

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 April 2019

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

Intervener

*Transcribed by OPUS 2 INTERNATIONAL LTD
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.com*

PRE-TRIAL REVIEW

APPEARANCES

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 Intervener.

1 THE CHAIRMAN: Mr Beard, good morning?

2 MR BEARD: Mr Chairman, Members of the Tribunal, good morning, I appear today with
3 Miss Osepciu, Mr Holmes and Mr Grubeck appear for Ofcom, and Mr Bates is here for
4 Whistl. You will have had, I hope, a pre-trial review bundle with submissions and
5 correspondence.

6 THE CHAIRMAN: I have, thank you.

7 MR BEARD: You will see from that, I hope, that actually there is a marked degree of - I will not
8 say 'agreement' because that would be going too far - concurrence in relation to various
9 matters. Looking through, however, and having in mind the Tribunal's agenda, there were
10 three points that I thought it was going to be sensible to pick up: one or two points on
11 evidence, primarily regarding experts, so that is particularly on ordering and timing. Then
12 one or two issues regarding bundles, and an issue regarding electronic simultaneous
13 transcription, which actually I think is resolved following some discussions between
14 ourselves and Ofcom, but I will come back to that.

15 If I may, I was just going to work through those points briefly.

16 THE CHAIRMAN: And the actual timetable itself?

17 MR BEARD: I was going to pick up the timetable itself as I dealt with matters in relation to
18 experts. If it is helpful, the timetable I was going to refer to was the draft I have at tab 1 in
19 the bundle appended to our submissions. The only reason I refer to that is because it had
20 the two alternatives in it.

21 THE CHAIRMAN: I note that you have taken the full five weeks we laid out. It is quite a long
22 trial. Are there any opportunities for carving a few days off in the interests of speeding it up
23 a bit?

24 MR BEARD: That would be delightful, but if we work our way through looking at the timings,
25 we do think that we will need over a day for opening in relation to this matter, and we think
26 that would be useful. Then when we move into the factual witnesses, we are working on
27 the basis of Ofcom's estimate as to the period it would need for cross-examination. Of
28 course, as preparation moves forward it may be that Mr Holmes and his team revise their
29 estimate, but we are not quibbling with the three days that they have put down there.

30 THE CHAIRMAN: I am thinking that all parties are content with what has been put forward -
31 that is correct, is it?

32 MR BEARD: Yes, I believe that----

33 THE CHAIRMAN: Do Ofcom just want to confirm that for us?

1 MR HOLMES: We do believe that it is a weighty matter and that there are a number of issues. It
2 may be that we can truncate, and if we can we will, but we do not think it is prudent to do so
3 at this stage.

4 THE CHAIRMAN: Thank you. I will not say any more about that at this stage.

5 MR BEARD: We have given an estimate of up to two days dealing with Whistl factual witnesses.
6 Again, it may well be that we can curtail that, in which case that will enable there to be
7 potentially spare days at the end of week two, the beginning of week three. I will come on
8 to deal with the experts who are listed for week three into week four. Although we have a
9 five week trial window, a chunk of week four is envisaged not to be sitting time for the
10 Tribunal, but preparation of written closings. We think that, as has been discussed
11 previously, is a sensible course and will hopefully speed the plough as it comes to oral
12 closings in week five.

13 We have discussed and thought about the timings. These are the best estimates we can
14 sensibly come up with in order to deal with the range of issues.

15 With that in mind, could I just pick up one or two issues in relation to the expert witnesses.
16 There are broadly two issues to cover, ordering and timing. Can I just make a couple of
17 preliminary points. We, of course, quite understand the Tribunal's desire to have
18 concurrent hearing of expert economic evidence in relation to certain of the matters and
19 certain of the experts, but there are issues that particularly arise in this case.

20 The Tribunal will have it very well in mind, but of course what we are dealing with here is a
21 legal appeal against a very particular decision, and the structure of legal process, of course,
22 that we have in common law legal systems is not an accident, the process of interrogation of
23 witnesses by way of cross-examination being the normal process. That process of ensuring
24 that each side gets to test the other's evidence is seen as a fundamental incident of the
25 nature of fairness within an adversarial system, and the Tribunal is not here inquisitorial.
26 No doubt, in preparing for the concurrent evidence process, we will have that very much in
27 mind.

28 There is a residual concern about what is referred to as a 'hot tub' process or a 'concurrent
29 evidence' process, because it is easy for experts, economists, to gather together and discuss
30 matters and have a very interesting interaction about various issues. That interaction,
31 however fascinating it may be, cannot expand or alter the nature and terms of the decision
32 that is under challenge. That is, we say, going to be important here, because one of the
33 things we will be highlighting is the nature of the statement of objections and the decision
34 and what Ofcom is maintaining subsequently, and how it has sought to do so, and indeed

1 what Whistl has sought to do in its intervention in relation to various matters. So there is a
2 concern about the way in which a concurrent evidence process works here.

