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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1299/1/3/18

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

20 June 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

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**HEARING – DAY 8**

## APPEARANCES

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

Mr Josh Holmes QC, Ms Julianne Kerr Morrison and Mr Nikolaus Grubeck (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Jon Turner QC, Mr Alan Bates and Ms Daisy MacKersie (instructed by Towerhouse LLP) appeared on behalf of the Intervener.

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Thursday, 20 June 2019

(10.30 am)

Housekeeping

THE CHAIRMAN: Good morning, Mr Beard.

MR BEARD: Good morning, Mr Chairman, members of  
the tribunal.

Before we turn to the evidence, just a couple of  
quick matters. Picking up the question that was raised  
by the tribunal yesterday in connection with  
Ms Whalley's statement, paragraph 106, concerning the  
spreadsheet. She sets out there that the Royal Mail's  
modelling team has analysed the level of arbitraging in  
2017/2018. That spreadsheet was generated on  
4 October 2018 by the modelling team.

THE CHAIRMAN: Thank you.

MR BEARD: So that's the specific answer.

The other matter just to pick up is that we received  
this morning a supplemental report from Mr Parker just  
before we left. I'm sorry, just before it goes up, we  
have not had a chance to review that. Before  
the tribunal has a look at it, if we could just consider  
what's in it before the tribunal looks at that, and it  
may be that there is no issue as to the appropriateness  
of it being produced even at this late stage.

I don't imagine that will hold matters up.

1 THE CHAIRMAN: Can we perhaps ask Mr Turner what is the  
2 purpose of a late --

3 MR TURNER: Yes. It's not additional evidence in any way.  
4 It's a corrective statement. He was running through his  
5 material before giving evidence and he has noticed some  
6 errors, and you will see when you get this that he is  
7 simply correcting it. There is nothing offensive about  
8 it.

9 THE CHAIRMAN: I see.

10 MR BEARD: If there is nothing offensive then we will not  
11 take any offence and there will be no issue, but if you  
12 wouldn't mind just pausing for a moment and if we could  
13 review it and then confirm.

14 THE CHAIRMAN: And if we could review it too. Thank you.

15 MR TURNER: Sir, the first witness for Whistl will now be  
16 called, which is Mr Polglass.

17 MR NIGEL GRAHAM POLGLASS (affirmed)

18 THE CHAIRMAN: Thank you, Mr Polglass. Do sit down, make  
19 yourself comfortable.

20 Examination-in-chief by MR TURNER

21 MR TURNER: Mr Polglass, do you have to hand or can you be  
22 given a bundle marked C2.

23 (Pause). Do you have there the Whistl bundle?

24 THE CHAIRMAN: You need a copy of Mr Polglass' statement,  
25 I think.

1 MR TURNER: Yes. You don't have the full Whistl bundle?  
2 (Pause). You should have, if you open that up and look  
3 in what should be marked as tab C, do you have  
4 a document marked "Confidential first witness statement  
5 of Nigel Graham Polglass"?

6 A. I do.

7 Q. If you turn over to page 1, does it say:

8 "I am currently employed by Whistl UK Limited ...  
9 (formerly known as TNT Post and referred to as Whistl in  
10 this statement) as Chief Operating Officer"?

11 A. It does.

12 Q. Is this your statement?

13 A. It is.

14 Q. Could you turn, please, to the last page, and you will  
15 see a heading there marked "Statement of truth"; do you  
16 see that?

17 A. I can.

18 Q. Underneath there is a date, and what is the date?

19 A. 25 January 2019.

20 Q. You see a signature. Is that your signature?

21 A. It is.

22 Q. Mr Polglass, is there anything in this statement that  
23 you need to correct?

24 A. There were a couple of small changes I wanted to make,  
25 Mr Beard kindly allowed me to bring in those pages so

1 that I didn't have to try and remember them.

2 The first was on the page 478, where it talks about  
3 the Ofcom decision dated 26 October. I just wish to  
4 correct that, because the decision was 14 August and the  
5 publication was 26 October.

6 On your numbering 479, my paragraph 11, towards the  
7 end, one line up from the bottom, I put right at the end  
8 "and subcontract Royal Mail"; what I should have said  
9 there is "separately contract".

10 On page 481, paragraph 16, second line down, towards  
11 the far right, it says "which allowed us to"; I would  
12 like to insert "which generally allowed us to".

13 Then on, again your numbering, 491, my paragraph 50,  
14 I think it will just help with explanation. It's the  
15 second two -- sorry, the bottom two lines, starting with  
16 "Royal Mail retained the right to move us". Rather than  
17 put "us", I would rather have that as "NPP1 customers  
18 onto a zonal contract, and, under the CCNs this  
19 contractual limit was 15% items surcharged", full stop.

20 MR TURNER: Mr Polglass, if you wait there, please,

21 Royal Mail's counsel will have some questions for you.

22 Cross-examination by MR BEARD

23 MR BEARD: Good morning, Mr Polglass.

24 A. Good morning.

25 Q. I do have some questions to you. The extent to which we

1           actually differ on many matters of fact I think we will  
2           see, perhaps not, it may be a matter of perspective.

3           If we just go back to the start of your witness  
4           statement. You joined Whistl in 2008 as managing  
5           director of TNT Post London, and then you were promoted  
6           up to the board as the commercial director and then you  
7           became the chief operating officer in 2013; that's  
8           correct?

9           A. That is correct.

10          Q. So you are giving evidence on behalf of Whistl UK  
11          Limited today?

12          A. I am.

13          Q. Thank you. Now, there are various bits in your  
14          statement. I want to clarify, if I may, just in  
15          relation to paragraphs 42 and 43, that we're talking  
16          about the same materials and history, if I may, to start  
17          with.

18                 So in paragraph 42, second sentence, you say:

19                 "In October of [2012], Royal Mail threatened, but  
20                 then withdrew the proposal, to introduce differential  
21                 pricing and volume commitments that [you say] would have  
22                 put us at a disadvantage if we continued with E2E."

23                 I just want to make sure that we're talking about  
24                 the same things here. If you could be provided with  
25                 bundle C4A, please, and it's at tab 4, and this is

1 a Royal Mail document. You're familiar with this  
2 document?

3 A. No.

4 Q. This is the document you are referring to when you talk  
5 about "in October of 2012 Royal Mail threatened"? It's  
6 this proposal? This isn't a test of your memory on this  
7 document. If we go on to page 18, if we may, you see  
8 there "National terms", so this is part of Royal Mail  
9 proposals:

10 "National terms.

11 "We propose to introduce new National terms. We are  
12 considering including both a commitment to volume and a  
13 commitment to profile in the new National terms."

14 Then the commitment to profile is described in 5.13,  
15 and then at 5.14:

16 "The commitment to volume will be the total number  
17 of Letter and Large Letter items a customer commits to  
18 send over a defined period."

19 Now, my understanding is that that is the proposal  
20 you are referring to in your witness statement at  
21 paragraph 42; is that correct?

22 A. That is correct.

23 Q. Thank you. You say that you didn't like those, you  
24 didn't like either the profile commitment or the volume  
25 commitment; that's right, isn't it?



1 A. Yes, that's correct.

2 Q. But volume commitments are different from profile  
3 commitments, as we can see from the terms of this  
4 document; you would agree with that as well?

5 A. I would.

6 Q. And you objected to both, and if you keep that file,  
7 because I'm going to keep coming back to a few documents  
8 in there, but if you could be provided with the Ofcom  
9 cross-examination bundle, it's a relatively thin one,  
10 I think, probably white. (Pause). Don't worry. Then  
11 let us go -- we have provided a cross-examination bundle  
12 with, I hope, documents that we're going to refer to or  
13 may refer to that aren't otherwise in the witness files.  
14 Do you have that bundle? (Pause). I will give the  
15 references to the documents for the moment.

16 I apologise. For the purposes of the witness, we will  
17 provide that. The reference for those that don't have  
18 that bundle is Ofcom cross-examination bundle 18. In  
19 your bundle, it should be at tab 3 in your bundle,  
20 Mr Polglass.

21 So if we could just look at that document, this is  
22 TNT Post UK, so Whistl's response to Royal Mail's  
23 wholesale proposals of that date, 8 October. Were you  
24 involved in the preparation of this document,  
25 Mr Polglass?

1 A. No.

2 Q. No. But if you notice right at the top it says:

3 "Proposals in section 5 [so this is section 5 of the  
4 proposals] are illegal ... and they should be withdrawn  
5 immediately."

6 You can see that?

7 A. I can.

8 Q. Yes. So the position you were taking then was that any  
9 sort of commitment, volume commitment, profile  
10 commitment, was illegal and inappropriate; is that  
11 correct?

12 A. No, I don't think that we would take that view, that any  
13 suggestions were illegal. We felt that the proposals  
14 being put forward at the time would be.

15 Q. Thank you.

16 Now, the results of that consultation were  
17 announced -- you can put that document away. Since you  
18 didn't prepare it I'm not going to ask you further  
19 questions on it.

20 A. Do you want me to keep this bundle? (Indicated).

21 Q. Yes, if you wouldn't mind, because that is a source of  
22 documents that you don't have files for. I'll provide  
23 everyone else with the relevant references as we work  
24 through.

25 The results of that consultation were announced

1           21 January 2013, and if you go back to C4A, which is the  
2           bundle of documents you had in front of you, and go to  
3           tab 9, do you have a document with a "Royal Mail"  
4           heading --

5           A. I do.

6           Q. -- on top of it? It says "Reform of access contracts".  
7           Although this isn't actually -- it doesn't have a date  
8           on the front of it, we know that it is in fact  
9           21 January 2013, this document.

10          A. Okay.

11          Q. Do you recall seeing this document?

12          A. I can't say I recall it. I may well have seen it at the  
13          time, but ...

14          Q. Understood. Yes, this is not a test on every -- what  
15          documents you may or may not -- I'm just asking for  
16          familiarity.

17                 If we could go down under "Pricing", page 1, and  
18                 there you see a statement that:

19                 "[Royal Mail believes] that there is merit in the  
20                 introduction of a price structure that allows customers  
21                 greater price stability in return for committing volume.  
22                 However, customer feedback revealed that while many  
23                 customers are attracted to this concept, more time is  
24                 needed before the industry would be in a position to  
25                 implement proposals of that sort due to the complexity

1 of the arrangements. Therefore, we will continue to  
2 work with the industry during 2013 with a view to  
3 introducing some form of volume commitment pricing (or  
4 other incentives connected to volume) into the new  
5 contracts. We will announce further proposals in due  
6 course."

7 Then you will see that under that it says:

8 "... we are not intending to make major changes to  
9 the current Access pricing plans currently available."

10 If you just go over the page, the second full  
11 paragraph down, it says:

12 "We will maintain price equivalence between the  
13 different price plans. However, we believe that the  
14 value of the commitment given by these different pricing  
15 plans to Royal Mail may well differ and we will review  
16 whether it is appropriate for these pricing plans to be  
17 set at the same level in the future."

18 Now, you understand from that that the reference to  
19 price equivalence is between the National Price Plan 1  
20 and the National Price Plan 2 at that time?

21 A. I would agree with that, yes.

22 Q. So what was being said here was that Royal Mail  
23 considers that there is a value to the differences in  
24 commitment under those two price plans; you understand  
25 that as well?

1 A. I understand that's Royal Mail's view, yes.

2 Q. Yes. Quite so.

3 Then if we go down under "Variations", just to be  
4 clear it's under "Contract governance", third bold  
5 heading down.

6 A. Yes.

7 Q. It says:

8 "New variation provisions which allow us to vary the  
9 terms and conditions of the contract on 6 months notice  
10 (certain changes ... with less notice, eg pricing,  
11 changes required by regulation, changes to  
12 specifications ...). The new pricing conditions allow  
13 us to make tariff change up to twice a year if  
14 necessary.

15 "Nothing in the letters contract detracts from the  
16 customers' right to raise an Access dispute with Ofcom  
17 or a complaint under the Competition Act. In the event  
18 that Ofcom accepts such a dispute or a complaint is  
19 accepted, we will suspend any contractual notices  
20 pending resolution."

21 So just two things coming out of this. First of  
22 all, this change in the access contract arrangements  
23 enabled variations to be put forward by Royal Mail,  
24 unilateral variations effectively; you agree?

25 A. It did allow them more flexibility to put forward the

1 areas that you just quoted, sir.

2 Q. Yes, and that was all subject, of course, to the  
3 possibility of raising an access dispute or making  
4 a complaint to Ofcom, and that should that be done, then  
5 if Ofcom accepts such a dispute or complaint the  
6 proposed change would be suspended; you understood that  
7 too?

8 A. I do understand. It's a bit of a shame that a company  
9 treats its clients in such a way or thinks it might have  
10 to, but yes.

11 Q. So if we just go back to your -- I will be coming back  
12 to this bundle -- paragraph 42 of your witness  
13 statement, you knew that there was a clear possibility  
14 not only of Royal Mail making price changes generally  
15 but of it specifically introducing a price differential  
16 at that time, didn't you?

17 A. We knew, of course, that they could alter prices. We  
18 had no issue with the fact that they had that  
19 responsibility. We would always have our own view,  
20 of course, and, yes, we knew that there was a chance  
21 that they may come back to a price differential, albeit  
22 we felt as a result of the letter that we've just been  
23 referencing that this was something that they may well  
24 not do in the future.

25 Q. But they had specifically flagged that they were

1           considering those matters explicitly in the letter,  
2           price changes that have come to be referred to as  
3           a price differential?

4       A. Well, indeed, and the letter itself highlights that they  
5           may -- you know, they're saying that if we don't like it  
6           we can go through a process.

7       Q. Being fair, at your paragraph 42 you say at the end:

8           "We thought ... that we would be able to stop them  
9           going ahead with any future proposal, whether by  
10          pressure from us or intervention from Ofcom."

11          So you recognised that there was likely to be  
12          a proposal but you could stop it if you didn't like it?

13       A. Well, it's perhaps bold but, based on the result of the  
14          October consultation, then yes.

15       Q. You say bold, but you had a relatively good relationship  
16          with Ofcom at that time, didn't you?

17       A. Well, no different to any other business in the access  
18          market, I'm sure.

19       Q. Well, we'll perhaps come back to that.

20       A. I don't think we had a cosy relationship, if that's what  
21          you are suggesting.

22       Q. Yes, I think you did have a cosy relationship with  
23          Ofcom. And you were confident that if you went to Ofcom  
24          and you put forward an objection to the differential,  
25          that Ofcom would at the very least, would at the very

1           least suspend any proposed changes; that's correct,  
2           isn't it? They would take your complaint seriously and  
3           suspend the change -- result in suspension of the  
4           changes?

5           A. My expectation, Mr Beard, would be that the regulator  
6           has a responsibility, we put forward our views on  
7           something, I expect them of course to make their call  
8           and judgement on it in their position as the regulator  
9           of the industry. I can't influence what they're going  
10          to do, other than to of course put across our own  
11          concerns.

12          Q. But you were confident, weren't you, that if a price  
13          differential were put forward, then in those  
14          circumstances Ofcom would take your complaint seriously,  
15          investigate it, and as a result, because of the terms of  
16          this contract, any proposed change would be suspended;  
17          that was the position?

18          A. I expected them to take it seriously, definitely.  
19          I expected them to assess it professionally, and my  
20          expectation would be, based on our view of the market,  
21          that they would consider it an infringement.

22          Q. It was because you were so confident about this in part  
23          that you signed up to the new access terms, wasn't it?

24          A. I'm not quite sure I understand your question.

25          Q. It's because you placed reliance on the existence of the



1 suspension clause that Royal Mail had built into the new  
2 access terms that you were willing to sign up to those  
3 terms; that's correct, isn't it?

4 A. It would have been one of many reasons for signing the  
5 contract, certainly.

6 Q. But you placed considerable reliance on the existence of  
7 that suspension clause, didn't you?

8 A. We will have paid some reliance on it, yes. I mean, to  
9 what extent to be honest I can't remember, but we will  
10 have placed some reliance on the fact that our regulator  
11 of our industry was likely to adjudicate on something we  
12 didn't agree with.

13 Q. Once more, Mr Polglass: you placed considerable reliance  
14 on the fact that any changes you considered  
15 anticompetitive would be abandoned or suspended in the  
16 event that a dispute was accepted, or a regulatory or  
17 competition complaint was investigated, didn't you?

18 A. I expected that anything that was considered to be  
19 an infringement would be investigated. So not any, but  
20 anything that we might consider to be an infringement we  
21 would have an opportunity to present it and that would  
22 be properly reviewed.

23 Q. Anything that you considered, as you say, to be  
24 anticompetitive would be reviewed and therefore would be  
25 suspended?

1 A. No, you're drawing a conclusion that it would naturally  
2 be suspended. I don't know that it would naturally be  
3 suspended.

4 Q. Well, can we just have bundle C4B at tab 94, please. If  
5 we could just go to page 21 in that bundle.

6 A. Page --

7 Q. Page 21, it's a little tiny page number, sorry, it's a  
8 test.

9 So this is a witness statement that was provided by  
10 Mr Wells, and the wording that I just used that you were  
11 not immediately keen to agree with me on is the final  
12 sentence used by Mr Wells in paragraph 69. You don't  
13 disagree with Mr Wells there, do you?

14 A. No, because I think that's what I said.

15 Q. We will review the transcript in due course,  
16 Mr Polglass.

17 The next matter I wanted to move on to -- we can  
18 close that bundle over, I just wanted to confirm that  
19 position. The next document I want to go to is in the  
20 Whistl bundle at tab B6. (Pause).

21 I'm so sorry, Mr Polglass. It's a slightly  
22 complicated bundle. I don't know if you can find it.  
23 In mine it's under the fourth tab. There is a tab 4 and  
24 then there is a run of smaller tabs, and it's tab 6 in  
25 that run of smaller tabs. It's at page 360 in the

1 numbering.

2 A. Royal Mail prospectus?

3 Q. That's it, you have it, and it's only an extract from  
4 it, and I just want to go on to page 84, which again is  
5 an extract that Whistl included.

6 You will see (C) on that page, "Letters". Just  
7 picking up the second paragraph, so this is the IPA  
8 prospectus for Royal Mail:

9 "Following the introduction of new contracts for  
10 network Access services in April 2013 [so that's the  
11 change contracts we were just referring to; correct?]  
12 Royal Mail has more flexibility to be able to respond to  
13 changes in market developments. Possible initiatives  
14 which Royal Mail may consider in this area in the future  
15 include providing Access customers with price stability  
16 in return for volume commitments, contents-based  
17 pricing, and differentiated pricing for different  
18 service plans."

19 Here we have a public statement again by Royal Mail  
20 that it was specifically considering the introduction of  
21 differentiated prices for different service plans at the  
22 time of privatisation, and you knew about that?

23 A. Yes.

24 Q. Yes. Now, before I move on, I just want to take a step  
25 back slightly in time. We can close that bundle for the

1 moment, thank you. Early in 2013, Whistl had begun  
2 looking for a potential investor in its end-to-end  
3 proposition, and that was actually announced by PostNL  
4 in February 2013. Do you recall that?

5 A. Yes.

6 Q. To assist with that process, Whistl engaged a corporate  
7 finance company called HMT?

8 A. Correct, yes.

9 Q. So together Whistl and HMT developed a detailed  
10 investment memorandum and business plan, as you would do  
11 for going out and seeking investment; correct?

12 A. That's correct.

13 Q. Can we go back to the C4A bundle, you probably still  
14 have it open, it's at tab 10. Now, I should say,  
15 Mr Polglass, I don't think I'm going to traverse  
16 anything that will require confidential answers, but of  
17 course if there is anything confidential that you want  
18 to say, let me know, we will pause and we can deal with  
19 it subsequently.

20 A. Thank you.

21 Q. Do you want to just -- that document, you probably don't  
22 need to go right the way through it, the cover page is  
23 probably sufficient. That was the business plan,  
24 investment memorandum put together by Whistl and HMT  
25 looking for investment; that's correct, isn't it?

1 A. Yes.

2 Q. Yes. So if we could just skip on, I'm not going to go  
3 through all of this, if we look at slide 12 in my  
4 version, it may be slide 11 because apparently there are  
5 two versions with different page numbers, it should say  
6 at the top "Executive summary. The regulatory risk  
7 environment".

8 A. Yes.

9 Q. Can I just ask, is that page 12 in your version?

10 A. It is.

11 Q. Good, that's helpful, thank you.

12 You will see on the left-hand side "Key identified  
13 risks", and if we just go down the fifth of those:

14 "Further change in pricing metrics to make NPP1 --  
15 a plan that TNT Post cannot access [you say there] --  
16 cheaper than NPP2."

17 So that was identifying as a key risk the  
18 introduction of a price differential; that's correct,  
19 isn't it?

20 A. It is.

21 Q. There is more on this issue further on in the document.  
22 If we go to what I think will be slide 60, this is  
23 a slide, I'm not going to go through it all, you will be  
24 pleased to know, Mr Polglass, but on the right-hand  
25 side -- sorry, it's "Risks and opportunities. Impact of

1 regulation in postal services". On the right-hand side,  
2 if we could just pick it up in the second bullet point  
3 on "impact on TNT Post", it says:

4 "Retail prices have been permitted to increase  
5 significantly in the last three years supporting the  
6 economic case for development of alternative delivery  
7 carriers in E2E."

8 Retail prices increasing in the letters market is  
9 quite a common feature, isn't it, Mr Polglass, of  
10 markets across Europe?

11 A. I'm not particularly familiar with all the pricing  
12 structures across Europe.

13 Q. But the general trend is significant increases in  
14 prices?

15 A. There are increases in prices, I would suggest primarily  
16 because of volume decline.

17 Q. Volume decline, yes. I think in Italy they have gone up  
18 250% or something. Anyway, I'm not going to test you  
19 on --

20 A. That's Italy for you.

21 Q. -- those issues.

22 "In April 2012 a new price control was introduced  
23 for Royal Mail giving it much greater commercial freedom  
24 as a prelude to privatisation. In particular all price  
25 controls were removed apart from second class

1 stamps ..."

2 So this is just reiterating what we have already  
3 seen, that there is flexibility there.

4 Then if we go down to the fourth bullet point:

5 "It is clear therefore that Ofcom is seeking to give  
6 Royal Mail greater pricing control over its products in  
7 return for opening up the market to greater competitive  
8 forces, creating a beneficial opportunity for TNT Post."

9 So this is the investment memorandum recognising  
10 that Royal Mail had a great deal more freedom in  
11 relation to pricing as compared to the previous  
12 regulatory regime.

13 So effectively this is a sort of balance between the  
14 opportunities for entrants and the commercial freedom  
15 for Royal Mail being recognised in the regulatory  
16 regime; you would agree?

17 A. Yes.

18 Q. Yes. If we just go back to slide 44, this is under  
19 a heading "The opportunity. Why now?", and you say, or  
20 rather the Whistl/HMT document says:

21 "The E2E barriers which have historically existed  
22 for E2E have now been largely mitigated, opening the  
23 door for a full roll-out."

24 Then this slide provides the reasoning that you had  
25 for that at the time; that's correct, isn't it?

1 A. It is.

2 Q. So if you just look on the -- you can see how it's  
3 structured. You have identified on the left-hand side  
4 barriers to entry, then you have some observations, then  
5 the "TNT Post solution/mitigation".

6 So the first one is high fixed costs of entry, and  
7 you say in relation to your TNT Post solution  
8 mitigation:

9 "As a result of its DSA operation, TNT Post already  
10 has significant infrastructure in place to allow it to  
11 adapt to an E2E model."

12 That's correct, isn't it?

13 A. That is.

14 Q. Yes?

15 A. Yes.

16 Q. Then if we go down to 3, "Conversion of customers":

17 "TNT Post has already converted circa 50% (and  
18 growing) of customer volumes and expects to have  
19 converted circa 88% by 2018. All regional customers are  
20 automatically converted through their existing  
21 contracts."

22 So you're talking about conversion of customers of  
23 what sort here?

24 A. What sort of customer?

25 Q. What sort of conversion are we talking about? Can you



1           just explain what that means?

2       A.   What a conversion is?

3       Q.   Yes, what the conversion is that's being referred to

4           here, Mr Polglass.

5       A.   This is a conversion of the mail volumes that were going

6           through our downstream access business --

7       Q.   And converted to what? I'm so sorry.

8       A.   -- such that we would be able to then deliver them by

9           a different means other than via Royal Mail.

10      Q.   So this is converting access volumes into delivery

11           volumes; is that right?

12      A.   This is getting agreement from clients that where we

13           were open with our own delivery options, that they would

14           allow us to use that option to deliver their mail, and

15           there were obvious commercial terms that came with that.

16      Q.   But that is customers that you currently had or might

17           win for access services --

18      A.   Yes.

19      Q.   -- being converted to delivery? I'm just trying to be

20           absolutely --

21      A.   The simplest way to look at it is we had roughly

22           4 billion items of mail going through downstream access,

23           roughly 25% of all mail in the country, and we were

24           looking to try and get about 1.5, 1.6 billion of that to

25           be delivered through our own network once we had reached

1 full roll-out.

2 Q. You are here talking about the rate of conversion that  
3 you expect of an ordinary -- one of your customers'  
4 levels of access mail converted into end-to-end delivery  
5 mail, and you are saying you expect to have converted  
6 around 88% by 2018; is that right?

7 A. That was the plan at this point, yes.

8 Q. Yes. Just the next sentence:

9 "All regional customers are automatically converted  
10 through their existing contracts."

11 This is because you had been going along, as you  
12 rolled out your access business and took on new  
13 customers, you had been putting provisions in the  
14 contracts to enable you to roll over the delivery  
15 mechanism you used for them; is that right?

