.

24 THE CHAIRMAN: I think it was your phrase "efficient management of each sets of
25 proceedings" which caused them to get a bit worried. Who is managing which set? We are
26 not managing the private action.

27 MR BATES: You are not managing the private action at the moment. As we have said in our
28 skeleton argument we intend to seek an order in due course for those proceedings to be
29 transferred to this Tribunal. We do not know what the course of either set of proceedings
30 will be. The point that we were making was simply that, in so far as the Tribunal is dealing
31 with the two proceedings at the same time to any extent, there may be some convenience in
32 our being party to these proceedings. But actually, that point does not really matter in
33 circumstances where, as I understand it, nobody is actually opposing our intervention in the
34 present proceedings. There is nothing to be inferred by what we have said there of any

1 intention to use material from these proceedings in some other set of proceedings. That is
2 an example of what I said at the outset of Royal Mail placing a construction on what we
3 have said that is not justified by the words that we have used.

4 THE CHAIRMAN: I hope this atmosphere of mutual trust continues throughout the case.

5 Mr Beard, do you want to reply?

6 MR BEARD: Yes. Unfortunately, I am not quite sure I can fully buy into this one for mutuality
7 at the moment. There are a couple of points to raise in relation to these matters. If I start at
8 the back end with the concerns about the interaction with the damages claim, I have to say
9 that Mr Bates' submissions just gave rise to greater concerns about the intentions of Whistl
10 in relation to the use of these proceedings and its relationship with damages matters. I hear
11 the Tribunal is very much alive to this. We have suggested in our skeleton that there should
12 be an order preventing Whistl and its advisers using materials obtained in these proceedings
13 for any other purpose than the intervention in these proceedings. That is the proper course
14 here.

15 We do have a real concern that we understand the lawyers, the forensic accountants and
16 perhaps the economists that are being put forward to be in the confidentiality ring and
17 therefore obtain this material are the very same people that are involved in the damages
18 claim. They do not have the power to wipe one half of their brain in relation to material
19 they receive in relation to these proceedings, unless I misunderstand. In those
20 circumstances, there is a real concern about those people actually being able to use
21 information they are obtaining in these proceedings in damages claims in circumstances
22 where the material has not been disclosed. We think, therefore, that it is a real concern and
23 we suggest that order.

24 THE CHAIRMAN: It is not the first time we have had this problem, is it?

25 MR BEARD: No, and indeed people have been excluded from confidentiality rings on precisely
26 this basis. In *Sky/ITV* for instance, banker advisers were excluded entirely, as I recall.

27 THE CHAIRMAN: I remember it well! You and I are probably the only two people alive who
28 do!

29 MR BEARD: I did not realise it had those terrible repercussions! There the consideration was
30 that people cannot wipe information from their mind that they receive in the course of one
31 proceedings and end up having it informing their position in relation to others.

32 THE CHAIRMAN: That rather points towards dealing with this under confidentiality.

33 MR BEARD: That I understand, but we highlight that point in relation to the position of the
34 advisers, but we do also express the concern about Mr Bates' expression of what he is

1 intending to do. We highlighted the fact in our skeleton that there is forensic accountancy
2 answering Ofcom's interpretation of the Whistl material. What we are very concerned
3 about is that this should not open up a new front by Whistl in relation to interpretation of
4 materials that Ofcom have undertaken and made decisions on in its decision. Those should
5 not be reopened. We understand the quandary that Mr Bates faces, that he does not know
6 what it is he is going to have to be dealing with, but we are concerned about an approach
7 that just leaves this over, leaving potentially forensic accountants or economists being
8 instructed to put in reports that are then handed to the Tribunal and it is said, "Well, you
9 might as well take this into account, we have written them now."

10 What we have said in paragraph 12 of our skeleton seem to us to cut the Gordian Knot for
11 Mr Bates, which is to say if he is going to seek to adduce expert evidence he should explain
12 with reasonable specificity in advance what he is going to do once he and those in the
13 confidentiality ring have received the relevant material - not before, because we recognise
14 that Mr Bates, notwithstanding his many and manifest powers, cannot do it without the
15 documents in front of him. So that is the way that we suggest this can best be case
16 managed, rather than simply leaving it over to a CMC in due course.