3 Resulting from that, there is, of course, an important concern that from our point of view, as
4 Royal Mail, there is adequate time subsequently to cross-examine, in particular,
5 Mr Matthew. How much time will be required will, of course, depend on what is
6 considered in the hot tub process and what evidence is given. I will come back to those
7 timing issues in a moment.

8 The process that we put forward in terms of ordering this, given that we have got, certainly
9 from a common law perspective, the unusual process of concurrent evidence being dealt
10 with, we thought it was going to be more efficient, frankly, to deal with the questioning of
11 Mr Dryden following the hot tub and then Mr Matthew, and then Mr Parker. And we
12 thought that it was more sensible to have a single session of cross-examination of
13 Mr Matthew, which would cover matters flowing from or arising from questions that arose
14 from discussion in the concurrent evidence process, and the other matters on which he gives
15 evidence. The same would be true of Mr Parker. It was simply because we see that we are
16 not dealing with an entirely orthodox evidential process, that, okay, we would not be taking
17 the experts in the orthodox order, but we thought that was the most sensible and efficient
18 way of dealing with matters to avoid two sessions of cross-examination of Mr Matthew and
19 two sessions of cross-examination of Mr Parker, in particular where we recognise that there
20 are overlaps in the evidence of Mr Matthew and Mr Parker in relation to the matters that
21 they deal with regarding Mr Dryden's report, which will be dealt with in the hot tub, and
22 then Mr Harman's report which will not.

23 THE CHAIRMAN: May I ask, Mr Beard, apart from normal considerations of courtesy and
24 convenience, are there any questions of non-availability of the experts on the days that we
25 are talking about?

26 MR BEARD: Not as far as I am aware. No one has indicated that anyone has a problem with
27 availability in relation to those days.

28 MR HOLMES: There is no problem on our side with availability.

29 MR BEARD: So if the Tribunal, rather than the process that we would prefer, would prefer to
30 have Ofcom's double cross-examination process, then we understand that in some ways the
31 more orthodox, or reverting to the more orthodox evidential process. We do not think it is
32 as efficient. We think, because of the continuities of evidence, potentially the overlaps in
33 evidence given by Mr Matthew and Mr Parker on these matters, there is a real risk that one

1 gets slightly tangled up with what questions are to be asked and dealt with in which session
2 and when, and we are not sure that that is particularly helpful.

3 Mr Holmes says, if you do it this way there will be a risk of the need for recall of
4 Mr Matthew and Mr Parker. Frankly, we do not see that as a significant risk. Recall is
5 always a possibility in relation to witnesses. It is worth bearing in mind here that we are
6 dealing with Ofcom's Decision. Mr Harman and Mr Dryden are dealing with Ofcom's
7 Decision. We have the statements, we have the relevant materials here. The idea that
8 somehow Ofcom are going to be caught out by what either of those experts will be covering
9 seems somewhat unlikely.

10 But if we are going to do two sessions, rather than our proposal, which, as I say, I commend
11 to the Tribunal, there will be two particular consequences. One is to make sure that there is
12 adequate time for cross-examination of Mr Matthew subsequently. And the second, which
13 I think it is important to stress, of course Messrs Dryden, Matthew and Parker, as soon as
14 they enter the hot tub will be giving evidence until the conclusion of their final session of
15 cross-examination and re-examination. That must be a consequence of the way in which it
16 is being organised.

17 THE CHAIRMAN: No loose chat.

18 MR BEARD: No chat about anything to do with the case at all. Now, that is fine. We
19 understand that that is the consequence of these matters, but that must be the way in which
20 this is dealt with. Because there are overlaps and continuities between the evidence, you
21 cannot have a situation where Mr Matthew or Mr Parker are talking to anyone in their legal
22 team about anything to do with their case, leaving aside lunch orders, and so forth.

23 MR HOLMES: May I just clarify to make sure I have understood: is the suggestion that
24 Mr Beard is making, which I should say runs counter to the practice which was followed by
25 this Tribunal in the WMO case, that once the concurrent evidence begins, the witnesses are
26 then in purdah----

27 MR BEARD: Absolutely.

28 MR HOLMES: -- during the subsequent cross-examination process?

29 MR BEARD: Yes.

30 MR HOLMES: That is helpful.

31 MR BEARD: Yes, it absolutely must be the case. Because you have a situation where
32 Mr Matthew and Mr Parker are dealing with matters that cross between the Dryden report
33 and the Harman report, and there are necessarily going to be a range of issues. I can go into
34 more detail about those sorts of issues.

1 THE CHAIRMAN: No, no, that rings a bell.

2 MR HOLMES: The way in which this Tribunal has approached matters before, is that the hot tub
3 takes place. It is by no means unusual in this Tribunal as a method of hearing evidence.

4 THE CHAIRMAN: Yes. I do not like it referred to as unorthodox, less orthodox.

5 MR BEARD: Unorthodox within the general common law, Sir.

6 MR HOLMES: The experts are then released following the hot tub, and they can confer with
7 their respective teams in order to assist in the testing of one another's evidence in the
8 subsequent period of cross-examination. We, for our part, do not see any difficulty with
9 that as an approach. Rather, it ensures that the cross-examination is informed by an expert
10 understanding and is likely to be of more assistance to the Tribunal in consequence.