16 A. That's correct. We called them short form contracts,  
17 they were typically for the smaller volume, they may not  
18 have been small customers, they could have been very  
19 large well known brands, but their mailing profile may  
20 have been quite small, and we had this sort of short  
21 form contract, and that allowed us to roll out the  
22 delivery via our own network when we had established it.

23 Q. Yes. Then if we could just move down to the fourth  
24 I suppose barrier to entry on the left, "Royal Mail's  
25 VAT exemption", and if we just go across to the

1 "TNT Post solution mitigation", the last -- I'm not  
2 going to go through all of it, but just the little  
3 paragraph:

4 "Management assume that the legal procedures that  
5 have been put in place will lead to Royal Mail's VAT  
6 exemption being removed by Q2 2016, resulting in  
7 an ability to remove VAT absorption from this date,  
8 subject to other competitive pricing factors."

9 What that's referring to is the fact that you were  
10 challenging the existence of a VAT exemption that  
11 applied to certain aspects of Royal Mail's business  
12 because of its role as the universal service operator;  
13 that's correct, isn't it?

14 A. Yes, it is correct.

15 Q. Here the assumption is that that will be removed by Q2  
16 2016; that's correct as well, isn't it?

17 A. We were certainly hoping that that would be the case.

18 Q. Well, it says "Management assume ..." That is  
19 an assumption, isn't it, Mr Polglass?

20 A. The legal procedures have been put in place which will  
21 lead to Royal Mail's VAT, yes, being removed, yes.

22 Q. Then the fifth row here:

23 "Regulator's obligation to retain Royal Mail as  
24 USP."

25 You say here:

1           "Having reviewed TNT Post's E2E roll-out plan, Ofcom  
2           has stated that it will not initially be intervening in  
3           the market and will review the market periodically but  
4           no review is expected before the end of 2015.  
5           Management believes the risk of regulatory restrictions  
6           being imposed is very low."

7           So the view you were taking here and setting out to  
8           investors was that Ofcom had effectively reviewed your  
9           plans, thought they were healthy, and wouldn't want to  
10          intervene in the market to protect Royal Mail as  
11          a universal service operator; that's the position you're  
12          setting out there, am I correct?

13         A. We would be a fairly weak management team if we didn't  
14          assess the impact that our plans might have within this  
15          market, a regulated market, and it -- and we at all  
16          times kept Ofcom briefed on our plans.

17         Q. You kept them briefed. So if we go down to the next  
18          bullet point in fact:

19                 "Ofcom has a history of liberalisation and promoting  
20                 competition within the telecommunications sector and  
21                 TNT Post maintains a strong relationship with Ofcom,  
22                 regularly keeping them updated on their proposed plans  
23                 for E2E."

24                 So earlier you were saying you had a relationship  
25                 like anyone in the market. In fact here you are saying

1 to investors you have a strong relationship with Ofcom.

2 That's correct, isn't it?

3 A. I am saying we have -- or we were saying we have  
4 a strong relationship because we put a lot of effort  
5 into our plans, we made absolutely certain that Ofcom  
6 was aware of our plans, that they could critique those  
7 plans at all times, we regularly updated them on them.

8 Q. So just picking up there on the regular updating, so the  
9 plans changed over time, I think as we will see in the  
10 documents?

11 A. Plans always do.

12 Q. I'm not doubting that for a moment, Mr Polglass. Not  
13 doubting that for a moment. So as they changed, you  
14 updated Ofcom on what was going on with them?

15 A. Yes, this wasn't like a daily announcement or anything.  
16 But on a --

17 Q. I wasn't assuming it was quite daily Mr Polglass.

18 A. -- on a regular basis, of course we did.

19 Q. Monthly?

20 A. To be honest --

21 Q. Approximately. I'm not holding you to a full weekly  
22 period.

23 A. I don't think it was a regular period. I think it was  
24 as and when something had altered or changed.

25 Q. Well, it says here "regularly keeping them updated with

1 the proposed plans". So that's what you are saying to  
2 investors, you are saying "regularly" there?

3 A. Yes.

4 Q. Was this by way of meetings with people at Ofcom?

5 A. I didn't attend any meetings with Ofcom during this  
6 period personally.

7 Q. No?

8 A. And therefore I'm not sure I could give you an exact  
9 answer to the question you have. My understanding is  
10 that we had regular, albeit they weren't one a month.

11 Q. No, I'm not saying that they were scheduled  
12 specifically, but there were regular meetings with  
13 Ofcom, that was your understanding?

14 A. Yes.

15 Q. Yes. But you weren't involved, so I'm not going to ask  
16 you further questions in relation to those.

17 So let's just go on to slide 60, if we may. Sorry,  
18 61, probably. Yes, 61. We were looking at 60 a moment  
19 ago. If we go to 61, "Risks and opportunities.  
20 Regulatory risks summary":

21 "Steps have been taken to mitigate risk and the  
22 likelihood of each risk impacting the plan has been  
23 assessed."

24 If we pick up the "Regulatory risks" on the  
25 left-hand side, we will see regulatory risks that have

1           been referred to in an earlier slide being referred to  
2           again:

3           "Further change in pricing metrics to make NPP1 --  
4           [again saying] a plan that TNT Post cannot access --  
5           cheaper than NPP2."

6           So this is price differential again. Then "Risk  
7           response:

8           "Possible that this may happen in 2014  
9           repricing ..."

10           So you are there recognising in this investment  
11           memorandum that you thought it was entirely possible  
12           that there would be a price differential put forward for  
13           the April 2014 repricing; that's correct?

14          A. We hoped there wouldn't, but yes.

15          Q. Just to be clear, this is not something you have given  
16           evidence on, but price changes made by Royal Mail in  
17           relation to access contracts, they occurred effectively  
18           annually, April each year; that was the structure of how  
19           they happened?

20          A. Back then, yes.

21          Q. Yes. So:

22           "Possible that this may happen in April 2014  
23           repricing, but would be seen as discriminatory against  
24           the nascent E2E service from TNT Post -- unlikely that  
25           Ofcom would be supportive of differential pricing until

1 competitive force established."

2 So what you are saying here is: yes, we expect it's  
3 going to be put forward, but we don't think that Ofcom  
4 will permit this to happen at least until we are very  
5 well established in the market. Because competitive  
6 force you are referring to you here, is that broadly  
7 right?

8 A. Yes, this is our opinion in our investment memorandum,  
9 yes.

10 Q. Yes. If we go on then to 76, I'm not, you will be  
11 pleased to know, going to ask you any questions about  
12 any of the numbers and tables that are there, even if  
13 you can read them at this scale.

14 A. Yes. Good.

15 Q. The simple question is: it's a financial information  
16 monthly forecast cash position, and it says:

17 "Running downside sensitivities on volume, working  
18 capital and VAT resolution reinforce the feasibility and  
19 attractiveness of the opportunity."

20 So this is a financial information summary for  
21 potential investors setting out a range of  
22 sensitivities; correct?

23 A. That is correct.

24 Q. Yes, and there is no sensitivity here taken into account  
25 in relation to any possible price differential changes,



1 is there?

2 A. There isn't, because we never -- we didn't feel that  
3 they would be approved.

4 Q. Thank you.

5 If we then go on to slide 85, I should just give you  
6 the context, I don't want to make it unduly confusing.  
7 This is in appendix 3, which is a regulatory risks  
8 summary. It starts on page 82, but I'm just going to go  
9 to 85.

10 A. Oh, same file?

11 Q. Yes, sorry, same file, same document, I'm just giving  
12 you context. Page 85 is the one I want to go to.

13 So here you have appendix 3, "Regulatory risks  
14 summary", and again on the left-hand side we have the  
15 "Risk":

16 "Royal Mail makes National Price Plan 1 ... cheaper  
17 than NPP2 ... and zonal."

18 The first point that's made is an "Impact" and you  
19 say "Unable to sign up" because your view was you  
20 wouldn't be able to meet the "all reasonable endeavours"  
21 clause?

22 A. Mm.

23 Q. Yes. And:

24 "Customer base exposed to competition from  
25 Royal Mail Retail, UK Mail and others ..."

1           Then you say "Mitigation":

2           "Seek justification for differential pricing."

3           Then:

4           "Prepare Ofcom now for possible challenge in early  
5           2014 on grounds that more expensive terms of NPP2 would  
6           not be fair and reasonable and would be  
7           discriminatory/constitute ... exclusionary abuse."

8           So what you are saying to your investors is, because  
9           of what we have already seen, that you are anticipating  
10          that these price changes could be put forward, that you  
11          would actually prepare the groundwork in your meetings  
12          with Ofcom for a possible challenge in early 2014;  
13          that's correct, isn't it?

14         A. Yes, that's -- yes, that's what it says, yes.

15         Q. Then it goes on and says:

16                 "[And we would] challenge terms before Ofcom/Courts  
17                 or European Commission ..."

18                 So this is not just pressing Ofcom, you would  
19                 actually go out to Brussels and press the  
20                 European Commission on these sorts of issues as well; is  
21                 that right?

22         A. If we had to.

23         Q. It says then:

24                 "... (suspensive effect of cheaper pricing plan  
25                 pending resolution)."

1           So there you are recognising that so long as you've  
2           got those challenges under way, you won't actually feel  
3           the effect of any of these changes; is that correct?

4           A. It was important to us that if there were the  
5           introduction of any of these type of pricing  
6           differentials that they were dealt with promptly.

7           Q. Promptly? Yes. And suspending through the complaint  
8           mechanism would ensure that they were dealt with  
9           promptly; that's correct, isn't it?

10          A. Not necessarily, no.

11          Q. Not necessarily?

12          A. Because the suspension only suspends it, it doesn't give  
13          a timeframe.

14          Q. It doesn't give a timeframe for the final conclusion of  
15          Ofcom's inquiries, does it?

16          A. It doesn't give a timeframe for either of what you just  
17          stated or for Royal Mail to withdraw it.

18          Q. But the practical effect would be a prompt removal of  
19          any immediate impact of any of these price changes,  
20          wouldn't it?

21          A. Only in terms of the prices being paid.

22          Q. Only in terms of the prices being paid.

23          A. The impact, as I'm sure we may come to, is quite severe.

24          Q. Well, we will come to that, but the impact of the prices  
25          would be removed, wouldn't it?

- 1 A. The immediate impact of prices being charged would be  
2 removed.
- 3 Q. Yes. If we go on to the right-hand side, it says:  
4 "Probability: moderate to high (April 2014)."  
5 I am interpolating from the answers you have already  
6 given that what you are saying here is that it's a  
7 moderate to high chance that Royal Mail are going to  
8 come forward with this, but not a moderate to high  
9 chance that it's actually going to occur?
- 10 A. Well, it's a moderate to high chance that they will come  
11 forward with it, and we've just gone through the  
12 mitigations that you put in there.
- 13 Q. So you didn't think there was a moderate to high chance  
14 that actually a price differential would come into  
15 effect, did you?
- 16 A. No, we thought it was a low to medium chance. It  
17 doesn't say that on there, I accept.
- 18 Q. In fact you thought it was a low chance, didn't you?
- 19 A. No, I -- we thought it was a low to medium chance.  
20 That's what I just said.
- 21 Q. We will come back to that. We will come back to that.  
22 Now, the next document I want to go to is at tab 32  
23 in this bundle, and it's a relatively rare thing in that  
24 it's something that was commissioned by LDC, as we  
25 understand it. We have very little material, but this,

1 as I understand it, was a draft commercial due diligence  
2 report commissioned by LDC, is that your understanding?  
3 Do you know this document?

4 A. I'm aware of this document, yes. It was commissioned by  
5 LDC and completed by PwC.

6 Q. Thank you. So if we go on to page 8 in this document,  
7 this is under the heading "At a glance -- our views",  
8 and you see on the right-hand side it says at the  
9 right-hand column:

10 "Royal Mail Group responses predominantly involve  
11 price, many of which have mitigations.

12 "Royal Mail Group's likely competitive response  
13 involves pricing ...

14 "We believe the pricing structure (price  
15 plan/surcharges) is unlikely to change."

16 So that was the view being expressed by PwC to LDC  
17 at the time?

18 A. Yes.

19 Q. Do you know how they reached those views?

20 A. Well, I guess it's likely most due diligence processes,  
21 they spoke to management, they spoke to clients, they  
22 spoke to prospective clients, they assessed the market  
23 in whatever fashion they chose to do, and they -- I'm  
24 not sure if they did at this time, I think they did,  
25 they met with Ofcom as well.

- 1 Q. They met with Ofcom?
- 2 A. They did.
- 3 Q. Were you at the meeting with Ofcom when they met them?
- 4 A. No.
- 5 Q. No. Do you know who was?
- 6 A. No.
- 7 Q. No. And you haven't seen any notes of any meetings with  
8 Ofcom?
- 9 A. Not that I can recall.
- 10 Q. No, and you didn't at the time?
- 11 A. Not that I can recall sitting here at the moment.
- 12 Q. So if we go on to slide 58, just so I understand what's  
13 going on here, the heading is:
- 14 "At the point of 25% national coverage, TNT Post is  
15 able to offer a sufficient discount to make it  
16 financially attractive (and material) for customers  
17 convert to TNT E2E."
- 18 So, as I understand it what's being said here by PwC  
19 is that when you get to 25% coverage you can offer  
20 a discount so the plan is to invest to get to that level  
21 of coverage; is that right?
- 22 A. I would probably have to read the whole document --
- 23 Q. Please, sorry, yes, I don't want to stop you looking at  
24 it as a whole.
- 25 A. (Pause). So I think the context is in line with the

1 previous page, which is some of the key clients --

2 Q. Yes?

3 A. -- that we currently had. Some of our clients,  
4 particularly the key clients, those that were not on the  
5 short form contract that I referred to previously, where  
6 we needed to negotiate with them commercial terms for  
7 using our service, some of them it made -- it was  
8 interesting to them immediately; for some they wanted to  
9 see a certain level of roll-out before they would start  
10 switching volume across to our delivery network.

11 I think that's what it's referring to.

12 Q. But it says at the point of 25% national coverage you  
13 are able to offer discounts. That's what's being put  
14 forward here, isn't it? Whether it's the customers on  
15 the previous page or other customers; that's correct,  
16 isn't it?

17 A. Yes, but it's the context and without reading the entire  
18 document it would be a bit difficult for me to give --  
19 I think that's the context. I think it's in line with  
20 the more significant clients that we had in volume  
21 terms.

22 Q. So just putting this in context as to what's going on  
23 more generally, am I right in thinking that what's being  
24 done here is consideration by PwC for LDC that there is  
25 a way of assessing a plan to invest where you might take

1           some losses initially to get to a scale where you are  
2           making returns from those customers and others that  
3           means you will be able to offer discounts in due course;  
4           is that right?

5       A.   Undoubtedly there was a roll-out plan that did see  
6           losses in early years.  As the volumes got greater and  
7           our delivery got wider, then some of the clients --  
8           particularly I'm thinking of some on this previous page  
9           that are financial companies -- we would be able to then  
10          start to mitigate things like VAT if indeed we hadn't  
11          won that case.

12       Q.   Yes.  So here -- sorry, just to summarise, I suppose,  
13          before I go on to the next slide.  So effectively what  
14          you are looking at, as you fairly said, is effectively  
15          a sort of medium term plan with some short term pain  
16          involved financially?

17       A.   Yeah, that's a real simplification, but I'll accept it.

18       Q.   Thank you.

19                 Let's go on to slide 74.  So there are a whole bunch  
20                 of slides in here on regulation and potential Royal Mail  
21                 responses.  I'm not going to take you through all of  
22                 them, but if we could just go on to slide 79, you will  
23                 see on slide 79 it's headed "Royal Mail could respond to  
24                 TNT Post's E2E roll-out by attempting to alter the  
25                 current access pricing structure, although we believe



1 this is unlikely to occur. In addition, management  
2 believes this would have a limited impact."

3 So it's a heading and I think a summary of this  
4 page. What you will see is, on the left-hand side,  
5 "Royal Mail wholesale pricing structure" and you will  
6 see down the left the three plans, effectively, and then  
7 some comments on those three plans, and then  
8 "Importance", so the significance of the different  
9 plans.

10 Then, it's quite a dense slide, but on the far  
11 right-hand side you have "The importance of the  
12 different price plans", and it's asserted in bullet 1:

13 "Currently there is little practical difference  
14 between NPP1 and NPP2."

15 Which is of course true in the sense that both of  
16 them were the same price. That's correct at that time,  
17 isn't it?

18 A. There was price equivalence, yes.

19 Q. Yes. "... customer chooses which plan it signs up to".

20 Then it says in the third bullet:

21 "In future, Royal Mail could try [to] make  
22 alterations to the plans in order to protect the  
23 profitability of the group and complete the universal  
24 service obligation."

25 Then the sub-bullets:

1           "A change in the pricing metrics to make NPP1  
2 cheaper."

3           So that's a reference to the price differential  
4 again, isn't it?

5       A. Yes, it would appear to be.

6       Q. Then there are others. So mixing tolerances, a change  
7 in the number of pricing zones, offer volume discounts,  
8 and it says:

9           "While changes would be subject to review, the  
10 regulator has indicated that there is unlikely to be  
11 an increase in the number of zones or a divergence of  
12 the price plans."

13           So this had been said to PwC and Whistl at the time?

14       A. This is a document created by PwC for LDC, this is not  
15 a document produced for Whistl.

16       Q. Understood. So you can't comment further in relation to  
17 that; I understand.

18           If we just go on, finally on this document, to  
19 tab 85, slide 85, I'm sorry, you have got there --  
20 actually set out in a table -- a range of possible  
21 avenues of complaint or challenge that are being set out  
22 with their timelines and costs. You will see there that  
23 competition law, a description of the timeline, can take  
24 a long time. Sorry, it's just the second of the  
25 bullets:

1           "Management estimates at least one year although  
2 previous cases have taken up to four years for  
3 resolution." It would be expensive.

4           Then you will see "Access dispute", and then you  
5 will see the fifth bullet there:

6           "Four month assessment period."

7           And the cost:

8           "Low tens of thousands."

9           And then regulatory condition complaint:

10          "Can take between four weeks and six months."

11          That's the third bullet.

12          So what we see there is PwC effectively setting out  
13 what you have been referring to in previous documents  
14 about avenues of challenge that could result in  
15 suspension of the timelines and costs; that's right,  
16 isn't it?

17          A. Yes, this is their assessment of that, yes.

18          MR BEARD: Yes.

19          I'm conscious of the time. I'm about to move on to  
20 another topic. Would now be a convenient moment for the  
21 five minute --

22          THE CHAIRMAN: Very convenient. Thank you, Mr Beard.

23          MR BEARD: I'm grateful.

24          THE CHAIRMAN: Mr Polglass, you mustn't speak to anyone  
25 about the case.

1 (11.33 am)

2 (A short break)

3 (11.42 am)

4 MR BEARD: Mr Polglass, November 2013 you heard rumours in  
5 the market about a price differential being put forward  
6 by Royal Mail because some customers were approaching  
7 you saying that UK Mail had been contacting them saying  
8 that Whistl wouldn't any longer be able to offer  
9 a competitive price. Do you remember that?

10 A. I do.

11 Q. Yes, and you were aware of that in November 2013, and  
12 then you had your commercial director contact Royal Mail  
13 about that; do you remember that?

14 A. Yes, I think Andy did -- sorry, yes, I believe so.

15 Q. When you say Andy, do you mean Andrew Goddard?

16 A. Goddard.

17 Q. Why don't we go to the document, it's tab 45 in C4A.  
18 His name is currently redacted, but you are content for  
19 it to be --

20 A. Yes, that's fine.

21 Q. Yes. So, yes, you are ahead of me, Mr Polglass, this is  
22 Mr Goddard, the commercial director, writing to -- I'll  
23 keep that name redacted -- at Royal Mail.

24 There you see the email:

25 "Wonder whether you can help? It has come to my

1 attention that customers are being approached by one of  
2 our key competitors and stating that there will be a  
3 differential price come April 14th in the above contract  
4 rates."

5 You see from the subject that it's "NPP1/NPP2 price  
6 differential". So that's the -- you reacting to the  
7 rumours. Presumably by that stage Mr Goddard was under  
8 you in the Whistl hierarchy; is that broadly right?

9 A. Yes, I'm sure he wouldn't like that description, but --

10 Q. No, I realised almost as soon as I said it that was not  
11 perhaps my best phraseology.

12 A. I'm not sure I do either, by the way. Yes, he reported  
13 in to me, but it would be useful perhaps to understand  
14 there are obvious reporting lines but we have a very  
15 flat structure.

16 Q. Understood. But you knew about this, obviously --

17 A. Of course, yes.

18 Q. -- as you have indicated.

19 A. Yes.

20 Q. You are asked, or Mr Goddard is there saying:

21 "Please can you give us your absolute assurance  
22 that: no Royal Mail employee has been authorised to make  
23 any announcement about there being a price differential  
24 between NPP1 and NPP2 access terms; in addition can you  
25 please confirm that Royal Mail will not introduce

1 differential pricing between NPP1 and NPP2 in  
2 April 2014."

3 So here we have a situation where what you  
4 recognised and were concerned Royal Mail might well do,  
5 you were hearing rumours that they were actually going  
6 to do it and you wanted to put pressure on them to stop  
7 it; is that broadly right?

8 A. We, obviously, as I've already said, we feared that they  
9 might well try to do something. To hear about it from  
10 our clients because one of our competitors was telling  
11 them was a shock.

12 Q. So the reply to that, if we just go on, tab 48, you  
13 say -- so here is the reply from Mr Agar to Mr Goddard:

14 "[X] has forwarded on to me your email ... As Nick  
15 raised a similar issue with me on the telephone on  
16 25 November ..."

17 So that's Mr Wells; is that right?

18 A. Yes, yeah.

19 Q. "... I thought it more appropriate for me to reply.

20 "I can confirm that no employee has been authorised  
21 to make any announcement about there being a price  
22 differential between NPP1 and NPP2 ... I can go further  
23 and say that, at the time of writing, a final decision  
24 has not yet been taken as to the scale of the Access  
25 tariff changes we will announce in early January."

1           So not the scale.

2           "Having said that, there is clearly some speculation  
3           as to what our intentions are. We have made no secret  
4           of the fact that we have actively considered introducing  
5           such a differential and we raised the prospect of such  
6           a change last year."

7           Just picking up that last sentence, that's obviously  
8           true, they had raised the prospect of that change in the  
9           previous year, hadn't they?

10          A. They had, yes.

11          Q. And they'd repeated the fact that there was the prospect  
12          of change at various stages during the year, hadn't  
13          they?

14          A. They had.

15          Q. Yes. So when you say you were shocked, it was more the  
16          means by which you heard about it rather than the fact  
17          that a price differential was coming forward that was  
18          your shock, then, wasn't it, Mr Polglass?

19          A. Plainly we didn't want there to be a price differential,  
20          so -- but to find out about it via our customers that  
21          had been told by our major competitor in the access  
22          market space was undoubtedly a shock.

23          Q. Yes, so it was the means of the communication, not the  
24          fact that there was going to be a price differential in  
25          April being put forward that was the shock, wasn't it?

1 A. Well, perhaps one is a shock and the other one is  
2 a disappointment.

3 Q. I'll stay with that, Mr Polglass.

4 "Therefore, in response to your question, I think  
5 ... I should let you know that, following careful  
6 consideration to ensure compliance with our regulatory  
7 and legal obligations, we have made a decision in  
8 principle to introduce a price differential between NPP1  
9 and NPP2/ ... zonal pricing from next April."

10 Of course this had been subject, as I say, to quite  
11 a deal of speculation in the market, and clearly one of  
12 your competitors had decided that they would rely on  
13 that speculation in pitching to your customers; that's  
14 correct, isn't it?

15 A. I can only accept that it's speculation, but we had  
16 suspicion, but I can only accept that it's speculation.

17 Q. Thank you. If we just go back a page, just to complete  
18 this little bit I think, here we have an email from  
19 Royal Mail head of contracts:

20 "We are aware that there has been recent speculation  
21 in the market concerning whether or not Royal Mail will  
22 be introducing a price differential between NPP1 and  
23 NPP2, as we recently received a letter from one customer  
24 asking us to confirm what our position is."

25 Since we have seen -- I think we broadly know who



1           that is.

2           "Although the final details of the Access tariff  
3 charges have not been finalised, we have confirmed to  
4 that customer that we have made a decision in principle  
5 to introduce a price difference between NPP1 and NPP2  
6 from next April."

7           So this was Royal Mail confirming what you had  
8 suspected would happen, that they were intending to  
9 introduce a price differential from April 2014. And  
10 then:

11           "The final price differential has not been finally  
12 decided. Of course we will contact you as soon as  
13 possible after the tariff 2014 details have been  
14 published in January to work with you on assessing the  
15 most suitable price plan for your company."

16           So this was just a general market announcement from  
17 Royal Mail, a standard announcement in the circumstances  
18 you took it to be; yes?

19           A. Well, it's saying what we then already knew.

20           Q. Yes. Now, in your witness statement at paragraph 43 --  
21 you don't need to turn it up -- you say that when you  
22 heard about the intention to impose a price  
23 differential, you were furious?