17 Sir, those are our proposals. You have heard our submissions in relation to these concerns.
18 The Tribunal I am sure has these matters firmly in mind. Unless I can assist further in
19 relation to these matters on intervention, those are our submissions.

20 THE CHAIRMAN: In that case we are going to adjourn briefly and give you an answer on
21 intervention.

22 MR BEARD: I am grateful.

23 (Short break)

24 THE CHAIRMAN: The Tribunal has considered the question of Whistl's application to
25 intervene. We allow the intervention. We are not inclined to make a specific order as to
26 how this intervention should subsequently be conducted. We would emphasise, however,
27 that the intervener must confine itself to supporting one or other party on the matters in
28 dispute. We appreciate that the intervener is as yet not fully briefed on what are the matters
29 in dispute. I cannot emphasise that strongly enough.

30 The Tribunal will adopt its normal approach to the question of adducing new evidence, and
31 we will deal with the question of treatment of confidential information to which the
32 intervener may become a party when we deal with confidentiality.

33 Right, you are now a party to the proceedings, so we may continue on a three-party basis.

1 MR BEARD: I am grateful. That then takes us naturally to confidentiality, which was the third
2 issue on the agenda. I do not think there is an issue but that in circumstances where Whistl
3 is admitted as an intervener there is a need for a confidentiality ring. The terms of that
4 confidentiality ring are still being finalised, but I think, broadly speaking, the overall shape
5 of the order and undertaking are not contentious.

6 There is one issue I do want to draw to the Tribunal's attention, which does go back to the
7 point, Mr Chairman, that you made earlier which was leave over issues to do with use of
8 documents to the confidentiality submissions.

9 THE CHAIRMAN: We have a suggestion for you on that.

10 MR BEARD: I am grateful.

11 THE CHAIRMAN: We can cut through the thicket. I think we would like both the undertaking
12 and the terms of the establishment of the confidentiality ring to make it clear that the
13 confidential information to which the intervener becomes party must be used for the
14 purposes of these proceedings only. There is no question of it being used for any other
15 proceedings. We can have our view as to how reliable such a restriction actually is in
16 practice, but we rely on the professional sense of all taking part.

17 MR BATES: Sir, can I just at this point draw attention to the confidentiality ring order attached
18 and the form of undertaking----

19 THE CHAIRMAN: Sorry, I think you must let Mr Beard finish actually.

20 MR BATES: I just wanted to draw to paragraph 3.

21 MR BEARD: "I am accepting that" in 3 in the undertaking:

22 "... I will use information, the undertaking, only for the purpose of these
23 proceedings and for the purpose of no other current or future proceedings, dispute,
24 complaint or other use whatsoever without the express consent of the party
25 originally disclosing the information, or permission of the Tribunal."

26 That may well mirror the consideration the Tribunal has in mind.

27 THE CHAIRMAN: That is the undertaking. We also, I think, need to deal with confidential
28 information as such, so we would propose a condition in the order establishing the
29 confidentiality ring which makes that clear.

30 MR BEARD: The one issue that stands over, of course, is that confidential information is
31 specifically defined as between Ofcom and Royal Mail for these purposes, but, of course,
32 there is a lot of material that is not confidential information in the terms of the order, which
33 is nonetheless disclosed to an intervener in these proceedings that is not, strictly speaking,
34 covered by that sort of undertaking, and it is for that reason we have the concern that the

1 comprehensiveness of the protection - in other words, that all documents and material,
2 including confidential material, should be used only for these proceedings, and that goes
3 beyond what is in the undertaking, or indeed a modification of the order, because not
4 everything will be treated as confidential for these purposes.

5 THE CHAIRMAN: There is nothing to stop the intervener sitting at the back of the court
6 listening to the whole case?

7 MR BEARD: When material is put into open court that is very different and we entirely accept
8 that, but the material that is received will be vastly greater than the material that is put in
9 play.

10 THE CHAIRMAN: But is not in principle any different because all the material is potentially
11 able to be read out in open court?