11 THE CHAIRMAN: As I recall in *Pay TV*, the issues in the hot tub were relatively clearly defined
12 and isolated, so we may set our procedures with that in mind. I think it is fair to say that in
13 this case the issues do stray around a little bit.

14 MR BEARD: That is our concern. Let me be clear: if the Tribunal is really concerned about
15 those sorts of matters and wants to ensure that the witnesses, post the immediate hot tub
16 process, consult with legal teams, that is one thing. What is different, and cannot occur is
17 any form of consultation arising once someone is giving evidence and subject to cross-
18 examination. The fact that the cross-examination is then taken in two parts is not material
19 in those circumstances.

20 MR HOLMES: Sir, I am a little confused. If you imagine the ordinary situation in which you
21 have experts giving evidence sequentially in relation to the topic, there is nothing at all
22 untoward when one expert is giving evidence under cross-examination for a party's counsel
23 to discuss with and to consider appropriate lines of questioning with their own witness in
24 conducting cross-examination. That is the normal course of events, and I really do not
25 understand what point of principle Mr Beard is raising----

26 MR BEARD: This is a fundamental issue.

27 THE CHAIRMAN: Perhaps you can just tell us what mischief you are trying to guard against?

28 MR BEARD: The mischief I am trying to guard against is the situation that, following on from
29 the hot tub, Mr Matthew will be subject to cross-examination on Ofcom's approach in
30 relation to matters that arise in the hot tub. On Ofcom's approach, Mr Matthew will then
31 stand down. Mr Harman will then give evidence. There will then be further evidence from
32 Mr Matthew and Mr Parker, or more exactly cross-examination of Mr Matthew and
33 Mr Parker. What cannot happen is that between the first cross-examination of Mr Matthew
34 and Mr Parker they can discuss the case with their legal teams in advance of their

1 consideration of the cross-examination that follows, because we say in this case there is a
2 continuity of the issues, there is a confluence of the issues and the idea that, because you
3 introduce the process of concurrent evidence giving, you can have a situation where
4 someone under cross-examination in relation to their single statement, part way through that
5 cross-examination can be talking to their legal team. That is completely inappropriate, and
6 that is what we are focused on.

7 It is for that reason that if Mr Holmes' concern is that immediately after the hot tub there
8 can be instructions taken, that is one matter, but during the course of cross-examination
9 subsequently there cannot be a discussion with legal teams. That is a fundamental principle
10 that applies in relation to the giving of evidence before this and any other Tribunal. That is
11 the principle that we are seeking here to guard. We have come up with a proposal that
12 obviates the concern in relation to this. If Ofcom want a different way of doing it, so be it,
13 there is a consequence.

14 THE CHAIRMAN: This may be helpful or not, as the case may be. We had our own idea on
15 this, which is that after the hot tub, which I think finishes on a Wednesday, does it not?

16 MR BEARD: Yes.

17 THE CHAIRMAN: There is then a Thursday morning of what I would call a mopping-up cross-
18 examination, and then we have a Friday. Perhaps Mr Harman could be examined and cross-
19 examined on that Friday.

20 MR BEARD: I think that is the plan from Ofcom, yes.

21 THE CHAIRMAN: Well, is it?

22 MR BEARD: Yes, I think that is Ofcom's proposal that----

23 MR HOLMES: I think what you were suggesting, Sir, but correct me if I am wrong, is that there
24 be cross-examination of Mr Dryden alone, or of all three experts on the Thursday morning?

25 THE CHAIRMAN: Well, I think you proposed all three, did you not?

26 MR HOLMES: Yes, we did, and then we would have Friday for Harman, and then we would
27 have the other two experts following the usual order.

28 THE CHAIRMAN: So your proposal was Friday for Harman anyway, was it?

29 MR HOLMES: Yes, it was, Sir.

30 THE CHAIRMAN: And you do not like that?

31 MR BEARD: If that is the alternative - our suggestion was that, after the hot tub, you then did the
32 cross-examination of Dryden, Matthew and Parker fully. Ofcom then say, "Ah, but
33 Mr Harman should be heard before Mr Matthew and Mr Parker are cross-examined in
34 relation to matters that Mr Harman is dealing with in relation to Ofcom's decision", to

1 which we say we understand that that is in the direction of a more orthodox ordering of
2 witnesses, but because you have got the hot tub involved, you are effectively then having
3 two sessions of cross-examination of Mr Matthew and Mr Parker, which is what Ofcom
4 have intended.

5 THE CHAIRMAN: On your annex 1 timetable, on 28 June, which is the Friday, the Royal Mail
6 proposal is cross-examination of Matthew and Parker, and the Ofcom/Whistl proposal is
7 Harman, Matthew, Parker, cross-examination on issues arising out of Mr Harman's
8 evidence.