24           A. I was.

25           Q. I don't doubt it, Mr Polglass.

- 1 A. Re-reading all of this brings it back.
- 2 Q. Yes. Well, I will try not to raise your blood pressure  
3 further, Mr Polglass.
- 4 THE CHAIRMAN: If you could look after mine too, that  
5 would ...
- 6 MR BEARD: It's always at the forefront of my mind,  
7 Mr Chairman.
- 8 Mr Polglass, in your fury you reacted in various  
9 ways. First of all, you got straight on to Ofcom saying  
10 "This must be stopped", didn't you?
- 11 A. I think firstly I punched the table, but yes, we did  
12 then start to move through the process that we had  
13 highlighted earlier with Ofcom, yes.
- 14 Q. Yes, so the first, one of the first things you did was  
15 contacting the legal director at Ofcom, Mr Rowsell?
- 16 A. Yes.
- 17 Q. Yes, because you knew that they had the power, if  
18 a complaint was made, to ensure that all of this was  
19 suspended; correct?
- 20 A. We knew that they had the authority to make a judgement  
21 on whether something was appropriate or not.
- 22 Q. You -- I'm sorry.
- 23 A. And that if it was not deemed to be appropriate by them,  
24 that they had the ability to suspend it, yes.
- 25 Q. Yes. So your approach to Ofcom was saying that you

1           would complain so that they, under the terms of the  
2           contract, could accept the complaint so that the notices  
3           could be suspended; that's what you were approaching  
4           them for?

5           A. We were approaching them ultimately for a decision that  
6           we hoped would be a removal of what we considered to  
7           be -- I'm not sure if "illegal" is the right term, but  
8           an illegal use of pricing dominance.

9           THE CHAIRMAN: Illegal will do very well.

10          A. Okay.

11          MR BEARD: For these purposes.

12                        But what you were doing was letting them know you  
13                        would complain; that's correct, isn't it?

14          A. Damn right.

15          Q. Yes. The second thing you were doing was that you  
16                notified the customers who had contacted you that this  
17                price change wouldn't happen and it wouldn't affect  
18                them. Is that correct?

19          A. No, you are simplifying it. So we did contact our  
20                clients, we had many conversations and many meetings  
21                with clients at this time and then over the following  
22                year to make sure that they weren't being overly  
23                influenced by our competitors.

24          Q. Now, you -- not just you, Mr Polglass, but Whistl --  
25                have disclosed various things to Ofcom. We haven't seen

1           any of that material, we were slightly surprised about  
2           that, but you say there were all sorts of contacts with  
3           customers; is that correct?

4       A.   Yes, yes, phone calls, meetings, I attended many of  
5           them.

6       Q.   Right.  And notes were presumably taken?

7       A.   Various notes would have been taken at the time, yes.

8       Q.   The third thing you did, you looked at postponing  
9           various commitments that you had as part of the business  
10          plan whilst these pricing -- the price differential and  
11          the other pricing proposals were being dealt with by  
12          Ofcom; is that right?

13      A.   That is correct.

14      Q.   I'm just pausing so that it comes out on the transcript.  
15          Nods don't.

16      A.   No, I know nods don't do it, I get it.

17      Q.   If we could just go to C4B, so you can probably put  
18          bundle C4A away for the moment, which was the one we  
19          were sort of working through broadly chronologically.  
20          Now, this is an email at tab 53 that I wanted to go to.  
21          I'm conscious that a number of the names are redacted,  
22          but if we just start at the bottom of the page:

23                "Hi ...

24                "Yesterday evening [a couple of people] and myself  
25          had a call with [Mr Wells] and [Mr Russell] related to

1 the 'announcement' of Royal Mail regarding their planned  
2 price differential between ..." it says "MPP1" but it  
3 means NPP1 we understand.

4 The author of this I should say is someone at  
5 PostNL; that's right, isn't it?

6 A. It is, yes.

7 Q. "We all realize this could seriously harm our E2E case  
8 and therefore would urgently need an overview which  
9 postpones some of the commitments and at the same time  
10 doesn't immediately impact the roll-out plan."

11 And then there were discussions of various  
12 postponements and there could possibly be smaller items.

13 So this is an email of 9 December, so they had  
14 already been thinking about postponements in the light  
15 of the price differential announcement on 6 December;  
16 that's right, that's what this is showing, is that  
17 correct?

18 A. It is.

19 Q. Yes. Then you will see a further email to you:

20 "Hi Nigel and [another].

21 "As discussed with Nick this morning on the phone,  
22 we need to come up with some ways to reduce the  
23 commitment. All the operational commitments, we need  
24 still try to get in, since it would delay our roll-out  
25 otherwise. However, we could look at mitigating actions

1 for buildings.

2 "I will give you a call in a second."

3 So this was a situation where, in the light of the  
4 6 December announcement, what you were doing was putting  
5 in place a range of commitments that reduced your  
6 immediate expenditures whilst you anticipated that you  
7 would make a complaint and Ofcom would deal with these  
8 matters; is that right?

9 A. Yes. What we're trying -- what we were looking to do  
10 here was reduce any of our sort of long-term commitments  
11 that we would have, yes.

12 Q. Yes. Now, if we just go back to your witness statement,  
13 you talk in paragraph 28, at the top of page 9 in your  
14 internal numbering, 485, about the impact of the CCNs,  
15 and you talk about concerns created by competitors  
16 spreading the message that your prices would increase.

17 You give a couple of examples, but let's just  
18 pick -- let's take the first of those. It's in the  
19 Whistl bundle at B14. Have you tracked it down? It  
20 says at the top "From" -- I don't want to give the name  
21 there.

22 A. Okay, so it starts with:

23 "For your information -- glad you headed this one  
24 off at the pass."

25 Q. That's right, but can we pick up the email at the

1 bottom. This is an email from someone at UK Mail to  
2 a person within the company that is redacted there.  
3 I think they're a clothing company, is that right, do  
4 you know?

5 A. Yes.

6 Q. So the UK Mail email at the bottom dated 18 February:

7 "I hope you're well and enjoying the lovely weather.

8 "I know it's been some time since we spoke however  
9 I wanted to get in touch with you in order to discuss  
10 the new Access Pricing structure that has recently been  
11 announced by Royal Mail Wholesale, due to take effect  
12 from April 2014. As I'm sure you're aware, last year  
13 Royal Mail issued new formats of the Access contracts,  
14 [PP1 and PP2] ... and all DSA operators had to choose."  
15 We chose price plan 1, TNT chose 2.

16 "Whilst last year the two Access contracts held the  
17 same pricing structure, under the new Access structure  
18 for 2014 Royal Mail have announced that there will now  
19 be a pricing differential between the Access rates  
20 available for each of these contracts in favour of  
21 pricing plan 1. This effectively means that UK Mail  
22 will be working under a cheaper Access structure than  
23 our competitors ..."

24 Then there is an estimate of -- by UK Mail, I'm not  
25 going to even guess whether or not it's accurate, of the

1 savings.

2 So this is a pitch by UK Mail saying "When the  
3 pricing comes in in April, we can be cheaper than TNT,  
4 who you are using at the moment; you should move to us".  
5 That's broadly it, isn't it?

6 A. Yep.

7 Q. As you rightly say, in fact the person in question who  
8 is the recipient of that email said -- they send it over  
9 to you saying "Well, glad you have headed this one off  
10 at the pass", so that was because you had already been  
11 in contact with them presumably?

12 A. I don't know this one specifically, I'm afraid.

13 Q. But they were confident that this wasn't going to happen  
14 and negatively affect them?

15 A. We went out to -- so I don't know if the UK Mail person  
16 had contacted them previously. As I say, they started  
17 contacting them in November of the previous year, and  
18 carried on contacting all of our major clients. They  
19 were using the change in pricing as a significant, very  
20 significant change to the pricing, and what we were  
21 doing was going out to the likes of [redacted] and  
22 informing them that we would not allow them to be  
23 disadvantaged, so we were saying that if there was  
24 a hit, we would take it somehow.

25 Q. Sorry, I didn't mean to cut you off. So from November,



1           you had been contacting your customers and saying "There  
2           will be no disadvantage to you"?

3       A.   We -- of course we did not know the amount, so we were  
4           laying out why we thought it may not progress but that  
5           we would not disadvantage them. We could not afford  
6           possibly for our clients to start moving away from us,  
7           off of our access services to one of our competitors.

8       Q.   Yes. Did you actually contact any of your customers  
9           asking them to write to you saying how much they  
10          objected to this price differential so that you could  
11          pass the material on to Ofcom?

12      A.   I don't know. I don't recall. I don't recall doing  
13          that myself, no.

14      Q.   You don't recall, but it's entirely possible that  
15          someone within Whistl did that?

16      A.   It's -- it would seem not unreasonable that if one of  
17          our clients was concerned about it, that we might not  
18          ask them to raise those concerns.

19      Q.   Right. So if we just go back to tab 12, you see here  
20          a letter from a customer who is redacted. I'm not going  
21          to refer to the name, but just call them customer H for  
22          the moment. It says:

23                 "Further to our conversation ...", so it's written  
24                 to you as Whistl, not to you personally, I'm sorry,  
25                 Mr Polglass, but to Whistl:

1           "Further to our conversation, I am writing to  
2           express my concern about the new proposed pricing  
3           structure. It doesn't seem justifiable to me.  
4           I believe that competition is essential to the postal  
5           market in the face of increasing competition from other  
6           media, which is why we have always supported TNT in  
7           their bid to be a true end-to-end alternative. We also  
8           believe the current service we experience from TNT is  
9           superior.

10           "I have already been approached by a DSA operator  
11           who is on the alternative price plan to yourselves  
12           offering preferential rates I will supposedly receive  
13           from yourselves when the new prices come into play in  
14           April 2014. As previously mentioned, we are keen to  
15           support TNT in their ambitions to open up the market to  
16           true competition, and I don't feel it is right that we  
17           should have to switch supplier to obtain the best DSA  
18           rates available."

19           There is something funny about this email, isn't  
20           there? Because you have just told me that the message  
21           you had been passing customers was they wouldn't be  
22           worse off, didn't you?

23           A. I did.

24           Q. So why would one of your customers, having had  
25           a conversation with one of your employees, be saying

- 1 "I will supposedly receive less good rates from  
2 yourselves in April 2014"?
- 3 A. This particular client was one of our earliest clients,  
4 from about 2005, I believe. They were -- this person  
5 that's writing this is a very respectable lady, very  
6 competent, and for -- all I can see from this is she's  
7 expressing her concerns as you have read them out.
- 8 Q. Yes. That's not quite an answer to my question, is it,  
9 Mr Polglass?
- 10 A. Well, I don't really know what you're asking me, then.
- 11 Q. Well, Mr Polglass --
- 12 A. You're asking me to suggest that [redacted] is in  
13 cahoots?
- 14 Q. No, I don't know what [redacted] did with the  
15 conversation she had with your employee, but it just  
16 strikes me as very strange, doesn't it strike you as  
17 strange that if you were telling your customers,  
18 including a very long-standing customer like this one,  
19 that actually they would be no worse off, to write to  
20 you saying that they expected to face higher rates seems  
21 a little unlikely, doesn't it?
- 22 A. No.
- 23 Q. No? Okay.
- 24 A. Not really.
- 25 Q. It's quite strange, isn't it, that the final sentence

1           says:

2           "I don't feel it's right that we should have to  
3           switch supplier to obtain the best DSA rates available."

4           But that's the way that competition works, isn't it,  
5           Mr Polglass? Sometimes you have to switch to get  
6           cheaper rates?

7           A. I would -- to answer that I would need to give you  
8           a quick lesson on DSA and pricing for DSAs. So DSA,  
9           there is a price equivalence from Royal Mail to all  
10          access clients for its services, so whether it's us or  
11          any of our competitors, we meet -- we are confident that  
12          we all have the same access price. Where downstream  
13          access operators compete is in the upstream piece that  
14          they are quoting. So for someone like this particular  
15          client, who was a relatively small volume, maybe  
16          15 million items, we would probably be charging for all  
17          of our part of the services a penny. Okay? If  
18          a differential of 0.25p on the access rate was available  
19          to them, that's plainly a 25% discount to the price that  
20          they're currently paying. Okay? Because it would have  
21          to be covered by the upstream provider.

22          Q. I completely understand that. I'm not even going to  
23          pretend whether I completely understand the pricing for  
24          DSA, Mr Polglass. But that's not really the question,  
25          is it? She says "I want competition but I don't want to

- 1           have to switch to obtain the best rates". That's  
2           a very, very odd statement, isn't it, Mr Polglass?
- 3       A. No, because what she's saying is that the -- she's --  
4           the competition would have a differential price, they  
5           would have a lower price. They are not lowering their  
6           price, they would have a lower price provided to them by  
7           Royal Mail.
- 8       Q. Yes, but she's saying they would provide her with  
9           a lower price, that's her working assumption. "I do not  
10          feel it's right that we should have to switch supplier  
11          to obtain the best DSA rates available". So she is  
12          talking about her rates, isn't she, Mr Polglass?
- 13      A. Yes, but her rates are based on downstream access prices  
14          from Royal Mail, let's call it 16p, and ours at a penny.
- 15      Q. I understand, but she is talking about an objection to  
16          competition meaning she could get better rates overall  
17          from a rival, isn't she?
- 18      A. She is, but those better rates are not coming from the  
19          rival.
- 20      Q. They're being passed through by the rival, aren't they?  
21          That's the predicate here?
- 22      A. That is exactly right.
- 23      THE CHAIRMAN: I'm not sure the witness is responsible for  
24          this correspondent's views on the competitive process,  
25          Mr Beard.

1 MR BEARD: That is absolutely true. I put the question  
2 about what was going on in terms of what Whistl was  
3 doing and the likely authenticity of the sentiments in  
4 this letter and the innocence of them, given that it was  
5 relied on in opening, and I'm just testing that  
6 proposition, but I will move on, Mr Chairman.

7 THE CHAIRMAN: Please.

8 MR BEARD: Could we just go to another example, actually.  
9 I think it's actually in what Whistl provided in the  
10 overflow bundle at tab 6, and you will have it in your  
11 cross-examination bundle that was handed up to you. I'm  
12 just going to find the reference, I'm so sorry.  
13 (Pause). Tab 4 in your bundle, Mr Polglass.

14 (Pause)

15 So this is just another one in the series.

16 Citipost, letting you know, 22 January:

17 "It is with regret that I have to inform you that  
18 Citipost are no longer in a position to use the TNT Post  
19 End 2 End service due to the changes with our Royal Mail  
20 Wholesale access Letters contract.

21 "The impact of the changes [so this is the  
22 forthcoming changes in April] should we continue to use  
23 the end-to-end service put Citipost Mail Ltd at risk of  
24 failing to achieve our forecast as we need to show  
25 details on an SSC specific basis and therefore could be

1 subject to a surcharge and have our National Price Plan  
2 1 contract terminated.

3 "Due to the change in Royal Mail Wholesale tariff  
4 for London we would also require a reduction on our  
5 current E2E charges of at least 25% ...

6 "As you will appreciate whilst we have been willing  
7 to use the E2E as an option the changes to the RMW  
8 contract could expose Citipost Mail to additional  
9 charges and termination of our contract."

10 So what they're saying here is that they're  
11 concerned about the changes that are going to be made in  
12 April and that that would mean that it would make it  
13 uneconomic for them to stay with TNT's end-to-end  
14 business; that's correct, isn't it?

15 A. It is, yes.

16 Q. Do you know what happened in relation to Citipost? They  
17 didn't move away, did they?

18 A. They did move away from our end-to-end service, yes.

19 Q. Let's just pick it up in bundle C4C at tab 149, can we?  
20 So at 149, this was one of the occasions where Ofcom  
21 made certain enquiries of third parties, and in  
22 particular they asked Citipost, and this is the response  
23 from Citipost to Ofcom:

24 "As discussed on the telephone I do not have any  
25 further evidence apart from the attached email in which

1           one of my colleagues briefly mentions the impact of  
2           Royal Mail Wholesale contract changes.

3           "To clarify Citipost continued to use the E2E up  
4           until such times as Whistl decided to withdraw the  
5           service this was despite my letter to Andy Goddard dated  
6           22 January 2014 as the Royal Mail Wholesale contract  
7           changes had been suspended. Hope this helps."

8           So in fact they did stay, so whatever contact you  
9           had with Citipost worked, didn't it?

10          A. Sorry, I didn't hear the last ...

11          Q. Sorry. Whatever contact you had with Citipost to  
12          persuade them to stay worked, didn't it?

13          A. Citipost stayed with us on downstream access. They have  
14          their own contracts, as the previous letter highlights,  
15          directly with Royal Mail. We do their upstream  
16          collection and trunking.

17                 They certainly did stop their end-to-end. If I had  
18                 time I could probably find the documents to prove it.  
19                 They may well have started up again, I don't know.

20          Q. Well, it's pretty clear from someone from Citipost, in  
21          response to a specific query from Ofcom, that they  
22          stayed with end-to-end, didn't they?

23          A. That's certainly what it says here.

24          Q. I won't take it further. Can I just be clear, what  
25          we're seeing in all of this is, I think, customers care



1           about prices and are ready to shift if prices actually  
2           change, aren't they?

3           A. Well, yes, that shouldn't be a surprise to anyone --

4           Q. It does not shock me at all, Mr Polglass. What we're  
5           also seeing is that competitors would drop their prices  
6           only if the Royal Mail changes actually came into  
7           effect, don't we?

8           A. Yes, we do, yes.

9           Q. Yes, and only if the prices actually came into effect  
10          would you face the threat of competitive pricing  
11          pressure from rival access operators; that's correct,  
12          isn't it?

13          A. No, not strictly, because as we saw from a previous  
14          letter, and they did this elsewhere as well, one of our  
15          competitors was already quoting reductions in pricing.

16          Q. No, Mr Polglass. What they were talking about were  
17          prices from April 2014, weren't they?

18          A. Yes. I accept that.

19          Q. So it's only when those prices came into effect that you  
20          would actually face competitive pricing pressure from  
21          rival access operators. That's correct, isn't it?

22          A. When it actually comes into effect, but the market  
23          certainly was very active, perhaps is a good way to put  
24          it, during the period from early December through to the  
25          period we're up to now, and we were on effectively the

1 back foot with many of our clients because they were  
2 being approached vigorously by our major competitors.

3 Q. Can we go back to your witness statement, Mr Polglass.

4 I just want to pick it up at paragraph --under the  
5 heading at paragraph 64, so it's page 19 internal  
6 numbering, 495 external numbering. Now, at 64 you're  
7 referring to the fact that Royal Mail has put in  
8 evidence from Mr Harman about the continuation of  
9 roll-out. You will be relieved I'm not going to test  
10 you on Mr Harman's reports; I'll leave that to Ofcom's  
11 counsel.

12 A. Thank you.

13 Q. Yes, I think we're both relieved about that.

14 THE CHAIRMAN: Mr Harman is in court, Mr Beard.

15 MR BEARD: I've met him on many occasions, he won't be  
16 remotely offended by that. I think he may be very  
17 pleased.

18 65, you talk about Royal Mail's position, which I'm  
19 not going to ask you about, because you saw that  
20 subsequently and it's obviously not a matter for you to  
21 give evidence on.

22 66, you say in your first sentence:

23 "The price differential alone destroyed our E2E  
24 business."

25 Just to be clear, for the reasons that Mr Harman has

1 given we don't accept that at all. But I just want to  
2 see what you are saying here. So you say we are  
3 ignoring commercial reality and it would have:

4 "... destroyed our E2E business plan because it  
5 would have caused us to incur substantial additional  
6 costs over the period of the roll-out."

7 In other words I think what you are saying there is  
8 the pricing, if it had come into effect, would have  
9 caused you significant losses over the period of the  
10 roll-out; that's right, isn't it?

11 A. Yes.

12 Q. "In the first year ... our analysis showed that  
13 absorbing the price differential for all the customers  
14 would have [been] 9.1 million."

15 So that's the actual loss you would have suffered on  
16 your calculations, had the price differential come into  
17 effect?

18 A. Correct.

19 Q. Yes.

20 A. Only based on the differential itself.

21 Q. Yes, I'm sorry, just based on the differential, I'm not  
22 talking about all the charges. I'm just checking that  
23 I understand what you are talking about here, and you  
24 are talking about the price differential.

25 Then you say it would have decreased year on year

1 but even in 2017, if that price differential had been in  
2 place, it would have meant an almost £7 million cost.

3 That's the position. So then in 67 -- let's just go  
4 down to 68 actually:

5 "I also don't think that our customers would have  
6 stuck with us if we had attempted to roll out E2E in the  
7 face of the price differential. They would have  
8 essentially been sponsoring a loss-making company."

9 So there when you are talking about sponsoring  
10 a loss-making company, you are referring to the losses  
11 that you have set out or outlined in paragraph 66.  
12 I know that there were losses in the other years as  
13 well, but that's what you are talking about there;  
14 that's correct, isn't it?

15 A. I am in part, yes.

16 Q. No, you are talking about that there, aren't you?

17 A. I am, yes.

18 Q. Yes:

19 "Our large customers would have found that totally  
20 unacceptable. Nearly every large customer has the right  
21 to audit us ... I can't see how we would have kept their  
22 business if we were losing money hand over fist. The  
23 loss of clients would, at least, have been a huge risk  
24 that would have jeopardised ... [it]."

25 So it's clients are not going to want to deal with

1 a business that's actually making losses in these  
2 circumstances and actually there are ways of then  
3 checking up on you and what losses you are making?

4 A. Particularly the financial services industry but not  
5 alone, but particularly they have a right of audit on  
6 our business on a yearly basis.

7 Q. Now, if you just go back up to 67:

8 "I understand that it is being suggested by  
9 Royal Mail that if we had been able to push on with the  
10 E2E roll-out in the face of the price differential then  
11 we would eventually have started to make a profit. But  
12 the reality is that we couldn't push on with the  
13 roll-out because we didn't have the funds to do so."

14 Just to be clear -- sorry, then you say:

15 "The management couldn't fund it, PostNL couldn't  
16 fund it [that's really a matter for PostNL] and I can't  
17 see any reason why LDC would have been prepared to fund  
18 it either."

19 And you are quite fairly not speculating about LDC  
20 there. But you do say:

21 "It would have been a materially different and  
22 substantially less attractive plan ..." than what had  
23 been put to LDC in 2013.

24 You then say:

25 "It would also have been plain to LDC how easy it

1           was for Royal Mail to throw our business plans off  
2           course."

3           I mean, that, if that was key, that was true whether  
4           or not the CCNs were in place, wasn't it, Mr Polglass?

5           A. Your question is regarding what?

6           Q. The final sentence, it was plain to LDC -- if it really  
7           was plain to LDC "how easy it was for Royal Mail to  
8           throw our business plans off course", that fact wasn't  
9           dependent on the CCNs, was it?

10          A. Yes, the CCNs were the vehicle used by Royal Mail,  
11          obviously, to announce what we considered to be unfair  
12          pricing.

13          Q. But you have already explained to me and to the tribunal  
14          that actually it was back in late November/December that  
15          things were thrown off course by the speculation and  
16          rumours in the market, haven't you, Mr Polglass?

17          A. Yes, but it didn't -- it doesn't happen on just one day,  
18          does it?

19          Q. No, no, I completely accept that. All sorts of things  
20          happen in the market all of the time, don't they, and  
21          you have to take these matters into account, don't you,  
22          Mr Polglass?

23          A. We do.

24          Q. Yes. Just going back to 67, if you were able to make  
25          a reasonable rate of return in the medium term, so three

1 to five years, you would still have been an attractive  
2 investment?

3 A. Yes, you have got to get there, though, Mr Beard.

4 Q. Yes.

5 A. And we had a business that was structured around  
6 downstream access, we had a business that was -- we had  
7 operated for just over ten years, it was making profits  
8 of about £8 to £9 million a year, and it had the volume  
9 within it that then we could divert into our own  
10 delivery network.

11 Q. Sure.

12 A. So that access business was utterly vital to any other  
13 roll-out. The 0.25p differential wiped out those  
14 profits entirely, immediately.

15 Q. Yes. I understand your position on the numbers, and  
16 Mr Harman is analysing those numbers. As I say,  
17 Mr Harman explains why in fact, faced with a price  
18 differential, you could make a reasonable rate of  
19 return. My question was simply: if you could make  
20 a reasonable rate of return in the medium term, you  
21 would still be an attractive investment, and I think you  
22 agree with that?

23 A. But you have to have the investment to be able to get  
24 there, and if we're killed off before we get to three to  
25 five years, it's really irrelevant.

1 Q. Yes. It might be that the investment is needed to get  
2 you to the three to five years, and an investor would be  
3 thinking about that longer time horizon, wouldn't they?

4 A. Well, we had a potential investor, they were thinking in  
5 the way that they chose to think, and they were as  
6 concerned as we were.

7 Q. Well, we have a dearth of material from LDC,  
8 Mr Polglass.

9 A. And if Mr Harman, who I don't know as well as you, but  
10 if Mr Harman's view is that both the management team,  
11 PostNL, one of the biggest companies in Europe, very  
12 respected, and LDC, the biggest mid-market funder in the  
13 country, are all fools, that seems somewhat arrogant.

14 Q. Well, I'm very happy to introduce you to Mr Harman  
15 subsequently.

16 A. I would be delighted to meet him too.

17 Q. I don't think that Mr Harman is suggesting that either  
18 PostNL or LDC are fools, and I don't think that will be  
19 his evidence, but I really don't want to anticipate  
20 that. What you cannot do is give evidence on behalf of  
21 either PostNL or LDC.

22 Now, there are a couple of other points I just  
23 wanted to make on the -- or questions I had in relation  
24 to paragraphs in your witness statement around here.

25 If we just move on to 69:



1           "Royal Mail totally disregards the fact that we  
2           would have had to assess the risk that the price  
3           differential (if it had been allowed) could have been  
4           increased in the future, which would have had further  
5           adverse effects for our E2E plans. Royal Mail itself  
6           indicates that it might have been able to justify  
7           a higher differential. In my view, we could never have  
8           rolled out with that risk in the background."