12 MR BEARD: With respect, sir, there is a difference. In ordinary court proceedings, of course,
13 you are subject to the ordinary implied undertaking that you will not in any way use any of
14 the material received, and that implied undertaking is then qualified as soon as material is
15 made public in the course of proceedings. Until that point, you are subject to that
16 restriction. Now, formally speaking, we are not clear that such an implied undertaking
17 exists in this Tribunal, and it is in the circumstances of this particular case that that has
18 become a concern. So, yes, we completely accept that when something is public in the
19 course of proceedings then the confidentiality concerns and its use in other circumstances
20 falls away. Indeed, it can be reported by journalists, and so on. In terms of the material that
21 is provided, this does not, in fact, mirror the ordinary implied undertaking in court.
22 It is because of the particular circumstances of this case, because of the weight placed by
23 Whistl on its parallel proceedings, that this issue has come into rather clearer focus than
24 perhaps it has in other proceedings previously.

25 THE CHAIRMAN: Mr Holmes, what is your position on this?

26 MR HOLMES: Sir, we agree that a confidentiality ring should be established in these
27 proceedings. We have a few minor comments on the form of the order. We suggest the
28 most appropriate course is for the parties to liaise amongst themselves and to present an
29 order in an agreed form by, say, 2 pm tomorrow so that it can be quickly made by the
30 Tribunal.

31 THE CHAIRMAN: Mr Bates, have you anything else to say?

32 MR BATES: I would only say that the concern expressed by Royal Mail seems slightly
33 overblown, given that there is no reason to think that the same rules that apply in other

1 proceedings would not apply in these proceedings in terms of how disclosed material should
2 be used.

3 With regard to the point that Mr Beard made earlier about people not being able to wipe
4 information from their minds, that of course is a point that applies just as much to Royal
5 Mail's experts as it applies to Whistl's experts. There is no reason why they would not be
6 able to use the same experts in defending against the damages claim that they have used in
7 these proceedings. So actually the problem is on both sides, and if any special restriction
8 should be applied with regard to the use of the material then one would think it should be
9 applied to all parties rather than only one.

10 MR BEARD: With respect to Mr Bates, the difference in ordinary proceedings, of course, is that
11 if you have an order for an implied undertaking it is enforceable by way of contempt of
12 court. I am not going to get into the niceties of enforcement of contempt in these
13 proceedings because of course you cannot get a contempt ruling before this Tribunal.

14 THE CHAIRMAN: Such a pity! I wish we could!

15 MR BEARD: I feel, sir, that you are itching for that opportunity! I will take shelter where I can!
16 Nonetheless, what we do not have is an equivalent to the ordinary implied undertaking here.
17 With respect to Mr Bates, it is not good enough for him to say, "Ah, yes, well, the ordinary
18 rules do apply here. If that is the undertaking that those receiving this material on behalf of
19 Whistl are willing to give, then I think we would have a way through this problem. If they
20 will give that undertaking then we do not have the difficulty, but it does go beyond the
21 confidentiality undertaking.

22 THE CHAIRMAN: Right, so that is the difference between you. I rather like Mr Holmes'
23 suggestion, if you could try and agree something sensible and practical going forward and
24 put it to us, we will look at it. If you cannot, we will come back to the issue.

25 MR BEARD: Covering both confidentiality and----

26 THE CHAIRMAN: Well, confidentiality, there is no question about that.

27 MR BEARD: And also in relation to the----

28 THE CHAIRMAN: If you cannot agree anything else, we will want to come back to it, but let us
29 not hold up this afternoon any further.

30 We have dealt with confidentiality as a matter of principle, but we need maybe to think
31 about the size of this ring that binds us all. You are suggesting it is rather large so far?

32 MR BEARD: We are suggesting that. There is an inherent problem that the more people you
33 have in a ring, the more people that have access to the information, there must be an
34 increase in risk. We recognise that there is always a compromise to be drawn here, but

1 when you are dealing with an intervener rather than one of the main parties, to have 17
2 people listed in the confidentiality ring looks to us to be plainly excessive. It was one of the
3 matters that fed into our concerns more generally about the approach being adopted by
4 Whistl, but we do not think it is reasonable. We said five. We are not trying to fixate on a
5 particular number. If Mr Bates can come back and say, "Well, we do need X, Y and Z",
6 then we are willing to listen, but 17 seems to us excessive.