9 MR BEARD: Yes.

10 MR HOLMES: Sir, to be clear, what we have done is, you will see that we have taken the three
11 days, so as to avoid any fine division of time amongst those three experts, we have specified
12 the order in which we say they should be called - Harman first, then Matthew, then Parker
13 in the normal way. Their evidence should be given across 28 June, 1 July and 2 July. In
14 practice, that would of course mean Harman giving evidence for all of the Friday, or almost
15 all of Friday.

16 MR BEARD: The difficulty is----

17 MR HOLMES: Is that clear, Sir?

18 THE CHAIRMAN: Yes.

19 MR BEARD: The difficulty is that the natural process of follow-up cross-examination following
20 the hot tub is of the participants in the hot tub, which Ofcom is rightly recognising in its
21 proposal. The issue that arises is that, following the hot tub, you need to have the follow-on
22 cross-examination of Dryden, Matthew and Parker in relation particularly to those matters.
23 What we recognise----

24 THE CHAIRMAN: We hope not too much.

25 MR BEARD: Sorry?

26 THE CHAIRMAN: We hope not too much.

27 MR BEARD: Well, that may be the hope----

28 THE CHAIRMAN: It is a hope.

29 MR BEARD: It is a hope, but we say that it is significant and important because of these issues
30 of us being able to test the evidence in particular that of Mr Matthew. It may well be, as
31 I say, that because of the operation of the hot tub it does not need to be very much. We
32 need to make provision that allows time for potentially relatively significant cross-
33 examination of Mr Matthew in this case, we think. In those circumstances, we say that you
34 would need a day following on from the hot tub of Dryden, Matthew, Parker cross-

1 examination in relation to matters which are focused on hot tub issues. Then, and this is
2 taking the Ofcom approach, you would move on to Mr Harman, and then you would have
3 further cross-examination of Mr Matthew and Mr Parker.

4 We have said, we understand that you want to go in that direction. We have put forward
5 our proposal that means that you do not need to have this double production of witnesses.
6 Given the hot tub, given the need to cross-examine on issues that have arisen in the hot tub
7 whilst they are fresh, you are going to have this process of Mr Matthew and Mr Parker
8 being cross-examined twice, and all we have said is, if that is the way you are going,
9 Mr Matthew and Mr Parker, between those two sessions of cross-examination, cannot talk
10 to their legal team. That is not a radical proposition, it is absolutely a basic principle of the
11 way that evidence should be given. We do not see the issue in relation to these matters.

12 THE CHAIRMAN: Mr Holmes, we had better hear you properly on that.

13 MR HOLMES: Sir, the Ofcom proposal, which I hope is now clear, is that following the
14 concurrent evidence, which we agree is a sensible and appropriate approach for the Tribunal
15 to use, there should then be a sweep-up session, as I think you termed it, a short period in
16 which cross-examination can take place specifically in relation to the matters that have been
17 covered in the hot tub. This is both convenient and sensible. It ensures that the matters
18 covered are fresh in the Tribunal's and in counsel's mind, and it reduces the risk of
19 duplicative and unnecessarily lengthy cross-examination on those same matters which will
20 immediately have been heard by the Tribunal. For that reason, we propose that the
21 Thursday morning, 27 June, be set aside to deal with the hot tub.

22 The hot tub topics are, in our submission, sufficiently discrete to mean that it is convenient
23 and sensible to deal with them first, and then to turn to the evidence of Mr Harman. This is
24 clear enough from BT's [Royal Mail's] own submissions, where you will recall, Sir, they
25 set out in para.8 a clear list of topics that they consider should be dealt with in the hot tub,
26 and then a separate list of topics in para.9, which are to be addressed in the consideration of
27 Mr Harman's evidence, and in the testing of Mr Harman's evidence.

28 So we say it is convenient, sensible and perfectly straightforward to break cross-
29 examination down, deal with the hot tub matters first, and then to turn to the matters to be
30 dealt with arising out of Mr Harman's evidence.

31 We say that the usual order should be observed in terms of the cross-examination of experts
32 on matters arising out of Mr Harman's evidence. Mr Matthew and Mr Parker are both
33 responding to the evidence of Royal Mail's expert, Mr Harman, and it is logical that the
34 sequence that should, therefore, be followed is that the Tribunal hears, first, the evidence of

1 the appellant's expert, and then the evidence of the two experts who have been instructed to
2 address and to respond to that evidence.

3 So there is no basis, in our submission, for departing from the normal and well established
4 order in which cross-examination should take place in relation to the second set of topics. It
5 should be Harman, followed by Matthew, followed by Parker, in the usual way.

6 The concern that Mr Beard has raised on his feet for the first time - it was not foreshadowed
7 in his skeleton argument - is that there is some issue in relation to the need to maintain
8 purdah throughout the oral examination of the experts. In our submission, this concern is
9 misplaced. The usual concern with purdah is that when a witness is in the box it would be
10 inappropriate for counsel to speak to the witness, not least in order to try and help the
11 witness out with the answers that they might give under cross-examination. That is
12 obviously inappropriate. You cannot encourage a witness, you cannot plant ideas----

13 THE CHAIRMAN: I am sure counsel would not dream of doing such a thing.

14 MR HOLMES: Well, there is obviously a risk if discussion takes place that ideas could be
15 planted in the expert or the factual witness's mind, and so for that reason there is a hard and
16 fast rule that when a witness is dealing with a given topic in the box they should not discuss
17 it with their counsel or with their legal teams.