9           So just unpacking this paragraph, you are saying  
10          that what concerned you was further increases in a price  
11          differential being permitted in due course; that's what  
12          you are referring to here, is that correct?

13         A. Yes, if Royal Mail were able to put into the market  
14          a price differential of 0.25p, I've tried to explain the  
15          severity of that on our customers, what would be  
16          stopping them moving that to 0.5p, to 0.7p, to some  
17          other number at any point in the future?

18         Q. I see. So your concern, just to be clear, is that the  
19          price differential that they were putting forward was  
20          lawful --

21         A. No, I didn't say that.

22         Q. Well, on what basis would they be able to put it forward  
23          if it wasn't lawful, Mr Polglass?

24         A. If -- I didn't say that. What I said was that if they  
25          were successful with it, why wouldn't they then increase

- 1           it further in the future?
- 2       Q. I think, Mr Polglass, we have already agreed that your  
3           strategy was to ensure that, as soon as possible,  
4           a complaint could be made if the price differential was  
5           something that you felt materially affected you, wasn't  
6           it?
- 7       A. It was.
- 8       Q. And if a complaint was made, then Ofcom could either  
9           consider that the price differential was inappropriate  
10          or it could conclude it was lawful?
- 11      A. That's correct.
- 12      Q. In those circumstances, the only possibility of the  
13          price differential coming into effect was if Ofcom  
14          thought it was lawful, wasn't it?
- 15      A. That would be correct.
- 16      Q. Yes. So in those circumstances, you are here  
17          contemplating a situation where the price differential  
18          was lawful and you are then saying "But the threat of  
19          further increases would have meant we could never have  
20          rolled out with that risk in the background"; that's  
21          your evidence here, isn't it?
- 22      A. Well, my evidence is that we couldn't roll out with the  
23          size of the differential as it was already put forward,  
24          and I guess the rest is just speculation.
- 25      Q. Well, this is your view as to the business, it's your

1 evidence, Mr Polglass, and what you are saying is you  
2 could never have rolled out with the risk of further  
3 price differential extensions in the background; that's  
4 what you are saying here, isn't it? Those are the words  
5 in your final sentence.

6 A. Yes, I'm not -- I don't think I'm disagreeing with you,  
7 Mr Beard.

8 Q. But that's in the context of the price differential  
9 being lawful, and you are talking here about general  
10 uncertainties as to what further changes could be made,  
11 aren't you?

12 A. Well, in the various paragraphs that you've referenced,  
13 I'm referring to the impact of the 0.25 differential on  
14 our existing customer base.

15 Q. No, just here --

16 A. That's what I'm referring to.

17 Q. No, Mr Polglass, you are not doing that here. You are  
18 not doing that. You are talking about increases in the  
19 future beyond that 0.25%. It is absolutely clear from  
20 the words, and you are there talking about general  
21 uncertainties in relation to pricing and saying "We  
22 could never have rolled out with that risk in the  
23 background", aren't you?

24 A. We could never have rolled out with general  
25 uncertainties, I agree.

1 Q. Thank you.

2 Just one or two further points that I wanted to pick  
3 up in relation to paragraph 70. Just going back to  
4 paragraph 46, you describe the zonal tilt at 46, you  
5 considered the zonal tilt was a subsidiary issue, and --  
6 sorry, that's just in the first line of 46.

7 A. Yes, I know what it says.

8 Q. Then at 70, going back to 70, you say:

9 "... I'm not saying [it] ... wouldn't have been  
10 a problem even on its own. As I have explained, our  
11 end-to-end roll-out had been planned as started on the  
12 basis that London was one of the most expensive zones  
13 and that zonal prices would continue to be  
14 cost-reflective."

15 So this is your view as to cost-reflectivity across  
16 zones, I think you're putting forward there?

17 A. That's correct.

18 Q. "If the zonal tilt changes had been implemented, we  
19 would have incurred significant surcharges because we  
20 would not have satisfied the profile requirement under  
21 APP2. Our modelling at the time showed that would have  
22 added significant costs ... if we had stuck with the  
23 order of roll-out that we had planned. Clearly [you  
24 say], in the unlikely event that Royal Mail had been  
25 permitted by Ofcom to change the zonal tilt in a way

1 that was not cost-reflective, we would have had to give  
2 careful consideration to the impact on our end-to-end  
3 plans ..."

4 Can I just ask a couple of questions on that  
5 sentence? Now, first of all, you say "in the unlikely  
6 event that Royal Mail had been permitted by Ofcom to  
7 change the zonal tilt in a way that was not  
8 cost-reflective". First of all, I think what you are  
9 implicitly saying here, and I think you do say it  
10 earlier, is that what was put forward in the contract  
11 change notices you felt wasn't cost-reflective pricing;  
12 is that correct?

13 A. For the tilt?

14 Q. Yes. I'm just dealing with the tilt at the moment.  
15 Just park the differential; I'm just talking about the  
16 tilt.

17 A. Correct.

18 Q. You say "in the unlikely event that Royal Mail had been  
19 permitted by Ofcom" to change it in the way that it was  
20 proposing. So there you are saying you didn't think  
21 that Royal Mail would permit that because you complained  
22 about the zonal tilt as well; is that right?

23 A. Sorry, repeat the question.

24 Q. You are saying there that you think -- you are saying  
25 that it was unlikely that Royal Mail would have been

1 permitted by Ofcom to change the zonal tilt, and the  
2 reason you say it's an unlikely event is because you  
3 would complain, and indeed did complain, about the zonal  
4 tilt and therefore it was suspended as well?

5 A. Yes.

6 Q. Yes.

7 A. That's true.

8 Q. And then subsequently there was the pricing review which  
9 reached a consultative stage but the zonal tilt didn't  
10 operate because of that regulatory enquiry; that's  
11 correct, isn't it?

12 A. That is correct.

13 Q. Yes. You then say:

14 "... we would have had to give careful consideration  
15 to the impact on our end-to-end plans, for example by  
16 changing the order ... We didn't look at that question,  
17 however, for two reasons. First, because it seemed  
18 a clear breach of the regulatory requirement for  
19 alignment between costs and prices."

20 So as with price differential you were very  
21 confident that actually Ofcom wouldn't, if you  
22 complained, just leave the zonal tilt in place; it would  
23 carry out an investigation and in the end would not  
24 permit the zonal tilt. That was your thinking?

25 A. Yes, because it astonished us that London, which had

1           always been the -- one of the highest cost areas,  
2           suddenly became one of the cheapest.

3       Q.   I understand.  Then:

4           "... secondly, because the price differential alone  
5           would have stopped our E2E roll-out."

6           So let's just look at the way that you actually put  
7           things when you initially raised this in the complaint.  
8           The complaint is in C4B, which is the chronological  
9           bundle you have in front of you, at tab 93.

10          So you are familiar with this complaint, I take it,  
11          Mr Polglass?

12       A.   Yeah.

13       Q.   I don't mean that you have memorised all of it.

14       A.   No.

15       Q.   I will take you to some paragraphs in it.  Paragraph 1:

16           "The Complaint is in relation to the prices, terms  
17           and conditions ... on which Royal Mail is offering to  
18           provide D+2 Access ...", the access scheme set out.

19           You see there that it refers to all of the changes  
20           that are being considered within the CCNs; that's  
21           correct?  It's referring to the whole of the new access  
22           pricing scheme?

23       A.   Excuse me.  It appears to be.

24       Q.   Again I'm just giving you a little bit of context here.

25           If you go down to 4, paragraph 4, this is actually

1 talking about zonal tilt specifically, and I think this  
2 captures what you have just said. If you pick it up  
3 seven lines from the bottom:

4 "Yet Royal Mail has, under the new ... scheme,  
5 introduced a sudden shift by which, for example, the  
6 London zone has gone from being the second most  
7 expensive zone to being the ... cheapest."

8 So you are referring here to there being a dramatic  
9 shift in the zonal pricing?

10 A. Yes.

11 Q. Yes, so that's part of your complaint. Then if we go on  
12 to paragraph 24, here is essentially a summary of the  
13 complaint. 24(a), reference to the price differential;  
14 (b), surcharges; (c) you refer to it as "Increase in  
15 prices in ZPP3 prices in those areas where Royal Mail is  
16 less likely to face competition in downstream delivery".  
17 That is effectively the zonal tilt or it's one way of  
18 putting the zonal tilt, isn't it?

19 A. Yes, again it would appear to be, yes.

20 Q. Yes. Then as we go on you see at 32, paragraph 32, the  
21 complaint is phrased in terms of the whole of the access  
22 pricing scheme having an impact on Whistl's E2E  
23 business. So:

24 "The new access pricing scheme will operate to  
25 penalise any person who is a competitor of Royal Mail



1 ... who rolls out ... any significant scale ..."

2 The scheme does this by imposing price surcharges  
3 both on relevant rival operator in respect of its  
4 purchase of downstream but also a Royal Mail downstream  
5 access customer which chooses to purchase some of its  
6 bulk downstream delivery requirements.

7 So you are trying there to set out why all of that  
8 package is of concern to you?

9 A. Correct.

10 Q. Then if you just pick it up at 34, it says:

11 "Their effect [so this is all of a price change, as  
12 you say] will be to force TNT Post to abandon its  
13 roll-out of E2E delivery and revert to meeting all its  
14 downstream letter delivery requirements by purchasing  
15 from Royal Mail."

16 So the complaint is about all of the aspects of the  
17 price changes; it doesn't try and treat one or other as  
18 subsidiary, does it?

19 A. No, no, it was a wholehearted attack on competition, we  
20 felt.

21 Q. I see. If we go on to the complaint witness statement,  
22 which we referred to earlier, this is Mr Wells'  
23 statement, you will there see, if you go on to --

24 A. Sorry, where is this?

25 Q. Sorry, tab 94, I apologise, it's just the following tab,

1 Mr Polglass.

2 A. Where do you want me to look?

3 Q. I'm happy to pick it up just at page 13, it's that tiny  
4 numbering again, under heading "2014 tariff decision and  
5 reduced tolerance decision". Then if you see in 37 --  
6 sorry, there is a subheading there, "Introduction of  
7 price differential", and it says:

8 "Since 2004 and until the 2014 tariff notification,  
9 customers on NPP1 and APP2 have paid the same flat  
10 national price. The 2014 tariff notification would  
11 introduce a price differential for the first time  
12 effectively providing a 1.2% discount to those customers  
13 using NPP1."

14 So that's the price differential; yes?

15 A. It is.

16 Q. Yes. Then Mr Wells goes on and talks about  
17 conversations with customers. We haven't seen material  
18 from those two that are referred to there. If we go  
19 down, we will see the penultimate sentence:

20 "Our business made an annual profit of 9.8 million.  
21 We calculate if we have to absorb the price differential  
22 for all of our customers in order to retain them, it  
23 will cost us the following amounts ..."

24 So this is what you would have to absorb in order to  
25 deal with the price differential on your calculations at

1 the time of the complaint; that's right, isn't it?

2 A. Yes.

3 Q. Yes, and then if you go on just under that, it's another  
4 subheading "Tariff notification. Tariff changes for  
5 London and urban zones". Postcomm reviewed Royal Mail's  
6 costs and zonal prices and you talk about what the  
7 prices are:

8 "It is implausible that Royal Mail's costs have  
9 shifted to the extent that London is 10% more expensive  
10 than the national price one year and 25% cheaper than  
11 the national price the next. I therefore find it  
12 extremely difficult to understand how such a shift could  
13 be consistent with Royal Mail adhering to regulatory  
14 accounting guidelines."

15 So this is all about the zonal tilt, isn't it?

16 A. That is, yes.

17 Q. "This change is of profound importance because TNT Post  
18 has relied heavily on the current levels of zonal prices  
19 in planning its E2E network roll-out."

20 And what you were putting to Ofcom then was:

21 "The impact of the zonal prices are set out in the  
22 table below."

23 Feel free to just read through that paragraph.

24 (Pause)

25 What we see there is that what you are putting to

1 Ofcom is that these zonal changes would be far, far more  
2 significant than anything to do with the price  
3 differential, aren't you?

4 A. They would be, yes.

5 Q. Yes. You don't suggest that there is any means of  
6 attenuating those very large numbers, do you?

7 A. You will need to help me with your "attenuating", what  
8 do you mean?

9 Q. In other words, you are saying here that those are the  
10 sums, surcharges you would face if this zonal tilt  
11 mechanism was put in place, and you are not suggesting  
12 there that they're a means by which you can eliminate or  
13 substantially eliminate those surcharges by, for  
14 instance, changing your roll-out order, are you?

15 A. We're not saying that in here, no.

16 Q. No. And if you go on to 41, in fact you go further and  
17 say:

18 "Needless to say, this level of surcharges would  
19 force TNT to abandon its planned E2E expansion."

20 A. Yes.

21 Q. So in contrast to the position in relation to price  
22 differential, where you say "Well, we would have to  
23 absorb some money", you say here, or rather Mr Wells for  
24 Whistl says here that this level of surcharges would  
25 force TNT Post to abandon its planned E2E expansion.

1           So in contrast to the position you put forward in  
2           your witness statement, at the time of the complaint,  
3           zonal tilt wasn't a subsidiary issue at all, was it?

4           A. It was, in the respect that the investor, LDC, had put  
5           in place a material change clause and that took place  
6           before we even knew about the tilt.

7           Q. Well --

8           A. And that was specifically about the price differential.

9           Q. I understand that you refer to the material change  
10          clause. I'm looking at the sums involved and the  
11          statements you made. You say that the sums involved in  
12          relation to zonal prices were far, far more significant  
13          and they would cause you to abandon your E2E expansion;  
14          on the other hand, you don't say that in relation to the  
15          price differential, do you?

16          A. Well, actually I did, I believe.

17          Q. This is the witness statement that was accompanying your  
18          complaint, Mr Polglass, in relation to these matters.  
19          It is not consistent with your current witness  
20          statement, is it?

21          A. Well, I stand by the fact, in my opinion fact, that the  
22          price differential had a -- would have had a devastating  
23          impact on our business, our profitability and our  
24          ability to roll out our intended plans. I do not deny  
25          that the zonal tilt has an even bigger impact.

1 Q. That's not consistent with the terms of your witness  
2 statement, but I'm not going to put the question again.  
3 Your point overall is that the price differential and  
4 its impact you considered to be material, and you say at  
5 the end of 70:

6 "The effect of the price differential ... is  
7 reflected by the action we took ... in December 2013  
8 before we had any idea about the zonal tilt changes."

9 A. Are you on --

10 Q. I'm back in the witness statement.

11 A. Are you on mine, now?

12 Q. I'm back in your witness statement. I'm sorry, that was  
13 not fair of me to jump.

14 A. Which paragraph?

15 Q. You say:

16 "The effect of the price differential in isolation  
17 is reflected by the action we took [and you have already  
18 referred to the MAC clause from LDC] back in  
19 December 2013 ..."

20 A. Can you tell me which paragraph?

21 Q. I'm so sorry, it's just the last sentence of  
22 paragraph 70.

23 (Pause)

24 A. Yes.

25 Q. Yes.

1 A. I've read that.

2 Q. So what you are saying there is that the effect of the  
3 price differential is reflected by the action you took  
4 and you say LDC took back in December 2013 and that's  
5 why -- and that you say is before you knew about the  
6 zonal tilt changes?

7 A. It was, yes.

8 Q. I see.

9 Now, sticking with your witness statement, if we  
10 could just go back to paragraph 59, this is under your  
11 heading "Forecasting under APP2".

12 A. Yes, got it.

13 Q. "Royal Mail suggested at the time, and is still  
14 suggesting, that the price differential between APP2 and  
15 NPP1 was justified on the basis of cost-savings that  
16 could be obtained by the provision of forecasts of mail  
17 volume forecasts, broken down by SSC, from operators on  
18 NPP1."

19 And that Royal Mail says it would assist in making  
20 cost savings. And you say it doesn't make any sense to  
21 me, at the end of 59, and then you essentially give  
22 three reasons in paragraphs 60 and 61, and I hope I'm  
23 going to summarise them fairly.

24 First of all, you say Whistl could have provided the  
25 SSC forecast that Royal Mail wanted and you offered to

- 1 do so; that's the first reason?
- 2 A. Yes.
- 3 Q. Secondly, you say Whistl's forecasting volumes would be  
4 more valuable than anybody else's?
- 5 A. Yes.
- 6 Q. Then you say that whilst not all APP2 operators could  
7 have provided forecasts, you think many would have found  
8 a way given the price incentive.
- 9 A. Yes.
- 10 Q. I'm just going to discuss each of those three reasons  
11 with you, if I may. Let's just start with your claim  
12 that Whistl was willing to provide forecasts. Now, you  
13 say that you offered to provide forecasts during  
14 a meeting of the working access group which took place  
15 on 29 January 2014. You say quite fairly you weren't at  
16 this meeting. Now, your colleagues that were aren't  
17 here. But we do have a note of that meeting, which is  
18 in the Whistl bundle at C5. (Pause). Sorry, I know  
19 there are a lot of files open. I apologise.
- 20 (Pause)
- 21 So you should have, under C5, a document that is  
22 headed "Minutes from WAG meeting 29 January 2014"?
- 23 A. I do.
- 24 Q. And you have seen this document?
- 25 A. I have.



1 Q. Yes. So this is a trade meeting of access operators?

2 A. That's correct.

3 Q. Yes, and it's one that Royal Mail also attends?

4 A. Yes.

5 Q. And it's there to facilitate discussion between

6 Royal Mail and the access operators?

7 A. That's correct.

8 Q. Yes. So if we just go on to "Forecasting frequency and

9 adjustment", if you just read through to yourself the

10 "Forecasting frequency and adjustment" and the "Price

11 plan 2/3 forecasting commitment" part.

12 (Pause)

13 A. Okay.

14 Q. Now, in your witness statement you say you offered to

15 provide the forecast. It's not recorded here at all

16 that you or indeed anybody else offered to provide those

17 forecasts, is it?

18 A. It doesn't -- it doesn't show that here, no, that's

19 true. It was asked, I suppose.

20 Q. It was asked. It was asked whether or not PP2 could get

21 a similar price commitment, but you didn't offer

22 forecasting commitment, did you?

23 A. I wasn't at the meeting. I'm reading the notes as you

24 are. Plainly it was asked whether this was possible and

25 the representative of Royal Mail said it was not.

1 Q. No. That's true. But you didn't actually offer  
2 forecast.

3 If we could go back -- sorry, just before we do  
4 that, you will note just above that there was a specific  
5 discussion of a difference between forecasting and  
6 volume commitments, that presumably you are well aware  
7 of the difference between just straight forecasting and  
8 volume commitments?

9 A. Yes, I am.

10 Q. Yes. We can put that bundle away just for a moment,  
11 thank you.

12 I just want to go back to your complaint that we  
13 were in, in C4B. It was at tab 93 in C4B. That meeting  
14 took place, we've just seen, on 29 January 2014 and so  
15 that was a day after you had actually submitted this  
16 complaint, or at least the date of this complaint; it's  
17 28 January. I'm not asking you, that's just a statement  
18 of fact.

19 In this complaint, you actually objected strongly  
20 about proposed forecasting requirements, didn't you?

21 A. You would have to show me where it is, but it wouldn't  
22 surprise me if we had done that, yes.

23 Q. Yes, so if we -- actually I think maybe the easiest way  
24 of taking it is at paragraph (e) on page 14.

25 Essentially what you are saying here in your complaint

1 is that you consider the idea of any forecasting  
2 information being provided to Royal Mail as being highly  
3 objectionable?

4 A. Yes. We had our plans for our roll-out of a competing  
5 service with the 500-year old monopoly, and we wanted of  
6 course to keep that commercially to ourselves. Why  
7 would we wish to share that? So in providing  
8 information of this nature, we would be highlighting up  
9 to two years in advance exactly what our plans were.

10 Q. It's not just to do with your -- I paraphrase -- what  
11 might be referred to as the commercial sensitivity of  
12 your plans, it's the fact that you actually wanted to  
13 retain flexibility in relation to how you rolled out as  
14 well, wasn't it?

15 A. Yes. I mean, that's a fairly obvious thing I would have  
16 thought, yes.

17 Q. Yes. So just to be clear, you didn't ever ask  
18 Royal Mail about how issues concerning confidentiality  
19 of data might be dealt with, did you?

20 A. I didn't.

21 Q. No. Do you know of anyone else within Whistl having  
22 done so?

23 A. I'm not aware of it.

24 Q. No. So you considered that those forecasts were highly  
25 objectionable. You say in your witness statement:

1           "I'm not saying we would have provided the forecasts  
2 happily."

3           That's at paragraph 63 of your witness statement.

4           A. Mm.

5           Q. It's a fine example of understatement, isn't it,  
6 Mr Polglass? You would not have provided those  
7 forecasts because you didn't explore ways of protecting  
8 commercial sensitivity and you wanted to retain  
9 flexibility in roll-out, didn't you?

10          A. Yes. I don't understand why this is such an issue,  
11 frankly. We felt that we were under attack, frankly,  
12 directly from the incumbent. Why on earth would we wish  
13 to share confidential information with them if we did  
14 not have to? It's -- I don't see why that's in  
15 anyone's -- a surprise to anyone.

16          MR BEARD: I'm conscious of the time. I have perhaps one or  
17 two questions on this and then moving on to another  
18 topic, but now is a good moment perhaps.

19          THE CHAIRMAN: I think it would be a good time to break now.  
20 Thank you.

21                 Mr Polglass, you will remain in isolation, splendid  
22 or otherwise. Thank you.

23          THE WITNESS: Thank you.

24          (1.05 pm)

25                         (The short adjournment)

1 (2.00 pm)

2 THE CHAIRMAN: Mr Beard.

3 MR BEARD: Mr Chairman, members of the tribunal,  
4 Mr Polglass, good afternoon.

5 Just one quick question. I just wanted to  
6 double-check, I think it's clear from your witness  
7 statement, but in relation to forecasting issues you  
8 didn't actually discuss those issues with other APP2  
9 operators at all, did you?

10 A. I wouldn't know who they were, frankly.

11 Q. Thank you. I'm just going to ask one or two questions  
12 about the possibility of using NPP1 and ZPP3 at the same  
13 time. The term arbitrage has been used in relation to  
14 that, but actually the term arbitrage has been used in  
15 different ways in this case, and I just wanted to  
16 clarify this. Could you have the Whistl bundle 1 at B9,  
17 please.

18 A. (Pause). I've just had a small disaster.

19 Q. Ah. We will just pause, it's fine.

20 A. I am afraid it's all come out.

21 Q. Okay. Is that from the file you were just looking at?

22 A. I was about to. Which ...

23 Q. I gave you the wrong reference, I think, it's at  
24 page 418. (Pause).

25 A. So I have most of it here.

1 Q. Very good. Yes, it is, it's B9, I'm sorry, it's  
2 page 400 -- my notes were wrong, I apologise. Page 400.  
3 Do you have that? Are you in WH1?

4 A. WHB? No.

5 Q. Yes, that might be it.

6 A. Nicholas Wells?

7 Q. You are quite right, it is an exhibit to his statement.

8 A. Which page, sorry? 400, did you say?

9 Q. Yes, 400 on the big external numbering. It's another  
10 email from UK Mail at the bottom.

11 A. Yes, got it.

12 Q. We saw this earlier, but I'm just referring to this one  
13 because it was one that Mr Turner took the tribunal to.

14 If you go over the page, it says:

15 "In addition, RMW [so that's Royal Mail] have also  
16 issued a communication recently advising that they will  
17 be taking action to close the loop which currently  
18 allows zonal arbitrage. I know that by working in this  
19 manner TNT have gained a competitive advantage over  
20 UK Mail previously therefore ... this coupled with  
21 changes to Plan 1/Plan 2 ... will definitely put UK Mail  
22 in a much more competitive position."

23 When UK Mail are talking about arbitrage here,  
24 that's a different sort of arbitrage, isn't it, that  
25 they're considering?

1 A. To what?

2 Q. From -- to plan arbitrage between NPP1 and ZPP3, they're  
3 talking about arbitrage between zones, aren't they?

4 A. I'm not sure I can give you a definite off of here.

5 Q. I'll leave it then. That's fine.

6 A. My expectation is that it's probably between two plans,  
7 but I don't know.

8 Q. No, okay, I'll leave it, it can be a matter for  
9 submission.

10 Now, let's go back to the two-plan version of  
11 arbitrage rather than between zones, zonal arbitrage.  
12 You say in your witness statement at paragraph 57, you  
13 say:

14 "We did not think that it was rational for us to  
15 include [it says arbitrate but I know it means  
16 arbitrage] as part of our E2E business plan ..."

17 So you didn't ever actually consider how you could  
18 optimise between multiple price plans, did you?

19 A. No.

20 Q. No. So you were essentially working on the basis that  
21 incurring surcharges if you moved on to NPP1 would be  
22 inherently bad without considering overall whether cost  
23 savings from those surcharges could be made by using  
24 ZPP3?

25 A. No, we didn't consider that, we didn't -- we didn't

1 believe that arbitrage was a sensible route at all.

2 Q. In your witness statement you give two reasons for that:

3 "... (i) there was not, so far as we were [aware],  
4 anything to prevent Royal Mail from taking steps to stop  
5 the practice of arbitrage, and (ii) we thought that it  
6 was very likely that ..." they would.

7 Those are the --

8 A. Yes.

9 Q. Those are the points. But in order to stop the  
10 arbitrage between using NPP1 and ZPP3 at the same time,  
11 you would have had to have had another contract change,  
12 wouldn't you?