7 THE CHAIRMAN: Now Mr Bates is in the proceedings, maybe that is the best way forward,
8 again if you would come to some sensible agreement amongst yourselves and put it back to
9 us. I have to say, your starter for 17 does look a bit large from our point of view. I put it no
10 higher than that, or no lower.

11 MR BATES: Sir, I hear that indication. What I would say about it is that there is a slight
12 unfairness in the way this issue has been raised, because of course Whistl has been
13 completely transparent about the number of people who we wanted to include in the ring.
14 We have not heard anything from the other parties about the number they wish to include.
15 However, the number of people currently included in the existing ring in the administrative
16 proceedings from Royal Mail is 42, and that does not include further people who were in
17 the ring previously and are no longer in the ring. So I think it has to be seen in that context.

18 THE CHAIRMAN: I understand that, but we are dealing with an appeal against an Ofcom
19 decision, and that is what we are going to do. We are going to run a procedure which is fair
20 to deal with that case. We cannot do any more, I am sorry.

21 MR BATES: That is entirely understood, sir, I just would not want it to be thought that the
22 Tribunal was giving any indication that 17 was too great a number, without my having an
23 opportunity to deal with it in reply.

24 THE CHAIRMAN: I just said it looked rather high, but then I am old-fashioned.

25 MR BATES: Well, ten of them are lawyers from Towerhouse and counsel who are directly
26 engaged in working on this matter. There are two principal experts, the economist and the
27 forensic accountant, both of whom in the normal way have in one case two people, in the
28 other case three people, to assist them in order to process material in an efficient and cost-
29 effective way.

30 THE CHAIRMAN: There should be more or less equality of arms, so your number should bear
31 some relation to Royal Mail's and Ofcom's. We do not want this to get unwieldy and
32 unmanageable, and the more people who are privy to confidential information the less
33 confidential it is.

34 MR BATES: I am grateful, sir, yes.

1 THE CHAIRMAN: Right. Does that take us on to the next item?

2 MR BEARD: Yes. I should stress that Royal Mail is in a rather different position in terms of the
3 confidential information.

4 THE CHAIRMAN: Well, as I say, I have got one case to do, that is quite enough for me.

5 MR BEARD: Future conduct of the trial: in broad terms, I think there has been a measure of
6 agreement between the parties as to the timing of steps. I think this can probably be seen
7 clearly from Ofcom's confirmation in its correspondence that it agreed with the broad
8 timetable that had been put forward by Royal Mail in its correspondence as to the timings of
9 the various steps that should be dealt with in these proceedings. Those are summarised in
10 our skeleton argument at page 8.

11 THE CHAIRMAN: Yes. Has Whistl been party to this?

12 MR BEARD: I think Whistl has seen these materials in the skeleton, and I do not understand that
13 Mr Bates has any concerns. If he does, I do not want to stop him raising anything.

14 THE CHAIRMAN: So you have been taking part on a contingent basis.

15 MR BEARD: We are trying to be efficient, sir.

16 THE CHAIRMAN: Optimistically contingent, all right.

17 MR BEARD: Yes.

18 THE CHAIRMAN: Right, just take us through that. That means defence to be filed, and an
19 extension has been agreed, and we are quite happy with that.

20 MR BEARD: Yes, Ofcom wants another couple of weeks. We----

21 THE CHAIRMAN: 10 December, I think that takes us to.

22 MR BEARD: Yes, that is right, 10 December.

23 THE CHAIRMAN: Statement of intervention, 11 January?

24 MR BEARD: That is right.

25 THE CHAIRMAN: And your reply, 8 February?

26 MR BEARD: Yes, that is the structure we have got.

27 THE CHAIRMAN: Right, and that is the end of pleadings?

28 MR BEARD: That is the end of pleadings.

29 THE CHAIRMAN: Can we jump to the trial?

30 MR BEARD: We can, yes.

31 THE CHAIRMAN: Then we could work backwards.

32 MR BEARD: The timing of trial is suggested to be in Trinity term.

33 THE CHAIRMAN: I love this language!

34 MR BEARD: I get lost, in fact.

1 THE CHAIRMAN: Do you mean June?

2 MR BEARD: I do mean June, yes, so we are looking at June. There is a debate between Ofcom
3 and ourselves about how long that needs to be. Ofcom have essentially suggested a six-
4 week listing, but to be fair to Ofcom the first couple of weeks of that they say are reading in
5 and openings.