18 Where you have discrete topics of the kind that you have in this case, those covered by
19 Mr Dryden's evidence and those covered by Mr Harman's evidence, we say that there
20 should be no difficulty, once the hot tub session is concluded, with the parties discussing
21 with their experts during the cross-examination of one another's experts in the normal way,
22 as occurs in the run of cases and is, speaking for myself, as humble counsel, extremely
23 helpful in ensuring effective cross-examination of an expert witness. An expert is much
24 better placed to understand the economic subtleties of the case that needs to be assessed,
25 and can therefore assist counsel greatly in identifying appropriate questions. Given that we
26 do have these discrete topics, as Royal Mail has itself acknowledged in its skeleton
27 argument, in the division between paras.8 and 9 of its skeleton argument, and given that that
28 division of topics is also quite clearly set out in the expert evidence. If you look, for
29 example, at the table of contents to Mr Matthew's report, you see that Mr Harman's
30 materiality analysis is dealt with separately and subsequently in a separate section E. We
31 say that, given that division of topics, the appropriate course in this case is to release the
32 experts following the conclusion of the hot tub sessions and then to allow them to liaise
33 with their counsel for the purposes of the oral cross-examination of one another's experts,
34 the other experts, in relation to the Harman topics.

1 If that were not accepted, we say that the preferable course would, in that case, be to
2 conduct the hot tub and, following the hot tub, to release the experts, and to have single
3 sessions of evidence, as Mr Beard has proposed, but those single sessions of evidence
4 should follow the ordinary sequence of experts.

5 There are two elements to Mr Beard's proposals, which are dissociable. They need not be
6 combined. One is a proposal that there should be only a single session of cross-examination
7 in relation to each expert, and the other concerns the order in which the experts are called.
8 One could have single sessions of evidence for each expert following the hot tub, but have
9 the witnesses proceed in a conventional order. That would be to say Dryden firstly,
10 immediately after the hot tub, then Harman, then Matthew, then Parker. It would meet
11 Mr Beard's concern about having a single session of evidence, but it would avoid the
12 reversal of the order of evidence, which is both contrary to normal practice for the obvious
13 reason that the respondent's and the intervener supporting the respondent's experts are
14 addressing the evidence of the appellant and therefore the appellant's evidence must come
15 first.

16 The risk otherwise, and it is a real risk, Sir, because we have all heard refinements of expert
17 evidence in the box, is that something new will come along during the course of the
18 evidence of the appellant's expert, and it would need, in fairness, to be addressed by the
19 respondent's experts, and that will give rise to the risk of those responding experts needing
20 to be recalled after the appellant's expert's evidence. So if the order is reversed, it means
21 that you might need to have a second round of expert evidence from the respondent's
22 experts, and we say that is better avoided.

23 So, if the Tribunal did see any merit in Mr Beard's purdah concern, which we say is
24 baseless given the clear division of topics here, then the appropriate course would be to
25 have single sessions, but without disrupting the normal order in which experts are heard, the
26 appellant's going first, and the respondent and those supporting the respondent following.

27 THE CHAIRMAN: Anything you want to add?

28 MR BEARD: Yes, one or two quick points. We have obviously in our submissions tried to
29 delineate the issues that are to be dealt with in the hot tub and those that fall outside, but
30 there is a continuity of these issues. I do not need to work my way right through the
31 Dryden, Matthew, Parker list of issues in order to make the point. I can do it in relation to a
32 series of them. Actually it is illustrated by Mr Matthew's report itself, where he repeatedly
33 refers to the Dryden/Harman AECT analysis.

1 THE CHAIRMAN: We did wonder whether we should invite Mr Harman to join the hot tub for
2 part of his evidence, but on the whole we do not think that is a very good idea.

3 MR BEARD: It is difficult to delineate these things. We understand the dilemma, we can see
4 that, and all we are trying to deal with are the consequences of that. Mr Holmes is now
5 suggesting, after criticising us for not anticipating what Ofcom would wish us to do in our
6 skeleton - to leave that to one side----

7 MR HOLMES: It was proposed that it be answered in correspondence.

8 THE CHAIRMAN: Can we concentrate on the substance of this, please.

9 MR BEARD: We say that because of those issues of overlap and continuity, you just cannot have
10 a period of oral evidence from the same witness over two periods where they can discuss
11 these matters with their legal team.

12 Mr Holmes' new suggestion, I accept, would solve that. What it loses is the immediacy of
13 sweeping up cross-examination following the hot tub. If that is the consequence and that is
14 the way that matters have to be dealt with, so be it.