13 A. To have stopped it happening?

14 Q. Yes.

15 A. Yes.

16 Q. Yes. So if Royal Mail had moved to stop that sort of  
17 arbitrage happening, it would have been subject to the  
18 same objection and suspension process that we've seen in  
19 relation to the CCNs, wouldn't it?

20 A. From us, do you mean?

21 Q. Yes. If Royal Mail come forward and say "Well, we don't  
22 like the idea that people can use NPP1 and ZPP3 at the  
23 same time, we're going to change the Access contract so  
24 you can't", that will be a contract change, they would  
25 have to give notice, you could complain about it?



- 1 A. We could.
- 2 Q. And by the sound of it you would?
- 3 A. I think others may be ahead of us.
- 4 Q. Did you know that Royal Mail had actually considered the  
5 possibility of stopping those plans operating together  
6 and drop the idea?
- 7 A. Arbitrage, which is a funny word, really, it's almost  
8 a dirty word within the mail industry, Royal Mail made  
9 it very clear for many, many years that they did not  
10 like the idea of arbitrage moving between contracts and  
11 taking the best price from each.
- 12 Q. Thank you. So again we're looking at your concerns  
13 about further changes or expectations.
- 14 I just want to ask you one or two questions about  
15 your business model for end-to-end. I think we've  
16 already covered that it's based on rolling out to  
17 selected SSCs over time. Just to confirm, you would  
18 choose those SSCs presumably based on how profitable you  
19 thought they would be for Whistl to enter?
- 20 A. Yes.
- 21 Q. The roll-out process was built on an incremental  
22 process, and you didn't -- you weren't required to  
23 commit to delivering mail in any particular number of  
24 SSCs right from the off as part of the business plan?
- 25 A. We were rolling out, and obviously as we rolled out to

1           each SSC then obviously we were delivering to all  
2           addresses within that SSC as best we could.

3       Q.   And the service you provided was going to be on  
4           alternate days, generally on a D+3 basis; is that right?

5       A.   It was on alternate days, yes.

6       Q.   And on a D+3 basis?

7       A.   We could argue that for hours.

8       Q.   We won't. I've put the point to you.

9           If we can go back to bundle C4A at tab 10, and go to  
10          tab 10, it's the Project Luke document we were in  
11          earlier this morning, Mr Polglass. If we could just go  
12          to slide 50.

13      A.   50?

14      Q.   Yes, please. Here you are saying that you have a unique  
15          proposition for end-to-end entry combining what you say  
16          is the latest technology with a cost-effective delivery  
17          model, and you are saying here that it's flexible and  
18          involves reduced investment and overhead costs; that's  
19          right? Sorry, I'm picking up the third bullet down on  
20          the right, "Reduced investment and overhead costs".

21      A.   Yes.

22      Q.   That was an advantage in fact you had over Royal Mail  
23          which was obliged to deliver to every household in the  
24          UK six days a week; that's right, isn't it?

25      A.   They are obliged to do that, yes.

1 Q. The estimate of the relative cost benefit to Whistl is  
2 somewhere around 40%, it's estimated; do you accept that  
3 figure?

4 A. I've heard it right now.

5 Q. Do you accept it?

6 A. I don't know who's estimated it, so I would need to see  
7 the numbers to be able to answer it.

8 Q. We can happily go to the numbers. It's in the witness  
9 bundle at tab 10, that you have, and for the remainder  
10 of the court it's Royal Mail bundle 2B at 329.

11 A. I don't know if I have got it at the moment, I'm afraid.

12 Q. I'm sorry. I apologise, you are rebuilding the file,  
13 thank you. Let's see whether it's there.

14 A. Sorry, which tab was it?

15 Q. 10.

16 A. (Pause). I must have something else, then. I have  
17 RM2B, and it starts at tab 21.

18 Q. It's 41, I apologise, in that bundle.

19 A. 41?

20 Q. Yes. (Pause). So this is a Royal Mail document,  
21 page 332 in the external numbering, and the analysis  
22 that Royal Mail had done in the first full paragraph  
23 under "Structural imbalance":

24 "Our analysis is that the ability to offer an  
25 'every-other-day' service confers a cost benefit of

1           around 40% to a direct delivery operator compared well  
2           providing a six-day delivery network."

3           Then there are further cost advantages. Is that  
4           a figure that seems out of kilter to you?

5           A. I don't know. I seriously don't know how I can answer  
6           it. I haven't -- I would want to see the entire numbers  
7           to see how you get to 40%. I've no idea if it's 40%.

8           Q. I'll leave it there.

9           Now, you indicated that in your roll-out you would  
10          be rolling out to areas where you considered it  
11          particularly profitable to Whistl, and you focused that  
12          roll-out particularly in relation to urban and London  
13          areas; is that fair?

14          A. Started with London areas, they were one of the most  
15          expensive areas, it was also close to home because we're  
16          based in Marlow, and then we were rolling out to, yeah,  
17          urban I guess you would say, urban areas across the  
18          country.

19          Q. When you say expensive, you mean expensive for Royal  
20          Mail?

21          A. To Royal Mail.

22          Q. Yes, but not to you?

23          A. No, less expensive to us.

24          Q. Yes. If we could just go back to your witness  
25          statement, you make that point in paragraph 39. You

1 say, halfway down that paragraph:

2 "As I have explained, London was a more expensive  
3 zone for Royal Mail [in your view], which reflected  
4 Royal Mail's higher costs in London. That meant we  
5 could hand over less mail to Royal Mail for delivery in  
6 London without disadvantaging them."

7 I wasn't sure I really understood this proposition.  
8 If you rolled out in an area of London, you would be  
9 disadvantaging them, wouldn't you? That was your whole  
10 project.

11 A. Okay, well, I think all I'm saying in this sentence is  
12 that, it being one of their more costly areas, we're  
13 taking out some of their more costly deliveries.

14 I don't think I'm trying to make any or point.

15 Q. Right. Just to be clear, essentially in relation to  
16 mail delivery, we're looking at essentially a zero sum  
17 gain. If you took volumes away from Royal Mail -- if  
18 you gained volumes you would be taking them from  
19 Royal Mail; that's right, isn't it?

20 A. For delivery, yes.

21 Q. Yes, for delivery. In fact it's probably slightly less  
22 than a zero sum gain given declines over time, it's  
23 almost a negative gain, but we'll leave that.

24 The position here is, though, that in dealing with  
25 a roll-out in London, what you would be doing is taking

1 volumes away from Royal Mail but they would still have  
2 the cost infrastructure that they would need in order to  
3 carry out their obligations under the USO and deliver  
4 six days a week, wouldn't they?

5 A. Yes, unless they can drive their own efficiencies.

6 Q. Well, that of course is something that Royal Mail was  
7 engaged in in any event. The point I'm making is that  
8 the volumes you took away from Royal Mail would mean  
9 that the costs per item that Royal Mail faced in  
10 a London area, or indeed any area where you took volumes  
11 away, would actually increase, wouldn't it?

12 A. If they didn't take cost out, yes.

13 Q. And they were endeavouring to take costs out but  
14 removing volumes of this sort would still leave them  
15 with increased average costs, wouldn't it?

16 A. Probably.

17 Q. Now, I'm not going to take you through the reports of  
18 Richard Hooper, who, you may well be familiar with,  
19 conducted independent reviews of the postal sector back  
20 in the earlier 2000s, or 2008/2010. He talked about the  
21 difficulties for a universal service operator of  
22 cream-skimming or cherry-picking by direct delivery  
23 operators. He identified a series of characteristics  
24 that might be identified as cherry-picking, and what we  
25 see with Whistl is those characteristics being met.

1 First of all, we've got delivery being undertaken to the  
2 most profitable, dense urban areas.

3 A. Do we know that, Mr Beard? Do we know that it was the  
4 most profitable area? It certainly was the highest cost  
5 area.

6 Q. I'm not talking about London here, I'm talking about  
7 urban areas.

8 A. Okay.

9 Q. So we've got Whistl entering in relation to the most  
10 profitable, dense urban areas, haven't we?

11 A. We have.

12 Q. Yes, and inevitably the roll-out is leaving Royal Mail  
13 to deliver to the least profitable, least populated  
14 areas, in particular rural areas; that's correct, isn't  
15 it?

16 A. When we rolled out to somewhere like Liverpool, for  
17 example, that also had suburban and rural areas, and we  
18 delivered to every address.

19 Q. Well, we'll come back to the profile that you looked at  
20 in terms of these matters. But whilst there might be  
21 occasional examples of suburban or rural, overall what  
22 you were doing was focusing on supplying areas where  
23 there was high population density and leaving to  
24 Royal Mail the requirement to deliver to areas of low  
25 population density overall?

1 A. What we were doing was concentrating on what our clients  
2 wanted us to offer them, which was a service to high  
3 density areas, yes.

4 Q. Yes, but you were leaving the low density expensive  
5 rural areas to Royal Mail?

6 A. Other than I've described, yes.

7 Q. Yes, and we've already agreed you were delivering only  
8 on a small number of days a week, and we've also had  
9 an exchange about the revenue generation.

10 So in those circumstances, although you say "We  
11 weren't engaged in cherry-picking", if we look at the  
12 criteria that Mr Hooper uses to define the term,  
13 cherry-picking or cream-skimming, that is precisely what  
14 Whistl was in fact engaged in?

15 A. I think cherries grow on trees, don't they, and I don't  
16 think it would have mattered too much which tree we  
17 would have approached, it would have been deemed to be  
18 cherry-picking. Why is it unusual for an entrant into  
19 a market to go after the areas where it's likely to make  
20 the best return?

21 Q. I wasn't suggesting it was in any way unusual,  
22 Mr Polglass.

23 A. Right, sorry, it's just an emotive term that came out of  
24 Royal Mail, cherry-picking, and creaming, it's just  
25 an emotive term.



1 Q. Well, I'm very happy to take you to Mr Hooper's report.  
2 It is he that refers to both the terms cream-skimming  
3 and cherry-picking, Mr Polglass. It is not a creation  
4 of Royal Mail, is it?

5 A. Well, regardless, it's still an emotive term.

6 Q. Could we just go back to the original Whistl business  
7 plan just at C4A, tab 2. I just wanted to go to slide  
8 18, if I may. So this is your original business plan,  
9 or business plan 26 August 2011, so it's the earliest  
10 one we have in the documents. I'm not going to presume  
11 I know the original plan.

12 Do you have slide 18, Mr Polglass?

13 A. Yes, I'm just making sure, this is the board of  
14 management 26 August, yes?

15 Q. Please, do feel free to flip through if you want, I'm  
16 just focusing on this slide.

17 A. So on 18?

18 Q. Yes, please. So it's "E2E design: powerful  
19 differentiation", and what we see here is Whistl setting  
20 out why it is powerfully differentiated from Royal Mail.  
21 If we start -- we see the two columns, and you see the  
22 first bullet point:

23 "Can select high density and high volume areas."

24 Then contrast to Royal Mail:

25 "100% UK coverage, delivers to rural and urban

1 areas."

2 Next bullet point:

3 "SLA 95% up to three days ..."

4 "SLA 98% [up to] two days."

5 So that's a service standard difference, isn't it?

6 A. It is.

7 Q. Thank you. You say:

8 "Full track and trace solution with scan on  
9 delivery."

10 So that was what you were hoping to roll out as part  
11 of the development of SSCs, albeit you didn't roll it  
12 out immediately across all SSCs, did you?

13 A. We rolled it out across the SSCs as we rolled out SSCs.

14 Q. This was a tracking system that involved a further cost  
15 to customers, effectively; is that right?

16 A. No.

17 Q. Well, it involved a further cost to you, it wasn't that  
18 it was an optional cost to customers?

19 A. Yes, there was no cost to the customer, and this was  
20 a --

21 Q. No additional price?

22 A. -- full track and trace to the door. A marketer would  
23 know that their envelopes had arrived on your doormat,  
24 Mr Beard, and could call you up that afternoon about the  
25 holiday they were trying to sell you.

- 1 Q. I see. If we keep going down in the next box:  
2 "Economies of scale; six centralised sorting  
3 centres."  
4 Contrast to Royal Mail:  
5 "No economies; 67 sorting centres."  
6 That's correct, isn't it? You had economies of  
7 scale that Royal Mail couldn't mirror in relation to  
8 your sorting arrangements?  
9 A. We were a much smaller player, of course.  
10 Q. But you had economies of scale that they didn't, that's  
11 what you are identifying here, aren't you?  
12 A. Yes, we didn't -- we weren't going to roll out masses of  
13 different sorting centres, that's correct, we were going  
14 to use machinery to do most of our sortation.  
15 Q. And:  
16 "Can use alternative delivery model eg 3 days ..."  
17 Which is D+3?  
18 A. Mm.  
19 Q. Whereas Royal Mail, as we've just discussed, has to  
20 deliver six days a week; that's correct as a contrast,  
21 isn't it?  
22 A. It is.  
23 Q. Then the bottom one, bottom box:  
24 "Market conforming salary and wage structure: [but]  
25 over £1 per hour below Royal Mail base salary.

1           "Flexible contracts.

2           "Productivity based bonus scheme ...

3           "Work in partnership with unions."

4           So this is to do with your labour costs effectively,

5           is that right?

6        A.   Correct.

7        Q.   Then in contrast, Royal Mail:

8           "Expensive full-time employees.

9           "Inflexible contracts.

10          "Cannot incentivise ..."

11          And you say at that time:

12          "Poor industrial relations with union CWU."

13        A.   Correct.

14        Q.   Those were the, and you have very substantial advantages

15           as compared to Royal Mail in rolling out, that's

16           correct, that's what is being set out here, isn't it?

17        A.   If we were simply the same nobody would have bothered to

18           use us.

19        Q.   Understood. I'm going to move through a series of

20           topics, Mr Polglass, about Whistl's business plans and

21           how they panned out to some extent, just different

22           aspects of it.

23        A.   Okay.

24        Q.   The first I'm actually going to pick up is on quality of

25           service. You deal with it in your witness statement, if

1           you want to just turn to it, at 73 through to 75. So  
2           you say:

3           "After our E2E roll-outs in 2012/13 we were pleased  
4           with how things had gone. It wasn't perfect, but then  
5           we weren't expecting it to be. We had [to] do some  
6           learning as we went along like any other start-up. We  
7           did have some incidents of mail dumping, and they were  
8           well-publicised ... I went to see Ofcom about that,  
9           together with the operational director for end-to-end.  
10          We explained what we thought had happened, how we had  
11          dealt with it and what corrective action we could take  
12          going forward."

13                 So could I be clear, who did you go and see at  
14          Ofcom?

15          A. I'm sorry, I can't for the life of me remember.

16          Q. Was this back in 2012 or 2013?

17          A. This would have been in 13, I'm almost certain.

18          Q. 2013. Right. Thank you. You say:

19                 "Ofcom understood that we were learning ... and  
20          didn't take any action."

21                 And your clients understood too. And then you say  
22          well, Royal Mail experiences these sorts of issues,  
23          albeit of course Royal Mail has a regulated code and  
24          a structure for dealing with complaints and  
25          compensation, doesn't it?

1 A. Yes, so did we.

2 Q. Yes, yes. Then you say, 75:

3 "The truth is that we and LDC had no concerns about

4 the operational side of end-to-end."

5 Albeit you can't actually speak for LDC in relation

6 to these matters?

7 A. No.

8 Q. No.

9 "Where we experienced issues, we dealt with them

10 quickly and took corrective action that was necessary."

11 You say:

12 "... well supported ... by PostNL."

13 And PostNL had set up delivery networks in other

14 countries; yes?

15 A. They had.

16 Q. So let's just look at one or two of the documents, if we

17 may. Could we go to bundle CB4 at tab 98, please. C4B,

18 I'm sorry. I apologise, sir. C4B. Yes. It's the

19 second of the core chronological bundles.

20 PROFESSOR ULPH: Which tab?

21 MR BEARD: 98. Yes, please, sorry, Professor Ulph. It's

22 98. It's a document that should be entitled "UK

23 management report February 2014". TNT Post.

24 A. That's correct, yes.

25 Q. Thank you. I'm assuming that's a pretty Ronseal

1 description. This report is to management updating  
2 what's going on in preceding months?

3 A. Yes.

4 Q. If we could just turn on to page 20 here, if we may. So  
5 this is February 2014. Just under the red box:

6 "In relation to E2E, London is continuing to improve  
7 in productivity performance. Manchester is on a level  
8 with London already. Harrow launched on time, although  
9 there are only 5 delivery units ... opened on time  
10 [I think it should probably say], which has posed some  
11 early service issues in that area."

12 You say a solution will be in place in March.

13 Now, Harrow was a particular problem area for you,  
14 wasn't it, Mr Polglass?

15 A. We did have some issues finding the appropriate delivery  
16 units, yes.

17 Q. Yes. If we could go on to the next of the chronological  
18 bundles, C4C, at tab 111. So this is "UK management  
19 report April 2014"; yes?

20 A. Yes.

21 Q. So just the next month's version, essentially?

22 A. Yes.

23 Q. If we go to slide 3, you will see under the red box  
24 "E2E". Picking up the second bullet:

25 "Difficult delivery month in Harrow due to several

1 individual incidents. Managing PR."

2 So you said just now that there were problems in  
3 Harrow in relation to delivery points, but actually you  
4 had rather more serious incidents in Harrow at that  
5 time?

6 A. Yeah, we had a major dumping issue in Harrow.

7 Q. You did have a major dumping issue. If we go on, then,  
8 to slide 20, you will see lower down on the left-hand  
9 side under "Marketing" you say:

10 "This month has seen negative articles in the press  
11 ..."

12 I'm sorry, this is marked as "confidential". I'll  
13 just ask you to read that paragraph. I'm not sure that  
14 this particular paragraph is confidential.

15 A. I don't think we would be concerned, frankly.

16 Q. No, thank you. So there are some reports that although  
17 you say, well, some of the details are not correct,  
18 there are publicised problems in relation to your  
19 roll-out in Harrow; that's correct, isn't it?

20 A. There were, yes.

21 Q. Yes?

22 A. I'm not denying that, no.

23 Q. Then if we go on to 112, this is the next month's  
24 management report, if we go to slide 12, you will see  
25 again it's marked "confidential", I'm not going to do



1 any of the figures though, I just want to go to the  
2 left-hand side under "Conversion reduction", and it  
3 says:

4 "Conversion reduction. Partly reduced of volume due  
5 to press/service issue."

6 So the adverse incidents that you had in Harrow and  
7 the publicity is impacting your conversion rate for  
8 end-to-end, and you can see that headlined at the top of  
9 that page, and indeed the conversion rate bar, which is  
10 the second in from the right. That's correct, isn't it?

11 A. Yes, I don't deny we had some service issues, and  
12 plainly they will impact on customer confidence.

13 Q. Yes. If we go on to tab 119 in this bundle, so this is  
14 June, June 2014, it's entitled "LE2 2014".

15 A. Yes.

16 Q. Could you say what LE stands for?

17 A. Latest estimate.

18 Q. Right, thank you. If we go on to slide 11 in this  
19 bundle, and so what we see here on slide 11 is variance  
20 against forecasts in relation to 2014; that's right,  
21 isn't it?

22 A. Yes.

23 Q. Yes, and the red figures are negative variations; that's  
24 correct, isn't it?

25 A. Oh yes.

1 Q. We see significant issues in relation to volume, and  
2 then revenue, substantial decline, and it said:  
3 "Adjustment for Harrow non delivered mail,  
4 operational error in not using correct return and reject  
5 codes."

6 So it's not only the broader publicity but you are  
7 having to -- you are losing revenue because of the  
8 difficulties you have had in Harrow; that's correct,  
9 isn't it?

10 A. Well, by June -- I'm not denying that, I've already said  
11 that. By -- this is now June or late June 2014, I and  
12 a number of my colleagues spent a great deal of time  
13 with clients trying to ensure that we retained them.

14 Q. Yes, I can see.

15 A. Not because of service.

16 Q. Yes. Service and publicity.

17 A. No, because of the ongoing delay to the issue that we're  
18 all here about today.

19 Q. Well, let's have a look at that, shall we? Let's go to  
20 witness bundle tab 9, which for the remainder of the  
21 court is RM7, tab 73.

22 THE CHAIRMAN: RM7A or RM7B?

23 MR BEARD: RM7B, I'm so sorry. It's also in the witness  
24 bundle, that witness additional documents bundle at  
25 tab 9.

1           A. C4B?

2           Q. No, not C4B. There was a bundle handed up at the start  
3           that just has additional cross-examination material in,  
4           that we handed up, and it should be in tab 9 there.  
5           It's just because the witness doesn't have all of these  
6           other bundles, so ...

7           A. I have it.

8           Q. You should have there a -- it starts "TNT mail row.  
9           Hundreds of letters including official documents dumped  
10           in the river". It's an article from the  
11           Evening Standard. I imagine, unfortunately, you are  
12           familiar with it?

13          A. I am, yes.

14          Q. Yes. I'm not going to say whether or not you are  
15           a controversial delivery firm, but you faced -- it was  
16           being said that you faced an official investigation  
17           after a London MP discovered hundreds of letters,  
18           including official benefits documents and banking  
19           details, dumped in a river. And the Information  
20           Commissioner's Office has been brought in after the MP  
21           found a large sack of TNT Post at the bottom of the Silk  
22           Stream river in Colindale. And there is a description  
23           of the confidential nature of the material in it and  
24           polling cards and so on.

25                    It was undoubtedly bad publicity, I can quite

1 understand.

2 A. I think you have made that point, yes.

3 Q. How did it register on your tracking system?

4 A. How does that mean?

5 Q. Well, you said you had rolled out a tracking system --

6 A. That's right.

7 Q. -- for letters. If a whole sackful of sensitive mail

8 including benefit documents and polling cards ends up in

9 a river, does that not register on your tracking system

10 if it's working well?

11 A. The tracking system tracks items to the sortation

12 office, and out with the delivery agent. They then, as

13 they reach the doorstep of any recipient there is

14 a barcode on the envelope, the barcode is wanded against

15 a little handheld machine and placed through the

16 letterbox. It's not signed for or anything like that,

17 it's simply tracked to the door.

18 Q. So here the sack of mail we're talking about would have

19 been entered at your sortation office, and the barcode

20 scanned there?

21 A. Yeah.

22 Q. And it would have been scanned out onto the postie's

23 bike, is that right, how it works?

24 A. It would have been scanned to the postie in the office.

25 He then -- he or she then puts together their round.

1 Q. But the fact that none of those documents were delivered  
2 and were found at the bottom of a stream, that wasn't  
3 anything that was alerted on your tracking system?

4 A. I don't recall. I don't remember whether it was or it  
5 wasn't. But plainly this is -- this was a very bad  
6 piece of news for us.

7 Q. Right. If you could go back to witness bundle, tab 8,  
8 so it's the preceding tab in your bundle. Unfortunately  
9 it's in RM5, so it's in a different bundle for the  
10 remainder of the court. RM5 at tab 3.16, which I think  
11 is in ...

12 MR FRAZER: Which of the RM5s?

13 MR BEARD: I thought it was RM5B, but I'm just  
14 double-checking that, I'm so sorry. (Pause). Yes, it's  
15 at tab 16 in RM5B.

16 Again, I imagine you are familiar with this?

17 A. Unfortunately, yes.

18 Q. Yes. This is Barnet; is that right?

19 A. Yes.

20 Q. We're not dealing with Harrow any more; is that right?

21 A. No, we're in Barnet.

22 Q. Yes. We're not in Harrow any more. It would not have  
23 been quite so memorable in the Wizard of Oz, would it?

24 THE CHAIRMAN: Nor in Kansas.

25 MR BEARD: Exactly.

1           Here we see that there was a concern again about  
2           polling cards being dumped or delivered to the wrong  
3           address, and being discarded on tops of bins. Again,  
4           unfortunate publicity. Again, not picked up by the  
5           tracking system in any way?

6           A. Again, they will have gone through the process and out  
7           with the delivery officer, the postie, and plainly it  
8           didn't get tracked as handed over at the door, that's  
9           true.

10          Q. If we just go back to, in your bundle, tab 7, for the  
11          court over the page, over the tab at tab 17.

12                 Again, I imagine you are familiar, this is back in  
13                 Harrow, accusations of problems arising from  
14                 administrative errors from Whistl concerning council tax  
15                 bills which resulted in council tax payers actually  
16                 having to be given an extra period in which to pay their  
17                 bills. You recall that?

18          A. Yes.

19          Q. Then if we go back one more tab in your bundle, forward  
20          in everybody else's, this is not just the  
21          Evening Standard, this is in the Mail, I think this may  
22          well have been the dumping problem that you perhaps  
23          referred to earlier?

24          A. Well, this is a problem in Manchester.

25          Q. Yes. This is a problem in Manchester, as you rightly

1 say. So just to be clear, when did you roll out in  
2 Barnet?

3 A. I can't recall.

4 Q. No, okay. And Manchester? Manchester was one of your  
5 earliest roll-outs, wasn't it?

6 A. No, Manchester would have been in 2014, I think, I can't  
7 remember now. Can't remember.

8 Q. It matters not. All of these events are in 2014, so  
9 relatively long after you had started your overall  
10 roll-out, and these I think we can fairly say are more  
11 than just teething problems, they are significant issues  
12 that, as you have fairly said, you then set about trying  
13 to deal with?

14 A. We did, very much so, and nobody wants to have issues  
15 with their service. You suggested earlier that  
16 Royal Mail keeps records of its complaints and so on; so  
17 do we, and the number of complaints that we were  
18 receiving, obviously there are some highlighted ones  
19 here, but the number of complaints we received was  
20 certainly in line if not better than those published by  
21 Royal Mail itself.