6 THE CHAIRMAN: I was not aware that the listing included time for us to read in. That is a new
7 one on me.

8 MR HOLMES: Sir, I practise between the Tribunal and the High Court. I know some High
9 Court judges get rather annoyed if the listing does not include pre-reading.

10 THE CHAIRMAN: We operate in a bubble here, as I am sure you know.

11 MR HOLMES: To cut through, as I understand it, the only real difference between Mr Beard and
12 myself concerns the length of time for openings. I think we are agreed on up to a week for
13 factual evidence, up to a week for expert evidence, a week and a half for reply, seven days
14 for closings, if I recall correctly. So the only question is whether we allow three days or
15 five days at this stage for opening submissions.

16 THE CHAIRMAN: That is something you can discuss. If I helped you by saying that we are
17 happy to start on June 4, and to go on for about five weeks, there will be odd days when we
18 cannot sit, but that will be basically it. That takes us through to the end of the first week of
19 July. We could conceivably go a bit longer if we have not finished. We can all work
20 around that, and if you can be more specific by agreement in terms of what you do within
21 that timetable, that is fine by us.

22 MR BEARD: We have no difficulty with that. We think that some of the estimates that have
23 been put forward by Ofcom feel a little unnecessarily long. The idea that there is seven
24 days needed for factual evidence where Ofcom are saying they are not putting forward
25 factual witnesses, and you have three for Royal Mail, seems to us to suggest that----

26 MR HOLMES: Sorry, just to correct Mr Beard, we suggested five days, a working week.

27 MR BEARD: You said five to seven, in fact, but I am not going to quarrel----

28 MR HOLMES: I apologise, five days is sufficient.

29 MR BEARD: If you are back at five, that makes more sense.

30 THE CHAIRMAN: Yes.

31 MR BEARD: And the same may well be true in relation to experts. We have two, Ofcom are
32 contemplating whether to have one. Again, if Ofcom are saying now that they only need
33 five days, then fine. If they are saying seven that again felt excessive. Given the window
34 that you have just indicated, it does not sound like we need to resolve these matters in

1 detail. What we do not want, however, is for matters simply to fill the window if it is
2 unnecessary in these circumstances.

3 THE CHAIRMAN: You can guarantee that we will not be at all receptive to that. Indeed, the
4 reverse, if anything, but it is good to have reserve.

5 MR HOLMES: Indeed, sir.

6 MR BEARD: We will try to discipline that, and we will also look, therefore, at making sure that
7 there are relevantly brief but sufficiently expansive periods both for opening submissions
8 and indeed for closing. We do agree with Ofcom that, subject to the Tribunal, and it sounds
9 like this is feasible within the window, there should be a gap between the closing of
10 evidence, submission of written closings and then oral closings.

11 THE CHAIRMAN: That is increasingly the practice, is it not?

12 MR BEARD: It is increasingly the practice.

13 THE CHAIRMAN: As long as it does not get out of hand, that is fine.

14 MR BEARD: Yes, and we understand that it does not want to get out of hand. The joy that all
15 concerned have in that short *lacuna*, when written closings are produced, is something that
16 it is difficult to put words to, and therefore we all look forward to that enormously, but we
17 do think that that is a sensible course with a view to assisting the Tribunal in corralling
18 relevant material.

19 THE CHAIRMAN: That is okay. You come back to us with an agreed proposal on that.

20 MR BEARD: We will do that, yes.

21 THE CHAIRMAN: The important thing is to fix a starting date and an overall envelope.

22 MR BEARD: Understood. I should say, in relation to these matters, we will go away with the
23 Tribunal's indication and pull together timings in relation to the dates. Mr Holmes is, of
24 course, right that in the High Court often time estimates are put forward with reading time
25 included in them. For these purposes, we do not take 4 June as being the first day of
26 reading time, it is not fair.