15 THE CHAIRMAN: So you want to catch that?

16 MR BEARD: That deals with my principal concern. It is not as apt to deal with sweeping up
17 after the hot tub, but what we would then have is the hot tub process, then Mr Dryden for
18 however long it is that Ofcom want to cross-examine him. It sounds like, from what they
19 have suggested, given that they put in half a day for three people, that they are not going to
20 want long with Mr Dryden. Then we would move on to Mr Harman. We have the whole
21 day on 27 and 28 June.

22 We would then be moving on to Mr Matthew on that Friday. We will need at least a day
23 with Mr Matthew. Then we will move into Monday, and then we will finish with Mr Parker
24 on Monday/Tuesday. I do not think we should try and curtail. We will need at least a day
25 with Mr Matthew, and we may want up to a day with Mr Parker.

26 THE CHAIRMAN: The overall times are not in issue.

27 MR BEARD: No, I do not think the overall times are.

28 THE CHAIRMAN: It is the allocation of times.

29 MR BEARD: I do not think they are, and, as I say, Mr Holmes' alternative approach will cover
30 that. It is unfortunate that, because of Mr Holmes' objection to Mr Matthew and Mr Parker
31 being in purdah, we will not have the neat sweep up after the concurrent evidence process.
32 But if that is the consequence, that is the consequence. We understand that.

33 THE CHAIRMAN: Right. Do I hear agreement breaking out?

34 MR BEARD: Concurrence, not agreement.

1 THE CHAIRMAN: Right.

2 MR HOLMES: I think we have a way forward, Sir, if it commends itself to the Tribunal.

3 THE CHAIRMAN: Thank you very much.

4 MR BEARD: I think that covers both the order and timing of experts in relation to those matters.

5 I do not think any other points remain in relation to the timing.

6 I think there is one matter just to pick up in relation to evidence generally, and that is that
7 we need to be clear who is cross-examining who. We are concerned obviously about the
8 possibility, if this is being envisaged by Ofcom and Whistl, of our evidence, whether
9 witnesses of fact or our experts, being subject to essentially two rounds of cross-
10 examination. It does not seem that there is any need for it. It seems to us that Ofcom
11 should be the cross-examiner, and Whistl can feed any suggestions into Ofcom in order that
12 they can carry out that cross-examination. There are fact witnesses. We see no reason why
13 it cannot be done by Ofcom alone in relation to these matters. And in relation to experts,
14 similarly, it seems to us that the cross-examination should be by Ofcom. Indeed, if Ofcom
15 decide not to challenge our experts on various matters which Whistl are concerned about,
16 that may, in itself, be instructive as to the relevance of those issues raised by Whistl.
17 We say the primary position should be only Ofcom carrying out the cross-examination, not
18 two rounds. Of course there will be residual liberty of parties to apply, but that is the
19 position we should adopt.

20 In relation to other witnesses, obviously there are witnesses of fact that Whistl are putting
21 forward. We will cross-examine those. I think we should be clear that Whistl is intervening
22 in support of Ofcom, and therefore, and I have not checked this with Mr Holmes, I assume
23 that he is not presuming that there would be any cross-examination of those witnesses by
24 Ofcom. There certainly should not be.

25 Then in relation to other experts----

26 THE CHAIRMAN: We have not heard Mr Holmes on that yet.

27 MR BEARD: No, I was just going to roll through these points and then obviously Mr Holmes
28 can make observations.

29 In relation to the other experts, of course, as we have already been discussing, Mr Matthew
30 will be cross-examined by us, as will be Mr Parker. Again, Ofcom should not be entitled to
31 cross-examine Mr Parker, a supporting witness, in relation to these matters.

32 Those, I think, are just some final observations in relation to who should be doing what in
33 relation to witnesses. As I say, in the background of course Whistl can be liaising with
34 Ofcom in relation to these matters.

1 THE CHAIRMAN: When you get round to sending in a further agreed draft timetable, it would
2 be very helpful to have the specific factual witnesses allocated days and times as well.

3 MR BEARD: Certainly, we will happily do that when we draft the order.

4 THE CHAIRMAN: There should not be any issues on the order, should there?

5 MR BEARD: Sorry?

6 THE CHAIRMAN: There should not be any issues on the order.

7 MR BEARD: I do not think so. The timetabling sets the broad order out, and then it is just
8 internal ordering.

9 MR HOLMES: The order in which each party wishes to call its own witnesses is a matter for it,
10 Sir, and we would not presume to influence that.

11 THE CHAIRMAN: No.

12 MR HOLMES: If I might just say a word about the cross-examination of witnesses?

13 THE CHAIRMAN: Yes, please.

14 MR HOLMES: No one wants duplicative cross-examination, and you have experienced counsel
15 appearing before you who will endeavour to ensure that that does not occur. I cannot say
16 for sure that there will not be cross-examination of any witness appearing before you for
17 another party. One simply needs to see what their oral evidence consists of. In so far as it
18 is inconsistent with something that Ofcom has said in the Decision, we must be entitled to
19 cross-examine upon it. It is perfectly normal and standard practice that a party can cross-
20 examine on any other party's witnesses. Again, this was not a point that was raised in the
21 skeleton arguments for today, but we can provide authority if the Tribunal is in any doubt
22 about that. A party can cross-examine any other party's witness.