22 So whilst I am not trying to condone these  
23 particular issues, and I'm not suggesting Royal Mail has  
24 these issues as well, but the number of complaints that  
25 we had in the year of 2014 on our end-to-end was 1,600,

1           which is about one in every 48,000 items, which is  
2           significantly better than that published by Royal Mail.

3       Q. I understand the statistic, but you don't receive  
4           materials because they have been dumped in a bush, you  
5           don't necessarily know to complain, do you?

6       A. Sorry, say that again.

7       Q. If you don't receive materials because they have been  
8           dumped in a bush, you don't necessarily know to  
9           complain, do you?

10      A. No, that would be true.

11      Q. These were very high profile incidents, weren't they?

12      A. They were. We were a challenger, and the -- some of the  
13           media were riled up about it, yes.

14      Q. Yes, in fact in your witness statement you suggest that  
15           it was Royal Mail's publicity machine that was  
16           generating these; is that right?

17      A. Amongst other things.

18      Q. It's not true, is it?

19      A. Well, they weren't generating the problem, I didn't say  
20           that.

21      Q. You have no basis for suggesting that it was them that  
22           was notifying the press, do you?

23      A. No, I have no facts whatsoever.

24      Q. It's complete speculation and an unjustified accusation,  
25           isn't it?



1 A. It's speculation, yes.

2 Q. You have no basis to justify it? (Pause). No.

3 Thank you.

4 Can I just go, whilst I think you have still got C4C  
5 in front of you, again one of the few pieces of evidence  
6 we have in relation to LDC, this is a meeting on  
7 20 May 2014, if you go to page 5 --

8 MR FRAZER: Of?

9 MR BEARD: I'm sorry, it's C4C, tab 113. I apologise,  
10 Mr Frazer.

11 This was a meeting you attended?

12 A. It is.

13 Q. Yes. On page 5, you joined the meeting and were  
14 discussing improvement projects. If we just go down to  
15 the bottom of that section:

16 "These projects were part of a continuous  
17 improvement programme and will get full management  
18 attention and focus [this is what you were telling LDC],  
19 but this should be considered in the context that 3m  
20 items are already being delivered daily ..."

21 So you are saying, well, look, put this in  
22 perspective. But then:

23 "The recent adverse publicity was discussed again  
24 and one of the actions being considered was to remove  
25 the TNT Post indicia from DSA delivered mail, as this is

1 taken to letterbox by Royal Mail, which on some  
2 occasions was being confused with TNT Post end-to-end  
3 deliveries."

4 So here your concern is that the recent adverse  
5 publicity is significant and that actually you are  
6 suggesting here that some of the mistakes are due to  
7 Royal Mail; is that right?

8 A. (Pause). I can't remember exactly what I'm saying  
9 there, to be honest.

10 Q. That's what it's saying, isn't it? You are trying to  
11 say: well, let's take some of the TNT Post indicia off  
12 DSA delivered mail because it's taken to the letterbox  
13 by Royal Mail and on some occasions it's being confused  
14 with TNT deliveries, and this is in the context of  
15 recent adverse publicity being discussed again, isn't  
16 it?

17 A. Yeah, I genuinely can't recall the point I'm making  
18 there, but I can't deny the words on the page.

19 Q. No, understood. So what we have is the adverse  
20 publicity clearly being of significance to LDC and you  
21 suggesting that perhaps it's Royal Mail's fault?

22 A. Ultimately, if I may, the determiner of how well our  
23 service is being provided will be our clients, and if we  
24 were failing them on a regular basis they would walk  
25 quite quickly. And we didn't have that issue, we kept

1 very close to them, we were very open, very honest, told  
2 them exactly what we were doing, how we were going about  
3 it. As I mentioned earlier, I met with Ofcom because  
4 there was genuine concern at one point from them about  
5 service levels. So we were doing our damndest to  
6 provide a quality that we had promised.

7 Q. We will come back to how well you were retaining and  
8 developing your customer base in a moment, but the next  
9 topic I would like to move on to is just your staffing  
10 model. Now, we have already seen in relation to some of  
11 the documents that, right from the beginning, you  
12 identified staff as being an area where Royal Mail had  
13 relatively high costs, high staffing costs, whereas  
14 Whistl could engage staff much more cheaply and use  
15 flexible contracts and flexible working hours contracts;  
16 that's correct, isn't it?

17 A. Flexible contracts, yes.

18 Q. Yes. If we actually go back to the original 2012  
19 business plan, if we could, at C4A, tab 2, and I just  
20 want to go to slide 15 in this. It's the document we  
21 have seen a couple of times already. Again, I think the  
22 whole of this page has been marked by Whistl as  
23 confidential. I won't refer to figures, just in case  
24 they are still confidential. But, Mr Polglass, can  
25 I read out and refer to the text above under the

- 1 "Flexible employed network" section?
- 2 A. Yes.
- 3 Q. Thank you. So flexible employed network, you say you  
4 are targeting housewives, retirees, students and  
5 second-jobbers; that's what you're saying here under the  
6 business plan; is that correct?
- 7 A. That's what it says, yes.
- 8 Q. But that's what you were doing as well; yes?
- 9 A. Yes.
- 10 Q. You refer to it as a lifestyle career, that's referring  
11 to the idea of flexibility in the working hours; is that  
12 right?
- 13 A. That's correct.
- 14 Q. Yes, and then you say:  
15 "Flexible contracts paying only worked hours."  
16 That's right, isn't it?
- 17 A. That's right.
- 18 Q. Now, that is another way of referring to contracts that  
19 are sometimes referred to as zero hours contracts;  
20 that's correct, isn't it?
- 21 A. There are zero hour contracts, but unlike many, we paid  
22 all of the holiday pay and bonuses and suchlike.
- 23 Q. But they were zero hours contracts, weren't they?
- 24 A. In the first roll-outs they were, yes.
- 25 Q. Well, it's important the first roll-outs, isn't it?

1 A. No, because we moved, once we had established a depot or  
2 a sorting centre, we then moved people on to fixed term  
3 contracts.

4 Q. Well, we will come back and see about that in a moment,  
5 Mr Polglass. But what you see there is very significant  
6 differences between the labour costs of Royal Mail and  
7 your base costs and your bonus delivery operative costs.

8 A. Well, I'm not going to apologise for that.

9 Q. I wasn't asking for an apology, I was simply observing  
10 that that was the case, and that is the case, isn't it,  
11 Mr Polglass?

12 A. It is.

13 Q. Yes. In relation to the business you were in, staff  
14 costs inevitably formed a very significant portion of  
15 the overall cost base; is that right?

16 A. They would have done, yes.

17 Q. I don't want to get into specific figures, because  
18 I think they're confidential, in open court, but we  
19 would be looking at more than 50% of the overall cost  
20 base, wouldn't we?

21 A. I would think so, yes.

22 Q. Yes. Certainly the largest cost element of your  
23 business?

24 A. On a day by day basis, yes.

25 Q. If we just go on to slide 28 in this pack, there is

1 a slide entitled "Taking action to mitigate regulatory  
2 risks". If we look under "Labour unions", you see:

3 "Current status: no recognised union."

4 Then you see:

5 "Statutory recognition in seeking unified postal  
6 sector working conditions by Unite or the CWU ..."

7 That's the Communication Workers Union?

8 A. It is.

9 Q. Those are the unions you didn't want to have to deal  
10 with, aren't they, because you say "Mitigating actions:  
11 start negotiations with the GMB"; that's right, isn't  
12 it?

13 A. We did not want to be with Unite or CWU, no, if we could  
14 avoid it.

15 Q. Your use of zero hours contracts, indeed zero hours  
16 contracts generally, are not uncontroversial, are they?

17 A. I'm not quite sure what you're asking me, I'm sorry.

18 Q. The use by companies of zero hour contracts is  
19 controversial, isn't it, Mr Polglass?

20 A. Yes, it is.

21 Q. That risk was recognised in particular if we go on to  
22 tab 32 in this bundle, which is the PwC report that  
23 we've seen previously, and we go on to page 120. So  
24 tab 32, page 120. If we look at the heading there, it  
25 says, this is obviously PwC saying:

1           "Management's view is that TNT Post's zero hour  
2 contracts are fairer than others in the UK and provide  
3 good benefits and incentives to the postmen."

4           So what this appears to be suggesting, and I'm not  
5 asking you because obviously this is PwC, is that views  
6 had been expressed to PwC that the zero hour contracts  
7 were at better rates than others in the UK, but zero  
8 hour contracts were seen as beneficial; is that fair?

9       A. We were using zero hour contracts, as I've already said,  
10 at the start-up of our centres, and unlike many others,  
11 and you are quite right, many were controversial, but  
12 unlike the controversial ones we did offer holiday pay,  
13 sickness pay and overtime pay.

14       Q. I see. If we go down the left-hand side you see:

15           "Zero hour contracts provide flexibility of working  
16 for employers and employees."

17           And then the next bullet is:

18           "Criticism of zero hour contracts. Since workers  
19 receive little stability or security, many zero hour  
20 contracts have no holiday pay sickness or overtime ...  
21 limited notice given as to when employee will be  
22 required."

23           And then there is material from a report that  
24 I believe was -- was that commissioned by LDC, that  
25 report?

- 1 A. I don't know.
- 2 Q. You don't know. But it's expressing the concerns around  
3 zero hour contracts, and:
- 4 "... any plans for changes to regulatory framework  
5 around these are not developed. Nonetheless, TNT Post  
6 will need to remain vigilant over future proposals to  
7 limit usage of zero hour contracts or require businesses  
8 to amend the way the contracts are set out and used."
- 9 The reason you need to remain vigilant is because  
10 that would potentially have a significant effect on your  
11 cost base; that's correct, isn't it?
- 12 A. They were -- zero hour contracts were getting, we all  
13 know, were getting a very bad name for themselves. We  
14 didn't want a lot of poor publicity about us being  
15 a poor zero hour contract provider.
- 16 Q. I see. Now, by 2015, overall what percentage of your  
17 employees were on zero hour contracts?
- 18 A. In 2015?
- 19 Q. Early 2015, so February, January/February 2015.
- 20 A. I don't believe we had any by then, but ...
- 21 Q. I see. We may need to come back to this, because  
22 I don't think we've seen your submission to the House of  
23 Commons Business, Innovation and Skills Committee, but  
24 it appears that you told them that nearly half of all  
25 Whistl employees were on zero hour contracts.



- 1 A. In 2015?
- 2 Q. This was a report that was published in March 2015, so  
3 I don't know precisely when you would have provided that  
4 information, we haven't seen it. Does that surprise you  
5 as a figure?
- 6 A. It does, yes, because we were working with Community  
7 Union, we have a good working relationship with them,  
8 they're still part of our business today, we've removed  
9 all zero hour contracts from our workings. People do  
10 have set hours, because people want to work 10 hours or  
11 20 hours or 30 hours or 40 hours within our warehouses,  
12 but I thought we had by then removed all zero hour  
13 contracts. I thought we had.
- 14 Q. I wonder whether we are confusing two things. You may  
15 be referring to TNT UK. Whistl had around 50% zero hour  
16 contracts at that time.
- 17 A. No.
- 18 Q. In any event, you have just referred to the fact that  
19 there was a negotiation eventually with the Community  
20 Union that was entered into in March 2015; is that  
21 correct?
- 22 A. I can't remember the date, but --
- 23 Q. Go to your witness bundle, tab 12. Sorry, it isn't  
24 a test on dates. For the court, bundle RM5B, tab 3.12.
- 25 A. Which tab am I looking at?

1 Q. I'm sorry, in yours it is in fact witness bundle tab 12,  
2 it's I think a screenshot from Post & Parcel Magazine.  
3 It should be -- it's that additional bundle that we  
4 passed up. I'm so sorry. (Pause). I'm sorry I'm  
5 requiring you to have so many bundles open.

6 A. We're getting there.

7 Q. Do you have it?

8 A. I do.

9 Q. It says:

10 "Union deal to reduce Whistl's use of zero-hours  
11 contracts."

12 So against the background of the House of Commons  
13 Committee carrying out an inquiry, you did a deal with  
14 the union to reduce zero hours contracts?

15 A. Yes, it's a little later than I thought, but, yes, we  
16 were removing all zero hour contracts from our business.

17 Q. Just if we go over the page, it says at 374:

18 "The company's wage levels have been one factor with  
19 demands by Whistl's critics for regulator Ofcom to  
20 impose conditions on the company to level the playing  
21 field with Royal Mail's universal service. MPs  
22 yesterday called Whistl's use of zero hour contracts  
23 disproportionate. Zero hours contracts are employment  
24 contracts in which workers are not guaranteed an amount  
25 of time."

1           So in those circumstances under public pressure, as  
2           you say, with criticism of zero hour contracts, you  
3           finally agreed a deal with the union that resulted in  
4           you having to take on more expensive contractual  
5           arrangements with your staff, didn't it?

6           A. We always expected to, once a delivery unit was  
7           established and up and running and we had a consistency  
8           within it, that people would move on to committed hours  
9           contracts.

10          Q. That may have been the intention in the general terms  
11          that you referred to, but what we see are very  
12          substantial numbers of people being on a zero hours  
13          contract, you finally moving away from zero hours  
14          contracts in March 2015 at the time of the Parliamentary  
15          inquiry, and that imposed a very significant additional  
16          cost on Whistl's business, didn't it?

17          A. I'm not entirely sure what it would have added but it's  
18          probably that -- it probably did add something.

19          Q. Pension contributions and living wage requirements would  
20          have caused a cost increase of over 10%, wouldn't they?

21          A. Well, we weren't paying below minimum wages anyway.

22          Q. No, I didn't say minimum wages, Mr Polglass, I said  
23          living wages, because those were conditions of the  
24          contracts you agreed to enter into, weren't they?

25          A. (Pause). Well, I'm sure it must say it here somewhere

1 but I can't see it at the moment, but ...

2 Q. If it's of assistance, if you go to witness bundle  
3 tab 13, you will find Mr Harman's estimate of the cost  
4 increases. I'm not going to refer to the specific  
5 figure. For the tribunal, it's in Mr Harman's -- and  
6 it's just to note -- second statement at paragraph 3.28.

7 THE CHAIRMAN: Would it be a good moment to stop?

8 MR BEARD: Yes, I have two more follow-up questions on this  
9 and then I was going to pause, if that's acceptable.

10 THE CHAIRMAN: Fine.

11 MR BEARD: So significant cost increase and also a reduction  
12 in the flexibility of your workforce in relation to  
13 those new contracts; that's correct, isn't it?

14 A. Well, I'm not sure I would put it quite that way. As  
15 I say, we were using these contracts when we first  
16 established roll-out of the units, we always knew that  
17 we would move away from those types of contracts, we  
18 knew that we would move to fixed term contracts, or  
19 fixed hours, sorry, contracts, because that's what we  
20 did in the rest of our business.

21 Q. So March 2015 you announce the deal with the unions, you  
22 are going to move away from zero hours contracts, that  
23 imposes a significant cost increase in relation to your  
24 largest cost, it reduces your flexibility?

25 A. It doesn't reduce our flexibility, I don't believe,

1           because we have people on 10, 20, 30, 40-hour contracts.

2           Q.   And this is March 2015 when this agreement is made, and  
3           in May 2015 that's when LDC decided to exit end-to-end  
4           and not invest; that's correct, isn't it?

5           A.   That is the right time, yes.

6           MR BEARD:   Two months afterwards.

7                     I don't have further questions on this topic, I'm  
8           going to move to another topic next.

9           THE CHAIRMAN:   Ten minutes.

10          (3.12 pm)

11                                 (A short break)

12          (3.22 pm)

13          THE CHAIRMAN:   Mr Beard, just before you go on, we were  
14          discussing amongst ourselves, we are slightly puzzled  
15          about the point you put right at the beginning about  
16          arbitraging between zones. Do you understand what that  
17          actually means in practice?

18          MR BEARD:   It's actually not between zones, I probably put  
19          it badly. It's taking advantage of the way in which the  
20          pricing of different zones is set as compared to the --

21          THE CHAIRMAN:   If post is going to a zone, it goes to  
22          a zone. I'm not sure how you can arbitrage.

23          MR BEARD:   I think the issue is that it's referred to a  
24          zonal arbitrage, which is what was being talked about by  
25          UK Mail, and it's different from the between the

1 multiple plan arbitraging. That was the only point  
2 I was making.

3 THE CHAIRMAN: I still don't understand that, I'm sorry.

4 MR BEARD: I'm going to make submissions in relation to it  
5 in relation to UK Mail and what they said in that  
6 letter. I can go to it now, but otherwise I can come  
7 back in due course.

8 THE CHAIRMAN: We need to understand the terminology as  
9 these words get bandied around.

10 THE WITNESS: May I?

11 THE CHAIRMAN: Oh, the witness! Yes, of course. The man  
12 who might actually know. Please proceed, Mr Polglass.

13 A. Would it help?

14 THE CHAIRMAN: Only time can tell.

15 A. Yes, indeed.

16 So the arbitrage, as it's used, is basically using  
17 two contracts. Let's say you have got a national spread  
18 contract, a national price contract, and a zonal price  
19 contract. You take out of the national spread items  
20 that are cheaper on the zonal, but try and maintain your  
21 profile on the zonal such that you have got a cheaper  
22 price overall. You have maintained your profile, but  
23 you have stripped some of it out and put it on a zonal,  
24 but you have a cheaper price usually on the urban area.  
25 Does that make sense or not?

1 MR FRAZER: Maintain your profile on the national, you mean,  
2 rather than on the --

3 A. You try to maintain your profile on the national  
4 contract and you put urban items, let's say, or suburban  
5 items if they're large letters, because it's different  
6 pricing, on to a zonal contract, thereby arbitrating  
7 across those contracts to get the best price overall.

8 PROFESSOR ULPH: That's what I would understand when you  
9 were talking about --

10 MR BEARD: Yes, I think that is --

11 PROFESSOR ULPH: -- putting two price plans together and  
12 arbitraging between price plans.

13 MR BEARD: I think that is what is generally referred to.  
14 I think what UK Mail was referring to was simply the  
15 modification of the zonal tilt in order to change the  
16 attractiveness of the zonal pricing arrangements in  
17 relation to that.

18 THE CHAIRMAN: That's not arbitraging at all.

19 A. No.

20 THE CHAIRMAN: If you are on a zonal price arrangement only,  
21 you don't have anything to arbitrage. I'm only a plain  
22 and simple lawyer, I don't understand these things.

23 MR BEARD: I'm only dealing with -- the only point I was  
24 making was in relation to the language used by UK Mail  
25 which is talking about arbitrage but is actually talking

1           about closing the loop in relation to arbitrage by  
2           reference to changes in zonal tilt, because that is  
3           what's being talked about there, and that's what's  
4           slightly confusing in relation to the presentation.

5       THE CHAIRMAN: Professor, do you have more questions on  
6           arbitrage itself?

7       PROFESSOR ULPH: Yes, I would like to understand a bit more  
8           about what the precise mechanics and the economics of it  
9           are. I think you have talked a lot about the economics,  
10          but let me ask about the mechanics. So you have mail  
11          coming from various customers and you have to -- you  
12          want to put some through NPP1 or APP2, and you want to  
13          put some through ZPP3. So first of all -- and that's  
14          with delivery by mail. So, first of all, how does  
15          Royal Mail know that this is the stuff that goes on  
16          APP2, and this is the stuff that goes on the zonal  
17          contracts, and the price to be put and paid for the  
18          zonal ...?

19       A. Because you produce files that tell them what you are  
20          giving them, right, and the envelopes have marks on them  
21          that can also tell them.

22       PROFESSOR ULPH: So you have to mark --

23       A. If you are doing a zonal item you have to put a zonal  
24          indicator on it, but it's primarily done through the  
25          files that you would submit to Royal Mail of which they



1 invoice you.

2 PROFESSOR ULPH: But you do have to put a mark on individual  
3 letters?

4 A. If it's going via a zonal, you have to put a zonal  
5 indicator on it so that they know it's an A, B, C or D.

6 PROFESSOR ULPH: Roughly how much does that cost? Does that  
7 cost much to do that?

8 A. To put on the zonal indicator?

9 PROFESSOR ULPH: Yes.

10 A. It gets quite complicated, I am afraid. Nothing really  
11 but if you are separating out, if you are doing one  
12 mailing and then trying to arbitrage, then you have got  
13 to potentially run the machinery twice. So the cost  
14 isn't to the client, the cost isn't to us, the cost is  
15 really in the mailing, the print mailing house, if you  
16 like.

17 PROFESSOR ULPH: Okay. That's helpful.

18 The second question is: how do you decide which mail  
19 you put through the national plan and which mail you put  
20 through the zonal plan, and at what level in the  
21 organisation is that done? Because to meet the national  
22 plan profile, presumably it's the mail across the  
23 entirety of the business that tells you whether or not  
24 you have delivered that. So how do you coordinate  
25 within and across the business to ensure that you're

1 meeting that profile at the same time as putting this  
2 amount of mail out --

3 A. There is one point I want to make here, because it's  
4 a suggestion we were doing this back in 2013, and my  
5 testimony says that we were not. So --

6 PROFESSOR ULPH: That's fine, but --

7 A. But I do know quite a bit about it.

8 PROFESSOR ULPH: Okay, based on your knowledge.

9 A. Now I've lost the track. Sorry. I know a lot about it  
10 but I've lost my track.

11 PROFESSOR ULPH: How do you actually organise this inside  
12 the organisation? How do you determine and at what  
13 level inside the organisation do you make decisions  
14 about this mail goes --

15 A. It's really done by software on the print machinery at  
16 the print house. Okay, so when they're printing,  
17 they're printing whatever the item is, they're printing  
18 the address, they may print a zonal indicator, they may  
19 print a barcode on it, for a whole host of reasons.  
20 Right? So when it's going through that process, the  
21 software that they have determines it at that point.  
22 You would put into it a whole host of algorithms that  
23 I wouldn't understand, but a whole host of algorithms  
24 that say: right, if you have got this, you can move that  
25 to there and that to there.

- 1 MR FRAZER: Would that take account of your profile, your  
2 national profile, which might depend on post which is  
3 not going through that mail house?
- 4 A. Yes, yes. If you were doing this you would have to keep  
5 a very close eye on it and an individual company may  
6 find it almost pointless doing it. It only really works  
7 I guess if there is a big consolidation of mail, and  
8 typically those that were doing this back then were  
9 doing it either with their unsorted mail or they would  
10 ask a client to send them the data and they would sort  
11 the data and then present that data to the mailing  
12 house, who would present it. Okay? And all the time  
13 they're trying to balance their overall profile so that  
14 they're not moving into surcharges for urban density or  
15 national spread matters. That's what they are trying to  
16 do all the time.
- 17 PROFESSOR ULPH: Does the process of actually designing the  
18 software and running the software and managing that  
19 system, does that incur additional costs for the  
20 business?
- 21 A. There is cost to writing software, of course, there  
22 would be costs for a print house, let me call it that,  
23 to put this into their systems, and there may be a cost  
24 because ultimately you are presenting the mail slightly  
25 differently, so there is an element of cost there as

1 well. There is no cost to the client but there is  
2 a cost in the rest of the supply chain.

3 PROFESSOR ULPH: Okay. Is that potential cost part of the  
4 reasons why some businesses including your own might be  
5 reluctant to do that, or is it just you might be  
6 reluctant to do that because your profile fits the  
7 national profile sufficiently well that you don't really  
8 need to do the arbitrage? What might drive this?

9 A. Cost savings.

10 PROFESSOR ULPH: You are cost saving by doing the  
11 arbitraging.

12 A. Yes, because the amount that one might save by moving it  
13 out of a national price on to an urban price outweighs  
14 any costs that you might incur.

15 PROFESSOR ULPH: So if you thought the normal amount of mail  
16 or pattern of mail you would get fits sufficiently well  
17 with the national profile, there is no value to you in  
18 arbitraging, really, particularly, is there?

19 A. There could be.

20 PROFESSOR ULPH: Okay.

21 A. There could be.

22 PROFESSOR ULPH: If you take out this --

23 A. Yeah, there could be. As I say, it is quite tricky.  
24 You can't just take all your mail and say, right, I'm  
25 just going to do it to everything.

1 PROFESSOR ULPH: No, you're not.

2 A. You would have to be very careful about how the profile  
3 of your national postings are moving and changing,  
4 otherwise you could end up, you would end up quite  
5 rightly from Royal Mail surcharging against this change  
6 in profile. So what companies try to do is manage this  
7 profile all the time, if they're arbitraging, to move  
8 work off onto a lesser priced item.

9 It's also worth pointing out that just because there  
10 is a zonal based contract doesn't mean that everything  
11 in there is being arbitraged, because there is lots of  
12 companies that would use a zonal contract, that's why it  
13 was set up in the first place, there is lots of  
14 companies that would use a zonal contract because they  
15 do have mail that just goes to urban areas. So it's  
16 actually quite difficult, my guess is, for Royal Mail to  
17 truly see what is genuine use of it and what is not.

18 PROFESSOR ULPH: But for a company like Whistl which is  
19 potentially sending into all types of zones, arbitrage  
20 is only really valuable if it's stopping you making --  
21 paying surcharges. Is that a way to put it?

22 A. Well, we didn't do it to any extent.

23 PROFESSOR ULPH: Okay. Had you been a company of the size  
24 that would have done it ...?

25 A. Well, if we were, then we would assess the value that

1           came back to it that we would either have to provide or  
2           share or whatever across that supply chain, including  
3           the client, and did that outweigh any threat of the  
4           surcharges that you might incur.