27 THE CHAIRMAN: No, 4 June is when you all turn up.

28 MR BEARD: Yes, 4 June can be when we all turn up, and we will work on that basis.

29 Working backwards, of course, we have suggested----

30 MR HOLMES: Sir, do you mind if I briefly make a submission, if I may, just in relation to the
31 window?

32 THE CHAIRMAN: The window, yes - the envelope.

33 MR HOLMES: If I noted correctly, you suggested beginning on 4 June and running until the first
34 week of July.

1 THE CHAIRMAN: The end of the first week.

2 MR HOLMES: End of the first week of July, indeed. You mentioned though that there would be
3 some dates on which the Tribunal could not sit, which is entirely understandable.

4 THE CHAIRMAN: I can give them to you now.

5 MR HOLMES: In view of that, and so that everyone can reserve time and----

6 THE CHAIRMAN: Not many.

7 MR HOLMES: It may be the problem does not arise then, but I was only going to suggest, if
8 there is a risk of a few days being lost along the way, would it be sensible for everyone
9 provisionally to reserve a further week, which can then be released as soon as the shape of
10 trial is clearer.

11 THE CHAIRMAN: I can tell you now that I - I am talking for my colleagues here, rather
12 presumptuously - will not be able to sit on 28 June, the afternoon of 27 June, so that will be
13 a short week, and the afternoon of 21 June, but the whole of the rest of the time is free at the
14 moment.

15 MR BEARD: I would be cautious about reserving other weeks in those circumstances, unless the
16 other members of the Tribunal----

17 THE CHAIRMAN: My feeling was that those days could fit into reading or pauses or finishing a
18 bit early.

19 MR HOLMES: Yes, sir, it is obviously much harder to----

20 THE CHAIRMAN: I am not going off to watch the cricket or anything!

21 MR HOLMES: No, that is fully understood, sir. It is a substantial commitment of time for
22 people with other obligations.

23 THE CHAIRMAN: We have to think of the Tribunal and other things.

24 MR HOLMES: Indeed.

25 THE CHAIRMAN: I would be disappointed if we could not do this in five full weeks subject to
26 effectively two afternoons and a day off.

27 MR HOLMES: That is understood, but with a break also for preparation of the written closings---
28 -

29 THE CHAIRMAN: Well, the 28 June day might be one of those break days.

30 MR HOLMES: It might very well, sir.

31 THE CHAIRMAN: I feel that it would be a very good idea if it was.

32 MR HOLMES: Indeed. I hear what you say, sir. My only concern is that diaries fill up----

33 THE CHAIRMAN: They do.

1 MR HOLMES: -- and if there is time currently available for the Tribunal at the end, would it be
2 sensible to have any kind of a reserve period.

3 THE CHAIRMAN: There is no problem from our point of view. Mr Bates?

4 MR BATES: Sir, I appreciate there is probably very little flexibility on the part of the Tribunal
5 about the start date, and obviously all counsel will do our best to co-operate with the
6 timetable, but there may be particular dates in June where neither my leader nor I are
7 available, and it may be there are difficulties for others as well. So if there are dates which
8 are being skipped - specific dates which are being skipped - because of the Tribunal's
9 availability, it may be that there will be a very small number of other dates where there
10 might be requests for dates to be skipped as well, in which case having a longer window
11 would probably be helpful.

12 THE CHAIRMAN: It sounds like the slippery slope to me. I do not want that, sorry. This is a
13 long time in advance. I just happen to have these commitments which are hard wired,
14 which I cannot avoid, but otherwise I would make myself available for the whole time.

15 MR BEARD: I am grateful.

16 THE CHAIRMAN: Could you come up with a sensible timetable, and we will get this settled
17 quickly. You will certainly have five weeks, and if you can make a case for more we will
18 do that.

19 MR BEARD: I am grateful.

20 THE CHAIRMAN: That then leaves the period between the close of the pleadings and the trial,
21 which is where the fun starts, I always think.

22 MR BEARD: There is an extent to which not everything perhaps needs to be resolved, but I think
23 there is a broad consensus between ourselves and Ofcom that it would be sensible to pencil
24 in a CMC after essentially the close of the pleading process.

25 THE CHAIRMAN: Yes.

26 MR BEARD: I do not think that that CMC needs to await the conclusion of the expert interaction
27 that is envisaged.

28 THE CHAIRMAN: Would the week beginning 25 March be convenient to you?

29 MR BEARD: I may have a difficulty during that week. If, in principle, the Tribunal were minded
30 to set aside - perhaps it is worth pencilling in half a day or a day at some point, and then we
31 could find a date that was mutually convenient to the Tribunal and to counsel.