23 THE CHAIRMAN: I think I am against any attempt to tie the Tribunal's hands on things like
24 this. We will take that issue as it comes.

25 MR BEARD: Yes, I am perfectly content with that.

26 THE CHAIRMAN: Good sense will prevail, I am sure.

27 MR BEARD: Yes.

28 THE CHAIRMAN: Mr Bates, I was going to ask you as intervener if you had anything to add?

29 MR BATES: Well, I am not sure, Sir, whether, in the light of the indication you have just given,
30 I need to respond to Mr Beard's submissions about the role that Whistl should have in
31 cross-examination.

32 THE CHAIRMAN: I do not think you need to.

33 MR BATES: I am grateful.

1 THE CHAIRMAN: I think you can rely on the Tribunal to make sure that intervener's rights,
2 such as they are, are fully respected.

3 MR BATES: I am grateful for that, Sir, and of course it is always understood that interveners
4 should not be repeating what other parties have said that we intervene in support of.

5 Obviously, Ofcom's counsel are not our counsel, it is not for us to feed questions to them,
6 but we would expect any questions that we ask in cross-examination to be supplementary
7 and not going over the same ground that Ofcom has already covered.

8 THE CHAIRMAN: It sounds sensible to me.

9 MR BEARD: I think that then leaves us with bundles and electronic transcription. In relation to
10 bundles, obviously you have what I think amounts to 18 files, which are the Appeal,
11 Defence, Intervention and Reply bundles. The proposal is that a core bundle should be
12 prepared and agreed. That is going to run to around three lever arch files.

13 Ofcom have suggested that they would like to have a chronological bundle of
14 documentation. In principle, there is no objection to having chronological bundles of
15 documentation. Our only concern is the extent to which there is going to be duplication.
16 We have looked at the index that Ofcom have put forward. Inevitably, if you are going to
17 have a chronological bundle of documents you are going to work from, there are going to be
18 some others that we would want to add. We have done a rough page calculation. It ends up
19 being around five lever arch files.

20 THE CHAIRMAN: Five?

21 MR BEARD: Yes.

22 THE CHAIRMAN: It started out as somewhat fewer than that.

23 MR BEARD: Yes, and the problem is that that is then material that is already in the other files.
24 So we end up with, we expect----

25 THE CHAIRMAN: That sounds like a tactic, Mr Beard. It seems an eminently sensible proposal
26 to have a chronological index, which is manageable, which will tell us where things are.
27 There is no point in expanding it to greater than the length of the other documents.

28 MR BEARD: We understand that, Sir. I think the difficulty was----

29 THE CHAIRMAN: What are you losing by----

30 MR BEARD: I think Ofcom's was around three, their proposed----

31 MR HOLMES: Sir, I can clarify, it has now been produced. It is two lever arch files.

32 MR BEARD: Okay, if it is two, and we can get fewer than fine. We have no objection to this. It
33 is just that the Tribunal needs to be alive to the fact that----

1 THE CHAIRMAN: We are very clear on this: we would like a chronological bundle, we would
2 like it to be as short, manageable and as useful as possible. If you want to refer to other
3 documents outside the chronological bundles you can do so.

4 MR BEARD: Of course we can.

5 THE CHAIRMAN: What is the problem? If you are trying to help the Tribunal, as I am sure you
6 are always, that is one way in which you could.

7 MR BEARD: We will bear that in mind, but we have proffered the index of additional documents
8 already to Ofcom in relation to it. I do not know if their magic copying skills can compress
9 what we have provided.

10 MR HOLMES: Sir, there have obviously been some crossed wires. We have not received such
11 additional documents.

12 MR BEARD: I apologise, it is my fault, it has not been provided.

13 THE CHAIRMAN: It will be provided.

14 MR BEARD: Yes, it will be. That then takes us to----

15 THE CHAIRMAN: Good sense should prevail on that, please.

16 MR BEARD: -- electronic services. The current arrangements are that there will be transcription
17 throughout the trial. The arrangements have been agreed in relation to end of day
18 transcripts being provided. We thought there was a real benefit in having Real-Time
19 transcription in relation to the evidential portion of the trial. Initially we suggested having it
20 throughout, but we have gone back to the provider and said, "Could you do it just for the
21 portion of the trial where evidence is being given", because that is when it is most relevant.
22 They have said they can. We have therefore got some cost estimates to enable the Tribunal
23 to have four terminals in total of the live transcription, and then each of the parties can
24 purchase as many of the terminals as they want in addition. I think we have an agreement
25 between at least Ofcom and ourselves that that is a sensible way forward, because we have
26 been able to reduce the costs. I see Mr Holmes nodding. He confirms the position.

27 I raised this just before the hearing with Mr Bates. I do not know what Whistl's position is,
28 and he may want to take instructions.

29 THE CHAIRMAN: He has not had much time to think about it then, has he?

30 MR BEARD: No, he has not, but the figures we are talking about are in total for providing the
31 arrangements for the Tribunal. That will be £4,500 in total as an incremental cost for those
32 four terminals and then each party----

33 THE CHAIRMAN: Is there a cost per terminal?

1 MR BEARD: Then the cost per terminal thereafter for those three weeks is £1,500, but that is a
2 matter of choice by the parties how many they take.