5           PROFESSOR ULPH:   Okay.

6           THE CHAIRMAN:   Can we add the term algorithmic arbitrage to  
7           the glossary please?

8           PROFESSOR ULPH:   Thank you, that is helpful.

9           MR FRAZER:   Just one follow-up on that.   You say there would  
10           be some costs in the supply chain from the arbitrage  
11           costs you mentioned and that that wouldn't go with the  
12           client and it wouldn't stick with you.   Where did that  
13           particular buck end up?

14          A.   Some of it may sit with us or another provider.   It sits  
15           typically when the mail is being produced, because it's  
16           at that point that the items are printed, the  
17           appropriate indicias and barcodes and so on are printed,  
18           and the mail is -- through the software that's provided  
19           is then sorting that mail and it is trayed at that  
20           point.

21           What you can end up with is having to run your print  
22           run twice, at the worst case scenario, because you are  
23           printing the stuff that's going on a national and the  
24           stuff that's going on a zonal separately.   All right?  
25           Then you will produce -- so it's taking time, it's

1 taking effort, it's taking money, because of the  
2 opportunity cost. Then the presentation of it to  
3 Royal Mail will be -- there would be more trays involved  
4 because you are presenting it in a different way, for  
5 example. Does that help?

6 MR FRAZER: Yes, it does.

7 PROFESSOR ULPH: Very helpful, thank you.

8 THE CHAIRMAN: Mr Beard, what is your timing now? Having  
9 taken up your time.

10 MR BEARD: I was hoping I might be able to be concluded by  
11 4.30. I will try and go faster so that re-examination  
12 can be undertaken this afternoon and Mr Polglass can be  
13 released.

14 THE CHAIRMAN: That will be helpful. Mr Turner, you are  
15 going to re-examine, presumably?

16 MR TURNER: Yes.

17 THE CHAIRMAN: Mr Holmes, are you planning to ask any  
18 questions?

19 MR BEARD: Not at this point, sir.

20 THE CHAIRMAN: Please proceed.

21 MR BEARD: I don't know how long Mr Turner will need.

22 THE CHAIRMAN: We don't want Mr Polglass to have to return  
23 tomorrow, though I suspect he may be here anyway.

24 A. If I'm not here, it would be helpful, to be honest,  
25 because I've got a rather important --

1 THE CHAIRMAN: We're the best judge of that, aren't we?

2 A. I guess.

3 THE CHAIRMAN: Let's do what we can.

4 A. If I'm needed I'll be here, is the truth.

5 THE CHAIRMAN: Right. Crack on.

6 MR BEARD: I'll try and move it along as quickly as

7 possible.

8 So we spoke earlier about conversion of customers,

9 and you deal with that in your witness statement in

10 paragraph 14, and 15, and you pick up some of the points

11 in 17 as well. Broadly speaking, what you are

12 indicating is that for your business plan it was

13 important that you converted customers that you had on

14 your access services; is that right?

15 A. Yes.

16 Q. Yes. You factored conversion rates into your business

17 plans, and I won't take you back to it unless you want

18 me to, but your business plan, or rather the investment

19 memorandum, May 2013, talked about a forecast to reach

20 88% conversion by 2017?

21 A. That's correct.

22 Q. You recall that?

23 A. Yeah.

24 Q. I won't go back to that. If we could just, though, pick

25 up in bundle C4A at tab 32, back to the Project Luke



1 document, slide 53.

2 A. Which page?

3 Q. Page 53, Mr Polglass. You will see there the heading:

4 "Management has re-based its original conversion  
5 forecast to reflect slower than expected conversion to  
6 date. The amended forecast is built bottom-up based on  
7 individual customer expectations and appears sensible."

8 So as compared with the earlier business plan,  
9 there's actually been quite significant underachievement  
10 of forecast conversion rates, and in particular that's  
11 taken from specified customers. So if one sees the two  
12 columns, and I'm not going to refer to the customers,  
13 you can see there that you had "Forecast for 2012" on  
14 the left-hand side, and then on the right-hand side you  
15 have got the Q3 2013 actual conversions. So if you  
16 compare that right-hand column "Q3 2013 actual  
17 conversions" with the Q3/13 forecasts, you will see that  
18 ironically, apart from the first of the customers, there  
19 is a significant disparity all the way through between  
20 forecast and achievement. That's correct, isn't it?

21 A. That's correct.

22 Q. Yes. So there are some recalibrated forecasts that are  
23 lower, that's then put in place; that's right, isn't it?

24 A. That is correct.

25 Q. So this was during 2013, the conversion rates were being

1 re-based downwards.

2 Now if we skip forward to bundle C4C at tab 125, and  
3 you go to slide 29, here you have conversion rates from  
4 the Luke documents to which we have just been referring  
5 in blue and the new base case in red, and you will see  
6 that the forecasts are not only lower in terms of  
7 conversion, but have moved out to the right. In other  
8 words they're delayed as well.

9 So again, what we have is a trajectory of conversion  
10 rates falling short of forecast including of the amended  
11 forecast in Luke; that's correct, isn't it?

12 A. Yes, there is two things. One is the conversion of  
13 individual clients that you are highlighting, which was  
14 back in 2013. The other here, during -- from  
15 December 13 through to this point in time, or rather,  
16 sorry, from January 14 through to this point in time,  
17 our plans were on hold pretty much.

18 Q. Well, let's just think about that. You say your plans  
19 were on hold. You were still rolling out, weren't you,  
20 in January 2014?

21 A. We rolled out two more in 14 because we were already  
22 committed to do so.

23 Q. Yes, but you were continuing to roll out and you had  
24 made your complaint and the pricing had been suspended,  
25 hadn't it?

- 1 A. Yes, but that doesn't give any confidence to clients,  
2 does it?
- 3 Q. Well, if in these circumstances you are able to offer  
4 the sorts of advantages you say that you are able to  
5 offer, attributing the difficulties to that suspended  
6 price differential is a bold piece of causal analysis,  
7 isn't it, Mr Polglass?
- 8 A. Yeah, well, I am bold.
- 9 Q. Yes, Mr Polglass, I'm sure you are. But here you have  
10 a situation where you have moved the timing of your  
11 eventual target of 88% out by two years, haven't you?
- 12 A. We have.
- 13 Q. And, furthermore, this is part of an overall trajectory  
14 of not hitting the forecasts that we saw had started  
15 well before the price changes in question, hadn't we?
- 16 A. We were about 5% -- 5 points, sorry, 5 points off of our  
17 trajectory throughout most of the roll-out of our  
18 business, end business. When we reached, as I've said,  
19 January 2014, the position that we had certainly meant  
20 that getting further conversions was extremely unlikely.
- 21 Q. Well, let's just think about that. You are talking  
22 about conversions of your existing customers, and you  
23 had made very clear, as we heard earlier today, that you  
24 had gone out of your way to explain that customers would  
25 not suffer any detriment by reason of even the

1 proposals, had they been implemented; that's correct,  
2 isn't it?

3 A. That's what I said, yes.

4 Q. Yes. In those circumstances, those customers -- because  
5 we're talking about conversion of those customers --  
6 would have had your guarantee in relation to that issue,  
7 wouldn't they?

8 A. They would.

9 Q. And in circumstances where not only did they have that  
10 guarantee but in fact, after February 20, the price  
11 differential and indeed all of the CCN price changes  
12 were suspended, they could be confident in conjunction  
13 with the guarantee that they were not going to face  
14 those increased prices that you were so concerned about?

15 A. You would need to understand our clients a lot better.  
16 Many of them, if you take the large financial services  
17 industry, they're very conservative in their approach.  
18 They take a considerable period of time to make  
19 decisions about these types of changes and moves, and  
20 the fact that we were effectively waiting for  
21 an outcome, it's no surprise at all to me that our  
22 conversion rate pretty much came to a stop.

23 What we would have is someone like a big financial  
24 services that was converted but they wouldn't then move  
25 across other streams of traffic. So they may have given

1           us some statement traffic, but they wouldn't move across  
2           other streams of traffic.

3       Q.   But the other streams of traffic, that's not the  
4           conversion rate you are talking about here, is it?

5       A.   Yes.   Conversion rate is a conversion of volume.

6       Q.   Yes.

7       A.   Okay?   So a large mailer, 375 million items, if we've  
8           converted them but they are giving us 29% of the volume  
9           that -- allowing us to move that into our own delivery  
10          network, during this period they stopped moving across  
11          any more streams of traffic.   So we retained what we  
12          had, we continued to deliver that, but they did not move  
13          across any more streams of traffic until they knew for  
14          certain what the next steps were going to be.

15      Q.   So you are saying that the concern they had was the  
16          delay in relation to the resolution of the complaint  
17          during 2014 and 2015; is that correct?

18      A.   They had a concern about the length of time it may take  
19          and the outcome.

20      Q.   Did any of them set out any of these concerns in  
21          writing, Mr Polglass?

22      A.   I don't know.

23      Q.   Actually there were a range of concerns that  
24          conservative institutions might have in relation to  
25          Whistl's business in any event, some of which we have

1 already been canvassing. The fact that it was a new  
2 service and therefore there was a perceived risk in  
3 moving away from Royal Mail might be one of them for  
4 a conservative organisation?

5 A. Yes, but you would also need to understand that there  
6 was a pent-up desire amongst ours and other mailers to  
7 have an alternative delivery network. Royal Mail's  
8 prices were going up substantially year on year on year,  
9 and they wanted an alternative commercial operation that  
10 they could use, and that would be competing with  
11 Royal Mail.

12 Q. Of course, Mr Polglass, that is how you analysed the  
13 market, because that is the basis on which you justified  
14 the project. But you have a situation where you are  
15 launching a new service, you are restricted effectively,  
16 you think, in relation to the discounts you could offer,  
17 you have to recognise, I think, that some customers  
18 simply prefer a different level of service than the  
19 three-day service; that is correct, isn't it?

20 A. Some would.

21 Q. Yes.

22 A. That's why there is a variance in service levels within  
23 Royal Mail also.

24 Q. It may well be that you underestimated the number of  
25 people that actually wanted a higher level of service,

- 1           isn't it?
- 2           A. Plainly we underestimated, as I've already said, we were  
3           five points below our expected conversion rate. We also  
4           had clients that felt that it was worthwhile them moving  
5           to it once a level of roll-out had been achieved. So we  
6           had, just like in any business, we had early adopters  
7           and we had those that wanted to wait and see how this  
8           went, and when it reached 15%, 20%, 25% coverage they  
9           would move across.
- 10          Q. But there were a whole range of other factors, weren't  
11          there, that would be determinative of whether somebody  
12          wanted to move, wouldn't there?
- 13          A. There always is.
- 14          Q. Let's just look at the progress of your roll-out, if we  
15          may. Could we go back to C4A, tab 2. So this is your  
16          initial business plan. Could you just explain what we  
17          see on slide 14, please?
- 18          A. (Pause). This is a depiction of our roll-out.
- 19          Q. So you have got the years 2012 through to 2016, and then  
20          you have got Royal Mail's SSCs, so 5, 11, 19, 24, 26.  
21          Is that the number of SSCs you expected to roll out in  
22          each year?
- 23          A. That was the cumulative number that we were aiming for.
- 24          Q. Then "Volume bin items" -- "billion items", I'm sorry.
- 25          A. Yeah.

1 Q. That's the number of actual letters that you expected to  
2 be processing in each of those years; is that right?

3 A. That's correct, yes.

4 Q. Yes. Then sorting depots you would open, sorting  
5 machines you would use, delivery units and headcount for  
6 delivery; is that right?

7 A. That's correct.

8 Q. So by the end of 2013, just on your cumulative approach,  
9 you expected you would have rolled out to 11 SSCs; is  
10 that right?

11 A. That was the original plan, yes.

12 Q. Yes. So let's just go forward to tab 10. If we go up  
13 to slide -- sorry, I'm not sure we need to deal with  
14 tab 10. If we could go to tab 55 in C4B, we can move  
15 forward faster. C4A (sic), tab 55.

16 A. C4A?

17 Q. B. I'm so sorry. Did I say A? I apologise,  
18 Mr Polglass. Tab 55. So at slide 4 in this pack, in  
19 terms of layout, we have a slide that's rather similar  
20 to the one we saw?

21 A. Yes.

22 Q. Could you explain what we see on this slide, please,  
23 Mr Polglass?

24 A. This is the actual performance in red against those  
25 original plans.



1 Q. So just to be clear, what you are saying is that in 2012  
2 rather than rolling out five you had rolled out three --  
3 to three SSCs, and in 2013 you had rolled out to five  
4 rather than 11, so just under half what you had hoped  
5 and expected to hit?

6 A. That's correct.

7 Q. That's correct. And then in terms of volume, in the  
8 first year you were a little bit under, in the second  
9 year you were around half your forecast?

10 A. Yeah.

11 Q. And then in terms of delivery units, first year you were  
12 quite close to the number you had anticipated; second  
13 year, you were very substantially behind the intended --

14 A. That's probably less relevant, but yes.

15 Q. Understood. Then headcount, well, we can see, that's  
16 people involved.

17 Then if we just go over the page or across the page  
18 to December 2013, can you just explain what we're seeing  
19 on that page, please?

20 A. (Pause). This looks like our -- this looks like our new  
21 forecast to roll-out to a steady state of the coverage  
22 that we had planned.

23 Q. Right, so this is December 2012, and this is the  
24 forecast ... I'm just slightly unclear, because this is  
25 in 2013, at the end of 2013, and you have figures here

1           that don't match either the actuals or the previous  
2           forecasts.  Sorry, I'm not trying to be obtuse, but if  
3           you look at, for instance, volumes, you have  
4           0.01 billion, and that is neither the pilot nor the --  
5           it's neither the actuals nor the previous forecast.

6           A.  I can't explain that.

7           Q.  No.  Fine.  If you can't, I'm not going to even venture  
8           to, Mr Polglass.

9                        So if we go back -- if we can close C4B, I'm not  
10           going to ask you any further questions in relation to  
11           that one -- to tab 32 in bundle C4A, so this is the PwC  
12           due diligence report, and we pick that up at page 47, if  
13           we could.

14          A.  37, did you say?

15          Q.  47, I'm so sorry.

16          A.  Sorry.

17          Q.  (Pause).  So I'm only just highlighting what has been  
18                said here, that what was key was the TNT Post's E2E  
19                volumes are predominantly --

20          A.  I'm sorry, Mr Beard, I think I'm looking at the wrong  
21                files.

22          Q.  I apologise.  C4A.

23          A.  Yes.

24          Q.  Tab 32.

25          A.  Is it page 47?

- 1 Q. Yes, it is.
- 2 A. I was on tab 47.
- 3 Q. I'm sorry, I probably wasn't clear.
- 4 A. Okay.
- 5 Q. Just at the top of the page:
- 6 "TNT Post's E2E volumes are predominantly driven by
- 7 the speed of their physical roll-out and their ability
- 8 to convert customers."
- 9 I have already taken you to considerations in
- 10 relation to the conversion of customers. In relation to
- 11 physical roll-out, what we are seeing in the tables that
- 12 we have just encountered is that there were significant
- 13 delays in relation to the rolling out of Whistl's
- 14 end-to-end service to SSCs already in 2012 and in
- 15 particular in 2013; that's correct, isn't it?
- 16 A. Yes, predominantly driven by our parent company, PostNL,
- 17 who were not prepared to continue with the funding.
- 18 Q. I see. Now, just on PostNL, I'm just curious about
- 19 them. You obviously don't provide evidence on behalf of
- 20 PostNL. Do you think there is any reason why PostNL
- 21 wouldn't have answered questions if any had been put by
- 22 Ofcom to them?
- 23 A. I wouldn't know why they wouldn't, no.
- 24 Q. There is no reason why they wouldn't answer any
- 25 questions posed by Ofcom to them?

1 A. Not that I can give you an answer to, no.

2 Q. No, thank you.

3 A. I'm sure that if they didn't, I'm sure they had their  
4 reasons, but I don't know them.

5 Q. I think they weren't asked, Mr Polglass. They weren't  
6 asked.

7 Briefly, I'm just going to ask you about VAT appeal.  
8 We have touched on it earlier when we were looking at  
9 certain documents. Now, you say in your witness  
10 statement at paragraph 22:

11 "The business plan was never based on the challenge  
12 succeeding."

13 That's right at the end of paragraph 22. Sorry,  
14 I don't want to rush you through it.

15 A. Sorry, I wasn't expecting you to -- yes, that's correct.

16 Q. You hoped you would win the challenge, but here you are  
17 saying the business plan wasn't based on it. If we  
18 could go back to C4A, tab 2, and just look at that  
19 original business plan, if we could, again. If we pick  
20 it up at slide 28, you will see this is the slide we  
21 went to earlier when I was asking you questions about  
22 labour issues. Just moving backwards to point 3, you  
23 see this is undertaking actions to mitigate the  
24 regulatory risks, VAT, Royal Mail access and retail  
25 service, VAT exempt, VAT law challenge, VAT compensation

1 required, and you say mitigating action -- sorry, VAT  
2 compensation required is meaning that you compensate  
3 your customers for the difference; that's correct, isn't  
4 it?

5 A. Yes, that's our risk.

6 Q. And mitigating action, court hearing 2012, court ruling  
7 September 2012.

8 Then if you go across the page to page 29 or slide  
9 29 and look at the heading, it rather speaks for itself:

10 "VAT volumes crucial for profitability."

11 A. The plan that we put before LDC as a potential investor  
12 absolutely did not have VAT as part of the profitability  
13 in that plan.

14 Q. We will come on to that. I just want to be clear. This  
15 is your original business plan, and it says "VAT volumes  
16 crucial for profitability", and when it says "volumes"  
17 it doesn't mean volumes of post, it means money, doesn't  
18 it?

19 A. Plainly if the court ruling had been in our favour, it  
20 would have made a significant difference.

21 Q. Yes.

22 A. Certainly.

23 Q. At that time you were saying that was crucial. You are  
24 quite right, we do need to move on through it. If we  
25 look at the sensitivities which you prepared for Ofcom

1 in September 2011, let's just go back there. Whistl  
2 bundle, tab B3. So we are moving back in time for  
3 a moment before we go forward. I'm so sorry, it's the  
4 Whistl bundle. It's not the cross-examination. It's  
5 probably the -- I don't know how large your Whistl  
6 bundle is.

7 A. This is right.

8 Q. It's the document that says "TNT E2E Ofcom  
9 12 September 2011".

10 A. Yes.

11 Q. So this was a presentation you made to Ofcom; is that  
12 correct?

13 A. I didn't personally, but ...

14 Q. Have you seen this material before?

15 A. Not -- certainly not recently.

16 Q. Well, I'll take you to the slide and if you are able to  
17 answer, excellent. If not, leave it.

18 If you go to slide 14, the statement being made  
19 there at that time was:

20 "Further delay in VAT resolution will put the E2E  
21 business case at risk. E2E will only be profitable by  
22 early VAT solution."

23 So that's saying that the VAT exemption for  
24 Royal Mail critically needed to be removed in order for  
25 the E2E business plan to work; that's correct, isn't it?

- 1 A. That's -- that's what it says, yes.
- 2 Q. Yes. That's what it says. And that is Whistl saying  
3 that.
- 4 Let us then --
- 5 A. Well, I would simply -- if I can?
- 6 Q. Yes.
- 7 A. I would simply add that we talked earlier on that plans  
8 do change.
- 9 Q. Yes, and I'm going to take you up to May 2013 now, so  
10 that may be where we see some differences. It's in core  
11 4A at tab 10, it's the Luke investment memorandum.
- 12 A. What tab, sorry?
- 13 Q. 10. What we have seen so far is representation to Ofcom  
14 that VAT was critical, your business plan saying that  
15 VAT was critical to profitability, and now we come to  
16 the Luke memorandum. As you say, you have changed the  
17 way that you approached these issues. If we look at  
18 slide 5 -- I'm sorry, slide 6 I think it is. Yes, slide  
19 6, I apologise, my notes are wrong.
- 20 Slide 6, left-hand side, the second statement from  
21 the bottom in black, just after an ellipsis, starting  
22 "67 million ..."
- 23 A. I see that.
- 24 Q. "Year 18, assuming resolution of VAT inequality in Q2  
25 2016."

1           So the executive summary is that you're assuming  
2           resolution of VAT inequality, by which you mean success  
3           in your challenge, in Q2 2016, aren't you?

4           A. Yes.

5           Q. Yes.

6           A. Yes, but the investment plan that LDC, PostNL and  
7           management would have invested in did not include any  
8           benefit coming from VAT. It was seen as a potential  
9           upside, if it happened.

10          Q. The impact of it was, when you lost the case, that it  
11          made the position so far as an investor was concerned  
12          more fragile, didn't it?

13          A. It reduced it from 67, and I'm sure it's in here, but  
14          I think it reduced it to 55.

15          Q. So it was a significant drop, 12?

16          A. But that was the investment plan that was being  
17          presented to our external investors, and the investors  
18          were PostNL, LDC and management itself.

19          Q. Let's go on to slide 61. Sorry, 62. I apologise, my  
20          notes are all one out at the moment. Here we see  
21          "VAT -- currently an uneven playing field". If we look  
22          on the right-hand side, second bullet:

23                 "This has a significant impact on the ability of  
24                 effective competition in the market; customers ... who  
25                 cannot recover the VAT they pay on the supplies of goods



1 and services ... are required to pay an effective higher  
2 price due to the irrecoverable VAT they incur for  
3 otherwise equivalent services."

4 What you mean is they have to pay you an effective  
5 higher price for what you considered to be equivalent  
6 services; that's correct, isn't it?

7 A. It particularly affects, of course, those customers who  
8 cannot reclaim VAT.

9 Q. Yes. Sorry, it isn't for all customers, it's for that  
10 focus particularly; I understand. And those include the  
11 major financial institutions; is that right?

12 A. They do.

13 Q. Yes?

14 A. Yep.

15 Q. You then say in your third bullet:

16 "... this distortion makes VAT inclusive charges for  
17 final mile delivery 'overpriced' to such customers  
18 thereby preventing TNT Post from competing with  
19 Royal Mail and delivering significant mail volumes from  
20 these customers who can't recover their input ..."

21 So that's the point you have just made, isn't it?

22 That's right?

23 A. Yes, these are factual statements really, aren't they?

24 Yes.

25 Q. I am just confirming that you concur, because you were

1 talking about how things had changed, and this is in  
2 relation to the Project Luke memorandum, I wanted to be  
3 clear where we were with it.

4 Then sixth and seventh bullets there, you are saying  
5 to the investor you have got a very good chance of  
6 winning?

7 A. (Pause). Do you want me to respond?

8 Q. No. I'm just confirming that I'm correctly interpreting  
9 those; yes?

10 A. We were indicating that the advice that we were still  
11 being given at that point is that there was a chance  
12 that we might win, yes.

13 Q. It's more than that, it's more positive than that, isn't  
14 it, bullets 6 and 7?

15 A. Well, it's a view that we had that we would win the VAT  
16 case. But as I've said already, we didn't include it in  
17 the LDC business case.

18 Q. Well, if you go to the penultimate bullet point, it  
19 says:

20 "Based on the assumption that Royal Mail's VAT  
21 exemption will be removed by April 2016, the financial  
22 benefits of this to TNT Post are modelled from this date  
23 and explained in detail in the financial forecast  
24 section."

25 A. That's right.

1 Q. So in fact you were modelling it and including it in the  
2 investment.

3 A. I didn't say we weren't modelling it, Mr Beard. We were  
4 modelling it. It was an upside to the plan. It wasn't  
5 part of the investment plan, so if it happened, it was  
6 a substantial upside.

7 Q. Then if we go on to tab 32, which is the PwC material,  
8 PwC were effectively saying that you should remove the  
9 VAT equalisation that you had modelled in the base case  
10 from that modelling, and if you go to slide 104, so  
11 tab 32, slide 104, here you can see, I think, the point  
12 that you have been trying to anticipate in a number of  
13 your answers. A VAT resolution is forecast to be worth  
14 around 12 million a year but the E2E business case is  
15 not dependent on the success of resolution. I think you  
16 have accepted that it does make a very significant  
17 difference to the overall profitability of the business  
18 plan; that is correct, isn't it?

19 A. It is correct.

20 Q. Yes, and if we could just close C4A and go to C4B,  
21 tab 55, this is a presentation to Ofcom,  
22 Riverside House, 9 December. If we go to slide 9, this  
23 is what you are saying at the beginning of December.  
24 You are emphasising here to Ofcom the significant impact  
25 of no VAT resolution impacting the business case; that's

- 1 correct, isn't it?
- 2 A. It is.
- 3 Q. What you see on the left-hand side at the bottom, I'm  
4 not going to refer to numbers again, although I'm not  
5 sure ironically they're confidential.
- 6 A. I don't believe they are.
- 7 Q. But I don't think the risks are confidential. It says:  
8 "Without VAT volume the business case is less  
9 viable."  
10 So it was a significant impact even though it had  
11 been taken out of the base case on PwC's advice; that's  
12 correct, isn't it?
- 13 A. It is, but it was the case that LDC was engaged with  
14 from the start.
- 15 Q. It's clearly something LDC were aware of, because the  
16 PwC draft due diligence was prepared for them, wasn't  
17 it?
- 18 A. Prepared for them, yes.
- 19 Q. Yes.
- 20 A. Yes, yes.
- 21 Q. So you lost the VAT challenge. It would have  
22 significant profitability impact. Did you break that  
23 news to LDC?
- 24 A. Me personally?
- 25 Q. Yes.

1 A. No.

2 Q. No. I'm going to move on to another topic, if I may,  
3 Mr Polglass. You can close C4B.

4 THE CHAIRMAN: Still on track, Mr Beard?

5 MR BEARD: I'm not sure I'm going to get done in the next  
6 ten minutes or so. I probably have about half an hour.  
7 So it may be that, given that I don't know how long  
8 Mr Turner is going to be, but it may be that we're going  
9 to run into tomorrow. I'm trying to cut things down and  
10 move along.