32 THE CHAIRMAN: Yes, that is what I was trying to do. You say you cannot do that week?

33 MR BEARD: I may be able to do that week, I apologise, the trial I have got finishes the week
34 before.

1 THE CHAIRMAN: Okay. That week, not the 26th and not the 28th, so 25th, 27th and 29th, if you
2 could see whether you can pencil one of those in.

3 MR BEARD: Yes, we will liaise on that. I would ask that it perhaps not be the 25th in those
4 circumstances.

5 THE CHAIRMAN: So the 27th or 29th, and it could be the following week.

6 MR BEARD: Yes, I am grateful.

7 THE CHAIRMAN: April Fools' Day perhaps! Then you think maybe we have to have a pre-trial
8 review as well?

9 MR BEARD: We are not sure. We can see the potential benefit of such a matter if it looks like
10 there are issues to discuss. I think this is much more a question of pencilling things in so
11 that people have space in diaries with the hope that it is not needed, quite frankly. Lovely
12 though it is to gather, I am not sure that there is necessarily a great---

13 THE CHAIRMAN: We can think of nothing better, but because Easter is very late this year, can
14 we suggest the week of 29 April is the one to look for for that, in pencil?

15 MR BEARD: We will liaise, if we may, and come back to the Registry with suggested dates.
16 Again, with that, I imagine it will just need to be half a day that we pencil in. I do not
17 envisage---

18 THE CHAIRMAN: It depends what we have to argue about.

19 MR BEARD: Of course, but I think with all of these things, if people think that there is an issue
20 that needs resolving and is going to last more than we have pencilled in then they need to
21 alert the Tribunal and the other parties as soon as possible so that we can re-arrange things.
22 I think we are all conscious of that in terms of making this work. It is just a precautionary
23 measure at this stage.

24 THE CHAIRMAN: We would like to have things in the diary that we can vacate rather than the
25 other way round.

26 MR BEARD: That is exactly where we were as well, I think.

27 THE CHAIRMAN: Apart from the trial, which we want not to vacate.

28 MR BEARD: Whatever acronym we put on the particular date it is essentially just holding some
29 space in diaries.

30 I think that that probably deals with the majority of the trial procedure, save for the issue
31 that we have included at (d) and (e) in paragraph 18, which is the process of experts
32 meeting. We recognise that in their skeleton argument Ofcom are saying, "we are still
33 thinking about whether or not we are putting forward an expert", but in the circumstances
34 we thought it was sensible to build in a process at this stage on the basis that they will be

1 putting someone forward, and we suggested dates in March for that process. This is not
2 trying to tie Mr Holmes to anything.

3 THE CHAIRMAN: It does not really involve us, other than that we have an interest in it
4 happening, particularly if there is to be a list of issues on which experts agree that they
5 agree - I cherish the notion. Obviously we need to know and we need to have a date
6 because we then have to decide what we do about that, and whether there is any more
7 process that is required----

8 MR BEARD: Yes. We noted from the----

9 THE CHAIRMAN: -- such as contemporaneous examination.

10 MR BEARD: Yes, we noted from the agenda the issues to do with how you deal with experts.
11 I think it is perhaps much better to deal with that at the CMC at the very least.

12 THE CHAIRMAN: I think we need to know what the issues in dispute are. We can have ideas,
13 but they are rather inchoate at the moment.

14 MR BEARD: I should say in relation to that, we would at the moment be pencilling in a
15 CMC----

16 THE CHAIRMAN: 29 March.

17 MR BEARD: 29 March, just shortly after we would have had this. Therefore, it would be an
18 appropriate date on which to deal with it.

19 THE CHAIRMAN: Yes. There is quite a lot of economic theory milling around in this case - a
20 certain amount of law, but quite a lot of economic theory, so I can see that it may well be
21 helpful to try and get a measure of agreement.

22 MR BEARD: Yes. I think, however much there is, the more agreement that can be reached the
23 more helpful it is, and indeed identifying disagreements as well, because that does help
24 clarify what we need to deal with at trial. I do not think there is any issue that this is a
25 process that, if there is going to be an expert on the other side, we need to go through.