3 THE CHAIRMAN: Mr Bates?

4 MR BATES: Well, I am, of course, not the one paying for it, so I will have to take instructions.

5 THE CHAIRMAN: No, I did not think you would be.

6 MR BATES: Certainly the figures that were suggested this morning did seem a lot more
7 reasonable than those before, so it may be that something can be agreed. Obviously, if
8 Ofcom and Royal Mail want to have the live transcription and are happy to pay for it then
9 that is fine, in any event. If Whistl wants to participate in that, then it will have to
10 contribute to it.

11 THE CHAIRMAN: That sounds eminently sensible.

12 MR BEARD: Sir, I think that one is resolved. The other matter is that it was suggested that we
13 should have an all singing, all dancing electronic bundle that you could then access for
14 witnesses on screen and trigger the documents live. Because that system has not yet been
15 set up by any of the parties and because of the incremental costs that that would involve, it
16 has been agreed that that will not be adopted unless the Tribunal has real concerns about not
17 having a fully functioning electronic bundle. There will, of course, however be electronic
18 versions of all of the relevant paper bundles, so that the Tribunal and those involved in the
19 case will not have to lug however many files they may wish to take away with them.
20 It can be on a USB stick for each person concerned. So there will be an electronic version,
21 but it just will not be an interactive electronic bundle for the trial.

22 MR HOLMES: Sir, if I might just add one point in relation to that: the consequence of the rather
23 basic model of electronic bundle from which we are proposing to work is that the Tribunal's
24 hearing will still be predominantly paper based and----

25 THE CHAIRMAN: I think we can live with that, Mr Holmes.

26 MR HOLMES: I am grateful, Sir, but I wanted just to mention----

27 THE CHAIRMAN: We will struggle against technological advantage, but I think we can
28 probably manage.

29 MR HOLMES: I am grateful, Sir.

30 MR BEARD: There will be a bundle of documents provided for the witnesses, and so on.

31 THE CHAIRMAN: Is there anything else?

32 MR BEARD: No, I think all other matters have been agreed.

33 THE CHAIRMAN: I have one other thing, which is the skeleton arguments that we are going to
34 get presumably at some stage.

1 MR BEARD: Yes.

2 THE CHAIRMAN: I was going to suggest that we adhere to the Tribunal's guidance in terms of

3 length, so no more than 20 pages for skeleton arguments, double spaced, as set out in the

4 guidance.

5 MR BEARD: We are in the process of preparing our skeleton argument. I think 20 pages will be

6 difficult for us.

7 THE CHAIRMAN: Yes. We have had this conversation before, Mr Beard.

8 MR BEARD: We have.

9 THE CHAIRMAN: You have time to write a short presentation, and the shorter it is, the clearer it

10 is, the better it serves its purpose.

11 MR BEARD: Might I, given the number of issues we have, put in a bid for 25 pages in relation to

12 it. I do not think that that will unduly disturb the Tribunal. I think that leeway might be of

13 real value for us in covering the various grounds that we need to deal with.

14 THE CHAIRMAN: Twenty five slips to 30, slips to 35.

15 MR BEARD: There will be no slippage, Sir.

16 THE CHAIRMAN: Well, it will have to be the same for everybody.

17 MR HOLMES: Sir, we are happy to live within what limit the Tribunal finds. We see the

18 advantage of concision, and we will work either to 20 or 25 pages, depending on what the

19 Tribunal would find helpful.

20 THE CHAIRMAN: We may be a bit more generous when it comes to the written closings.

21 MR BEARD: Written closings are a separate matter because of the inclusion of extracts of

22 evidence, and so on.

23 THE CHAIRMAN: We have files of copious material and we have read large amounts. The

24 purpose of skeletons is not to go over old ground. It is to focus the issues.

25 MR BEARD: We quite understand.

26 THE CHAIRMAN: We are in agreement on that?

27 MR BEARD: Yes.

28 THE CHAIRMAN: So why are we arguing about five pages?

29 MR BEARD: Because, given what I have been involved in the drafting of so far, I think that

30 compressing it to 20 will be more than even the Blaise Pascal, "if I had more time it would

31 have been shorter", metric would permit us to comply with.

32 THE CHAIRMAN: We will say 23, shall we!

33 MR BEARD: I am going to start bidding for fonts!

34 THE CHAIRMAN: Anything else?

1 MR HOLMES: Not from us, Sir.
2 THE CHAIRMAN: Mr Bates, anything from you?
3 MR BATES: No, Sir.
4 THE CHAIRMAN: Right. I cannot believe that we shall not meet again before June 10, but that
5 is the plan. Obviously we will write to you and you will write to us with the revised draft
6 timetable. That would be very helpful.
7 MR BEARD: Yes, and we will include orders of witnesses.
8 THE CHAIRMAN: Okay, thank you for being commendably short.
9