11 MR TURNER: I so far have seven questions.

12 THE CHAIRMAN: How are our shorthand writers doing?

13 (Pause)

14 I think for Mr Polglass' convenience --

15 MR BEARD: I would much prefer that.

16 THE CHAIRMAN: In which case we will have a short break now  
17 and then reconvene and try and finish at 5 o'clock.

18 MR BEARD: I will try and cut things down.

19 (4.20 pm)

20 (A short break)

21 (4.25 pm)

22 MR BEARD: In the interests of getting through and ensuring  
23 Mr Turner has time to re-examine, I'm going to put  
24 various propositions to the witness without necessarily  
25 going through all of the documentary material.

1 THE CHAIRMAN: That may be something of a relief, Mr Beard.

2 MR BEARD: For us all, Mr Chairman, yes.

3 Now, I was just then dealing with issues concerned  
4 with the VAT appeal. I just want to deal with a few  
5 other factors that affected the way in which the  
6 business plan operated or rolled out.

7 The first is that in fact what we see is that there  
8 were underestimates by Whistl of the levels of discount  
9 that would be required to attract customers to your E2E  
10 service and they were actually much higher than you had  
11 initially expected. For example, in the Project Luke  
12 memorandum, which we have been to on a number of  
13 occasions, the estimate was of 5%. Do you recall that?

14 A. Yes, I believe so, yes, I believe that's correct.

15 Q. What turned out was that in fact you needed to offer  
16 much more significant discounts, and actually to  
17 shortcut this, if the tribunal has bundle RM5C, and  
18 Mr Polglass, if you go to your witness cross-examination  
19 bundle, tab 14.

20 PROFESSOR ULPH: So which tab for us?

21 MR BEARD: Sorry, it's the first tab in the bundle. I'm  
22 going to go to paragraph 545 on page 40.

23 Just picking it up at 545, you should have  
24 an extract there from the report of Mr Harman, and he  
25 has just done some calculations. I'm not asking you to

1 test or agree with the calculations, but he indicates  
2 that the levels of discount that you had to provide both  
3 for non-VAT exempt customers and in particular for VAT  
4 exempt customers were much higher than 5%; you agree  
5 with that?

6 A. Yes, it is I think saying 7% here, so if you refer to  
7 that as "much". Of course what we also had during the  
8 period since the earlier plan, Royal Mail had  
9 substantially increased its prices.

10 Q. Understood.

11 A. So 5% off of a much higher number, 7% off of a much  
12 higher number.

13 Q. The next topic very briefly I want to touch on, we can  
14 close Mr Harman but I am going to go back to him  
15 shortly, so it might be worth keeping the file out.

16 A. I'll keep it on one side.

17 Q. Another factor: you lost key customers. You deal with  
18 this at paragraph 24 in your witness statement. The  
19 loss of a master bid for HMRC, DWP, DVLA mail. So this  
20 is customs and tax, work and pensions and driving  
21 licensing mail. So quite a substantial contract.  
22 I think you recognise that. You lost that contract.

23 Now, you say "We didn't ever plan on the basis of  
24 it", but that was clearly a blow, and you refer to it at  
25 the end of paragraph 24 as being one that probably you

1           wouldn't have won by reasons of political controversy,  
2           at paragraph 24.

3           A. Yes, perhaps for obvious reasons. But I should point  
4           out HMRC, DWP and DVLA until this point had been  
5           separately contracted.

6           Q. Yes.

7           A. As part of the Government's move to centralise  
8           contracting, these were merged together, I believe DWP  
9           ran it, and our element of it was HMRC. So we lost  
10          HMRC, that is true.

11          Q. Yes, and you lost -- that caused a 3% decline in  
12          volumes?

13          A. Yes, there were about 190 million items, if I remember  
14          correctly.

15          Q. When you talk about political controversy, that was  
16          a concern that, because of the position that Whistl was  
17          in, it was less likely the Government were going to  
18          award you contracts?

19          A. No, not -- nothing to do with us, frankly, but the  
20          positioning at the time of the Government with  
21          Royal Mail.

22          Q. A couple of questions about Localsort, if I may,  
23          Mr Polglass. In your witness statement at paragraph 77  
24          you say that the impact on end-to-end business by reason  
25          of Localsort undershooting its forecast growth and



1 development was minimal and you don't believe this would  
2 have had any impact on LDC's decision to invest.

3 Now, quite fairly you have consistently said you  
4 can't give evidence in relation to LDC, but just in  
5 relation to this aspect, if you go to your witness  
6 bundle at tab 14, and this is an extract from  
7 Mr Harman's report at paragraph 5.37.

8 So what Mr Harman sets out at 5.37 was that the  
9 position of Localsort in relation to its forecast was  
10 already well behind target in 2013, and he then goes on  
11 to consider its continuing decline. And in fact  
12 Localsort was actually anticipated by 2018 originally to  
13 have generated almost £40 million(?) in incremental  
14 revenues for you. That's correct, isn't it?

15 A. I don't recall the exact number, but it was -- it  
16 probably was of that size.

17 Q. Yes. That was around 40% of the total incremental  
18 direct revenues that you were expecting from the  
19 business in 2018, so it was a very significant amount?

20 A. It was. We hadn't lost all of our Localsort volume.

21 Q. No, sorry, to be clear I'm not suggesting you had lost  
22 all of it, but I'm just suggesting that it is  
23 a significant factor and certainly more significant than  
24 one might have taken away from your witness statement in  
25 the sense that Localsort was significantly falling

1 behind target and was an expected important element of  
2 the incremental direct revenues?

3 A. But what Mr Harman would not know is the discussions  
4 that we were having with the significant councils that  
5 were in the areas we were planning to roll out to.  
6 Liverpool is quoted on here. I'm not sure if I should  
7 quote it, but I'm going to. Birmingham Council, which  
8 is the biggest in Europe, who have their own CDA  
9 licences and do all of their own sortation, were going  
10 to transfer their equipment, assets and people to us.

11 Q. Right. You don't mention Birmingham at all in your  
12 witness statement, do you?

13 A. No. Well, we never got there, did we?

14 MR TURNER: I wasn't sure Mr Polglass had finished his  
15 answer.

16 MR BEARD: I'm sorry.

17 A. So Localsort was a concern for us primarily in London.  
18 We had lost, I think, a small group of councils from  
19 London. But I was confident, given the conversations  
20 I was having at Liverpool, given the conversations we  
21 were having in Birmingham, given the conversations we  
22 were having in Scotland, that we would get these  
23 volumes. Indeed, we did in fact win all of Government  
24 in Scotland at around this time.

25 Q. Still Localsort was well behind forecast, wasn't it?

- 1 A. It was at this stage.
- 2 Q. Presumably you updated LDC about the position in  
3 relation to Localsort?
- 4 A. We will have done, yes.
- 5 Q. We have touched on one or two elements of increased cost  
6 that you faced, in particular label costs. I'm going to  
7 run through one or two others that you were clearly  
8 facing as compared with your earlier modelling.
- 9 First of all, during late 2013 through into 2014,  
10 I believe that there were issues in relation to  
11 productivity; is that correct?
- 12 A. Erm ...
- 13 Q. Falling -- you had a drop in productivity to contend  
14 with? You don't recall?
- 15 A. What period?
- 16 Q. It was running through -- the business case update  
17 detailed it particularly during the period February to  
18 June 2014, but these productivity issues had arisen  
19 previously; that's correct, isn't it?
- 20 A. I would like to be able to give you a direct answer, but  
21 I'm afraid I cannot recall.
- 22 Q. There were various efficiency assumptions that you had  
23 made that turned out to be unduly optimistic; that's  
24 correct as well, isn't it?
- 25 A. We had a business plan that we were rolling out that

1           plainly was facing a cliff edge, and yes, we were  
2           reviewing every aspect of that business, every aspect of  
3           it.

4       Q.   You had also faced increases in sorting and labelling  
5           costs following on from the investment memorandum in  
6           May 2013 that you hadn't anticipated?

7       A.   Well, you will be able to highlight to the tribunal  
8           those where it's worked against us.  There were of  
9           course others where it worked in our favour.  On  
10          balance, it was pretty much neutral.

11      Q.   Well, I think we will come to see the position with  
12          Mr Harman.  But I'm just putting to you also: there were  
13          forecasts of significantly higher overheads being  
14          anticipated than had originally been envisaged in the  
15          investment memorandum as well; that's correct, isn't it?

16      A.   Well, as I say, no plan is perfect.

17      Q.   No.  That of course is true.

18      A.   But I'm pretty certain that the increases that were  
19          taking place within Royal Mail's base pricing added  
20          something like £9 million, for example.  So there's ups  
21          and downs across this whole piece.

22      Q.   Understood.

23      A.   Some worked against us, some worked in our favour.  We  
24          had improvements in our assets, we had some improvements  
25          in the properties, we had some improvements in IT.  But

1 I can't quote the numbers to you.

2 Q. I'm sure these will be matters on which Mr Harman will  
3 be cross-examined in due course, Mr Polglass.

4 Just going back to your witness statement, I think  
5 we had got through to paragraph 70. I'm going to pick  
6 up one or two final points. Just on 72, you talk about  
7 what you had been told by Frontier Economics, that  
8 Royal Mail's experts had suggested an economic cost of  
9 an as-efficient-competitor can be modelled on the basis  
10 of Royal Mail's costs for bulk mail but not including  
11 other costs, and you say that -- sorry, I should -- not  
12 including any costs that Royal Mail would incur anyway  
13 for delivering mail under all of their other services,  
14 and you say that doesn't make sense to you.

15 Now, you understand that what's being talked about  
16 there is effectively what's known as a measure of  
17 incremental costs, don't you?

18 A. I wouldn't claim to be an expert in this area, Mr Beard.

19 Q. Essentially what you are saying is that, rather than  
20 looking at these sorts of incremental costs, you should  
21 look at effectively the standalone costs of running this  
22 sort of business; is that what you are saying here?

23 A. Allow me to read it, please.

24 Q. Of course.

25 (Pause)

1 A. Yes, I guess I'm questioning which costs they should  
2 include and which they should not.

3 Q. Then just the penultimate sentence, you say:

4 "The assumption that a competitor would not have to  
5 at least partially fund these costs from the bulk mail  
6 business is not realistic."

7 So you are saying a competitor like Whistl would  
8 also share these costs across its bulk mail business and  
9 you take those into account; is that what you are saying  
10 there?

11 A. Yes, I believe so, yes.

12 MR BEARD: Thank you, Mr Polglass. I don't have any further  
13 questions for you. Mr Turner does, I understand.

14 A. Thank you.

15 Re-examination by MR TURNER

16 MR TURNER: Mr Polglass, I will try and rattle through.

17 I think I have round about eight questions. They all  
18 arise from things that you were asked by Mr Beard.

19 The first is in the C4A file, if that's anywhere to  
20 hand, and it's the first thing that you were shown by  
21 Mr Beard in tab 10, the investment memorandum.

22 A. Yep.

23 Q. We went in it to start with to page 44. You were asked  
24 a very basic question about the first row at the top,  
25 "High fixed costs of entry". Can you see that, do you

1 remember?

2 A. Mm.

3 Q. You were asked about the high fixed costs of entry and  
4 what was involved, and you were taken to, on the  
5 right-hand side, that first sentence:

6 "As a result of its DSA operation, TNT Post already  
7 has significant infrastructure in place."

8 Then the questioning stopped there.

9 If you could read also to the end of that box, the  
10 remaining sentence, and then comment again, if you have  
11 anything further to add, on the question of costs of  
12 entry into the E2E business.

13 (Pause)

14 A. Well, plainly we had an infrastructure, that's stated  
15 here, I think that's perhaps obvious because we were  
16 already handling 4 billion items of mail each year and  
17 handing those over to Royal Mail. What we didn't have  
18 is an end-to-end infrastructure of delivery units,  
19 sortation equipment, IT infrastructure, that met the  
20 needs, a bit like we were talking about with things  
21 like, you know, all the algorithms and so on. And that  
22 was a substantial investment, and as you can see from  
23 this, it was in circa £62 million by full year 18. So  
24 substantial investments were required by us in new  
25 assets and new properties and new equipment.

1 MR TURNER: Sir, before I move on, is there anything  
2 the tribunal would wish to ask on that issue?

3 PROFESSOR ULPH: Can I just ask you: to what extent are  
4 those investments you are talking about sunk  
5 investments? In other words, if you have bought this  
6 equipment or you have got some buildings, can you resell  
7 them to somebody else in the event that you cannot  
8 continue the business?

9 A. Well, of course the event was that we didn't continue  
10 that element of the business, and we wrote off those  
11 costs. So properties we didn't own we leased, we had  
12 lease contracts, they would be for three or five or  
13 whatever period of time they were. We had -- of course  
14 the IT investment was not -- we couldn't use that  
15 anywhere else. All of the handheld devices for scanning  
16 at the door, those types of things, of course were of no  
17 value, so those were written off.

18 We then had very significant sortation equipment  
19 which did the sort of inward sort of the mail. Those  
20 are -- those were designed specifically for us, and the  
21 software was built specifically for us. As I say, we  
22 had to -- for our end-to-end operations. So we had to  
23 write those off, which we did when we finally closed it.

24 PROFESSOR ULPH: Thank you.

25 MR TURNER: The second question related to tab 32, the PwC



1           due diligence report. Mr Beard then went on to ask you  
2           a question about slide 58, which is about the importance  
3           of getting national coverage. If you want to just look  
4           at that again, do you remember you were asked questions  
5           about that slide?

6           A. About slide 58?

7           Q. Yes, "At the point of 25% national coverage ...", if you  
8           have that, that's the slide you were asked about.

9                     In your answer you said that you thought that that  
10           slide should be considered in the context of the slide  
11           on the previous page, 57. Oh, I'm sorry, are you  
12           looking at the right document?

13          A. I don't think I am, actually, because --

14          Q. It's at tab 32 in the C4A file.

15          A. I'm sorry. Sorry, give me the numbers again.

16          Q. Page 58.

17          A. Yes.

18          Q. Do you recall this is the slide that begins:

19                     "At the point of 25% national coverage ..."?

20          A. Mm.

21          Q. You were asked questions about that, and in your answer  
22           you said, well, I think this slide should be considered  
23           in the context of the slide on the previous page.

24          A. Yes.

25          Q. Read the heading. You referred to the customers there.

1           There was no follow-up from Mr Beard; is there anything  
2           that you would wish to add about the interrelationship  
3           between these slides on the question of getting national  
4           coverage?

5           A. I think I did mention at one point that we had many  
6           clients, the largest mailers, who -- some are more  
7           conservative in their approach, we've got early adopters  
8           and we've got those that come on at the end, as it were,  
9           when everyone else has tested it for them. A number of  
10          these clients and other significant ones had indicated  
11          to us during the, if you like, the resale process that  
12          we were having with them that they needed a certain  
13          level of coverage before they might move across or  
14          before they moved all of their mail across, and it  
15          ranged from, as I say, those that were early adopters --  
16          Tesco is on there, Tesco was an early adopter, always is  
17          with us -- but others would require us to get to 15%,  
18          20%, 25% coverage, and then that made it particularly  
19          attractive to them to move across to us.

20          Q. Go to the third question. You were asked by Mr Beard  
21          about the likely relative impact on your business of the  
22          zonal tilt changes on the one hand and the price  
23          differential on the other hand. He did that by  
24          reference to the complaint witness statement from  
25          Mr Wells which is in C4B, tab 94. You will recall that



1           risked the upstream business that we had already built,  
2           and in risking that upstream business, that was the  
3           foundation for us to be able to do end-to-end. So if we  
4           were losing business out of our upstream element,  
5           plainly we wouldn't have it in our downstream.

6           The other point, and we did only talk about the  
7           price differential, we also talked about the tilt but  
8           then the surcharges that come as a result of us not  
9           meeting the profile could be very substantial indeed,  
10          potentially at full roll-out tens of millions of pounds  
11          per annum.

12         Q. Fourth question. Mr Beard took you to a group of,  
13           I think, four news cuttings from late April 2014, and  
14           comparing those with the times of your roll-out he  
15           suggested to you that those weren't teething problems.  
16           There was some confusion there, including about the date  
17           of the roll-out itself. You remember we talked about  
18           Manchester and Harrow and so forth?

19         A. Yes.

20         Q. Could you be shown the decision, which I think is in  
21           file C1, and go in it to page 111. If you cast your eye  
22           over the table there, which is -- or the figure --

23         A. Sorry, which page?

24         Q. 111 of the internal numbering of the decision. You will  
25           see a figure at the top, figure 4.8. Do you have that?

- 1 A. Original numbering, yep.
- 2 Q. You will see there a list of the areas into which you  
3 rolled out. Does that help you on the dates, the times  
4 when you rolled out into respectively the Manchester,  
5 Harrow and Barnet areas, or where in fact Barnet fits  
6 in?
- 7 A. Certainly. Yes, plainly Manchester was at the end of  
8 13, and then we rolled out to Harrow and Liverpool.
- 9 Q. Where does Barnet fit in? That was one of the news  
10 clippings that you were taken to.
- 11 A. I'm trying to picture in my mind where Barnet sits, and  
12 I'm afraid I'm struggling.
- 13 Q. All right.
- 14 A. I can't remember where Barnet is. I don't wish to cast  
15 anything about Barnet, I'm sure it's lovely, but I can't  
16 recall where it is.
- 17 Q. Do you recall the dates of those news clippings, or  
18 shall we look at that again briefly?
- 19 A. I don't recall --
- 20 Q. It's in the cross-examination bundle that was prepared  
21 for you, and they were all grouped together. Start at  
22 tab 7. You see at tab 7 that news clipping you were  
23 taken to?
- 24 A. Yes.
- 25 Q. You see the date at the top?

- 1 A. April 14.
- 2 Q. Yes, 23 April specifically.
- 3 A. Mm.
- 4 Q. If you turn to tab 9, which was Colindale, do you see  
5 the date at the top?
- 6 A. 28 April.
- 7 Q. If you turn back one tab to tab 8, Barnet, wherever that  
8 is.
- 9 A. Wherever it is, 25 April.
- 10 Q. Finally I think Manchester was the first tab 6.
- 11 A. 21 April. I should have remembered that, it's my wife's  
12 birthday.
- 13 Q. Can you add anything or do you wish to add anything to  
14 the response you gave to Mr Beard earlier in relation to  
15 whether these were or were not teething problems, having  
16 refreshed your memory on the timing?
- 17 A. (Pause). To be honest, I'm not sure what else I could  
18 add. Plainly these were disappointments to us. As you  
19 roll out into a new area, obviously recruiting new staff  
20 into those units, we go through a rigorous process of  
21 recruiting staff, they're all CRV checked, we go through  
22 a significant training programme with them as well from,  
23 believe it or not, how to ride a bike with some people,  
24 right through to of course all the route planning and  
25 everything else. When we are confident that they're

1 ready, they go out on their round.

2 It is, of course, a big disappointment to us and  
3 frankly to their colleagues when one of them lets us  
4 down. We would always spend time with those  
5 individuals, they would be disciplined, depending on the  
6 severity of the incident. If they had done something  
7 like a dumping here, they would also be reported to the  
8 police, and removed from our business.

9 I don't think there is anything else I could --

10 Q. If you turn -- question five -- to tab 12 in this same  
11 bundle if it's in front of you, the cross-examination  
12 bundle prepared for you. You were asked a series of  
13 questions about zero hours contracts, and you were taken  
14 to the publication there, if you have it at tab 12, from  
15 13 March 2015.

16 A. Yes.

17 Q. You were asked about the dates when you had the zero  
18 hours contracts still in place. There was some  
19 confusion about that. If you turn to the second page,  
20 please, under "New contracts" on the left-hand side.

21 A. Yes.

22 Q. If you read not just the first paragraph but the first  
23 sentence of the next, does that help at all on the  
24 question of the dates by which the zero hour contracts  
25 came to an end?

1       A. Yes. I was -- I knew we had zero hours contracts, I'm  
2       afraid my memory didn't serve me well on the dates,  
3       plainly.

4               We worked very well with Community, I thought.  
5       They're still our representatives of our staff, and we  
6       dealt with these types of issues, as they might see  
7       them, I think professionally and well. But plainly the  
8       timings that I had in my mind were not quite right. It  
9       looks like we finalised the deal which was then  
10      backdated to 1 January in 2015, and I think I was also  
11      asked about a living wage as part of Mr Harman's  
12      evidence, which it talks about here, but our commitment  
13      on living wage was that we would pay above minimum wage  
14      and we would then meet living wage through a series of  
15      bonuses, which was performance related.

16     Q. Mr Beard suggested, at the end of this line of  
17     questioning, that this was linked to LDC's decision in  
18     May 2015, which he said was two months later, not to  
19     invest. He did not, however, ask you a direct question  
20     about that, so I will ask: are you able to comment on  
21     that suggestion --

22     A. I think it's nonsense.

23     Q. -- of a linkage based on your own knowledge?

24     A. Sir, I think it's -- they're not related at all. All  
25     right? So I was involved in many meetings with -- both



1 internally within our own management group and with LDC,  
2 and there was no issue being raised with regard to them  
3 walking away from the deal because of our new contracts  
4 with our staff.

5 Q. Sixth, you were asked -- you can put that away -- by the  
6 tribunal about how arbitrage was done, and we've coined  
7 the term "algorithmic arbitrage" from the use of the  
8 software.

9 Do you know, from when has that software been  
10 available?

11 A. Each company that might be engaged in this might write  
12 their own software, so with regard to ourselves as  
13 Whistl, during the time that we're referring to here we  
14 had nothing. At a later date, late 2015/early 2016 we  
15 started to develop something.

16 Q. Last couple of questions. If we go back to C4A/10, C4A,  
17 the bundle, at tab 10, sorry, which is the investment  
18 memorandum, Mr Beard asked you a series of questions  
19 about the VAT issue and he took you to slide 6. This  
20 was on the question whether the business case involved  
21 positive resolution of the VAT issue.

22 A. I think I may be in the wrong spot again, I'm sorry.

23 Q. C4A is the bundle and you should have tab 10. The point  
24 is this: that he took you to the sixth slide and  
25 questioned you on that in relation to the role of

1 positive resolution of the VAT issue. I would ask you  
2 to turn to page 9, where you should have something  
3 headed "Executive summary. E2E -- why TNT Post? Why  
4 now?" Do you have that?

5 A. I do.

6 Q. If you look on the left-hand side, under the second  
7 figure, "Why now?", and the heading "VAT", if you read  
8 what's immediately under that, and then, having done  
9 that, read on the right-hand side the final bullet at  
10 the bottom of the page.

11 (Pause)

12 Now you have seen those two, I would ask you whether  
13 you would wish to add a comment on the role of the VAT  
14 resolution to the business case at this time?

15 A. I think it -- thank you. I think it reaffirms what  
16 I was saying, that whilst VAT resolution would have been  
17 an important factor, it was not critical and we had  
18 excluded it from the profitability of the profits that  
19 we were discussing with the three sets of investors,  
20 PostNL, LDC and management, and we therefore saw it very  
21 much as if we were successful, it was an upside to the  
22 case.

23 Q. Last question, doesn't require any documents. You were  
24 being asked at the end about your efficiency  
25 assumptions, and it was suggested that they had been

1           overoptimistic. In your answer, reading the transcript,  
2           you said:

3                     "We had a business plan that we were rolling out  
4           that plainly was facing a cliff edge, and yes, we were  
5           reviewing every aspect of that business ..."

6                     To be clear, what exactly did you mean by "facing  
7           a cliff edge"?

8           A. The cliff edge was that after many, many years of  
9           planning and building, we had reached a point where we  
10          felt the Royal Mail was taking a stance that would  
11          scupper the whole opportunity that we had to roll out.  
12          The cliff edge, therefore, was, if we were unsuccessful,  
13          if this carried rolling on, most importantly if LDC  
14          didn't invest, all of that effort, all of those years of  
15          hard work for this very purpose were going to be killed  
16          off.

17          MR TURNER: Sir, I have no further questions.

18          THE CHAIRMAN: In that case, thank you very much,  
19          Mr Polglass, you are discharged, you may stand down.  
20          It's been a long day. We will meet tomorrow at the  
21          usual time.

22          MR TURNER: It will be Mr Wells.

23          THE CHAIRMAN: Mr Beard?

24          MR BEARD: No, that's my expectation as well.

25          THE CHAIRMAN: Thank you very much.

1 THE WITNESS: Thank you.

2 (The witness withdrew)

3 (5.10 pm)

4 (The hearing adjourned until 10.30 am

5 on Friday, 21 June 2019)

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21

22

23

24

25

INDEX

|    |   |      |
|----|---|------|
| 1  |   |      |
| 2  |   | PAGE |
| 3  | Housekeeping .....                        | 1    |
| 4  |   |      |
| 5  | MR NIGEL GRAHAM POLGLASS (affirmed) ..... | 2    |
| 6  |   |      |
| 7  | Examination-in-chief by MR TURNER .....   | 2    |
| 8  |   |      |
| 9  | Cross-examination by MR BEARD .....       | 4    |
| 10 |   |      |
| 11 | Re-examination by MR TURNER .....         | 172  |
| 12 |   |      |
| 13 |   |      |
| 14 |   |      |
| 15 |   |      |
| 16 |   |      |
| 17 |   |      |
| 18 |   |      |
| 19 |   |      |
| 20 |   |      |
| 21 |   |      |
| 22 |   |      |
| 23 |   |      |
| 24 |   |      |
| 25 |   |      |