26 THE CHAIRMAN: Right.

27 MR BEARD: So, as long as the Tribunal is happy, I think broadly the dates are agreed between
28 us, unless Mr Holmes has concerns.

29 THE CHAIRMAN: Right.

30 MR BEARD: Unless there are other matters in relation to the timetable through to trial, that is
31 what we have in relation to that issue.

32 That then takes us, to some extent, to agenda items 6 and 7 on evidence. We can, of course,
33 say where we are in terms of evidence. We recognise that Ofcom has these matters under

1 consideration. I am certainly not going to recapitulate the points I have made about Whistl
2 and their evidence.

3 THE CHAIRMAN: No, I am grateful.

4 MR BEARD: I am so sorry?

5 THE CHAIRMAN: I would be grateful if you did not! Yes.

6 MR BEARD: Sir, I am not sure at this stage that we can go much further. Ofcom have indicated
7 they are not calling a witness of fact, but they are still considering experts. Mr Bates has
8 put forward his position. We have put down our markers in relation to those issues. I am
9 not sure we can take that that much further at the moment, but it is part of the reason why
10 we do think that there may need to be a further CMC just to make sure all of these things
11 are properly organised.

12 THE CHAIRMAN: We are clear, are we, that Helen Jenkins is a witness of fact?

13 MR BEARD: She is a witness of fact - absolutely she is a witness of fact, but she is also an
14 economic expert, and if Ofcom are going to take issue with what they refer to as opinion
15 evidence on her part, then that is a matter that we will deal with in due course. There are----

16 THE CHAIRMAN: We have seen the correspondence, obviously.

17 MR BEARD: Yes.

18 THE CHAIRMAN: Mr Holmes, do you have anything that you want to say on that?

19 MR HOLMES: Well, sir, we think the correspondence will need at least another round, because
20 we found Royal Mail's response in some respects rather unclear. We understand Royal
21 Mail to be suggesting that Miss Jenkins is primarily giving evidence as to the opinions that
22 were communicated to Royal Mail at the time. When we consider her witness statement,
23 the evidence appears to go some way beyond that and to contain statements of her current
24 opinions, which are then relied upon in these proceedings, and we are concerned about that.
25 We do not think we need to trouble the Tribunal with it now. It is something that, in so far
26 as we cannot reach agreement, we may need to ventilate with you at the next CMC.

27 THE CHAIRMAN: Right. Would it help you if I said we feel more than capable of taking
28 evidence as we find it and informing ourselves as to whether it is a matter of economic
29 expertise or a matter of fact. The distinction is occasionally rather blurred in terms of
30 content, but as to how we treat it the rule is very clear.

31 MR HOLMES: Sir, that----

32 MR BEARD: We have that in mind, and we also note - it perhaps is not to be traversed today.
33 We are happy to engage in correspondence. There is relevant authority that explains the
34 situation, if you have someone that is an expert that is giving factual evidence but then does

1 proffer opinion evidence within their relevant field, how that is to be dealt with under the
2 CPR and how the Tribunal, or in most cases the courts deal with issues as to weight, and so
3 on. I can give relevant authorities in correspondence or now, but we are happy to engage in
4 that correspondence.

5 THE CHAIRMAN: Mr Holmes?

6 MR HOLMES: Sir, it is fully understood, of course, that the Tribunal is experienced and can
7 easily distinguish between matters of fact and expert opinion. What concerns us is to ensure
8 that the role that Miss Jenkins plays in these proceedings is as a factual witness, so that we
9 are not faced with three economic experts traversing very heavily overlapping ground. That
10 would not be proportionate and, in our submission, it would not be fair either. So we intend
11 to limit our cross-examination accordingly.

12 THE CHAIRMAN: I do not think there is a place for her in the hot tub, so do not worry.

13 MR HOLMES: I am grateful, sir.

14 THE CHAIRMAN: Is there anything else?

15 MR BEARD: I think we have probably already dealt with issues concerning 8 and 9 on the
16 agenda. I do not believe, unless those behind me - no, I do not believe that there is anything
17 else.

18 THE CHAIRMAN: That is excellent. We are most grateful. Do my colleagues have any
19 questions? No. In that case, it remains for me to thank everybody for their participation
20 and we will see you again in the New Year.

21